

IN THE MATTER OF THE ARBITRATION BETWEEN

THE POLICE OFFICERS'	)	GRIEVANCE No. 08-07
FEDERATION OF MINNEAPOLIS,	)	
	)	
	)	
	)	
Union,	)	
	)	
and	)	
	)	
THE CITY OF MINNEAPOLIS,	)	DECISION AND AWARD
	)	OF
Employer.	)	ARBITRATOR

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APPEARANCES

For the Union:

Robert Zeglovitch  
The Law Offices of Robert  
Zeglovitch  
Attorneys at Law  
Suite 1740  
The 400 Building  
400 Robert Street North  
St. Paul, MN 55101

For the Employer:

Michael B. Bloom  
Assistant City Attorney  
City of Minneapolis  
Office of the City Attorney  
210 City Hall  
350 South Fifth Street  
Minneapolis, MN 55415

On February 25, 2010, in Minneapolis, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by changing the original process the Employer established for the selection of candidates for promotion.

## FACTS

The Employer is the City of Minneapolis, Minnesota. The Union is the collective bargaining representative of "all sworn law enforcement personnel [employed by the Employer] except those appointed to serve in the positions of Chief of Police, Assistant Chief of Police, Deputy Chief and Inspector." Thus, the bargaining unit includes those who hold the ranks of Patrol Officer, Sergeant, Lieutenant and Captain.

On January 31, 2008, Assistant Chief of Police Sharon Lubinski sent the following announcement to all personnel of the Minneapolis Police Department (the "Department"):

There will be a Police Captain's promotional exam in 2008. An official (Civil Service) job announcement will be posted on the City's website by February 8, 2008. . . Minimum requirements will include: Permanent employees (those who have passed probation) of the Minneapolis Police Department who currently hold the rank of Police Lieutenant AND have two years of continuous service as a Lieutenant by February 29, 2008.

A written test will be administered and education and seniority points will be awarded. More details will be provided in the official job announcement.

The evidence shows that the purpose of this promotional process was not to fill an immediate vacancy, but, instead, to develop an eligibility list from which those who qualified could be selected for future promotion to the rank of Captain as vacancies in that classification might occur over a two-year period.

In early February, the Staffing Division of the City published on the City's website an undated announcement of the selection examination process for inclusion on the Police

Captain's eligibility list. Relevant parts of that announcement (hereafter, the "Original Announcement") are set out below:

POLICE CAPTAIN (Restricted Mpls. Police Department)  
Exam 20209 - Open Monday, February 4, 2008 through  
Friday, February 15, 2008

POSITION INFORMATION: . . .

REQUIREMENTS: . . .

APPLICATIONS ACCEPTED: Dates: Monday, February 4, 2008  
through Friday, February 15, 2008. . .

SELECTION PROCESS: The examination process will include:  
1) Written Test (10%); 2) Assessment Center consisting of  
at least two exercises (78%); 3) departmental seniority  
rating (10%) and 4) education credit (2%).

The top 18 scoring candidates from the written test will  
be invited to participate in the Assessment Center. The  
Human Resources Department reserves the right to amend  
the examination plan in accordance with applicable  
policies and procedures. . . .

On March 1, 2008, twenty-three applicants for the  
Captain's eligibility list took the written test that had been  
specified as the first part of the testing process. Two  
applicants had the same score, just below the score of the  
applicant with the seventeenth highest score. The parties agree  
that, in accord with usual practice, these two applicants were  
both considered as having successfully placed within the "top 18  
scoring candidates" and that, therefore, if the examination  
process had continued in accord with the Original Announcement,  
nineteen applicants would have advanced to the next step in the  
process, the Assessment Center.

The Assessment Center tests candidates by assessing their  
responses to hypothetical situations that might arise in a

Police Captain's work, as judged by a committee of those holding the rank of Captain from the Police Departments of other cities.

