

LABOR RELATIONS CONNECTION
LABOR ARBITRATION DECISION AND AWARD

In the Matter of the Arbitration between:

SENA, LOCAL 9158, UNITED STEELWORKERS, AFL-CIO

AND

CITY OF BOSTON

LRC Case Number: **336-19, 24-0391**

Grievant: [REDACTED] **(Promotional Bypass)**

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having duly heard the proofs and allegations of the parties,

AWARD as follows:

The City of Boston violated Article 14, section 2, of the parties' Collective Bargaining Agreement by acting arbitrarily and capriciously in the manner in which it implemented the 2018 selection process for the position of General Superintendent of Parks/Turf Maintenance in the City of Boston Parks Department.

As a remedy, the selection of [REDACTED] is to be vacated, and the City is ordered to repost the position of General Superintendent of Parks/Turf Maintenance for the City of Boston Parks Department and to fill it in accordance with the terms of Article 14. The panel will disregard the experience gained by [REDACTED] following his selection as General Superintendent. Should Mr. Mosman be selected for the position, he will be made whole for retroactive compensation and other benefits lost during the period of time that [REDACTED] occupied the position. I shall retain jurisdiction over the matter for sixty days to address any issues that may arise concerning implementation of the award.

Accordingly, the grievance is sustained.



March 9, 2020
Date of Issue

Sherrie Rose Talmadge, Arbitrator

**LABOR RELATIONS CONNECTION
LABOR ARBITRATION PANEL**

In the Matter of Arbitration)
) **Case No.** 336-19, 24-0391
 Between) **Grievant:** ██████████
) **Date of Issue:** March 9, 2020
SENA, Local 9158, USW, AFL-CIO)
)
 And)
)
CITY OF BOSTON)

Before: Arbitrator Sherrie Rose Talmadge, Esq.

Appearances:

Ian O. Russell, Esq.
Pyle Rome Ehrenberg PC
On behalf of the Union

Kate Kleimola, Esq.
Office of Labor Relations
On behalf of the City of Boston

Hearing Date (s): November 22, 2019
Hearing Location (s): Boston City Hall, MA
Receipt of Briefs: January 3, 2020

INTRODUCTION

The Union asserted that the City was arbitrary and capricious in its selection of the successful candidate over the Grievant for the position of General Superintendent (Parks/Turf Maintenance) in violation of Article 14. The City contended that the selection of the successful candidate rather than the Grievant was not arbitrary or capricious or otherwise inconsistent with the collective bargaining agreement.

STIPULATED ISSUES

1. Did the City violate Article 14, Section 2, by selecting an applicant other than the Grievant for the position of General Superintendent of Parks/Turf Management?
2. If so, what shall be the remedy?

Arbitration Decision continued.

**RELEVANT CONTRACTUAL PROVISIONS from the
AGREEMENT BETWEEN CITY OF BOSTON and SENA
Effective for the period 2017 - 2020**

ARTICLE 14. Temporary and Permanent Positions

Section 1. When there is no existing Civil Service list for the bargaining unit position to be filled, the provisions of Section 2 shall apply.

Section 2. Recognizing the career manager status of members of this bargaining unit, the Appointing Authority's selection of employees to fill temporary or permanent vacancies shall be made on the basis of qualifications and abilities, including, but not limited to, managerial skills, interpersonal skills and work history.

The Appointing Authority shall be the sole judge of qualifications and abilities required for the job. The selection of the most qualified applicant shall be subject to challenge by a more senior applicant only insofar as the grievance alleges the selection to be arbitrary and capricious.

ARTICLE 10. Grievance Procedure

D. Decision of the Arbitrator

The arbitrator hereunder shall be without power to alter, amend, add to, or detract from the language of the Agreement.

E. Award of the Arbitrator

...the arbitrator shall make no award that grants any appointment, reappointment, promotion, or termination, of any member of the bargaining unit.

FINDINGS OF FACT^{1 2}

In the fall of 2018, the City of Boston Parks and Recreations Department (Department) sought to fill the position of General Superintendent Parks/Turf Maintenance (General Superintendent) with a candidate who would be responsible for managing the day-to-day operations of the Maintenance Division of the Department.

██████████ who was Parks Commissioner at that time, testified that the General Superintendent position is the operations manager for the Maintenance Department. .

