

**American Arbitration Association
Voluntary Labor Tribunal
Case No. 01-19-0004-1682**

**IN THE MATTER OF ARBITRATION BETWEEN
MASSACHUSETTS DEPARTMENT OF TRANSPORTATION
AND
UNITED STEELWORKERS LOCAL 5696**


Grievant: [REDACTED]

AWARD OF THE ARBITRATOR

The Undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered by the above named parties and having been duly sworn and having duly heard the proofs and allegations of the parties AWARDS as follows:

For the reasons set forth in the attached Decision, it must be concluded that the Department violated Section 14.2 of the parties' Agreement by utilizing a faulty and incomplete selection process to fill the position of [REDACTED], [REDACTED] for District [REDACTED]. The appropriate remedy is for the Department to vacate the position, and consider only those applicants who were previously interviewed for the position and to apply the promotional criteria as required by the Agreement. In addition, should [REDACTED] reapply, the Department cannot consider any of her work experience or her seniority gained as a result of her being selected to the position by virtue of this faulty selection process.

March 8, 2021
Boston, Massachusetts


Gary D. Altman

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ARBITRATION DECISION AND AWARD

Introduction

United Steelworkers, Local 5696, ("Union") and the Massachusetts Department of Transportation ("Employer" or "Department") are parties to a Collective Bargaining Agreement ("Agreement"). Under the Agreement, grievances not resolved during the grievance procedure may be submitted to arbitration. The parties presented their case in a virtual arbitration hearing before Gary D. Altman, Esq., on November 4, 2020. The Union was represented by Alfred Gordon, Esq., and the Department was represented by Patrice Dixon, Esq. The parties had the opportunity to examine and cross-examine witnesses and to submit documentary evidence. The parties submitted written briefs after the close of the testimony.

Issue

The parties agreed to the following issues:

Has there been a violation of Article 14 of the CBA? If so, what shall be the remedy?

Facts

The United Steelworkers, Local 5696 ("Union") is a member of the Coalition of MassDOT Unions and, in that capacity, represents certain employees in Unit E at the Massachusetts Department of Transportation ("Department"). Included in Unit E are employees in the [REDACTED] [REDACTED] title, including those employees in the classification of [REDACTED] and those in the classification of [REDACTED]. On April 22, 2019 the Department posted a position of [REDACTED] with the functional title of [REDACTED], and the position was assigned to District [REDACTED]. The job posting for the position reads as follows:

Position Summary

The [REDACTED] will be responsible for the installation, modification, maintenance and repair of [REDACTED] and equipment maintained by the department including, but not limited to the [REDACTED]. Plan, direct and oversee the execution of assignments by assigned trades for the above activities to ensure continuous normal operation of all equipment. Troubleshoot [REDACTED]. Review maintenance records to identify trends and abnormal conditions so that corrective and preventative measures can be prescribed to avoid equipment failures. Responsible to provide ordering information on required supplies to support timely completion of assignments; aid in the creation and adherence to all departmental procedures; assures adherence to all approved policies, practices and safety procedures; evaluates the performance of assigned technicians.

Duties and responsibilities

Coordinate the design and support of [REDACTED].

Act as liaison with city, state and regional [REDACTED] to ensure coordinated joint [REDACTED].

Assist [REDACTED] [REDACTED] in the planning, design and preparation of contract documents involving DOT systems and facilities.

Direct [REDACTED] in the maintenance of [REDACTED] including, but not limited to:

[REDACTED].

[REDACTED].

Assist in the negotiation with vendors for non-DOT systems that may be installed on DOT property.

Review bid documents and participate in selection of consultants and contractors for the design and/or installation of [REDACTED].

Administer adds, changes or deletions to [REDACTED].

Aid in the creation of all departmental policies and procedures in coordination with relevant personnel and other DOT departments.

Ensure all operator and user training and instruction manuals are available and are kept up to date for maintenance personnel use.

Comply with all policies, practices and safety procedures.

Perform other duties of a similar nature as may be required and directed by the [REDACTED].

