

**Wolkinson #3**

IN THE MATTER OF THE ARBITRATION BETWEEN  
EMPLOYER  
AND  
UNION

Arbitrator: Dr. Benjamin Wolkinson selected by the parties under the terms of their agreement.

On July 27, 1995 an arbitration hearing in the above matter was held in City A, Michigan. At the hearing the parties were given the full opportunity to present evidence, have witnesses testify, and to subject such witnesses to both direct and cross examination. The parties closed by submitting written briefs.

**BACKGROUND**

In May of 1994 the Employer in the Michigan Fire Service News solicited applications for the position of Fire Marshal. On April 20, 1995, the Employer posted an opening in the position of Fire Marshal and informed applicants that a successful candidate would have to take and 'pass a written examination. The posting indicated that dual eligible lists would be established from a promotional pool consisting of current Employer fire fighters and from a pool of outside applicants. On April 30, 1995 the Employer advertised in the Newspaper A its acceptance of applications for the Fire Marshal position. Both the job posting of April 20 and the April 1995 advertisement indicated that preference in filling the position would be given to incumbent qualified Employer fire department employees. Since

the announcement, two bargaining unit members and approximately 20 non-bargaining unit members have applied to take the examination.

## **ISSUE**

The parties have stipulated to one issue and have disagreed with respect to a second. The stipulated issue is did the Employer violate the contract when it recruited applicants from outside the bargaining unit to test and qualify for the position of Fire Marshal. Additionally at the hearing the union raised the issue whether management violated the agreement when it listed as a service requirement "experience as a Fire Marshal" in both the April 20, 1995 examination announcement and the classified advertisement of April 30, 1995.

The arbitrator must reject consideration of the second issue advanced by the union as it involves a matter beyond the scope of the original grievance. The grievance initiated by the union on April 28, 1995 is limited in scope to the contention that management breached the agreement by soliciting applications for the Fire Marshal position from individuals outside the bargaining unit. The grievance does not address as an issue the addition of prior experience as a Fire Marshal as a requirement for the Fire Marshal position. Arbitrators routinely eschew consideration of issues that are first raised in arbitration for to do so would be to undermine the purpose and integrity of the grievance procedure. For this reason the arbitrator finds that the second issue presented by the union is untimely and must therefore be dismissed.

## **UNION POSITION**

The union maintains that Article 12, sections 1 and 2 contemplate that vacancies within the fire department other than entry level, are to be filled exclusively with employees within the unit. Additionally, past practice is that all promotions are filled by unit employees.

Furthermore, in those instances where there were no or an inadequate number of eligible candidates, promotions were nevertheless made. In these circumstances, the parties agreed to modify normal service requirements in order that unit members be made eligible for promotions. By seeking to recruit applicants from outside the unit to fill promotions, the Employer has breached past practice and Article 30 of the parties' agreement which require that conditions of employment existing prior to the parties' agreement be maintained as the standard in effect.

## **EMPLOYER POSITION**

According to the Employer, Article 12, section 2 of the contract encompasses the parties' explicit agreement regarding promotions. Nowhere in that article or in any section of the contract does it provide that the Employer may only post, test or promote from within the bargaining unit. Rather, the agreement provides that except as specifically modified by the agreement, promotions are to be handled in accordance with Civil Service rules. These rules specifically authorize the Employer examiner to do what is ever necessary to furnish a qualified pool of candidates to fill vacancies in Civil Service positions which include the Fire Marshal. The rules also require that if an internal candidate passes a Civil Service exam he/she will be promoted over any outside candidate regardless of their relative experience and/or test scores. If, however, there are no qualified internal candidates for promotion, then the Employer has the right, both through the Civil Services rules and its management rights clause to hire qualified entrance or outside candidates to fill the vacancy. The ability to solicit those applicants for testing is a necessary prerequisite to creating a qualified candidate pool and ultimately to hiring a qualified candidate. Given that the Employer had run a previous test with no internal candidates qualifying for the eligible list and that no candidate passed a Fire Marshal test since the late 1980s the Employer was justified in opening the testing to

qualified external candidates to assure the availability of at least one name on an eligible list for an appointment. Finally, the Employer maintains that there is no evidence of a past practice of automatically relaxing the qualification requirements in the absence of qualified employees eligible for promotion.

## RELEVANT CONTRACTUAL PROVISIONS

### Article 4 - Management Rights

#### Section 1. Directing Work Force

Except as otherwise specifically provided herein, the Management of Employer and 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 layoff 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.

Jt. Ex 1, p2.

### Article 12 - Promotion and Voluntary Demotions

#### Section 2. Promotion 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 procedures; 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 the effective date of this Agreement.

