

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF TOMAH

and

CITY OF TOMAH EMPLOYEES, LOCAL 180, AFSCME, AFL-CIO

Case 51
No. 66734
MA-13614

Appearances:

Ms. Penny Precour-Berry, Esq., P.O. Box 110, Tomah, WI 54660, on behalf of the City.

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, WI 54656-3755, on behalf of Local 180 and the Grievants.

ARBITRATION AWARD

According to the terms of the 2006-2007 labor agreement, the parties requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and resolve a dispute between them involving which of three internal applicants should have received the Parks and Recreation Working Foreman position. The Commission appointed Sharon A. Gallagher to hear and resolve the matter. The parties agreed to hold a hearing in the matter on April 9, 2007 at Tomah, Wisconsin at which time the parties had a full opportunity to submit documentary and testimonial evidence. At the close of the hearing, the parties agreed to submit their initial briefs by e-mail directly to the Arbitrator by close of business April 27, 2007, but they then jointly agreed to submit initial briefs by May 11, 2007. The parties also agreed that they would submit their reply briefs, if any, within 10 working days after their receipt of the other parties' initial brief. The Arbitrator received the Union's e-mail on May 24, 2007 indicating that the parties were waiving the right to file reply briefs, whereupon the record was closed.

ISSUES

The parties stipulated that the following issues should be decided in this case:

1. Did the City violate the Labor Agreement when it awarded the position of Park and Recreation Foreman to Steve Greenwood rather than to either of the two more senior employees, Belcher and Westpfahl?
2. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

Article II – Seniority

2.02 The length of service of the employee with the City shall determine the seniority of the employee.

2.03 The principle of seniority and qualifications shall govern and control in all cases of promotion within the City, transfer, decrease or increase of the working force as well as preference in assignment to shift work and choice of vacation period.

. . .

ARTICLE III – PERMANENT JOB POSTING AND BIDDING

3.01 A vacancy is an open position. Vacancies will be posted.

3.02 When a position covered by this agreement becomes vacant, such vacancy shall be posted in a conspicuous place listing the pay, duties and qualifications. This notice of vacancy shall remain posted for five (5) working days. Within five (5) working days of expiration of the posting period, the Employer will award the position to the most senior applicant qualified. For the position of Foreman only, if the qualifications of two (2) or more applicants are relatively equal in the judgment of the Employer, the Employer will award the position to the most senior applicant.

If an employee is aware that there is an impending vacancy but the employee will be on approved leave during the posting period, the employee shall be allowed to apply for the vacancy prior to the posting period. Said application will be treated the same as if the employee had posted for the vacancy.

3.03 The successful applicant shall be given a thirty (30) calendar day trial and training period in the new position at the applicable rate of pay. If at the end of the trial and training period, it is determined that the employee is not qualified to perform the work, he shall be returned to his old position and rate.

. . .

ARTICLE XXIII – RESERVATION OF RIGHTS

23.01 The City retains all of the rights, powers and authority exercised or had by it prior to the time that the local became the collective bargaining representative of the employees here represented except as specifically limited by express provisions of this Agreement. The powers, rights and/or authority herein claimed by the City are not to be exercised in a manner that will undermine the Local or as an attempt to evade the provisions of this Agreement or to violate the spirit, intent, or purposes of this Agreement. In keeping with the intent of this Article, the City agrees it will not sub-contract or farm out work which is normally done by the employees in the bargaining unit or if it will result in layoff or loss of time worked by the employees.

. . .

MEMORANDUM OF UNDERSTANDING

The City of Tomah and the City of Tomah Employees, Local 180, AFSCME, AFL-CIO have agreed to incorporate the following language into the 2006-2007 agreement between the parties:

“For the position of Foreman only, if the qualifications of two (2) or more applicants are relatively equal in the judgment of the Employer, the Employer will award the position to the most senior applicant.”

