MICHIGAN EMPLOYMENT RELATIONS COMMISSION

CASE NO. A10 B-0005

In the matter of the labor arbitration between

City 1

and

Union

GRIEVANCE NUMBER:	1-5-10
GRIEVANCE IDENTIFICATION:	Class Action-Posting
DATE OF GRIEVANCE:	January 5, 2010
DATE OF HEARING:	July 8, 2010
LOCATION OF HEARING:	City 1
DATE HEARING CLOSED:	July 8, 2010
DATE POST-HEARING BRIEFS FILED:	August 9, 2010
DATE RECORD CLOSED:	August 9, 2010
ARBITRATOR:	Richard N. Block

APPEARANCES:

For Union
- Union Attorney
- Union representative
- City Treasurer and Human Resources Manager

For City 1
- City 1 Attorney
- City Treasurer and Human Resources Manager
- Controller
- City Manager

ISSUE

Does the record establish that the City violated the collective bargaining agreement when it hired Individual 1 for the position of laborer on April 12, 2010? If so, what shall the remedy be?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 7
SENIORITY

. . .

Q. Job openings will be posted as follows:

(1) Job openings will be posted within the affected department as set forth in Exhibit A.

(2) If three or more qualified applicants submit applications from within the affected department, no further postings will be allowed and the opening will be filled from these applicants. If two or less qualified applicants apply for the position, the City has the right, but not the requirement, to proceed to the next step, which would be posting to all affected members of the bargaining unit.

(3) If three or more qualified applicants submit applications from the first two posting steps, no further postings will be allowed and the opening will be filled from these applicants. If two or less qualified applicants apply for the position, the City has the right, but not the requirement, to proceed to the next step, which would be posting to all other full-time employees of the City.

(4) If three or more qualified applicants submit applications from within the first three posting steps, no further postings will be allowed and the opening will be filled from these applicants. If two or less qualified applicants apply for the position, the City has the right, but not the requirement, to proceed to the next step, which would be posting the job to all other qualified individuals.

FACTS AND BACKGROUND

Various classifications of employees of the City 1 (hereinafter the City) are represented for collective purposes by Union. The City and the Union are parties to a collective bargaining agreement that was effective on July 1, 2009 and expires on June 30, 2012 (Jt. Ex. 1). There are approximately 35 employees in the bargaining unit.

Toward the end of 2009, pursuant to Article 7.Q(3) of the collective bargaining agreement, the City posted within the bargaining unit a full-time vacancy in the Laborer classification in the Department of Public Works (DPW; Jt. Ex. 5). The City received applications from three bargaining unit members: Member 1 on December 9; Member 2 on December 10; and Member 3 on December 10 (Jt. Ex. 6). At the time, Member 1 was assigned to a half-time clerk position in the Recreation Department, Member 2 was a full-time employee in the Utility Department in the classification of Meter Reader, and Member 3 was a full-time employee in the Treasurer's Department in the classification of Account Clerk II (Jt. Ex. 22).

On Friday, December 11, the City offered Member 3 the laborer position. Upon being offered the position, Member 3 asked to discuss the position with Public Works Department Head. Member 3 then asked for the weekend to consider the offer. On Monday, December 14, Member 3 informed the appropriate City officials that he declined the offer. At that time, City Treasurer/Human Resources Director, on behalf of City Manager, asked Member 3 to withdraw his application in writing. Member 3 did so (Jt. Ex. 8).

On December 31, 2009, the City placed an advertisement in the local newspaper seeking applications for the position of Laborer in the Department of Public Works (Jt. Ex 7). The City placed this advertisement because it determined that it did not have three qualified applicants for the laborer position pursuant to Article 7.Q(3) of the collective bargaining agreement. On January 5, 2010, the Union filed a grievance alleging that the advertisement constituted an external posting in violation of Article 7.Q of the collective bargaining agreement, because three qualified bargaining unit employees had applied for the position (Jt. Ex. 2).

