

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 67, AFSCME, AFL-CIO

and

CITY OF RACINE

Case 556
No. 57295
MA-10580

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Guadalupe G. Villarreal, Deputy City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

Local 67, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the City of Racine, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the collective bargaining agreement. The undersigned was so designated. Hearing was held in Racine, Wisconsin, on September 27, 1999. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on December 3, 1999.

BACKGROUND

Due to a death and a retirement, the City posted for an electrician in the Parks Department. The International Brotherhood of Electrical Workers claimed the job fell under its jurisdiction. The City then posted for a Parks Maintenance Worker. The job posting

required a Fourth Class Boiler's License and an Owner's Facility Electrician License. Two members of the Union posted for the position, Ron Bogard and Randy Eschmann. Bogard was employed in the Public Works Department, Street Maintenance Division, and was the most senior applicant having been hired in 1979. Bogard did not possess either license. Eschmann who was hired in 1992, and worked in the Solid Waste Division, held the Fourth Class Boiler's License but not the Owner's Facility Electrician License and did not apply for one. The City hired a new employee who possessed both licenses when he assumed the position. Bogard and Eschmann grieved their non-selection which was denied and appealed to the instant arbitration.

ISSUE

The parties were unable to agree on a statement of the issue. The Union stated the issue as follows:

Did the City violate the collective bargaining agreement when it failed to award the position of Parks Maintenance Worker to the senior qualified applicant?

If so, what is the appropriate remedy?

The City views the issue as follows:

Did the Employer violate the collective bargaining agreement (CBA) when it created and posted the position of Park Maintenance Worker?

If so, what is the appropriate remedy?

The undersigned frames the issue as follows:

Did the City violate the collective bargaining agreement when it did not award the position of Parks Maintenance Worker to Ron Bogard or Randy Eschmann but instead hired from the outside?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE II

Management and Union Recognition

. . .

E. Management Rights. The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract and the past practices in the departments covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. These rights which are normally exercised by the various department heads include, but are not limited to, the following:

. . .

2. To hire, promote, transfer, assign and retain employees in positions with the City and to suspend, demote, discharge and take other disciplinary action against employees for just cause.

. . .

8. To determine the methods, means and personnel by which such operations are to be conducted.

. . .

In addition to the Management Rights listed above, the powers of authority which the City has not officially abridged, delegated or modified by this Agreement are retained by the City. The Union recognizes the exclusive right of the City to establish reasonable work rules. The Union and the employees agree that they will not attempt to abridge these Management Rights and the City agrees that it will not use these Management Rights to interfere with rights established under this Agreement or the existing past practices within the departments covered by this Agreement, unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. Nothing in this Agreement shall be construed as imposing an obligation upon the City to consult or negotiate concerning the above areas of discretion and policy.

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ARTICLE XII

Job Postings

A. Posting Procedure. Any job vacancy which occurs due to retirement, quit, death, new position or for whatever reason in the bargaining unit shall be posted.

The posting shall set forth the job title, duties and qualifications desired, rate of pay, work location or assignment and shift. Sufficient space shall be provided for employees to sign (apply) for said job opening.

All job openings within the province of the bargaining unit shall be posted for five (5) working days in overlapping consecutive weeks. The successful bidder or the Union shall be notified within five (5) (sic) work days after the close of the posting.

The City agrees to move the successful bidder to his new position as quickly as possible but in no event later than thirty (30) calendar days after notification of his selection.

UNION'S POSITION

The Union contends that the City's requirements for a Fourth Class Boiler's License and an Owner's Facility Electrician License are not germane to the requirements of the job and are contrary to past practice. It observes that Bob Metty held the position in dispute until his retirement and he held neither license. It rejects the City's contention that Metty worked under Wally Rhone's licensing umbrella because Rhone passed away six months before Metty retired, so he was not required to have either license. As to the Fourth Class Boiler's License, the Union points out that Eschmann had one and the courses needed to get one are offered once a year starting in August and run for thirty weeks. It refers to a number of employees including Kelly Tuinstra, Randy Schmidt and Wilfred Jerke, who were given a position through posting which required such a license and they were given up to a year after being placed in the position to obtain the license. It submits that there is a clear and long-standing practice of giving newly appointed employees the time needed to achieve the required licenses and there is no reason not to extend this same practice to the position in dispute.

As concerns the Owner's Facility Electrician License, the Union points to the Racine municipal codes Sec. 22-382(a) which states:

(a) *Exception to specific license requirement.* Any person, referred to in this article as “employer,” who maintains an electrical department which regularly employs a person certified under this article as a supervising electrician, and who obtains annual registration under section 22-384, may have electrical work performed in his industrial, institutional or governmental buildings without a specific license as provided under this article.

The Union observes that the City has an Electrical Department with four journeymen electricians, thus it asserts that the code exempts others from holding the license, and in addition, the position is in the Parks Department and the code appears specific to electrical departments, so it has nothing to do with the Parks Department. The Union also notes that there is confusion with respect to the requirement itself as the job posting refers to an Owner’s Facility Electrician License but the code makes no mention of it. It claims that the Chief Electrical Inspector’s license exempts the Parks Department position and to exclude employees from the position because of undue reliance on unreasonable requirements is blatant.

The Union contends that both internal applicants are qualified as Bogard was in the Army Reserve and has rehabilitated buildings and graduated from the Army’s nuclear weapons maintenance school. It argues that Eschmann, in his current position as well as his private construction business, is qualified to perform the duties of the position.