The parties agree that this language will be interpreted to mean that the Employer makes the decision as to the applicant selected for the vacancy. If the Union disagrees with the Employer’s selection, it may be appealed through the grievance and arbitration procedures as set forth in the collective bargaining agreement between the parties.

. . .

BACKGROUND

The City's Parks and Recreation Department (PRD) encompasses four sub-departments: Parks, Recreation Programs and Events, the City's (60 acre) Recreational Park and the Aquatic Center. PRD work includes maintenance, repair and operations as well as mowing, landscaping and snow removal at about 40 structures (including City restrooms and shelters). During the Summer season, the PRD also employs two full-time 70 to 75 part-time seasonal employees. There are two full-time PRD employees, and one Working Foreman. Part of the Working Foreman's job is to contact and deal with clubs, organizations and individuals who rent the City's PRD facilities either for regular events or for occasional use. Some of these organizations with which the Working Foreman has direct contact are as follows:

| | |
|------------------------------------|-----------------------------|
| Arrows-Braves Baseball | Boys & Girls Club |
| Tomah Youth Wrestling | VA Medical Center |
| Tomah Youth Soccer | Tomah Youth Hockey Club |
| Tomah Youth Football | Chamber of Commerce |
| Tomah Youth Softball Association | Monroe County 4-H |
| Tomah-Warrens Sportmen's Alliance | Ho-Chunk Nation |
| Monroe County Agricultural Society | American Kennel Club |
| Tomah Lions Club | Monroe County Tavern League |
| Tomah Area Cancer Support | Wild Turkey Federation |
| American Cancer Society | Tomah Health Care Center |
| Tomah Area School District | Boys (sic) & Girl Scouts |
| Tomah Memorial Hospital | Mecca Shrine Club |

In the early 1990's PRD Director Laudon sought to have a PRD Working Foreman position created by the City because he could not handle all of the hands-on work necessary to operate and rent out the various facilities of the PRD. In 1994, the City created the PRD Working Foreman position, the job description for which then read as follows:

FUNCTION

This is a supervisory position involved in overseeing the daily operations of the park department and its full-time and seasonal maintenance employees. Position is directly responsible to the Director of Parks and Recreation. Work schedule is 40 hours per week with some overtime possible. It should be noted that this position is listed as a "working" one, which shall be construed as also performing tasks that could be assigned to the full-time or seasonal members of the staff, as well as supervising those same individuals.

DUTIES, RESPONSIBILITIES AND WORK PERFORMED

1. Reports to the Director of Parks and Recreation on a timely schedule as to the maintenance operation involved with park areas and facilities.
2. Supervises park personnel engaged in maintenance duties.
3. Works in constructing, assembling, positioning, maintaining and repairing all park and recreation areas and facilities.
4. Performs the work involved in preparing soil, seeding lawns, rolling, fertilizing, weeding and cutting grass, shrubs, trees and brush.
5. Recommends possible solutions to problems concerning personnel and operations.
6. Substitutes for the director in making decisions in his/her absence in regard to park maintenance.
7. Submits recommendations concerning budget proposals, equipment purchases and departmental policies.
8. Performs any other duties, not specifically listed, which are related to those normally assumed by full-time personnel.
9. Compiles payroll records for personnel.

ESSENTIAL KNOWLEDGES AND ABILITIES

1. Ability to plan, organize, evaluate and supervise maintenance programs for park areas and facilities and its supporting staff.
2. Knowledge of municipal maintenance trends and application of such to the needs of the leisure community.
3. Ability and skill needed to operate a variety of hand tools, equipment and vehicles.
4. Knowledge of the rules and regulations governing the operation of park and recreation areas.
5. Ability to understand, remember and carry out oral and written instructions and to transmit such instructions to subordinates for a productive solution.
6. Ability to instruct personnel in the operation of departmental tools, equipment and vehicles.
7. Ability and skill needed for the maintenance and repair of related equipment and machinery.
8. The City of Tomah has adopted rules and regulations established for the safety of its employees in the performance of their jobs. It shall be the direct responsibility of the department heads and the first line supervisors to be sure all employees of the City of Tomah comply with the safety rules and regulations. Department heads and first line supervisors shall establish procedures to ensure enforcement of said safety rules and regulations.

