

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 INTERNATIONAL ASSOCIATION OF :
 FIRE FIGHTERS, LOCAL 583 :
 :
 and : Case 86
 : No. 42557
 : MA-5729
 CITY OF БЕЛОIT (FIRE DEPARTMENT) :
 :

Appearances:

Lawton and Cates, S.C., Attorneys at Law, by Mr. Richard Graylow,
 appearing on behalf of the Union.
 Hansen, Eggers, Kelley, Blakely and Holm, S.C., Attorneys at Law, by
Mr. Daniel T. Kelley, City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and City respectively, were signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on October 23, 1989 at Beloit, Wisconsin. The hearing was transcribed and the parties filed briefs and reply briefs which were received by January 16, 1990. Based on the entire record, the undersigned issues the following award.

ISSUE

The parties were unable to agree upon the issue and requested the Arbitrator to frame it in his award. 1/ The Arbitrator hereby adopts the Union's suggested framing of the issue as his own.

PERTINENT CONTRACT PROVISIONS

The parties' 1988-89 collective bargaining agreement contained the following pertinent provisions:

ARTICLE IV

APPLICATION AND INTERPRETATION OF WORK RULES

Section 1 For purposes of this Article, work rules are defined as and limited to:

Rules promulgated by the City within its discretion which regulate the personal conduct of employees during the hours of their employment.

. . .

Section 4 The Union reserves the right to grieve the reasonableness of a work rule. Anytime a work rule is grieved, said work rule shall be withheld until such grievance is resolved.

. . .

1/ The Union states the issue as:

Did the City violate Article IV, Section 4, p. 3; Article XV, Section 3, Part I, p. 21; or Article XV, Section 3, Part II, Note, p. 23 of the collective bargaining agreement? If so, what remedy is appropriate?

While the City states the issues as:

1. Did the City fail to utilize a written test developed by Blackhawk Technical Institute in violation of Article XV, Section 3, Part I, of the collective bargaining agreement?
2. Did the City fail to post the title of any and all publications from which test questions were obtained in violation of Article XV, Section 3, Part II, Note, of the collective bargaining agreement?

ARTICLE XV
PROMOTIONS PROCEDURE

Section 1 Promotional appointments shall be made in accordance with the Wisconsin Statutes and the Procedures set forth in this contract.

Section 2 The following listed department promotions will be tested and evaluated:

. . .

c. Lieutenant

. . .

Section 3 The promotional testing procedure will include:

I. Written Examination

Developed by Blackhawk Technical Institute . . . Anyone writing 69 or below will not be eligible for promotion

. . .

Note:For all positions being tested the Department will post the title of any and all publications from which test questions and assessment center situations are obtained.

. . .

FACTS

The City decided to fill several acting lieutenant vacancies in the Fire Department and establish an eligibility list for future promotions. This process involved three separate steps. First, a written exam was given to those applicants who were eligible (i.e. motor pump operators or higher rank). Second, the examinees who passed the written exam were given an oral assessment by fire department officers from outside the Beloit Fire Department. Third, oral interviews of the finalists were conducted by Beloit Fire Department officers. It is the first part of this process (i.e. the written exam) that is in issue here.

In December, 1988, Assistant Chief Robert Schendel called Tom Hable, the Fire Science Coordinator at Blackhawk Technical Institute, and asked him to compile a lieutenant exam and a captain exam for the Beloit Fire Department. Hable, who had compiled such written tests before for the Beloit Fire Department, agreed to do so. Only the lieutenant exam is in issue here.

