

Antoine #3

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

EMPLOYER

-and-

UNION

Promotional Examination- Fire Captain

OPINION AND AWARD

BEFORE:

Theodore J. St. Antoine, Arbitrator, University of Michigan Law School, Ann Arbor MI

FACTS

This dispute concerns eligibility to take the Fire Captain promotional examination in the City A. On September 12, 1995, the Civil Service Board of the Employer posted an announcement of a promotional examination for the position of Fire Captain (C-6, p. 6; U-1). Qualification requirements included 2 ½ years service as a Fire Lieutenant in fire suppression" (ibid.). No date was specified by which time that service had to be obtained.

The announcement stated that applications would be accepted until October 12, 1995, but did not indicate when the exam would be given.

Thirteen employees applied to take the Fire Captain promotional exam (C-6, p. 1). Three Fire Lieutenants, Person 1 (a past Union President), his cousin Person 2, and Person 3 were notified they were ineligible for the exam. Eligible applicants included Person 4, the current Union President (U-5). Person 5, personnel analyst and assistant to the Civil Service Board Chief Examiner, informed Person 3 and presumably the Person 1 and 2 that they were ineligible

because they had not met the 2 ½ years service requirement "by the closing date for applications which was October 12, 1995" (U-3).

In support of her disqualification of Person 3 and the Person 1 and 2, Person 5 attached a letter from Person 6, Director of Employer Human Resources, to then-President Person 1, dated May 28, 1992, which Person 5 described as an "agreement with Union" and which declared that the "previously approved Civil Service Board eligibility requirements... for writing promotional examinations [included for Fire Captain] 2-1/2 years of service as a Fire Lieutenant in fire suppression" (U-2; U-3).

On December 8, 1995, Person 1 wrote Chief Examiner Person 6 to request an appearance before the Civil Service Board at its meeting of December 12, 1995 (U-6, p. 2). Chief Examiner Person 6 told the Board at the meeting that the Union "did not want the requirements changed," and "would like the years of service by the end of the application period" (id.). The minutes indicated that the Board knew some candidates "did not apply because they thought they were ineligible due to the 2-1/2 year requirement by the end of the application period" (id.).

Nonetheless, the Board found that "five years ago the Human Resources Department did allow persons to file who had the required seniority by examination date" (id.). The Board thereupon adopted a motion that "the three persons who applied for Fire Captain, Person 1, Person 2 and Person 3, be allowed to test on Thursday, December 14, 1995" (id.). The Person 1 and 2 proceeded to take the December 14 exam and passed.

Chief Examiner Person 6 testified that he tried to telephone Person 3 about the Board's ruling but Person 3 wasn't home. Person 6 left a message on Person 3's answering machine but did not know when Person 3 got word of his eligibility for the December 14 exam. Person 3 testified that he learned of the changed eligibility closing date on December 13. He did not take

the December 14 exam, however, because he wished to abide by the Union's position on eligibility and because he wasn't prepared for the exam, having heard about his eligibility only some 18 hours beforehand. Another lieutenant, Person 7, testified she didn't apply for the 1995 captain's exam because then-President Person 1 informed her the service requirement had to be fulfilled by the end of the application period, not the testing period, and the rule could not be changed.

Union President Person 4 testified that Chief Examiner Person 6 assured him before the December 14 test was given that Person 6 would be able to "invalidate" the Person 1 and 2's scores. Person 6 conceded only that he told Person 4 he could invalidate the scores if necessary, not that he would.

Union Vice President Person 3 filed a union-initiated grievance covering all employees on December 15, 1995. Person 3 called for the Employer to "disqualify these two candidates [the Person 1 and 2] from obtaining a test score or placement on the Fire Captain's Eligibility List" (J-2). The Employer denied the grievance (id.). Thereafter an arbitration hearing was conducted before the undersigned on February 9, 1996, at the City Hall. All parties were present, examined and cross-examined witnesses, and submitted other evidence. Both the Union and the Employer filed comprehensive and helpful briefs, and these have been duly considered.

