

McCormick #2

In the Matter of the Arbitration Between:

EMPLOYER

-AND-

UNION

Gr: Promotion Interviews

OPINION AND AWARD

A hearing in the above-captioned matter was held before the undersigned Arbitrator, Robert A. McCormick, on May 26, 1988 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

Was the method used by the Employer to interview candidates in violation of the collective bargaining agreement between the Parties?

RELEVANT CONTRACT PROVISIONS

ARTICLE IV. MANAGEMENT RIGHTS

Section 1.

Except as otherwise specifically provided herein, the Management of the Employer and [sic] the direction of the work force, including but not limited to the right to hire, the right to discipline or discharge for proper cause, the right to decide job qualifications for hiring, the right to lay off for lack of work or funds, the right to abolish positions, the right to make rules and regulations governing conduct and safety, the right to determine schedules of work, the right to subcontract work (when it is not feasible or economical

for the Employer employees to perform such work), together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management. Management, in exercising these functions, will not discriminate against any employee because of membership in the union.

ARTICLE XII. PROMOTION AND VOLUNTARY DEMOTIONS

Section 1.

In the competitive class, promotions to positions within the bargaining unit shall be made by appointment from the top three (3) persons on the eligible list. In the event the top standing eligible is not chosen, that person shall be afforded an opportunity to discuss the matter with the Fire Chief.

Section 2. Promotion Points.

- a. Written examinations shall be set at a maximum of 100 points.
 - (1) The examination of Fire Equipment Operator shall consist of sixty (60) points written and forty (40) points performance.
- b. Seniority shall be set at a maximum of fifteen (15) points. Seniority of all applicants shall continue to accumulate until the date of the examination.
- c. The combined written examination and seniority factor shall be set at 115 points maximum.
- d. Seniority shall be calculated on the basis of 1/12 point for each completed month of service in the eligible rank.
- e. A passing grade must be obtained on the written test before seniority point credits will be added. A passing grade for the Fire Equipment Operator examination shall be based on the combined written and performance score.

ARTICLE XXX. 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 workings 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.

BACKGROUND

On March 17, 1936, Person 1 was appointed Chief of the Employer Fire Department. Upon his arrival, Chief Person 1 instituted the procedure of interviewing final candidates for promotion to certain positions within the Department. Those positions included Fire Captain, Fire Lieutenant, Fire Marshall and Fire Prevention Inspector. For other positions such as equipment operator, or fire alarm operator, Chief Person 1 testified, no oral interviews were undertaken.

Retired Chief Person 2 testified that during his thirty-five years with the Department, prior to Chief Person 1's appointment, the unvarying practice in the Department had been to promote the candidate with the highest score, based upon examination and other criteria¹ and without interviews².

The central issue in this case is whether the practice of interviewing candidates, as a part of the promotional process, violates the agreement between the Parties.

FACTS

Chief Person 2 testified that during his employ he assisted in the negotiation of six collective bargaining contracts. Prior to 1977, he stated, promotions were based upon a written examination, an efficiency rating and seniority. A maximum of sixty points could be awarded for the written portion, forty points for the efficiency rating and ten points for seniority. The candidate with the highest score was awarded the position.

¹ Captain Person 2 testified that on one occasion in 1954, the Fire Chief recommended someone other than the highest scoring candidate, but that otherwise the top scoring candidate was awarded the available position at least up through 1977.

² Deputy Chief Person 5 testified that in 1963 certain candidates were interviewed for available positions. This, however, antedated the collective bargaining relationship by several years.

The efficiency rating aspect of the procedure, Chief Person 2 testified, was very unfavorably viewed by unit members.³ This assessment was reached because of their belief that subjectivity and favoritism played an overly significant role in the selection process. Captain Person 2 recalled that the Employer readily agreed that this factor was too subjective.

Accordingly, during the 1977 negotiations, Captain Person 2 testified, the Union sought and succeeded in removing reference to the Civil Service Rules from the contract and in eliminating the efficiency rating portion of the formula as well. Consequently, in succeeding contracts the following maximum weights were assigned the remaining promotional criteria: 100 points for the written exam and 15 points for seniority.

