

IN RE ARBITRATION BETWEEN:

**AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES,
AFSCME COUNCIL 65**

and

HIBBING PUBLIC UTILITIES COMMISSION, HPUC

DECISION AND AWARD OF ARBITRATOR

BMS 08-PA-0278

JEFFREY W. JACOBS

ARBITRATOR

July 7, 2008

IN RE ARBITRATION BETWEEN:

AFSCME Council 65,

and

DECISION AND AWARD OF ARBITRATOR
BMS Case # 08-PA-0278
Apprenticeship Standards grievance

Hibbing Public Utilities Commission.

APPEARANCES:

FOR THE UNION:

Teresa Joppa, Attorney for the Union
Mark Mandich, Staff Representative
Larry Claude, Union President
Mark Reger

FOR THE EMPLOYER:

Allen Jacobson, Attorney for the Employer
John Carlson, Dir. of Electrical Systems
Kevin Gargano, Dir. of Finance
Corey Lubovich, Dir. of Utility Operations
Gary Westerberg, Lead Lineman, retired

PRELIMINARY STATEMENT

The hearing in the above matter was held on June 25, 2008 at Hibbing Public Utilities Commission at 1902 6th Ave. East, in Hibbing, Minnesota. The parties presented oral and documentary evidence at which point the record was closed. The parties waived post-hearing Briefs.

ISSUE PRESENTED

Did the Employer violate the collective bargaining agreement, PELRA and past practice when it unilaterally changed the minimum qualifications to be considered for apprentice lineman position? If so, what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period January 1, 2007 through December 31, 2009. Article X provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. At the hearing the parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator. The parties waived the 10-day requirement for issuance of a decision in the matter as set forth in the grievance article.

UNION'S POSITION

The Union's position was that the Employer violated the contract when it unilaterally changed the minimum standards for apprentice lineman working in the utility. In support of this position the Union made the following contentions:

1. The Union claimed that the Employer, HPUC, is obligated to negotiate any changes to the apprenticeship standards, including the qualifications necessary for entry into the apprenticeship program negotiated between the parties. The essence of the Union's argument is that the HPUC may not unilaterally set those entry standards without negotiation with the Union.

2. The Union pointed to the provisions of Appendix B, Apprenticeship Standards, MODIFICATION OF STANDARDS, which provides as follows: "Apprenticeship standards may be modified at any time by mutual agreement of the Utility and the Union. Such modifications shall not alter apprenticeship contracts in effect at the time of such changes without written consent of all parties to such contract." The Union argued that this language is clear and requires that any changes in the standards for the apprenticeship program must be negotiated and may not be unilaterally implemented by the HPUC.

3. Further, the Union asserted that in 1998 the parties mediated a settlement to a grievance that had been filed by an employee named Jeff Stokes. That agreement was set forth in a letter dated February 24, 1998 and provided in relevant part as follows: 1. FJAC (Functional, Joint Apprenticeship Committee) will meet and set the criteria for employees entering the Apprenticeship program including any credit to be given for prior experience and schooling. ... 3. The SJAC (Supervisory Joint Apprenticeship Committee) results will then be forwarded to the State Apprenticeship Board for their approval.

4. Accordingly, the parties met and formed the FJAC, which then hammered out the standards for the apprenticeship program set forth in Joint exhibit 2. Apprenticeship Standards of the Public Utilities Commission, Hibbing, Minnesota and AFSCME, Local 94, Hibbing, Minnesota.

5. The original draft of that document, Union exhibit 2, contained language at Article III, Qualifications for Apprenticeship that required that “applicants for apprenticeship must be at least 18 years of age, must possess a high school diploma or GED equivalent and must be physically able to perform the manual work of the trade.” The Union sought to have the language requiring a high school diploma or GED removed from the basic requirements in order not to exclude those employees who did not possess either of those from consideration for the apprenticeship program. After negotiations, the parties agreed to remove that requirement so that the current language now reads as follows: “applicants for apprenticeship must be at least 18 years of age and must be physically able to perform the manual work of the trade.”

6. Moreover, Article XVII Section 3 gives clear preference to apprentices who come from inside the bargaining unit. That language provides in relevant part as follows: “In filling job vacancies within any of the Apprenticeable jobs, first consideration must be given to individuals with the most seniority within the department where the vacancy exists. Should the apprenticeship vacancy not be filled from within the department, then the most senior qualified employee elsewhere within the plant will be given the opportunity to fill the position. Whether an individual is qualified to fill a vacant apprenticeship job shall be determined in accordance with the procedure set forth in the Apprenticeship Standards of this Agreement.” The Apprenticeship Standards section is found at Appendix B set forth in relevant part above.

