

IN THE MATTER OF ARBITRATION BETWEEN

American Federation of State, County, and Municipal
Employees, AFL-CIO, Council 65, Local 748A,
Union,

and

City of St. Cloud, Minnesota,
Employer.

OPINION AND AWARD

Class Action Grievance
Utilities Maintenance Mechanic

BMS Case No. 08-PA-0277

ARBITRATOR:

Gerald E. Wallin, Esq.

DATE OF AWARD:

August 12, 2008

HEARING SITE:

St. Cloud, Minnesota

HEARING DATES:

April 22 and June 13, 2008

RECORD CLOSED:

July 14, 2008

REPRESENTING THE UNION:

Sarah Lewerenz, Esq.
AFSCME Council 65
517 West 6th Street
Duluth, MN 55806

REPRESENTING THE EMPLOYER:

Gary N. Gustafson, Esq.
Assistant City Attorney
400 2d Street South
St. Cloud, MN 56301

JURISDICTION

The hearing in this matter was opened on April 22 and concluded on June 13, 2008. The undersigned was selected to serve as arbitrator pursuant to the parties' collective bargaining agreement ("Agreement") and the procedures of the Minnesota Bureau of Mediation Services. The parties submitted two contract violation grievances to arbitration. No procedural issues were raised. The Agreement provision calling for award issuance within thirty days after close of the record was waived. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties submitted post-hearing briefs, duly received on or before July 14, 2008, which closed the record, and the matter was taken under advisement.

ISSUES

The parties agreed with the following issue statement in pre-hearing discussions:

Did the Employer violate the Agreement and Civil Service Rules when it filled the disputed Utilities Maintenance Mechanic position in the manner that it did? If so, what is the proper remedy?

BACKGROUND AND SUMMARY OF THE EVIDENCE

The instant dispute consists of two grievances that challenge the propriety of the Employer's actions in connection with filling a vacancy in the position of Utilities Maintenance Mechanic ("UMM") in 2007. The first grievance was filed after the Employer did not fill the vacancy when, in the Union's view, it had a valid list of four qualified applicants from which to choose. The second grievance was filed after the Employer changed the content and weighting of the components of the qualification test that was administered to applicants in July of 2007. The skills test was changed to examine welding proficiency for the first time.

With the exception of an issue surrounding the discussions that occurred during a Civil Service Board meeting on May 17, 2007, which will be described in detail later, the key facts surrounding both grievances are not in dispute.

The Employer has three UMM positions in its classified service. The positions are subject to Civil Service rules. The Civil Service rules are incorporated by reference into the Agreement. As a result, violations of the Civil Service rules are a proper subject for the grievance process under the Agreement.

One UMM position is regularly assigned at the Employer's Water Treatment Plant. The remaining two UMM positions are regularly assigned to the Employer Waste Water Treatment Plant. The position in dispute was one of the two Waste Water Treatment Plant positions. Despite the location where they are regularly assigned, the employees can be cross-utilized at either facility.

According to the Job Description for the UMM position that had been in effect since April 6, 2000, one of the several MINIMUM REQUIREMENTS that had to be satisfied by candidates for vacancies was the following:

Possession of a State of Minnesota Special Class boiler license and ability to attain a First Class C low pressure boilers licence by completion of 6-month probation period.

No special knowledge or experience is required to obtain the Special Class boiler license. It can be obtained merely by applying for it. However, it must be held for a minimum of three years before a person is eligible for the First Class C license. Therefore, a candidate for a UMM vacancy must have already possessed the Special Class license for more than two and one-half years to be able to obtain the First Class C license by the completion of the 6-month probationary period for the UMM position. This licensing requirement in the original Job Description is the genesis of the instant dispute.

The original Job Description contained other information that is noteworthy for developing the background of the dispute. According to its text, the UMM is responsible for preventive maintenance as well as installing, repairing, or maintaining equipment at the two water facilities. The UMM is expected to perform with considerable independence in maintaining, diagnosing equipment malfunction, and repairing equipment after an orientation period. The employees may be assigned to rotate between the two plants. The Job Description contained the following entry among the nine listed EXAMPLES OF WORK to be performed:

Operates a variety of hand and power shop equipment including welders, drills, grinders, pipe cutters and threaders, and saws;

Under the heading DESIRABLE EDUCATION AND EXPERIENCE, the original Job Description listed the following entry along with ten others:

Some experience in gas, arch *{sic}*, and wirefeed welding;

The original Job Description also listed eight ESSENTIAL JOB FUNCTIONS after with the following introductory sentence:

The following are considered essential to performing the duties of this position and must be met with or without reasonable accommodations:

Among the eight listed essential job functions is this entry:

Must be able to recognize, identify, and operate hand machines, equipment, and tools required to accomplish assigned tasks;

A UMM vacancy emerged in late 2005. In accordance with applicable Civil Service rules, the job was posted to solicit candidates. Applicants underwent a written exam weighted for 30%, a skills test also weighted at 30%, and an interview weighted at 40%. A passing score of 70% was required for the written exam and skills test. Per the Civil Service rules, the failure to pass the written exam or skills test disqualifies a candidate from further consideration.

