

**McCormick #3**

**VOLUNTARY LABOR ARBITRATION**

In the Matter of the Arbitration Between:

UNION

-AND-

EMPLOYER

GR: Long Term Acting Assignment

**OPINION AND AWARD**

A hearing in the above captioned matter was held before the undersigned Arbitrator, Robert A. McCormick, on April 27, 1993 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 the way in which it made a Long Term Acting Assignment?

## **RELEVANT CONTRACT PROVISIONS:**

### **ARTICLE 16. NEW AND CHANGED JOBS**

#### **SECTION 1**

- A. Existing classifications and job descriptions may be amended during the life of the Agreement in a manner consistent with Civil Service Board rules for the maintenance of the classification plan.
- B. The parties will negotiate as to whether a new and/or changed job should be in or out of the bargaining unit. Disputes as to whether a new or changed job should be in or out of the bargaining unit shall be resolved by the Michigan Employment Relations Commission in accordance with their applicable administrative procedure.
- C. The parties will negotiate as to the salary range for all new and/or changed jobs determined to be included in the bargaining unit.

### **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 (30) 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.
- C. When the promotional examination procedure of the Civil Service Board results in the establishment of a new eligible list, existing acting assignments shall remain in effect as required if promotions are contemplated within thirty (30) days following the establishment of the new list. Thereafter, existing acting assignments shall be terminated and any continuing need of acting assignment will be met utilizing the new eligible list.

## **INTRODUCTION:**

On July 30, 1992, Fire Chief Person 1 of the Employer Fire Department (herein, "the Employer" or "the Department") issued a memorandum to all Departmental members

announcing that Person 2, Fire Captain - Building Maintenance, would soon be retiring.<sup>1</sup> The memorandum also solicited applications from any eligible employee who wished to be considered for a Long Term Acting Assignment to the position Mr. Person 2 was vacating.

The Employer Fire Fighters, Union (herein, "the Union") argues that the Employer was obligated by the contract to make the Long Term Acting Assignment from a promotional eligibility list created in 1986 for the position of Fire Maintenance Supervisor. The Employer, on the other hand, argues that the position of Fire Captain - Building Maintenance was a new position and that no promotional eligibility list for that position existed from which to make the Long, Term Acting Assignment. The Employer argues that it was accordingly within its managerial rights in soliciting applications for the Long Term Acting Assignment from all eligible members of the Department.

## **FACTS:**

The facts of this case are not sharply disputed. The prior collective bargaining contract between the Parties provided for the job classification of Fire Maintenance Supervisor.<sup>2</sup> Person 3, a Fire Equipment Operator and President of the Union, identified a September 4, 1986 Civil Service Board notice announcing a promotional examination for that position.<sup>3</sup> Thereafter, the promotional examination was administered and an eligibility list was created<sup>4</sup> in accordance with the then-existing contract. Under that contract, the Department was required to fill the available position from among the three highest qualifying candidates on the eligibility list.<sup>5</sup> Those three candidates were Person 4, Person 5 and Person 2. Mr. Person 2 was selected by the Fire Chief to fill the Fire Maintenance Supervisor position.

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<sup>1</sup> Joint exhibit 8

<sup>2</sup> Joint exhibit 3

<sup>3</sup> Joint exhibit 4

<sup>4</sup> Joint exhibit 5

<sup>5</sup> Ranking on the promotional eligibility list was based upon a combination of test score and seniority.

Mr. Person 3 also identified the job description for the position of Fire Maintenance Supervisor.<sup>6</sup> According to Mr. Person 3, the Fire Maintenance Supervisor was responsible for maintaining the fire station buildings. In that capacity, the Fire Maintenance Supervisor either performed the maintenance work himself, delegated the work to other fire fighters or, when necessary, sought bids from outside contractors to perform the work. Mr. Person 3 testified that a number of fire fighters at the Bridge Street Station had skills or interests in maintenance work such as welding, small engine repair or carpentry and that such employees were often selected by the Fire Maintenance Supervisor to perform maintenance work on the facilities and were paid additional compensation to perform such work. The Fire Maintenance Supervisor earned a salary between that of a Lieutenant and a Captain.

Under that prior contract, another officer, the Fire Apparatus Inspector, had responsibility for maintaining the vehicles, fire apparatus, tools and equipment in the Department. The Fire Apparatus Inspector held the rank and pay grade of Fire Equipment Operator.