Sometime in early March, 2008, the Employer decided to amend the Original Announcement by issuing an Amended Announcement that would allow all twenty-three candidates who took the written test to advance to the Assessment Center. Thus, this change eliminated one of the conditions stated in the Original Announcement -- that only the "top 18 scoring candidates" would advance to the Assessment Center part of the testing process.

On March 20, 2008, Bryan Seboe, Human Resources Generalist, sent each of the candidates a memorandum that 1) stated the results of the written test, 2) stated that adjustments had been made to six questions, and 3) informed the candidates of the decision to increase the number of candidates who would advance to the Assessment Center from the "top 18 scoring" candidates to twenty-three -- all who took the written test. Below, I set out the parts of this memorandum that explain the reason for the amendment:

. . . Twenty-three (23) candidates completed the written test that was conducted on March 1, 2008. Overall scores ranged from 34 to 51 correct responses out of a possible 52 correct responses.

Analysis of the Police Captain Written Test:

As part of the test validation process, staff from the Human Resources Department performed what is termed an "adverse impact" analysis to determine how the written test impacted protected class groups. Based on this analysis, all 23 candidates will be invited to participate in the second portion of the examination, the Assessment Center exercises.

The decision to increase the number of candidates from 18 to 23 was made to:

1. Comply with the Uniform Guidelines on Employee Selection Procedures published by the Equal Employment Opportunity Commission.
2. Allow City of Minneapolis to fulfill its legal responsibility to reduce or eliminate adverse impact.

Below, I show the part of the Amended Announcement that changed the testing process, with the changed text underlined:

SELECTION PROCESS: The examination process will include: 1) Written Test (10%); 2) Assessment Center consisting of at least two exercises (78%); 3) departmental seniority rating (10%) and 4) education credit (2%).

AMENDED: Twenty-three (23) candidates will be invited to participate in the Assessment Center.

On March 17, 2008, officers of the Union, having heard that the Employer intended to amend the testing process, brought the present grievance, relevant parts of which are set out below:

Grievant: Class Action.

Statement of Grievance: The City's expansion of the applicant list that will proceed to the assessment center following the promotional examination for the rank of Captain administered in early April beyond the individuals who received the top 18 scores (19 total applicants due to a tie) violates section 30.4 of the Collective Bargaining Agreement.

Contract Violation(s): Section 30.4

Remedy Sought: City to remain with top 18 candidates (19 due to a tie) as initially posted.

Section 30.4(a) of the parties' 2005-2008 labor agreement provides:

30.4 - Promotions.

- a. Examinations. Promotional examinations as defined in Civil Service Rule 6.05, shall be offered to current sworn employees in the classified service who meet minimum qualifications to compete for promotion to the classes of sergeant, lieutenant or captain. The Human Resources Department in cooperation with management and labor representatives will develop job-related examination components for examinations

for the classification of sergeant, lieutenant or captain. Examinations may consist of one or more of the following components: written test, oral interview, rating of education, skills, and/or experience, practical/work sample, physical performance, or seniority. However, the Employer retains the discretion to establish the examination components and the relative weight of each component. The number of candidates advancing to successive components in the examination may be restricted to the most highly qualified candidates, provided the criteria for so limiting continued participation is described in the examination announcement.

#### DECISION

The Union makes the following primary argument. The Amended Announcement changed the number of candidates who moved to the Assessment Center portion of the selection process -- by increasing that number from the "top 18 scoring candidates" on the written test (19 with the tie), as specified in the Original Announcement, to all twenty-three candidates who took the written test. That change violated Section 30.4(a) of the labor agreement -- particularly its last sentence:

The number of candidates advancing to successive components in the examination may be restricted to the most highly qualified candidates, provided the criteria for so limiting continued participation is described in the examination announcement.