The Department, which creates and maintains clean, green, safe and accessible open space in 2100 acres of park land throughout Boston, has between 220 and 230 employees. The General Superintendent supervises about 140 employees and

¹ During the hearing the parties had an opportunity to submit relevant and material documentary evidence and to question sworn witnesses under direct and cross-examination. After the hearing, the parties submitted post-hearing briefs.

² The findings of facts were drawn, in part, from the parties' excellent briefs, as well as the witness testimony and documentary evidence.

Arbitration Decision continued.

“performs administrative and supervisory duties in the daily operation of the Parks Maintenance Division and manages and supervises the operations and activities of the Parks Department Maintenance Division. The General Superintendent is responsible for managing work orders and schedules, evaluating personnel, coordinating inventory, coordinating professional development for the Maintenance Division employees, recommending best practices for improvements, and serving as a liaison to outside groups. The General Superintendent is also responsible for implementing a long-range maintenance plan for the parks maintained by the Department.

In the fall of 2018, the City distributed a job posting for the vacancy for the General Superintendent (Parks/Turf Maintenance) position, intending to fill the position on a permanent basis. The position was posted internally and externally for more than seven days. They received about forty applicants and of those eight were interviewed. [REDACTED] the Grievant, who had been working in the position of Interim General Superintendent, was one of the candidates who was interviewed for the permanent position.

[REDACTED] along with [REDACTED] Director of Human Resources for the Department and [REDACTED] then Director of Administration and Finance, interviewed the candidates and asked each applicant the same questions. [REDACTED] made the ultimate decision as to who was to get hired.

The job posting included the following “Minimum Entrance Qualifications”:

- Applicant must have five (5) years’ of increasingly responsible experience in administration, park management, maintenance operations in a large-scale commercial or government maintenance facility.
- Applicant must have three (3) years of supervisor experience in a large-scale commercial or government maintenance facility. Experience working in a union environment is a plus.
- Candidates with demonstrated knowledge of urban forestry and park system operations will be given preference.
- Demonstrated ability with software such as Customer Relationship Management (CRM) and Microsoft Office Word and Excel.
- Demonstrated analytical, oral and written communication skills.

Preferences:

A bachelor’s degree in agriculture, landscape management, business administration, facility management, public administration, urban forestry, or a

Arbitration Decision continued.

relevant field of study may be substituted for two years (2) of the required experience.

█████ testified that following the interview process, the panel discussed the qualifications of each of the eight candidates interviewed. █████ testified that █████ and an external candidate, █████ were █████ top two choices based on the interviews and the applicants' prior experience. █████ testified that the panel decided to select an internal candidate who was familiar with the City's operations and selected █████ for the position. █████ stated that █████ experience, interest and desire to affect change and his constituent focus would benefit the department. He explained that █████ understands control of services and equity. █████ testified that he had spoken to Commissioner █████ who said █████ was a hard worker, who backed up the Commissioner and was good with constituents. █████ testified that █████ the Grievant, who had been working as the Interim General Superintendent, was not among the top two choices for the position.

█████ testified that the Grievant had a lackluster interview. █████ explained that he did not get a sense that the Grievant had enthusiasm for the position or wanted it. █████ acknowledged that the Grievant had made a fair point that while Interim General Superintendent he held off making changes to the department because he was in an interim position. However, █████ noted that he had felt that not much had changed in the Parks Department when the Grievant was Interim General Superintendent and █████ had hoped that there would have been more change. █████ emphasized that he had a very strong opinion of the Grievant and felt that he was a strong candidate who could perform the job of General Superintendent. █████ stated that he was aware of the Grievant's past discipline, but that it did not affect his decision in the selection for General Superintendent.

█████ testified that █████ interview went very well. He showed great enthusiasm for the Parks System and the position. █████ felt that when asked about sharing an action correcting a subordinate's behavior, the manner in which █████ addressed it was very strong. The Grievant's response to that question involved initially having a conversation with the employee and then documenting verbal warnings. When asked about implementing training for the Department, Passacantilli talked about the adoption of tablets for the employees and the City Worker program. █████ noted that the Grievant offered training, working with the Friends Group and the tree program at the

Arbitration Decision continued.

Victory Garden. ██████ acknowledged that he also considered the recommendations provided by the Friends of the Public Garden and the Fenway Civic Association on behalf of the Grievant.

