

ARBITRATOR'S OPINION AND AWARD

In the matter between:

WORCESTER FIREFIGHTERS LOCAL 1009

and

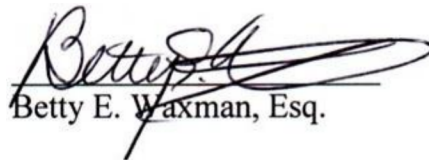
CITY OF WORCESTER

Grievance No. 2018-021

AWARD

The Undersigned, having been designated in accordance with the parties' Collective Bargaining Agreement and having duly presided at the parties' arbitration hearing, AWARDS as follows:

The grievance is substantively arbitrable. The City violated Article 22 of the parties' Collective Bargaining Agreement when it provisionally promoted District Fire Chief Andrew White to the rank of Deputy Fire Chief effective March 26, 2018. In accordance with Article 22, section 2, District Fire Chief Samuel Richesson was entitled to the provisional promotion, provided he was the "senior District Fire Chief in the group involved." If so, he is entitled to be made whole for lost wages and benefits for the loss of said provisional promotion beginning from the time of his non-selection and continuing throughout the duration of the provisional promotion.


Betty E. Waxman, Esq.

Dated: November 4, 2019

AMERICAN ARBITRATION ASSOCIATION
ARBITRATOR'S OPINION AND AWARD

WORCESTER FIREFIGHTERS
LOCAL 1009

and

AAA #01-18-0001-8419
Grievance No. 2018-021

CITY OF WORCESTER

Appearances: For the Union: Leah Barrault, Esq.
For the Employer: William Bagley, Esq.

I. STATEMENT OF THE CASE

On April 4, 2018, Union President Michael Papagni filed a grievance to challenge the Employer's failing to permanently promote District Fire Chief Samuel Richesson off a so-called "short list" (containing fewer than three names for a single vacancy) to the position of Deputy Chief and, instead, selecting District Fire Chief Andrew White to fill the position on a non-permanent basis even though District Fire Chief White was junior in seniority to District Fire Chief Richesson. Joint Exhibit 1. The grievance was denied by Fire Chief Michael Lavoie on the basis that District Chief White's selection was a provisional promotion that is permitted as an alternative to selection off a short list. Joint Exhibit 2. The Union appealed to the City Manager who rejected the appeal on the basis that a provisional promotion may be made in lieu of a selection off a short list and, in addition, that matters relating to the position of Deputy Fire Chief are not subject to the collective bargaining agreement. Joint Exhibits 3 and 4.

An arbitration hearing was held on July 10, 2019. The following individuals testified: Michael Papagni and Edward Augustus,. The parties presented ten (10) joint exhibits. Additionally, the Union presented thirteen (13) exhibits and the Employer presented nine (9) exhibits. The parties submitted post-hearing briefs at which time the record was closed.

II. ISSUE

Is the grievance substantively arbitrable?

If so, did the City violate the parties' collective bargaining agreement when it provisionally promoted District Chief Andrew White to the rank of Deputy Chief effective March 26, 2018 and, if so, what shall be the remedy?

III. RELEVANT STATUTORY PROVISIONS

M.G.L. Chapter 31, section 15

An appointing authority may, with the approval of the administrator . . . make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit. Such provisional promotion may be made only if there is no suitable eligible list, or if the list contains the names of less than three persons eligible for and willing to accept employment No provisional promotion shall be continued after a certification by the administrator of the names of three persons eligible for and willing to accept promotion to such position.

IV. RELEVANT CONTRACT PROVISIONS (Joint Exhibit 5)

ARTICLE 3, section 1

". . . the terms and conditions of employment of unit employees, not covered by a specific provision of this Agreement, shall be maintained for the duration of this Agreement."

ARTICLE 4, section 2

All job benefits heretofore permitted by ordinance or law and enjoyed by employees which are not specifically provided for or abridged in this Agreement are hereby protected.

ARTICLE 22 - OUT OF GRADE COMPENSATION

Section 1. When a department officer is absent for any reason, the employee occupying a lesser rank who fills-in for the absent officer for four (4) consecutive tours of duty . . . will be compensated pursuant to the following . . . as if such employee occupied the rank of the absent officer.

