

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *

CITY OF QUINCY *

-and- *

MA PUBLIC EMPLOYEE COUNCIL *

ARB-16-5373

Arbitrator:

Kerry Bonner, Esq.

Appearances:


Stephen Durkin, Esq. - Representing City of Quincy

Sal Romano - Representing MA Public Employee 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 of Quincy did not violate Article XXIV of the collective bargaining agreement by bypassing Michael Moody for the position of Working Foreman – Heavy MEO in May 2016.


Kerry Bonner, Esq.
Arbitrator
May 11, 2017

INTRODUCTION

On July 15, 2016, the MA Public Employee Council (Union) filed a unilateral petition for arbitration. Under the provisions of G.L. Chapter 23, Section 9P, the Department of Labor Relations (DLR) appointed Kerry Bonner, Esq. to act as a single neutral arbitrator with the full power of the DLR. The undersigned arbitrator conducted a hearing at the DLR's Boston office on March 1, 2017.¹

Sal Romano represented the Union. Michael Moody, the grievant, appeared and testified for the Union. Also appearing, but not testifying, was Joe McArdle, Business Manager and Field Representative for the Union.

Stephen Durkin, Esq. represented the City of Quincy (Employer or City). Helen Murphy, the City's Human Resources Director, appeared and testified for the Employer.

The parties' briefs were received by April 28, 2017. On May 2, 2017, the City submitted a Rebuttal Argument. By email dated May 2, 2017, I informed the parties that I was denying the City's Rebuttal Argument and would not consider any of the arguments made in its rebuttal brief. In response, by email dated May 2, 2017, the City requested I hold a hearing on its Motion to Strike the Union's closing argument. I denied the City's request by email dated May 3, 2017.

THE ISSUE

The parties were unable to agree on an issue, and instead agreed to allow me to frame the issue. Thus, the appropriate issue is:

¹ Prior to the hearing, the City submitted a Position Statement. I explained to the parties that nothing contained in the Position Statement constituted evidence.

Whether the City of Quincy violated Article XXIV of the collective bargaining agreement by bypassing Michael Moody for the position of Working Foreman – Heavy MEO in May 2016?

If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

The parties' Collective Bargaining Agreement (CBA) contains the following provision, in pertinent part:

ARTICLE XXIV: SENIORITY

It is agreed that the City will post on a bulletin board in the individual Departments notices of vacancies in permanent and provisional job positions for a period of not less than five (5) working days to allow employees of the unit to make applications for such positions.

The Union and all applicants shall be notified of the results of the application process.

Where any vacancy is to be filled by management, and the qualifications of the applicants are equal, seniority shall prevail. Qualifications shall include, but not be limited to, experience, skills and ability, job performance, work habits, attendance and recommendations.

* * *

The parties agree that seniority will be determined by the rank on a Civil Service Examination achieved by an employee if more than one (1) person is appointed on the same day. The City agrees that in selection for promotion where all other qualifications are equal, seniority will be a predominant factor in the selection for purposes of promotion.

* * *

FACTS

In May 2016, the City posted a Notice of Available Position in the bargaining unit for a Working Foreman Heavy MEO (Foreman) in the Park Department (Department), as the incumbent in the position, Wayne Smith (Smith), was

retiring.² As with postings for other vacancies within the bargaining unit, the City posted this notice in locations where all unit members who worked for City departments would have access to it, and not just within the Department. The posting included a Position Description, which provides in relevant part:

GENERAL STATEMENT OF DUTIES AND RESPONSIBILITIES:

Supervises and works with a group of lower level skilled personnel. Maintains discipline, order[s] supplies and equipment. Reviews work that crew has performed. Operates trash packer and is responsible for emptying barrels and collecting trash across the park system.

* * *

DUTIES AND RESPONSIBILITIES:

1. Supervises and works with a crew to perform such tasks as they relate to the Park Department. Principal duties will be to run a two man trash crew that will place barrels, empty barrels, clean pick litter from parks and perform general cleanup of parks. Individual will drive trash packer and be responsible for trash collection throughout park system on a daily basis throughout the year. Duties may occasionally include layout and marking of athletic facilities, grass cutting and trimming, planting of flowers and shrubs, tree trimming and removal, installation of playgrounds, cleaning debris, raking leaves, Christmas and holiday decorating and sodding and seeding of turf areas.
2. Assist in special events, including the delivery and placement of bandstands, sound systems and other related equipment.
3. On the job site, maintain discipline and enforce safety regulations. Review work of the crew assigned to your supervision. Responsible for equipment and tools assigned to the crew.
4. Assist with all related duties and responsibilities of the Park Department as directed by the Project Manager/General Foreman.