██████ explained that he felt they needed a culture change in the Parks Department. He noted that ██████ had been Director of Constituent Services for City Councilor ██████ and had been Director of Operations at BTM and believed that the skills were transferrable to the Park Department. ██████ discussed his interest in formalizing the maintenance program to ensure all parks are addressed on a regular basis. ██████ also considered the fact that ██████ had a BS degree in Communications, although not in the field listed on the posting, would be helpful as the General Superintendent, which requires a complex administrative relationship with Administration and Finance. ██████ testified that he was aware that ██████ was a close friend of Mayor ██████ but emphasized that he was not told to hire ██████

Under cross-examination, ██████ acknowledged that although the minimum qualifications for the General Superintendent position state that candidates with demonstrated knowledge of urban forestry and park system operations will be given preference, ██████ had no knowledge of forestry and had not been involved with the park system operations. However, ██████ testified that ██████ had handled constituent requests involving the park system. ██████ did not have the five years of increasingly responsible experience in administration, park management, maintenance operations in a large-scale commercial or government maintenance facility. However, ██████ pointed to ██████ two years of experience as Director of Operations at the Boston Transportation Department. ██████ also considered ██████ seven years as Director of Constituent Services for City Councilor ██████ during which time he had intimate role addressing constituent services. When asked about ██████ use of a few swear words during the interview, ██████ considered that to be evidence that ██████ was comfortable with the panel and not an indication that he would not be professional on the job. ██████ testified that he had determined that ██████ was the most qualified candidate based on his experience in the operations of City administration and his interview.

Arbitration Decision continued.

██████████ qualifications

The Grievant, who is a certified arborist, with training in turf maintenance, horticulture, and invasive weed management, had 17 years of experience in the City's Park Department.

Prior to working for the City, the Grievant had experience in the field of parks maintenance, parks administration, urban forestry, tree maintenance, and turf maintenance. Between 1994 and 1998, following high school, the Grievant worked at DeVincent Farms in Waltham, MA which operated a farm stand, plant nursery, greenhouses, and farming acreage. There he gained experience in the use of heavy farming equipment, in addition to the operation of green houses and plant nurseries. He also attended Framingham Community College and transferred to Stockbridge School of Agriculture at UMass Amherst. At UMass Amherst, he studied turfgrass management, taking such courses as botany, irrigation and plant pathology. While interning at the Newton Commonwealth Golf Club, the Grievant worked in golf course maintenance.

From 1997 to 2002, the Grievant worked at Lupien Tree and Landscape, a company providing residential tree and landscaping services, where he became a crew lead tending to trees and their removal and head tree climber. By 2000 the Grievant became a certified arborist and has maintained his certification which involved continuing education classes in the field of arboriculture. In 2002 he also received a certificate in horticulture.

In 2002 the City hired the Grievant as the Superintendent of Tree Maintenance. He is responsible for the care of 38,000 trees and over 2,000 acres of forested parkland. He supervises a crew of City employees that has varied in size over the years. Currently, the crew includes two general foremen, one foreman, and a research analyst. The Grievant provides performance evaluations to the employees he supervises. He also oversees a number of contractors who provide services to the City and manages their contracts. The Grievant oversees spending on trees located on City streets, approximately \$800,000 on planting, \$500,000 on pruning and \$300,000 on removals, and an additional budget related to the contract work performed in the City's parks.

The Grievant testified that he also spends time meeting with community groups involved in park advocacy, with whom he discusses tree care, turf care, and management of invasive species. The Grievant noted that he has maintained good relations with community groups throughout his employment with the City.

Arbitration Decision continued.

As Tree Warden for the City the Grievant is responsible for overseeing public shade tree removal hearings, which are open to the public. To assist in the performance of his duties, the Grievant uses Customer Relationship Management (CRM), Microsoft Office Work and Excel software.

When the Grievant began in his position as Superintendent of Tree Maintenance, he ran an active tree inspection program, inspecting trees for infestations and infections. When the City transitioned into a reactionary program in which trees are inspected based upon calls that come into the Parks Department, the Grievant continued to run the program.

The Grievant presented un rebutted testimony that he had always received positive performance evaluations, and the one handwritten performance evaluation that the City provided to the Union indicated that the Grievant had received “above expectations” or “significantly above expectations” ratings on most categories. Throughout his employment, the Grievant’s salary level had increased from MM5 to MM7, along with his increase in responsibilities.

The Grievant received various certifications related to his employment. Through the City of Boston Management certification program, which involved training in managing City employees, he received a certification. He received a certification in integrated emergency management through FEMA, which involved training in how to respond to a large-scale storm or other catastrophic event. He received a certification from UMass in weed management and received a National Green Infrastructure Certification which involved instruction in green infrastructure and storm water retention.

