

**McCormick #5**

**VOLUNTARY LABOR ARBITRATION**

In the Matter of the Arbitration Between:

EMPLOYER

-AND-

UNION

Gr: Acting Assignment

**OPINION AND AWARD**

A hearing in the above-captioned matter was held before the undersigned Arbitrator, Robert A. McCormick, on Tuesday, May 22, 1995 in City A, Michigan. At the hearing, the Parties examined witnesses and introduced documentary evidence in support of their respective positions. Thereafter, the Parties, through their Representatives, submitted written briefs to the Arbitrator. This Opinion and Award is based upon careful consideration of this evidence and argument.

**ISSUE:**

Did the Employer violate the collective bargaining contract by placing Employee 1 in a long term acting assignment as Deputy Fire Chief?

**RELEVANT CONTRACT PROVISIONS:**

**ARTICLE 12. PROMOTION AND VOLUNTARY DEMOTIONS**

**SECTION 3. ANNUAL EXAMINATIONS**

There will be annual promotional examinations for the ranks of Fire \ Lieutenant, Fire Captain, and Fire Equipment Operator. The remaining ranks will be tested on an as-

needed basis.

## ARTICLE 45. ACTING ASSIGNMENT

### SECTION 1. LONG TERM

- A. Acting assignment shall mean an assignment for a limited time to a position class as determined by the needs of the service; -such assignment not involving promotion, demotion or change of status, notwithstanding any provision or rule to the contrary. Acting assignments, when utilized to fill a permanent vacancy, shall be made from one of the three most senior persons (department seniority) on the existing eligible lists or most recent eligible lists, for the position within fifteen (15) days of the onset of the vacancy. Acting assignment with the potential of thirty (3) days or more shall be filled from one of the three most senior persons on the existing eligible lists or most recent eligible lists for the position. This shall not include vacation periods. This provision shall be implemented within fifteen (15) days of the position opening.

### **BACKGROUND AND FACTS:**

The facts of this case are not disputed. By memorandum dated April 28, 1994,<sup>1</sup> Fire Chief Person 1 informed Person 2, Human Resources Director for the Employer (herein, "the City") that Deputy Fire Chief Person 3 planned to retire in July of that year. Chief Person 1's memo stated that, as a consequence, examinations for Deputy Fire Chief and Battalion Fire Chief positions would need to be conducted. Testing for the latter position was required because any promotion to the Deputy Fire Chief position would necessarily come from the Battalion Fire Chief rank, thereby creating a vacancy at the Battalion Fire Chief position.

In addition, Chief Person 1 informed the Department's six Battalion Chiefs in a memorandum dated June 22, 1994, that the newly approved budget had restored a second Deputy Fire Chief position that had been eliminated several years earlier. In this memorandum Chief Person 1 also noted that there was no existing or previous eligibility list for this position and he solicited applications from all Battalion Chiefs interested in a Long Term Acting Assignment

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<sup>1</sup>Joint Exhibit 14

(LTAA) to the position of Deputy Fire Chief.

Four Battalion Chiefs submitted their names for the Long Term Acting Assignment: Person 4<sup>2</sup>, Employee 1<sup>3</sup>, Person 5<sup>4</sup> and Person 6<sup>5</sup>. On July 5, 1994 Chief Person 1 announced the appointment of Battalion Chief Employee 1 to the position.<sup>6</sup> Chief Employee 1 held the least seniority of any of the four candidates.<sup>7</sup>

On July 13, 1994, the Union grieved the appointment of Chief Employee 1 to the Long Term Acting Assignment<sup>8</sup>. In its grievance, the Union argued that the City was obligated to select one of the three most senior Battalion Chiefs to fill the appointment.

Person 7, Personnel Analyst for the City, testified that her duties include compiling eligibility lists for vacancies in all City departments including the Fire Department. Ms. Person 7 described the process for creating the eligibility list in this case: first, she said, a notice was posted from May 12 to May 31, 1994. Five persons applied, one of whom was not a Battalion Chief and consequently, was ineligible for the position. Another applicant withdrew from consideration.

Ms. Person 7 initially announced a test date of August 18, 1994, but that date was later postponed to September 27 upon the request of one or more of the candidates who sought additional time to prepare. Ms. Person 7 also distributed a reading list to assist the candidates in their preparation for the examination.