EDUCATION, EXPERIENCE AND TRAINING

1. Possession of a High School Diploma or a General Education Diploma (GED).
2. Possession of a valid Wisconsin driver's license.
3. Ability to qualify for a Commercial Driver's License (CDL), if required.
4. Five (5) or more years experience in maintenance of park and recreation areas and facilities for a municipality.
5. Some experience in a supervisory capacity desirable.
6. Possession of current standard first aid certificate from the American Red Cross and current CPR certificate desirable, but not required. Should be willing to acquire these if made available.

This job description was then given to the Union; the Union filed no objections to this description. The Working Foreman position was then posted in 1994. Neither of the Grievants herein, John Belcher and Stuart Westpfahl posted for the position. Then full-time PRD employee Roger Brockman was selected to fill the PRD Working Foreman position. At the time of his selection, for the PRD Working Foreman position, Brockman had been a full-time PRD employee from 1982 forward. Neither Belcher nor Westpfahl posted for the full-time PRD position vacated by Brockman when he was selected to fill the PRD Working Foreman position in 1994.

Brockman stated herein that there are no Departmental manuals that the Working Foreman can refer to for proper practices and procedures in the PRD; that it took him at least one year, despite his 12 years of experience working in the City's PRD, to learn the Working Foreman job; that when he was Working Foreman, he supervised the two full-time PRD employees and the seasonal PRD employees about 70 to 75% of his time although he also worked along side the other PRD employees as PRD Working Foreman.

As Working Foreman, Brockman worked out of the PRD shop with the other PRD employees, one mile from Director Laudon's office at City Hall. It is undisputed that Laudon is rarely present at the PRD shop, that the Working Foreman is expected to prioritize and assign, and complete PRD work. Brockman retired from the Working Foreman position in 2007. From 1994 to 2007 when Brockman retired, full-time PRD employee Steve Greenwood filled in for the Working Foreman when he was absent or on vacation (5 weeks per year).

John Becker's Qualifications:

The City's Water Department (WD) has seven buildings and two water towers. Belcher has worked for the City for the past 27 years, 26 of which he spent as a Water Department Operator, which included performing cleaning, maintenance and simple repair work on WD facilities. Belcher testified herein that he has never worked in the City's PRD or for any other PRD. Belcher has done some landscaping and building at his home; he has a Pole building business and a Powerwashing and Painting business on the side. As a WD employee, Belcher admitted he has not supervised employees or dealt regularly with the public. Belcher has overseen WD seasonal employees' work from time to time but he has not assigned or directed their work. Belcher has done maintenance and repair work on WD facilities and he has done trimming, mowed lawns and removed snow at WD facilities. Approximately six times in 26 years, Belcher has had to call the private contractor the City uses for weekend water emergencies (Rezin Co.) in accord with Departmental past practice, and on these occasions he has overseen their work.

Prior to his hire by the City in September 1980, Belcher had been in the National Guard, he had worked as an electrical and water and sewer installer and did extensive lawn work and landscaping for Allen Steele Corp., he drove semis and straight trucks for Keene's Transfer and packed and moved furniture, directing moving crews at times. Belcher's resume', submitted to the City after the Grievance was filed, also stated other relevant WD duties Belcher has performed, as follows:

. . .

Coordinate water system repair and installation which is setup contractors for digging and follow through to the finish of project with repair of street and lawns.

Snowplowing with ¾ ton pickup with plow.

Maintenance on Vehicles

Maintenance on Pumps

Operate and maintenance on Toro Groundmaster 3000-D and Groundmaster 120 lawn mowers.