Before compiling the exams, Hable went to the Beloit Fire Department offices and picked up three publications from Schendel: the Fire Department Chief Officer manual (which was for the captain exam), the Fire Department Company Officer manual (published by the International Fire Service Training Association, hereinafter IFSTA) and the Study Guide for IFSTA, Fire Department Company Officer (hereinafter Study Guide). The IFSTA Fire Department Company Officer is a textbook consisting of 186 pages of substantive material. The Study Guide is a 30-page document consisting of 165 questions and multiple choice answers. The original source for all the questions contained in the Study Guide is the IFSTA Fire Department Company Officer. The Fire Department Company Officer is copyrighted by Oklahoma State University and the Study Guide is copyrighted by Davis Publishing Company. In a short discussion, Schendel and Hable decided that the test questions for the lieutenant exam would be taken from the Fire Department Company Officer manual, as had been the case in previous lieutenant examinations. Schendel did not give Hable any instructions in how to write the lieutenant examination.

Hable later compiled the lieutenant examination at his home. The test he prepared consisted of 100 questions and answers extracted directly from the Study Guide in blocks of 25 questions each. Hable's test questions 1 through 25 were the same as questions 1 through 25 in the Study Guide, his test questions 26 through 50 were the same as questions 46 through 70 in the Study Guide, his test questions 51 through 75 were the same as test questions 86 through 110 in the Study Guide and his test questions 76 through 100 were the same as questions 131 through 155 in the Study Guide. At the hearing, Fire Chief Gerald Buckley indicated that this (i.e. taking test questions directly from the Study Guide) should not have occurred.

After Hable compiled the lieutenant exam, he had it typed at Blackhawk Technical Institute by his secretary. No one else saw the test after it was prepared and Hable did not discuss it or the Study Guide with any Beloit firefighters (some of whom are instructors at Blackhawk). Hable delivered the lieutenant exam and the three publications he had originally borrowed to

Chief Buckley who put the lieutenant examination in a locked file cabinet. The Study Guide was filed away in another locked cabinet.

The City posted a notice of the lieutenant examination process in a departmental memo on April 6, 1989. That notice indicated that the written exam would be given May 8 and 9, 1989. It further stated:

The suggested book to study will be the IFSTA manual, FIRE DEPARTMENT COMPANY OFFICER. All stations have the book in their library and the station book in (sic) not to be taken out.

All firefighters in the department had access to this IFSTA manual. Schendel, who prepared this memo, only listed the IFSTA manual on the memo because Hable told him that was the only publication that the test questions were taken from. Chief Buckley testified at the hearing that in hindsight, the Study Guide should also have been listed on this memo.

In the course of preparing for the lieutenant examination, several firefighters noticed that the IFSTA Fire Department Company Officer manual contained a notice on the second page that additional information could be obtained from IFSTA headquarters at Oklahoma State University. They called IFSTA headquarters at the phone number listed in the notice and, in doing so, learned of the existence of the Study Guide to the IFSTA Fire Department Company Officer manual. Three firefighters who planned to take the test (Bryan Northrop, Edwin Armstrong and David Dvorak) ultimately obtained this Study Guide by ordering it from the Alabama State Fire College Bookstore. Then, each of them used it to study for the lieutenant examination. In doing so, none had any knowledge prior to the exam that they were studying the actual examination questions. Another firefighter who planned to take the lieutenant exam, Bobbie Burnett, learned of the Study Guide two days before the exam when Armstrong showed Burnett his copy which he was reviewing at the fire station. Other firefighters planning to take the exam were not aware of and did not try to obtain the Study Guide.

There were originally 13 applicants for the lieutenant examination but two of the applicants did not take the test. Half of the applicants took the exam on May 8 and the remainder took it May 9. On the first day of the examination, Bryan Northrop finished the two and one-half hour test in 40 minutes. Upon doing so, another of the test takers, Bobbie Burnett, told Assistant Chief Schendel, who was administering the test, that the test questions were the same as those contained in the Study Guide he had seen two days before the test. Afterwards, Burnett renewed his complaint regarding the test to Schendel. Burnett and Deputy Chief Garner then searched the department's training office and found the Study Guide in a locked file cabinet.

That night, local union president Terry Hurm heard of the flap that had arisen over the lieutenant examination and called Schendel. (Chief Buckley was out of town at the time.) Hurm asked Schendel to stop the test set for the next day but Schendel declined to do so.