Section 2. The designation of employees for such out of grade, fill-in service and compensation will be made on the following basis. . . . District Chief for Deputy Chief . . . on the basis of the senior District Fire Chief in the group involved. Where the Fire Chief does not call back an off duty Deputy Fire Chief to fill-in for an absent Deputy Fire Chief, and where there is no District Fire Chief in the group involved available and/or willing to fill-in for an absent Deputy Fire Chief, a District Fire Chief from an off-duty group will be called in pursuant to this Agreement on an overtime basis to work the tour involved as a Deputy Fire Chief

V. EVIDENCE

The Worcester Fire Department has three positions in its management team: the Fire Chief and two Deputy Chiefs. The remaining members of the Fire Department are members of Local 1009. Union members occupy the following positions: Firefighter, Lieutenant, Captain, and District Fire Chief. Civil service exams are offered every two years for bargaining unit positions whereas an assessment center is implemented on an as-needed basis for the selection of non-bargaining unit Deputy Fire Chiefs. Transcript at 46-47.

The Union provided evidence that, in the past, the City has permanently promoted union members to the ranks of Lieutenant, Captain, and District Fire Chief off the top of short civil service lists of certified candidates. The instances of such promotions are: Marc Wyco promoted to Lieutenant in 2011; John Gallagher promoted to Lieutenant in 2015; Roger Maynard promoted to Captain in 2017; Brian Finnegan promoted to Lieutenant in 2017; William Mosley promoted to Lieutenant in 2017; and Stuart Howe promoted to District Fire Chief in 1992.

In 2015, City Manager Edward Augustus was called upon to appoint a successor to then-Fire Chief Gerard Dio. At the time, there was a short (two-person) civil service promotional list for Fire Chief containing the names of District Fire Chief Michael

Lavoie (ranked first) and Deputy Fire Chief Geoffrey Gardell (ranked second). The City Manager decided not to use the short list and, instead, provisionally promoted Deputy Fire Chief Gardell to the position of Fire Chief. Transcript at 57-58; City Exhibits 2-3.¹ At the same time, City Manager Augustus permanently promoted District Fire Chief Michael Lavoie to Deputy Fire Chief. Transcript at 58. At the arbitration hearing, the Town Manager did not identify the eligible list from which District Fire Chief was permanently promoted to Deputy Fire Chief in 2015.

In 2017, Deputy Fire Chief Lavoie was permanently promoted to Fire Chief off a four person civil service list on which he was the highest-ranked candidate. City Exhibit 4. The resulting vacancy in his Deputy Fire Chief position (Deputy Chief of Operations) led to implementation of an assessment center. The assessment center consisted of a written exam, a practical exam, and a review of the candidates' education and experience. Two candidates emerged from the screening process: District Fire Chief Samuel Richesson as the first-ranked candidate with a score of 84 and Captain Martin Dyer as the second-ranked candidate with a score of 81. District Chief Richesson has been in the Department for nineteen years, has held the rank of District Fire Chief for nine years, and is the most senior individual in that rank. Transcript at 42-43. He has no disciplinary record. Id.

The City Manager and the Assistant City Manager interviewed the two candidates. Of the two candidates on the short list for the vacant Deputy Fire Chief position, Captain Dyer was selected for a permanent promotion even though his assessment center score was lower than District Fire Chief Richesson's because the latter

¹ The Union maintains that it was not informed that Gardell's promotion was provisional, but the evidence supports the City's assertion in this regard. City Exhibit 3.

candidate was deemed to have had a poor interview. Transcript at 42. District Chief Richesson appealed his bypass to the Massachusetts Civil Service Commission which upheld the bypass and dismissed the appeal. City Exhibit 7.

In March 2018, another Deputy Fire Chief position became available as a result of the resignation of Deputy Chief Sullivan. At the time, the only name on the promotional list was Deputy Chief Richesson's. The City Manager declined to make a selection from the list, opting instead to make a provisional promotion pending the implementation and grading of a new assessment center. Transcript at 31, 61. The City Manager provisionally promoted District Chief Andrew White to the vacant Deputy Fire Chief position. District Chief White was not on the promotional list for Deputy Chief because he had failed the exam. Transcript at 36. He had less seniority in the rank of District Chief than District Chief Richesson. Mr. White held the provisional promotion for about a year while retaining his permanent civil service rank of District Chief. Transcript at 39.

According to Local President Papagni, the Fire Department, in approximately 2018, began to use provisional promotions to temporarily fill vacant positions. Transcript 38-39, 49-50. Mr. Papagni stated that District Chief Richesson was the senior person in the next lower rank when the Deputy Fire Chief position became vacant in 2018. Transcript at 41.

