

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of the Arbitration Between: \*

CITY OF TAUNTON \*

-and- \*

ARB-16-5084

MASSACHUSETTS & NORTHERN NEW \*

ENGLAND LABORERS' DISTRICT \*

COUNCIL \*

\*\*\*\*\*

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

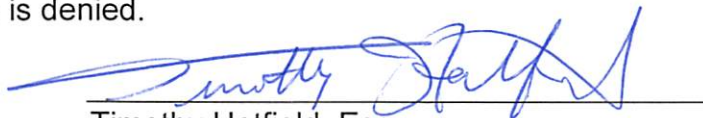
Daniel F. de Abreu, Esq. - Representing City of Taunton

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 complied with the arbitration award dated November 4, 2015 (ARB 15-4237), and the grievance is denied.



Timothy Hatfield, Esq.  
September 12, 2016

**INTRODUCTION**

On February 4, 2016, 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 April 7, 2016.

The parties filed briefs on June 8, 2016.

**THE ISSUE**

Did the City comply with the arbitration award dated November 4, 2015 (ARB 15-4237)?

If not, 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 at all relevant times to this arbitration. 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.

On or about September 9, 2014, the City posted a vacancy for a Water Treatment Plant Pond Caretaker position in the DPW Water Division. Eric Corey (Corey), the grievant, submitted an application for the position before the posting's closing. In addition to Corey, one external candidate, John Gulan (Gulan) 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, while Gulan, as an external candidate, had none. The City selected Gulan 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 DLR subsequently docketed the matter as ARB-15-4237. On November 4, 2015, a decision was issued in that matter, finding that the City had violated the collective bargaining agreement with the process used in the hiring of Gulan. The City was ordered to re-interview the candidates based on the circumstances that existed at the time of the original application deadline. The City was ordered to properly credit Corey's seniority and provide him with the contractually mandated preference due him as the senior qualified candidate.

On December 14, 2015, Jon Chase (Chase), the Water Supervisor, re-interviewed Corey and Gulan for the Water Treatment Plant Pond Caretaker position. Each candidate was scored on a thirteen category matrix. The scoring system of the matrix was based on a zero, five or ten point system for each

category. Chase testified however that Corey was awarded fifteen points in the category of "Seniority in the Union" to ensure he was given the proper preference. After the scores were tallied, Gulan had one hundred points and Corey received ninety points. Based on these scores alone, Gulan was deemed to be the more qualified candidate and was again awarded the position.

On January 11, 2016, the Union filed a grievance over the decision to again award Gulan the position. The City denied the grievance at all steps of the grievance procedure, which resulted in the instant arbitration.

### **POSITIONS OF THE PARTIES**

#### **THE UNION**

Based upon a well-founded interpretation of relevant contract language in the collective bargaining agreement, it is abundantly clear from a plain reading of the decision in ARB-15-4237 that the City, short of some new earth shattering evidence, cannot wage a persuasive argument to support its claim that Gulan was a more qualified candidate than Corey.

In the second interview, Chase used a self-created scoring matrix to conclude that Gulan was more qualified, had better credentials, and was better suited for the City's needs. This statement on its face is arbitrary and not supported by any credible, reliable or convincing evidence.

This case can be viewed in several different ways. There are multiple standards in play here besides the just cause standard. The by-pass standard must also be considered. It is well established that by-pass issues are reviewable by an arbitrator. Specifically, an arbitrator can review whether the

appointing authority has sustained its burden of proof by a preponderance of evidence and that the appointing authority's decision was made after a thorough review with reasonable justification. Here, the City failed to ensure its decisions comport with basic merit principles. Chase, the City's only witness, demonstrated an absence of due diligence in the manner that he evaluated the candidates. The City selected Gulan based solely upon his former military status and the results of an unfair, rigged, and biased matrix score.

The matrix chart is a prime example of the City trying to hoodwink the arbitrator, by stacking the results against Corey. How is military service relevant and how do you determine that it is worth ten points? Why was advancement initiative selected as a category, when there was no mention of it in the job description? Even if the category of advancement initiative exists, how do you substantiate giving Gulan ten points when the record is barren of any facts supporting this evaluation? Additionally, the only evidence of brush clearing was introduced by Corey and not Gulan, yet Gulan was awarded ten points for this category. Finally, Gulan received ten points for his experience in supervising personnel. However, the evidence that Chase provided from his conversations with Captain Marsh are based on hearsay, completely unreliable, and therefore, are not worthy of being credited. Compared to the unimpeachable extensive and credible testimony provided by Corey, a pattern of nepotism exists resulting in Gulan's selection for the position.