## Article 3C. MAINTENANCE OF STANDARD

### 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.

### RELEVANT CIVIL SERVICE RULES

- 301.8 The Board shall develop and administer such recruiting and examination programs as may be necessary to obtain an adequate supply of competent applicants to meet the needs of the Employer's service and to further the Employer's affirmative action goals.
- 304.5 The Chief Examiner shall develop and administer such recruiting and examination programs as may be necessary to obtain an adequate supply of competent applicants to meet the needs of the Employer service.
- 401.0 Competitive Examinations - All appointments in the classified service of the Employer shall be made according to merit and fitness to be ascertained insofar as practicable by competitive examination. Examinations shall be prepared by or under the direction of the Chief Examiner and shall relate to those matters which will test fairly the capacity and fitness of the candidate to discharge efficiently the duties of the classes for which examinations are held.
- 402.1 Entrance and Promotional: The Chief Examiner shall establish such entrance and promotional eligible lists for classifications in the competitive class as are necessary to meet the needs of the service. Such eligible lists shall contain the names of those persons who have passed examination for a specific classification.
- 404.1 Permanent Appointments: All vacancies in permanent positions shall be filled by one of the following means, in the following order of priority: preferred eligible, promotion, transfer demotion, entrance appointment. The Chief Examiner shall be responsible for observing this order of priority, and he may combine any of these sources of appointment...

### DISCUSSION

Under Article 4, Section 1, the Employer is granted the general authority to hire and to decide job qualifications. Standing alone, this language would afford the Employer the authority to advertise vacancies among the general community and to fill a position if incumbent employees can't satisfy eligibility requirements. At the same time Article 4,

Section 1 does not afford management absolute rights in the area of hiring and selection. The qualifying language in Article 4, Section 1 "except as otherwise specifically provided herein" recognizes that other provisions in the agreement may restrict the Employer's authority to fill vacancies.

With regard to filling non-entry level promotional vacancies, the parties in Article 12 have negotiated specific language which governs their respective rights and responsibilities. A review of this provision reveals the parties' general intent to integrate Civil Service Board rules and regulations into the promotional process. Thus under Article 12, Section 2D "except as otherwise specified above, the provision of Civil Service Board rules and regulations shall apply."

If Civil Service rules alone were determinative, the Employer would be authorized to solicit candidates for promotional vacancies from among the general community, test them, and employ non-employees if no incumbent employee were eligible. Thus, section 301.8 of Civil Service rules authorizes the board to develop recruiting and examination programs necessary to obtain an adequate supply of applicants, Section 401.0 provides that all appointments be made insofar as practicable by competitive examination, and Section 404.1 permits the appointment of non-employees if no incumbent employee is eligible for promotion.

Yet it is also clear from Article 12 that the parties did not intend that Civil Service rules are necessarily controlling. As with the management prerogatives clause of Article 4, the parties in Article 12 negotiated language which establishes limits on the Employer's authority to follow Civil Service rules when filling promotional vacancies. Thus Article 12, Section 2D provides that Civil Service rules be followed "except as otherwise specified above." This language necessitates determining whether other previously promulgated provisions in Article 12 supersede Civil Service rules relied upon by the Employer to solicit

and to test external candidates for the position of Fire Marshal. The primary provision in Section 12 which addresses the identity of workers who may be considered for promotion is Section 2(a). It provides as follows:

Only those employees who have attained the Civil Service Board's• service requirements may express their interest in being qualified for promotions by filling applications with the human resource department.

This provision is unfortunately ambiguous and subject to two conflicting but equally plausible interpretations. One may read it as the union has to mean that only employees who have satisfied the service or experience requirements may be considered for promotion. Thus, according to the union this provision reflects the parties' intent to reserve promotions only to members of the bargaining unit. Alternatively, it may also be argued that the intent of this provision was not to bar outsiders. Instead it is simply designed to limit the class of employees who may be considered for promotion in any given circumstance to those who have satisfied the Civil Service Board's service requirements.

Where a provision is subject to conflicting interpretation, the arbitrator must look to guidance from different sources. These include the parties' intent when negotiating the provision, grievance settlements and past practice. Here the parties have introduced no evidence pertaining to bargaining history or prior grievance settlements. At the same time there has been considerable testimony with regard to past practices concerning promotions and such evidence merits close review.

