
IN THE MATTER OF ARBITRATION

OPINION AND AWARD

between

CITY OF AUSTIN, MINNESOTA

**BMS Case No. 14 PAO814
(Grievance No. LP 009646-
Job Posting-Spencer Welner)**

and

**UNITED AUTO WORKERS
LOCAL 867**

Gil Vernon, Arbitrator

APPEARANCES:

On Behalf of the City: Cyrus F. Smythe, Jr. – Consultant, David Hoversten – City Attorney and Tricia Weichmann – Human Resources Director

On Behalf of the Union: Mike Krumholz – International Representative

I. ISSUE

The issue presented by the grievance before the Arbitrator can be framed as follows:

Did the City violate the Collective Bargaining Agreement (CBA) when it did not assign Spencer Welner to the “Trimmer/Chipper Operator” vacancy that was posted November 27, 2013 and instead hired an outside candidate, and if so what is the remedy?

II. BACKGROUND

On November 27, 2013 the Employer posted the following vacancy:

Job Posting Park & Recreation

POSITION: Tree Trimmer/Chipper Operator

DUTIES INCLUDE:

See attached job description

The duties listed in the job description are intended only as illustrations of the various types of work that may be performed. The omission of specific statements of duties does not exclude them from the position if the work is similar, related or a logical assignment to the position. Job descriptions are subject to change by the Employer as department needs and requirements of the job change.

Education and Experience:

- (A) Graduation from high school or GED equivalent, and
- (B) Three years experience in turf, tree maintenance and tree trimming, and
- (C) Prior knowledge or completion of the Electric Hazard Awareness Program (EHAP)

Special Requirements

- A) Valid state driver's License with CDL and air brake endorsement
- B) CPR and First Aid certification
- C) Must obtain Minnesota Department of Agriculture Certification for Tree Inspection within one year.
- D) City or state licenses/certificates as may be required to obtain when deemed necessary.

Necessary Knowledge, Skills and Abilities:

- (A) Working knowledge of equipment, materials and supplies used in tree maintenance; working knowledge of equipment and supplies used to do minor repairs; working knowledge of first aid and applicable safety precautions.

- (B) Skill in the operation of listed tools and equipment properly and safely.
- (C) Ability to work independently and to complete daily activities according to work schedule; Ability to lift heavy objects above shoulder level, stand for long periods of time, and to perform strenuous physical labor under adverse field conditions; Ability to communicate orally and in writing.
- (D) Ability to understand, follow and transmit written and oral instructions; ability to keep proper work logs; ability to establish effective working relationships with employees, supervisors, and the public.
- (E) Ability to assist with educational classes and/or training of others.

PAY RANGE: \$20.26 - \$24.12

EFFECTIVE: When opening becomes available

Attached to the posting was a position description. Because it is essential to a full understanding of the dispute, it is attached as Appendix A to the decision.

It is also necessary to review the history of this position. Prior to 2006 the City maintained two separate classifications and position descriptions. There was a separate position description for Trimmer and a separate position description for Chipper Operator. The Trimmer position was the higher paid and skilled position. It is not wrong to think of the Trimmer position as having arborist-type duties. When combined, the pay was \$2.00 per hour higher than the previous wage of the Chipper Operator. (Job class 13 versus job class 11)

When first combined in 2006 the hybrid position only required one year experience in “turf and tree maintenance” and had no electrical hazard training requirement. In 2008, the minimum experience requirement was raised to two

years. As is within their discretion, the City, by the time of the 2013 posting, changed a number of duties of the position and increased necessary skills.

Between the 2013 job posting and position description, there were a number of changes including but not limited to the following:

- Three years turf, tree maintenance and tree trimming
- Prior knowledge or completion of the electric hazard awareness program (EHAP)
- Obtainment of the Minnesota Department of Agriculture certificate for tree inspection
- Skilled tasks in preventative care and formative pruning
- Evaluation and inspection and guidance regarding the identification and control of plant diseases/insects
- Data entry and tree inventory

When the Grievant applied for the job he was rejected as not meeting the minimum education and experience requirement. Subsequently, he filed a grievance reading in relevant part as follows:

“Detailed Reasons for Grievance:

“Spencer was told he was not qualified for tree trimmer job without being given 30 days in which to qualify for job. Reasons doesn’t know how to operate boom truck and doesn’t have electrical awareness training. None of our tree trimmers have had any electrical awareness training since March of 200_. Spencer wasn’t even asked if he knew how to operate boom truck. Spencer was told at work in summer of 2013 to take boom truck out to RCC and operate boom truck to check serial #s in speakers. Also used it to fix lites at skimmers Hill. Used boom truck to put gable ends up on new building at the soccer fields. The city has not provided electrical awareness training since March of 2001.