The City's agenda in this matter is unmistakable. It has managed to circumvent the terms of the collective bargaining agreement, and it has continued

to irrevocably taint the hiring process by failing to give a reasonable justification for selecting Gulan. The City has failed to adhere to the spirit, intent and defined mandates of the prior arbitration decision because of its outrageous selection of Gulan for a second time.

For all the reasons stated above, the Union requests that the grievance be granted, and that Corey be awarded the position with all lost wages and entitlements.

### **THE CITY**

In the underlying Arbitration Award (ARB-15-4237), the City was ordered to re-interview Corey and Gulan using the original job description and qualifications. Corey was also entitled to have his seniority credited and receive a preference from the City under Article XIX of the collective bargaining agreement.

#### Re-interviews were conducted pursuant to and in compliance with the Arbitration Decision

The appointing authority Chase testified that in advance of the re-interviews, he devised a scoring grid in order to evaluate the candidates and comply with the arbitration decision. Chase determined that there were twelve categories in which he would score each candidate, plus a category for seniority in the union. In each of the twelve categories, Chase evaluated each candidates' experience, ability and willingness (as applicable in each category) and determined whether there was none, some, or a good amount. A candidate received zero, five, or ten points respectively. Chase limited the scoring in each category to only those scores to avoid any arbitrary scoring. Having established



the scoring system, Chase then granted Corey a score of fifteen, which was more than the maximum score allowed in any other category, in order to acknowledge and credit Corey's seniority in the bargaining unit and give the benefit of any doubt with respect to a seniority preference. Thus the City complied with the arbitration decision.

The decision to hire the successful candidate was not arbitrary and capricious and should not be disturbed

This arbitration hearing is not a de novo interview, but rather a review of the actions of Chase. The Union has not proved that Chase acted in an arbitrary or capricious manner. Chase was forthright and straightforward in his handling of the re-interview process and in his testimony at the hearing. Chase implemented the directives of the Arbitration Decision in good faith. In the absence of such proof, the City submits that Chase's judgement as to the evaluation of each candidate should not be second guessed.

In addition to awarding Chase a preference for seniority, Chase repeatedly gave Corey the benefit of any doubt when it came to scoring. In the willingness to operate the plant category, Corey changed his answer from the original interview and now stated that he was willing to learn and participate in the operation of the plant. Even though Corey's answers were not consistent, Chase awarded him ten points the same as Gulan in that category. Additionally, while Gulan had extensive report writing experience from his time in the Marines, Corey's experience was limited to completing an annual inventory of holiday decorations and daily work sheets. Objectively, Gulan could have outscored Corey ten to five, yet Chase scored each candidate equally.

Finally, Chase also reasonably considered Corey's and Gulan's applications as one measuring stick of the candidates' qualifications. Part of the job is report writing, and the ability to work independently. Gulan took the time and effort to complete the application and list four references, which was in stark contrast to Corey, who did not list any references.

### Conclusion

Wherefore, the City respectfully submits that the grievance should be denied.

### OPINION

The issue before me is: Did the City comply with the arbitration award dated November 4, 2015 (ARB 15-4237)?

If not, what shall be the remedy?


For the reasons stated below, the City complied with the arbitration award dated November 4, 2015 (ARB 15-4237), and the grievance is denied.

The parties' stipulated issue in the matter before me is whether the City complied with the previous arbitration award when it re-interviewed Corey and Gulan for the position of Water Treatment Plant Pond Caretaker. The extremely narrow issue limits my review to the two issues raised in the first arbitration decision, specifically, whether the City afforded Corey his bargaining unit seniority, and whether he received the contractual preference outlined in Article XIX of the collective bargaining agreement. A review of any other aspect of the re-interview process would exceed the scope of my authority as agreed to by the parties.

Based on the record before me, I find that the City credited Corey with his over thirty-years of bargaining unit seniority and further provided him with the preference referenced in the collective bargaining agreement. The unrebutted testimony of Chase was that he credited Corey with fifteen points in the matrix category of seniority in the Union, which represented the ten point maximum for each of the matrix's categories, plus an extra five points representing the preference called for in the collective bargaining agreement. I find Chase's crediting of fifteen points to Corey in the manner described to sufficiently fulfill the City's obligation under the prior arbitration decision. As this was the only issue the parties stipulated for my review, the grievance is denied.

**AWARD**

The City complied with the arbitration award dated November 4, 2015 (ARB 15-4237), and the grievance is denied.



Timothy Hatfield, Esq.  
September 12, 2016