QUALIFICATIONS AND ENTRANCE REQUIREMENTS:

(include required knowledge, abilities, and skills. Also specify entrance requirements such as experience and/or education)

² Smith, whose duties included driving the trash compactor, used paid leave for a period of time prior to his retirement date. During this time, other members of the Department filled in for him.

- Must be skilled in the trade being supervised. In all cases performs the same type of work as individuals supervised.
- Must possess valid Massachusetts Class B CDL with air brake endorsement. Additionally, tank endorsement preferred but not required.

The notice required that interested applicants sign the notice by May 13, 2016. Michael Moody (Moody), the grievant; Ken Johnson (Johnson); and Willy Parsons (Parsons) signed the posting. Johnson subsequently withdrew from consideration for the position.

Moody is a Park Maintenance Worker with a seniority date of March 26, 2012. On or around May 27, 2016,³ he was interviewed for the Foreman position by Christopher Cassani (Cassani), the Director of the Department at the time.⁴ Moody informed Cassani that he did not have a Commercial Driver License (CDL), but he was scheduled to take the CDL exam within 4-5 days.⁵ Moody successfully took the exam as scheduled and obtained his CDL on the day of the exam.

At the time of the interviews for the Foreman position, Parsons was a Union member, and a Heavy MEO for the Highway Department with a seniority date of

³ Both parties in their closing briefs described different dates of the interviews and start date of the Foreman position, however, none of these dates are in evidence. The only evidence regarding the date of Moody's interview was his testimony that he believed it was the "27th or 29th of May, end of the month." I take administrative notice that May 27, 2016 was a Friday, and May 29, 2016 was a Sunday.

⁴ Cassani is no longer employed by the City.

⁵ Again, both parties set forth different dates in their closing briefs as to when Moody obtained his CDL. And again, the exact date is not in evidence; the only evidence is Moody's testimony that he interviewed for the position "4 or 5 days before the date of the test," and that he passed the test.

September 17, 2012.⁶ Parsons possessed a CDL when he interviewed for the Foreman position. Following the interviews, Cassani selected Parsons for the Foreman position.⁷

POSITIONS OF THE PARTIES

THE UNION

According to the Union, at the interview for the Foreman position, which was on a Thursday, Moody advised Cassani that he was scheduled to take the CDL test the following Monday, which was two business days after the interview. The Union argues that during Smith's absence, prior to his retirement, no City employees assumed his duties as Foreman, which shows there was no urgency in filling the position. In fact, there are many other duties a Foreman can perform without driving any vehicle requiring a CDL. Therefore, the City acted

⁶ The Town's post-hearing brief indicates that Parsons worked in the Sewer/Water/Drain Department, but the only record evidence is Moody's testimony that Parsons worked in the Highway Department.

⁷ Moody testified about two other unit members in the Department, Greg McMillan and James McDonough, who were promoted to Heavy MEO positions although they did not possess CDLs, and were given six months to obtain the licenses. Although I credit Moody's testimony, the Union did not provide any further evidence about these situations, such as when they occurred or whether any of the other candidates for these positions had CDLs. Moody also testified that sometime after May 2016, a unit member in the Highway Department, Stephen Manolikas (Manolikas), was selected for the promotion to a foreman position despite the fact that he did not have a CDL license. However, the posting for the position stated that the candidates should have a CDL, or obtain one within nine months. In addition, Murphy testified that in February 2017, the City did not hire anyone for an open position in the Sewer, Water, and Drain Department that required a CDL, as none of the candidates possessed a CDL. Because the events involving Manolikas and the Sewer, Water, and Drain Department position occurred after the instant grievance, they are not relevant to my decision.

unreasonably when it refused to wait a few days for the Petitioner to take his CDL test before making its hiring decision.

In addition, the Union contends that the City did not provide any evidence of a "reasonable justification for selecting Parsons for the position over Moody, such as evidence that Parsons was more qualified, more experienced, more skilled, had better work habits, performed tasks better, or had better attendance records, which are all referenced in Article XXIV of the CBA. The City also did not produce any testimony indicating that it had performed a sufficient interview process to establish whether or not Parsons was more experienced than Moody. Therefore, both applicants have to be considered equal, which makes seniority the deciding factor.

Further, the evidence shows that the City's bypass of Moody was arbitrary, capricious, and in bad faith, evidenced by the fact that McDonough, McMillan, and Manolikas, none of whom possessed CDLs, were promoted and permitted additional time to obtain the CDLs that were required for the positions.

The Union also argues that the City's promotion of Parsons to the position was contrary to custom and practice because Parsons did not work in the Department.

