

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *

CITY OF TAUNTON *

-and- *

ARB-15-4237

MASSACHUSETTS & NORTHERN NEW
ENGLAND LABORERS' DISTRICT
COUNCIL *

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Daniel F. de Abreu, Esq. - Representing City of Taunton

Salvatore Romano - Representing Massachusetts Laborers'
District Council

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 City violated the collective bargaining agreement in the process used to fill the Water Treatment Plant Pond Caretaker position. The City is ordered to re-interview the candidates in a manner consistent with this decision.

Timothy Hatfield, Esq.
November 4, 2015

INTRODUCTION

On January 2, 2015, the Massachusetts & Northern New England Laborers' District Council (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 June 10, 2015.

The parties filed briefs on August 10, 2015.

THE ISSUE

Whether the City violated the collective bargaining agreement by not awarding Eric Corey the Water Treatment Plant Pond Caretaker position?

If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

Article I – Union Recognition – Agency Shop Fees (In Part)

Section 1- Recognition (Bargaining Unit):

The Employer recognizes the Union as the exclusive bargaining representative with respect to wages, hours and other conditions of employment for all such employees of the Parks, Cemeteries and Public Grounds Department, Department of Public Works, Library, and City Hall Custodians, but excluding all Department Managers, Office Managers, Chief Operator and Sanitary Engineer at the Water Treatment Plant and Superintendents of each Department.

Article III – Rights of Management (In Part)

Section 1- Rights of Management:

Except to the extent that there is contained in this Agreement an express and specific provision to the contrary, all of the authority, power, rights, jurisdiction and responsibility of the City are retained by and reserved exclusively to the Employer, including but not limited to, the right to manage the affairs of the City and maintain and improve the efficiency of its operation; to determine the methods, means, processes and personnel by which operations are to be conducted, including the contracting out of work; to determine the schedule and hours of work and the assignment of employment to employees; to establish new job classifications and job duties and functions, and to change, reassign, abolish, combine and divide existing job classifications for all jobs; to require from each employee the efficient utilization of his/her services; to hire, promote, transfer, assign, retain, discipline, suspend, demote and discharge employees with just cause; to relieve employees from duty because of lack of work or other legitimate reasons; to promulgate and enforce reasonable work rules and regulations pertaining to operations and employees; and to take whatever action may be conducive to carrying out the mission of the Department.

Article IV – Civil Service/Seniority (In Part)

Section 1

The Union and the Employer agree and recognize that when employees covered by this Agreement are Civil Service Employees and are covered by Chapter 31 of the General Laws, it is agreed that if any provision of this Agreement is in contravention of the laws or regulations of the United States of America or the Commonwealth of Massachusetts, such provision shall be superseded by the appropriate provision of such a law or regulation so long as the same is in full force and effect; but all other provisions of this Agreement shall continue in full force and effect.

The City agrees to fill all vacant positions in accordance with Civil Service Rules and Regulations. The City shall make every effort to properly train personnel prior to assuming a new position and shall constantly strive to prepare employees for advancement.

Article XIX – Seniority (In Part)

To the extent permitted by applicable law (including M.G.L. Chapter 31), seniority shall govern for all purposes. Seniority shall mean length of continuous employment in the bargaining unit. ...

The City reserves the right to promote and/or transfer qualified employees, however, it also agrees to give preference to the three (3) most senior applicants who have the required qualifications for the position into which they are to be transferred and/or promoted.

Article XXII – Grievance Procedure (In Part)

Section 4 Arbitration Procedure
Shall be as follows:

- a) The Union and the City will attempt to agree on an impartial arbitrator to hear and decide the unresolved grievance. Both parties agree that the arbitrator's decision will be final and binding; the cost of the arbitration will be borne equally by the City and the Union. If the City and the Union cannot agree on the individual to serve as an impartial arbitrator within a reasonable time, the arbitrator shall be selected by the American Arbitration Association pursuant to the Voluntary Labor Arbitration Rules of said Association. Either party may submit to the American Arbitration Association or if the parties mutually agree, they may submit their request to the Division of Labor Relations.
- b) Union Stewards and Officers shall be granted sufficient time off during working hours to investigate and/or resolve grievances and/or complaints. Union Stewards and Officers shall be granted such time off without loss of pay.

Section 5 Arbitration

Aggrieved members shall have the right to Union representation including International Representatives through the entire course of the grievance procedure. Nothing in this grievance procedure shall be construed to change, conflict, amend or affect in any way the rules and regulations of Civil Service of Massachusetts General Laws, Chapter 31.

