

**Grissom #4**

**VOLUNTARY LABOR ARBITRATION**

IN THE MATTER OF THE ARBITRATION BETWEEN:

EMPLOYER

AND

UNION

GR: Promotions

**ARBITRATION OPINION AND AWARD**

David W. Grissom

Arbitrator

December 16, 1997

This Arbitration took place on August 26, 1997 at Employer Hall in Grand Rapids, Michigan. The Hearing was concluded on the above noted date. Pursuant to the receipt of Post-Hearing Briefs, this Arbitration Opinion and Award is rendered.

**FACTS**

This grievance arises from a Civil Service Examination Announcement posted by the Civil Service Board on January 14, 1997 regarding the position of Battalion Fire Chief and the Board's subsequent action on February 11, 1997 in extending the eligibility cutoff date from February 13, 1997 to February 17, 1997 thereby allowing Captain Person 1 February 19, 1997, to take the examination. The facts leading to this Union Initiated grievance filed on are not in dispute as set forth below.

The January 14, 1997 Announcement stated that "Applications will be accepted until

February 13, 1997 for the following position: Battalion Fire Chief (Joint Exhibit #2). The Announcement further denoted that the "Qualification Requirements" were "Two and a half or more years as a Fire Captain in fire suppression." Three (3) applicants, including Captain Person 1, were subsequently declared ineligible to sit for the examination on the grounds that they had not completed the required 21/2 years of service as a Fire Captain in fire suppression (Union Exhibit #10). It is undisputed that Captain Person 1, having been promoted to Fire Captain on August 17, 1994, was four (4) days short in meeting the above cited 21/2-year requirement but as he asserted to the Union and in a letter to the Civil Service Board on January 23, 1997, he would have the necessary two (2) years in by February 17, 1997 (Joint Exhibit #3). Again, the cutoff date for applications was February 13, 1997.

Captain Person 1's query to the Union for information regarding previous application periods (Union Exhibit #1) in conjunction with a request for assistance in either changing the posting requirements or the time necessary to accumulate service qualifications, was met with advice contrary to his position. In a letter dated January 30, 1997, Union Secretary Person 2 stated that the posting period had been thirty (30) days since 1994 and inferred that there could be no exceptions (Union Exhibit #2). In a February 11, 1997 letter to Human Resources/Chief Civil Service Examiner Person 3, Person 2 solidified the Union's stance (thirty (30) day posting period) in the following terms (Joint Exhibit #4):

Person 1 appeared before the Executive Board of Union on February 10, 1997 to request consideration as to changing the current method. After much discussion and revisiting the 1995 Captain's Case our Board directed that all promotional issues be addressed at the upcoming bargaining of the Contract this spring. The decision was made that no exceptions be made.

I am therefore informing you once again of the Grand Rapids Fire Fighters Union Executive Board's decision that the practice of calculating the service requirements for promotional exams be met by the closing date of the 30 day posting period. This continues to represent a consistent practice for all levels of the promotional process and

we are advising you that there be no changes at this time.

In the meantime, Fire Chief Person 4 urged Mr. Person 3 to re-open the posting period to permit Captain Person 1 to take the examination since he was only four (4) days short of the 21/2-year service requirement. His stated reason was that he was in favor of increasing the eligibility pool for Battalion Chief (see letter dated January 28, 1997 – Joint Exhibit #4).

On February 11, 1997, Captain Person 1 presented his case before the Civil Service Board which was opposed by the Union, the upshot of which was that the Board voted to extend the cutoff date for eligibility for the Battalion Chief promotional examination from February 13, 1997 to February 17, 1997, thereby allowing Captain Person 1 to test (Joint Exhibit #6). Ergo, a "Corrected Posting" resulted indicating that the "Closing Date (was) extended" and that "Applications will be accepted until February 17, 1997" for the position of Battalion Chief (Joint Exhibit #2). As such, Captain Person 1 sat for the examination.

On February 19, 1997, the Union filed the instant grievance in the following terms (Joint Exhibit #2):

**Grievance #: XX-XX**

**February 19, 1997**

**STATEMENT OF FACTS:**

On February 11, 1997, the Civil Service Board violated the Union labor agreement and practice of having one (1) posting of thirty (30) days for a promotional exam. This was done when the Employer created a 2nd posting of 5 days for the promotional exam of Battalion chief. This posting enabled one extra individual to meet the requirements for an exam, which, seven (7) legitimate candidates were already on the list from the first thirty (30) day posting.

**REMEDY:**

Rescind the second posting to comply with one (1) thirty (30) day posting agreement. Also, remove Cpt. Person 1 from the eligible list for taking the Battalion Chiefs exam.

The grievance alleges violations of Article 12, Section 2.A of the collective bargaining

Agreement on Promotion and Voluntary Demotions as well as Article 30 on Maintenance of Standards and Articles 32 and 33 on Supplemental Agreements and Validity respectively.

