

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

TOWN OF LYNNFIELD
-and-
AFSCME, COUNCIL 93

ARB-21-8661

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Yael Magen, Esq. - Representing Town of Lynnfield

Jared Kelly, Esq. - AFSCME, 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 Town did not violate Article 6 of the collective bargaining agreement when it did not select Dan Harvey for the position of Head Custodian. The grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
December 9, 2022

INTRODUCTION

On June 2, 2021, AFSCME, Council 93 (Union) filed a unilateral petition for Arbitration. Under the provisions of M.G.L. Chapter 23, Section 9P, the 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 December 2, 2021.

The parties filed briefs on March 14, 2022.

THE ISSUE

Did the Town of Lynnfield violate Article 6 of the Collective Bargaining Agreement when it non-selected Mr. Daniel Harvey for the position of Head Custodian at Lynnfield Middle School? If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

Article 6 Job Posting and Bidding (In Part)

When a vacant position covered by this agreement is to be filled, such vacancy shall be posted in a conspicuous place listing the pay, duties and qualifications, and such notice of vacancy shall remain posted for seven (7) days. Subject to the equality of skills, the Employer shall award the position to the qualified applicant with the greatest seniority. ...

FACTS

The Town of Lynnfield (Lynnfield/Town/Employer) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration. Dan Harvey (Harvey/grievant) was employed by the Town as a school

custodian since November 27, 2006. Martin Ayoal (Ayoal) was employed by the Town as a school custodian since February 27, 2007. John Tomasz (Tomasz) is the Town's Director of Public Works.

On March 4, 2021, the Town posted an opening for the position of Head Custodian – Middle School. Harvey, Ayoal and another individual (who is not part of this proceeding) applied for the position. Ayoal applied for the position with a typed letter and Harvey applied for the position with a handwritten letter, written in the third person.

On May 5, 2021, Tomasz received two letters of recommendation from twelve teachers in the school recommending Ayoal for the position of Head Custodian. Additionally, Middle School Principal Stephen Ralston (Ralston/Principal) emailed Tomasz stating his preference for Ayoal over Harvey for the position.

After receiving the recommendations and email from the Principal, Tomasz called Harvey and Ayoal into a room and informed both that he was selecting Ayoal for the position of Head Custodian based on the recommendations received. Tomasz did not ask any questions of either candidate.

On March 25, 2021, the grievant filed a grievance over the selection of Ayoal as Head Custodian. The grievance was denied at all steps of the grievance procedure and resulted in the instant arbitration.

POSITIONS OF THE PARTIES

THE UNION

The Town acted arbitrary and capricious in its selection process for the Head Custodian position. The Town's actions were taken to ensure that Ayoal was selected over the more senior and substantially equally qualified grievant. In this matter, the process of interviewing the candidates was arbitrary and resulted in the grievant, a more senior candidate with substantially equal qualifications and abilities, being bypassed while Ayoal was selected to fill the position of Head Custodian.

Grievant More Qualified Than Ayoal

Article 6 of the collective bargaining agreement describes the process to determine which applicant shall be selected to fill a vacancy. Vacancies are to be filled by the most skilled applicant and should there be multiple similarly-qualified applicants, the vacancy is to be filled by the most senior applicant.

In reviewing the Employer's selection, the Employer violates the collective bargaining agreement if it makes an arbitrary and capricious selection or unreasonably applies the contractual criteria in making its election. In this instance, the Employer was demonstrably arbitrary and capricious in its selection based on the lack of interviews of the candidates. This allowed the Employer to choose a candidate other than the grievant.

The Town received three applicants for the Head Custodian position. Of those applicants, only two were selected for interview, Ayoal and the grievant. Tomasz informed the grievant and Ayoal at the interview that he had selected Ayoal for the position, and that he would not be asking either candidate any questions about the position. Tomasz did not ask either candidate about their

skills, abilities, or experiences as they relate to the position of Head Custodian. Tomasz did not ask the grievant about his reading disability, he stated that he had heard through other people that the grievant had a reading disability, but he failed to have a conversation regarding the disability with the grievant. The Town did not even attempt to evaluate the qualifications and abilities of the applicants.

The lack of proper evaluation is apparent as Tomasz stated at the hearing that he did not evaluate the two applicants at the interview stage and made his decision solely on the letters of recommendation submitted on Ayoal's behalf, commenting that it was unusual to receive letters of recommendation for a custodian. Tomasz stated that these letters influenced his decision on who to select for the position.

Tomasz's reliance on the letters of recommendation and second-hand knowledge violated the collective bargaining agreement. The collective bargaining agreement states that "subject to equality of skills, the employer shall award the position to the qualified applicant with the greatest seniority." Tomasz did not even attempt to assess the skills of the two candidates. The grievant is the more senior of the two employees, and thus in the situation where the skills of the applicants are equal, the grievant must be awarded the position.

Grievant's Work as a Temporary Head Custodian

The grievant has the skills and ability to perform the duties of the Head Custodian. During his time as a night custodian, he temporarily filled in as Head Custodian on multiple occasions. When filling in, he was able to complete all assignments and duties associated with the Head Custodian position. The Town

is clearly aware of his ability to perform the work given that they have asked him to temporarily fill the role on multiple occasions and at several different schools. Yet, it instead made an arbitrary and capricious selection of Ayoal in violation of the collective bargaining agreement.