As an active member of the Massachusetts Arborists Association, the Grievant has helped draft the Massachusetts Arborist Certification Exam as a member of the exam committee, served on the Board of Directors and spent one year as President of the Association. The Grievant also worked with New England Grows, which had put on the largest agricultural trade show in New England, for which he served on the education committee and was President of the group’s board in 2015.

In January 2018, after the position of General Superintendent (Parks/Turf Maintenance) in the Parks Department had become vacant, [REDACTED] who was Commissioner of the Parks Department, asked the Grievant to take the position on an interim basis. The Grievant testified that he worked to increase efficiency in the Division. The Grievant followed through with devising with new routes for snow equipment as had been requested by his predecessor, [REDACTED]. The Grievant offered a new class

Arbitration Decision continued.

in invasive weed management to employees and began enrolling staff in “Green School” through UMass extension programs.

The Grievant testified that he created an innovative approach to addressing damage to Parks Department vehicles, and he addressed complaints about Parks Department employees gathering in public areas through personal observations, conferring with union representatives and directly addressing the employees involved.

While working as Interim General Superintendent, the Grievant reported to [REDACTED] who provided positive feedback about his job performance. [REDACTED] testified that the Grievant is a good employee who has performed well in the positions he has held in the Parks Department.

A variety of community groups supported the Grievant’s candidacy including Friends of the Public Garden and the Fenway Civic Association. The Executive Director of Friend of the Public Garden wrote to “strongly support the candidacy of [REDACTED] [REDACTED] for the position of General Superintendent,” as he was “the ideal candidate to help take the City and the Friend’s vital work in these iconic parks in the heart of downtown to the next level as General Superintendent.” She wrote that the group had worked with “many parks personnel and tree wardens” and that [REDACTED] had been “by far the most knowledgeable and responsive.” She wrote that [REDACTED] is “incredibly positive and committed to his work...shows a willingness to help his colleagues and treats them with fairness and respect...is not afraid to follow or enforce the proper procedural requirements...has strong managerial and leadership skills...and is uniquely qualified to fulfill this position due to his extensive experience collaborating with community groups, park advocates, multiple city departments, and neighboring municipalities.”

On behalf of the Fenway Civic Association, [REDACTED] wrote that the Board of her organization, “believes [REDACTED] will be much-needed and highly -valued asset for the Back Bay Fens and the larger parks system as superintendent.” She praised his “knowledge of city parks,” his “depth of knowledge” and “enthusiasm”, noting that the group had worked directly with him on “myriad park projects and street tree issues over the past 15 years.” She noted that “we are routinely informed by Friends groups across the city that [REDACTED] has heard their requests and supported and enhanced their parks through responsive care.” She noted that the City’s parks would be “well-served” by a General Superintendent like [REDACTED] “who brings together knowledge, passion, commitment and a spirit of collaboration.”

Arbitration Decision continued.

██████████ qualifications

██████████ has a Bachelor of Science in Communications and Journalism. From 2006 – 2013, he worked as Director of Constituent Services for City Councilor ██████████ handling constituent requests relating to all City Departments, including the Parks Department. ██████████ testified that he had to learn how each Department in the City of Boston administration operated so he could respond to and resolve constituent requests. He left that position to work on Mayor ██████████ campaign managing volunteers within his geographic responsibility. Next, ██████████ held a role on the transition team assisting with the Inauguration and the transition to governing. Mayor ██████████ appointed him Special Assistant to the Mayor from January 2014 – January 2015, when he helped members of the new administration learn the operations of the City.

In January 2015, ██████████ Commissioner of Boston Traffic Department, asked ██████████ to assume the role of Director of Operations. ██████████ testified that in that role he acted as an operations manager for the Department, supervising a unionized workforce of approximately 60 employees.

██████████ testified that in January 2017, ██████████ Chief of Operations for the City of Boston, and ██████████ Commissioner of the Office of Economic Development (OED), asked him to join the OED as an Operations Specialist. In that position he helped small businesses through the permitting process that allowed them to be operational and acted as a liaison between the business and City agencies when needed. While working as Operations Specialist at the OED, the position of General Superintendent at the Parks Department became vacant. ██████████ testified that he had been interested in the Parks Department and the position of General Superintendent, which was responsible for the day to day operations of the Maintenance Division of the Department, because he enjoyed playing sports on every field in the department. He acknowledged that he was not knowledgeable about urban forestry, and his familiarity with turf maintenance was limited to his work as a football referee checking the turf before a game. ██████████ testified that he is good at operations and at getting things accomplished expeditiously.