Lieutenant Person 3 testified that on December 2, 1986, at an officers' meeting, Chief Person 1 first announced that he would initiate the practice of interviewing candidates for promotion. Lieutenant Person 3 recalled Chief Person 1 saying that the interviews would have great weight. Captain Person 4 corroborated this testimony.⁴

Chief Person 1 acknowledged having announced in December, 1986, that he would interview the top three candidates for certain positions and recalled stating that he was doing this in order to get to know the members of the Department. He told the assembled officers that he might not recommend the candidate ranking number or based on the contractual criteria, but he denied having said that the interviews would carry great weight.

The current promotion procedure is as follows: Job openings in the Fire Department are announced by the Civil Service Board through the Human Resources Department.⁵ Candidates make application for available positions at the Human Resources Department which is also responsible for administering the written exam. Thereafter, an eligibility list is created by

3. See Union exhibit 1.

4. A grievance filed by the Union regarding this announcement, Joint exhibit 2, was subsequently withdrawn.

5. See, e.g. Joint exhibit 5.

combining the examination score and seniority credit. Chief Person 1 stated that after he receives the eligibility list, he schedules interviews with the top three candidates for an opening. These interviews, Chief Person 1 testified, are conducted by him, together with Deputy Chiefs Person 5 and Person 6. Chief Person 1 testified that he created the questions asked during the interviews and stated that each candidate is asked the same questions. Oral interviews are conducted during the candidate's duty hours in the Fire Chief's office. The interviews for the position of the Fire Chief, Chief Person 1 stated, took forty-five minutes at the most. At the end of each interview, as well as at the conclusion of all interviews, Chief Person 1 recalled, he and Deputy Chiefs Person 5 and Person 6 discussed the candidates for approximately five to ten minutes.

Chief Person 1 testified that he took notes during these interviews. On May 17, 1987, the Attorney for the Union, Person 7, Esq., wrote to Chief Person 1 demanding, among other things, that the Union be provided a copy of the notes recorded during the interviews.⁶ Thereafter, Chief Person 1 testified, he retained all of the notes taken during the interviews and kept them, not in the candidate's personnel file, but in his personal possession.

Chief Person 1 testified that the oral interviews influenced his decisions as to which of the candidates he should recommend for available positions. According to Chief Person 1, fire officials must deal with the public and represent the Department. Therefore, in his view, an individual's ability to express himself and to be a good communicator are important factors in evaluating his ability to serve as Fire Captain.

Chief Person 1 testified that, among other things, he asked candidates why they thought they should be selected. He stated that he asked this question in order to obtain the candidates' assessment of their strengths and weaknesses. Chief Person 1 also recalled asking candidates

⁶Union exhibit 2. These notes were not made available to the Union until the date of hearing in this matter.

how they would address a hypothetical situation, given the fact that they would be a supervisor and a bargaining unit member at the same time. His purpose in delving into this area, Chief Person 1 stated, was to see whether a candidate had difficulty with this potential conflict, and if so, how these relationships might bear on his decision making. In part, Chief Person 1 testified, he interviewed candidates to know them better. He stated that he has passed over the candidate with the highest test score on two occasions out of approximately twenty promotions he has made.

Officer Person 8, an Equipment Operator and a thirteen year veteran of the Department, testified that he took the promotional exam for Lieutenant in the fall of 1987. He finished third in the scoring. In September or October of 1987 he underwent an oral interview. This interview was not described in the position announcement. Present at the oral interview were Chief Person 1 and Deputy Chiefs Person 5 and Person 6. Among the questions asked him during the thirty minute interview, Officer Person 8 recalled, was one regarding whether he saw a dilemma in his mutual loyalties to the Department and the Union.

Officer Person 8 testified that the two officers who earned higher scores than he did were subsequently promoted, thereby making him the number one candidate for promotion. Nevertheless, he stated, he was passed over for the next available position and another officer was promoted instead.

