Kelman #2

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between

Employer

-and-

Union

Gr: Employee 1 and Employee 2

Before Arbitrator Maurice Kelman

OPINION AND AWARD OF THE ARBITRATOR

The case was heard at the Employer office in City A, Michigan, on February 27, 2004. Post-hearing briefs were exchanged on March 30.

Background

The grievances challenge the promotion process by which the Employer filled a fire captain vacancy. Employee 2 and Employee 1 are fire fighters (engineers) who were unsuccessful candidates for the position. Their identically worded grievances complain that "the delay of the promotion process and bias[ed] manner in which the promotion process was conducted discriminated against the senior employees."

In the Employer fire service during the time period encompassed by the grievances, the position of captain was the rank immediately above fire engineer. Each of the three rotating

twenty-four hour shifts was commanded by a shift captain. On March 17, 2000, Captain 1, one of the captains, was elevated to the non-unit position of Assistant Chief. Taking over from Captain 1 as acting captain was grievant Employee 1, the most senior member of the shift who was willing to assume that responsibility.

The Chief at the time, Chief 1, took no steps to fill the vacated captaincy on a permanent basis before his own departure seven months later. On October 2, 2000, Captain 1 was named as Chief 1's successor. It was not until February 8, 2002, that the captain promotional vacancy was officially posted, along with five new jobs -- three lieutenant positions, an EMS coordinator, and a fire inspector. The grievants and two other fire fighters, Employee 3 and Employee 4, applied and tested for the captain opening. The same four plus fire fighters Employee 5 and Employee 6 concurrently were candidates for the three new lieutenant positions.

The written examination for captain was administered on August 28, 2002, although Mr. Employee 2, who was then on vacation, was permitted to take the test on September 1. The oral exams were conducted seriatim on February 26, 2003, before a three member panel consisting of Chief Captain 1 and fire chiefs from Commerce Employer and Chief 2.

The written test was worth a possible 93 points, the oral exam 50 points.

The scores, released on March 4, 2003, were as follows;

Candidate	Written	Oral	Total points
Employee 4	68	42	110
Employee 3	59	35	94
Employee 2	42	26	68
Employee 1	50	17	67

The top finisher, Employee 4, was thereupon appointed captain and the instant Employee 2/Employee 1 grievances followed almost immediately. (Employee 3, the runner-up, is not a party to the grievance.)[1]

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1. The Chief employed a similar procedure with respect to the three posted lieutenant positions. The order of finish was;

Employee 4	136 points
Employee 3	132
Employee 6	104
Employee 5	101
Employee 1	100
Employee 2	98

Employee 4's promotion to captain leaves the next three candidates as the successful job bidders if and when the Department funds the positions. Though Employee 1 and Employee 2 lost out, they have not challenged the lieutenant promotional process.

Contract language

Article 18 of the 1997-2002 agreement deals with promotions. The relevant portions are these;

A. Promotions or new jobs within the Fire Department shall be made, or filled, on the basis of experience, qualifications for the position desired, the required training for said position as set forth below, levels of past training, ability to perform and desire and willingness to do the job. Employees shall be expected to fulfill all the requirements of this Article in order to be promoted or fill new jobs.

1. Employees desiring promotion from a non-ranking position should have completed at least five (5) years service with the Employer Fire Department. Said employees shall also have completed all levels of fire fighting training outlined by the Michigan Fire Fighters Training Council. The applicant shall also have a certificate of training in an approved command training course, which at a minimum shall mean that the applicant shall have obtained a Fire Officer I certificate to qualify for a Lieutenant position, a Fire Officer II certificate for a Captain position, and a Fire Officer III certificate and certified Inspector for Fire Marshal.

* * *

At no time will a vacancy be filled without the successful passing of an approved testing procedure established by the Chief, which shall include the following;

a. Written exam.
b. Oral exam (oral exam conducted by a Board chosen by the Chief).
c. Physical (where applicable).
d. Qualifications (where applicable).
e. Seniority (where applicable).