ISSUE

Did the Employer violate Article 12, Section 2 of the parties' 1991-94 Agreement on December 12, 1995, by allowing three candidates, Person 1, Person 2, and Person 3, to take the promotional exam for Fire Captain on December 14, 1995? If so, what shall the remedy be?

DISCUSSION

The parties' 1991-94 collective bargaining agreement reads in pertinent part as follows

(J-1, pp. 8-9, 31):

ARTICLE 12. PROMOTION AND VOLUNTARY DEMOTIONS

SECTION 1. DATE OF PROMOTION

The undersigned parties agree that in instances of filling vacancies within the Fire Department, no certification from an eligible list will be made until the day following the actual date of termination the individual whose termination creates the vacancy.

SECTION 2. PROMOTIONAL PROCEDURE

- A. Only those employees who have attained the Civil Service Board's service requirements may express their interest in being qualified for promotions by filing application with the Human Resources Department.
- B. A validated examination shall be administered under the supervision of the Civil Service Board. Participants who successfully complete the procedure on a pass/fail scoring basis shall constitute the eligible qualified candidate pool.
- C. Regardless of any rule regulation, or requirement to the contrary, the Employer Manager shall have the authority to promote any employee who-is determined to be qualified.
- D. Except as otherwise specified above, the provision of the Civil Service Board rules and regulations shall apply to the promotional procedure; however it is expressly understood and agreed that the prior "rule of three (3)" certification restriction required by the Employer Charter shall be considered void and have no application to promotions occurring after the effective date of this Agreement.

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.

SECTION 4. ELIGIBLE LISTS

Eligible lists for Fire Lieutenant and Fire Captain will be in effect from April 2 through March 31. The Fire Equipment Operator eligible list will be in effect from June 1 through May 31. All remaining eligible lists would remain in effect for on* (1) year from the date of certification by the Civil Service Board.

ARTICLE 30. 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 33. VALIDITY

SECTION 1

The provisions of this Agreement shall supersede any existing regulations of the Employer and/or any of its Boards or agencies which Sky rules and be in conflict therewith.

SECTION 2

This Agreement is subject to the laws of the State of Michigan with respect to the powers, rights, duties, and obligations of the city, the Union and the employees in the bargaining unit, and in the event that any provision of this Agreement shall at any time be held to be contrary to law by a court of Competent Jurisdiction from whose final judgment or decree no appeal has been taken within the time provided therefore, such provision shall be void and inoperative. However, all other provisions of this agreement shall, insofar as possible, continue in full force and effect...

The Rules of the Civil Service Board of the Employer read in pertinent part as follows (J-3, pp. 7-11):

301.8 The Board shall develop and administer such recruiting and examination programs as may be necessary to obtain an adequate supply of competent applicants to meet the needs of the Employer's service and to further the Employer's affirmative action goals.

304.5 The Chief Examiner shall develop and -administer such recruiting and examination programs as may be necessary to obtain an adequate supply of competent applicants to meet the needs of the Employer service.

400.0 RULE IV - RECRUITMENT, TESTING AND EMPLOYMENT

401.0 Competitive Examinations - All appointments in the classified service of the Employer shall be-made according to merit and fitness to be ascertained insofar as practicable by competitive examination. Examinations shall be prepared by or under the direction of the Chief Examiner and shall relate to those matters which will test fairly the capacity and fitness of the candidate to discharge efficiently the duties of the classes for which examinations are held.

402.0 Eligible Lists

402.1 Entrance and Promotional: The Chief Examiner shall establish such entrance and promotional eligible lists for classifications in the competitive class as are necessary to meet the needs of the service. Such eligible lists shall contain the names of those persons who have passed examination for a specific classification.