Minimum Entrance Requirements:

Applicants must have at least (A) six years of full-time, or equivalent part-time, technical or professional experience in [REDACTED] work of which (B) at least three years must have been in a professional capacity, and (C) of which at least one year must have been in a supervisory, managerial or administrative capacity or (D) any equivalent combination of the required experience and the substitutions below.

Substitutions:

An Associate's degree with a major in [REDACTED] [REDACTED] may be substituted for a maximum of one year of the required (A) experience.*

A Bachelor's degree with a major in [REDACTED] [REDACTED] may be substituted for a maximum of two years of the required (A) experience.*

A Graduate degree with a major in [REDACTED] [REDACTED] may be substituted for a maximum of three years of the required (A) experience and one year of the required (B) experience.*

*Education toward such a degree will be prorated on the basis of the proportion of the requirements actually completed.

NOTE: Educational substitutions will only be permitted for a maximum of one year of the required (B)

experience. No substitutions will be permitted for the required (C) experience.

SPECIAL REQUIREMENTS: Based on assignment, possession of a current and valid Massachusetts Class D Motor Vehicle Operator's License.

██████████ works as a Human Resource Specialist for the Department of Transportation, and her duties include posting positions to be filled, reviewing resumes that have been submitted, screening resumes to ensure that the candidates meet the minimum qualifications, and then sending the candidates, who have satisfied the minimum requirements, to the hiring manager. For those candidates that she decides do not meet the minimum requirements, she sends a letter informing them of that fact.

██████████ testified that twenty-two applicants applied for the ██████████ position. Upon review of the candidates' resumes and applications the Hiring Manager decided to interview six of the candidates who met the minimum qualifications for the posting, and the list included ██████████, an external candidate, and the one eventually selected, the grievant, ██████████, and four other internal candidates. ██████████ explained that she has no involvement in the interview process, and is next involved when she receives the recommendation from the Hiring Manager, she then sets the rate of pay based on contractual criteria, and sends a letter informing the candidate of his or her selection and the proposed rate of pay. ██████████ stated that she also sends letters to those candidates that have not been selected informing them of their non-selection.

██████████ explained that she does not set the minimum entrance requirements, that these are already described in

the job posting. [REDACTED] testified that the job posting provides for a certain level of experience and education and that, at times, certain higher education can be substituted for years of experience. [REDACTED] testified that in the present case the job posting also provided that with respect to the applicant's experience "at least one year must have been in a supervisory, managerial or administrative capacity". [REDACTED] stated that there could be no substitution for the requirement of supervisory, managerial or administrative experience.

[REDACTED] explained that candidates apply for positions using the Massachusetts Careers Website, and the candidates respond to on-line questions, and indicate if they meet the minimum qualifications. On the on-line form, [REDACTED] indicated that she met the minimum qualifications as she had:

A Bachelor's degree with a major in [REDACTED] and at least four years of full-time, or equivalent part-time, technical or professional experience in [REDACTED] work of which at least three years must have been in a professional capacity, and of which at least one year must have been in a supervisory, managerial or administrative capacity.

[REDACTED] testified that she reviews the candidates' resumes and cover letters to ensure that they meet the minimum qualifications of the position. [REDACTED] stated that [REDACTED] was not aware of any Department or contractual guidelines that describe supervisory, managerial or administrative experience. [REDACTED] testified that she reviewed [REDACTED]'s cover letter and resume, which indicated that she oversaw various projects during her career, which she believed met the minimum qualifications

for administrative experience. [REDACTED] acknowledged that she did not know the type of technologies described in the job posting, but that the Hiring Manager would know if a certain candidate met the minimum qualifications.

[REDACTED] is [REDACTED] for the [REDACTED] for MassDOT's Highway District [REDACTED], and prior to holding this position served as the [REDACTED] ([REDACTED] [REDACTED]) for District [REDACTED] Mr. [REDACTED] testified that he was on the interview committee, and developed a series of questions that would elicit the candidate's knowledge and skill sets that were directly related to the position of [REDACTED], [REDACTED] position.