The second day of testing proceeded as originally scheduled on May 9. After the testing on that day was completed, Schendel had the test graded.

The test results were that seven applicants passed with a score higher than the cutoff point of 70 percent. The three applicants who used the Study Guide (Bryan Northrop, Edwin Armstrong and David Dvorak) received the three highest test scores (100, 97 and 92 percent, respectively). Four applicants did not pass the exam and therefore did not proceed further in the lieutenant selection process. Those applicants who passed the test proceeded further in the selection process by undergoing the oral assessment and the oral interview. Ultimately, four firefighters (Bryan Northrop, Gary Schenck, Edwin Armstrong and Rashad El Amin) were promoted to acting lieutenant and three (David Dvorak, Robert McKibben and Bobbie Burnett) were placed on the eligibility list for acting lieutenant (which is good for 24 months).

Six firefighters who took the lieutenant exam filed grievances over it. Their grievances requested that a new lieutenant test be developed, the test be repeated and all promotions withheld until the matter was resolved. The grievances were denied and ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

It is the Union's position that the City's actions herein violated the contract. First, the Union contends the City violated that portion of Article XV which requires that the written exam be "developed by Blackhawk Technical Institute". According to the Union, this language means that the test is to be created and written by a staff member of Blackhawk. In its view, Tom Hable of Blackhawk Technical Institute did not "develop" the test; rather, Oklahoma State University did because it has the copyright on the Study Guide from which the test questions were duplicated. The Union notes in this regard that all Hable did was to take questions developed by Oklahoma State, check to be sure the answers were correct and transpose them onto another piece of

paper. Thus, the Union argues the test was not "developed" by Blackhawk Technical Institute as the contract requires. The Union submits that if Hable had developed his own test, rather than simply selecting test questions copyrighted by Oklahoma State, this entire problem could have been avoided. Next, the Union contends the City was also required by the contract to post the title from any and all publications from which test questions were obtained and the department did not. In its view, the Study Guide to the Fire Department Company Officer is a "text" which should have been listed on the exam notice. Since it was not, the Union submits that the posting was insufficient. Finally, it is the Union's position that the City violated Article IV by its conduct here. That clause requires that the City withhold a work rule any time a work rule is grieved. The Union contends that the test in question constitutes a work rule subject to this requirement on the grounds that the promotional procedure regulated the personal conduct of employees during the hours of their employment. Thus, it submits that the City should have stayed the promotional proceedings after they were grieved until the reasonableness of the City's decision could be determined. The Union therefore asks that the grievances be upheld and that Arbitrator fashion an appropriate remedy.

The City's position is that its actions herein did not violate the contract. First, it contends it complied with the contract provisions regarding the development of the lieutenant's test. In this regard, it notes that Tom Hable, an instructor at Blackhawk Technical Institute, developed the test in question. In doing so, Hable chose to select the test questions from the Study Guide available for the IFSTA Fire Department Company Officer manual. The City argues it therefore was in compliance with the contract requirement that the examination be developed by Blackhawk Technical Institute. Next, the City submits that the book it listed in the notice of the exam dated April 6, 1989 (namely, the IFSTA manual, Fire Department Company Officer), complied with the contractual requirement that the department post the title of any and all publications from which the test questions are obtained. In its view, the Study Guide to this publication, which some firefighters were industrious enough to find and use, was not a document the City was obligated to list in its examination notice. In support of this view, the City notes that the Fire Department Company Officer manual was the ultimate source for all questions and answers contained on the test. Moreover, the City notes that there had been previous discussions between the parties regarding the number of texts that were listed on promotion notices, and the outcome of these discussions was a memo from the Fire Chief to the local union president dated March 3, 1989 indicating that the department would henceforth limit the number of texts that the test questions were taken from to no more than three. According to the City, it could fairly conclude that the word "texts" used in this memo did not mean a study guide composed of questions and answers and page references, but rather substantive textual material. That being so, the City contends it was justified in posting just the Fire Department Company Officer manual in the exam notice. Finally, the City asserts it did not violate the work rule provision of the contract as alleged by the Union because the written exam in issue does not constitute a work rule promulgated by the City. The City therefore requests that the test be upheld and that the grievances be denied.