A candidate list ("List 1") with four names emerged from the screening process on December 16, 2005. The bottom name on the list was Steve D. One other applicant, Ted B., narrowly failed the written exam with a score of 69.6% and was eliminated from further consideration.

As time passed, two of the four names on List 1 were promoted into the UMM position. They both passed their probationary periods and performed successfully in the job. As will be described more fully later, neither person satisfied the licensing requirement discussed earlier. Coincidentally, one of these employees, Chris P., was the son of the local Union president. However, the record does not establish there was any favoritism or special treatment involved nor does either party make any such contentions.

As it turns out, although it was not recognized until later, the First Class C licensing requirement served no useful purpose. It is undisputed that the supervisor of the UMM classification held a higher license at all times material to the instant dispute. The supervisor's license essentially provided a license umbrella over the two facilities and eliminated the need for individual UMM incumbents to have the First Class C license.

Thus is the stage set for the unfolding of the instant dispute.

In late 2006, Chris P. was promoted to a different position with the City of St. Cloud. This opened a UMM vacancy at the Waste Water Treatment Plant. List 1 had only two names left on it and was more than six months old. Civil Service Rule 402 reads, in relevant part, as follows:

To provide specific parameters for the requirement that an opportunity to test for a position be posted, the Board adopts the following guidelines:

1. An opportunity to apply for a City position shall be posted to classified members in the event that the Mayor determines the vacancy to be restricted to current classified members and;
 - a. there is no current list of qualified classified members;

b. there is a current list of qualified classified members with less than three individual names on it AND said list has been in existence for 6 months or more;

c. the test or the minimum requirements have been changed; in this case the current list is considered void and any candidates on that list must re-qualify and re-test.

In the same vein, Civil Service Rule 602 C. provides as follows:

Whenever a vacancy in the classified service is to be filled, from an eligibility list, the Secretary to the Board shall submit to the Mayor the three names certified by the Board standing highest on the appropriate list, as well as any names included through expanded certification, to fill the vacancy. If less than three names appear on an internal or promotional eligibility list, the Mayor may select one of the remaining names from that list, or may request that the Civil Service Board open the competition and have another list be prepared and merged. * * *

Because List 1 had only two names on it and was more than six month old, the Employer posted the notice of vacancy (Posting 1) on December 20, 2006. The posting showed the licensing requirement as one of the minimum requirements for eligibility and it also listed the following among the facets of Desirable Education and Experience:

* * *; some experience in gas, arch, and wirefeed welding; * * *

Posting 1 also listed the testing requirements with the same components and weighting as noted previously. Although a skills test was administered, welding was not part of it because the test was administered at a technical school in the St. Cloud area that did not have welding equipment available for that purpose. Nonetheless, a new eligibility list ("List 2") emerged with five names on it. Ted B. passed the written test this time and was ranked highest with the greatest overall score. Steve D. was again ranked lowest but nevertheless remained eligible.

It is important to note at this juncture that neither the legitimacy of the testing content, both written and skills, as well as the interview nor the scoring of these components is in question. Thus it is an accepted fact for the purpose of this dispute that List 2 and its rankings were valid.

Ted B. was promoted into the UMM vacancy and began work on March 7, 2007. Sometime thereafter, Steve D. brought to the attention of the local Union president that Ted B. could not satisfy the First Class C licensing requirement within the 6-month time limit of the probationary period.

When this information was relayed to the Employer's Human Resources Director, internal discussions with the Employer's Public Utilities Director led to the decision to remove Ted B. from the UMM position because he had not satisfied one of the minimum requirements for the position.

Further investigation led to the realization that the two employees who had been previously promoted to the job from List 1 also could not have satisfied the licensing requirement and were put in the job by mistake. Although Chris P. had been promoted out of the job, the other incumbent, Randy E., was still in the job, had successfully passed his probationary period, and was performing satisfactorily.