Labor Relations Manager Person 5 Answered the grievance on March 7, 1997, in pertinent part, denoting that the same facts and arguments were made in a previous grievance (No. 00-00) and that in the Arbitration resulting there from, it was determined that no clear and consistent practice existed regarding the posting for promotional exams. Person 5 further contended that nothing had changed since the April 18, 1996 Arbitration Award was issued by Arbitrator Theodore J. St. Antoine and that consistent with that ruling, the Civil Service Board maintains the authority to set cutoff dates and had properly exercised that authority in the Person 1 situation. This grievance Answer is set forth below in its entirety (Joint Exhibit #2).

GRIEVANCE NO: XX-XX

DATE GRIEVANCE RECEIVED: 2-19-97

EMPLOYEE'S NAME: Union Initiated

EMPLOYEE'S CLASSIFICATION:

ENGINE HOUSE:

REPLY: This grievance alleges violations of Article 30, 32, 33, and 12, §2A based on a Civil Service Board (CSB) decision on February 11, 1997. At that meeting the CSB approved Captain Person 1's request to extend the sign-up time for a promotional examination. The Union grievance calls this a "second posting" and seeks as a remedy removing Captain Person 1 from the list of those eligible to take the promotional exam. The Union also references a thirty-day posting agreement. The second step meeting on this grievance was held by telephone on March 6, 1997.

The facts and arguments here are almost identical to grievance #00-00. In that case the CSB allowed individuals to sign up for a promotional exam after those persons appealed to the CSB to extend the time limit for eligibility. In the instant grievance the Employer and the Union did not discuss agreeing on an extension of the time limits. Captain Person 1 made his request directly to the CSB.

The CSB heard arguments from Captain Person 1 and from Union representatives on February 11, 1997. The CSB granted Captain Person 1's request. The Union argues that

this action violates the above contractual provisions, past practice, and the thirty-day "agreements." The arbitrator in grievance #00-00 addressed these same arguments. The arbitrator ruled no clear and consistent practice exists regarding the posting for promotional exams. The arbitrator concluded the following:

"the Civil Service Board has the authority, under the parties agreement promotional examinations, including the cutoff dates for determining whether individual candidates meet those requirements" (emphasis added).

Nothing since the decision in grievance #00-00 has changed the authority of the CSB. The CSB had the authority to set cutoff dates and exercised that authority in the instant grievance. Unlike the situation in grievance #00-00, this grievance does not involve other candidates prejudiced by the CSB's action.

The cited contractual provisions have not been violated. The CSB did not ignore a past practice or thirty-day agreement and acted within its recognized authority. The grievance is denied.

3-7-97  
DATE

Person 5  
LABOR RELATIONS MANAGER

This grievance (No. XX-XX) having been denied up through the Grievance Procedure, was brought on for Arbitration on August 26, 1997.

#### PERTINENT CONTRACT LANGUAGE

#### 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 of 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 July 1, 1991.

## ARTICLE 10. 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 32. SUPPLEMENTAL AGREEMENTS

### SECTION 1.

All supplemental agreements modifying this Agreement are subject to approval by the duly authorized representative of Union of the Union and the Employer. All supplemental agreements shall be in writing.

## ARTICLE 33. VALIDITY

### SECTION 1.

The provisions of this Agreement shall supersede any existing rules and regulations of the Employer and/or any of its Boards or agencies which may 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 Employer, 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.

## ISSUE

Whether the Employer violated the collective bargaining Agreement and/or a binding past practice when the Civil Service Board under its auspices, extended the eligibility deadline from February 13, 1997 to February 17, 1997, thereby allowing Captain Person 1 to test for the Battalion Chiefs examination?

## DISCUSSION

The first order of business in this dispute involves a review of Article 12, Section 2 of the collective bargaining Agreement on Promotion and Voluntary Demotions (Joint Exhibit #1). Under Subsection A., it is stated that "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." Further, under Subsection B., "A validated examination shall be administered under the supervision of the Civil Service Board" and at Subsection D., the following pronouncement is made: "Except as otherwise specified above, the provisions of the Civil Service Board rules and regulations shall apply to the promotional procedure. . . ." Thus, under Article 12, Section 2, the Civil Service Board maintains wide authority to set the parameters of promotional exams and to determine "service requirements" under its ruling-making powers. This constitutes the indispensable and pivotal element in this dispute.

There is no language in the Contract which specifies a posting period for promotional examinations. However, it is the position of the Union that although prior to late 1994 when varying periods existed during which an employee could apply for examination from the date of Announcement (Union Exhibit #4), the parties agreed as of December 15, 1994 to a thirty (30) day application period. On that date, Union President Person 6 transmitted a letter to Human

Resources Director/Chief Civil Service Examiner Person 3 stating that "For now, our understanding is that all Fire Department promotional examinations shall (emphasis in letter) have a 30 calendar day posting from announcement date to date of closing acceptance of applications" (Union Exhibit #3). Person 6 testified that all postings have been thirty (30) days since at least December 1995. He went on to state that what the Civil Service Board actually did on February 11, 1997 in the Person 1 situation was to create a "second posting" of five (5) days to "capture" that bargaining unit member only. According to President Person 6, the singular exception to the "thirty (30) day practice", related to the Battalion Chiefs examination "carved out" for Captain Person 1 for a period of less than thirty (30) days.

