Antoine #4

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

EMPLOYER,

and

UNION,

Gr: Battalion Fire Chief & Fire Captain Promotions

OPINION AND AWARD

BEFORE:

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

FACTS

The facts are relatively undisputed in this case, which deals with the authority of the Employer Civil Service Board to change unilaterally the long-standing service requirements needed for promotion to Battalion Fire Chief and Fire Captain. The undisputed testimony of Union President Person 1 and of Union Vice President Person 2, taken together, established that since at least 1978, the Employer had required2 ¼ years of service as a Captain to qualify for promotion to Battalion Fire Chief and 2 ½ years of service as a Lieutenant to qualify for promotion to Fire Captain (see also U-3; U-4). The present Article 12 of the parties' Agreement, covering promotions, was introduced in the 1991-94 contract (U-1), and has since remained essentially unchanged. That was the first time there was a reference to the "Civil Service Board's service requirements." Over the years the Employer and the Union have negotiated changes in promotion eligibility, including the elimination of the "rule of three" in 1991.

On November 16, 2001 the Employer posted a notice of a promotional opportunity for Battalion Fire Chief, but stated that the qualifications included "2 years service as a Fire Captain in fire suppression" (J-4). The deadline for applications was December 16, 2001. On December 13, 2001 the Employer posted a notice of a promotional opportunity for Fire Captain and stated that the qualifications included "2 years service as a Fire Lieutenant" (J-5). The Employer's Civil Service Board, on the recommendation of Human Relations Director and Chief Examiner Person 3, approved changing the required years of subordinate service for these positions from 2 1/4 years to 2 years at its regular meeting on December 11, 2001 (J-7, p. 13793). The current Rules of the Civil Service Board (J-7) contain nothing so specific as a statement of promotional requirements. But the Union introduced a document entitled "Civil Service Board Fire Department Promotional Criteria," dated 7/88, which provided that the "current Civil Service qualification requirements" for Fire Captain and Battalion Fire Chief were "21/4 years experience" as a Fire Lieutenant and as a Fire Captain, respectively (U-2).

The Employer's Chief Examiner justified reducing the required number of years of experience on the grounds it would permit three additional persons to participate in the examination process for each of the two positions that were open (J-7, p. 13788). The Union officers objected that this was a significant change, cutting by 20 percent the experience that candidates would have to acquire in the next-lower positions. Safety and efficiency were listed as major concerns. Witnesses for both the Union and the Employer agreed that the effect of the change was to increase the number of eligible candidates for Battalion Chief from 31 to 34 and for Fire Captain from 14 to 17. In each instance that was the full complement of the incumbents in the subordinate position.

On December 12, 2001, the day after the Employer's Civil Service Board had approved

the reduction in service requirements, the Union submitted a proposal that would have amended the parties' Agreement by listing for the first time the specific number of years of experience in various Fire Department positions that would be necessary for eligibility to write a promotional exam for higher-ranking posts (C-1). This proposal was not adopted and the new contract was accepted without any substantive change in Article 12.

The Union filed grievances on November 27 and December 20, 2001 to protest the Employer's reductions in the service requirements for promotions to Battalion Fire Chief and Fire Captain (J-2; J-3). An arbitration was conducted before the undersigned in City A on July 24, 2002. All parties were present, examined and cross-examined witnesses, and submitted other evidence. Both Union and Company filed post-hearing briefs and these have been duly considered.

ISSUE

Did the Employer violate Articles 12 and 30 of the parties' 1997-2001 Agreement, or binding past practices under it, when its Civil Service Board unilaterally reduced the service requirements needed for promotion to Battalion Fire Chief or Fire Captain? If so, what shall the remedy be?

DISCUSSION

The parties' 1997-2001 Agreement (which it was stipulated was extended and is applicable to this dispute) reads in pertinent part as follows (J-1, pp. 10, 36):

> **ARTICLE 12. PROMOTION AND VOLUNTARY DEMOTIONS**
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> **********
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> **SECTION 2. PROMOTIONAL PROCEDURE**
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> 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 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 July 1, 1991.

ARTICLE 30. MAINTENANCE OF STANDARDS

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.

The Union argues that promotional standards are a mandatory subject of bargaining and that negotiated collective bargaining provisions take precedence over charter-created civil service promotional systems. Here, according to the Union, there is both a long-standing, consistent, and mutually accepted practice of at least 24 years' standing regarding service requirements which should be enforceable on its own merits, and an explicit maintenance-of-standards clause that confirms the enforceability of such preexisting conditions of employment as the promotional criteria at issue in this case. The Union goes on that there is virtually nothing in the Civil Service Board's rules and regulations that addresses promotional service requirements. Prior arbitration decisions cited by the Employer do not, asserts the Union, apply to the present situation. Those cases involved only the cutoff dates for meeting the service requirements, and not the much more significant employment condition of the service

requirements themselves.

In response, the Employer insists that the two prior arbitration decisions on cutoff dates necessarily established the Civil Service Board's authority to determine service requirements. In the Employer's eyes, the issues are essentially the same and the matter is thus *res judicata* (that is, already decided). Moreover, the Employer maintains, Article 12, Section 2 of the parties' collective bargaining contract, adopted in 1991, shows there was a mutual agreement that the Board was entitled to set service eligibility requirements. Finally, in the 2001 contract negotiations, the Union unsuccessfully sought to incorporate eligibility criteria in the parties' Agreement. Its effort demonstrates that such language was needed for any change and its failure shows that the Board's authority remained intact.