Additional inquiry while considering what to do led the Employer to discover that the licensing requirement was essentially superfluous; because of the higher license possessed by the supervisor, it was unnecessary for UMM's to possess a First Class C license at any time for the performance of their work. Thus, the Employer realized that the top-ranked candidate for the UMM vacancy had been knocked out of the job because of a minimum requirement on the Job Description that served no useful purpose. Accordingly, the Employer determined to ask the Civil Service Board to approve a change to the Job Description that would delete the First Class C license requirement.

It is in this time frame that the Union maintains the Employer violated the Agreement. In the Union's view, the Employer had a vacancy and a valid List 2 that had four remaining names on it. Accordingly, the Union maintains that the Employer was required to fill the vacancy from the remaining four names. In its post-hearing brief, the Union cited Civil Service Rule 602 C. in support of its position. The pertinent portion of the rule was quoted earlier herein. When the Employer did not fill the vacancy from the remaining names on List 2, the first grievance was filed on May 11, 2007. The Employer, to the contrary, maintains that it did not violate the Agreement and was merely acting within its managerial authority recognized by Article VII of the Agreement.

The Civil Service Board met on May 17, 2007 and approved the change to the Job Description. The minutes of that meeting do not reflect any suggestion that other topics were discussed beyond the deletion of the licensing requirement. This lack of any reference whatsoever to other discussions becomes important with the second grievance.

The Employer's City Council adopted the changed UMM Job Description at its next meeting on May 21, 2007. Because the new Job Description now had changed minimum requirements, Civil Service Rule 402 1.c., quoted previously, required that a new eligibility list be developed. The rule required re-qualification of all candidates through re-testing. Accordingly, the Employer posted the vacancy ("Posting 2") under the date of Thursday, June 7, 2007. Posting 2 listed the same testing protocol as before with the same weighting of the written and skills tests as well as the interview.

According to the testimony of the Employer's Public Utilities Director, he discussed with the Human Resources Director that a written test would not be necessary. The thinking was that all of the likely candidates had already passed the previous written test so it would not be necessary to do so again so soon. In addition, because the previous written test had now been compromised by its

administration, a new written test would have to be developed and content validated. This would take too long. Moreover, it was his recollection that he thought that he had also discussed with the Civil Service Board at the May 17, 2007 meeting that the testing protocol should be changed to eliminate the written test and adjust the weighting of the skills test and interview accordingly. His recollection was that the Civil Service Board gave its approval for the testing and weighting changes. As noted previously, the minutes of that meeting are entirely silent about this aspect of any discussions.

When the Public Utilities Director read Posting 2, he noted that it still mentioned a written test as part of the protocol and it also kept the previous weightings. He immediately brought this to the attention of the Human Resources Director. On Monday, June 11, 2007, a corrected notice of the UMM vacancy was posted ("Posting 3"). Posting 3 reflected that there would only be a skills test and an interview. The test was to be weighted at 60% instead of its former 30% and the interview was to be continued at its former weighting of 40%. The weighting of the skills test was effectively doubled.

According to the testimony of the local Union president, he met with the Mayor for the discussion of the first grievance at Step 3 of the grievance procedure in the same time frame. The president commented to the Mayor words to the effect, "What if Ted B. fails the written test again? He has failed it before." Because of this comment to the Mayor, the Union views the sudden replacement of Posting 2 by Posting 3, which removed the written test requirement, with suspicion.

The Employer also changed the content of the skills test. According to the testimony of the UMM supervisor, welding proficiency was something that should be tested. The Employer, therefore, hired an engineer to administer the skills test at the Waste Water Treatment Plant. This permitted the actual welding equipment owned by the Employer to be used for the test. The new skills test had four components, one of which required a demonstration of the ability to weld and cut metal.

Civil Service Rule 407 is titled, Rating of Examinations. It provides, in relevant part, as follows:

Unless a specific request has been made to change previously adopted weights, they will remain the same as set for prior tests.

The local Union president attended the May 17, 2007 Civil Service Board meeting at which the change to the licensing requirement on the UMM Job Description was approved. According to his testimony, however, there was no discussion of changing the components of the testing protocol or the weighting of them. When the written test was eliminated and the weighting of the skills test was doubled, the Union filed the second grievance alleging that such action violated the Agreement.

The July 3, 2007 round of skills testing produced a new eligibility list ("List 3"). This list had only two names on it. Ted B. was again top-ranked and was selected to fill the vacancy. The name of Steve D. was not listed because he had failed the skills test overall because of poor performance on the welding portion. According to his testimony, he revealed his weakness in welding skills in a prior interview.

