

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

FRANKLIN COUNTY SHERIFF'S
OFFICE

-and-

NATIONAL CORRECTIONAL EMPLOYEES
UNION

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ARB-16-5684

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

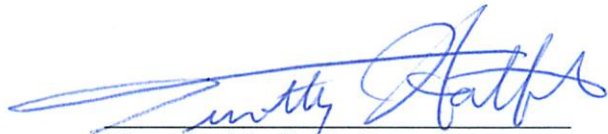
Talia K. Gee, Esq. - Representing Franklin County Sheriff's Office

John D. Connor, Esq. - Representing National Correctional Employees Union

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 Employer did not violate the parties' collective bargaining agreement when it failed to promote Gary Gagnon to the position of correctional caseworker in October of 2016, and the grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
June 22, 2018

INTRODUCTION

On December 27, 2016, National Correctional Employees Union (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 Springfield office on October 26, 2017.

The parties filed briefs on December 1, 2017.

THE ISSUE

Did the employer violate the parties' collective bargaining agreement when it failed to promote Gary Gagnon to the position of correctional caseworker in October of 2016?

If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

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

Article 5 – Management Rights

Managerial Rights/Productivity. Except as otherwise limited by an express provision of this Agreement, the Employer shall have the right to exercise complete control and discretion over its organization and technology, including, but not limited to, the determination of the standards of services to be provided and standards of productivity and performance of its employees; establish and/or revise personnel evaluation programs; the determination of the methods, means and personnel by which its operations are to be conducted; the determination of the content of job classifications; the appointment, promotion, assignment, direction and transfer of personnel, the suspension, demotion, discharge for just cause or any other appropriate action against its employees; the relief from duty

of its employees because of lack of work or for other legitimate reasons; the establishment of reasonable work rules; and the taking of all necessary actions "not in conflict with this contract" to carry out its mission in emergencies.

Article 8 – Promotions within the Bargaining Unit (In Part)

Section 1. A promotion shall mean advancement to a higher salary grade within the Franklin Jail and House of Correction. This Article is applicable to all promotions except those reasonably anticipated to be for less than six (6) months and its application in all cases is restricted to employees who possess the education, training and/or experience requirements established by the Employer for appointment to the relevant position.

All vacancies with respect to positions covered by the terms of this Agreement, excluding those reasonably anticipated to be for less than six (6) months, shall be posted but will not limit the Employer from hiring from outside the department or bargaining unit, provided the Employer must first consider the applications of all unit employees. In the event a person is hired from outside the department or the bargaining unit, such action shall be subject to the grievance procedure through Step 4 as provided by Article VI of this Agreement.

Section 2. The provisions of this Article shall only apply to all bargaining unit positions.

Section 3. Each of the following factors shall be considered by the appointing authority or his designee in selecting the best qualified persons for a promotion. The principal factor in making promotions shall be the efficiency and integrity of the Franklin Sheriff's Department.

- a) Seniority, as measured by length of continuous service as a permanent employee from the most recent date of hire within the Franklin Sheriff's Office;
- b) Seniority within rank;
- c) Ability to do the job as determined by, but not limited to:
 - i. Experience and competence (job performance) in the same or related work;
 - and
 - ii. Education and training related to the vacant position;

- d) Work history, education and training; and
- e) Promotional examination to include a Standards and Procedures Manual component and a situational component. The promotional examination will be administered every two (2) years. Only the results from the most recent examination will be used as one of the criteria of promotion.

In the event that a bargaining unit employee is aggrieved by the decision of the appointing authority in the selection of a candidate to a position defined in Section 2 above, the aggrieved employee may utilize the grievance procedure through Step 4 as provided in Article VI of the Agreement.

FACTS

The Franklin County Sheriff's Office (FCSO) and the Union are parties to a successor collective bargaining agreement that was in effect at all relevant times to this arbitration. In March and July 2016, the FCSO posted job vacancy notices for correctional caseworker positions. As part of the application process, the FCSO collected application materials and conducted interviews of candidates. Gary Gagnon (Gagnon) applied for the position in July, but withdrew his application prior to being interviewed. Linus Nkansah (Nkansah) applied for the position in July as well, but was not promoted at that time.

On October 6, 2017, the FCSO posted a job vacancy notice for a correctional caseworker. Both Gagnon and Nkansah submitted letters of interest. Nkansah, and other candidates who had been previously interviewed for one of the earlier vacancies, were offered the option of having the FCSO rely on their prior interview from March or July, or submitting to a new interview for this position. Nkansah chose to rely on his prior interview and decided against interviewing again. Gagnon, having withdrawn his prior application before being interviewed, sat for an interview with a panel, which included Superintendent

Special Sheriff Lori Streeter (Streeter), Assistant Superintendent Classification and Records Kris Shea, and Union member Corey Lovett.

