Antoine #2

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

EMPLOYER

-and-

UNION

OPINION AND AWARD

BEFORE:

Theodore J. St. Antoine, Arbitrator

FACTS

The present arbitration is unusual in that the respondent, the Employer, concedes it failed to comply with the collective bargaining agreement between the Employer and Union in taking the actions which are the subject of the pending grievances. The basic issues between the parties are what remedies should be provided in this situation.

In late 1989 the members of the Employer became aware that Deputy Chief (for Administration) Person 1 would retire in January 1990. Previously, all acting assignments to the position of Deputy Chief had apparently come from the next lower rank, Battalion Chief.

At this time, only one name, that of Battalion Chief Person 2, remained on the most recent eligible list for Deputy Chief. (This list had resulted from a Civil Service exam and originally contained three names; those ranking No. 1 and No. 2 had been promoted earlier (J-

15).) Person 2 was not interested in becoming Deputy Chief, as he eventually informed Fire Chief Person 3.

The current most senior Battalion Chief, Person 4, believing it unlikely that Person 2 would want the assignment, approached Chief Person 3 in early December 1989 to ask that he be considered for the position. According to Person 4, Person 3 replied that he did not think the two men could work together. Person 3 admitted having two discussions with Person 4 in which the latter expressed his interest in becoming acting Deputy Chief, but denied telling Person 4 that he would not be appointed.

On December 18, 1989, Fire Chief Person 3 posted the following Memorandum, addressed to "All Hands" (J-8):

> In the absence of three top standing persons on an existing or previous eligible list for the position of Deputy Fire Chief, I am accepting applications from anyone interested in long term acting assignment as Deputy Chief of Administration.
>
> This vacancy results from the upcoming retirement of Deputy Chief Person 1.
>
> Persons interested in being considered for such assignment, which will be made in mid January 1990, should let me know in writing, no later than December 28, 1989.

Chief Person 3 received a number of written applications, but none from a Battalion Chief, including Person 4. On January 5, 1990, Person 3 announced that Fire Training Supervisor Person 5 would receive a long-term acting assignment as Deputy Chief of Administration, effective January 15, 1990. A Fire Training Supervisor has a pay grade equivalent to that of Battalion Chief but there is no command responsibility in fire suppression. Person 5 had previously been a Fire Captain and a Fire Lieutenant, the next ranking positions below Battalion Chief.

Fire Chief Person 3 posted another Memorandum for "All Hands" on December 28, 1989 (J-10):

> In the absence of three top standing persons on an existing or previous eligible list for the position of Assistant Training Supervisor, I am accepting applications from anyone interested in long term acting assignment in that position.
>
> This vacancy continues to exist as a result of no one having taken the previously posted examination for the position.
>
> Persons interested in being considered for this long term acting assignment which will commence in mid January, 1990, should let me know in writing no later than January 5, 1990.

Firefighter and Acting Lieutenant Person 6 applied for the position of acting Assistant Fire Training Supervisor on December 30, 1989 (C-1). Person 6 received a long-term acting assignment to this post on or about January 29, 1990, and continues to occupy it to this date. The Union filed two grievances on January 15, 1990, concerning the long-term acting assignment of Person 5 as Deputy Chief. Grievance No. B alleged that the Employer had violated Articles XXXXV (Acting Assignment), XI (Seniority), and XXX (Maintenance of Standards) of the parties' Agreement by not appointing the senior Battalion Chief, Person 4 (J-2). Grievance No. C alleged that the Employer had violated the same Articles by not appointing the one person whose name remained on the most recent eligible list, Battalion Chief Person 2 (J-4).

The position of Deputy Chief of Administration, held on an acting basis by Person 5 during the first half of 1990, was abolished effective July 1, 1990. Nonetheless, the Union requests that Battalion Chief Person 4 be made whole for the loss he suffered by not being given the acting assignment for the period it was available (U. Br., pp. 10-11).

On February 9, 1990, the Union filed Grievance No. A concerning the assignment of Person 6 as acting Assistant Fire Training Supervisor (J-6). Allegedly violated by the Employer were Articles XXXIV (Entire Agreement), XXXXV, Section 1 (Acting Assignment), XXXII (Supplemental Agreements), XII, Section 3d (Promotions and Voluntary Demotions), XXX

(Maintenance of Standards), and XVI (New and Changed Jobs).

An arbitration hearing regarding these three grievances was conducted before the undersigned on July 25, 1990 at the Grand Rapids Employer Hall. All parties were present, examined and cross-examined witnesses, and submitted other evidence. Both the Employer and the Union filed helpful post-hearing briefs, and these have been duly considered.