Despite the grievance, the City continued to consider non-bargaining unit applicants for the laborer position. Interviews were scheduled in January, 2010. Among the persons interviewed was Individual 1, who was not a member of the bargaining unit.

In early March, the City determined that it would hire Individual 1 for the laborer position. Also in early March, after the City had determined that it would offer the position to Individual 1, but prior to contacting him, Member 2 informed City Treasurer that she wished to withdraw her application for the laborer position. According to City Treasurer's testimony, Member 2 informed City Treasurer that she believed there was more security in the meter reader position than in the laborer position, as the City had recently instituted short-term layoffs among the laborers. The record establishes that when Member 2 withdrew her application, she could not have been aware that the City intended to offer the laborer position to Individual 1.

The City did not ask Member 2 to provide a written withdrawal. City Treasurer testified that the reason for this was that City Treasurer had not been offered the position.

On March 8 and March 9, the City informed Individual 1 that it wished to offer him the laborer position. The record establishes that Individual 1 was hired with a seniority date of April 12, 2010.

Concurrently with the procedure that resulted in hiring Individual 1, the parties continued to process the January 5, 2010 grievance. The parties were unable to resolve the grievance, and the instant arbitration resulted.

POSITIONS OF THE PARTIES

Position of the Union

The Union argues that the collective bargaining agreement is clear. If three or more qualified bargaining unit applicants apply for a posted position, the position must be filled from among those three applicants. As the applicants were all "qualified" for the position, only if all three applicants decline the position may the City go outside the bargaining unit to hire for the position.

The Union contends that any City argument that all three of the applicants must be "ready, willing, and able" to accept the position is without merit because the language of the collective bargaining agreement does not include these criteria. As these words do not appear in the contract, for the arbitrator to adopt the City's contention would amount to amending the collective bargaining agreement.

Any City contention that Member 3's application is less than genuine is without merit. Member 3 discussed the position in question with the individual who would be his supervisor and with his wife. City Treasurer also testified that there were

more promotional opportunities in the DPW position than in Member 1's current position.

The Union argues that the fact that the laborer classification involves outdoor work while Member 3's current position involves indoor work is irrelevant. The Union notes that there is nothing in the contract that permits a qualitative determination of an applicant's sincerity in applying for a position.

The Union notes that the City bargained only for three applicants. It did not also bargain for a guarantee that all three applicants would accept the position, if it was offered.

Overall, the Union argues that the language of the collective bargaining agreement is clear. Three bargaining unit members were qualified applicants for the laborer vacancy in the DPW. The Employer must hire one of those three applicants. Accordingly, the Union requests that the grievance be sustained, that Member 1 be awarded the position for which she applied, and that she be made whole retroactive to April 12, 2010, the hire date of Individual 1.

Position of the City

The City contends that the history of the negotiations over the provision in question shows that, since 1990, the Union has attempted to require the City to hire only bargaining unit employees for job vacancies. The City, for its part, desires to have the option to hire the best qualified employee for a vacancy.

The City notes that the Union was unsuccessful in obtaining what it desired. The provision in question requires the City to hire from the bargaining unit for a vacancy only

if there are three "qualified" applicants from the bargaining unit. Otherwise, the City may hire from outside the bargaining unit.

The City contends that two of the three bargaining unit applicants for the laborer position in question were not "qualified" for the position because they were not ready, willing, and able to take the position. The City notes that Member 3 currently works indoors in the utility office at a wage rate of $17.94 per hour. The laborer position that was posted requires physical labor outdoors in all weather at a wage rate of $16.93 per hour. The City contends that under those circumstances, it would be expected that Member 3 would have declined the job offer. The City also notes that Member 2 is a meter reader at a wage rate of $17.35 per hour. Her job, which involves walking a route, is much less physically taxing than the laborer position.