There were ten subject areas: [REDACTED] [REDACTED] [REDACTED], and a question as to why the person believed that he or she was the best candidate for the position. Each of the ten subject areas was broken down into a series of questions, and had a series of points to be awarded for the applicant's answers. A total of seventy points could be awarded. In addition [REDACTED] prepared a model answer sheet that could be used to score the candidates. [REDACTED] [REDACTED] stated that he, [REDACTED], [REDACTED], [REDACTED], and [REDACTED], an [REDACTED], formed the interview committee.

[REDACTED] further testified that at the outset of the interview each of the applicants was provided with a written description of District [REDACTED], and the work that would be performed by the position. [REDACTED] stated that the candidates could take as much time as they wanted in

answering the questions. [REDACTED] further stated that each member of the interview committee kept their own notes, and individually scored the candidates' answers, and after all the interviews the scores were tallied and divided by three to arrive at the average composite score. [REDACTED] gave [REDACTED] a score of 42, and [REDACTED] a score of 28; [REDACTED] gave [REDACTED] a score of 28.33 and [REDACTED] a score of 23, [REDACTED] gave [REDACTED] a score of 37, and [REDACTED] a score of 22. The average score was 35.8 for [REDACTED] and 24.3 for [REDACTED], and as a result of the scores they recommended [REDACTED] for the position.

The Interview Committee recommended [REDACTED] for the position, and she was ultimately offered and accepted the position. [REDACTED] explained that the recommendation was based entirely on the applicants' scores, and no questions were asked of the candidates' education, experience or their seniority with the Department. [REDACTED], when asked why [REDACTED] was rated higher, responded that it was because of her answers to the interview questions. In addition, [REDACTED] stated that [REDACTED] had more knowledge of the job duties, and was more familiar with the work to be performed.

The Union, soon thereafter, submitted the present grievance challenging the Department's decision to by-pass [REDACTED].

Relevant Provisions of the Agreement

Article 14 Seniority, Transfers, Promotions,
Reassignments, Filling of Vacancies and New Positions

Section 14.1

A. A promotion shall mean an advancement to a higher salary grade within MassDOT. This Article is applicable to all promotions except those reasonably anticipated to be for less than one year and its application in all cases is restricted to employees who possess the educational, training, and/or experience requirements established by the Personnel Administrator or Employer for appointment to the relevant position. The provisions of this Article shall apply when promoting employees covered by this Agreement and other employees within the Division to positions other than positions to be filled by appointments from a civil service eligibility list. Where the Union files a grievance over the non-selection of an employee(s), the Union shall be limited to advancing the grievance of one (1) non-selected employee per vacancy or class action. The Union shall identify such grievant in writing within sixty (60) days after filing its demand for Arbitration. In any-class action, the Arbitrator shall not have the authority to select the successful candidate for the position but shall be limited to an order re-posting the position and reconsidering candidates from the original pool of applicants, except if the Employer re-selects the original successful candidate following an order to repost the position and the arbitrator finds a new violation of Article 14. If a redetermination of the selection process is ordered, it shall be limited to the original pool of applicants.

Section 14.2

The following factors in priority shall be used by the Employer or his designee in considering employees covered by this Agreement and other employees within the Division who apply for promotions under the provisions of this Article:

1. Ability to do the job as determined by:
 - a. Experience and competence (job performance) in the same or related work
 - b. Education and training related to the vacant position

2. Seniority, as measured by length of service within the Division, provided that employees who transferred from a Commonwealth agency or the Massachusetts Turnpike Authority as a result of Chapter 25 of the Acts of 2009 shall be credited with the seniority they had with the predecessor agency as of November 1, 2009.

3. Work History

Section 14.3

A. All positions to be filled shall be posted throughout the Division for seven workdays. Postings may be made by electronic means in any work unit(s) where employees have access to email. The Employer may reasonably determine the positions in which employees must be employed and/or the requisite related work experience the employee must possess in order to be eligible to apply for a given promotion. The job posting shall include the job title, salary grade and other pertinent information. The Employer may receive and consider applications from persons outside the department simultaneously with applications from employees for a vacancy posted under these provisions. All positions to be filled shall be posted throughout the Division wherever employees covered by this Agreement are employed. Initial consideration may be limited to those applicants who meet the minimum entrance requirements for the position and any preferred qualifications. The Employer may establish a screening procedure to determine who among those who meet the minimum entrance qualifications will be interviewed for the position provided it shall be based on objective and job related factors.