The Union insists that the testing process is marred. It submits that Eschmann was told he could not take the test because he failed to meet the requirements in Sec. 22-382 of the municipal code but the Union takes the position that Section of the code does not apply. It points out that Eschmann was told there were no resources he could study to prepare for the test, yet it was established that the test was an open book test. It observes that the outside applicant did not have the license and was given until his hire date to get one and that date was nearly three months after the posting closed. It argues that denial of the test to the grievants was improper as was the fact they were not even interviewed.

In conclusion, the Union argues that the license requirements are bogus, not required by the code, and even if they are, there is a licensed electrician already employed. It reiterates that employees have been allowed up to a year to get a Fourth Class Boiler’s License. It states that the requirements for the position are unreasonable. It claims that the City cannot create an exclusionary barrier not intended for a maintenance worker. It takes the position that the City never required licenses of any sort in the past and the requirement is arbitrary, capricious, discriminatory and made in bad faith. It seeks an award sustaining the grievance and granting the position to Bogard, and if he declines, then to Eschmann, and the successful applicant be made whole. In the alternative, it seeks a reasonable, pertinent test that draws an accurate nexus to the job and the senior man with a passing score be awarded the position.

CITY'S POSITION

The City contends that under the Management Rights Clause it has the right to create new classifications to meet its needs. It claims that it created the Park Maintenance Worker position with the qualifications required by the ordinances of a supervising electrician's license and the person hired was required to possess the license before assuming the position. It points out that Sec. 22-382 of the City's ordinances prohibit a person from performing electrical work without an electrician's license or a supervising electrician's license and the Union is asking the Arbitrator to allow a person to perform electrical work without any license and the prohibition against this is clear and unambiguous.

It notes that the Union has asserted a past practice with respect to the Fourth Class Boiler's License; however, the electrician license is not the same and this license was required in addition to the Fourth Class Boiler's License. It submits that in other positions, employees worked under Edward Doonan's First Class Boiler's License or others with the Fourth Class Boiler's License were on duty when they were working. It asserts that for the electrician license, the law does not make a provision or exception for such a practice and past practice cannot authorize a violation of local or state law.

The City maintains that it properly posted the position and selected the eligible candidate for the position. It notes that the posting satisfied the contractual requirements and the person selected was the only one that had the licenses and experience required for the position. It asserts that the grievants did not have the required supervising electrician's license and only intermittent work experience. In conclusion, the City states that the grievants did not have the required licenses to be considered for the position and the City selected a qualified person who did.

DISCUSSION

The City under the Management Rights clause has the right to create positions and to determine the requirements for the position. The Union has asserted that the Fourth Class Boiler's License and Owner's Facility Electrician License are not germane to the position. A review of the job description indicates that the position is responsible for installation, maintenance and/or repair of heating, ventilating, air conditioning, electrical and related equipment (Ex. 5). Furthermore, Walter Rhone possessed the proper license for the position. The Union claims that Bob Metty held the Park Maintenance Worker position and performed these duties for six months prior to his retirement and did not have any license. The evidence failed to establish that Metty ever held the position or performed work that required the licenses. The evidence established that after Rhone died, emergency electrical work was performed by Electricians from the Electrical Inspection Office or the work was subcontracted from Rhone's death until January, 1999, when the position was filled. The licensing requirements relate directly to what the job requires and the technical requirements for the job do not appear to be arbitrary, capricious, discriminatory or made in bad faith. Thus, the evidence sufficiently supports a conclusion that the licenses were a requirement for the position.

It is also noted that the job was placed at the HU-22 wage bracket (Ex. 4) and under the contract, HU-22 lists carpenter, plumber and electrician, all craft positions (Ex. 1). The maintenance worker is listed at HU-18 (Ex. 1). It must be concluded that the licensing requirements were required and pertinent to the job and certainly were not bogus. Although there was some confusion over the precise title of the license required for the electrical work, this has no effect on the outcome of the case.

The Union also argues that past practice requires an employe to be put in the job and given time to get the appropriate license. The past practice was limited to Boiler's Licenses and in every case, an employe who did not have such license was under someone's umbrella license. The evidence failed to show that anyone was allowed time to obtain an Owner's Facility Electrician License. Also, the City ordinances prohibit the performance of electrical work unless someone performing the work has the proper license. The mere fact that the City has an Electrical Inspection Department does not mean that electrical work can be performed in City buildings by unlicensed personnel. This is not only unsafe to the person performing the work but could create an unsafe building. It follows that a pre-requisite for the position is the appropriate electrical license and past practice does not establish otherwise.

The technical training and licenses required by the job were not possessed by the grievants, so it follows they were not qualified. Neither took the test and the requirements set out in the ordinance, Sec. 22-382(b) indicates that the grievants did not meet the pre-requisites to even take the test (Ex. 10). Thus, the City's selection of a qualified new hire was proper and the failure to select either grievant did not violate the contract as neither grievant was qualified nor had the proper licenses for the position.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned makes the following

AWARD

The City did not violate the parties' collective bargaining agreement when it did not award the position of Parks Maintenance Worker to Ron Bogard or Randy Eschmann, and therefore, the grievance is denied in all respects.

Dated at Madison, Wisconsin, this 29th day of December, 1999.

Lionel L. Crowley /s/

Lionel L. Crowley, Arbitrator