On January 24, 1988, Officer Person 8 recalled, he spoke with Deputy Chief Person 5 as to why he had not been selected. According to Officer Person 8, Deputy Chief Person 5 gave a variety of reasons and mentioned that the oral interview was one of the elements that resulted in his recommendation to Chief Connor that he not be selected. Officer Person 8 also testified that Chief Person 1 and Deputy Chief Person 6 told him that the decision was predominately based

on Deputy Chief Person 5's appraisal and recommendation.⁷

Deputy Chief Person 5 recalled speaking with Officer Person 8 after the decision. He denied having said that the interview influenced him, although he did remember telling Officer Person 8 that his answer to the question regarding his relative strengths and weaknesses was poor.

Captain Person 9 testified that he, too, was interviewed prior to his promotion to Fire Captain in November, 1986 and that he was not previously aware that there would be such an interview. During his interview, Captain Person 9 testified, he was asked, among other things, how he would order a work detail after 1600 hours.⁸

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

DISCUSSION

The context in which this grievance arises is highly significant. For many years the Department assigned substantial weight to the so-called efficiency rating in determining an individual's ranking on the promotion eligibility list. This ranking was all-important because, virtually invariably, the highest ranking candidate on the eligibility list received the desired promotion.

This efficiency rating component, however, engendered substantial unhappiness on the part of unit members who viewed it as a vehicle through which the subjective wishes of superior officers, and not the relative merits of the candidates, governed the promotional process. Indeed, given the efficiency rating criteria, including "Bearing and Demeanor" and "General

⁷ Officer Person 8 filed a grievance over this matter. In the instance grievance, however, the Union does not seek to post Officer Person 8 to the position he failed to obtain.

⁸ According to Captain Person 9, the contract provides that work details after 1600 hours are required only on an emergency basis.

Suitability",⁹ this concern appears to have been well founded.

The Employer, apparently, shared this assessment and, in 1977, the Parties eliminated the efficiency rating component. They determined, instead, to establish the eligibility list based upon the written examination and seniority points.

Consequently, when Chief Person 1, in December, 1986, unilaterally established the practice of interviewing the three top qualifiers from the eligibility list, the Union believed that the Employer was attempting to re-establish the discredited practice of invoking subjective considerations into the promotional process.

The Union's reaction was not without justification. Chief Person 1¹ notes taken during the interviews reveal that a number of open-ended questions, including, "Why should you be chosen?" and "What did you think of the written test?", are being routinely used to evaluate candidates.¹⁰ More disturbing are the questions regarding how the candidate would resolve a hypothetical conflict of loyalty to the Employer and the Union. This question is troublesome, of course, because of its potential of influencing Chief Person 1 to base his recommendation upon anti-Union considerations.

The issue in this case, however, is whether the interview process violates the collective bargaining agreement. As a general matter, in the absence of a contractual limitation, management has the right to promote and to determine the criteria upon which to make promotion.¹¹ Accordingly, despite the lack of clear reservation of the right to control promotions in the management rights clause, the Arbitrator has concluded that such a right is retained in the Employer except to the extent that is " specifically limited elsewhere in the contract.

⁹ Union exhibit 1.

¹⁰ Union exhibit 2.

¹¹ See, Elkouri and Elkouri, *How Arbitration Works*, (BNA, 4th Ed. at 563 and cases cited therein).

The contract between the Parties clearly calls for a two-step process in promoting candidates to command positions. First, an eligibility list is created based upon a written examination and seniority within the Department. The contract, in Article XII, Section 1 states that "promotions . . . shall be made by appointment from the top three (3) persons on the eligibility list." Accordingly, while the contract requires that the top-scoring candidate be one of the three persons considered for promotion, it also clearly envisions that the position may be awarded to someone other than the top-scoring candidate.¹²

The Union, in its brief to the Arbitrator, does not argue that the actual promotion of the highest scoring candidate constitutes a binding practice between the Parties. Instead, they argue, the practice of having the Fire Chief "recommend" the highest scoring candidate, being not described by the express provisions of the contract, has become a matter of binding practice.