DISCUSSION

These grievances arose from the written lieutenant examination compiled by Tom Hable, the Fire Science Coordinator at Blackhawk Technical Institute. Hable, who had prepared written tests for the Beloit Fire Department before, was asked to compile the instant exam which he did. Prior to doing so, Hable obtained two pertinent publications from the Department, namely the Company Officer and the Study Guide (to the IFSTA Company Officer). At that time it was decided that the test questions were to come from the material covered in the Company Officer manual, as had been the case in previous lieutenant exams. Other than that, Hable did not receive any instructions from the Department concerning the drafting of the test itself. In compiling the lieutenant exam, Hable did not draft any original test questions or answers. Instead, Hable reviewed the test questions contained in the Study Guide to ensure the subject matter was covered in the Company Officer and then copied his test questions and answers directly from the Study Guide.

The undersigned surmises that in copying the Study Guide's questions and answers verbatim for his own test, Hable must have presumed that no one else, other than himself, had access to the Study Guide. If such had been the case, it would not have mattered that the test questions came from the Study Guide. However, such was not the case. Instead, three test takers obtained their own copies of the Study Guide prior to the exam and used it as a study aide to prepare for the exam. It is acknowledged by the parties, as well as emphasized by the undersigned, that the individuals did nothing wrong in obtaining their own copies of the Study Guide. To the contrary, they simply did what many industrious test takers do to prepare for a test which is to review and study as many sources and guidebooks as possible. In doing so though, they did not know they were studying and memorizing the answers to the actual test questions until they took the test. It is no surprise then that the three individuals who obtained their own copies of the Study Guide prior to the exam scored the highest on it.

The Union does not challenge the validity of the instant test based on

the traditional criteria involved in most testing grievances, i.e. that the test be job related, fair and reasonable, fairly administered and properly evaluated. 2/ Rather, the Union contends the test violated three separate provisions of the contract, to wit: 1) that portion of Article XV which requires the City to post the title of any and all publications from which test questions are obtained; 2) that portion of Article XV which requires that the written exam be developed by Blackhawk Technical Institute; and 3) the work rule provision (Article IV). These alleged contractual violations will be addressed in inverse order below.

The Union contends the City violated that portion of the work rule provision (Article IV, Section 4) which requires the City to withhold a work rule anytime the reasonableness of a work rule is grieved. According to the Union, the test in question constitutes a work rule so the City should have stayed the promotion proceedings after they were grieved. It is apparent that this contention is premised on the test being considered a work rule within the meaning of Article IV, Section 1. The problem with this contention though is that the Union has not shown how the instant test meets the contractual definition of a work rule, i.e. "rules promulgated by the City within its discretion which regulate the personal conduct of employees during the hours of their employment". That being so, it is held that the written test administered here for promotional purposes does not fall within the meaning of a work rule. Therefore, Article IV, Section 4 is inapplicable here and no violation of that provision has been shown.

Next, the Union contends that the City violated that portion of Article XV which provides that a written exam will be "developed by Blackhawk Technical Institute". In deciding whether the instant test was "developed by Blackhawk Technical Institute", it is initially noted that the word "developed" is not contractually defined nor are any examples listed therein. While the Union contends that "developed" means "created and written", I am not persuaded that this was the intended definition. Foremost in reaching this conclusion is that there is no explicit contractual requirement that the test questions be original material drafted exclusively for that test, which of course would be the case if a test was "created and written" by a Blackhawk staff member for the Beloit Fire Department.

