

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

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TOWN OF ATHOL

-and-

ARB-19-7378

INTERNATIONAL UNION OF PUBLIC
EMPLOYEES, LOCAL 6

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Joseph Fair, Esq.

- Representing Town of Athol

Patrick Foley, Esq.

- Representing International Union of
Public Employees, Local 6

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 failed to promote the grievant to the position of Working Foreman, and the grievance is denied.

Timothy Hatfield
Arbitrator
October 28, 2021

INTRODUCTION

International Union of Public Employees, Local 6 (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 virtual hearing via Web Ex on November 16, 2020.

The parties filed briefs on January 12, 2021.

THE ISSUE

Did the Town violate the parties' collective bargaining agreement as described in the May 2019 grievance when it failed to promote the grievant to the position of Working Foreman? If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

The parties' collective bargaining agreement (Agreement) contains the following pertinent provisions:

ARTICLE 4 SENIORITY (IN PART)

Section 2. Standard for promotions shall be qualifications and Seniority. Seniority shall be defined as seniority within the division of a department. The job shall be awarded to the senior most qualified applicant within the Highway, Water, Sewer, Sewage Treatment Plant, and Cemetery/ Park/Tree Departments. The successful applicant shall be given a minimum of thirty (30) working days and maximum of ninety (90) working days trial and training period in the new positions. The applicant shall maintain his/her current rate of pay for the first thirty (30) working days and shall receive the applicable rate of pay for the remaining trial and training period.

If at the end of the trial and training period it is determined that the employee is not qualified to perform the work, the employee shall be returned to his/her old position and rate. Any employee who transfers to another department or is promoted within his or her department may return to his or

her previous position within thirty (30) working days without loss of seniority in that department. This shall not preclude, however, the right of the Town to hire outside the Department if in its judgment there is no employee who is qualified to fill the position, so long as employees are given at least thirty (30) working days to get any required license(s); or until all are asked to be trained for the position; pursuant to the application of the above conditions, the decision of the Superintendent shall be final.

ARTICLE 8 OVERTIME (IN PART)

Section 3. Overtime will be fairly and equally distributed by divisions (e.g., highway, parks, water, sewer and cemetery/tree) within the Department of Public Works to all employees covered by this Agreement and qualified to do the work performed.

ARTICLE 17 CLOTHING/BOOT ALLOWANCE (IN PART)

Section 1. The Town of Athol will provide mandatory uniforms that must be worn (unless not returned from the cleaners) by the members of the Department of Public Works employees: Eleven (11) sets (five (5) clean delivered, five (5) soiled picked up, one (1) employee wears), two (2) jackets, lockers for storage.

However, the sets of uniforms for the two mechanics at the highway division will be thirteen (13). ...

ARTICLE 18 MISCELLANEOUS (IN PART)

Section 4. All job openings in the D.P.W. will be posted in each department. Consideration for filling these openings will first be given to present employees applying for these jobs starting with the most senior qualified applicant in the division in which the opening occurs.

FACTS

The Town of Athol (Town) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. Thomas Turner (Turner / grievant) is the Assistant Working Foreman in the Highway Division of the Town's Department of Public Works (DPW). Prior to the promotion in question, Robert Costa (Costa), the successful candidate, worked as the Equipment Manager in the Highway Division of the Town's DPW. The Equipment Manager and Mechanic position are funded out of the Highway

Division, wear the same-colored uniforms as other Highway Division employees, and are included on the Highway Division seniority lists and overtime rosters.

The DPW is divided into four divisions/departments¹:

- 1) Highway Division
- 2) Water and Sewer Division
- 3) Cemetery, Parks and Trees Division
- 4) Sewage Treatment Plant

On May 6, 2019, the Town posted a vacancy for the position of Working Foreman. The job vacancy notice was posted in numerous locations that employees report to within the DPW. Most relevant to the matter before me, the notice was posted in the Highway Division and the Mechanic shop within the Highway Division. In response to the posting, Turner and Costa applied for the position.

At the time of the applications, Turner was serving in the position of Assistant Working Foreman, a title he held for slightly over one year. Turner had held other positions in the Highway Division since his date of hire on February 28, 2000, giving him over nineteen years of seniority within the Highway Division. Costa was serving in the position of Equipment Manager, and prior to that had served as the Mechanic since October 10, 1988, giving him thirty-one years of seniority within the Highway Division. Each candidate held the required licenses

¹ The terms division and department are used interchangeably by the parties and throughout the collective bargaining agreement. As such, all references to the Highway Department and the Highway Division in this decision mean the same thing.

for the position, and Costa held an additional CDL-A license that allows the holder to drive the vehicle necessary to transport steel road plates used for road work.