VI. THE PARTIES' POSITIONS

THE UNION'S POSITION

The Union argues that the instant dispute falls under the parties' arbitration agreement because doubts should be resolved in favor of coverage. It asserts that the City's failure to promote District Chief Richesson to Deputy Chief in 2018 violates a past

practice recognized under Articles 3 and 4 of the CBA or, alternatively, the provisional appointment process outlined in Article 22. Arbitral authority supports the principle that the topic of promotion is a mandatory subject of bargaining even for a position outside of the bargaining unit because the manner of filling such positions implicates contract language.

Turning to the issue of short lists, the Union argues that G.L. c. 31, section 15 permits, but does not require, that the City refrain from making permanent promotions from a civil service certified list of less than three names. Notwithstanding the dual options afforded by section 15, the City has long adhered to a practice of selecting the top applicants off so-called short lists. The Union asserts that there is no conflict between civil service law and recognizing the City's past practice of permanently promoting top candidates off of short lists. As support, the Union relies on the Overton Award (a 1990 arbitration decision that City of Worcester's failure to promote the top candidate on a promotional list to District Fire Chief violated the parties' CBA by deviating from past practice)² and the Garraty award (a 2005 arbitration decision that City of Medford's failure to promote a firefighter from a short list violated the parties' CBA by deviating from past practice). According to the Union, these decisions establish that the Employer may exercise the discretion accorded to it under the law by consistently appointing the highest ranking candidate and/or using short lists from which to make selections.

The Union next argues that there is a strong past practice of always promoting the candidate ranking at the top of an active civil service list, whether complete or short lists, as well as multiple strong past practice provisions -- Articles 3 and 4 -- in the parties'

² The Overton Award (Joint Exhibit 7) was upheld on appeal to the Superior Court (Joint Exhibit 8) and the Appeals Court (Joint Exhibit 10).

CBA. It notes that the City attempted to eliminate the practice during contract negotiations but was prohibited from doing so. According to the Union, the sole instance of the City not promoting the top-ranked candidate on a short list was Captain Dyer's promotion to Deputy Chief of Administration over District Chief Richesson in 2017. The Union discounts the promotion of Deputy Fire Chief Gardell over District Fire Chief Lavoie in 2015 because Gardell's position was outside the bargaining unit at the time of his promotion to Chief.

The Union argues that pursuant to the Overton Award, the parties' past practice requires that it appoint the top candidate on an existing promotional list except where it has "valid, substantive, reasonable reasons" not to do so. According to the Union, no such reason was present in this case, given District Chief Richesson's unblemished disciplinary record, his seniority over District Chief White, and the fact that he passed the promotional exam for the position whereas White did not. The City's decision not to promote Richesson was based on his interview performance for a prior vacancy which the Union claims is not a valid reason for rejection. Although the Civil Service Commission upheld Richesson's bypass the previous year, the Union asserts that it did so based on civil service law, not the parties' contractual obligations.

Finally, the Union argues that even if the City was not obligated to permanently promote Richesson, it violated Article 22, section 2 of the CBA when it refused to provisionally promote him to Deputy Chief in 2018 because Article 22 states that a temporary Deputy Chief vacancy is to be filled by the senior District Fire Chief. The Union interprets Article 22 as governing the provisional promotion to Deputy Fire Chief in 2018. It argues that a temporary fill-in situation was necessitated by the Employer's

refusal to make a permanent promotion to the then-vacant Deputy Chief of Operations position, pending construction of an assessment center. According to the Union, even if the City had the right to refrain from making a permanent promotion off the short list in 2018, it was still bound to provisionally promote Richesson, the most senior District Fire Chief, to the position pursuant to Article 22.

THE EMPLOYER'S POSITION

The City states that it exercised its prerogative under M.G.L. c. 31, section 15 to fill a vacant Deputy Fire Chief position through a provisional promotion because the existing civil service list for the position consisted of less than three names. According to the City, chapter 31, section 15 does not require an appointing authority to permanently promote a civil service employee from a short list of certified candidates.

The City disputes that there is a past practice of promoting candidates to the rank of Deputy Fire Chief from the top of short lists. While the City generally fills bargaining unit positions (Lieutenant, Captain, and District Fire Chief) from the top of civil service promotional lists, it denies doing so for Deputy Fire Chief and Fire Chief positions which lie outside the bargaining unit. The City distinguishes between these categories on the basis that bargaining unit positions are filled from promotional lists that are developed with regularity as a result of civil service exams held every two years. Non-bargaining unit positions, by contrast, are filled from lists based on assessment centers which are conducted on an irregular, as-needed basis. The positions of Deputy and Chief, moreover, are management ranks which are part of the City Manager's cabinet. Individuals in both ranks may be called upon to participate in cabinet meetings, present at budget hearings, and serve as the face of the Fire Department.