This arbitrator has no hesitancy in accepting the Union's propositions that under Michigan law promotional standards, at least generally, are mandatory subjects of bargaining and that collective bargaining agreements can override charter-created civil service provisions. *IAFF Local 1383 v. City of Warren*, 411 Mich. 642 (1981); *Detroit Police Officers Ass 'n v. City of Detroit*, 61 Mich. App. 487 (1975). Moreover, I am a strong believer in the notion that a clear, consistent, long repeated, and mutually accepted past practice is enforceable as the best evidence of the parties' actual contractual intent. See Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," 59 Mich. L. Review 1017, 1019 (1961); *Mid-Michigan Educ. Assn (MEA/ NEA) v. St. Charles Community Schools*, 150 Mich. App. 763 (1986), overruled on other grounds, 452 Mich. 309 (1996). But the problem is not the validity of the general principles; the problem is their application to this particular, concrete situation.

Article 12, Section 2-A of the parties' Agreement, as added in 1991, speaks of the "Civil Service Board's service requirements" (J-1, p. 10; emphasis supplied). That possessive form

indicates that the Board has primary control of the content of those requirements. The Union's agreement to this language in 1991 would seem to constitute a recognition of this arrangement. Even more to the point, a preexisting 1988 document introduced by the Union itself, entitled "Civil Service Board Fire Department Promotional Criteria," supports the conclusion not only that the "qualification requirements" are set by the Board but also that they are subject to change. In listing the various promotion criteria, including the 2 1/2 year service requirements for promotion to Fire Captain and Battalion Fire Chief, the document refers to them as "the current Civil Service qualification requirements" (U-2; emphasis supplied). What is "current" means the status at the "present time," and expresses no commitment as to the future.

For the purposes of this case, I shall assume that the promotion requirements at issue are subject to negotiation between the Employer and the Union,* and also subject to a binding past practice. The difficulty with the past-practice analysis urged by the Union, however, is that the Employer's 24-year use of a 2 1/2 years' service requirement for promotions is at best ambiguous, and not at all clear in the sense espoused by the Union. The past practice is entirely consistent with the position reflected in both the 1988 Civil Service Board document and the parties' 1991 contractual language that the 2 ½ -year requirement was simply the Board's choice at that time, with no commitment as to the future.

Viewed differently, there was no unilateral change in working conditions in violation of Article 30 (Maintenance of Standards) of the parties' Agreement. The 24-year or so practice here is most aptly described as dynamic, or subject to variance by its very nature. It is understandable that employees come to expect the continuation of what has long prevailed. But the mere

*Unlike the situation in private employment under federal and state law, supervisory employees are of course entitled to collective bargaining rights under Michigan's Public Employment Relations Act. *Muskegon County Professional Command Assn v. County of Muskegon* (Sheriff's Dep 't), 186 Mich. App. 365 (1991).

non-exercise of an employer's authority, unless affected by contractual limitations, does not destroy or erode that authority. Arbitrators have recognized that the mere existence of a traditional way of operating does not establish a vested right in employees that that method be maintained. See, for example, Elkouri & Elkouri, *How Arbitration Works* 726-27 (M. Volz & E. Goggin eds. 5th ed. 1997).

In reaching this result, I have paid some but not a great deal of attention to the unsuccessful effort by the Union to incorporate express service requirements for promotions into the contract during the 2001 negotiations. Such attempts sometimes reveal parties' current understandings about a contract's terms. But they may just be precautionary. In this instance I believe there is stronger evidence on which to rely.

My conclusion here is independent of, but confirmed by, the arbitration decisions in Employer and Union, Gr. No. XX-XX (St. Antoine 1996) (J-8), and Employer and Union, Gr. No. X-XX (Grissom 1997) (J-9). It is true those cases dealt with the cutoff dates for determining eligibility rather than the qualification standards themselves. Both Arbitrator Grissom and I accepted the general principle that the Civil Service Board has the "authority ... to set 'service requirements' for promotional examinations" (J-8, p. 11; see also J-9, p. 9). The rulings on cutoff dates were simply particular applications of that general principle.

Nothing said here is intended to say anything about the soundness or unsoundness of the Grand Rapid Civil Service Board's decision to reduce the service requirements for promotions from 2 ½ years to 2 years. I am merely ruling on the Board's authority to act as it did. In light of the Union's suggestion that this ruling means the Board could even reduce the service requirement to three months (U. Br., p. 16), however, I should emphasize that such a question is not before me. Without passing on the issue, I may at least suggest that collective bargaining

agreements may, even without explicit language, foreclose arbitrary and capricious actions by the contracting parties, especially when the pubic interest in the safe and efficient operation of security forces is at stake.

AWARD

The grievances are denied. The Employer did not violate the parties' 1997-2001 Agreement when the Civil Service Board reduced the service requirements for promotions to Battalion Fire Chief and Fire Captain.

THEODORE J. ST ANTOINE

Arbitrator

October 14, 2002