Some of the duties of the Working Foreman include:

- Supervision of Highway Division work projects
- Supervision of Highway Division work crews
- Operation of heavy equipment
- Snow and Ice removal operations
- Equipment and Supply procurement
- Assist in scheduling Highway Division personnel
- Assist in payroll functions

In his role as Equipment Manager, Costa was responsible for supervising employees who assisted in vehicle repair projects. He was responsible for servicing and maintaining all DPW vehicles and equipment as well as some Town vehicles. He was responsible for ordering all parts and supplies for the repair shop and maintaining accurate inventory records. Costa participated in snow and ice removal operations and worked overtime shifts outside of his mechanic shop duties across the Highway Department as well as the Water and Sewer Divisions.

The Town attempted to introduce evidence of a verbal warning it had given to Turner, Turner testified that he had no knowledge of receiving a formal verbal warning, and I am unconvinced that anything more than a verbal counseling was ever issued. As such, neither employee possessed a disciplinary record of note while applying for the Working Foreman position.

Being familiar with the candidates, the Town by-passed the opportunity to interview them and awarded the position to Costa based on his years of experience and broad knowledge of the Highway Division. Turner filed a grievance over his promotional by-pass that was denied at all steps of the grievance procedure and resulted in the instant arbitration.

POSITIONS OF THE PARTIES

THE UNION

The Working Foreman position is a position within the Highway Division of the DPW. Prior to his promotion, Costa held the position of Equipment Manager, which does not fall within the Highway Division of the DPW, but rather the Mechanic Department of the DPW. Although the Town alleges that there is no Mechanic Department within the DPW, the May 6, 2019, Working Foreman job posting clearly references a “mechanic department” at the bottom of the posting.

Article 18, Section 2 of the collective bargaining agreement requires all job openings to be posted in each department within the DPW. As such, the Town was required to post the job opening for Working Foreman in each department of the DPW, including the Mechanic Department. Here, based on the two job postings on the record, the Town clearly acknowledges the existence of a Mechanic Department within the DPW. Furthermore, the DPW has an emergency call list, under the Highway Division section, Costa’s name is not listed, further bolstering the idea that the Equipment Manager position falls outside the Highway Division.

Article 4, Section 2 of the parties' collective bargaining agreement outlines the promotional process within the DPW and requires that promotions be based upon qualifications and seniority, with vacancies awarded to the most senior qualified applicant within a specific division/department of the DPW. Seniority is defined as seniority within the division of a department. Given that the position of Equipment Manager falls outside of the Highway Division of the DPW, Turner was the most senior employee in the highway division as of May 2019.

The Town relies upon the fact that the Equipment Manager position is funded by the Highway Division of the DPW. The Union does not dispute that the Equipment Manager's position is funded by the Highway Division of the DPW. However, the Highway Division budget contains the largest budget of all DPW divisions and is thus used to accommodate the funding of personnel that serve multiple divisions within the DPW, such as the Equipment Manager. The fact that the Equipment Manager position is funded by the Highway Division of the DPW is not evidence that the position falls within that division.

In addition to performing his own payroll as Equipment Manager, unlike any other employee of the highway division, Costa also controlled his own overtime. In fiscal year 2019, Costa worked 405 hours of overtime, 50 hours more than the average overtime worked by members of the highway division. If the Equipment Manager position was a position within the Highway Division, then Costa would have been required to adhere to the language of Article 8, Section 3 that requires "fair and equal distribution of overtime."

The Equipment Manager position does not report to any Highway Department personnel but is a floating entity that directly reports to the DPW Superintendent. Furthermore, the Equipment Manager position is a supervisory position that performs functions in all divisions of the DPW, not just the Highway Division.

Qualifications

The term qualifications is defined in the collective bargaining agreement as “licenses and endorsements.” Turner obtained all relevant licenses for the Working Foreman’s position while serving in the capacity of Assistant Working Foreman. Furthermore, Turner had no known disciplinary record, and was the only employee within the DPW who had exclusively performed the Working Foreman position’s duties whenever the Working Foreman was otherwise unavailable. Although the Town produced an October 2018 letter documenting an alleged incident in which Turner received a verbal warning, Turner testified that he never received this letter. Given that employees are required to be made aware of any prior conduct that may have an adverse impact on their employment for purposes of progressive discipline, which did not happen here, the Union respectfully requests that the letter be disregarded.

It would be difficult to argue that anyone was more qualified than Turner to serve in the role of Working Foreman, given his past experience, and the fact that the responsibilities of the Assistant Working Foreman and Working Foreman are nearly identical. Finally, the Town produced no evidence that Turner’s

performance when filling in for the Working Foreman was somehow deficient or that his performance evaluations were anything short of satisfactory.