In this record are five (5) postings which followed the December 15, 1994 Person 6 letter citing a thirty-day (30) "agreement" with the Employer (Union Exhibit #2). All such postings are for thirty (30) calendar days. The same relates to postings in 1996 and 1997 (Union Exhibit #11). On cross-examination, President Person 6 acknowledged that there was no written agreement between the parties on the subject of a thirty (30) day posting period.

The bottom line in the Union's position and President Person 6's averments was that a "thirty (30) day" past practice existed prior to and beyond the St. Antoine Arbitration Award (April 18, 1996) which bound the parties and elevated that practice to the level of Contract language which when breached by the Civil Service Board on February 11, 1997, violated the collective bargaining Agreement.

Human Resources Director/Chief Civil Service Examiner Person 3 testified on behalf of the Employer. He advised that after Captain Person 1 applied on January 3, 1997 to take the Battalion Chiefs examination and ultimately addressed the Civil Service Board regarding his service period (four (4) days short), the Board "corrected" the original posting, thereby extending

the closing date from February 13 to February 17, 1997. He pointed out that this was not a new posting for a five (5) day period as the Union has asserted and that the original posting was not cancelled by that body.

The undersigned Arbitrator has already determined that under Article 12, Section 2 of the Contract, the Civil Service Board maintains wide discretion to set service requirements and to supervise, administer and otherwise specify examination parameters under its ruling-making authority. As a corollary to this finding, it is further concluded from a study of the subject "Corrected Posting", that it was indeed an extension of the original posting as per the statement thereon - "Closing Date Extended" (Joint Exhibit #2). Thus, pursuant to a reading of the Announcement language which states that "Applications will be accepted until February 17, 1997. . . .", the posting is in essence for thirty-five (35) days. Both of the above specified rulings support the position of the Employer.

The major point in the Employer's argument is that the subject matter of the instant dispute has already been ruled upon in the matter of the Arbitration between the parties in Grievance No. 00-00 - GR: Promotion Examination - Fire Captain (Joint Exhibit #9). This Award, issued by Arbitrator St. Antoine on April 18, 1996, addressed a similar situation where the Civil Service Board allowed two (2) applicants to test for Captain who did not have the required 21/2 years of service as Lieutenant as of the closing date for accepting applications but who would meet that requirement prior to the examination date. Precisely the same Contract language was considered by Arbitrator St. Antoine in Gr. No. 00-00. Arbitrator St. Antoine opined as follows on page 11:

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.

As already emphasized, the undersigned Arbitrator concurs with Arbitrator St. Antoine's assessment. In ultimate disposition, he remanded the matter back to the Civil Service Board because, though he had concluded that the Board acted within its authority, the result was undue surprise or disadvantage to affected employees. It is the Employer's position that the St. Antoine Award is final and binding upon the parties on the issue at hand. The undersigned Arbitrator agrees principally on the grounds that the Board's authority under Article 12, Section 2 is clear and unambiguous and in this circumstance, the past practice concept is inapplicable and does not come into play for the purpose of giving some other meaning to the Contract language, Phelps Dodge Copper Products Corp., 16 LA 229 (Justin, 1951).

Further, as a factual proposition, the Civil Service Board's decision on February 11, 1997, impacted on no employees other than Captain Person 1 thereby fully deflecting elements such as surprise and disadvantage. Correspondingly, the agreement between the parties to make promotional postings thirty (30) days and not less, is not a part of the collective bargaining Agreement or otherwise in writing and in any event does not serve to override the Civil Service Board's authority under Article 12, Section 2 of the Contract. Here, the Board extended the cutoff date from February 13 to February 17, 1997, action within its authority under the above cited language supported by Arbitrator St. Antoine in his Award on Gr. No. 23-95 where the Board essentially did the same thing.

It is also noted that notwithstanding the Union's assertion that an agreement on the posting period was in place as of December 15, 1994, the facts show that pursuant to the September 12, 1995 posting in Gr. No. 00-00, no such agreement was evident and the Board went ahead to extend the cutoff date for the promotional examination to Fire Captain with subsequent arbitral approval by Arbitrator St. Antoine. It is also observed that though Arbitrator

St. Antoine did not rule until April 18, 1996, still no past practice was found.

It is well established that the burden is upon the Union in Contract interpretation cases, to prove by the preponderance of the evidence that a violation of the collective bargaining Agreement exists, Reynolds Metals, 62 LA 695 (Volt, 1974). It is concluded here that the Union has been unable to meet that burden of proof.

It is determined that under Article 12, Section 2.A and D of the Contract and in accordance with the St. Antoine Award, the Civil Service Board maintained the authority to extend the cutoff date relative to the promotional posting for the subject Battalion Chiefs examination. That posting was not less than thirty (30) days. The Union's past practice contentions are not adopted. As such, the ultimate finding here is that the Civil Service Board did not violate the collective bargaining Agreement by extending the eligibility deadline at issue from February 13, 1997 to February 17, 1997 thereby allowing Captain Person 1 to test. No Contract violation is found. The grievance is denied.

## **AWARD**

No Contract violation is found. The grievance is denied.

David W. Grissom

Arbitrator

December 16, 1997.