Chief Person 1 testified that in the late 1980s he determined that certain changes in the organization of the Department were necessary. As a result, he said, he initiated a request under the contract to change several job descriptions. He recalled consulting with the Human Resources Director and developing new job descriptions for four positions: Fire Captain - Building Maintenance, Fire Captain - Fleet Maintenance, Fire Captain - Fire Prevention and Fire Captain - Public Education. He also concluded, he said, that the positions of Fire Captain - Building Maintenance and Fire Captain - Fleet Maintenance should carry the rank and pay earned by a Captain so that the position would carry more management control than it had

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<sup>6</sup> Joint exhibit 6.

<sup>7</sup> Joint exhibit 7.

previously held. Subsequently, the Parties negotiated the new classification into the collective bargaining contract.

Mr. Person 3 served as Vice-President of the Union in 1988-89 and recalled the negotiations between the Employer and the Union leading to these new job classifications. He testified that the positions of Fire Captain - Building Maintenance and Fire Captain - Fleet Maintenance were created, in essence, to replace the former positions of Fire Maintenance Supervisor and Fire Apparatus Inspector. The salary of both positions was increased to that of a Captain, Mr. Person 3 recalled, in order to reflect the increased responsibilities of the two positions and to attract additional employees in to fire suppression careers. According to Mr. Person 3, the salary of the Fire Captain - Fleet Maintenance was increased some \$6000. The Fire Captain, - Building Maintenance also received a pay increase to that of Captain and was assigned more active management role in fire administration.<sup>8</sup>

Person 6, Human Resources Director for the Employer, also serves as Chief Examiner to the Civil Service Board. Mr. Person 6 testified after the position of Fire Captain – Building Maintenance was created, a disagreement arose as to how the position would be filled. Under normal circumstances, Mr. Person 6 stated, a new or changed job would be posted for eligible employees, including incumbents, to compete. In this instance, however, the Parties agreed through discussions and correspondence, that Mr. Person 2 would remain in the newly created position at the new rate of pay.<sup>9</sup> Thereafter, the new job description for the position of Fire Captain - Building Maintenance was forwarded to the Civil Service Board for incorporation into the Board's classification plan. The job classification number assigned to this position by the

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<sup>8</sup> Two other positions , Fire Captain- Fire Prevention and Fire Captain- Public Education were also created.

<sup>9</sup> Joint exhibits 13 and 14.

Civil Service Board - #214 - remained the same as the number that had been assigned to the Fire Maintenance Supervisor.

Chief Person 1 testified that when Mr. Person 2 retired, he concluded that the list for Fire Maintenance Supervisor was no longer available and that, accordingly, there was no current or previous list. On July 30, 1992, Chief Person 1 issued the above-described memorandum announcing Person 2's retirement.<sup>10</sup> That memorandum also stated, in relevant part,

In the absence of an existing or previous eligible list for this position, any interested person in the eligible class for this position who would like to be assigned to that position during the pendency of the Civil Service testing and certification process, should notice me in writing of their interest.<sup>11</sup>

After the issuance of this memorandum, the Union lodged the grievance giving rise to this arbitration.<sup>12</sup> Mr. Person 3 testified that the grievance was lodged because a promotional list for the Fire Maintenance Supervisor position had been created in 1986 with two employees remaining on the list. In the Union's view, the position of Fire Maintenance Supervisor did not change other than in compensation and job title and, consequently, one of the two candidates remaining on the list should have been selected for the long term acting assignment. According to Mr. Person 3, both Officers Person 4 and Person 5 were interested in the position. On August 27, 1992, however, Chief Person 1 announced that the Long Term Acting Assignment of the Fire Captain - Building Maintenance had been awarded to Equipment Operator Person 7.<sup>13</sup>

On August 13, 1992 and on November 18, 1992, the Civil Service Board announced a promotional examination for the position of Fire Captain - Building Maintenance.<sup>14</sup> On February 10, 1993, the Civil Service Board announced its promotional eligibility list from those candidates

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<sup>10</sup> Joint exhibit 8.

<sup>11</sup> id.

<sup>12</sup> Joint exhibit 1.

<sup>13</sup> Joint Exhibit 10.

<sup>14</sup> Joint exhibits 9 and 10. The second notice was posted because the first notice was not posted in two fire stations.

who had taken the exam.<sup>15</sup> Of the candidates, only Mr. Person 7 and Mr. Person 4 passed the exam. Under the current contract between the Parties, Mr. Person 3 stated, the top three candidates are the three most senior officers who pass the examination. The Fire Chief continues to retain the authority to select one of those candidates. In this case, Mr. Person 7 was awarded the position on a permanent basis.

Mr. Person 3 acknowledged that, in the Union's view, the Fire Chief could not have utilized the 1986 Fire Maintenance Supervisor eligibility list in recommending a promotion to the rank of Fire Captain - Building Maintenance because the list had expired and that when the Parties negotiate a new position with a new job description and a higher salary, the Fire Chief is obligated to announce the position. On the other hand, Mr. Person 3 articulated the Union's view that Article 45 required the Chief to select from the 1986 list in making the Long Term Acting Appointment.