Conclusion

Based on the above, the Union requests that the arbitrator uphold the Union's grievance and direct the employer to comply with the collective bargaining agreement, and any and all other remedies deemed relevant.

THE EMPLOYER

Failure to Meet Burden

In the instant grievance, the Union has the burden of demonstrating by a preponderance of the evidence that the Town violated the collective bargaining agreement when it promoted Costa to the position of Working Foreman instead of Turner. In his grievance, Turner alleges that the Town's failure to promote him violated Article 4, Section 2 of the collective bargaining agreement. Additionally, he points to Article 18, Section 4 to buttress his contention that the Mechanic/Equipment Manager positions are in a division separate from the Highway Division.

The Union, however, offered little to no evidence at the hearing to support these claims. The Union offered only the brief testimony of Turner who, self-servingly, proclaimed that he was more qualified and experienced than Costa without providing any supporting facts or evidence. In addition, Turner testified that he did not receive an interview for the position, but the record does not reflect that any other candidates were interviewed either.

Turner's belief that he was entitled to the promotion stems largely from his contention that the Assistant Working Foreman has been the person promoted whenever the position has become vacant in the past. It could very well have been the case that the most senior qualified person for the job in the past was the Assistant Foreman at that time. That does not mean, however that that will always be the case. In short, where the Union has the burden in this matter, the utter lack of evidence introduced by the Union is grounds alone for the Arbitrator to summarily dismiss the grievance.

Promotion was consistent with Collective Bargaining Agreement

With respect to promotions, Article 4, Section 2 states, in relevant part, that:

Standard for promotions shall be qualifications and Seniority. Seniority shall be defined as seniority within the division of a department. The job shall be awarded to the senior most qualified applicant within the Highway, Water, Sewer, Sewage Treatment Plant, and Cemetery/ Park/Tree/ Departments.

In this case, the record reflects that Costa had more time in the Highway Division than Turner and was more qualified for the job.

Costa had more Seniority in the Highway Department than Turner

The Union asserts that the promotion was awarded to an employee who was not assigned to the Highway Division. As the Town amply demonstrated however, this is simply incorrect.

To begin with, the Costa's appointment letter for the Mechanic position in October 1988 clearly states that the Mechanic position is in the Highway Division. Although at some point, Costa was elevated to the Equipment Manager, the DPW Superintendent testified that the Equipment Manager title

is essentially an upgraded Mechanic position with additional job duties and managerial type responsibilities. Outside of that, there is no real organizational difference between the two positions, including what division they are assigned to.

That the Mechanic and the Equipment Manager are included in the Highway Division is also evidenced by the fact that both positions are assigned to wear the same-colored uniforms as other members of the Highway Division, and both positions are funded out of the Highway budget line. Moreover, both seniority lists submitted by the Union in this matter clearly show that Costa, in his positions of Mechanic and Equipment Manager, has historically been listed as part of the Highway Division. Additionally, Article 17 of the collective bargaining agreement states that “the sets of uniforms for the two mechanics at the highway division will be thirteen (13).” Finally, Article 8, Section 3 states that “overtime will be fairly and equally distributed by divisions (e.g., highway, parks, water, sewer and cemetery/tree) within the Department of Public Works to all employees covered by this Agreement and qualified to do the work performed.” Noticeably absent from the parenthetical list is any mention of a mechanic division.

In support of his contention that the Mechanic and Equipment Manager are not part of the Highway Division, Turner pointed to Article 18, Section 4 and argued that “there is always a posting in the Equipment/Mechanic Division.” No other evidence or argument was offered to support this contention. While it’s true that Article 18, Section 4 does call for vacant

positions to be posted in each division, this language merely reflects the minimum number of places the Town is required to post job openings. There is nothing in the collective bargaining agreement that prohibits the Town from posting openings in additional locations. Thus, to the extent that the job postings state "POST: Highway; Water & Sewer; S.T.P.; Cemetery & Park/Tree; Filtration; Mechanic," this language merely reflects the physical locations where the notices are posted and is not a list of the divisions that exist within the DPW. The overwhelming weight of the record demonstrates that the Mechanic and Equipment Manager positions have been included in the Highway Division from October 1988 to the present, at the very least.

The record also reflects that Costa began his career in the Highway Division on March 13, 1985, and has continued to hold positions in the Highway Division since that time, first as the Mechanic and later as Equipment Manager, giving him more than thirty-four years of seniority in the Highway Division at the time of his promotion. In contrast, Turner only has nineteen years seniority in the Highway Division. There is no dispute that Costa was far and away the more senior employee within the Highway Division.