J. At the time the vacancy is filled, the unsuccessful applicant(s) for promotion to a vacancy posted under these provisions shall receive a notice stating the reason(s) for non-selection.

Position of the Parties

Summary of the Union's Arguments

The Union contends that the Department violated Article 14 in the selection process to fill the position of [REDACTED]. The Union maintains that the Employer must utilize an objective and fair process to assess the candidates' abilities, and when the Employer has established minimum qualifications for the position, it must make a good faith effort to determine whether all the candidates satisfied the minimum job requirements. The Union contends that in the present case, the evidence demonstrates that the Department simply disregarded the minimum requirements, when reviewing the application of [REDACTED] at the outset of the selection process, which resulted in an unfair and arbitrary selection process.

The Union states that the job description required years of experience, and that educational attainment could substitute for years of experience. The Union further maintains that the job position also required that candidates must have at least one year of work in a "supervisory, managerial or administrative capacity." [REDACTED], the Human Resource Specialist, testified that unlike education and experience, which could be interchanged, one could not substitute education or experience for the requirement that the candidates must have at least one year of supervisory, managerial or administrative experience.

The Union contends that [REDACTED] barely satisfied the minimum education and experience requirements as she had the requisite degrees and four years of experience. The Union argues that a review of [REDACTED]'s resume and

cover letter show that she had no supervisory, managerial or administrative experience during her four years of work after she attained her degree. The Union states that [REDACTED] [REDACTED] explanation that [REDACTED]'s cover letter indicated that she had overseen projects, which must have included administrative oversight, is not convincing.

The Union argues that the minimum job requirements intended more than just an employee having [REDACTED] skills, but also an employee who had at least a year of experience in a supervisory, managerial or administrative role. The Union states that although these terms are general, they are not a nullity, and indicate that the Department sought a candidate who held a leadership role in their prior work experience. The Union concludes that the Department, by awarding the position to an employee who did not meet the minimum job requirements, violated Article 14, and accordingly the selection of [REDACTED] must be overturned.

The Union further argues that even assuming that [REDACTED] [REDACTED] satisfied the minimum entrance requirements, the Department failed to apply the contractual promotional criteria set forth in Section 14.2. The Union states that Section 14.2 sets forth three criteria that "shall be considered" when deciding upon promotional opportunities for bargaining unit employees. The Union states that Article 14.2 sets forth three criteria with ability to perform the job, as the first factor, seniority as the second factor, and work history as the third and final criteria. The Union asserts that under Section 14.2 although ability to perform the job is the more important criteria, this provision nonetheless requires the Department to consider all three criteria. The Union states

that Section 14.2 is analogous to a hybrid seniority clause, which requires an assessment of both a candidate's relative abilities and employees' seniority; and that the Department cannot ignore seniority and work experience and focus entirely on the candidate's ability to perform the job.

The Union contends that the Department did not consider [REDACTED]'s seniority or his work experience, and instead came up with an arbitrary quiz that asked only technical questions, and then scored the applicant's answers. The Union argues that it is inconceivable that the Department would select an outside candidate, who only had four years of experience, over [REDACTED], who has two master's degrees, thirty years of experience, and worked as an [REDACTED], the classification immediately under the [REDACTED] classification. The Union further states that [REDACTED] worked in the Highway Department, and worked on the same [REDACTED] as would the [REDACTED]. Moreover, the Union states that [REDACTED]'s performance evaluations show an employee that consistently exceeded expectations. The Union maintains that the evidence overwhelmingly demonstrates that [REDACTED] was the superior candidate.

The Union concludes that the grievance should be sustained, and that [REDACTED] be awarded the position, and made whole from July 15, 2019, the date that the promotion was made.

