

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

TOWN OF BILLERICA

-and-

BILLERICA FIREFIGHTERS, LOCAL 1495 IAFF

ARB-22-9610

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

Kevin Feeley, Esq.

- Representing Town of Billerica

Nourhene Chtourou, Esq.

- Representing Billerica Firefighters,
Local 1495 IAFF

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 grievance is procedurally arbitrable, but the Town did not violate the collective bargaining agreement when Firefighter Pierce was not appointed as a rescue technician in March 2022, and the grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
March 18, 2025

INTRODUCTION

On October 6, 2022, the Billerica Firefighters, Local 1495 IAFF (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 September 29, 2023.

The Union filed its brief on February 2, 2024

The Town filed its brief on December 11, 2024.

THE ISSUES

- 1) Is the grievance procedurally arbitrable?
- 2) Did the Town violate the collective bargaining agreement when Firefighter Pierce was not appointed as a rescue technician in March 2022?
- 3) If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

ARTICLE 15

SECTION 1: ...

SECTION 3: MANAGEMENT RIGHTS

The listing of the following specific rights of management in this Article is not intended to be a waiver of any of the rights of the Town or the Chief not listed herein. Such inherent management rights shall remain with the Town or the Chief subject to the provisions of the Agreement.

The employer shall have the exclusive right, subject to the provisions of this agreement and consistent with the applicable laws and regulations:

- A. To direct employees of the employer in the performance of their duties;
- B. To hire, promote, transfer, assign, and retain employees in positions within the Fire Department and to suspend, demote, discharge, or take other disciplinary action against such employees;
- C. To maintain the efficiency of the operations entrusted to it;
- D. To determine the methods, means, and personnel by which such operations are to be conducted;
- E. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature;
- F. To establish continued policies, practices, and procedures for the conduct of town business and, from time to time, to change and abolish policies, practices, and procedures subject to the provisions of the Agreement.
- G. To prescribe and enforce reasonable rules and regulations for the maintenance of discipline and for the performance of work in accordance with the requirements of the Town.

ARTICLE 17 (In Part)

SECTION 1: GRIEVANCE-ARBITRATION

A grievance arising out of the interpretation or application of this Agreement may be processed in the following manner:

STEP 1: The Union and/or an employee or group of employees shall initiate the grievance in writing with the Chief or his designee within fourteen (14) calendar days in writing.

STEP 2: If the grievance remains unsettled after step 1, it shall be presented in writing to the Town Administrator within fourteen (14) calendar days after the Chiefs response is due. The Town Administrator shall respond in writing within fourteen (14) calendar days.

STEP 3: If the grievance remains unsettled after step 2, the Union may, within fifteen (15) calendar days of the due date of the Town Administrator's response, submit the grievance to the Massachusetts Board of Conciliation and Arbitration.

The arbitrator shall have no authority to add to, subtract from, alter, or amend this Agreement. His/her decision shall be binding upon the parties. The fees and other expenses of the arbitrator shall be shared equally by the parties. ...

Failure to process the grievance within the above time limits shall constitute a waiver of the grievance.

A complaint not arising out of the interpretation of the Agreement may be processed only through step 1 of the procedure.

ARTICLE 18

SECTION 1: AGREEMENT MODIFICATION

This agreement represents the entire agreement of the parties and may not be modified except as provided herein during its terms except by mutual agreement of the parties.

ARTICLE 21 (In Part)

SECTION 1: ...

SECTION 4 – SPECIAL ASSIGNMENT – RESCUE TECHNICIANS

Eight (8) individuals shall be designated by the Chief as rescue technicians at the rank of firefighter and assigned to Headquarters as line firefighters. Rescue technicians will be certified in the disciplines of water, ice, rope, confined space, and trench rescue. Rescue technicians shall receive 3% increase in regular compensation and overtime.

ARTICLE 22 (In Part)

SECTION 1: PAST PRACTICE

All existing terms and conditions not modified by this agreement shall continue with full force and effect. ...

FACTS

The Town of Billerica (Town) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration.

