

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *

WAREHAM SCHOOL COMMITTEE *

-and- *

ARB-14-4187

AFSCME, AFL-CIO, COUNCIL 93 *

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Gregor A. Pagnini, Esq. - Representing Wareham School Committee

Anna Shapell, Esq. - Representing AFSCME, AFL-CIO, 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 grievance is substantively arbitrable. The School Committee did not violate Article IX of the Agreement by improperly evaluating candidates for the lead custodian position, and the grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
August 13, 2015

INTRODUCTION

On November 25, 2014, AFSCME, AFL-CIO, Council 93, Chapter 30 (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. The undersigned Arbitrator conducted a hearing at the Department's Boston office on May 22, 2015.

The parties filed briefs on June 26, 2015.

THE ISSUES

- 1) Is the grievance arbitrable?
- 2) Did the Employer violate Article IX of the Agreement?
- 3) If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

Article II – Management Rights Clause

The Committee and the Union agree that the Committee and the Superintendent shall retain and reserve all their statutory rights, authority and obligations in the administration of the school department and the direction of its employees.

Further, the Union agrees to be bound by the rules and regulations of the Committee and the Superintendent except as modified by the Agreement.

Article VI – Grievance Procedure (In Part)

- A. Definition: For the purpose of this Agreement, a grievance shall be defined as a dispute between a member of the bargaining unit covered by this Agreement or the Union and the Committee over the interpretation or application of an expressed written provision of this Agreement.

Article VII – Arbitration (In Part)

The grievance shall be submitted to an arbitrator who shall be selected mutually by the parties. If the parties do not select an arbitrator within fifteen (15) calendar days from the date of submission of a grievance to arbitration, then either party may request a list of five (5) arbitrators from ... the Massachusetts Division of Labor Relations. ...

The arbitrator shall be bound by the written submission of both parties of the grievance. His decision shall not extend beyond said submission nor alter, amend, or modify the provisions of this Agreement. Nor shall the arbitrator render a decision that shall impinge upon any reserved rights and duties of the Committee. ...

Article IX – Seniority (In Part)

Seniority of employees covered by this Agreement shall be determined as of the date the employee becomes a full-time, permanent employee of the Committee.

Seniority, ability, qualification and performance shall be determining factors in promotion to higher-rated positions within this bargaining unit and in decrease or increase of working force.

Article XXIV – Evaluation (In Part)

Custodians shall be evaluated annually by their respective Principal and Head Custodian. ... All evaluations pursuant hereto shall be in writing and the employees shall sign to acknowledge that he/she has had the opportunity to review the evaluation report, with the expressed understanding that such signature in no way indicates agreement with the report. The employee shall have the right to submit a written response to the evaluation report, which will become part of the employee's personnel file along with the written evaluation. ...

FACTS

The Wareham School Committee (School Committee, School District or Employer) is the Town of Wareham's collective bargaining representative for the purpose of dealing with school employees. The School Committee and the Union are parties to an Agreement that, by its terms, is in effect from July 1, 2013 to June 30, 2016. The Agreement was in effect at all relevant times to this arbitration.

The Agreement covers certain personnel employed by the School Committee, including custodians and lead custodians. Wareham High School has five custodial staff, which consists of a head custodian, a lead custodian, and three night custodians. The lead and night custodians report to the head custodian, Rene Nascimento (Nascimento), who in turn reports to the school's principal, Scott Palladino (Palladino). At 200,000 square feet, Wareham High School is the largest public building in the School District and used for both school purposes and community activities. Among other duties, custodians are responsible for helping to set up school and community events at Wareham High School. The lead custodian oversees and supervises the three night custodians, in addition to responsibility for cleaning an almost one-quarter area of the school.

The grievant, Walter Murphy (Murphy), has worked for the Employer since April 1996, as a custodian. Since his employment began, Murphy has worked exclusively at Wareham High School, with the exception of his first two years where he worked elsewhere within the School District.