Operate and maintenance on push lawn mowers

Operate and maintenance on weed trimmers and tree limb trimmers

Operate tractors and/or attachments, skidsteers and one-ton dump trucks.

Familiar with all city buildings including Parks & Recreation Buildings and Recreation Park facilities.

. . .

Inspect water and sewer main installation by contractors.

Keep inventory & records of valves & hydrants in water department system.

Setup flush routes for Spring & Fall water main flushing.

Install meters for residential & commercial buildings.

Meet with the public on water quality complaints and for nonpayment of water bills.

Report problems and maintenance needed for department to Supervisor and suggest solutions.

On occasion attended meetings and met with contractors when department supervisor could not and reported back.

Operate Water Dept. Lab and iron removal filter.

Do daily, weekly and monthly sampling of water supply.

Operate chemical feed pumps for city water supply.

Order chemicals and parts when needed.

Computer experience with recording the daily and monthly reports on the Mass Unit Manager by Civic Systems.

Water Dept. Scada System basic electrical troubleshooting.

On call weekends and holidays with full control of Water Dept. Take whatever action necessary to keep Department operating properly which includes calling in other employees and/or contractors to solve problem.

. . .

Fill out own time sheets for each pay period.

Ability to plan and organize maintenance programs for the department.

Can operate a variety of hand tools.

Some knowledge of Parks & Recreation rules and regulations.

I understand, remember and carryout oral and written instructions and transmit them to other employees.

Know the operation of most department equipment and can instruct others how to operate.

Can maintain and repair most equipment and machinery.

Am familiar with safety rules and regulations

Have a Wisconsin Drivers License and the ability to obtain a CDL.

Have taken First Aid and CPR classes.

During his interview for the PRD Working Foreman position, Belcher requested that he be given one year to learn the PRD Working Foreman job.

Stuart Westpfahl Qualifications:

Westpfahl has worked in the City Streets Department since 1982, first in Sanitation, then as Truck Driver and currently as a Heavy Equipment Operator. During his interview Westpfahl spoke in depth of his 18 years as a volunteer firefighter which included 8 years as Assistant Chief and 8 years as Training Officer and his 16 years of volunteer work with the Monroe County Haz Mat Unit. The only pay Westpfahl receives for his Fire/Haz Mat work is \$14.00 per hour for acting as Assistant Chief, there are 8 hours of training per month and approximately 100 fire calls of (various lengths) per year. Westpfahl testified herein; he also submitted a resume' (after the Grievance herein was filed) which listed his other relevant past work as follows:

. . .

Service Station – Motel/Mobile Home Complex – 1967 to 1982

Duties – Service Station: Scheduled oil changes, tire changes, tune-ups, replacement of exhaust systems, brake replacement. Cleaned bay areas, bathrooms and station office. Ordering of fuel, oil products, station inventory. Billing of and handling payments from monthly charge customers. Pumping gas, checking oil and taking payments from customers. Snow plowing of station area.

Duties – Motel: Making and scheduling motel reservations along with dealing with concerns of the customer. Painting of interior and exterior buildings. Plumbing problems consisting of changing or fixing of faucets, hot water heaters, fixing or replacement of water pipes (copper, PVC, galvanize). Electrical problems consisting of changing outlets, light switches, light fixtures, replace heating elements in hot water heaters, replace electrical controls to space heaters, replaced existing wiring when necessary. Snow removal of motel sidewalks and parking lot.

Carpentry: Replace rotting boards, building shelves, installation of doors and window, shingling and roofing of buildings.

Mobile Home Park Duties: Collecting lot rent and taxes and dealing with renters problems. Maintenance of grounds including mowing, leaf removal, grass seeding, fixing leaky underground water pipes, thawing of underground water & sewer pipes. Snow plowing of mobile home park streets.

Maintenance of Rental Mobile Homes: Included fixing or replacing water & sewer pipes, faucets, hot water heaters, limited work on furnaces, painting, roof maintenance, carpentry work as needed.