404.1 Permanent Appointments:

All vacancies in permanent positions shall be filled by one of the following means, in the following order of priority: preferred eligible, promotion, transfer, demotion, entrance appointment. The Chief Examiner shall be responsible for observing this order of priority, and he may combine any of these sources of appointment.

When the Employer Manager has made known to the Chief Examiner that a vacancy exists, the Examiner shall certify the names of persons who are highest in order of rank on the

The Union argues that the parties' collective bargaining agreement takes precedence over the Civil Service Rules if there is any conflict. The Union then goes on to say that the parties' Agreement, their past practice, and the corroborative statements and understandings between them demonstrate that the calculation of the two-and-one-half-year service requirement for promotional examinations is to be made as of the closing date for applications. These understandings are reflected in the letter from Human Resources to Person 3, dated November 3, 1995 (U-3), and in an exchange between Union President Person 4 and Human Resources Director Person 6 in November and December 1995, whereby Person 6 invited the Union to reconsider its position on the date for calculating the required service time, and the Union declined that invitation (U-19; U-20; U-21; U-22). Furthermore, the Union insists that the parties have consistently engaged in bargaining over promotional issues, and that Article 30 of the parties' Agreement, the maintenance of standards provision (J-1, p. 31), precludes the Employer from unilaterally changing the eligibility cutoff date without the consent of the Union.

The Employer responds that Article 12, Section 2(D) of the parties' Agreement expressly

provides that Civil Service Board rules "shall apply to the promotional procedure... [e]xcept as otherwise specified above" p. 9), and that none of the negotiated provisions prohibit the Board from establishing service requirements and hearing complaints from individual employees. Even more specifically, Article 12, Section 2(A) limits applicants for promotion to "[o]nly those employees who have attained the Civil Service Board's service requirements" (id.; emphasis supplied in Employer Br., p. 5). Furthermore, continues the Employer, the unrebutted testimony of former Union president Person 1 establishes that the Employer stated during the 1989 negotiations that the Civil Service Board sets the service requirements for examinations. Indeed, the 1991 contract gave the Board a "blank check" regarding qualifications, except as limited by Section 2, according to then-President Person 1. Current President Person 4 conceded the Employer had been given "too much latitude" in 1991. Finally, the Employer points out that in 1990 and 1991 the specified cut-off dates for qualifying service time were the dates of the examination. In subsequent years the cut-off points were not specified in the announcements of the examination, but they were not an issue for Fire Captain.

This arbitrator readily accepts several of the Union's basic premises. First, when there is a conflict between a provision of a collective bargaining agreement adopted pursuant to the Public Employment Relations Act and Civil Service Rules adopted pursuant to a Employer charter, the contract provision prevails. Local 1383 v. Employer of Warren, 411 Mich. 642 (1981); see also Pontiac Police Officers Assn'n v. City of Pontiac, 397 Mich 674 (1976). Second, a past practice may become incorporated as a binding and enforceable part of a collective bargaining agreement if it is (1) clear and consistent; (2) repeated over some length of time; and (3) mutually accepted by employees and supervisors. Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," 59 Michigan Law

Review 1017, 1019 (1961). Third, a maintenance of standards provision prevents an employer from unilaterally changing working conditions that are a mandatory subject of bargaining and that were in existence at the time the contract was executed, unless the union agrees to the change.

In the present case I see no conflict but rather compatibility between the Rules of the Civil Service Board and the provisions of the parties' 1991- 94 Agreement. Indeed, Article XII, Section 2(A) is quite explicit: "Only those employees who have attained the Civil Service Board's service requirements may express their interest in being qualified for promotions..." (J-1, p. 9; emphasis supplied). Furthermore, Section 2(D) goes on to declare: "Except as otherwise specified above, the provision of the Civil Service Board rules and regulations shall apply to the promotional procedure..." (id.).