Arguments

In the Union's view, Article 18 and "established past practice" were violated by the twenty nine months it took to fill the vacancy. The Union also accuses Captain 1 of deliberately refraining from posting the captain position for sixteen months in order to enable Employee 4 and Employee 3 to qualify by obtaining their Special Qualification certificates. Had the vacancy been posted within six months, the grievants would have been the only eligible applicants. Indeed, the Chief is accused of a personal animus against Employee 2, if not also Employee 1, and a bias in favor of Employee 4. For that reason the Union considers it improper as well as unprecedented for the Chief to have served as one of the oral board examiners. In addition, the Union complains that the Chief did not factor years of service into the scoring system and thereby denied the grievants, especially Employee 1, the advantage of considerably higher seniority than Employee 4.

The Employer categorically denies each and every allegation of impropriety and contends in any event that the grievance should be rejected as untimely.

Timeliness issue

Article 16(E) provides that a grievance must be initiated "within ten (10) calendar days of the event giving rise to it, or [the grievant's] having knowledge of such event." Since the twin grievances are dated March 7, 2003, and were received by the Chief on March 10, the Employer argues that the only "event giving rise" to the grievance of which Employee 1 and Employee 2 can complain are their scores on the promotion tests as announced on March 4. This would include the non-awarding of seniority points and the consensus approach taken by the oral board to scoring candidate interviews. But the other "events" the Union is attempting to cite as violations of the CBA -- the delayed posting of the job vacancy, allowing the

candidacies of Employee 3 and Employee 4, the further delay in completing, the testing process, the Chief's self-appointment to the oral examination panel -- all occurred and were known to the grievants long before the window of time for a March 2003 grievance.

The difficulty with the Employer's defense of untimeliness is that the defense itself is untimely. The Chief's Step 1 response joined issue on the merits but did not also assert a disregard of the time limits for grieving. The same is true of Supervisor 1's Step 2 answer. Step 3 is review by an "Appeals Board" composed of two officials named by the Employer Supervisor who had no prior involvement with the processing of the grievance, and two Union designees. Three votes are required for the Appeals Board to sustain a grievance. Because the Employee 1/Employee 2 appeal did not muster the necessary votes, the denial of the grievances was upheld without a written explanation.

The documentary record thus fails to disclose any timeliness objection by the Employer prior to arbitration. While the Employer's brief asserts as a fact that the objection was voiced by Employer representatives at Step 3, testimony to that effect was not presented to the arbitrator. An employer who mounts a timeliness defense has the burden of demonstrating that the issue was raised in the course of the grievance process. That proof is lacking. Therefore, so far as the record before me indicates, the question of timeliness is being introduced for the first time at arbitration. As other arbitrators have ruled, time limits for grievances are considered waived by failure seasonably and clearly to assert and document the objection. See Camp Lejeune Marine Corps Base, 90 LA 1126, 1128 (Nigro 1988). The present grievances, accordingly, are arbitrable on the issues tendered by the Union.

Delay in filling captain vacancy

Nothing in Article 18 requires that a vacancy in a "ranking position" be filled at all, much less that it be filled within a prescribed period of time. Unlike other fire fighter agreements I have encountered, the Employer contract does not impose any mandatory staffing levels. Article 21, captioned "Filling of Vacancies", deals with the replacement of disabled, suspended, or otherwise "temporarily unavailable" employees, and leaves to management lone a determination "that the staffing level has been so reduced so as to detrimentally affect the efficient and effective operations of the department." Article 21, though, does require the employer to consider replacement and discuss the matter with the union when the incumbent's incapacity extends beyond six months. Although this article does not in terms address the case of clear-cut job vacancies caused by resignation, retirement, dismissal, or promotion, the Union reasons by analogy that if the employer decides to fill a vacated position -- and it was never suggested that the Employer did not intend to fill the captain vacancy -- the department should not take more than six months to begin the process.

But at most the Article 21 analogy would call for the employer to discuss and explain its intentions regarding a permanent replacement for the departed captain, and in this case, despite some grumbling in the ranks, the Union did not seek a meeting with management or attempt to force some action by filing a grievance when the vacancy persisted beyond six months.

