

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of the Arbitration Between: \*

TOWN OF DRACUT \*

-and- \*

ARB-13-3051

AFSCME, COUNCIL 93 \*

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Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Stanley Weinberg, Esq. - Representing Town of Dracut

Erin DeRenzis, Esq. - Representing AFSCME, Council 93

The parties received a full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at a hearing. I have considered the issues, and, having studied and weighed the evidence presented, conclude as follows:

**AWARD**

The Town did not violate the collective bargaining agreement when it promoted Leo Caron to the position of truck driver, and the grievance is denied.

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Timothy Hatfield, Esq.  
Arbitrator  
September 26, 2014

**INTRODUCTION**

On December 19, 2012, AFSCME, Council 93 (Union) filed a unilateral petition for Arbitration. Under the provisions of M.G.L. Chapter 23, Section 9P, the Department of Labor Relations (Department) appointed Timothy Hatfield Esq. to act as a single neutral arbitrator with the full power of the Department.<sup>1</sup> The undersigned Arbitrator conducted a hearing at the Department's Boston office on January 29, 2014.

The parties filed briefs on March 18, 2014.

### **THE ISSUE**

Whether the Town violated the collective bargaining agreement when it promoted Leo Caron to the position of truck driver?

If so what shall be the remedy?

### **RELEVANT CONTRACT LANGUAGE**

The parties' Collective Bargaining Agreement (Agreement) contains the following pertinent provisions:

#### Article 2 – Rights of Management (In Part)

Nothing in the Agreement shall limit the Town in the exercise of its function of management and in the direction and supervision of the Town's business. This includes, but is not limited to the right to: ...promote; ... determine where, when, how, and by whom work will be done; ... except where any such rights are specifically modified or abridged by terms of this Agreement.

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<sup>1</sup> Pursuant to Chapter 145 of the Acts of 2007, the Department of Labor Relations "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the ... the board of conciliation and arbitration ... including without limitation those set forth in [chapter 23C](#), [chapter 150](#), [chapter 150A](#), and [chapter 150E of the General Laws](#)."

Unless an express, specific provision of this Agreement clearly provides otherwise, the Town ... retains all the rights and prerogatives it had prior to the signing of this Agreement either by law, custom, practice, usage or precedent to manage and control the Department. ...

Section 1 – It is agreed that management officials of the Town shall, at all times, retain the right to direct employees, to hire, promote, transfer, assign and retain employees within departments, ... to maintain the efficiency of the operations entrusted to them; to determine methods, means and personnel by which such operations are to be conducted; ... provided that such rights shall not be exercised in violation of other sections of this Agreement ...

Section 3 – Except insofar as modified by this Agreement, the management and control of the Town of Dracut municipal departments and of the various employees employed therein shall remain the sole right, responsibility and prerogative of the Town, through the Department Head.

#### Article 5 – Grievance and Arbitration Procedure (In Part)

A grievance is defined as an allegation that one party to this Agreement has violated a specific provision of the Agreement. ...

The decision of the arbitrator shall be final and binding upon the parties. ... The arbitrator must confine his/her decision to interpreting the specific terms of this Agreement and is without authority to expand or modify the same, and must conform to any law or by-law governing a subject.

It is agreed by both parties that the arbitrator must confine his or her decision within the scope of the Agreement.

#### Article 6 – Seniority (In Part)

The length of service within each department shall determine the seniority of the employee, based on time said employee went on the Town payroll in that department as a permanent employee.

The principle of seniority shall govern and control in all cases of promotion or transfer within the department, where qualifications are approximately equal which shall be determined by the Department Head.

#### Article 7 – Job Posting and Bidding

Section 2 – Where the Department Head determines that qualifications are approximately equal, the senior qualified employee/applicant of the department will be given preference for selection. Any employee applying will be granted an interview for the position, for which he or she applied, by the Department Head.

Section 4a – Further, in the event of promotion, no appointment to and/or promotion to a position vacant by virtue of promotion shall become permanent until the employee initially promoted successfully completes the required additional twelve (12) month probationary period to attain permanent appointment in the new position. ...

### **FACTS**

The Town of Dracut (Town) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration.

The Town's Department of Public Works (DPW) is comprised of twenty-four bargaining unit members. The bargaining unit positions are: general foreman, assistant general foreman, mason, mechanic, finish raker, special heavy equipment operator, heavy equipment operator, truck driver and laborer.

The position of laborer requires a valid Massachusetts CDL license. The position of truck driver also requires a CDL license, and a Hydraulic License is preferred and required within six months of hire.