FACTS

The City of Taunton (City) and the Union are parties to a collective bargaining agreement that was in effect from July 1, 2012 to June 30, 2015. The collective bargaining agreement covers certain employees of the City's Parks, Cemeteries and Public Grounds Department, Department of Public Works

(DPW), the Library, and the custodians at City Hall. The Agreement was in effect at all relevant times to this arbitration.

On or about September 9, 2014, the City posted a vacancy for a Water Treatment Plant Pond Caretaker position in the DPW Water Division. Per the terms of the job posting, interested applicants were to submit their applications to the City's Human Resources Department by September 19, 2014. Eric Corey (Corey), the grievant, submitted an application for the position before the posting's closing. In addition to Corey, one external candidate, John Goulán (Goulán) applied for the position. There were no other applicants. Corey had approximately thirty-three years of bargaining unit seniority as an employee in the Parks, Cemeteries and Public Grounds Department,¹ while Goulán, as an external candidate, had none. On or about the afternoon of September 25, 2014, DPW Water Division Superintendent Cathal O'Brien (O'Brien) and Supervisor John Chase (Chase) interviewed Corey and Goulán in a conference room at the DPW headquarters.

At O'Brien's direction, Chase prepared an interview questionnaire consisting of thirteen questions based upon a review of the job posting and position description prior to the candidates' interviews. The thirteen questions asked to both candidates were:

1. Do you have a drinking water license issued by the board of certification of Drinking water operator [sic]? If so what grade?

¹ Corey's employment with the City began on March 3, 1982. At some point in Corey's employment with the City, he worked in the DPW as a painter until the job was eliminated in a downsizing.

2. Do you have any experience operating small boats (city has a 14ft boat with an outboard motor)?
3. Do you have any previous experience in this field? If so what?
4. Do you have any training in dealing with confrontational people?
5. What Licenses if any other than a drinking water treatment licenses [sic] that may benefit you here?
6. What experience do you have that may be of benefit to you in this job or future positions, mechanical, plumbing, electrical, SCADA² or OSHA³ training etc?
7. Do you have reliable transportation that could get you to work in all weather conditions?
8. Do you have issues with performing any of the duties listed in the job description?
9. Do you have any potential issues working overtime as required?
10. Do you have any issues working nights or a rotating schedule if needed?
11. Do you have any issues working on ladders, staging, or in high places?
12. With Training, are you comfortable with working with chemicals, assisting maintenance with repairs related to chemical feed systems?
13. Is there anything else that you feel we should consider?

² SCADA stands for “supervisory control and data acquisition.” Neither Corey nor Goulán had SCADA experience.

³ OSHA is the acronym for the federal Occupational Safety & Health Administration.

O'Brien and Chase alternated asking each candidate the thirteen interview questions. In addition to the thirteen questions on the questionnaire, both candidates were asked two summary questions based on the language in the job posting: 1) Would you like to be an operator; and 2) Have you ever worked independently in a patrolman capacity? O'Brien took notes of the candidates' answers to the summary questions.⁴

After the interviews were completed, O'Brien contacted Goulán's former commanding officer in Virginia, who confirmed that Goulán was exposed to patrol duty, the operation of heavy equipment, hazards and safety protocol as an active-duty marine in Afghanistan. O'Brien specifically asked Goulán's commanding officer whether Goulán had done observation and report-writing in a hostile work environment among people who may not be telling the truth and was told that he had. Subsequently, the City selected Goulán to fill the Water Treatment Plant Pond Caretaker vacancy.

On or about October 24, 2014, the Union filed a grievance on behalf of Corey challenging the City's failure to select him for the Water Treatment Plant Pond Caretaker position. The Union alleged that the City violated Article IV, Section 1 and Article XIX, Paragraph 4 of the parties' Agreement. The Union submitted the grievance to arbitration on January 2, 2015, and the DLR subsequently docketed the matter as ARB-15-4237.

⁴ O'Brien testified that he took notes of the candidates' answers to the summary questions but the City did not bring these interview notes to the arbitration hearing.

POSITIONS OF THE PARTIES**THE UNION**

Corey should have been selected for the Water Treatment Plant Pond Caretaker vacancy because the City failed to provide a reasonable justification for bypassing Corey. Both O'Brien and Chase demonstrated a lack of due diligence in evaluating the candidates. The only evidence, which the City provided for bypassing Corey, is the fact that Goulán was in the Armed Services. Additionally, the City failed to refute the fact that Goulán is the son-in-law of the Assistant DPW Commissioner. In spite of his lack of applicable knowledge, skills, certifications and experience, Goulán was awarded the position over Corey.