Summary of the Department's Arguments

The Department maintains that it did not violate the Agreement when it awarded the [REDACTED] position to [REDACTED], an external candidate, instead of the grievant [REDACTED]. The Department asserts

that the application and interview process were fair and resulted in a candidate who was determined to have the best ability to perform the work as the [REDACTED] in District [REDACTED] of the Massachusetts Highway Department.

The Employer first states that the contract language at issue, as determined by other arbitrators reviewing the same contract language, grants broad discretion to the Employer in assessing an employee's ability to do the job. Specifically, the Department states that it must conduct a fair and reasonable selection process and it must make a good faith determination that is not arbitrary, discriminatory, or capricious. The Department states that under the parties' Agreement the primary factor for consideration is the candidate's ability to do the job as measured by experience and competence in the same or related work as well as education and training related to the vacant position.

The Department argues that the candidates, in their interviews, were given a set of ten written questions that were directly related to one's ability to perform the duties of the [REDACTED] position in District [REDACTED]. All the candidates were provided handouts explaining District [REDACTED], and issued blank copies of the questions. There is no suggestion that the written questions did not relate to the specific job duties of the vacant position. The Department further states that the Hiring Committee did not impose any time limits and allowed candidates to return to any previous questions as needed. In fact, no candidate, including the grievant, had any issues with the time allotted for answering the questions.

The Department maintains that the Hiring Committee, composed of managerial and supervisory employees, then

rated the candidates' responses. A compilation of all the three interviewers, rated [REDACTED] significantly higher than [REDACTED]. The Department maintains that the interviews and the candidates' answers to questions provided a fair and objective assessment to ascertain the candidates' ability to do the job, and the Hiring Committee concluded that [REDACTED] had the best ability to perform the job of [REDACTED].

Moreover, the Department further argues that its conclusion that [REDACTED] was best able to perform the duties of the job was confirmed by the testimony of both [REDACTED] and [REDACTED], who explained the hiring process used in the present case. [REDACTED] credibly explained that [REDACTED], in her prior employment with an outside contractor, had previously worked on the Department's [REDACTED] systems in District [REDACTED], and thus had prior work experience in the type of work that would be performed by the [REDACTED] in District [REDACTED], where the posted position would be located.

The Department maintains that in the present case it conducted a fair and objective selection process, that it selected the best qualified candidate for the position, and that it would be inappropriate for the Arbitrator to now substitute his judgment for that of the Department supervisors who are directly involved with the operation of the [REDACTED] systems in District [REDACTED], and knew exactly what was required for the position of [REDACTED].

The Department further argues that the Union's contention that [REDACTED] did not meet the minimum requirements for the position, is without merit. The job posting provided that one of the minimum qualifications was

that the candidate must have at least one year of managerial, supervisory, or administrative experience. The Department states that there are no specific definitions as to what constitutes "supervisory, administrative, or managerial" duties. The Department argues that the candidates applied for the position on line and indicated that they met minimum qualifications, and [REDACTED] then reviewed their qualifications.

The Department maintains that although there are no precise definitions of "supervisory, administrative, or managerial experience" [REDACTED] reviewed the candidates' cover letters and resumes. The Department states that [REDACTED], in her cover letter, described various projects that she worked on with her current employer, which [REDACTED] reasonably determined met the standard of administrative experience. The Employer further contends that the Hiring Committee also had the opportunity to consider the applicant's qualifications, as they developed the questions and interviewed the applicants, and did not raise any concerns as to [REDACTED]'s job qualifications. The Department further maintains that no one on the Hiring Committee communicated to her that [REDACTED] did not meet the minimum qualifications for the position.

The Department maintains that the interviews and assessment by their Hiring Committee provided a fair and objective assessment that [REDACTED] was the best candidate for the position, and that accordingly, the grievance must be denied.

Discussion

The Union first maintains that the Department did not properly assess whether the candidates met the minimum

qualifications of the position. Specifically, the Union contends that supervisory, managerial or administrative work experience was not considered, and if it had been properly considered, [REDACTED] would not meet the minimum requirements of the position.