The City argues that the Union is attempting to obtain in arbitration what it could not obtain in negotiations by trying to "game" the system. The Union wishes to attempt to force the City to hire the sole remaining bargaining unit applicant.

Based on the foregoing, neither Member 3 nor Member 2 was "qualified" for the laborer position because they were not ready, willing, and able to accept the laborer position. As such, the City did not have three "qualified" applicants for the position and had the right to fill the vacancy from outside the bargaining unit.

DISCUSSION

The parties agree that this case is governed by Article 7.Q(3), which requires the City to hire from within the bargaining unit applicant pool for the laborer position if the internal posting generated three qualified applicants. The Union contends that Member 3

Member 2 and Member 1 were all qualified applicants. The City claims that Member 3 and Member 2 were not qualified applicants because they were not "ready, willing, and able" to take on the responsibilities of the laborer classification.

General Considerations

The Union's grievance contends that the December 31, 2009 advertisement violated the collective bargaining agreement because, on the date the advertisement was published, the City had three qualified applicants: Members 1, 2, and 3. Article 7.Q(3) prohibits the posting of a position if three qualified bargaining unit members have applied for the position. Therefore, I find merit in the Union's contention that the advertisement constituted a prohibited posting of the position, provided that the record establishes that Members 1, 2, and 3 were all qualified for the laborer position.

Thus, a key question in the case is whether Members 1, 2, and 3 were all qualified, within the meaning of Article 7.Q(3), for the laborer position. In considering the record regarding the qualifications of Members 1, 2, and 3 I note that the record establishes that the City used the criteria of "ready, willing, and able" to determine that Member 3 was unqualified for the laborer position, and that it used similar criteria to determine that Member 2 was unqualified for the laborer position. This finding is based on the City's observations that Members 2 and 3 would have been required to accept a wage reduction if either accepted the laborer position and because the working conditions of the laborer position might be considered inferior to the working conditions in their current positions. The

Union contends that the criteria of "ready, willing, and able" are not appropriate to consider in evaluating whether an applicant is "qualified" pursuant to Article 7.Q(3).

I find merit in this Union contention, as the City is arguing that an applicant, prior to an interview, must be willing to take a posted job as a condition of being determined to be "qualified " under Article 7.Q(3). While, a "qualified applicant" must be "ready" and "able" to take a posted position, I disagree that an applicant must be "willing" to take a posted position prior to the interview in order to be determined to be "qualified" within the meaning of Article 7.Q(3). A "qualified" (bargaining unit) applicant is an applicant whose skills, experience, background, and employment situation at the time of application indicate that he or she is reasonably likely, based on the written job description and the applicant's resume, cover letter (if any), and other City knowledge of the applicant's experience, to be prepared to take the position within the time frame of the City's needs ("ready"), and possesses the skills and ability to competently perform the responsibilities of the position ("able"). Such an applicant, presumably, also has a fairly high probability of accepting the position, if offered.

Nevertheless, a subsequent interview could alter the views of the applicant when the applicant learns the details of the position and becomes acquainted with his or her potential supervisor, but these altered views do not make the applicant not "qualified" under Article 7.Q(3).[1] Even a bargaining unit applicant might not be fully familiar with the day-to-day responsibilities of a position in a department in which the applicant does not work or in a position to which the applicant is not assigned. Moreover, the views of an otherwise qualified applicant towards a position could change over time, due to a

[1] The job interview provides an opportunity for the applicant to learn more about the job than can be discerned from the posting, just as the interview provides the potential employer the opportunity to learn more about the applicant than can be learned from the applicant's resume and cover letter.

change in the applicant's personal circumstances or a change in factors associated with a position.[2] Thus, a decision by a bargaining unit applicant to decline a job offer, considered separately, does not make the applicant not "qualified" within the meaning of Article 7.Q(3).

Based on the foregoing, the award will now turn to a discussion of the qualifications of Members 1, 2, and 3. This award will examine the qualifications of each applicant, individually.