In addition to the foregoing, the parties presented extensive testimony about the amount and type of welding actually performed by the UMM classification. According to this testimony, some incumbents are better at welding than others. When welding is required, it is usually assigned to the employee who is best at the task. One witness described how the total amount of welding he did in one year took approximately 30 to 40 hours. According to the Employer's testimony, each UMM is required to have some welding proficiency because other employees may be away on vacation, sick, or on other assigned duties when welding is required.

Finally, the record included evidence of the steps Steve D. has taken and has successfully completed to enhance his educational background and experience in the various water treatment disciplines.

OPINION AND FINDINGS

At issue in this dispute is the propriety of the manner in which the Employer filled the UMM vacancy in question. Given that Civil Service Rules are incorporated in the parties' Agreement by reference, the evidentiary record and the post-hearing briefs of the parties have raised essentially three sub-issues for analysis in determining the general issue stated at the outset:

First, whether the Employer violated the Agreement when it failed to fill the UMM vacancy from the four valid names remaining on List 2 after the removal of Ted B. from the position?

Second, whether the Employer violated the Agreement when it added a welding portion to the skills test for the first time in July of 2007?

Finally, whether the Employer violated the Agreement when it changed the previous test weighting protocol in developing List 3?

A consideration common to all three sub-issues is the first paragraph of Article VII, Section 7.1 of the parties' Agreement. The paragraph reads in full as follows:

7.1 Right to Manage. The Employer retains the full and unrestricted right to operate and manage all manpower, facilities and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; *to select direct {sic} and determine the number of personnel*; to establish work schedules; to

contract for services without the need for further negotiations relating to implementation of the decision in respect to lime sludge hauling and parking lot attendants; *to perform any inherent managerial function not specifically limited by this agreement.*

(Italics supplied)

Turning to the first sub-issue, the Union has cited Civil Service Rule 602 C., which was quoted earlier, in support of its contention that the Employer was required to select a candidate from among the four names remaining on List 2 after Ted B. was removed from the UMM vacancy in dispute. The second sentence of the rule reads as follows:

If less than three names appear on an internal or promotional eligibility list, the Mayor may select one of the remaining names from that list, or may request that the Civil Service Board open the competition and have another list be prepared and merged.

This sentence, however, must be read in context with the entire paragraph. Indeed, the first sentence reads:

Whenever a vacancy in the classified service is to be filled, from an eligibility list, the Secretary to the Board shall submit to the Mayor the three names certified by the Board standing highest on the appropriate list, as well as any names included through expanded certification, to fill the vacancy.

The key words of that sentence are the first fifteen. As written, it does not specify *when* a vacancy is to be filled. In alleging a violation of the Agreement, it is important to draw the proper distinction between what the Employer can do and what the Agreement says the Employer must do. Given that the rule does not mandate when a vacancy is filled, it follows that such a staffing decision remains within the inherent managerial functions of the Employer. No other provision of the Agreement was cited to the contrary. Accordingly, the Employer was free to exercise its discretion and decide not to fill the vacancy until after it had proposed the change in the licensing requirement to the Civil Service Board.

After the Board approved the change to the minimum requirements for the job and the City Council adopted the change, Civil Service Rule 402 1.c. quite clearly controlled the disposition of List 2. By its terms, the rule rendered List 2 entirely void and required a new round of qualification testing. On the facts of this record, therefore, the Employer did not violate the Agreement when it did not fill the vacancy from the four names remaining on List 2. Accordingly, the first grievance

must be denied.

As noted previously, the second grievance advances the second and third sub-issues referenced above. The second sub-issue challenges the inclusion of welding tasks in the revised skills test administered to produce List 3. On this sub-issue, Civil Service Rule 406 is instructive and, it is determined, controlling. It reads in full as follows:

406. Types of Examinations

The tests prescribed by the Board *may be* written, oral, or *in the form of a demonstration of skill*, or any combination of these, or any other form which in the judgement of the Board will best serve to determine the relative fitness and ability of applicants to perform the duties of the position. All examinations for positions in the classified service shall be competitive and shall relate to those materials which fairly test the capacity and fitness of the persons examined to discharge efficiently the duties of the position sought by them. *Any means or measures may be used* which are reasonably well calculated to test the fitness of candidates to become employees in position of the class for which the examination is held. Such means or measures may include any required statement of any investigation of education, experience or record of accomplishment; *any test of knowledge, skill, capacity, intelligence or aptitude*, and any inquiry into the moral character or any other quality attribute which in the judgment of the Board seems desirable. This rule shall apply to both entrance and promotional examinations.