To confirm the broad authority of the Board to prescribe reasonable qualifications for promotional exams, we have the unrebutted testimony of former Union President Person 1 and current Union President Person 4. Person 1 characterized the 1991 contract as giving the Employer a "blank check" to administer the promotion procedure. Person 4 acknowledged under cross-examination that the Union had given the Employer "too much latitude" in 1991. Standing alone, those statements are not conclusive of the precise issue before us, but they are highly indicative of the direction of concessions during the 1991 negotiations. They thus bolster the Employer's reading of the 1991 language.

I am prepared to go very far in interpreting or even modifying the terms of a labor contract on the basis of the parties' own practices under it. After all, no one should know better than they how the agreement they negotiated should be applied in actual operation. But to have the force of an established past practice with contractual consequences, the practice must exhibit

the characteristics outlined by arbitrator Mittenthal, *supra* -- clarity, consistency, repetition, and mutual acceptance. Yet if anything marks the handling of the cutoff dates for meeting the service requirements in the present instance, it is confusion and variability, not clarity and consistency. In 1990 and 1991, the written announcement expressly stated the cutoff for the Fire Captain exam was the test date (C-11; C-12). In 1992, 1993, and 1994, no date was specified in the announcement, and apparently there was no dispute over the cutoff date (C-7; C-8; C-9).

In 1995, the announcement again mentioned no cutoff date for meeting the service requirement. But individual letters to Person 3 and the Person 1 and 2 from personnel analyst Person 5 of the Human Relations Department informed the three lieutenants that they were ineligible because they "would have had to attain this service [2 1/2 years] by the closing date for applications which was October 12, 1995" (U-3). Subsequently, of course, the Civil Service Board voted on December 12, 1995, to change the cutoff date to the date of the examination, December 14 (U-6). From this welter of diverse behavior, it is impossible to extract evidence of the sort of "clear, consistent" past practice that is necessary to establish the existence of a mutually accepted procedure.

Nor do I find in the letter from Human Resources Director Person 6 to then-President Person 1 of the Union, dated May 28, 1992 (U-2), any "agreement with Union" setting the deadline for applications as the cutoff date for eligibility, even though the letter is referred to as such in personnel analyst Person 5's letters to Person 3, dated November 3, 1995, and to Person 4, dated October 12, 1993 (U-3; U-4). Person 6's letter simply describes itself as a "review of the previously approved Civil Service Board eligibility requirements" and merely states that the service requirement for Fire Captain is "2-1/2 years as a Fire Lieutenant in fire suppression," with no mention of a cutoff date (U-2). Union Vice President Person 3 recognized in cross-

examination that the May 28, 1992 letter was not a "memorandum of understanding," and it is not so labeled, in contrast to several other exhibits in the case (e.g., U-12; U-13; U-14).

Finally, even though current Union President Person 4 was declared ineligible to take the examination for Fire Captain in 1993 (U-4), it does appear, as argued by the Employer, that he, like other disqualified applicants for 1992, 1993, and 1994, would have been disqualified whichever cutoff date was used (C-7; C-8; C-9). Thus no past practice can be based on the conduct of the parties during those three years preceding 1995.

I reiterate that I accept, in principle the great importance of past practice in interpreting and applying collective bargaining agreements. I therefore have no quarrel with the decision of arbitrator Benjamin Wolkinson, dated October 30, 1995, regarding applicants for a certain position from outside the bargaining unit (U-15). I simply do not find in this case the kind of clear, consistent past practice concerning cutoff dates that arbitrator Wolkinson found in his case concerning outside applicants.

My conclusion is that the Civil Service Board has the authority, under the parties' Agreement and the past practice under it, to set "service requirements" for promotional examinations, including the cutoff dates for determining whether individual candidates meet those requirements.

Nevertheless, I find grave flaws in the way that authority was exercised in the particular circumstances of the December 14, 1995 promotional examination for Fire Captain. There is no more elementary principle in contract law than that the parties must deal with one another fairly and in good faith. I see no hint of subjective bad faith in the present situation, but there is also an objective element in the concept of good faith and fair dealing. Even though I recognize the authority of the Civil Service Board to set the date for determining service requirements, that

authority must be exercised in a way that does not result in undue surprise or disadvantage to affected individuals.