7. The Union asserted that based on these provisions, there is a clear mandate that the standards for the apprenticeship program must be negotiated and may not be unilaterally implemented or changed by the Employer.

8. The Union also notes that the State requirements for lineman apprentices do not require formal schooling and further asserted that there is thus no valid reason to insist on requiring such schooling for entry into the HPUC apprenticeship program.

9. Here the Employer sought to unilaterally implement a radical change in the minimum qualifications for entrance into the Apprenticeship Program for the Lineman position. As Union exhibit 5 shows, the HPUC posted a Lineman position and added the requirement that minimum qualifications are: “graduate from an accredited Line School and completion of a State of Minnesota accepted apprenticeship program, qualified per OSHA standard 1910.269 including but not limited to CPR First Aid, pole top, bucket rescue, pole climbing to Level 3, etc.” The Union asserted that this was never negotiated with the Union nor run through the approval FJAC committee in accordance with the Apprenticeship Standards and the agreed upon procedure for implementing such a change.

10. The Union also asserted that this change will have the practical effect of disqualifying internal applicants that might otherwise apply for a lineman position since they do not already have the necessary schooling. This is patently contrary to the provisions of the Agreement giving clear preference to internal applicants.

11. In the past many individuals have applied for and been accepted into the apprenticeship program without this schooling and have gone to become very competent linemen and even journeymen. The Union argued further that there is no need for these requirements and that there is no hard evidence that schooling will make the apprentices any safer or better able to perform their job.

12. Finally, the Union claimed that there was a clear past practice of always negotiating any changes in standards and that the parties have a long history of working cooperatively to implement these requirements and changes. The Union argued that there is no legitimate reason the Employer could not have simply negotiated this change if they felt that it was better for the safety of the workers.

The Union seeks an award sustaining the grievance and ordering the Employer to negotiate with the Union any changes in minimum qualifications for entrance into the apprenticeship program.

EMPLOYER’S POSITION:

The Employer’s position was that there was no contractual violation in this matter. In support of this position the Employer made the following contentions:

1. The Employer pointed to the Management rights provisions of the labor agreement at

Article II as follows:

(a) The following shall be the exclusive prerogative of management insofar as they are not exercised in a manner to conflict with the terms and intent of this contract, but Management may within its discretion confer with the Union concerning any circumstances that may arise under these prerogatives.

(b) The Commission retains the right to manage the business and plants and to direct the working forces including the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work or other legitimate reasons, subject to the limitation of this Agreement.

(c) The Commission shall have the sole right to determine the types of services to be rendered; the location of their facilities and the methods and processes and means of production.

(d) The Commission shall have the right to determine the size and composition of the work force and the assignment of work; to establish work rule and quality standards; to maintain discipline by requiring employees to conform to plant rules and regulations; these rights are not to conflict with the terms of this Agreement.

(e) The Commission shall have the right to determine the scheduling of operations and shifts; the health, safety and property protection measures where the Employer must meet legal, insurance or other requirements; the determination of prices and other aspects of the relationship of the Commission to its customers, vendors and contractors.

(f) It is not intended by the foregoing paragraphs to limit any of the normal or usual functions of Management or to fully define such function. The Commission shall exercise all rights of Management without interference, subject to the provisions of this Agreement.

2. The Employer argued that these provisions are broad and all-inclusive enough to reserve to Management the right to establish minimum qualifications for entry into any position whether that be an apprenticeable position or otherwise. The Employer argued that nothing in the remainder of the Agreement detracts from or limits the right to establish these minimum qualifications.

3. The Employer asserted most strenuously that there is a substantive difference between the minimum requirements for entry into the apprenticeship program and the requirements of the apprenticeship program once a person has already been accepted into it. At that point there is an apprenticeship agreement and a set of very specialized training requirements set by the terms of the Apprenticeship Standards. The Employer argued that the Union is confusing the *entry* requirements with the *apprenticeship* standards, which the Employer argued are different.

4. One must gain entry into the program prior to even initiating the apprenticeship standards and only the apprenticeship standards are those required to be negotiated pursuant to the provisions of Appendix B. There is no requirement in the contract to negotiate the entry requirements.