Qualifications of Members 3, 1, and 2

Member 3. I find it is unnecessary to determine whether Member 3 was "ready" and "able" to take the laborer position. I find the City's contention that he was not qualified for the laborer position without merit because the City offered Member 3 the laborer position on December 11, 2009. It is illogical to conclude that the City would offer the laborer position to Member 3 if it believed him unqualified. Although City officials may have been of the view that he would decline the position if offered, the City would have had the obligation to place him in the laborer position if he accepted.

I do not find that Member 3's withdrawal of his application changed his status to a non-applicant, leaving the City with only two (potentially qualified) bargaining unit applicants. The record is clear that the withdrawal of Member 3 was done at the request of the City so that the City could have documentation of the offer and non-acceptance in writing. This was an administrative action to record the result of the

[2] Such factors might include turnover in the supervisor position or a reorganization that changes promotional opportunities.

application process for the laborer position as it applied to Member 3. Under these circumstances, Member 3 was an applicant for the laborer position within the meaning of Article 7.Q(3) and continued in that status until the position was filled.

Member 1. Member 1's cover letter suggests that she has some experience performing outdoor labor of the type in the job description, indicating that she was qualified for the laborer position, within the meaning of Article 7.Q(3). Member 1's cover letter states that she has done construction work and outside maintenance work on rental property (Jt. Ex.6). Based on this evidence, this record establishes that she was qualified, within the meaning of Article 7.Q(3), for the laborer position.[3]

Member 2. Even disregarding the "willing" criterion urged by the City, the record does not establish that Member 2 was qualified for the laborer position, as the record does not establish that she is "able" to perform the responsibilities of the laborer position. Her application form indicates little or no experience with the outdoor physical work required in the laborer position. Although Member 2's current position of meter reader involves outdoor work, often in inclement weather, I find there is a substantial difference between the amount of physical effort required in the laborer position and the amount of physical effort required in the meter reader position. Unlike the record regarding Member 1, there is no evidence on the record that Member 2 is able to perform the essential duties and responsibilities of the position, possesses the desired

[3] This conclusion is based solely on the record in this case and should not be construed as an ultimate determination that Member 1 is qualified for a future vacancy in the laborer classification, based on a different record.

minimum qualifications and necessary skills and abilities for the position, or is able to meet the physical demands of the position.[4]

In reaching the conclusion that the record does not establish that Member 2 was qualified for the laborer position, I give no weight to Member 2's decision to withdraw her application or to the fact that the laborer position may be perceived as inferior to her current position. I also give no weight to the fact that Member 2 would be required to accept a salary reduction and (arguably) inferior working conditions in the laborer position. Basing my decision on those facts would be to consider the "willing" criterion improperly urged by the City. In addition, even if those facts were considered, the record indicates that overtime and long term promotional opportunities may be greater in the laborer position than in the meter reader position, suggesting that there are components to the laborer position that could be considered superior to the meter reader position.

Finding on Qualifications of Members 1, 2, and 3

As the Union bears the burden of proof in a contract interpretation case, I find that the Union has not demonstrated that the City had three qualified (bargaining unit) applicants when it posted the laborer position on December 31, 2009. The record does not establish that Member 2 was qualified for the laborer position. Therefore I must conclude that the record does not establish that the City's advertisement of the laborer vacancy on December 31, 2009 and the subsequent hiring of Individual 1 as a result of that posting violated the collective bargaining agreement.

[4] This conclusion is based solely on the record in this case and should not be construed as an ultimate determination that Member 2 is not qualified for a future vacancy in the laborer classification, based on a different record.

CONCLUSION

The record does not establish that the City violated the collective bargaining agreement when it hired Individual 1 for the position of laborer on April 12, 2010.

AWARD

The grievance is denied.

September 8, 2010

Richard N. Block
Arbitrator
East Lansing, Michigan