The Union's primary argument concerning the delay is founded on an alleged past practice of reasonably expeditious filling of promotional vacancies. It cites promotions to fire marshal in 1985 (61 days) and 1998 (35 days) and captain in 1985 (56 days) and 1989 (45 days), and contrasts that history to the 1,093 days that elapsed between the Captain 1 captain vacancy in March 2000 and the ultimate promotion of Employee 4 in March 2003.

This claim of past practice, I fear, tries to make bricks with too little straw.

Arbitrators recognize, of course, that a vague or mute contract provision can acquire specificity through the parties' behavior. But as Harry Shulman observed, not all customary conduct on the employer's part is indicative of mutual agreement -- which is the essence of a binding past practice. Sometimes an historical pattern represents only "choices by Management in the exercise of managerial discretion. . . [without] thought of obligation or commitment for the future." In Shulman's famous phrase, "such practices are merely present ways, not prescribed ways, of doing things." Ford Motor Co., 19 LA 237, 242 (1952).

Moreover, the "practice" invoked here lacks the elements of clarity, consistency, and frequency. Given the small size of the Employer fire department, promotion has been an uncommon occurrence; the last previous promotion was fourteen years ago. The Union is seeking to generalize a practice from only a smattering of instances. Also, as the Employer points out, the Union's analysis is selective and overlooks one of its own exhibits documenting a fire marshal vacancy that lasted six years (1979-1985) before it was filled by promotion (Ex. U7). Nor has it been shown that the relevant CBA provisions in effect at the time of the earlier promotions were identical to the provisions governing the present case -- an essential predicate for the formation of a contractually enforceable practice. For these reasons I see nothing that dictates a timetable for making promotions.

The Union also suggests that the Chief delayed action on the captain vacancy not for legitimate managerial reasons but in order to allow time for other fire fighters, in particular Employee 4, to acquire the F.O.II certification necessary to compete against Employee 1 and Employee 2 for the position. It does not strike me, however, as self-evidently improper for management to seek an expanded pool of eligibles before filling a command vacancy. There is, true enough, no required minimum number of candidates. Article 18 only directs that the person

selected be a qualified bargaining unit member, and "in the event there are no qualified applicants for the ranking position within the bargaining unit, the Employer may hire from outside the bargaining unit." In point of fact in 2002 there was only one applicant for the new EMS coordinator and one for the fire inspector openings, and both were appointed without formal examination. But that is not to say that Chief Captain 1 could not have chosen to repost the position or extend the application deadline had he seen fit to do so.

In any event, nothing in the Chief's actions gives rise to an inference of bias against the grievants. In the first place, Chief 1 was in charge when the captain vacancy occurred and he took no steps to fill the position on a permanent basis during the seven months he remained in office; yet the Union does not accuse him of any animus or bias against either grievant. Secondly, if Chief Captain 1's strategy was to postpone acting on the vacancy so as to let Employee 4 join the competition, he could have made the posting as early as May 2001, when Employee 4 became Special Qualification certified, but in fact he waited another eight months. His explanation, which I deem credible, was that in 2000 and 2001 he was preoccupied with the millage election to create an advanced life support service in the Department and then with the daunting task of Planning and implementing the voter-approved ALS, which nearly doubled the size of the department. Since the shift captain job was already being covered on an acting basis by grievant Employee 1, Chief Captain 1 felt that organizing a formal promotion process was a lower priority than devoting himself single-mindedly to the demands of the ALS project.[2] Whether one agrees or disagrees with Captain 1's priorities, he was making honest managerial judgments.

2. Had he been dissatisfied with Employee 1's performance as acting captain or otherwise ill disposed toward him, Captain 1 surely would not have continued the status quo.