POSITIONS OF THE PARTIES

UNION'S POSITION

The City's selection of the successful candidate over the Grievant for the position of General Superintendent (Parks/Turf Maintenance) was arbitrary and capricious in

Arbitration Decision continued.

violation of Article 14. When filling this vacancy, the City bypassed an extremely qualified member of the bargaining unit in order to appoint an individual from the outside of the unit who did not have the minimum qualifications for the position. The job posting for the position stated that the Minimum Entrance Qualifications for the position included five years of increasingly responsible experience in administration, park management, maintenance operations in a large-scale commercial or government maintenance facility. The Grievant had 17 years of such experience. The individual appointed to the position had zero years of experience in park management or administration and, at most, two years of experience in a government maintenance facility.

The job posting also stated that candidates with demonstrated knowledge of urban forestry and park system operations would be given preference. The Grievant is a certified arborist, with training in turf maintenance, horticulture, and invasive weed management, who had 17 years of experience in the City's Park Department. The individual appointed to the position had no knowledge of urban forestry and no experience in park system operations.

The City violated its collective bargaining agreement with the Union by acting arbitrarily and capriciously in appointing someone other than the Grievant. A fair and reasonable job appointment process requires the uniform application of objective criteria. The City created objective criteria to judge the applicants in the form of minimum qualifications for the position, and then appointed an applicant who did not have the minimum qualifications.

Additionally, the City offered shifting reasons for the appointment decision. During the grievance steps it argued that the decision was based upon unsubstantiated allegations of misconduct and poor job performance by the Grievant, but during the hearing the appointing authority testified that he did not consider these allegations in making his decision. ██████ testified that the Grievant was qualified for the position and was a good candidate.

The City also showed bias in favor of the outside applicant for reasons that were unrelated to their respective qualifications. The appointing authority testified, unconvincingly, that the individual who was appointed was more qualified than the Grievant because he had previously worked in constituent services in a City Councilor's office, where he occasionally received calls from citizens with complaints about trees on their street.

Arbitration Decision continued.

There was evidence of bias throughout the proceedings. The City argued that the outside applicant's use of obscenities during his interview was a sign of enthusiasm. It treated his bachelor's degree in journalism and communications as being relevant to, even determinative of, his ability to perform the job, even though it is not a degree listed on the job posting and is objectively unrelated to the position. It treated innocuous, or inappropriate answers offered by the outside applicant during his interview process as being inordinately impressive. All the while, the City discounted the obvious qualifications and experience of the Grievant, including his prior experience working in the position on an interim basis for which he was applying. The City ignored the enthusiastically positive letters of recommendations provided by multiple community groups on behalf of the Grievant.

While the Union does not need to establish the motivation behind the City's unreasonable actions to prove it acted unreasonably, it is notable that the individual for whom the Grievant was bypassed is the Mayor's longtime friend. Regardless of whether the City's biased actions were based on this relationship, the City clearly acted arbitrarily and capriciously. The Union requested that the Arbitrator sustain the grievance and find that the City violated Article 14 of the parties' Agreement. As a remedy, the Arbitrator should order the City to place the Grievant in the position of General Superintendent (Parks/Turf Management) and make him whole for any losses resulting from its failure to initially place him in the position.

CITY'S POSITION

The Union failed to meet its burden of demonstrating that the City's selection of Mr. [REDACTED] rather than the Grievant for the General Superintendent position was arbitrary or capricious. Pursuant to Article XIV, Section 2 of the contract, the determination of who is most qualified is within the sole province of the Appointing Authority. The Department has the unrestricted right to determine the requisite qualifications and abilities necessary and the unfettered right to select a candidate, as long as the selection is not arbitrary or capricious. The scope of review is very narrow, the arbitrator can only assess whether the selection was arbitrary or capricious.

[REDACTED] decision to select [REDACTED] was not arbitrary or capricious. The selection process was executed in a fair and reasonable manner and due consideration was provided all applicants. The Department conducted interviews, during which each applicant was asked the same questions from a list of questions developed prior to the

Arbitration Decision continued.

interviews and given an opportunity to demonstrate his/her qualifications and abilities in responding to those questions. The purpose of the interviews was to determine whether applicants met the minimum qualifications of the position and to determine their skills, abilities and experience. In choosing the most qualified candidate for the position, all candidates were evaluated based on their past experience and interview performance. At the conclusion of the interviews, the interview panel discussed the applicants. After the interviews, a selection was made based on the candidates' answers provided during the interviews and the qualifications and abilities demonstrated through those answers and the candidates' resumes.