In the opinion of the Arbitrator, the difficulty with the Union's position is this: If the Employer Manager has the discretion to select among the three highest scoring candidates, as the contract makes clear, on what basis can the Employer Manager exercise that discretion? Given the fact that the Employer Manager will likely have little or no expertise in fire fighting nor other evidence upon which to evaluate candidates, he or she will surely rely on the judgment of those in command positions who have observed the candidates and have formed a judgment regarding their relative capabilities. Reliance, then, on the judgment of the Fire Chief and his deputies would be natural and not unreasonable. If the Fire Chief, however, is bound by an established practice to recommend only the highest scoring candidate, where else may the Employer Manager turn for information on which to base his or her decision? If the Employer Manager

¹² Indeed, the ensuing sentence in Article XII, Section 1, guaranteeing to a disappointed top-scoring candidate a meeting with the Chief and an explanation for the decision, strongly supports this conclusion.

were to conduct an interview of the three candidates, objections of the variety lodged in this case - that personal bias and subjectivity would play an overly important role - would still be present, particularly given the Employer Manager's probable lack of expertise in the area. Reliance, instead, on rumor and general reputation would be similarly unsatisfactory.

The Union points out that the contract language and the bargaining history show that the written examination and the seniority credit are the only legitimate components of the promotion process. While it is true that they are the only permissible factors for establishing the eligibility list, the second step of the promotional process clearly permits the appointing authority to select from the top three candidates on the eligibility list and neither the contract nor the bargaining 1,/ history precludes the use of oral interviews in making the final selection. Thus, the Arbitrator has concluded that chief Person 1 did not breach the contract by undertaking interviews with final candidates for the positions in question.

As a final matter, however, the Union argues that even if Chief Person 1 possessed the right to create and administer oral interviews, the type of interview he has created violates the agreement between the parties. In support of this position, the Union looks to arbitral authority which holds that where management retains the authority to administer examinations, those examinations must be administered properly and must be fair, reasonable, and related to the requirements of the job. Here, the Union argues, the open ended, self-assessment nature of the questions asked during the interviews make them insufficiently job related to be valid.

The Arbitrator shares the view that, in general, fairness dictates that examinations be related to the requirements of the job for which the applicant is being tested. At the same time, in the matter at hand, the interviews were but one, albeit critical, aspect of selection process. The written exam, which the Arbitrator presumes is substantially more related to the technical aspects

of the positions, is, by a wide margin, the most significant factor in creating the eligibility list from which the three final candidates are selected. More importantly, the jobs for which Chief Person 1 has instituted these interviews are command and other highly visible appointments. The fact that the interviews are limited to candidates for these positions is important for two reasons: First, in an organization such as a fire department, it is particularly important that the Chief and his or her command officers be able to work together efficiently. Moreover, the jobs involved, by their nature, carry responsibilities which include communicating with the public as well as subordinate officers. In the opinion of the Arbitrator, these inherently subject qualities can be effectively evaluated through proper oral interviews. And, while the Arbitrator claims no expertise in judging the validity of particular testing techniques, it appears as though the questions asked by Chief Person 1, save one, are fair and reasonably related to the positions.

The exception to this is Chief Person 1's inquiry into how candidates would "handle" a potential conflict of interest between their dual loyalties to the Union and the Employer. The contract between the Parties permits persons in these positions to be members of the labor organization and at the same time to hold the positions in question. In the judgment of the Arbitrator, an officer's loyalty to the organization stands on an equal footing with his loyalty to the Employer. A candidate for promotion, particularly in an interview with superior officers, ought not to be put into 'the position of having to choose between these equally valid allegiances. Consequently, the Award in this matter orders the Employer to refrain from making inquiries as to how a candidate would choose among these loyalties during an interview.

While the Award denies the grievance in 'all -Other respects, the Arbitrator urges the Employer, through its Labor Relations Representatives and Fire Department Personnel, to discuss ways of improving the oral interview process So that the Employer's goal of ensuring the

highest quality officers might be furthered while the Parties' mutual concerns about the role of subjectivity and bias in the selection process might be lessened.

AWARD

The Employer shall refrain from inquiring of candidates how they would resolve potential conflicts of interest between their loyalties to the Employer and the Union. In all other respects the grievance is denied.

Robert A. McCormick

Dated: August 24, 1988 Detroit, Michigan