5. Further, the Employer argued that the State's requirements for entry into certain apprenticeship programs are truly minimum and that an Employer may establish more stringent requirements as it sees fits. See HPUC Exhibit 2, and Minn. Rule 5200.0310 and 5200.0320, establishing *minimum* standards to be met in apprenticeship training agreements.

6. Further, under PELRA, for an Employer to waive or limit its inherent managerial rights as established by M.S. 179A.07, such waiver must be clear and unequivocal. Here no such waiver was made nor could any be read into the provisions of Appendix B as asserted by the Union.

7. The Employer pointed to the Apprenticeship Standards negotiated between the parties and argued that even they clearly reserve to Management the right to establish the minimum standards for entry into the program. The labor agreement itself references the Apprenticeship Standards in the preamble to Appendix B.

8. Section III of the Apprenticeship Standards, Joint exhibit 2, provides as follows: "Applicants for the apprenticeship and training program must meet the entrance requirements for the listed trades in the personnel rules and regulations of the Hibbing Public Utilities Commission. Applicants for apprenticeship must be at least 18 years of age and must be physically qualified to perform the manual work of the trade."

9. The Employer argued that this language clearly reserves the right to establish the "entrance requirements" for the apprenticeable jobs listed at page 40 of the current labor agreement. While it also sets a base requirement of 18 years of age and being able to physically handle the manual work of the trade, nowhere does it abdicate management's legitimate right to determine those entrance requirements, i.e. minimum requirements, nor the determination of whether a person is physically qualified to perform the manual work of the trade.

10. Thus, the language of Appendix B, “Modification of Standards” applies only to the latter set of requirements, i.e. the Apprenticeship Standards themselves and not to the requirements for entry into the program itself. The Employer argued that there is nothing in the agreement limiting the right to establish those requirements unilaterally or to require negotiation with the Union about them.

11. Moreover, while there has perhaps been some discussion of the entry requirements in the past, there was never an agreement to waive the inherent right to set minimum standards and certainly no clear waiver of that right in the labor agreement. The Employer argued that the clear terms of the Management Rights clause and the Qualifications language at Joint exhibit 2, section III both reference the Employer’s right to establish minimum qualifications. Moreover, the Modification of Standards language at Appendix B refers to the “Apprenticeship Standards,” not the minimum qualifications, as those items that must be negotiated before they can be changed.

12. Finally, the Employer argued that having schooling for these jobs makes the individual much more competent and more likely to complete the apprenticeship training. In some cases people have entered the program only to find that lineman work is more demanding than they anticipated and they drop out, thus wasting the Employer’s money and everyone’s time. While some individuals have gone into the program without schooling, those who have the schooling before entering the apprenticeship program already know many of the things they need to and have a far better sense of whether this is the career for them.

13. The essence of the Employer’s argument is that the contract does not require negotiation of the minimum standards for entry into the apprenticeship program even though it does require negotiation of the actual apprenticeship standards themselves. These two things are different however and there is nothing in the agreement or the apprenticeship standards that limits or waives the inherent managerial right to set the qualifications for its positions.

Accordingly the Employer seeks an award of the arbitrator denying the grievance in its entirety.

DISCUSSION

The facts were straightforward and virtually undisputed. The parties have long been meeting about and negotiating the Apprenticeship Standards set forth in joint exhibit 2. This was apparently in response to a grievance filed in 1998 and the result of a mediated agreement set forth in a February 24, 1998 letter from the HPUC, Union exhibit 1. As the result of that mediation, the parties established a Functional joint Apprentice Committee to establish and review the criteria for entering the Apprenticeship program with HPUC. This included the job of Lineman. Further, the job of Lineman is one of the listed trades at the end of the current labor agreement at page 40 setting forth the apprenticeable jobs within the employer's operation.

When the Apprenticeship Standards were first discussed, the provisions of Section III, Qualifications for Apprenticeship, included a provision requiring that applicants have a high school degree or GED equivalent. In response to the Union's concerns about that language and the possibility that it would exclude certain employees who did not possess a high school degree or GED from consideration for apprenticeable jobs, that language was deleted. See Union exhibit 2. The language of Section II now provides that "Applicants for the apprenticeship and training program must meet the entrance requirements for the listed trades in the personnel rules and regulations of the Hibbing Public Utilities Commission. Applicants for apprenticeship must be at least 18 years of age and must be physically qualified to perform the manual work of the trade."

There was also no dispute that for a period of years; when linemen positions were posted they included only the minimum requirements as set forth above. In the spring of 2007, the HPUC sought to establish a higher minimum standard for entry into the lineman position, See Union exhibit 4. The HPUC was unable to fill that position and re-posted the job again in November of 2007, see Union exhibit.