“Specific Adjustment Requested:

“Be allowed to hold tree trimming job.”

The Employer's December 16, 2013 first step response read as follows:

"This is in response to your December 6, 2013 grievance with regard to the tree trimmer/chipper posting of November 27, 2013.

"The posting was signed by one department employee, Spencer Wolner. Unfortunately, Spencer does not meet the minimum qualifications of the position and was therefore not awarded the position.

"You cite article 6.4 and 6.1 as provisions of the contract that have been violated. Article 6.1 states in part – 'This article shall not be construed in such a way as to give anyone claim to a job the duties of which he or she is clearly unable to perform'.

"With regard to article 6.4, it is only after an employee receives a job in accordance with their seniority that they shall be given thirty (30) days in which to qualify for the job. The employee did not receive the job, therefore thirty (30) days is not required.

"The employee did not meet the minimum qualifications of the position. The above filed grievance is hereby denied."

Ultimately, the matter could not be resolved and it was appealed to arbitration. A hearing was held June 24, 2014. Post hearing briefs were filed and exchanged August 1, 2014.

III. RELEVANT CONTRACT LANGUAGE

ARTICLE III

EMPLOYER AUTHORITY

- 3.1 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 and determine the number of personnel; to establish work schedules; and to perform any inherent managerial function not specifically limited by this Agreement.

Any term and condition of employment not specifically established or modified by this Agreement shall remain solely within the discretion of the Employer to modify, establish or eliminate.

ARTICLE VI

SENIORITY

- 6.1 The Employer agrees to recognize the principles of seniority giving preferences of employment, jobs and advancement to employees on the basis of length of service. In the case of lay-off for lack of work, the youngest in point of seniority shall be the first lay-off. When the force is increased, those formerly laid off shall be hired before others are employed. They shall be rehired in the order of their seniority – the oldest first, etc. As vacancies occur, notice of the same shall be posted giving he straight time employees the opportunity, on the basis of seniority, to fill the vacant job. Any employee shall have the right to waive his or her seniority to any job. This article shall not be construed in such a way as to give anyone claim to a job the duties of which he or she is clearly unable to perform. The exceptions to seniority as provided in this paragraph shall be by mutual agreement of the parties hereto.
- 6.4 All employees receiving jobs in accordance with their seniority shall be given thirty (30) days in which to qualify for the job. In the event of disqualification said employee shall, without impairment of seniority rights, return to the job they left immediately preceding the step up.
- 6.5 An understanding and explanation of each job opening in regard to rate of pay, classification, length of job, and starting date of job shall be included and made a part of the job posting list at all times.
- 6.6 All job openings shall be posted for a period of seventy-two (72) hours (or thereafter until all employees have opportunity to sign) at the park shop for all employees on straight time. The job shall first be filled in accordance with Article VI, Paragraph 6.1 from the straight time employees of the City where the vacancy exists. If no straight time employees sign for the posted job, the City may hire a new employee to fill the job.

IV. OPINION AND AWARD

Fundamentally, the City did not violate the contract by denying the Grievant the posting in question. However, it should be clear that the Employer had never treated the electric hazard training as a prerequisite to applying for the job or any other job in the Department. There is no question it is important training that the

Employer is entitled to insist upon. However, given the evidence, if this were the only shortcoming on the Grievant's part, this lack of training alone would not have rendered him unqualified. It is something, given the way the Employer has treated the training, that like the tree certification could have been obtained after the job was awarded.

Unfortunately for the Grievant the lack of hazard training was not the only thing the Grievant lacked. He said he had prior relevant experience. However, the Arbitrator was not convinced it was three years worth or as broad based as the job required. He may have been qualified once. Nonetheless, the job qualifications were changed over time. The City is entitled to expect more qualifications and improve the quality of the services it provides. They did just that in this instance and there is no evidence it was done as a pretext to disqualify Grievant or to favor an outside candidate.

As for the Union's argument that Section 6.4 requires the Employer put him in the job for 30 days, it is well established that to be entitled to such a trial period the employee must first be qualified. This is reinforced by the language of 6.1 (albeit general in nature). The 30 days is not a training period but a period to allow the Employer and the employee to determine if the employee is truly qualified. During this period the employee can return to his prior position and the Employer can, if supported by sufficient evidence, disqualify the person without resorting to

formal discipline. The Grievant did not meet the minimum qualifications, therefore the trial period was inappropriate.

AWARD

The grievance is denied.

(Signature on Original)

Gil Vernon
Arbitrator

Dated this 31st day of October, 2014.