Based on the above, the Union requests the granting of this grievance.

THE EMPLOYER

The City contends that the qualifications of the two applicants were not equal because Parsons possessed a CDL and Moody did not. At the time the job was posted, at the time the parties were interviewed, at the time the hiring decision

was made, and at the time Parsons started in the Foreman position, only Parsons possessed the required CDL. Therefore, the City was not required to consider the seniority issue in making its hiring decision.

With regard to the Union's position that the City should have postponed its hiring decision until Moody had an opportunity to take and pass the CDL test, the CBA contains no such requirement. Further, the position was essential as it involves keeping the City's parks, fields and playgrounds sanitary and free of garbage, and it would be officially vacant as of May 23, 2016, when Smith retired. The City only used temporary measures to get the work done pending Smith's retirement, at which point it filled the position. In addition, there was no guarantee that Moody would even pass the CDL test.

Lastly, Moody's testimony that other employees had been conditionally promoted into positions that required CDLs with the understanding that the employees would obtain the licenses was unsubstantiated. Moreover, a position was recently posted that required a CDL. Although six applicants applied, none of them possessed the required CDL, and thus the position was not filled.

For the reasons set forth above, the City requests that the grievance be denied.

OPINION

In this case, although both parties have made arguments involving dates that are not in evidence,⁸ neither party disputes that that Moody did not possess

⁸ Other than Moody's testimony about interviewing on May 27th or 29th, four or five days before the CDL test, there are no dates in evidence, including the date Smith retired, the position became vacant, and Parsons started in the position.

his CDL when he was interviewed for the position, and Parsons did possess his CDL at that time. I therefore do not agree with the Union that the qualifications of Moody and Parsons were equal. The position description states, "Must possess valid Massachusetts Class B CDL with air brake endorsement." Parsons met this requirement; Moody did not. Therefore, Parsons was more qualified.⁹ Because the qualifications of Moody and Parsons were not equal, the City was not required to select Moody as the more senior candidate.¹⁰

Although the Union argues that the City had a past practice of conditionally promoting employees and allowing them to obtain their CDL within a certain amount of time, it did not establish that these past situations were similar to the instant situation.¹¹ Significantly, there was no evidence that in the instances cited by the Union, there were also candidates for the positions who already possessed CDLs when the City selected the candidates who did not have CDLs.

The Union also argues that the City did not follow its practice of promoting candidates within the same department when it promoted Parsons from the

⁹ The parties did not introduce any evidence regarding the qualifications of either candidate other than the possession of a CDL and seniority.

¹⁰ The Union maintains throughout its post-hearing brief that the Appointing Authority has the burden of proving by a preponderance of the evidence that there was "reasonable justification" for the decision to bypass the grievant, and it cites to Police Department of Boston v. Jill Kavaleski, 463 Mass. 680 (2012), in which the Court upholds the Civil Service Commission's decision to overturn the department's bypass of Kavaleski to a police officer position. However, in a grievance arbitration of a promotional bypass, it is the union that has the burden of proving that the employer violated the collective bargaining agreement.

¹¹ As referenced above, I am only considering the two promotions that occurred prior to Moody's grievance.

Highway to the Park Department. However, there was no evidence of such a practice. Rather, the only evidence even remotely relevant to this contention shows that the City posts vacancies in locations where unit members throughout all City departments will have access, and not just in the department with the vacancy.

Lastly, the Union's argument that the City was unreasonable in not holding the position open for a few days so that Moody could obtain his CDL also must fail.¹² There is nothing in the CBA that would require the City to hold a position open in order for a candidate to attempt to meet the requirements of the position. Moreover, the Employer retains the discretion to determine when it needs to fill a vacant position.

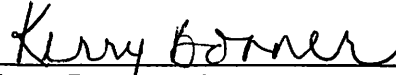
CONCLUSION

For the reasons set forth above, I find that the Employer did not violate Article XXIV of the collective bargaining agreement by bypassing Michael Moody for the position of Working Foreman – Heavy MEO in May 2016.

¹² The Union argues in its brief that "The unrefuted evidence shows this Working Foreman's position was non-functioning for at least three weeks prior to the interview dates...Director Murphy could not explain who, if anybody, drove the garbage truck when Smith was using his entitlement days prior to retirement." However, the position was not "non-functioning," as Moody testified that "multiple people in the Parks Department" were operating the trash compactor while Smith was on leave.

AWARD

The City of Quincy did not violate Article XXIV of the collective bargaining agreement by bypassing Michael Moody for the position of Working Foreman Heavy MEO in May 2016.



Kerry Bonner, Esq.

Arbitrator

May 11, 2017