Seniority points

Promotion to captain was determined entirely by the applicants' written and oral test scores. The Union argues that seniority points should also have been awarded. Grievant Employee 1 was the most senior of the four contenders with a hiring date of 8/29/85, followed by Employee 3 (4/24/89), Employee 2 (5/5/89), and Employee 4 (9/30/94). Reliance is placed on the statement in Article 18(5) that the "testing procedure established by the Chief. . . shall include. . . (e) Seniority (where applicable)." The qualifier "where applicable" also appears after two other factors, "Physical" and "Qualifications."

Neither the latter terms nor the phrase "where applicable" are defined in the contract. Chief Captain 1 did not require a physical exam or a fitness test, and he did not consider "qualifications" other than the minimum contractual prerequisites for all applicants, viz., five years service in the department as a trained fire fighter and a Special Qualification certificate. Candidate Employee 4, for example, received no points or extra credit for having a college degree, which the other applicants lacked. The Chief simply deemed "Physical" and "Qualifications" not to be "applicable." Similarly, he discounted seniority as an element in the promotion calculus except as a tie-breaker in the event the top finishers had identical composite test scores.

The Union rejects the Chief's belief that the Article 18 expression "where applicable" means insofar as the employer regards the factor as germane, but it offers no alternative construction of the phrase and does not make the logically equivalent argument that "physical" condition and "qualifications" likewise demand the awarding of points. What the Union invokes is past practice, noting that the 1989 candidates for promotion to captain had six to fifteen seniority points added to their written and oral test scores (Ex. XXX) and the same was true of another

promotion, probably the 1985 captain promotion (Ex. XXX, undated score sheet for Michael Fahrner). The evidence did not include the precise contract language in effect in those years, but even if it was identical to Article 18 of the 1997-2002 CBA, the previous promotional credits for years of service might simply have reflected management's desire or willingness at the time to credit seniority, rather than a sense that the contract required it to do that.

Not only does the Union demand that seniority be counted but it contends that since Article 18 does not specify the relative importance of the written test, the oral exam, and the seniority factor, all three components command equal weight. Here the earlier promotion cases confute the Union. When seniority was credited before, it was in the form of one point for each year of service. That was a considerably smaller portion of the total score than the test and interview points. If the four captaincy candidates in 2003 had been granted seniority points on the same basis, the rank order of their final scores would have been exactly the same.[3]

As for the weight assigned to the written test vis-à-vis the oral, there has been no consistency in the past. For instance, the promotion involving Michael Fahrner (Ex. XXX) gave the oral interview a maximum of 80 points and the written test only 50 points. A different weighting seems to characterize the 1989 captain promotion.[4]

The 2003 exam for captain gave 65% to the written test (93 points possible) and 35% to the oral (maximum of 50 points), yet the concurrently conducted lieutenant exam counted the written portion (144 possible points) for three quarters and the oral (50 points) for one quarter. These, then, were matters of ad hoc determination by the Chief, settled neither by the labor agreement nor by discernible past practice.

3. Under the 2003-2005 CBA, seniority is explicitly awarded one point per year to a maximum of ten percent of total score.

4. Ex. XXX lists the candidates' written and oral scores but does not show the maximum possible points for each component. The interview grades (38.75 to 46.75) exceeded the written test scores (34 to 38), suggesting that the oral component was at least co-equal in weight.

Written test

Chief Captain 1 contracted the creation of a written test and oral examination questions to a private vendor, Some Vendor, Inc., a company that services a national clientele. The Union does not challenge the validity of the written test or the manner it was administered. Chief Captain 1 knew in a general way the subjects to be tested and he provided the Some Vendor-recommended preparatory materials for the applicants to study before sitting for the test. He did not himself have access to the test questions and he simply collected and mailed the candidates' answer sheets back to Some Vendor for scantron scoring. There is no evidence -- none -that the Chief tampered with anyone's answer sheets (as grievant Employee 2 seemed to believe) or that he would even have known which answers to change.

Oral examination

The Union does question the Chief's serving on the panel that administered the oral examination- Article 18 speaks of "oral exam conducted by a Board chosen by the Chief." It is argued that "chosen by the Chief" implies that the Chief will name only third persons, not himself. But that is by no means a necessary inference. If, for example, a court rule for a multi-judge circuit court provided that the chief judge shall assign cases for trial, he would not be precluded from assigning cases to himself.