Andrew Pierce (Firefighter Pierce / Pierce) is a firefighter in the Town's Fire Department. Chief Robert Cole (Chief Cole) is the Town's Fire Chief.

In 2018, the Town and the Union agreed to establish eight rescue technician positions. Article 21, Section 4 states:

Eight (8) individuals shall be designated by the Chief as rescue technicians at the rank of firefighter and assigned to Headquarters as line firefighters. Rescue technicians will be certified in the disciplines of water, ice, rope, confined space, and trench rescue. Rescue technicians shall receive 3% increase in regular compensation and overtime.

Between 2018 and 2021, no firefighter appointed as a rescue technician possessed all five certifications prior to appointment. Each firefighter appointed possessed at least one of the certifications prior to appointment. Additionally, no firefighter was appointed who had none of the certifications prior to the appointment as a rescue technician.

On or about March 22, 2022, Chief Cole posted two rescue technician openings. Firefighter Pierce was the only bargaining unit member who applied for the opening. At the time of his response to the posting, Pierce did not possess any of the certifications listed in the posting. Chief Cole informed Pierce that because he lacked any of the certifications, he would not receive the 3% stipend that came with the position. Pierce subsequently bid out of the position.

On August 30, 2022, Chief Cole posted the following notice concerning the rescue technician position:

Any member who applied for the rescue tech position will need to submit copies of certificates to Captain Flyer by Friday, September 3, 2022. Members will be temporarily assigned until practical testing can be arranged.

On September 7, 2022, the Union filed a grievance over the Chief's posting. The initial Step 1 grievance addressed to the Town's failure to fill the eight required

rescue technician positions and made no reference to Firefighter Pierce's March non-appointment. The grievance was denied.

On September 13, 2022, the Union filed a Step 2 grievance which, when discussing the rescue technician openings and the Chief's stated requirement for pre-appointment certifications, did mention Pierce's March non-appointment. On September 20, 2022, Chief Cole denied the grievance resulting in the instant arbitration.

POSITIONS OF THE PARTIES

THE UNION

Arbitrability

The grievance is timely. On August 30, 2022, Chief Cole posted a notice stating:

Any member who applied for the rescue tech position will need to submit copies of certificates to Captain Flyer by Friday, September 3, 2022. Members will be temporarily assigned until practical testing can be arranged.

The Union filed the grievance on September 7, 2022, well within fourteen days mandated by the collective bargaining agreement. The impetus behind the filing was Chief Cole's instruction that members were to furnish copies of certificates for training, an unprecedented requirement introduced subsequent to the rescue technician posting on March 22, 2022. This change prompted the Union to act swiftly and submit the grievance within the specified timeframe. Therefore, the Town's argument fails, and the Union's grievance should proceed to the merits.

MeritsContract Language is Clear and Unambiguous

The plain language of Article 21 supports the Union's position that the certifications listed therein are post-employment requirements. The basic rule of contract interpretation is that if the language is clear and unambiguous, it should be enforced as written.

In the present case, the language reads as follows:

Eight (8) individuals shall be designated by the Chief as rescue technicians at the rank of firefighter and assigned to Headquarters as line firefighters. Rescue technicians will be certified in the disciplines of water, ice, rope, confined space, and trench rescue. Rescue technicians shall receive 3% increase in regular compensation and overtime.

In this instance, the contractual language is unambiguous. It explicitly states that the Chief shall designate eight individuals as rescue technicians. This wording leaves no room for interpretation; it is a clear mandate for the Chief, and the Town is not disputing such. Yet, when addressing the certifications of the rescue technicians, the contract adopts the future tense, stating they will be certified in the disciplines of water, ice, rope, confined space, and trench rescue. The deliberate use of the future tense in this context signifies an impending action, emphasizing that certification is a preference rather than an immediate condition for designation.

Past Practice and Bargaining History

If the arbitrator finds the contractual language to be ambiguous, the mutual intent of the parties at the time they agreed to the language is unrefuted. Former Union President Paskiewicz was at the bargaining table when the language was

incorporated in the collective bargaining agreement. He testified that the parties, after a long negotiation, agreed to continue working on language regarding necessary training and certifications.