Both postings set forth the requirements to be considered as follows: “Qualifications (minimum): graduate from an accredited Line School and completion of a State of Minnesota accepted apprenticeship program, qualified per OSHA standard 1910.269 including but not limited to CPR First Aid, pole top, bucket rescue, pole climbing to Level 3, etc.” The grievance, Joint exhibit 3, was filed on 5-22-07 claiming that the Employer did not have the contractual right to establish such minimum qualifications without negotiation with the Union. The basis for this was the language of Appendix B requiring negotiation over the Apprenticeship Standards set forth above.

That position was eventually filled with a person with the requisite schooling. That individual is apparently still working for the Employer but the Union does not seek to have him removed from his position even if they are to prevail in this matter.

The question is thus whether the Employer has the right to establish such minimum qualifications for consideration to be hired as a lineman or whether the contract requires negotiation with the Union prior to implementation of such requirements. This becomes a bit more difficult than it at first appears when considering the relevant contractual language in this matter.

Generally the Employer would retain all of the inherent rights set forth in the management Rights clause and PELRA, including the right to establish minimum qualifications for positions. Without more, there would be no question whatsoever that a public employer retains this right unless it has been expressly and clearly waived or limited in some way by the terms of the labor agreement.

The Union relies primarily on the provisions of Appendix B in support of the claim that the Employer must negotiate over the establishment of minimum standards and that it cannot unilaterally establish a schooling requirement in light of that provision. Appendix B provides simply that “Apprenticeship Standards may be modified at any time by mutual agreement of the Utility and the Union. Such modifications shall not alter apprenticeship contracts in effect at the time of such changes without written consent of all parties to such contracts.”

It was also clear from the evidence that the labor agreement references the Apprenticeship Standards themselves, Joint exhibit 2. The parties jointly negotiated the provisions of Joint exhibit 2 and that includes Section III, Qualifications for Apprenticeship, which provides that “Applicants for the apprenticeship and training program must meet the entrance requirements for the listed trades in the personnel rules and regulations of the Hibbing Public Utilities Commission.” This language seems to reserve to the Employer the right to establish minimum qualifications even though there was sparse evidence of any formal “personnel rules and regulations.”

In fact several other provisions relied upon by the Union refer to the “Apprenticeship Standards.” See e.g. Article XIII, Apprenticeable Vacancies, which provides as follows: “Whether an individual is qualified to fill a vacant apprenticeable job shall be determined in accordance with the procedures set forth in the Apprenticeship Standards portion of this Agreement.” The evidence showed quite clearly that this language refers to Appendix B, entitled “Apprenticeship Standards.” That document contains the language cited above that appears to reserve to the Employer the right to establish “entrance requirements.”

In Joint exhibit 2 itself there is a provision for Modification of Standards. See Joint exhibit 2, Section XVI. This provides as follows: “Details of the program may be modified from time to time subject to the approval of the Director. Any modification cannot at the time of the modification affect the apprenticeship agreements then in effect without the written consent of the parties to the agreement. The sponsor may withdraw from the program by submitting a written request to the approval agency. The approval agency may cancel the standards of apprenticeship for good and sufficient reason including violation of these standards.” The Director is defined as “the person appointed by the Commission of Labor and Industry as defined by Minnesota Statutes.” The “approval agency” is defined as the Minnesota Apprenticeship Advisory Council as authorized by Minnesota Statutes. The import being that the details of the apprenticeship program set forth in the Apprenticeship Standards can be modified subject to the approval of the State.

It was clear that the State was involved in the determination of the Apprenticeship Standards to begin with and that an individual named Bernie Michel assisted the parties with this entire process. The evidence showed that he audited this program and that it was subject to the approval of the appropriate State agency. The import of all of these facts is that the “Apprenticeship Standards” are those requirements for completion of the apprenticeship program set forth in the agreement between the FJAC and the State.

The question on a factual basis is whether the entry requirements for entrance into the apprenticeship program are to be equated with the Apprenticeship Standards themselves. The evidence showed that they are not.

First, and most importantly on this record, the language of Joint exhibit 2, Section III cited above makes it clear that the “entrance requirements” are treated differently from the “Apprenticeship Standards.” There is no contractual requirement that the “entrance requirements” must be negotiated. As the discussion above shows, the documents themselves are quite clear that they are treated separately. Accordingly, the language requiring negotiation of the “Apprenticeship Standards” in Appendix B does not limit the inherent right of the Employer to set the requirements for initial entry into the program.