The FCSO interview panel considered the factors articulated in Article 8, Section 3 for all candidates for the position. Gagnon shared all of his credentials and qualifications with the interview panel. Ultimately, the interview panel reached a conclusion on each candidate's qualifications. The interview panel recommended Nkansah to the Sheriff based on his superior interview, bilingual ability, prior paid work experience and greater knowledge of the Sheriff's philosophy. The Sheriff accepted the interview panel's recommendation and promoted Nkansah. Gagnon filed a grievance over the FCSO failure to promote him. The grievance was denied at all steps of the grievance procedure and resulted in the instant arbitration.

POSITIONS OF THE PARTIES

THE UNION

This grievance arises from the employer's failure to promote Gagnon to the position of correctional caseworker. Gagnon and Nkansah were correctional officers and the correctional caseworker position pays more, making it a promotional opportunity. Article 8 of the parties' collective bargaining agreement governs the promotional process.

Article 8, Section 3 states that each of the following factors shall be considered by the appointing authority or his designee in selecting the best qualified person for a promotion:

- a) Seniority, as measured by length of continuous service as a permanent employee from the most recent date of hire within the Franklin Sheriff's Office;
- b) Seniority within rank;
- c) Ability to do the job as determined by, but not limited to:
 - i. Experience and competence (job performance) in the same or related work;
 - and
 - ii. Education and training related to the vacant position;
- d) Work history, education and training; and
- e) Promotional examination to include a Standards and Procedures Manual component and a situational component. The promotional examination will be administered every two (2) years. Only the results from the most recent examination will be used as one of the criteria of promotion.

After considering all of these factors, it is clear that Gagnon was the best qualified person for the promotion to correctional caseworker.

Gagnon has the most seniority

There is no dispute that with respect to subsections (a) and (b) above, Gagnon has the most seniority. The only difference between subsections (a) and (b) is the reference to rank in (b). Because Gagnon and Nkansah have the same rank as correctional officers, (b) is largely irrelevant. The only argument that the Employer made was that Gagnon's length of continuous service and seniority in rank was shorter than Nkansah. Gagnon had a break in service in 2014 because he was terminated and reinstated in April of 2016. However, later, the Employer's witness, Streeter, admitted that Nkansah was also terminated and then rehired showing a break in service that also affected his seniority under the Employer's

theory. Further, Gagnon testified that the parties reached a settlement agreement which reinstated him, paid him all his back pay, and recognized that his seniority would be restored retroactively back to the date of termination. Finally, Streeter, under cross-examination, confirmed unequivocally that Gagnon had more seniority than Nkansah.

Gagnon has the most experience related to the vacant position

Gagnon has more experience related to the vacant position than Nkansah, as required by subsections (c) and (d). Subsection (c) considers the applicant's ability to do the job as measured by (i) experience and competence in the same or related work, and (ii) education and training related to the position. Similarly, subsection (d) requires the Employer to consider the applicant's work history, education and training. It is undisputed that Gagnon and Nkansah both have a Bachelor's Degree in Criminal Justice and thus, as Streeter testified, they are equal in education.

With respect to work experience and work history, Gagnon actually worked as a correctional caseworker for the Hampden County Sheriff's Department (HCSD) and performed the exact same duties that would be required of him as a correctional caseworker for the Employer. Specifically, he worked fulltime for HCSD as a correctional caseworker intern for approximately three to four months. Streeter confirmed that the Employer called the HCSD to complete a reference check and Gagnon received an exemplary recommendation. Further, Gagnon had an internship with the City of Springfield Police Department's Quality of Life Division and Training Program and the Citizens

Police Academy, which required him to communicate effectively with victims and other concerned members of the community.

It is undeniable that Gagnon's work experience is clearly more relevant to the correctional caseworker position than Nkansah's work experience. Although the employer asserted, unconvincingly, that Nkansah had more relevant work experience as a substance abuse counselor at Phoenix House, a private facility, it failed to acknowledge that Gagnon actually engaged in caseworker duties during his internship with HCSD. There simply cannot be any more relevant work experience than having performed the same type of work in the past. Also, Nkansah's resume fails to include his work experience at Phoenix House and there is no evidence with respect to the nature of the work, the length of time Nkansah worked as a substance abuse counselor and/or whether it was an internship or regular employment. Finally, Gagnon also attended correctional caseworker training provided by the FCSO specifically designed to qualify correctional officers for a position as a correctional caseworker. Nkansah never attended such a training.