█████ testified that the only reason he selected █████ as General Superintendent was because he was the best candidate for the job. █████ explained why he believed █████ experience and skills earned during his seven years as the Director of Constituent Services for City Councilor █████ transferred to the General Superintendent at the Parks Department. In that position, █████ learned how each department and agency in the City of Boston, including the Parks Department, operated so he could effectively respond to constituent complaints and requests. █████ testified that the operational understanding of the City administration, along with █████ two years as the Director of Operations for BTS fulfilled the requirement of five years in administration, park management, or maintenance operations in a large-scale commercial or government maintenance facility. Although █████ i had only two years of supervisory experience when he was the Director of Operations for BTS, █████ believed █████ had "more than enough relevant experience" to succeed at the position of General Superintendent.

At the interview, █████ was impressed with █████ answer to his question of a time when he had to take corrective action with a subordinate employee, which demonstrated his management skills, and his plans to improve the maintenance division of the Department and focus on constituent services. █████ also demonstrated excitement for the Department and the position and demonstrated that he had ample experience as an operations manager within the City and would be an asset to the Department in the General Superintendent position.

In contrast, the Grievant's experience was limited to being an Arborist. Moreover, at the interview █████ wondered whether the Grievant really wanted the promotion because he did not show enthusiasm for the job, did not invoke experiences learned while interim General Superintendent to impress the panel with his thoughts on how to

Arbitration Decision continued.

improve the maintenance division, and told ██████ that he was unsure whether he wanted the job. ██████ also testified that he considered the Grievant's past disciplinary history, although it was not a deciding factor.

██████ testified that the final decision for filling the vacancy was between ██████ and ██████ an outside candidate. He decided that ██████ lack of experience with the City, coupled with ██████ vast experience in operations positions throughout the City, made ██████ choice for General Superintendent.

Based on the qualifications and abilities outlined in the applicant's resumes and demonstrated during the interview process, the Department determined ██████ was the most qualified candidate. The selection was not arbitrary; it was well thought out given the responsibilities of the position. The decision was not capricious because the Department interviewed and duly considered many applicants with varied skills.

██████ had the proven operational experience and demonstrated desire for the job, and the Grievant did not. The decision to select ██████ was a rational decision, based on a well-founded determination by the Department that his qualifications and abilities exceeded those of the Grievant. Thus, the selection of ██████ was not arbitrary or capricious and the Union has failed to meet its burden of establishing that the selection of ██████ violated the parties' contract. The grievance should be denied.

However, should the Arbitrator determine the Department violated the Agreement, the only remedy the Arbitrator may issue is a new selection process for the General Superintendent position. Article X, Sections D and E, of the Agreement preclude any other remedy. Moreover, Article XIV, Section 1, grants the Appointing Authority sole discretion to determine the qualifications and abilities required for the position. Thus, the Arbitrator cannot award the position to the Grievant.

DISCUSSION

At issue is whether the City was arbitrary and capricious in its selection of the successful candidate over the Grievant for the position of General Superintendent Parks/Turf Maintenance in violation of Article 14. This case is in the minority of instances where a Union satisfies the high bar for mounting a successful challenge. Based on the credible evidence, I conclude that there was an abuse of discretion in the selection of the successful candidate.

Arbitration Decision continued.

Pursuant to Article 14 of the contract, there is a narrow standard of review for a more senior applicant to challenge the Appointing Authority's decision to select a less senior applicant. The narrow standard of review is discussed by Arbitrator Betty Waxman, in SENA, Local 9158 and City of Boston (Arb. No. 24-260, 2013):