ISSUES

Did the Employer violate the parties' 1989-91 Agreement when it made long term acting assignments of Person 5 as Deputy Fire Chief of Administration and of Person 6 as Assistant Fire Training Supervisor in January 1990? If so, what shall be the remedy?

DISCUSSION

The parties' 1989-91 Agreement reads in pertinent part as follows (J-1, pp.9,11,37, and 46-47):

> ARTICLE XI. SENIORITY AND PROBATION PERIODS
>
> ****
>
> SECTION 5. APPLICATION OF SENIORITY
>
> Seniority shall apply to work assignments, transfers, vacation, layoff and recall and to promotion as otherwise provided in this Agreement.
>
> ARTICLE XXX. MAINTENANCE OF STANDARDS
>
> SECTION 1.
>
> Management agrees that all conditions of employment not otherwise provided for herein relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at the standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this agreement.

ARTICLE XXXXV. ACTING ASSIGNMENT.

SECTION 1. LONG TERM

> 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 top three standing persons 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 (30) days or more shall be filled from one of the top three standing 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.

The Union contends that on the basis of the contract language and established past practice, a long-term acting assignment should go either to a person on the most recent eligible list (even if it's only one or two persons instead of three) or to the most senior person in the "eligible rank." Thus, the position of acting Deputy Chief should have gone to Battalion Chief Person 2, or, if he declined, to senior Battalion Chief Person 4, unless a new eligible list was established through Civil Service. Since there was no eligible list for the Assistant Fire Training Supervisor, the acting assignment there should have gone to the senior lieutenant in the "eligible rank."

The Employer concedes it violated the parties' Agreement in making both long-term acting assignments. But contrary to the Union, the Employer maintains that by the specific provision of Article V, Section 1, an appointment can only be made from an eligible list containing three names. Since there was only one name on the eligible list for Deputy Chief and no current list for Assistant Fire Training Supervisor, the Employer concludes that new eligible lists would have been necessary for both appointments here (absent a Employer-Union agreement on another method of selection). The Employer insists there is no past practice

allowing seniority in the "eligible rank" to be used as the basis for an appointment.

The arbitrator firmly believes that in appropriate circumstances, there is no better guide to what the parties mean by their contract than the way they act under it. But when there is express language in an agreement covering a particular matter, the natural meaning reflected in the written words can be modified or changed by a past practice only if that practice is clear, consistent, long-continuing, and accepted by both parties. See, e.g., Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, 59 Mich. L. Rev. 1017 (1961).

Article XXXXV, Section 1 of the parties' 1989-91 Agreement speaks only of eligible lists as the source of long-term acting assignments and says nothing at all about seniority in the "eligible rank," i.e., the next lower rank, whose occupants are entitled to take the Civil Service exam for a possible promotion. There was testimony by Union President Person 7, a 30-year veteran of the Fire Department and a Battalion Chief for 9 years, and other Union witnesses that seniority in the eligible rank has been a basis for acting assignments. The testimony was very sketchy as to individual instances, however, and they may have involved appointments prior to 1982, when Article XXXXV, Section 1 introduced the "rule of three" into the parties' Agreement. I conclude there are no adequate grounds for finding a clear, consistent, continuing, and mutually accepted past practice that would permit a resort to seniority in the eligible rank as the basis for acting assignments when there are no qualified or willing candidates on the eligible list. Battalion Chief Person 4 would therefore have not been eligible for appointment as acting Deputy Chief, even if he had submitted a written application.

Furthermore, in order to preserve one's right to grieve an adverse decision on an appointment, it is ordinarily necessary that a person comply with all reasonable procedural requirements for qualifying. I do not consider a formal written application an unreasonable

requirement in these circumstances. Battalion Chief Person 4 may have felt, as he testified, that it would be fruitless to submit an application in light of Chief Person 3's stated opposition to him. But if Person 4 was legally entitled to the post, Person 3' personal doubts or even his personal hostility would have been legal irrelevancies. Chief Person 4 is a mature, experienced professional, and he should have known that if he wished to pursue his claim, he ought to have perfected it by a formal application. Failure to apply in writing as requested amounted to a waiver of his claims, however dubious they may have been.

It is a much closer call whether the "rule of three," as embodied in Article XXXXV, Section 1 of the parties' 1989-91 Agreement (J-1, pp. 46-47), requires the current existence of three names at the top of an eligible list before an acting assignment can be made from that list. Article XXXXV, Section 1 simply states: "Acting assignment with the potential of thirty (30) days or more shall be filled from one of the top three standing persons on the existing eligible lists or most recent eligible lists..." p. 46; emphasis supplied). The Employer argues that three names must be present on an eligible list or else the Employer must arrange for a new list through a new Civil Service exam. The Union argues that the most recent eligible list may be used as long as a single name is left on it, although I gather that the Union would not object to the preparation of a new eligible list if the Employer wished to follow that procedure (U. Br., p. 6).