Corey should have been selected for the position when he applied for it. He should be returned to that classification and receive all lost benefits resulting from the City's failure to award it to him.

THE CITY

The Union's grievance should be denied because the Union failed to meet its burden to show the City violated Article IV and Article XIX of the collective bargaining agreement relating to seniority. In the absence of seniority, the collective bargaining agreement gives the City wide latitude to make hiring decisions. Corey is an employee of the Parks, Cemeteries and Public Grounds Department, while the Water Treatment Plant Pond Caretaker vacancy was within the DPW. These two departments have separate appointing authorities.

The undisputed testimony was that Corey had no seniority within the DPW.⁵ O'Brien, as the appointing authority of the DPW, had the authority to make the hiring decision in his best judgment in accordance with the CBA's management rights clause (Article III Section I), in the absence of any applicable provision of the CBA to the contrary.

Here, the Union did not identify any provision of the CBA which had been violated. Because neither Corey nor Goulán had seniority for the vacancy, O'Brien was at liberty to hire the better candidate based on merit. In the absence of a violation of the collective bargaining agreement, O'Brien's judgment as to who was the better candidate must stand. Based on Goulán's military experience, ability to work independently, and interest and willingness to engage in plant operation, there is more than enough reason for Goulán to have the edge over Corey. The City asks that the grievance be denied.

OPINION

The issue before me is: Whether the City violated the collective bargaining agreement by not awarding Eric Corey the Water Treatment Plant Pond Caretaker position?

If so, what shall be the remedy?

The City in its opening statement, through O'Brien's testimony, and in its closing brief repeatedly emphasized that the grievant had no seniority "with

⁵ In its post-arbitration hearing brief, the City argues that separate seniority lists are maintained within the DPW for the water treatment, water, and street divisions, and that as a member of the Parks, Cemeteries and Public Grounds Department, Corey does not appear on any of those DPW seniority lists. Based on the rationale of my decision herein, and the plain language of Article XIX, I decline to credit this as an appropriate reason for denying Corey the position.

respect to the position.” However, this assertion is contrary to a plain reading of Article XIX of the collective bargaining agreement. Article XIX states that:

To the extent permitted by applicable law (including M.G.L. Chapter 31), Seniority shall govern for all purposes. Seniority shall mean length of continuous employment in the bargaining unit.

The collective bargaining agreement does not define seniority on a department-specific basis, as contended by the City. Instead, Article XIX describes seniority as the length of continuous employment in the bargaining unit. Because Corey has been a bargaining unit member for over thirty years, he is entitled to have the City acknowledge and credit his bargaining unit seniority during the interview and hiring process.

Additionally, Article XIX of the collective bargaining agreement states that:

The City reserves the right to promote and/or transfer qualified employees, however, it also agrees to give preference to the three (3) most senior applicants who have the required qualifications for the position into which they are to be transferred and/or promoted.

Corey, with his greater than thirty-years of seniority, and as the only internal candidate who applied for the position, is entitled to receive preference from the City under the language of Article XIX. The City’s failure to credit Corey with his proper bargaining unit seniority, in turn, led to the City’s failure to give him preference as the most senior applicant.

The combination of the City’s failure to acknowledge and/or consider Corey’s seniority and its failure to provide Corey with the preference required by the collective bargaining agreement has irrevocably tainted the hiring procedure for the Water Treatment Plant Pond Caretaker position. The City’s failure to give Corey the proper credit for his seniority, while simultaneously relying on Goulán’s

qualifications, even though he had no seniority, prejudiced the process in such a manner that the collective bargaining agreement has been violated. For all the reasons stated above, the grievance is sustained.

REMEDY

Having found that the City violated the collective bargaining agreement by the process it used to fill the position of Water Treatment Plant Pond Caretaker, I now order the City to re-interview Corey and the successful candidate using the original job description and qualifications. The selection should be made on the basis of the circumstances at the time of original application deadline and be consistent with this decision, in order to ensure that Corey and the other candidate are in the same position that they would have been had it not been for the City's improper assessment of Corey's seniority and of the contractually mandated preference due him as the senior qualified applicant. If, as a result of the re-evaluation, the City selects Corey for the position, the City shall appoint him to the position retroactive to the date the present incumbent assumed the job and compensate him for any difference in pay and benefits retroactive to that date.

AWARD

The City violated the collective bargaining agreement in the process used to fill the Water Treatment Plant Pond Caretaker position. The City is ordered to re-interview the candidates in a manner consistent with this decision.

Timothy Hatfield, Esq.
November 4, 2015