The Union argues that, though this provision permits the Employer to restrict advancement in the examination process to highly qualified candidates, it also requires that the Employer describe the criteria for such a restriction in the examination announcement. According to the Union, once the Employer has established the criteria for such a restriction, as it did in the Original Announcement, the Employer cannot change those criteria. As I understand the Union's argument, it reads the language of the last sentence of Section 30.4(a) to imply that,

once the restricting criteria are stated, changing them is prohibited. In the Union's interpretation, to permit the Employer to change the restricting criteria would make meaningless the proviso that ends the sentence -- "provided the criteria for so limiting continued participation is described in the examination announcement." To the Union, permitting change in the criteria after they have been established in the Original Announcement would effectively eliminate the requirement that the Employer describe the criteria -- by opening the description to unilateral amendment at any time.

The Employer argues that, even if, arguendo, the last sentence of Section 30.4(a) could be read as prohibiting a change in the restricting criteria that increases the restriction (by reducing the number permitted to advance), nothing in the language of Section 30.4(a) implies the prohibition of a change that lessens the restriction by allowing a greater number to advance, or, as in the present case, by eliminating any restriction and allowing all to advance.

The Employer also makes the following argument. Even if Section 30.4(a) is read to require the Employer to administer the test within the restricting criteria stated in the Original Announcement, it has done so. In support of this argument, the Employer urges that the restricting criteria in the Original Announcement include all language relevant to the restriction:

The top 18 scoring candidates from the written test will be invited to participate in the Assessment Center. The Human Resources Department reserves the right to amend the examination plan in accordance with applicable policies and procedures. . . .

The Employer presented evidence that the reason for its decision to eliminate any restriction on the number of candidates advancing to the Assessment Center portion of the test was the following. The Employer's Human Resources Department determined after the written test was administered that an Adverse Impact Analysis of the test results -- a procedure required by the Equal Employment Opportunity Commission ("EEOC") and by the Employer's policies -- showed a possible violation of EEOC standards designed to prevent racial discrimination. The Employer argues, therefore, that, because the Original Announcement reserved to the Human Resources Department the right "to amend the examination plan in accordance with applicable policies and procedures," the change made by the Amended Announcement was within the restricting criteria that had been stated in the Original Announcement. Of the four candidates who had the lowest scores on the written test and were permitted to advance to the Assessment Center by force of the Amended Announcement, two were black and two were white.

The Union presented statistical evidence challenging the Employer's assertion that an Adverse Impact Analysis required expansion of the number of candidates advancing to the Assessment Center. The Union argues that the real reason for permitting all candidates to advance was so that the Chief of Police could be sure that two of his friends, who were among the four with the lowest scores on the written test, would be able to advance to the Assessment Center portion of the test.

The Employer argues that it has a management right to conduct Adverse Impact Analyses and that its implementation of that right is not subject to challenge by the Union. The Employer also argues that, in this case, even if it was in error in its determination that its Adverse Impact Analysis required expansion of the number advancing to the Assessment Center, it, nevertheless, had a management right to make that determination -- a right not subject to challenge by the Union.

I make the following rulings. I interpret Section 30.4(a) of the labor agreement to permit an amendment of the original criteria that restrict advancement to successive components of an examination plan by the most highly qualified candidates, 1) if the amendment eliminates a previously stated restriction, thus allowing all candidates to advance, or 2) if the amendment falls within a stated reservation in an original announcement that the examination plan may be amended to meet the requirement of existing policies.

In the present case, I find no violation of Section 30.4(a) of the labor agreement because the Amended Announcement eliminated the restriction entirely, permitting all to advance to the Assessment Center. The absence of language in Section 30.4(a) that expressly prohibits the Employer from entirely eliminating a once-stated restriction indicates that the parties left that possibility open and, therefore, within the Employer's management right to do so under Article 3 of the labor agreement.

It also appears that the Employer made a good faith determination that the Adverse Impact Analysis required

elimination of the restriction, even though it appears that the Employer's interpretation of the Adverse Impact Analysis was in error. The evidence is insufficient to support a finding that that interpretation was made in bad faith -- a subterfuge made to allow friends of the Chief of Police to advance to the Assessment Center.

AWARD

The grievance is denied.

May 25, 2010

  
Thomas P. Gallagher, Arbitrator