Palladino has been principal of the Wareham High School since 2010 and has twenty-two years tenure with the School District. In his capacity as principal, Palladino is responsible for hiring, supervising, and evaluating the personnel at Wareham High School. As part of the evaluation process, the custodial staff receives performance appraisals on a form called the Wareham Public Schools Custodial and Maintenance Evaluation. Palladino completes the high school custodians' evaluations in conjunction with their direct supervisor, Nascimento. The evaluation form ranks custodial and

maintenance personnel on a four-point scale across eleven dimensions.¹ A twelfth element was reserved for the evaluator's comments. Palladino conducted a performance appraisal for Murphy dated September 20, 2012, which rated Murphy as excellent in all of the eleven categories except for attendance, which Palladino rated as satisfactory.²

On or about July 7, 2014, the School Committee posted a lead custodian position for Wareham High School. The job posting directed applicants to submit a letter of interest to Palladino by July 18, 2014. Murphy, who apparently was initially unaware of the job's posting, learned about the vacancy by word-of-mouth sometime in July 2014 and applied for it on or about July 16, 2014.

The lead custodian notice of vacancy included the following responsibilities:

In addition to the job description of a custodian, the lead custodians will:

- Oversee all custodial work for the second shift
- Manage second shift custodians
- Maintain a high standard of safety, cleanliness, and efficiency
- Perform custodial duties to his/her assigned area
- Check the security of the building and grounds at the end of the shift
- Activate the alarm system.

The notice of vacancy also listed the following qualifications:

- Must have a minimum of five years' experience as a school custodian

¹ The scale is E = Excellent; S = Satisfactory; NI = Needs Improvement; U = Unsatisfactory. The eleven categories are: 1. Exhibits required technical skills; 2. Shows initiative; 3. Shows good judgment; 4. Follows directions; 5. Uses time efficiently; 6. Works carefully/accurately; 7. Is cooperative and adaptable; 8. Is punctual; 9. Attitude; 10. Benefits from instruction; 11. Attendance.

² Murphy's April 28, 2009 evaluation was completed by the assistant principal and his June 1, 2010 appraisal was completed by the previous principal. Murphy received an excellent rating in every category in 2009 and 2010. The parties did not introduce into evidence or testify about 2013 or 2014 performance evaluations.

- Must have a strong understanding of HVAC, plumbing and electrical systems
- Must get along well with others and deal effectively with the principal, teachers, students, and visitors
- Must have strong computer skills.

Three custodian bargaining unit members applied for the vacancy by submitting letters of interest to Palladino, as directed, and received interviews. Murphy was the second most senior employee to apply with nineteen years of service. James Coutu (Coutu), a custodian for twenty-three years, worked in the Wareham Middle School, and Richard Cleveland (Cleveland), a custodian in the Wareham High School for ten years, was the least senior employee to apply for the vacancy.³

Palladino asked Nascimento to participate in the interview process for the lead custodian position. As head custodian for the past eleven years, Nascimento is responsible for overseeing the high school's custodial staff. Palladino decided to include Nascimento in the interview process because of the importance in selecting a candidate for the lead custodian position who has a good working relationship with the head custodian. Palladino and Nascimento interviewed all three candidates in succession on or about the afternoon of July 24, 2014, in a conference room at Wareham High School. Each interviewed lasted approximately twenty minutes in duration. Murphy was interviewed first at around 2:30PM, followed by Coutu at around 3:00PM, and finally Cleveland at around 3:30PM. Palladino and Nascimento conducted the candidates' interviews using an identical Lead Custodian Worksheet, which listed

³ Cleveland also provided an updated resume and cover letter with his letter of interest. Though Palladino saw this as "nice," this was neither required nor a determining factor in the Employer's hiring decision.

seven questions, along with an eighth, open-ended question. The questions asked to each candidate were as follows:

1. Tell us about your experience as a custodian.
2. What do you see as the role of the lead custodian?
3. What characteristics or traits do you have that will allow you to be successful in this position?
4. What is your leadership experience?
5. Have you ever been in charge of supervising staff?
6. Do you have any experience with building use/budget?
7. How will you help strengthen, support the custodial staff?
8. Other?

Several of the questions on the Lead Custodian Worksheet were intended to elicit responses relating to the four determinative factors for promotions found in Article IX: seniority, ability, qualification or performance. Next to each question was an area for the interviewer to write notes and comments. Palladino and Nascimento alternated asking the candidates the questions listed on the Lead Custodian Worksheet, with Palladino asking the even numbered questions and Nascimento asking the odd numbered questions. Candidates were then provided an opportunity to ask any of their own questions to the interviewers.