The only witness at the hearing was Person 1, a battalion chief who has held high level union positions over the last 20 years. He noted several cases in which the parties have agreed to expand the eligibility pool because no current employee can satisfy the service requirements for a given promotional slot. For example, on September 15, 1992 the parties mutually agreed to expand the eligibility pool for the position of assistant fire training supervisor. Apparently experience as a fire lieutenant was a prerequisite under Civil Service

rules to take the examination for this position. Since no employee holding the rank of lieutenant expressed an interest in the position of assistant fire training supervisor, the parties mutually agreed that any employee with five years experience in the department could apply for such examination. On December 30, 1994 the parties again agreed to relax the service requirement of experience as a fire lieutenant as a prerequisite to apply for an examination for the position of assistant fire training supervisor. As in 1992 the parties agreed that anyone with at least five years of service with the department could apply to take the examination for the position of assistant fire training supervisor<sup>1</sup>.

The union maintains that these cases illustrate the parties' practice of reserving promotional positions to bargaining unit employees even if such practice requires relaxing service requirements previously established for a promotion. As a result, under Article 30 which requires the maintenance of working practices the employer is equally obliged in this dispute to fill the position of Fire Marshal exclusively with an employee. If the eligibility pool is currently inadequate then the employer has the responsibility to negotiate with the union appropriate modifications.

In response the employer notes that in both memorandums of understanding addressing the vacant position of assistant fire training supervisor, the parties agreed that the waiver would not apply to any future examinations. Consequently, these two cases do not establish the precedents that the employer is bound to loosen eligibility requirements when filling promotions nor to ensure that only bargaining unit personnel are considered. Additionally, the employer maintains that no consideration to the union's position is merited here because the union failed to request from the Employer its relaxation of qualification

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<sup>1</sup> The union has also cited two other memorandums of understanding. The arbitrator, however, finds both not probative of the contention that the employer by practice has relaxed eligibility standards for promotion and must, therefore, do the same if necessary in filling the Fire Marshal position. In one, the parties resolved appeals of examination results by authorizing certain promotions. In another the parties agreed to waive the contract rule restricting promotions until after the creation of a vacancy.

requirements for Fire Marshal. By contrast in the past qualification requirements were relaxed only after the union had made specific requests.

The arbitrator agrees that in these two situations the parties acknowledged that the existing applicable rules may control any future promotional decisions. At the same time the evidence suggests that these two cases are reflective of a process of union-management collaboration to facilitate the promotion of unit employees even when incumbent employees may lack the capacity to pass qualifying examinations. The Employer has acknowledged that in 1991 the position of Fire Marshal was reclassified and the duties of that position upgraded and expanded. Instead of posting that position or requiring the current occupant, Mr. Person 2 to write a new examination to qualify, the Employer and the union agreed to grandfather him into the revised classification with the understanding that future candidates would have to pass a revised examination to qualify for appointment. Upon Mr. Person 2's retirement in 1991, Larry Woods was made acting Fire Marshal. He tested for this position and failed. Notwithstanding the Employer continued to permit him to occupy this position until his retirement in July of 1995.

One or two instances do not establish a practice under normal circumstances. Yet, it is also recognized that a few occasions may indeed establish a practice where the situation arises only infrequently. It is significant that in every documented case stretching over a period of four years including two involving the Fire Marshal position where there has been no candidate able or available to pass the qualifying examination, the parties have negotiated a relaxation of the examination requirement. Given this pattern of negotiation and accommodation and the evidence based on Chief Person 1's undisputed testimony that the Employer has never solicited outsiders to fill a non-entry bargaining unit vacancy within at least the last 20 years, the arbitrator finds that the prevailing practice within the unit requires the Employer to engage in meaningful efforts to promote employees before non-employees

can be considered. Furthermore, as an established practice the union's omission in not initially requesting a relaxation of the service requirements for the Fire Marshal position is not controlling. Once the practice of accommodating service requirements to facilitate the promotion of unit employees has been established, the obligation to bargain falls on the Employer as the party seeking to change existing working conditions.

Given the established past practice it is reasonable to interpret Article 12, Section 2A as requiring the Employer to first consider only employees when filling promotional vacancies. Additionally, only if meaningful accommodations cannot be achieved can outsiders be solicited and tested. Here the Employer has presented no evidence of any effort to negotiate with the union to facilitate the promotion of employees. Furthermore, it has failed to demonstrate that any relaxation of eligibility requirements would have imposed any serious hardships on the Employer. Given these considerations the arbitrator finds that the Employer breached Article 12 when it concurrently advertised for the position of Fire Marshal among employees and non-employees and sought to establish an eligibility pool by testing both sets of applicants.

## **AWARD**

The grievance is sustained. The Employer is directed to withdraw any posting inviting external candidates to apply and to cancel any tests for the position of Fire Marshal scheduled to be taken by non-employees.

Any current test shall be limited to members of the bargaining unit. In the event that employees fail the Fire Marshal examination, the employer and the union shall collaborate in meaningful efforts to facilitate the promotion of unit employees into that position.

October 30, 1995

Benjamin Wolkinson