Management: Last four years in management position doing biweekly payroll overseeing work duties of about eight people along with maintenance work of the gas station, motel and mobile home park.

Operated and maintained push lawn mowers and riding lawn mowers.

Operated and maintained small dump truck with plow and pickup truck with plow.

Operated and maintained chain saws, weed whips and various hand tools.

Westpfahl's resume also described his current Street Department duties as follows:

. . .

Sanitation Operator: In this position for 6 years which consisted of picking up garbage and maintaining the trucks.

Truck Driver: In this position for 10 years which consisted of snow plowing of streets and airport, road repair and construction, storm sewer repair and installation of new, street sign and pole replacement, tree trimming and removal, boulevard dirt and seeding, trucking of dirt and various road materials, mowing of airport and road right of ways with tractor and rotary mower. Maintenance of chainsaws, mowing equipment, various hand tools and single axle and tandem dump truck with plow.

City Hall Maintenance Personnel: During my 10 years as truck driver I would fill in for custodian when absent. Duties included: painting, sheetrock installation, minor electrical (outlets, switches, etc.) installation of wiring for computers, maintenance of heating system; cleaning of restrooms, hallway floors and individual offices with carpet, minor plumbing (faucet repairs and replacement). Snow removal of sidewalks.

City Street Inspections: I did this for 2 summers during my time as a truck driver. Duties involved working with construction companies to see that street construction work was being done according to plans. This included the ability to read blueprints involving water, sewer, storm sewer and street construction. On a daily basis conferring with property owners as to how street construction would affect their property.

Heavy Equipment Operator: 9 years to present. Duties include the operation of various equipment in the city's day to day operations such as street construction and repair, storm sewer installation, snow plowing and removal. Equipment includes: end loader, road grader, backhoe, skid steer, street roller and street paver.

Equipment Maintenance: These duties relate to all above equipment. Daily checks of fluids and pressures, changing of filters and fluids at necessary schedules, replacement of lights and switches, minor body repairs and painting and cleaning of equipment.

FACTS:

In December, 2006, the City posted the PRD Working Foreman position using the same (1994) job description quoted above. Senior City employees John Belcher (9/80) and Stuart Westpfahl (2/82) signed/posted for the vacant position. The City did not request applications, resumes or any other documentation from any employee who posted for the position. Full-time PRD employee Steve Greenwood (9/94) also signed/posted for the vacancy. (A fourth unit employee, Wetzel, also signed/posted for the opening but did not file a grievance herein.) All applicants were interviewed by Mayor Ludeking, PRD Director Laudon and H.R. Director Rusch. The following questions were asked of each applicant by the interviewer:

1. Why have you applied for this position?
2. Do you understand the position as presented in the job description?
3. How many years of experience have you had in the maintenance of park and recreation facilities and areas? How many years of supervisory experience have you had in other areas of employment? How many years of supervisory experience have you had in the maintenance programs of parks and recreation facilities and areas?
4. What do you feel are your strengths based on the essential knowledges and abilities and education, training and experience listed in the job description? What are your weaknesses?
5. Do you understand that you will be working closely with the public? What skills do you have to carry out this function?
6. How do you feel about supervising an employee that is in the same bargaining unit?
7. If you were given the weekly work schedule by your supervisor and passed it on to your employees, but they disagreed with it, how would you handle the situation?
8. Based on your awareness of the other candidates vying for this position,

what makes you the most qualified over them?

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Each applicant received a copy of the Interview questions and the job description 15 to 20 minutes before they were interviewed. Steve Greenwood was ranked first by all three interviewers; Belcher was ranked fourth (or last) by all three interviewers and Westpfahl was ranked second by Laudon (tied with Wetzel for 2nd), ranked third by Ludeking and ranked third by Rusch.