(Italics supplied)

It is clear that Civil Service Rule 406 grants the Employer broad latitude to determine the content of a skills test so long as the tasks included are reasonably connected to actual work requirements. The UMM Job Description specifically lists the operation of welding equipment as an example of the work to be performed. Moreover, the ability to operate tools and equipment, which includes the welding equipment owned by the Employer, is listed as an essential job function on the Job Description. Finally, welding experience is specifically listed as a desirable quality on the Job Description. On this evidentiary record, therefore, the finding must be, and is, that the Employer did not violate the Agreement by including the testing of welding proficiency as it did on the revised skills test. Accordingly, this aspect of the second grievance must be, and is, denied.

Turning to the final aspect of the second grievance, as previously quoted, Civil Service Board Rule 407 mandates that test component weights must remain as set for prior tests unless a specific request has been made to change them from previously adopted levels. Although the Public Utilities Director thought he had discussed the changing of the test protocol and weights with the Civil

Service Board at its May 17, 2007 meeting and received the Board's approval to do so, he could not say with "100% surety" that such was the case. As noted previously, the minutes of the meeting are entirely silent about the occurrence of such a discussion. In addition, the Human Resources Director, who is also the Board Secretary and was present at the meeting, was similarly unable to recall with "100% certainty" that such a discussion took place. The local Union president, who was also present, was unaware of any such discussion. Upon careful review of the testimony, the following pivotal colloquy took place during the Public Utilities Director's testimony on cross-examination. He began with describing his goal that evening and then responded to a pointed question as follows:

A. My role and my goal at the Civil Service Board meeting that evening was to get the Job Description updated. I left that meeting with that understanding that the Job Description was updated.

Q. Did you leave that meeting believing that the Civil Service Board had approved a change in the weight of the various tests for the position of Utilities Maintenance Mechanic? Yes or no?

A. I'm not sure. I don't recollect.

Regardless of what actually transpired at the Board's meeting, the Employer raised a contention in its post-hearing brief that the Union had waived its right to challenge the change in skills test weighting. It based its contention on a discussion about Posting 3 between the local Union president and the Employer's Human Resources Director. According to the testimony, the Employer was willing to address the subject at the next Board meeting in approximately ten days. The Board met on the first and third Thursday of each month. According to her testimony, the local president was confident that the Board would approve any requested change in test weighting. He replied in words to the effect, "Do whatever you want."

Careful review of the evidence leads to the conclusion that the Union did not waive any violations of the Agreement arising out of test weighting. The presence of this aspect in the second grievance shows that the Union did not intend to make any such waiver. Nothing in the testimony of the involved witnesses shows that terms like "waiver" or "waiving" were ever used during the discussion in question. Moreover, Rule 407 creates an independent obligation running from the Employer to the Civil Service Board which does not directly involve the Union.

On the record before the arbitrator, the weight of the evidence decidedly favors the Union's position. The finding, therefore, is that the Employer did commit a technical violation of the Agreement when it changed the testing protocol and component weighting without complying with Rule 407.

The foregoing finding raises the question of remedy. Although the facts of any grievance can be said to be unique, the facts of this dispute are both unique and novel. Whether the July 3, 2007

skills test was weighted at 60% as it was or at 30% as it should have remained, the finding remains that the welding portion was a proper component of the test and it is undisputed that Steve D. did not successfully pass the skills test. Pursuant to Rule 407, the failure to attain a passing score in any part of the testing process eliminates an applicant from further consideration. The record establishes, therefore, that the only person harmed by the overall sequence of events was Ted B. He was unquestionably the most qualified of the five names on List 2 but was knocked out of the UMM job because of a Job Description requirement that both parties agree was unnecessary and served no useful purpose.

Under the circumstances, the Employer is directed to heal its technical violation of Rule 407 by formally obtaining Civil Service Board approval for the weighting change, if it has not already done so, and to faithfully comply with Civil Service Rules prospectively. Careful review of the evidence on the instant record does not warrant any additional remedy.

AWARD

The first grievance filed by the Union is denied.

The second grievance filed by the Union is denied in part and sustained in part. The Employer did violate the Agreement when it filled the disputed Utilities Maintenance Mechanic position in the manner that it did. The violation consisted of failing to comply with Civil Service Rule 407 before it changed the weighting of the July 3, 2007 skills test. The Employer is directed to provide the remedy in accordance with the Opinion and Findings.

Gerald E. Wallin, Esq.
Arbitrator

August 12, 2008