In the absence of a civil service list, Article XIV, sec. 2 of the parties' Collective Bargaining Agreement recognizes that the Appointing Authority is the "sole judge" of the qualifications of applicants for SENA, Local 9158 positions. At the same time, Article XIV, sec. 2 permits a senior applicant to challenge a selection on grounds that it is arbitrary or capricious. The standard of review provides an avenue, albeit a narrow one, for a more senior applicant to challenge the Appointing Authority's decision to select a less senior applicant. It does not permit a *de novo* review or second-guessing the wisdom of the decision. In order to prevail, the Union must establish that the selection was devoid of a legitimate, job-related rationale supported by credible evidence. See City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300 (1997) (a decision is arbitrary or capricious when it lacks any rational explanation that reasonable persons might support); City of Boston and SEIU, Local 285, Arb. No. 20-1483 at 21-22 (Katz, Arb., 1998) (as long as Employer establishes a reasonable, non-arbitrary basis for concluding that the junior candidate is demonstrably superior, the Employer's decision will stand); Northwest Bell, 19 LA 47, 48 *quoting In re St. Paul & Tacoma Lumber Co., 110 P.2d 877, 883 (1941) (defining "arbitrary and capricious" as "willful and unreasoning action...in disregard of the facts and circumstances"). Few challenges are able to overcome the hurdles presented by the arbitrary and capricious standard and the discretion it confers upon an Appointing Authority....*

In another case between the parties, Arbitrator Golick discussed the standard against which the appointing authority's selection is tested:

As countless cases involving non-selection of candidates for open positions have established, the question is not whether the arbitrator might have chosen the aggrieved employee over the successful candidate. It is whether the employer, in choosing the successful candidate, mismanaged its discretion in some way, leading to an unfounded and improper result.

City of Boston and SENA, Local 9158, Case OLR 24-269 (Golick, 2012).

Arbitrators have often taken a burden shifting approach in these promotional by-pass cases. As discussed by Arbitrator Katz:

In the first instance, the Union need only prove that the bypassed employee was qualified and more senior. Where, as here, this initial burden is met, the burden shifts to the employer to establish a

Arbitration Decision continued.

reasonable, non-arbitrary basis for its conclusion that the junior candidate is demonstrably superior.

City of Boston and SEIU, Local 285, Arb. No. 20-1483, (Katz, 2998).

An employer must follow a fair and impartial procedure when filling a vacancy, and this includes the uniform application of objective criteria based on an adequate investigation of a bidder's qualifications and analysis of whether the bidder meets the minimum requirements of the position.

In this case the City issued a job posting for the General Superintendent of Parks/Turf Maintenance position and bypassed the senior qualified applicant to appoint a candidate that did not meet the listed requirements. The Union established that the Grievant was qualified for the position. The Grievant had the required knowledge and experience and [REDACTED] the appointing authority, testified that the Grievant was qualified for the position. The Grievant was the more senior applicant with 17 years in the Parks Department and [REDACTED], who had not worked in the Parks Department, had five years with the City.

Although [REDACTED] had strong operational skills and experience, that were emphasized by [REDACTED], [REDACTED] did not appear to meet the "Minimum Entrance Requirements" listed on the job posting. He did not have the "five (5) years of increasingly responsible experience in administration, park management, maintenance operations in a large-scale commercial or government maintenance facility." Moreover, he did not have three (3) years of supervisor experience in a large-scale commercial or government maintenance facility." However, he did have two years of experience as the Director of Operations in the Transportation Department which constituted two years of experience in a government maintenance facility. Both [REDACTED] and [REDACTED] testified that none of the other positions that [REDACTED] had worked involved a large-scale maintenance facility. [REDACTED] acknowledged that he had no experience in "park management". In contrast, the Grievant had seventeen years of experience in park management and administration in a large-scale government maintenance facility working as the Superintendent of Tree Maintenance and Interim General Superintendent Parks/Turf Maintenance.

Furthermore, as the Union pointed out, the "Minimum Entrance Requirements" state that candidates with demonstrated knowledge of urban forestry and park system operations will be given preference." [REDACTED] acknowledged that he did not have experience with urban forestry or park system operations. The Grievant, however, is a

Arbitration Decision continued.

certified arborist with training in horticulture, weed management, and turf grass management, and seventeen years of experience working the field of urban forestry and park system operations. The City selected the candidate that did not have demonstrated knowledge of urban forestry and park system operations in favor of an applicant who possessed those preferred qualifications and experience.

██████ did not provide a reasonable explanation for his decision that ██████ met the minimum qualifications for the General Superintendent position. ██████ testified that he considered the position of General Superintendent to be an “operations” position and that ██████ had experience in operations, which was transferrable, based on his experience as Director of Operations in the Transportation Department, his operations work in OED and his work in constituent services in City Councilor ██████ office. However, the City has an obligation to inform the applicants of the minimum qualifications for the position and reasonably consider those qualifications and abilities. The posting did not mention that there was a minimum qualification for the position with experience in “operations”.