At their interviews, all held on the same day for approximately 30 minutes each, each employee was encouraged and given a full opportunity to describe their qualifications and past work experiences that would make them an effective PRC Working Foreman. Only Greenwood had the 5 years or more of PRD experience required by the job description. In addition, Greenwood had been named acting Working Foreman consistently over the past 12 years where Brockman was absent. None of the other applicants had any experience directing the work of PRD employees. Director Laudon was also directly aware of Greenwood's work and abilities as a PRD employee.

Steve Greenwood's Qualifications:

Greenwood testified briefly herein regarding his work history and Greenwood's testimony supported his resume entries (completed after the grievance was filed), as follows:

. . .

1969 to 1986: Went to work in Milwaukee for the Milwaukee Road Railroad. I as (sic) positioned a Check Clerk where I was overseeing (3) other clerks checking incoming and outgoing materials. In 1971 I transferred to Tomah where I was receiving clerk, forklift operator and crane engineer until 1986 when I was severed because of staff reduction due to selling of Railroad. In that position, I was required to maintain equipment, instruct others in use and maintenance of equipment and develop PR skills.

In 1986 to 1989 I was a self-employed painter. Said position not only required self-motivation but also customer service skills.

. . .

In 1988 I worked as a seasonal full-time position with the Tomah Parks and Recreation doing general maintenance and mowing grass.

In 1989 to 1994. I was employed by the Tomah Housing Authority where I worked 5 years maintaining 48 apartment units, doing lawn care and maintenance of work related equipment. The job required self-motivation, organization and working directly with the tenants to meet their needs. In 1992 I attended a seminar in Ashland, Wisconsin on locksmith and appliance maintenance. I have been using locksmithing many times since for my job

1994 to present. I interviewed and obtained the job with the City of Tomah, Parks & Recreation Department in 1994 and have been working there ever since. I have had the opportunity to work closely with Roger Brockman, the past foreman. My knowledge for the foreman position was greatly enhanced by being able to work with Roger. This prepared me for the busy seasons at the Parks and Recreation, working with renters, working with the Tractor Pull people, the Fair Board and working together with the other departments to help produce a good relationship with all. By doing this we are able to give our renters the best that we have to offer and keep them coming back to Tomah. Working with the past foreman has prepared me for everyday job duties and emergencies. During the 12 years with the Department of Parks and Recreation I have mowed many hours, maintained all buildings and grounds at the Recreation Park. I have shut off and turned the water on in Fall and Spring at the Recreation Park and all other parks. This involves blowing out all of the water lines, knowing where the valves, pits and connections are. On April 23, 2001, I attended a chain saw safety training program. In August 2003 I attended a Human Resources and Issues Seminar. I have performed the Foreman's duties whenever the past Foreman has been on vacation or sick and was needed by the Director.

On his resume, Greenwood also listed in detail, his volunteer Fire Department duties from 1987 through 1995, including at least two years when he was Assistant Chief. Greenwood was selected for the vacancy and the union thereafter filed the instant grievances on behalf of Belcher and Westpfahl which it then brought forward to arbitration.

POSITIONS OF THE PARTIES:

Union:

The Union argued that when Section 3.02 and the parties' Memorandum of Understanding are read together, it should be clear that the Arbitrator must make a de novo review of the Employer's selection of the successful Foreman candidate in this case, not just inquire whether the Employer acted in an unreasonable, arbitrary or capricious manner. The Union noted that the contract contains a relative ability test for Foreman vacancies; and that in this case, the City considered all three applicants to be qualified. The Union asserted that in order to bypass Belcher and Westpfahl, the City had to prove that Greenwood's qualifications "were well above and beyond" those of the other two (more senior) candidates. In this regard, the Union noted that the City based its selection of Greenwood on his experience working in the City's Park & Recreation Department and supervising employees and his performance in the oral interview. And yet, the Union argued that Article II Seniority recognizes only unit seniority, not departmental seniority, but by putting emphasis on work in a PRD, the Employer manipulated the Foreman job description in order to award the vacancy to Greenwood,

In regard to the supervisory experience requirement, the Union noted that the Foreman position is a unit position, really a lead worker position, and that the supervisory experience is merely desirable, not mandatory. In addition, the Union pointed out that Westpfahl had as much supervisory experience as Greenwood had as Assistant Fire Chief and Westpfahl has acted as a lead worker in the City Street Department in the absence of his foreman.