During the time period of 2018 to 2021, the Town's assignment of members to the rescue technician position never included individuals holding all five certifications for the position, and those individuals all began receiving their 3% stipend upon appointment.

From 2021 moving forward, the Town's assignment of members to the rescue technician position has also never included individuals holding all the certifications for the position, and up until this grievance, these members received their 3% stipend at the time of their assignment.

Past Practice of Appointing Rescue Technicians and Then Providing Training

For the last five years, the Town has consistently assigned rescue technicians who are not fully certified in all disciplines. Chief Cole testified that he made accommodations for members who were not fully certified to help get the program started. In 2019, some members only had three certifications, one had two and one only had one certification. All attended training as required. The Chief also confirmed that currently, not all of the rescue technicians have five certifications because of the difficulty of obtaining classes.

Jurisdiction of the Arbitrator

In the collective bargaining agreement, the Arbitrator is restricted to only making decisions on the interpretation and application of the articles in question. As detailed above, the Union has established that the contract language, the

parties' past practice, and the parties' bargaining history unequivocally prove that certifications are a post-employment requirement and that the Town is violating the collective bargaining agreement by now requiring certifications as a pre-requisite to being assigned and paid in a rescue technician position.

Conclusion

The Union's position must be sustained, and all firefighters impacted made whole. The Town must be ordered to fulfill its contractual obligations and assign firefighters to the rescue technician position, including Firefighter Pierce, in accordance with the express terms of Article 21 and with certifications remaining a post-employment requirement.

THE EMPLOYER

Arbitrability

In March 2022, a rescue technician position was vacated and Chief Cole promptly posted the opening. The opening generated one applicant, Firefighter Pierce. In April 2022, Firefighter Pierce learned that Chief Cole was not going to appoint him as a rescue technician since he had zero of the required certifications.

The instant grievance challenging the Chief's decision was filed on September 7, 2022. The collective bargaining agreement has a specific and strict statute of limitations for the submittal of grievances. Article 17, Section 1, allows fourteen days for filing grievances. Article 17 also expressly provides that "[f]ailure to process the grievance within the above time limits shall constitute a waiver of the grievance."

This is not a rolling or ongoing violation, rather, the consideration is prompted by and limited to the only applicant for the open rescue technician position. Since there was only one applicant, that applicant was not chosen and the grievance missed the grievance time limit by months, the grievance must be denied as untimely based on the clear language of Article 17.

Merits

There is no violation of the collective bargaining agreement, and the grievance should be denied. Article 21, Section 4 does, as the Union suggests, establish eight rescue technician positions. However, the Union skips the next sentence that requires the certification of rescue technicians in the disciplines of water, ice, rope, confined space and trench rescue. The sole applicant, Firefighter Pierce, was certified in zero of the five required disciplines. The applicant was simply not qualified for the position and the grievance should be denied.

The Arbitrator heard testimony that Chief Cole, due to a lack of interest in the rescue technician positions, would, when there were no fully qualified applicants, consider applicants that possessed a minimum of two certifications and agreed to promptly obtain the other certifications. The Chief testified that he thought this approach encouraged individuals to obtain all five certifications, while having the expertise to assist in at least two specialties. The Chief further testified that he would never appoint someone with zero certifications, as then the Town would be paying someone to be a rescue technician who had no idea how to be a rescue technician.

Conclusion

The Town never agreed to any reduction in the qualifications for assignment to rescue technician. Even if the Chief's attempts to fill the open slots with applicants that possessed a minimum of two certifications served to modify the collective bargaining agreement, the fact that the sole applicant possessed zero certifications necessitated the denial of this grievance.

OPINION

The issues before me are:

- 1) Is the grievance procedurally arbitrable?
- 2) Did the Town violate the collective bargaining agreement when Firefighter Pierce was not appointed as a rescue technician in March 2022?
- 3) If so, what shall be the remedy?

For all the reasons stated below, the grievance is procedurally arbitrable, but the Town did not violate the collective bargaining agreement when Firefighter Pierce was not appointed as a rescue technician in March 2022, and the grievance is denied.