On or about June 10, 2013, a truck driver position became available and was posted by Michael Buxton (Buxton), the DPW Director. Six bargaining unit members applied for the job and were interviewed. Joseph LaPlante (LaPlante), who had a hire date of May 6, 2002, was the most senior employee to apply. George Metros (Metros), who had a hire date of February 22, 2005, was the second most senior employee to apply. Leo Caron (Caron), who had a hire date of October 30, 2006, was the third most senior employee to apply.

Buxton interviewed all six candidates, reviewed their personnel files, attendance records, and their out of class work experience in positions higher than laborer. Caron was the only applicant to possess a Hydraulics License.

#### Working Out of Class

In fiscal year 2011, LaPlante worked 324 hours as a truck driver. Metros worked 293 hours as a truck driver. Caron worked 330 hours as a truck driver, 72 hours as a heavy equipment operator, and 68 hours as a mason.

In fiscal year 2012, LaPlante worked 118 hours as a truck driver. Metros worked 122 hours as a truck driver. Caron worked 136 hours as a truck driver, 104 hours as a heavy equipment operator, and 296 hours as a mason.

In fiscal year 2013, LaPlante did not work out of class. Metros worked 123 hours as a truck driver. Caron worked 148 hours as a truck driver, 226 hours as a heavy equipment operator, and 100 hours as a mason.

#### Sick Leave Usage

In fiscal year 2007, LaPlante used zero days of sick leave as he was out on disability for the entire year. Metros used 16.75 days of sick leave. Caron used 1 day of sick leave after he was hired on October 30, 2006.

In fiscal year 2008, LaPlante used 6.5 days of sick leave during the ten months of the year he was back at work. Metros used 13.5 days of sick leave. Caron used 10 days of sick leave.

In fiscal year 2009, LaPlante used 15 days of sick leave. Metros used 17.25 days of sick leave. Caron used 12 days of sick leave.

In fiscal year 2010, LaPlante used 9.5 days of sick leave during the five months he was working. Metros used 12 days of sick leave. Caron used zero days of sick leave.

In fiscal year 2011, LaPlante used 14.5 days of sick leave. Metros used 16 days of sick leave. Caron used 2.75 days of sick leave.

In fiscal year 2012, LaPlante used 13.5 days of sick leave during the seven months that he was working. Metros used 18 days of sick leave. Caron used 1 day of sick leave.

In fiscal year 2013, LaPlante used .5 days of sick leave, as he was out on disability for the remainder of the year. Metros used 14.5 days of sick leave. Caron used .25 days of sick leave.

Buxton recommended to the Town Manager, as the Appointing Authority, that Caron receive the promotion to truck driver. The Town Manager accepted Buxton's recommendation and the Town subsequently promoted Caron to the truck driver position.

On July 11, 2013, the Union filed a grievance over the promotion. The Town denied the grievance at all steps of the grievance procedure, resulting in the instant arbitration.

### **POSITIONS OF THE PARTIES**

#### **THE UNION**

The Employer's decision to award the position of truck driver to Caron, rather than to LaPlante, who was the most senior qualified applicant, was a violation of the clear language of the collective bargaining agreement. Alternatively, if LaPlante was not eligible/qualified for the position, the Town should have awarded the position to Metros who was the next most senior qualified applicant. The Town's determination as to the applicants' qualifications in the instant matter is arbitrary and capricious. LaPlante and Metros are not only senior to Caron, but are also at least as qualified as Caron, and, in reality, far more qualified for the position of truck driver than Caron.

Article Seven of the collective bargaining agreement is a relative ability seniority clause. The clause requires the employer to promote the more senior applicant to fill a vacancy where the employees are relatively equal in qualifications and ability. In situations where there is not a marked difference in ability, but there is a substantial difference in seniority, the employer should promote the senior of the two employees. A proper application of the contract language to the facts in this non-selection case should lead the arbitrator to the conclusion that the Town should have selected either LaPlante or Metros, the most senior candidates, for the truck driver position. Caron's promotion can be upheld under a relative seniority clause only if he is substantially more qualified than the grievants, which the evidentiary record establishes that he is not.

It is undisputed that both LaPlante and Metros filled in countless times in the capacity of truck driver. Although the Town has been quick to point out that Caron has filled in as truck driver, he has not served in that capacity as long as

LaPlante and Metros, because he only began to work for the Town in 2006. Also, it should be noted that any reliance by the Town on the possession of a Hydraulics License is misplaced as the license is not required until six months after employment in the position. Both LaPlante and Metros testified that they would have no issue obtaining the license within the required time.

Through the testimony and evidence offered at the hearing, the Union has demonstrated that LaPlante was the senior applicant and the best qualified to perform the duties of the truck driver position, followed by Metros. Accordingly, the Union asks that the Arbitrator to find that the Town violated the collective bargaining agreement when it awarded the position to Caron and not to LaPlante or Metros.