In regard to the interviews given herein, the Union urged that the questions were “too subjective to be of any real value;” that the City had not designated a passing cut-off grade in advance; that Laudon’s judgment regarding his employee, Greenwood, “may be somewhat biased;” and that no evidence was presented to show that the City considered more objective selection criteria such as performance evaluations, attendance, or work history.

Finally, the labor agreement at Section 3.03 contains a training period for the PRD foreman position during which the selected candidate could familiarize himself with PRD facilities, areas and equipment, putting all candidates on a more equal footing, lessening the familiarity factor. The Union urged that if other factors are equal, arbitrators sometimes hold that senior employees who have some experience should be given the opportunity to demonstrate their abilities by granting them a trial period even if a less senior employee has more job experience, (citing Elkouri and Elkouri, How Arbitration Works (Sixth Ed., 2003) page 891). In sum, the Union urged that as the record herein showed that all three candidates’ qualifications were relatively equal, the Foreman job should therefore have been awarded based on unitwide seniority and that the successful senior candidate should be made whole.

City:

The City argued that Greenwood was “head and shoulders above” the other more senior candidate for the PRD Foreman position. In this regard, the City argued that the relevant contract language is clear that only if the candidates are relatively equal, in the City’s judgment, does seniority become controlling. Here, Greenwood was found to be definitely, distinctly, substantially and significantly more qualified than Belcher and Westpfahl because of his knowledge and experience in the City’s PRD and his previous experience acting as foreman and his knowledge, experience and ability to deal with the PRD customers successfully. As neither Belcher nor Westpfahl had any work experience in a PRD, and they had limited if any relevant supervisory experience as required by the position description, neither was qualified for the Foreman position. Furthermore, the City would have acted irrationally had it overlooked Greenwood’s knowledge, experience and abilities when it filed the PRD Foreman position, especially in light of the fact the contract clearly gives the City the discretion to select the superior candidate for the foreman position.

In this case, given the City’s decision that Greenwood was the superior candidate, the only inquiry that may be made by the Arbitrator is whether the City’s selection process was valid, that is, whether management’s decision was unreasonable, arbitrary, capricious or

process was arbitrary, capricious, unreasonable or discriminatory. In this regard, the City noted that it posted the job internally, it took all applications, each applicant was also given the same opportunity to detail their qualifications; and the City interviewed all applicants using the same questions which were scored by the three interviewers. Here, the raw scores clearly showed that Greenwood was the best qualified candidate for the Foreman position, even before the interviewers discussed their conclusions and reached a consensus.

In all of the circumstances, the City urged that the record supports a conclusion that the City's selection of Greenwood was based on fact, it was rational, and the City relied upon factors relevant to the Foreman job description and contractual criteria and that the selection process was not designed or conducted to give an advantage or to disadvantage one or more applicants. The City therefore urged the Arbitrator to deny and dismiss the grievance.

DISCUSSION:

Initially, I note that there is no dispute that the City properly posted the PRD Foreman position; that the City did not require applications or resumes but it interviewed all (internal) applicants. Section 3.02 of the labor agreement contains a relative ability clause applicable "for the position of Foreman only," and that "if the qualifications of two (2) or more applicants are relatively equal in the judgment of the Employer, the Employer will award the position to the most senior applicant." In addition, the parties entered into a Memorandum of Agreement added to the 2006-07 agreement to explain the parties intentions in including the above-quoted language in Section 3.02, as follows:

The parties agree that this language will be interpreted to mean that the Employer makes the decision as to the applicant selected for the vacancy. If the Union disagrees with the Employer's selection, it may be appealed through the grievance and arbitration procedures as set forth in the collective bargaining agreement between the parties.