The Lead Custodian Worksheet template indicates that ratings for candidates' answers to the questions posed goes from "1=Low" to "5=High". During the ten-minute or so gap between each interview, Palladino wrote down comments on the respective candidates' interview worksheets while his thoughts were still fresh in his mind. Palladino also numerically scored each of the candidates' answers to the eight questions immediately after each interview, based on a scoring rubric he uses for all job interviews, as follows: 0: could not answer the question or lacked experience; 1: barely answered; 2: below average; 3: average score; 4: answered most of the question; and

5: exemplar, model answer. Palladino described the scoring as his immediate reflections after each interview ended.⁴ However, Palladino did not tally up the candidates' scores until after all of the interviews concluded.

During the interview, Murphy discussed his nineteen years of employment as a custodian with the School District, his comfort with performing climbing work, his familiarity with the building and its workings, his experience relieving for the lead custodian and head custodian during absences, and his good attitude working alongside the other custodians.

Upon aggregating each of the candidates' ratings at the conclusion of the interviews, Palladino scored Cleveland first with 23 points, Coutu second with 20 points, and Murphy third with 19 points. Nascimento ranked Cleveland first, Murphy second, and Coutu third.⁵ For Nascimento, two important considerations in a successful lead custodian candidate were knowledge of the building and interpersonal skills. During their post-interviews debrief, Nascimento noted that Cleveland had strong interpersonal skills, as evinced by the way he more openly communicated with Nascimento, the other custodial staff and students. As to leadership experience, while all of the candidates had filled-in as lead custodian on a relief basis,⁶ Palladino felt that Cleveland demonstrated differentiated, superior leadership experience compared to the other candidates, given his work experience supervising three to four employees as a grocery

⁴ Palladino did not provide notes or comments to Question 8, and none of the three applicants has a rating for this portion of the worksheets.

⁵ It is unknown whether Nascimento completed lead custodian worksheets for the candidates or what type of scoring methodology he used to rate the candidates, as no evidence or testimony was introduced regarding this.

⁶ Palladino did not testify as to whether custodians also relieved the head custodian.

store dairy manager for thirteen years.⁷ As additional leadership experience beyond relieving in the lead custodian's absence, Murphy spoke about being a groundskeeper. Palladino and Nascimento then discussed the discrepancy in their second and third choices. After conferring with Nascimento, Palladino decided to advance Murphy to second place over Coutu, based in part on Murphy's experience with the building.

Palladino did not review the candidates' evaluations prior to, during or after their interviews. Palladino testified that Cleveland received similar marks as Murphy on Cleveland's last evaluation, but without any attendance issues. Ultimately, Palladino determined that Murphy satisfied one of the determining factors as compared to Cleveland, seniority. Conversely, Cleveland met three of the promotion determining factors over Murphy; qualification, ability and performance.

On or about August 11, 2014, the Union filed a grievance over Cleveland's promotion. The Employer denied the grievance at all steps of the grievance procedure, resulting in the instant arbitration.

POSITIONS OF THE PARTIES

THE UNION

The Union's promotional bypass grievance is arbitrable because the parties' Agreement does not limit the arbitrator's authority to order the requested remedy, which is to award Murphy the lead custodian position. Since the Agreement does not expressly preclude an arbitrator from granting the Union's requested remedy, an arbitrator has implicit discretionary remedial authority to award injunctive specific

⁷ Cleveland's resume indicates he was a dairy manager for 23 years, from 1980-2003; however, Palladino testified that Cleveland held the title for 13 years.

performance as an appropriate remedy. Therefore, the grievance is substantively arbitrable.

The Employer's decision to award the position of lead custodian to Cleveland, rather than to Murphy, who was a more senior applicant and with substantially equal ability, qualification, and job performance to Cleveland, was a violation of the clear language of the Agreement. The Employer failed to adequately and accurately evaluate the promotion determination factors in Article IX because Murphy's three job performance reviews from 2009, 2010, and 2012, were not reviewed prior to or during the interviews.

Article IX of the Agreement provides that seniority, ability, qualification and performance are the four determining factors to be considered equally in making promotion decisions. Rather than only having one of the four determining factors superior to Cleveland, Murphy actually had all four determining factors in his favor. Murphy is clearly more senior than Cleveland. Murphy demonstrated his abilities as a custodian since his April 1996 hire date, which he emphasized during the interview with Palladino and Nascimento. Murphy was qualified for the lead custodian position, as evidenced by his knowledge and workings of the school building, acquired custodial skills, and instances where he filled in for the lead custodian during absences. Murphy met the performance factor per his 2009, 2010 and 2012 performance evaluations, in which he received an "excellent" performance rating in every category, with the exception of a "satisfactory" rating for attendance in 2012. Though Palladino relied on his personal knowledge and recollection of completing the 2012 performance

evaluations, he did not consider the input of Murphy's prior supervisors, who completed the 2009 and 2010 evaluations.