In 1993 and 1995 an authorized representative of the Human Resources Department, personnel analyst Person 5, had informed Union members and Fire Captain candidates, in effect, that the service requirements had to be attained "by the closing date for applications" (L., U-3; see also U-4). That this was also the original common understanding of Union President Person 4 and Human Resources Director/Chief Examiner Person 6 is plainly evident from their correspondence of November-December 1995 (U-19 through U-21). In reliance on that information and those understandings, at least one Fire Lieutenant, Person 7, did not file an application for the Fire Captain's promotional exam, and another, Person 3, did not pursue an appeal from his disqualification.

At its late afternoon meeting of December 12, 1995, less than 40 hours before the exam scheduled for December 14 at 8:30 a.m. (U-5), the Civil Service Board voted to change what until then would most reasonably have been considered the rules of the game. Person 3 testified quite credibly that he did not learn of the change until 18 hours before the exam began, and by then it was too late for him to prepare for it. Both Lieutenants Person 7 and Person 3 and perhaps others were thus severely prejudiced by this last-minute reversal of the Employer's position on cutoff dates. The reversal was contrary to the underlying obligation of good faith and fair dealing in the administration of any contract.

Even-the Employer acknowledges that "[p]roviding relief for Mr. Person 3 and Ms. Person 8 [sic; ??] is warranted" (Employer Br., p. 19). The Employer suggests, however, that relief for individuals is beyond my power because this is a "union initiated" grievance, and concerns only a "right given to the Union as such" (id; id. at 5). I do not recall any such position

being taken earlier in these proceedings, and any defense based on it may thus have been waived. In any event, I do not read the Union's grievance in such a limited fashion. Although described as "Union initiated," the grievance is filed on behalf of "all" employees. More important as a practical matter, the Employer's action could plainly have a detrimental impact on identifiable individuals like Lieutenants Person 3 and Person 7 by adversely affecting their future promotional prospects. I therefore see no reason for treating this grievance differently from any other where individual rights under a contract have been violated.

As a remedy, two possibilities exist. They are the same options that were available to the Civil Service Board at its meeting on December 12, 1995. The Board could have sustained the position taken earlier by its authorized spokespersons, Person 5 and Person 6, and made the deadline for applications the cutoff date for meeting the service requirements. That would have disqualified the Person 1 and 2 as well as Person 3 and Kathy Person 7. Or the Board could have changed the cutoff date as it did but postponed the promotional examination for such a reasonable length of time as would have enabled Lieutenant Person 3 to prepare for it. The latter course of action would have raised the further question of whether applications should have been reopened to enable Lieutenant Person 7 (or others similarly situated) an opportunity to apply. I shall not express an opinion on that point because the issue has not been argued before me and I do not know what might be some of the practical ramifications. In the first instance, the Civil Service Board should decide how to proceed.

In light of my ruling, which partially sustains and partially denies the grievance, the arbitrator's fees and expenses will be divided between the parties, in accordance with Article 8, Section 3(C)(3) of the parties' Agreement (J-1, p. 6).

AWARD

The grievance is sustained in part and denied in part. Under the particular circumstances of this case, the Employer violated Article 12, Section 2 of the parties' 1991-94 Agreement on December 12, 1995, by allowing three candidates, Person 1, Person 2, and Person 3, to take the promotional exam for Fire Captain on December 14, 1995, without allaying candidate Person 3 a reasonable opportunity to prepare. The case shall be remanded to the Civil Service Board for further proceedings in accordance with this Opinion. The arbitrator shall retain jurisdiction for the sole purpose of resolving any disputes that may arise concerning the interpretation or application of this Award.

Ann Arbor, Michigan April 18, 1996