Only one candidate passed the test. After the test's administration, however, a period of time ensued within which candidates could protest the questions asked on the test. In this case,

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<sup>2</sup> Joint exhibit 5.  
<sup>3</sup> Joint exhibit 7.  
<sup>4</sup> Joint exhibit 6.  
<sup>5</sup> Joint exhibit 8.  
<sup>6</sup> Joint exhibit 4.  
<sup>7</sup> Joint exhibit 9.  
<sup>8</sup> Joint exhibit 2.

some thirty of the one hundred seventy-five questions asked on the test were challenged. These questions, in turn, were submitted to an independent testing entity, the International Personnel Management Association (IPMA), to determine their validity. On January 9, 1995 - approximately two months after the questions were submitted - the IPMA responded to the inquiry, concluding that only one of the thirty challenged questions might be invalid and that elimination of this question would not alter the results of the examination.

These results were then forwarded to the Subject Matter Expert Committee - a contractually created committee made up of representatives of the Union and the City. This committee is the final arbiter of the validity of test questions. The Subject Matter Expert Committee determined that four questions on the examination had dual answers and decided to drop two of the questions. These findings resulted in two candidates, Employee 1 and Person 6, passing the test.

On February 3, 1995 the list of two candidates<sup>9</sup> was forwarded to Chief Person 1 who signed it on February 6 and on February 12, 1995, the two candidates were appointed to the permanent promotions. On April 11, 1995, the Civil Service Commission certified the list.

Ms. Person 7 stated that it normally takes a minimum of three months to establish an eligibility list for positions at this level. In this case, she said, it took longer primarily because the IPMA's evaluation was much more protracted than anticipated. In addition, Ms. Person 7 recalled, her office was very busy recruiting police officers and processing some one thousand applications for those positions. There was, she said, no attempt to delay the preparation of the eligibility list for this position and, indeed, she and others in the Department sought to hasten this process, albeit without success. Ms. Person 7 also recalled Chief Person 1 indicating his desire to

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<sup>9</sup> Joint exhibit 15.

have the eligibility lists completed as soon as possible.

The Parties also submitted three earlier arbitration awards which addressed related questions as to the City's rights and responsibilities in making Long Term Acting Assignments. In the first matter, heard by Arbitrator Theodore St. Antoine <sup>10</sup>, Chief Person 1 had solicited volunteers for a Long Term Acting Assignment to the position of Deputy Chief of Administration when one name remained on the most recent eligibility list. Chief Person 1 then appointed Fire Training Supervisor Employee 1 to the Long Term Acting Assignment. He also appointed Fire fighter and Acting Lt. Person 8 to a Long Term Acting Assignment to the position of Assistant Training Supervisor. In that case, the Union contended that the contract language and established past practice of the Parties dictated that the Long Term Acting Assignment go to either a person on the most recent eligibility list or to the most senior person in the "eligible rank".

Arbitrator St. Antoine concluded that the City violated Article 45, Section 1 of the contract by failing to make the LTAA from an eligible list when one name, instead of three, appeared on that list. He also concluded, however, that neither the contract nor past practice required the City to make such an assignment on the basis of seniority in an eligible rank. In the second decision, <sup>11</sup> the undersigned Arbitrator addressed the question whether the City breached the contract by soliciting volunteers for a Long Term Acting Assignment to the soon-to-be vacated position of Fire Captain-Building Maintenance. There, the Union argued that the City was obligated to make such an assignment from a promotional eligibility list created for the separate, but related, position of Fire Maintenance Supervisor. This Arbitrator, however, determined that no promotion eligibility list existed from which to make the Long Term Acting

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<sup>10</sup> Joint exhibit 10.

<sup>11</sup> Joint exhibit 11.

Assignment to the position of Fire Captain-Building Maintenance and that the position of Fire Maintenance Supervisor was sufficiently different that the City was not required to return to that eligibility lists to make the LTAA. Consequently, the Arbitrator decided that the City was within its managerial prerogatives in soliciting volunteers for the LTAA assignment in question.

In the third matter, Arbitrator Elaine Frost addressed the question whether the City breached Article 45, Section 1 of the contract by failing to make a Long Term Acting Assignment to a Fire Investigator vacancy in March, 1993 and leaving the position unfilled for approximately one year. There, Arbitrator Frost determined that the language of Article 45, together with the Parties' practices and bargaining history, obligated the City to make the acting assignment to the position in question when the vacancy arose.

Other facts that bear upon the resolution of this case appear later in this Opinion and Award.