Costa was also more qualified for the position than Turner

Other than Turner's self-serving testimony that he was more qualified for the position than Costa, the Union offered very little evidence to support this contention. While it is true that the Assistant Working Foreman fills in for the Working Foreman when the latter is on vacation or absent, Turner had only been serving in the position for slightly over a year at the time the promotion

was made. Thus, his experience was limited to no more than the Working Foreman's annual vacation and perhaps a handful of sick days.

These scant few weeks filling in for the Working Foreman are hardly sufficient to overcome the additional fifteen years of experience Costa had in working for the Highway Division. Also, the 2019 overtime list that the Union submitted reflects that Costa was one of the highest overtime workers in the DPW. Very few of these additional hours were performed in connection with vehicle maintenance duties, but instead were worked in connection with snow and ice removal operations, callbacks for road closures, and construction drainage issues. Costa had considerable experience in other Highway Division work both during his regular working hours and on an overtime basis.

Additionally, the Working Foreman is a supervisory position that is responsible for assigning and overseeing the Highway Division work crews, making arrangements for the supplies and equipment needed for projects, and assisting with scheduling of employees and payroll functions. This makes the Working Foreman position similar to the Equipment Manager supervisory position that Costa had been holding for a number of years. Costa supervises the employees who are necessary to assist him on a given project, maintains service records and maintenance schedules for all DPW and certain Town vehicles, and orders all parts and supplies for the shop. In contrast, Turner's only related experience was distributing work assignments during the Working Foreman's vacation. There is no evidence that Turner took on the other

aspects of the position such as ordering supplies and materials, scheduling employees or assisting with payroll functions.

An additional factor in Costa's favor is his possession of a CDL-A commercial driver's license which Turner does not possess. The CDL-A allows an employee to operate the tractor trailer that the DPW uses to haul steel plates that are necessary when performing road work. Costa is one of only two employees in the DPW, and the only one in the Highway Division, to hold such a license. This by itself makes Costa more qualified than Turner for the position. Finally, Turner was issued a verbal reprimand six months prior to the promotion, and Costa has no history of discipline.

Conclusion

The Town submits that the grievance should be denied because the Union has failed to meet its burden of showing that the Town violated the collective bargaining agreement when it promoted Costa to Working Foreman instead of Turner.

OPINION

The issue before me is: Did the Town violate the parties' collective bargaining agreement as described in the May 2019 grievance when it failed to promote the grievant to the position of Working Foreman? If so, what shall be the remedy? For all the reasons stated below, the Town did not violate the collective bargaining agreement when it failed to promote the grievant to the position of Working Foreman and the grievance is denied.

The burden of proof in promotional by-pass cases is on the Union as the moving party. In this case, the Union is arguing that the promotional selection process was flawed, and that Turner was the more qualified candidate. The Union failed to meet its burden with either argument.

First, contrary to the Union's argument that the Equipment Manager position is not in the Highway Department, the overwhelming evidence presented at the hearing proves that the Equipment Manager position is in fact part of the Highway Department. A combination of payroll records, uniform mandates, overtime lists, and witness testimony make it abundantly clear that the Equipment Manager position and the Mechanic position reside in the Highway Department. The idea that there is a separate Mechanic Department is unsupported by the evidence presented.

Having found that the Mechanic position and the Equipment Manager position are in the Highway Department, logic dictates that the Town did not violate the collective bargaining agreement in its handling of the job posting or in its consideration of Costa's seniority as time within the Highway Department.

The Union's second argument is that Turner was the more qualified candidate based on his time working as the Assistant Working Foreman. Turner and the Union were unable to provide enough evidence to sustain its burden on this belief. Turner provided limited evidence other than his belief that he was entitled to the position based on his current position as Assistant Working Foreman. While it is true that many of the job duties were similar to the duties of the Working Foreman, Turner was only in the position for approximately one year

and had limited opportunity to fill in for the Working Foreman beyond handling assignment duties during the Working Foreman's vacation. This limited experience is not sufficient to overcome Costa's twelve additional years of seniority in the Highway Department.

I agree with the Union that Turner's alleged verbal warning is inconsequential for my analysis of the qualifications of each candidate. What is significant, however, is Costa's CDL-A license. As only one of two DPW employees, and the only Highway Department employee to possess the license it allows Costa to perform additional tasks that are important to the Highway Department and give Costa an advantage over Turner.

Based on the evidence presented, I find that the Town properly handled the job posting in question and properly considered Costa's seniority to be time served in the Highway Department. I also find that after a review of the evidence presented, Turner is not the more qualified candidate for the position of Working Foreman, and the Town did not violate the collective bargaining agreement when it promoted Costa instead of Turner.

AWARD

The Town did not violate the collective bargaining agreement when it failed to promote the grievant to the position of Working Foreman and the grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
October 28, 2021