Arbitrability

On August 30, 2022, Chief Cole posted a notice stating that:

Any member who applied for the rescue tech position will need to submit copies of the certificates to Captain Flyer by Friday September 3, 2022. Members will be temporarily assigned until practical testing can be arranged.

On September 7, 2022, the Union filed a grievance over the Chief's proclamation that certifications must be filed prior to commencement of receiving the position, something that the Union believed was a new requirement.

Article 17 of the collective bargaining agreement states that:

STEP 1: The Union and/or an employee or group of employees shall initiate the grievance in writing with the Chief or his designee within fourteen (14) calendar days in writing.

The Union's grievance was clearly filed within the timelines outlined in the collective bargaining agreement and was directly related to the Chief's action which the Union believed violated the collective bargaining agreement. The Town's objection centers on the timing of when Firefighter Pierce was denied the 3% stipend for the rescue technician position in March 2022, which would render the grievance outside the collective bargaining agreement's timeline for filing a Step 1 grievance. The fatal flaw in this argument is that the Union's Step 1 grievance does not reference Firefighter Pierce being denied the 3% stipend for the rescue technician position. The Union's original objection is with the Chief's decision to make certifications a prerequisite to applying for a rescue technician position, something it claims was not done in the past.

Notwithstanding the stipulated issue before me in this arbitration, which directly addresses Firefighter Pierce's situation, the Union filed and worded the original grievance so as to make it timely filed and thus procedurally arbitrable.

Merits

As this is a contract interpretation case, I must first decide if the language of Article 21, Section 4 is clear and unambiguous. If the language is clear and

unambiguous, then my decision is based solely on the plain language of the collective bargaining agreement. If I find, however, that the language is ambiguous, I may then decide this dispute using additional evidence such as past practice.

Both parties in this dispute claim that the language in question is clear and unambiguous and supports its rationale for why it should prevail. The language states that:

Eight (8) individuals shall be designated by the Chief as rescue technicians at the rank of firefighter and assigned to Headquarters as line firefighters. Rescue technicians will be certified in the disciplines of water, ice, rope, confined space, and trench rescue. Rescue technicians shall receive 3% increase in regular compensation and overtime.

The Union's argument is that the word "will" in the sentence "Rescue technicians will be certified" denotes a future obligation that kicks in after an individual is appointed to the rescue technician position. The Town argues the exact opposite; that the word "will" in this context is a prerequisite and that certifications must be obtained prior to an appointment to a rescue technician position.

Based on each party's fundamental difference of opinion on the meaning of the language, I can see how the word "will" could be interpreted in multiple ways, i.e. must have the qualifications in order to be appointed to the position compared to will get the qualifications after appointment to the position. As such, I find the language to be ambiguous and turn my attention to other factors such as past practice to help resolve the dispute.

Based on the evidence presented at the hearing, it is undisputed that Chief Cole has, in the past, deviated from the Town's stated position that the certifications are a prerequisite for obtaining the rescue technician position. The evidence shows that on multiple occasions the Chief has appointed firefighters to the rescue technician position with less than the five stated certifications and then allowed them to obtain the remainder of the certifications after appointment.

Consequently, the focus of the dispute shifts to what, if any, past practice has evolved. The Union argues that the practice is open ended, and all firefighters are eligible for the rescue technician appointment regardless of whether they hold any of the certifications prior to appointment. The Town counters by arguing that the Chief has always required at least some of the certifications to be obtained prior to appointment and the remainder acquired after appointment.

The evidence presented establishes that Chief Cole has never appointed a firefighter to the rescue technician position who – like Pierce - had none of the certifications prior to appointment. As such, the Union is unable to meet its burden to prove that the Town violated an existing past practice of appointing firefighters to the rescue technician position who do not hold any of the listed qualifications. Because the Union did not establish that there was an existing past practice of hiring firefighters with zero certifications as a rescue technician, it failed to prove that the Town violated the collective bargaining agreement when it did not appoint firefighter Pierce as a rescue technician in March 2022.

AWARD

The grievance is procedurally arbitrable, but the Town did not violate the collective bargaining agreement when Firefighter Pierce was not appointed as a rescue technician in March 2022, and the grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
March 18, 2025