Although ██████ had experience responding to constituent complaints related to parks, this is not the same as experience in park administration in a large-scale maintenance facility or reflect demonstrated knowledge of urban forestry. ██████ testified that he had no knowledge related to urban forestry and no experience with turf management beyond his experience as a football referee when he would check the artificial turf on the field before a game.

██████ explained that he felt it was useful that ██████ had a bachelor’s degree, which is in journalism and communications, although it was not one of the degrees that the job posting listed as a substitute for two years of required experience which were “agriculture, landscape management, business administration, facility management, public administration and urban forestry”. Having a candidate with a bachelor’s degree, although not a minimum requirement for the position, may be a valid consideration; however, because it was not in one of the listed relevant fields of study, a degree in an unrelated field is less compelling as having met the minimum requirements. Furthermore, ██████ assertion that he wanted a culture change in the Parks Department and selected ██████ because he had not previously worked in the Parks Department, a preference that was not indicated on the job posting, does not overcome the fact that ██████ did not meet the minimum qualifications for the position. Additionally, ██████ testified that he was impressed with ██████ enthusiasm for the

Arbitration Decision continued.

position that he displayed during the interview in contrast to the Grievant's interview which [REDACTED] described as lackluster and led [REDACTED] to question whether the Grievant wanted the position. Without establishing that the successful candidate met the minimum qualifications of the position, the assessment of the applicant's enthusiasm for the position is not sufficient to establish that the selection of [REDACTED] was reasonable.

If the City disregards its own minimum qualifications to fill a posted position, that is the definition of arbitrary and capricious. It was arbitrary and capricious for the City to state that applicants for the position of General Superintendent of Parks/Turf Maintenance need to have a minimum amount of experience in "administration, park management, maintenance operations in a large-scale commercial or government maintenance facility" and hire an applicant without that experience. Moreover, it was arbitrary and capricious for the City to state that it would give preference to candidates with "demonstrated knowledge of urban forestry and park system operations" and bypass the senior applicant with that knowledge to appoint someone who does not possess that knowledge.

Accordingly, I find that the City acted arbitrarily and capriciously when it appointed an applicant that did not meet the minimum requirements of the job posting, in lieu of a senior candidate who met those requirements, in violation of Article 14, Section 2, of the parties' collective bargaining agreement.

Insofar as a remedy is concerned, I cannot adopt the Union's requested remedy of placing the Grievant into the position of General Superintendent of Parks/Turf Maintenance because it would ignore the contract's mandate that the Appointing Authority is the "sole judge of qualifications and abilities required for the job." (For a similar analysis see Arbitrator Waxman's Award, cited above.)

Therefore, as a remedy, the City is ordered to repost the position of General Superintendent Park/Turf Maintenance for the Parks Department and to fill it in accordance with the terms of Article 14. One would hope that the City would utilize the same criteria in its posting so that all candidates would be provided the same opportunity to seek the position. The panel is to disregard the experience gained by Mr. [REDACTED] following his selection as General Superintendent. Should the Grievant be selected for the position, he will be made whole for retroactive compensation and other benefits lost during the period of time that Mr. [REDACTED] occupied the position. I shall retain jurisdiction over the matter for sixty days to address any issues that may arise concerning implementation of the award.

Arbitration Decision continued.

AWARD

The City of Boston violated Article 14, section 2, of the parties' Collective Bargaining Agreement by acting arbitrarily and capriciously in the manner in which it implemented the 2018 selection process for the position of General Superintendent of Parks/Turf Maintenance in the City of Boston Parks Department.

As a remedy, the selection of [REDACTED] is to be vacated, and the City is ordered to repost the position of General Superintendent of Parks/Turf Maintenance for the City of Boston Parks Department and to fill it in accordance with the terms of Article 14. The panel will disregard the experience gained by [REDACTED] following his selection as General Superintendent. Should [REDACTED] be selected for the position, he will be made whole for retroactive compensation and other benefits lost during the period of time that [REDACTED] occupied the position. I shall retain jurisdiction over the matter for sixty days to address any issues that may arise concerning implementation of the award.

Accordingly, the grievance is sustained.

Respectfully submitted by:

A handwritten signature in cursive script that reads "Sherrie Rose Talmadge". The signature is written in black ink and is positioned above the printed name of the arbitrator.

Sherrie Rose Talmadge, Arbitrator