POSITION DESCRIPTION

Tree Trimmer/Chipper Operator

Department:	Parks, Recreation & Forestry
Division:	Park Maintenance
Grade:	13
Bargaining Unit:	UAW - Park Maintenance
FLSA Status:	Non-Exempt
Date:	November 2013

General Purpose

Performs a variety of skilled tasks in preventive care, formative pruning and removal of trees and shrubs on public property to improve appearance, maintain usability, improve plant health and minimize storm damage. Work is often considered high risk which requires comprehensive knowledge of tree removal techniques.

Other duties include but are not limited to removing dead and diseased trees; planting new trees, shrubs and plants; applying pesticides; worksite planning; utilizing proper safeguards for subordinates and the public; proper operation and care of assigned equipment; and performing other maintenance duties associated with the park or other City departments.

Supervision Received

Works under the general supervision of the Parks Supervisor.

Supervision Exercised

May supervise community service workers or temporary employees as required and assigned.

Essential Duties and Responsibilities

- Trim boulevard and park trees using aerial lift. Remove/dispose of diseased/dead trees and related debris according to requirements using heavy & light equipment. Plants trees, shrubs and flowers
- Provide inspection and guidance regarding the identification and control of plant diseases/insects. Evaluate suspected diseased trees.
- Operates aerial lift truck, chainsaws, pruning saws and other listed equipment as needed as well as assisting the street department with snow removal. Perform preventive and routine maintenance (identify potential problems) on aerial lift truck, chipper truck, chipper and equipment used in tree trimming. Provide external visual inspection for cracks and loose or worn components of all listed equipment.
- Maintain daily tree work records as well as tree inventory information. May be required to perform data entry of tree information into computer system.

Appendix - ~~000~~ A-1

- Responsible for following all safety practices while on the job.

The duties listed above are intended only as illustrations of the various types of work that may be performed. The omission of specific statements of duties does not exclude them from the position if the work is similar, related or a logical assignment to the position.

Peripheral Duties

General park maintenance duties.

Serves as a member of various employee committees, as assigned.

Minimum Qualifications

Education and Experience:

- (A) Graduation from high school or GED equivalent, and
- (B) Three years experience in turf, tree maintenance and tree trimming, and
- (C) Prior knowledge or completion of the Electric Hazard Awareness Program (EHAP)

Necessary Knowledge, Skills and Abilities:

- (A) Working knowledge of equipment, materials and supplies used in tree maintenance; working knowledge of equipment and supplies used to do minor repairs; working knowledge of first aid and applicable safety precautions.
- (B) Skill in the operation of listed tools and equipment properly and safely.
- (C) Ability to work independently and to complete daily activities according to work schedule; Ability to lift heavy objects above shoulder level, stand for long periods of time, and to perform strenuous physical labor under adverse field conditions; Ability to communicate orally and in writing;
- (D) Ability to understand, follow and transmit written and oral instructions; ability to keep proper work logs; ability to establish effective working relationships with employees, supervisors, and the public.
- (E) Ability to assist with educational classes and/or training of others.

Special Requirements

- A) Valid state driver's License with CDL and air brake endorsement.
- B) CPR and First Aid certification

Appendix A-2

C) Must obtain Minnesota Department of Agriculture Certification for Tree Inspection within one year.

D) City or state licenses/certificates as may be required to obtain when deemed necessary.

Tools and Equipment Used

Equipment listed but not limited to computer system, aerial lift, log truck, chipper truck, pickup truck, chainsaw, pruner saw, sod cutter, lawn and landscaping equipment, including tractors, chipper, mowers, chain saw, edger's, weed trimmers, electric motors, pumps, sprinklers, irrigation systems; miscellaneous hand and power tools for turf maintenance, painting, janitorial equipment, carpet cleaners, washers, vacuums, mops, brooms and dusting equipment.

Physical Demands

The physical demands described here are representative of those that must be met by an employee to successfully perform the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

While performing the duties of this job, the employee is regularly required to reach above shoulder with hands and arms holding heavy equipment. The employee frequently is required to stand; walk; and use hands to finger, handle, feel or operate objects, tools, or controls. The employee is occasionally required to sit; climb or balance; stoop, kneel, crouch, or crawl; and talk or hear.

The employee must frequently lift and/or move up to 50 pounds and occasionally lift and/or move more than 100 pounds. Specific vision abilities required by this job include close vision, distance vision, color vision, peripheral vision, depth perception and the ability to adjust focus.

Work Environment

The work environment characteristics described here are representative of those an employee encounters while performing the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

While performing the duties of this job, the employee regularly works near moving mechanical parts and in outside weather conditions. The employee frequently works in high, precarious places and is frequently exposed to wet and/or humid conditions, fumes or airborne particles, and vibration. The employee is occasionally exposed to risk of electrical shock. The noise level in the work environment is usually loud.

The job description does not constitute an employment agreement between the employer and employee and is subject to change by the employer as the needs of the employer and requirements of the job change.

Appendix A-3