I agree with the Union that the Department cannot ignore the minimum job requirements, and simply advance all candidates to the next step of the hiring process. On the other hand, the Employer has wide discretion to determine whether the minimum requirements of the position have been satisfied. The terms "supervisory managerial or administrative" are general terms and there is no precise definition as to what would constitute meeting such experience. The Union has the burden of proof to show that [REDACTED]'s prior work experience did not meet the minimum job requirements. Based on the evidence, a review of [REDACTED]'s and [REDACTED]'s resume and cover letters, it cannot be determined that they did not meet the minimum job requirements.

The second issue is whether the Employer, by not awarding the [REDACTED] position to the grievant, [REDACTED], violated the parties' Agreement. Section 14.2 is not a strict seniority clause. Specifically, the language of the Agreement sets forth the factors that must be considered when deciding to fill promotional opportunities. According to the terms of Section 14.2, there is a priority to the criteria. First in importance, is ability to do the job, second, is the seniority of the employee, and third is the applicant's work history.

The Department maintains that it has broad discretion in assessing candidates' ability and to consider the

qualifications of an applicant so long as it establishes a fair and objective process to assesses the candidates' abilities and qualifications. The Department maintains that it established an appropriate and fair process to assess the candidates' ability to perform the job, which is the most important criteria under the Agreement. Specifically, the Department states that [REDACTED] developed a series of questions that were related to the position and these questions were asked of all the candidates. The three person Hiring Committee individually scored the candidates and then took all the scores to obtain an average, and the applicant with the highest score was recommended and ultimately awarded the position.

I would agree that the interview and rating process used by the Department to select the candidate with the best ability to perform the job, was a reasonable method to assess the relative abilities of the competing candidates to perform duties of the [REDACTED] position. If this were the only criteria to be considered I would have no hesitation upholding the Department's decision.

It is accurate that Section 14.2 places primary importance on a candidate's ability to perform the job. The first sentence of Section 14.2, however, states that "[t]he following factors in priority shall be used ..." (Underscoring added). The other two factors described in Section 14.2 are seniority and work history. In other words, the specific language of Section 14.2 requires that all three factors shall be considered in making the decision as to whom to select for the position.

The Agreement does not prescribe the manner by which the Employer is to go about considering the three factors, and the Employer is to be given wide discretion in making

the ultimate decision as to whom to select after considering all the three criteria and applying the priority set forth in the Agreement. The Employer, however, cannot only consider the first criteria of ability to perform the job, and completely ignore the two other contractual criteria of seniority and work experience.

In the present case, the evidence demonstrates that the Interview Committee completely ignored the applicants' seniority and gave no consideration to the applicant's work history. In particular, a review of the interview questions demonstrates that absolutely no consideration was given to employees' seniority or their prior work history. The questions all related to specific knowledge and skills required for the position. Indeed, the testimony of both [REDACTED] and [REDACTED] was that they paid no attention to any of the candidates' Department seniority. [REDACTED] acknowledged that the Interview Committee did not ask about the employee's past experience and no ranking or points were given based on the employees' seniority. It must therefore be concluded that the Department utilized an incomplete and faulty selection process, a selection process that cannot be upheld.

The Union maintains that the appropriate remedy is for [REDACTED] be awarded the position. In cases where it has been found that the Employer utilized a faulty selection process the appropriate remedy is to vacate the position, and require the Department to consider only those applicants who were previously interviewed for the position and to apply the promotional criteria as required by the Agreement. In addition, the selection process cannot consider experience that [REDACTED] obtained by virtue

of her being appointed to the position as a result of this faulty selection process.

Conclusion and Award

For the reasons set forth more fully above, it must be concluded that the Department violated Section 14.2 of the parties' Agreement by utilizing a faulty and incomplete selection process to fill the position of [REDACTED] [REDACTED] for District [REDACTED]. The appropriate remedy is for the Department to vacate the position, and consider only those applicants who were previously interviewed for the position and to apply the promotional criteria as required by the Agreement. In addition, should [REDACTED] reapply, the Department cannot consider any of her work experience or her seniority gained as a result of her being selected to the position by virtue of this faulty selection process.

March 8, 2021
Boston, Massachusetts


Gary D. Altman