Second, the evidence showed that there was a substantive difference between the schooling at an approved line school and the apprenticeship requirements themselves. It was clear that the apprenticeship program starts once someone has been hired on as a lineman. The point here is that the language at issue does not extend to negotiation of the entrance requirements because they are clearly different from the apprenticeship standards. The language relied upon by the union at Appendix B calls for negotiation of the “apprenticeship standards.” Those are the standards set forth at Appendix C of the Apprenticeship Standards themselves. These call for 8000 hours of training whereas the schooling is a much shorter training period. See HPUC exhibit 5.

Third, the Employer pointed to Article XVII section 3 that provides that “whether an individual is qualified to fill a vacant apprenticeship job shall be determined in accordance with the procedure set forth in the Apprenticeship Standards portion of this Agreement.” The Employer argued that this language again ties back to the language of Section III of Joint exhibit 2 and presupposes the right to establish the entrance requirements for these positions. There was some merit to this assertion as well.

The Union also relied on Article XIII, Apprenticeable Vacancies, and argued that there is a preference shown in several portions of the labor agreement filling vacancies from within the department. The Union claimed that requiring schooling before even being considered for entry into the lineman apprenticeship program will effectively exclude anyone from within the department. The Union pointed out that the parties specifically negotiated the GED and high school diploma out of the base requirements set forth in the Apprenticeship Standards and that this shows an intent to allow internal candidates to apply

Several things militate against this argument. First there is the remainder of the language of that Section, which provides as follows: “Whether an individual is qualified to fill a vacant apprenticeable job shall be determined in accordance with the procedures set forth in the Apprenticeship Standards portion of this Agreement.” The evidence showed quite clearly that the intent of this language refers the reader to Appendix B, entitled “Apprenticeship Standards.” Again, there was a direct tie-in to the language that reserves to the Employer the right to set the entrance requirements.

Second, while the Union’s point is understandable, and may well disqualify many who might otherwise want to apply for lineman work, the Employer’s interpretation does not render the language meaningless. A person could certainly do the schooling, get a different job with the employer and apply for lineman work when an opening arose. While there is a clear contractual preference for internal applicants there is also a clear reservation of the Employer’s right to set the entry requirements for this position.

The Employer also pointed out that the rationale behind this change is to make sure that individuals who enter the program are serious about completing it. The Employer cited to instances in the past where people had started the program, discovered that lineman work was more than they bargained for or was not for them and subsequently dropped out. The Employer also expressed a desire to increase the competency and safety of the crews by making sure that people are adequately trained prior to entry into the apprenticeship program. The Employer is a small operation and does not have a formal training crew like a larger utility.

The Union did not dispute that safety and competency are a grave concern given the work of a lineman but disputed the need for schooling. The Union cited examples of individuals who had no formal schooling prior to entry and who went on to become journeymen and are quite competent. The Union also argued that there is no correlation between school and working safely.

This case is governed by the contractual language cited above and whether the language of Appendix B requires negotiation over the *entry requirements* as part of the “*Apprenticeship Standards.*” As noted above, it does not; the two concepts are different factually and contractually. The evidence showed that a person must complete some 8000 hours of training, See Appendix B, in order to gain a journeyman card. The evidence showed that there was a difference between those Apprenticeship Standards and the entry requirement to get into the apprenticeship program to begin with. As the employer argued, only the “apprenticeship standards are required to be negotiated pursuant to the terms of the contract. Those are different from the minimum qualifications. There is also the clear language requiring that the applicant for the program must meet the entrance requirements set by the HPUC.

Finally, the Union argued that there was a past practice requiring negotiation since the parties negotiated the Apprenticeship Standards through the FJAC in the past. There was insufficient evidence of a binding past practice to support this claim on this record. For one thing, this was apparently the first time the Employer altered the entrance requirements for a lineman to enter the apprenticeship program. Since a binding past practice is generally regarded as a consistent response to a recurring set of circumstances, this alone takes this out of a past practice consideration. Taking the evidence as a whole, the facts here do not support a past practice claim in the face of clear contractual language.

Accordingly, while the Union's claims were quite understandable and well presented here, the contract language at issue does reserve to the Employer the right to establish minimum qualifications for entry into the lineman apprenticeship program.

AWARD

The grievance is DENIED.

Dated: July 7, 2008

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Jeffrey W. Jacobs, arbitrator