Person 4, a fire fighter and a 23 year veteran of the Department, testified that he formerly served in the Bridge Street Station shop performing virtually all work performed there: wood work, welding, small engine repair and sewing. He was supervised by Person 2. According to Mr. Person 4 there were no changes in Mr. Person 2's job functions between his roles as Fire Maintenance Supervisor and Fire Captain -Building Maintenance.

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

## **DISCUSSION:**

The controversy in this case may be simply stated. Did the Employer violate the contract by soliciting and considering applications for the Long Term Acting Assignment from all

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<sup>15</sup> Joint exhibit 11.

eligible employees or, on the contrary, was it required to select from among the two remaining officers on the 1968 Fire Maintenance Supervisor promotion eligibility list? For the following reasons, the Arbitrator has concluded that the Employer was within its rights and did not breach the contract by proceeding as it did to fill the assignment.

Article 45, Section 1 of the contract governs Long Term • Acting Assignments. That provision states that

"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 within fifteen days of the onset of the vacancy.

The Union, for its part, argues that the positions of Fire Maintenance Supervisor and Fire Captain - Building Maintenance are essentially the same and that, accordingly, the Employer was obligated to fill the Long Term Acting Assignment through an eligibility list. Inasmuch as there was no existing eligibility list, they argue, the Employer was required to make the appointment from among the three senior employees on the most recent eligibility list.

The Union's argument, however, fails for several reasons. First, their assertion begs the question of what "lists" the contract is referring to in Article 45. In the opinion of the Arbitrator, the contractual reference to "existing eligible lists or most recent eligible lists" is to eligibility lists for the permanent position for which the Long Term Acting Assignment is being made. In this case, of course, there was no eligibility list for the position of Fire Captain - Building Maintenance -the permanent position for which the assignment was being made. Thus, Chief Person 1's conclusion that there was no Fire Captain -Building Maintenance eligibility list from which to select, was accurate.

In order to prevail in this matter, then, the Union would have to establish that the positions of Fire Maintenance Supervisor and Fire Captain - Building Maintenance were one and

the same or so similar that the Employer should substitute one job classification and title for another in implementing Article 45. The Union notes that the job descriptions for the positions are similar and it especially underscores Mr. Person 4's testimony that the day-to-day functions performed by Mr. Person 2 did not change upon the change in his title. Finally, they note, the Civil Service Board designation - #214 - was carried over from one job to the next.

On the other hand, the new classification of Fire Captain - Building Maintenance was created through collective bargaining during which the Parties agreed that the status and authority of the position should be enhanced. That impetus to substantially upgrade the position was accomplished by according it the rank and compensation of Captain. Moreover, Mr. Person 3 conceded that the positions were sufficiently different that the Employer would be prohibited by the contract, from permanently appointing a Fire Captain - Building Maintenance employee from the 1968 list, thereby avoiding its obligation to post such an available permanent position.

The Union also notes that Mr. Person 2 assumed the position of Fire Captain - Building Maintenance from his former assignment as Fire Maintenance Supervisor without the position being posted for bid, suggesting that the two positions were one and the same. As regards this transition, however, Mr. Person 6 persuasively testified that, under normal circumstances, Mr. Person 2 would not have automatically have been appointed to the position and, instead, that the new position would have to have been posted for eligible employees. In the opinion of the Arbitrator, this evidence that Mr. Person 2's appointment to the position of Fire Captain - Building Maintenance was accomplished only through the agreement of the Parties, further suggests that the Parties viewed the two positions as being distinct and different.

As with other newly created positions, the Civil Service Board announced and conducted a promotional eligibility exam for the position of Fire Captain - Building Maintenance and an

eligibility list was created. No doubt the results of that selection process disappointed Mr. Person 4 who had been one of the three top candidates on both the Fire Maintenance Supervisor list and the Fire Captain - Building Maintenance list and had not been selected on either occasion.

Nevertheless, the evidence persuades the Arbitrator that there was no "most recent eligibility list" for the position of Fire Captain - Building Maintenance in existence when Chief Person 1 announced the Long Term Acting Assignment opportunity. The Arbitrator is likewise persuaded that the positions of Fire Captain - Building Maintenance and Fire Maintenance Supervisor were sufficiently distinct that the Employer was not required to return to the 1986 Fire Maintenance Supervisor eligibility list to make the Long Term Acting Assignment.

**AWARD:**

For the foregoing reasons, the grievance is denied.

Robert A. McCormick

Arbitrator

July 13, 1993