#### **THE EMPLOYER**

Promotions predicated solely on seniority are neither required nor permissible under the collective bargaining agreement, yet that is essentially what the Union is seeking to accomplish by way of this grievance arbitration.

A promotional decision is a fundamental, inherent managerial right and prerogative. The parties acknowledge this prerogative in Article Two, the broad management rights article of the collective bargaining agreement. Article Two is limited only insofar as clearly modified or abridged by specific terms of the collective bargaining agreement. However, there is nothing in the collective bargaining agreement that specifically, or even by necessary implication, limits the discretionary authority of the Department Head to make determinations as to the relative qualifications of employees seeking promotions. Instead, Articles Six

and Seven are two virtually identical provisions relating to promotions that confirm the Department Head's authority. Specifically and unambiguously, Articles Six and Seven vest in Buxton, as Department Head, the authority to make determinations as to the relative qualifications of candidates for promotion. It is only, if and when, he determines that qualifications are approximately equal that seniority will come into play in the decision making process.

The grievance incorrectly equates a candidate's ability to drive a truck with that candidate's qualifications to be promoted to the position of truck driver. The Town does not dispute that both LaPlante and Metros have the necessary CDL licenses to drive trucks, and both have done so on many occasions while working out of class. If that were all that is required, then the contractual language regarding the Department Head's determination of qualifications would be rendered meaningless. The collective bargaining agreement's promotional provisions would be impermissibly modified to a strict seniority based promotional process, especially where, as here, every employee holds the requisite CDL license.

Furthermore, the Department Head appropriately weighed the relative qualifications of the candidates and made a rational, non-arbitrary, correct promotional decision. Buxton testified that based on his experience supervising all the candidates, Caron had the greater skills and dedication to the job and he could count on Caron more than the other two candidates. Caron had worked out of grade as a foreman where he had supervised DPW work crews. Further, Caron was the only applicant with a Hydraulics License. Objective numbers bear

this out as well, as both sick leave usage and working out of class numbers, support Buxton's decision to promote Caron.

For the reasons set forth herein, and in accordance with the clear and unambiguous provisions of the collective bargaining agreement, it must be concluded that the Town did not violate the agreement when it promoted Caron to the position of DPW truck driver.

### **OPINION**

The issue before me is: Whether the Town violated the collective bargaining agreement when it promoted Leo Caron to the position of truck driver?

If so what shall be the remedy?

For all the reasons stated below, the Town did not violate the collective bargaining agreement when it promoted Leo Caron to the position of truck driver, and the grievance is denied.

Article Six of the parties' collective bargaining agreement states that: [t]he principle of seniority shall govern and control in all cases of promotion or transfer within the department, where qualifications are approximately equal which shall be determined by the Department Head. Article Seven, states that: [w]here the Department Head determines that qualifications are approximately equal, the senior qualified employee/applicant of the department will be given preference for selection. Article Six and Article Seven clearly and unambiguously outline a procedure for promotion that recognizes seniority as the deciding factor only when the Department Head decides that qualifications are approximately equal.

If the Department Head finds the qualifications of the applicants approximately equal, then, and only then, does strict seniority prevail. In this case, Buxton did not find the qualifications of LaPlante, Metros and Caron to be approximately equal. Having found Caron to have greater qualifications for the position, the collective bargaining agreement permits him to by-pass strict seniority and recommend the candidate he finds to be most qualified.

The Union correctly argues that Buxton's evaluation of, and decision about, the qualifications of applicants must not be done in an arbitrary or capricious manner. The record before me, however, does not support the allegation that the procedure Buxton used, or the categories that he considered during his review of the applicants' qualifications were improper. Buxton used his knowledge as the applicants' supervisor to decide which applicant brought the most skills, ability and attributes to the job. Buxton reviewed the amount of time each individual worked out of class, as not only a truck driver but also in other DPW positions. He also analyzed the amount of sick time that the candidates used in order to judge their dependability. I find the process that Buxton used and the categories that he relied upon to be legitimate factors to consider for the position of truck driver.

Having found that the clear and unambiguous language of the collective bargaining agreement permits the Department Head to judge qualifications in promotional situations, and having found that the process used and the categories considered in this case to be proper, the Town did not violate the

collective bargaining agreement when it promoted Caron to the position of Truck Driver and the grievance is denied.

**AWARD**

The Town did not violate the collective bargaining agreement when it promoted Leo Caron to the position of truck driver, and the grievance is denied.

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Timothy Hatfield, Esq.  
Arbitrator  
September 26, 2014