## **DISCUSSION:**

The issue in this case addresses, for the fourth time in the last five years, the City's rights and obligations in filling Long Term Acting Assignments. Here, the specific question is whether the City breached the contract by soliciting volunteers and appointing one of those volunteers, Employee 1, to a Long Term Acting Assignment as Deputy Fire Chief.

The touchstone for resolving this question is, in the first instance, the language of the Parties' contract itself. Article 45, Section 1 of the contract provides in relevant part as follows:

Acting assignments, when utilized to fill a permanent vacancy, shall be made from one of the three most senior persons (department seniority) on the existing eligible lists or most recent eligible lists, for the position within fifteen (15) days of the onset of the vacancy.

While this language plainly requires that the City make a LTAA from "one of the three most senior persons on the existing eligible lists or most recent eligible lists..." it does not

similarly describe the City's obligations when no such lists exist.

The earlier arbitration opinions, however, shed considerable light on the question. Most analogous to the issue in this matter is this Arbitrator's 1993 Opinion and Award in grievance numbers 14-92 and 16-92.<sup>12</sup> That Opinion concluded the City did not breach the contract when it solicited volunteers and made a Long Term Acting Assignment when no current or prior promotion eligibility list for the position of Fire Captain-Building Maintenance existed. The determination made in that case, and its underlying reasoning, would appear to dictate the same result here, namely that "the City was within its rights and did not breach the contract by proceeding as it did to fill the assignment."<sup>13</sup>

The Union, for its part, looks especially to Arbitrator St. Antoine's opinion which it interprets as prohibiting the City from making a LTAA in the absence of an appropriate eligibility list.

Arbitrator St. Antoine's Opinion and Award, however, did not directly address this question. It held primarily that the City breached Article 45, Section 1 by failing to make a LTAA appointment from an existing eligibility list, despite the fact that one name, not three, remained on it. While Arbitrator St. Antoine did conclude that the City violated Article 45, Section 1 of the contract by appointing Fire fighter Person 8 to the LTAA position of Assistant Fire Training Supervisor when no eligible list for the position in question existed, that question was not squarely before the arbitrator because the City had conceded that its actions in appointing Fire fighter Person 8 had violated the contract.

In this case the Union acknowledges, as it must, that the contract does not require the City to maintain an eligibility list for the position of Deputy Chief. Article 12, Section 3 of the contract specifically addresses the City's obligation to maintain promotion eligibility lists. It states, in

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<sup>12</sup> Joint exhibit 11.

<sup>13</sup> Joint exhibit 11 at page 10.

relevant part:

There will be annual promotional examinations for the ranks of Fire Lieutenant, Fire Captain, and Fire Equipment Operator. The remaining ranks will be tested on an as-needed basis.

This language unambiguously permits the City to test for the rank of Deputy Chief, being one of the "remaining ranks", on an as-needed basis. While Battalion Chief Person 5 contended that the City should always have an eligibility list in place for the position of Deputy Chief, he conceded that the City and the Union have negotiated this issue and that the City can create an eligible list for the Deputy Chief position on an as-needed basis. This evidence persuades the Arbitrator that the City did not act improperly by failing to have an existing eligibility list on hand when the Deputy Chief vacancy arose.

In this case, Chief Person 1 began the process of testing and creating an eligibility list for the vacant position of Deputy Chief when he learned of Deputy Chief Person 3's impending retirement. The City likewise began the same process in June, 1994 after learning of the budget changes permitting the reinstatement of a second Deputy Chief position. Ms. Person 7 persuasively testified that it takes a minimum of three months to create an eligible list for the position in question. In this instance, delays in the process were created by factors not of the City's making, including the candidates' request for additional time to prepare for the examination, challenges to the legitimacy of questions asked on the examination and the lengthy period of time it took for the IPMA to evaluate those questions. In all of this, there is no evidence to suggest that Chief Person 1 sought to delay the process. Indeed, Ms. Person 7 persuasively testified that Chief Person 1 sought the results of the examination as soon as possible.

The Union's position in this matter would require that the City refrain from filling the position of Deputy Chief - the second highest ranking position in the Department - for the entire

period of time it takes to examine candidates and create an eligibility list. In this case, that period lasted nearly one year. Such an outcome would appear to be contrary to Arbitrator Frost's opinion. In addition, in the judgment of the Arbitrator, such a substantial limitation-on the City's prerogatives in operating the Department would have to be plainly evident in either the Parties' contract or their established practices. Finding neither in this case, the grievance must be denied.

**AWARD:**

For the foregoing reasons, the grievance is denied.

Robert A. McCormick

Arbitrator

August 15, 1995