Palladino's failure to consider the candidates' performance evaluations is prima facie evidence that Article IX was violated. Murphy deserved to have his "excellent" rating performance reviews thoroughly considered, and the failure to do so was to Murphy's detriment. Palladino's explanation that he performs evaluations and considers himself to be "hands on", and therefore knew that both Cleveland and Murphy had exemplary performance evaluations, is an insufficient approach to satisfy Article IX's requirements. When employee performance evaluations are routinely conducted, and job performance is a specific determining factor equally significant to the other factors in making promotional decisions, it is appropriate and crucial that the decision maker consider all relevant evaluations pertaining to each candidate. Further, the failure of Palladino and Nascimento to review the candidates' performance evaluations "seriously undercuts" Palladino's finding that Cleveland was more qualified than Murphy for the position.

Through the testimony and evidence offered at the hearing, the Union has demonstrated that Murphy met all four determining factors for promotion to the lead custodian position. In addition to being more senior than Cleveland was, Murphy's ability, qualification and performance were all equal to Cleveland. Had the Employer adequately and accurately evaluated Murphy against the promotion determination factors listed in Article IX, Murphy would have been given the position as the senior candidate. Accordingly, the Union asks for a finding that the Employer violated the Agreement when it awarded the position to Cleveland and not to Murphy by failing to

follow its selection procedures. The Union further asks Murphy be placed into the lead custodian position and made whole for all of his losses.

THE EMPLOYER

The principal of Wareham High School is vested with the ultimate authority under M.G.L. c. 71, § 59B to determine whom to select for the lead custodian vacancy. Therefore, the grievance is not substantively arbitrable because an arbitrator may not substitute his judgment for that of the principal and decide who should receive the lead custodian position. In the event that the matter is substantively arbitrable, the arbitrator lacks the authority to grant the Union's requested remedy of replacing Cleveland with Murphy in the lead custodian position because such an action would contravene M.G.L. c. 71, § 59B. Therefore, the arbitrator's only available remedy would be to remand the matter back to the Employer to re-conduct the interview process.

Under Article IX, there were four determining factors for the Employer to consider when filling the lead custodian position: seniority, ability, qualification and performance. Palladino selected Cleveland for the vacancy based on an objective interview process. There is nothing to suggest that Palladino's decision to offer the lead custodian position to Cleveland was arbitrary and capricious. Rather, Palladino's determination was methodical, fair and wholly in accordance with the terms of Article IX.

Palladino conducted the interviews with head custodian Nascimento to get feedback from someone who worked in the system. The candidates were asked identical questions, which were designed to elicit answers that related to the four determining factors identified by Article IX. Palladino scored the candidates' answers using the same grading rubric that he has used in past interviews. Palladino waited to

tally the scores until after all interviews concluded. Cleveland received the highest raw score and Murphy the lowest. Palladino asked for Nascimento's feedback before announcing his top choice for the lead custodian position. Nascimento also ranked Cleveland highest for the lead custodian position. After discussions with Nascimento, Palladino agreed to elevate Murphy to second, partially in recognition of his seniority.⁸

The School Committee asks that the grievance be found substantively non-arbitrable or in the alternative that the grievance be denied.

OPINION

Substantive Arbitrability

As a preliminary matter, I must determine whether this matter is substantively arbitrable. The Employer contends that the grievance is not substantively arbitrable because the Union's requested remedy (awarding the lead custodian position to Murphy) infringes upon the discretion that M.G.L. c. 71, § 59B (the Education Reform Act) grants to school principals to select personnel in their schools.

Murphy's grievance concerns the evaluative procedures used to assess the lead custodian candidates. Specifically, the Union argues that Palladino's failure to review the candidates' performance evaluations undercuts the Employer's conclusion that Murphy was not substantially equal to Cleveland in the areas of ability, qualification and job performance. Article IX of the parties' Agreement states in relevant part that "[s]eniority, ability, qualification and performance shall be determining factors in promotion to higher-rated positions within this bargaining unit" I therefore must

⁸ In reality, Coutu had more seniority than Murphy. During the arbitration hearing, Palladino explained that he agreed to raise Murphy to second place based on Murphy's experience and knowledge of the Wareham High School.

determine whether the Employer's evaluation procedure for selecting the lead custodian is subject to collective bargaining, and thus substantively arbitrable.