It is undisputed that the PRD Foreman position description has been in place since 1994, that the Union has never objected to its content and that since 1994, that position description has required 5 or more years' experience and made desirable some supervisory experience in a PRD.

It is in this context that this grievance must be analyzed. Contrary to the Union's assertion, I find that the interview questions were not subjective; they were designed to allow each candidate to describe their relevant prior experience, knowledge, education and training with an emphasis on PRD and supervisory experience which were specifically stated as either required or desirable in the Foreman position description. In my view, the City's approach to the interviews was also reasonable. In this regard, I note that all candidates were given the questions in advance of their interviews, that they were all asked the same questions, and they were given the same amount of time to respond; that all candidates were rated separately by the interviewers and Greenwood was found to be the most qualified candidate even before the

interviewers discussed the candidates.¹

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In addition, this record independently supports a conclusion that Greenwood was the only candidate that had the 5 plus years of PRD experience required by the Foreman position description. In regard to the desirable supervisory experience, the record supported the City's conclusion that Greenwood had more experience as an acting Foreman in the PRD which no other candidate had. In addition, the evidence herein supported the City's conclusion that at the most, Westpfahl and Greenwood's supervisory experience as Assistant Chief in the City's (volunteer) fire department, was equal. Finally, the City's judgment that Greenwood's prior experience dealing with PRD customers and working with PRD policies and procedures made Greenwood substantially more qualified than Belcher and Westpfahl for the PRD Foreman position in that regard.

The Union has argued herein that the City found all three candidates for the PRD Foreman position qualified. This is not the case. The evidence herein showed that the City found Belcher and Westpfahl did not possess the PRD experience and supervisory experience the City was looking for in the successful Foreman candidate, based on the relevant position description.

¹ In these circumstances, the fact that the City had set no cut-off grade in advance was not relevant or material.

The Union has also contended that the Arbitrator should make a de novo review of the City's selection process. In my view, such an approach would be uncalled for in this case. In this case, the City offered relevant and substantial evidence to show that Greenwood was "head and shoulders" above Belcher and Westpfahl so that seniority never came into play. Furthermore, I note that the Union failed to present any facts to show that the City's selection process and its treatment of Belcher and Westpfahl was arbitrary, capricious, discriminatory or done in bad faith.² Based upon this record, the Union also failed to prove that the City's conclusions regarding the candidates' qualifications, that the City's valuation of Greenwood's City PRD experiences - - as acting foreman, in dealing with PRD customers and given his 12 years of work at the City PRD - - was unreasonable or clearly wrong. Finally, contrary to the Union's assertion, the City never considered the fact that Greenwood had more department seniority, while Westpfahl and Belcher had more unit seniority. Departmental seniority was not shown to be a factor in any of the City's deliberations.

The Union has argued that either Belcher or Westpfahl should have been selected and then granted a trial and training period (under Section 3.03) as PRD Foreman to determine whether one of them could have successfully performed the job. Such an approach would not be appropriate in this case where the City found Greenwood's qualifications to be substantially superior to Westpfahl and Belcher's and it is therefore rejected.

As the City found Greenwood to be substantially more qualified, on several relevant bases, than Belcher and Westpfahl and as the City's conclusions were based upon clear and convincing record evidence, I issue the following

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AWARD

The City did not violate the Labor Agreement when it awarded the Park and Recreation Foreman position to Steve Greenwood rather than to either of the more senior employees, Belcher, and Westpfahl. The grievance is therefore denied and dismissed in its entirety.

Dated this 1st day of June, 2007.

Sharon A. Gallagher /s/

Sharon A. Gallagher

² Although the Union asserted that Laudon was biased in Greenwood's favor, it presented no evidence to support this assertion.

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