Conclusion

In this selection, the Town judged the candidates in an arbitrary and capricious manner. Tomasz did not interview the candidates and made his selection based on criteria that is not listed in the collective bargaining agreement or the job posting. Had Tomasz interviewed the grievant, he would have found him to be more than qualified for the position, and at least as equally qualified as the selected candidate. In that situation, the collective bargaining agreement requires the most senior candidate to receive the position.

The Union seeks to have the grievant placed into the position that he would have been in but for the Town's arbitrary selection process, including a make whole remedy for back pay and benefits retroactive to March 2021.

THE EMPLOYER

In order for an applicant to prevail on seniority alone, he must show that he is: 1) a qualified candidate; and 2) has skills equal to the other qualified candidates. Harvey lacks both prongs as he is not a qualified candidate nor are his skills equal to Ayoal's skills.

Harvey's appeal should be denied for three reasons. First, Harvey was not a qualified applicant as he did not have the skill set and qualifications for the job of head custodian including the ability to read and write, communicate in writing and

carry out directions and assignments in writing. Second, Harvey was not of equal skills to the other applicants, as Ayoal's skills and qualifications were superior to Harvey's. Third, Harvey's seniority is almost identical to Ayoal's, as both have been employed by the Town for fourteen years, and Harvey has only three months more time. Three months difference of seniority over a decade and a half is extremely minute and even irrelevant, especially with the broad difference in skillset between Ayoal and Harvey.

There is a big difference between the skills for a custodian and a head custodian. One of the differences is that while a custodian does not need to use reading and writing skills in order to perform his job, a head custodian must read and write on a daily basis to communicate with other administrative people that only the head custodian deals with. The head custodian job posting states that the head custodian must "carry out directions and assignments received from the Assistant Director of Facilities in a timely manner," "understand and follow oral and written directions," and "communicate clearly and concisely, both orally and in writing." While Harvey was able to serve as a custodian, he is not qualified to be a head custodian because it requires daily reading and writing, including communications via emails and correspondences with various third parties. When Harvey was asked if he could complete a job where reading and writing is a daily requirement, he testified that he would not be able to perform those reading or writing duties without outside help from his wife or another person.

Harvey's and Ayoal's skills were not equal. In addition to Harvey's reading and writing issues, Ayoal submitted a superior application for the position and

received a written recommendation from twelve teachers that praised his skills, knowledge and abilities and mentioned his “ability to work well with others and communicate effectively with his co-workers.” Finally, the principal recommended and requested Ayoal over Harvey for the position of head custodian.

Conclusion

The Town did not make this decision in an arbitrary or capricious manner, and did not abuse its discretion. The Town reviewed all the facts and made the best decision for the Town. For the reasons stated above, the Town requests that the grievance be denied.

OPINION

The issue before me is: Did the Town of Lynnfield violate Article 6 of the Collective Bargaining Agreement when it non-selected Mr. Daniel Harvey for the position of Head Custodian at Lynnfield Middle School? If so, what shall be the remedy?

For all the reasons stated below, the Town did not violate Article 6 of the collective bargaining agreement when it did not select Dan Harvey for the position of Head Custodian. The grievance is denied.

Article 6 of the parties’ collective bargaining agreement addresses job posting and bidding and states in relevant part: “Subject to the equity of skills, the Employer shall award the position to the qualified applicant with the greatest seniority.” To prevail in this case, Harvey and the Union must show that Harvey, as the applicant with the greatest seniority, and Ayoal, the successful candidate have, at a minimum, equal skills, if Harvey’s seniority is to be the deciding factor.

The job posting for the Head Custodian position includes many duties and responsibilities, as well as required skills, knowledge and abilities. The most pertinent of these are: “carry out directions and assignments received from the Assistant Director of Facilities in a timely manner;” “understand and follow oral and written directions;” and “communicate clearly and concisely, both orally and in writing.”

Harvey was open and honest about his struggles with reading and writing. Harvey testified that he needs the assistance of a third party, such as his wife, in these areas. Even with these challenges, Harvey has succeeded in his position as a custodian for fourteen years and has even filled in for the Head Custodian on a temporary basis from time to time. Unfortunately, the position of Head Custodian requires more reading and writing than the Custodian position. While Harvey undoubtedly can excel at many of the duties and responsibilities and certainly has many of the skills necessary for the position of Head Custodian, there is a subset of responsibilities and skills that he would be unable to accomplish.

Although Ayoal has less seniority, he has the skillset that is necessary for the position of Head Custodian. This skillset allows the Town to bypass seniority as the sole deciding factor under Article 6 of the collective bargaining agreement.

Having found that the candidates did not have equal skills, the Town did not have to award the position to the candidate with the most seniority. The Town’s decision to award the position to Ayoal based on his fourteen years of experience, the written recommendations received from teachers, and the stated preference of

the principal is not a violation of the collective bargaining agreement. The grievance is denied.

AWARD

The Town did not violate Article 6 of the collective bargaining agreement when it did not select Dan Harvey for the position of Head Custodian. The grievance is denied.



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