Massachusetts courts have consistently held that personnel-related procedures may be open to collective bargaining, and that the bargained-for procedure will be enforced so long as it does not abdicate the school committee's, or a school principal's, statutory authority. See School Committee of Newton v. Newton School Custodians Association, Local 454, SEIU, 438 Mass. 739, 746-748 (2003); School Committee of Lowell v. Local 159, SEIU, 42 Mass. App. Ct. 690, 693 (1997) (procedures for filling vacancies do not infringe upon the powers of the principal and the superintendent so long as they retain the right of approval of the employee selected pursuant to those procedures).

Once a school committee establishes minimum job requirements, as it has done here, it is obligated to follow them, and a determination of whether the employer complied with those standards is subject to arbitration. Massachusetts Board of Higher Education (Holyoke Community College) v. Massachusetts Teachers Association, 79 Mass. App. Ct. 27, 35-36 (2011). For example, the SJC described the disputed contractual language in Newton School Committee as requiring "the principal to make a good faith effort to evaluate a job applicant's qualifications in four enumerated areas, and to resort to seniority if the principal independently determines that the candidates stand on identical footing with respect to the other more subjective criteria." Id., 439 Mass. at 749. Though I lack authority to substitute my own judgment for that of the school principal, I retain the authority to review whether the school principal violated the parties' Agreement by filling the position with someone who did not meet the minimum

requirements set forth in the job posting. Holyoke Community College, 79 Mass. App. Ct. at 35-36. Accordingly, I find that the grievance is substantively arbitrable as it challenges the process used for filling the lead custodian position, and the School Committee's adherence to Article IX of the Agreement.

Merits

I next consider whether the School Committee violated Article IX of the Agreement when it promoted Cleveland to the position of lead custodian. For all the reasons stated below, I find that the School Committee did not violate Article IX of the Agreement when it promoted Cleveland to the position of lead custodian, and I deny the grievance.⁹

Article IX Seniority of the parties' Agreement states that: "[s]eniority, ability, qualification and performance shall be determining factors in promotion to higher-rated positions within this bargaining unit" Article IX clearly and unambiguously outlines a procedure for promotion that recognizes four determining factors. Article IX does not indicate that any one factor is weighted more than the others are. In this case, Palladino and Nascimento did not find the ability, qualifications and performance of Cleveland, Murphy and Couto to be approximately equal as the Union contends. Having found Cleveland to have greater ability, qualifications and performance for the position, the Agreement permits Palladino to bypass strict seniority and recommend the candidate he finds to be the most able and qualified.

⁹In view of my decision, I need not reach the Employer's argument that I lack the authority under the Education Reform Act to grant the Union's request to place Murphy into the lead custodian position.

The Union failed to establish that a review of the candidates' performance evaluations would have demonstrated that Murphy had equivalent ability and qualifications as Cleveland. The specific areas of ability and qualifications that were important to the Employer focused around leadership experience and interpersonal communication skills. The performance evaluation criterion, which appears to be a generic document for all custodial and maintenance staff, only marginally addresses these traits. Conversely, the interview questions specifically asked about abilities and qualifications germane to the lead custodian position. The Employer did not need to review the candidates' evaluations to distinguish their performance because at the time of the interviews, Palladino recalled Cleveland and Murphy's most recent evaluations, and knew that they both had similar marks. Further, Palladino testified that attendance is a component of performance, and in that area, Cleveland received a higher rating than Murphy on the most recent evaluation. Moreover, while Palladino had only conducted one performance appraisal for Murphy, Murphy's direct supervisor, Nascimento participated in the interviews and subsequent candidate deliberations with Palladino. Like Palladino, Nascimento also ranked Cleveland as the top choice for the lead custodian position. In selecting Cleveland for the position, Palladino found that Cleveland's ability, qualifications and performance were superior to Murphy.

Having found that the clear and unambiguous language of the Agreement permits the Employer to judge ability, qualifications and performance in promotional situations, and having found that the evaluative process used and the categories considered in this case to be proper and consistent with Article IX, the School

Committee did not violate Article IX of the Agreement when it promoted Cleveland to the position of lead custodian and the grievance is denied.

AWARD

The grievance is substantively arbitrable. The School Committee did not violate Article IX of the Agreement by improperly evaluating candidates for the lead custodian position, and the grievance is denied.

Timothy Hatfield, Esq.
Arbitrator
August 13, 2015