Streeter initially testified that the Assistant Superintendent of Human Resources informed her that Gagnon left the training early on the last day and that factored into her decision not to promote Gagnon. However, on cross-examination, Streeter admitted that she did not ask Gagnon whether and/or why he left. Streeter then wavered and stated that she was not sure whether Gagnon's alleged departure was even a factor in choosing Nkansah over Gagnon. Gagnon testified that on the last day of the training, a test was given

and after he completed the test he was permitted to leave. Given the conflicting testimony, Streeter's testimony alleging Gagnon left the training early should be disregarded.

Conclusion

In addition to the reasons stated above as to why Gagnon was more qualified for the position of correctional caseworker, it should be noted that although Nkansah is bilingual, his second language is French and Streeter admitted that she could not think of a single inmate who spoke French or in what instance Nkansah's ability to speak French would be an asset. Additionally, the Employer failed to list Nkansah's ability to speak French as a reason he was chosen over Gagnon during the grievance process. Finally, the other reasons proffered for choosing Nkansah over Gagnon, are outside the scope of Article 8 and constitute the type of arbitrary and subjective reasoning Article 8 was intended to avoid. Based upon the aforementioned reasons and factors in Article 8, Gagnon should have been promoted to correctional caseworker in October, 2016, and therefore, the Employer violated the collective bargaining agreement in promoting Nkansah over Gagnon.

Wherefore, the Union requests that the arbitrator award the correctional caseworker position to Gagnon and award him all back pay and otherwise make him whole.

THE EMPLOYERThe FCSO selected who it determined to be the best candidate for the position

On October 6, 2017, the FCSO posted a vacancy notice for a correctional caseworker position. Gagnon applied for the position and was interviewed by an interview panel of which Streeter was a member. Previously, in March and July 2016, the FCSO had posted correctional caseworker vacancies. Applicants for the October position, who had previously interviewed in March or July, were given the option of re-interviewing or relying on their previous interview. Nkansah chose not to re-interview, while Gagnon, who had not applied in March or July, was interviewed by the panel.

As Streeter testified, when deciding on the successful candidate, the FCSO considered the factors articulated in Article 8, Section 3, which included seniority in time, seniority in rank, skills and ability to perform the job, prior experience, education, writing skills evaluated by the writing sample, and an understanding of the program and the Sheriff's philosophy as demonstrated during the interview. After considering approximately six candidates, the interview committee recommended to the Sheriff that Nkansah be appointed as a correctional caseworker.

Nkansah was chosen as the successful candidate based upon his responses to questions asked during the interview process, which demonstrated good communication skills and a clear understanding of the Sheriff's philosophy for the program. He also had prior experience working as a full-time drug counselor at the Phoenix House, a substance abuse treatment agency, which the

interview committee determined to be relevant and a positive attribute. Nkansah demonstrated great writing skills in his writing sample and had a good rapport with the inmates and employees. Nkansah is also bilingual, which was a preferred qualification according to the vacancy notice. After considering his qualifications, and the qualifications of the other applicants, including Gagnon, the FCSO determined that Nkansah was the best qualified candidate for the promotion.

The grievant fails to allege a violation of a term of the collective bargaining agreement

During the arbitration, the Union cited the factors articulated in Article 8, Section 3 as those to be used by the FCSO when evaluating the candidacy of an applicant and to evaluate what Gagnon felt were his superior qualifications when compared to Nkansah. The collective bargaining agreement, however, only requires that the factors be considered. The contract does not require that any of the articulated factors be given any particular weight or that one factor should be given greater weight when compared to another. Therefore, to determine whether the FCSO violated the collective bargaining agreement, the arbitrator must determine whether the FCSO considered those factors when evaluating the applicants, including Gagnon and Nkansah. According to Gagnon's own testimony, he shared all of his credentials and qualifications with the FCSO during the interview process, and as Streeter testified, the factors were considered when the interview committee recommended Nkansah as the most qualified candidate.

The collective bargaining factors were considered

One of the factors in Article 8, Section 3 is seniority, as measured by length of continuous service as a permanent employee from the most recent date of hire with the FCSO. Gagnon alleges that he was more qualified on this factor than Nkansah and he was considered to have more seniority than Nkansah. However, this does not support Gagnon's belief that he was more qualified as both he and Nkansah had more than the preferred requisite of five years' experience as referenced in the job posting. As such, the interview committee considered each applicant to be equal when considering this factor.

A second factor to be considered is seniority within rank. The candidates again were treated as equal as neither held rank within the job of correction officer.

The third factor to be considered is the candidate's ability to do the job as determined by, but not limited to: (1) experience or competence (job performance) in the same or related work; and (2) education and training related to the vacant position. Nkansah and Gagnon possessed bachelor's degrees in criminal justice. Nkansah, however, was enrolled in a master's degree program in a related field and had prior experience as a full-time drug counselor performing work similar to that of the correctional caseworker. Gagnon, on the other hand, testified that he previously worked as a correctional caseworker, but that was work he completed during an internship program for college credit where he assisted a correctional caseworker at the Hampden County Sheriff's

Office. The FCSO views this experience as one of internship experience and not akin to actually performing the job as he claimed.