The Union also maintains that it was "a clear departure from past practice" for the Chief to join an oral examination board, but this assertion was not matched by testimony or documents detailing the composition of other panels over the years. As it happened, Chief Captain 1 also appointed himself to the 2003 oral board for the lieutenant positions without objection or grievance by applicants Employee 2 and Employee 1 or the Union.

Moreover, Chief 2 of Commerce Employer, one of the grievants' panelists, testified that he had performed that role for fifteen or twenty other communities and that in about half of them the local Chief was a member of the promotion panel.

It is no ground for objection that in a small department the Chief knows everyone well and is bound to have formed opinions about individual employees. While the hiring/promotion process must be fair and nondiscriminatory, the ultimate decisions are managerial, not judicial, in nature, and the fastidious standards for judicial recusal are quite out of place. The Union itself recognizes this difference, for in the 2003-2005 agreement it signed on to a number of revisions in the promotion article, one of which is that the oral examination board "shall include the Employer Fire Chief and two officers from surrounding departments."

Grievants complain that in this instance the Chief improperly influenced and manipulated his co-panelists. The grievants considered it highly suspicious that the grading sheets filled out by the three members of the oral board gave identical numerical scores, including some fractional numbers, for each of the five categories. However, what the grievants perceived as sinister collusion was explained convincingly in the testimony of Chief Captain 1 and Chief 2 as a consensus grading methodology the panel adopted for all the interviews. They stated that the panelists formed their individual impressions of the candidates' performance, exchanged their opinions and came up with rating numbers they could all agree with, and only then entered those numbers on their scoring sheets. An alternative method would have been for each panelist separately to assign marks which could then be averaged to produce a final composite score. This may or may not be preferable or more faithful to the less-than-clear guidelines contained in the Some Vendor manual (Ex. E6),[5] but either procedure is consistent with the fair oral exam required by Article 18.

5. Confusingly, Some Vendor calls for both "independent" ratings and "consensus" ratings.

"Over my dead body"

The most troubling indication of bias on Chief Captain 1's part was the testimony of Employee 3 that in a private, one-on-one conversation with the Chief following the February 2002 posting of the captain position, Captain 1 remarked, "Employee 2 will be a captain over my dead body." The Chief says he does not remember making the comment, but he did not categorically deny it. The question is whether, if Chief Captain 1 entertained a negative opinion of Employee 2 and scorned his ambition to become captain, he could legitimately take part in the testing process.

Given the totality of the Chief's actions, I believe the answer is yes. The issue is not whether the Chief automatically disqualified himself by expressing a strong a priori opinion about Employee 2 (for, as noted, personnel decisions are not governed by canons of judicial ethics), but whether he showed himself incapable of conducting the selection in a neutral manner. And the record demonstrates that the Chief in fact acted with utmost fairness. Rather than forcing Employee 2 to reschedule or interrupt a planned vacation, the Chief accommodated him by allowing Employee 2 to take the written test several days after the other applicants. In addition, despite his restriction against removing the study material from the fire stations, Captain 1 permitted Employee 2 to take the books home. This is not the behavior of a determined antagonist. On the oral examination, which allows for subjective assessment, the Chief took pains to find co-panelists who were not acquainted with any of the applicants. And whereas Employee 2 placed last on the wholly objective written test, his 26 points on the oral interview were nine more than Employee 1's score.[6]

Even if he had bettered Employee 4's 42 points with a perfect oral score of 50, Employee 2's combined written/oral grades still would have trailed Employee 4 and Employee 3.

In summary, the process that produced Employee 4's promotion to shift captain

was conducted in good faith and in compliance with the CBA.

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6. Employee 2 also outperformed Employee 1 by 5 points on the lieutenant oral exam over which Chief Captain 1 also presided.

A W A R D

The grievances are denied.

MAURICE KELMAN, Arbitrator

Dated: April 21, 2004