Moreover, the undersigned believes that the Union's argument about copyright ownership and infringement misses the mark. While the Union correctly notes that Hable used copyrighted material in compiling his test, I am not empowered herein to resolve alleged copyright violations. Most importantly though, the fact that the test Hable prepared consisted of copyrighted material does not mean he did not "develop" a test. Of course he did. While it certainly would have been preferable if Hable had not simply copied test questions out of the Study Guide, he nevertheless "developed" a lieutenant exam for the Department. That being so, I find that Hable's test comports with the contractual requirement that a written test be "developed by Blackhawk Technical Institute".

Attention is now turned to the Union's argument that the City violated that portion of Article XV which requires the posting of "the title of any and all publications from which test questions . . . are obtained". In this regard it is uncontested that the Study Guide was not listed on the posting; only the Company officer was. In the Union's view, the posting was insufficient because it failed to list the Study Guide.

Based on the following reasons, I find that the City's failure to list the Study Guide on the posting under the circumstances herein violated the contract. First, the above-quoted language is very specific in requiring the posting of "the title of any and all publications from which test questions . . . are obtained". On its face, this posting requirement does not exclude study guides, per se, from being listed. Also, contrary to the City's contention, this posting requirement is not limited to just substantive textual material (i.e. textbooks). Although the parties have a sidebar agreement to limit the number of texts that test questions are taken from to no more than three, this sidebar agreement does not alter the contract language in issue for the simple reason that the contract language does not use the term "texts" whereas the sidebar agreement does. Thus, the contract language controls here, not the sidebar language, and there is no contractual requirement that only "texts" be listed on the posting. Second, the obvious purpose of this posting requirement is to give test takers advance notice of where the test questions come from. That way, there is in theory a level playing field and everyone has notice of what to study for the exam. Here, that did not happen because three test takers learned of the Study Guide and studied it, but the remainder of the test takers did not. This is the exact situation the language was designed to prevent. Indeed, the scoring results on the test might well have been different if all of the test takers, rather than just three, studied the Study Guide. Third, the City's posting, which only listed the Company Officer, would have passed muster herein if it was the only publication from which test questions were obtained. However, under the instant circumstances, it was not.

2/ Elkouri & Elkouri, How Arbitration Works, 3rd Ed., p. 578.

While there is no doubt that all the substantive material covered in the exam was contained in the Company Officer, the actual questions and answers Hable chose to use on the exam were obtained verbatim from the Study Guide. That being the case, the Study Guide should have been listed on the posting along with the Company Officer because the Study Guide was a publication from which test questions were obtained. Even the Fire Chief admitted as much at the hearing. Therefore, it is held that the City violated that portion of Article XV which requires the posting of "the title of any and all publications from which test questions . . . are obtained", because it failed to list the Study Guide.

In reaching this conclusion, the undersigned is mindful of the City's contention that it had no reason to believe any other publication beside the Company Officer was needed on the posting. This is no doubt true because Hable did not tell City representatives prior to the test that his exam questions came from the Study Guide; instead, he only told them his test questions covered the material contained in the Company Officer. Having said that though does not let the City off the hook. This is because Hable was functioning as the City's agent so it must therefore assume ultimate responsibility for his actions (i.e. in this case failing to tell City representatives that test questions were taken from the Study Guide so that publication could be listed on the posting).

Having so found, attention is turned to the matter of remedy. The City's contractual breach here in failing to list the Study Guide on the posting was not de minimis. To the contrary, it goes to the heart of this dispute and the hard feelings it has created among the test takers. It is therefore the conclusion of the undersigned that the remedy required under these circumstances is that the written test results from the May 8 and 9, 1989 exam are to be discarded and the promotional process begun anew.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

1. That the City did not violate Article IV, Section 4, p. 3 of the collective bargaining agreement;
2. That the City did not violate Article XV, Section 3, Part I, p. 21 of the collective bargaining agreement;
3. That the City violated Article XV, Section 3, Part II, Note, p. 23 of the collective bargaining agreement. In order to remedy this contractual breach, the City is directed to discard the written test results from the May 8 and 9, 1989 exam and begin the promotional process anew.

Dated at Madison, Wisconsin this 15th day of February, 1990.

By _____
Raleigh Jones, Arbitrator