The critical phrase in Article XXXXV, Section 1, "one of the top three standing persons," is not entirely clear. It could mean, as the Employer contends, that right now there must be three persons from whom the Employer could choose. Thus, if that number has fallen below three, the list no longer qualifies. It could mean, as the Union would have it, that once three "top...persons" are identified, each remains eligible for appointment, even though the total number on the list

eventually falls below three. There are obviously good policy considerations supporting both positions. The Employer can say that three candidates should always be available, on the basis of test scores or quantitative measurements, so that the ultimate choice can take into account more subjective factors such as leadership, congeniality, community rapport, and the like. The Union can respond that once an eligible list is drawn up, reasonable expectations of advancement are aroused in all those listed, even if they are not the first on the list. Moreover, the Employer's requirement of a minimum of three names before an appointment can be made fails to take account of the situation when only one or two candidates qualify.

The contract language itself, "one of the top three standing persons," would seem to favor the Employer's interpretation (emphasis supplied). Union President and Battalion Chief Person 7 testified without contradiction, however, that in the mid-'80s Person 2, Person 1, a "Person 8" (sp.?). and "several others" received acting assignments from an eligible list that contained only one or two names. Indeed, the promotional eligible list for Deputy Fire Chief, dated September 19, 1983, would seem to confirm this practice (J-15). Person 9, Person 1, and Person 2 are the only three candidates listed. It is indicated that Person 9 was appointed in December 1983 and Person 1 in February 1984 (ibid.). If that is correct, Person 1 at the time of his appointment was obviously one of just two candidates on the eligible list. (Apparently it is immaterial whether the Person 1' appointment cited on the exhibit was an acting assignment or a promotion. Promotions follow the same "rule of three" as acting assignments. See Article XIII, Section 1 of the parties' 1989-91 Agreement (J-1, p. 11).)

The testimony of witness Person 7 and the notations on exhibit J-15 lend considerable support to the Union's position that Battalion Chief Person 2 was properly in line for the acting assignment as Deputy Fire Chief in January 1990. Ultimately, however, I do not believe it is

necessary for me to resolve this issue to dispose of the grievance before me. Person 2 did not want the appointment and so informed Chief Person 3. He made no effort to apply in response to the written invitation to "all hands." Person 2 thereby relinquished any claim to the position he might otherwise have had. Regardless of whether Person 2 was entitled to the acting assignment if he desired it, the Employer was plainly within its rights in not trying to force the appointment on an unwilling candidate.

The position of Deputy Fire Chief of Administration was abolished, effective July 1, 1990. Since neither Person 2 nor Person 4 is entitled to a remedy on the basis of the grievances filed by them, and since any question about the future of the Deputy Chief's position is now moot, no further relief is appropriate concerning Grievances Nos. B and C.

The position of Assistant Fire Training Supervisor remains in existence and continues to be occupied by Person 6 on a long-term acting assignment. In response to Union Grievance No. A, the Employer now concedes that the Person 6 appointment violated Article XXXXV, Section 1 of the parties' Agreement because there was no eligible list for the position in question (C. Br., pp. 10-11). That acting assignment should therefore be terminated as soon as practicable. Because there is no grievance concerning an identifiable individual who should have received the appointment instead of Person 6, no relief in the form of back pay or otherwise regarding the past violation is appropriate.

The arbitrator has the authority to order the Employer to comply with contract requirements and arrange for the holding of a Civil Service exam to provide for a new eligible list for the post of Assistant Fire Training Supervisor. The Employer and the Union may prefer to negotiate an alternative selection procedure, however, and that is their prerogative. The arbitrator shall therefore condition his Award on the decision of the Employer and the Union not to devise

another method of selection, or on their failure to agree on what that procedure should be.

AWARD

1. The grievances are sustained in part and denied in part. The Employer violated Article XXXXV, Section 1 of the parties' 1989-91 Agreement by failing to make acting assignments from an eligible list, but did not violate the Agreement by refusing to make those assignments on the basis of seniority in an eligible rank. No further relief is appropriate concerning Grievances Nos. B and C.
2. The present acting assignment of Person 6 as Assistant Fire Training Supervisor shall be terminated as soon as practicable. No further individual relief is appropriate concerning Grievance No. A.
3. As soon as practicable the Employer shall comply with the contractual requirements of preparing an eligible list for the position of Assistant Fire Training Supervisor, if that position is to be filled in the future and if the Employer and the Union do not agree within a reasonable period of time on an alternative method of appointment.
4. The arbitrator retains jurisdiction for the sole purpose of resolving any disputes that may arise concerning the interpretation or application of this Award.

THEODORE J. ANTOINE

Arbitrator,

October 6, 1990