Additionally, Nkansah is bilingual, demonstrated the crucial skills of a good rapport with inmates and employees, and clearly demonstrated an understanding of the program and the Sheriff's philosophy during his interview and in his writing samples. Nkansah interviewed well, showing enthusiasm for the position and the program. In contrast, Gagnon is not bilingual, did not interview well, did not demonstrate a strong interest in the position, and even stated that the Sheriff's philosophy was more about looking good for the community rather than providing treatment and care to the inmates. Gagnon's response clearly demonstrated a misunderstanding of the Sheriff's philosophy.

According to the collective bargaining agreement, the fourth factor to be considered was work history, education and training. Although Gagnon testified that he had completed correctional caseworker training and Nkansah had not, the FCSO decided that this factor did not make Gagnon's candidacy superior. Gagnon did not attend the entire training and did not successfully participate in team activities.

Gagnon's qualifications were considered and determined not to be superior

Gagnon testimony was that he "felt" that he was the most qualified candidate for the position. Gagnon's feeling of being the most qualified, or even if he was in fact the most qualified, is not the issue before the arbitrator. According to the hiring committee's assessment, Gagnon's qualifications were not superior to Nkansah's. Therefore, without having shown that the FCSO's

decision to not hire Gagnon, after considering the factors, was otherwise so unreasonable or arbitrary that it was tantamount to not considering the factors, the grievance must be denied.

Conclusion

The FCSO has the sole prerogative to appoint an employee to a position limited only by Article 8, Section 3's requirement to consider the articulated factors when selecting the best candidate. Therefore to prove a violation, the Union must show that the FCSO did not consider the promotional factors. The testimony of both the Union and the FCSO witnesses demonstrates that FCSO considered the factors and determined that Gagnon was not the best candidate for the position. The Union has failed to demonstrate that the FCSO's selection of Nkansah was unreasonable or arbitrary or that Gagnon's qualifications were superior to Nkansah's qualifications. Therefore, the Union has failed to prove a violation of the collective bargaining agreement and the grievance should be denied.

OPINION

The issue before me is: Did the employer violate the parties' collective bargaining agreement when it failed to promote Gary Gagnon to the position of correctional caseworker in October of 2016? If so, what shall be the remedy? For all the reasons stated below, I find that the employer did not violate the collective bargaining agreement when it failed to promote Gary Gagnon to the position of correctional caseworker in October 2016 and the grievance is denied.

Article 8, Section 3 of the parties' collective bargaining agreement outlines the specific factors that the employer must consider when promoting a bargaining unit member into a new higher position. The Employer has demonstrated that it considered all the factors as required by the collective bargaining agreement, and I find that the conclusions drawn by the Employer, as to the relative qualifications of the candidates, are not so unreasonable as to warrant intervention to overturn the Sheriff's decision to appoint Nkansah.

The FCSO appointed an interview panel for this promotion and Streeter testified as to the factors considered for all candidates including Nkansah and Gagnon. Based on the answers provided, the panel made a conclusion on each candidates' qualifications. Ultimately in making the recommendation to hire Nkansah, the panel decided he would be a better fit for the position. The panel's decision to rely on Nkansah's superior interview, bilingual ability, and greater knowledge of the Sheriff's philosophy, in addition to the stated criteria to be considered in Article 8, Section 3 does not violate the collective bargaining agreement.

Gagnon testified at the hearing that during the promotional interview, he was able to outline all of his qualifications for the position. Also, the Union has not shown that the Employer failed to consider any of the information that Gagnon supplied during the interview process. Gagnon maintains that the conclusions drawn by both the interview panel and subsequently the Sheriff, comparing his work as an intern to Nkansah's work at the Phoenix House were flawed. Gagnon's beliefs, about which work experience is more beneficial to the

position of correctional caseworker, are not controlling. Streeter testified that the interview panel considered Nkansah's actual paid position to be superior to Gagnon's work as an intern. This decision is not unreasonable and is the type of decision that the Employer is entitled to make when deciding promotional opportunities. Moreover, the facts before me show that the Employer properly considered all of the promotional criteria listed in the collective bargaining agreement when it selected Nkansah. As such, the Union has not proven that the Employer violated the parties' collective bargaining agreement when it failed to promote Gary Gagnon to the position of correctional caseworker in October of 2016, and the grievance is denied.

AWARD

The Employer did not violate the parties' collective bargaining agreement when it failed to promote Gary Gagnon to the position of correctional caseworker in October of 2016, and the grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
June 22, 2018