In refuting a past practice of selecting the top candidate from short lists for management positions, the City cites its manner of replacing Fire Chief Dio who retired in 2015. In that circumstance, the City Manager rejected a short list of candidates for Fire Chief and made a provisional promotion instead. In 2017, when there was a vacancy in Deputy Fire Chief, the City Manager used a short list but selected the lower-ranked candidate rather than the top-ranked candidate.

The City distinguishes the Overton award as dealing with a promotion to District Fire Chief -- a position covered by the parties' CBA -- rather than a promotion to Deputy Fire Chief or Fire Chief. The Superior Court, when reviewing the award, expressed reservations about the decision.

The City differentiates between making out-of-grade assignments to cover temporarily-absent employees and making provisional promotions to fill permanently-vacated positions. According to the City, the former occur when an individual is temporarily absent from work due to sickness, vacation, or injured-on-duty leave whereas the latter is used for permanent vacancies resulting from resignations or promotions. The City maintains that the latter is at issue in this case so the City's various methods of filling a temporary vacancy are irrelevant.

VII. CONCLUSIONS

Substantive Arbitrability

The Employer's arbitrability argument is premised on the fact that the position at issue -- Deputy Fire Chief -- is a management position which lies outside the CBA. The non-unit status of the position raises a legitimate issue regarding arbitrability, but several

factors favor the conclusion that the grievance is a permissible contract claim that is appropriately heard and resolved in this forum.

First, doubts about contract coverage should be resolved in favor of coverage. Second, the grievance is premised on the claim that there is a past practice under the parties' CBA which mandates that selections be made from the top of civil service promotional lists, even so-called short lists. Third, the individuals considered for the position of Deputy Chief -- Richesson on a short list and White as a provisional candidate -- were both members of the bargaining unit. Their status as Union members distinguishes this dispute from the selection of Deputy Fire Chief Gardell to Fire Chief in 2015. In that case, the position that Gardell previously occupied as well as the position he was promoted into were both outside the bargaining unit. For these reasons, I conclude that the promotion at issue is a legitimate subject of the grievance process.

The Merits

The Union asserts that two alleged past practices should have governed the selection of Deputy Chief in 2018: 1) use of short civil service lists in selecting members of the Fire Department for promotional positions and 2) adherence to the order of candidates on such short lists. The Union cites various instances in which members of the Department were promoted to Lieutenant, Captain, and District Fire Chief off the top of short lists. It cites, as well, the Overton Award wherein a seventeen-year practice of promoting from the top of civil service lists was cited as support for the selection of the top candidate on a 1989 promotional list for District Fire Chief.³

³ See IAFF, Local 1009 and City of Worcester (Overton, Arb., 1990) which was upheld "reluctantly" by the Superior Court in City of Worcester v. Armstrong, Memorandum of Decision, C. A. 90-0968 (Todd, J, 1991) (stating that it would not have found a past practice to invariably appoint the highest placed person on the promotional list had it addressed the matter in the first instance), aff'd, City of Worcester v. Local 1009, IAFF (Rescript, Mass. App. Ct., 1992).

The evidence cited above may be relevant to making selections for bargaining unit positions but fails to control the outcome in regard to selecting individuals to fill the Fire Department's management ranks where incumbents are called upon to participate in cabinet meetings, present at budget hearings, and serve as the face of the Fire Department. In prior circumstances where the positions of Fire Chief and Deputy Fire Chief were filled, the above practice was not uniformly applied. To be sure, top candidate Michael Lavoie may have been promoted off a short list for Deputy Fire Chief in 2015, but one instance is insufficient to establish a past practice in regard to filling management positions.

Given the absence of a controlling past practice mandating the promotion of the top candidate on a short list for Deputy Fire Chief, the Employer was entitled to make a provisional promotion to the Deputy Fire Chief position in 2018 rather than promote Samuel Richesson from a civil service list on which he was the sole candidate. Under G.L.c. 31, section 15, an employer is allowed to make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit if the list contains the names of less than three persons eligible for and willing to accept employment.

The City argues that the selection of Andrew White as Deputy Fire Chief in 2018 constituted such a provisional promotion governed solely by chapter 31, section 15, but this claim ignores Article 22 of the parties' CBA which imposes a further restriction on such a selection. Article 22 states an employee occupying a lesser rank may "fill-in" for an "absent" employee and receive out-of-grade compensation provided that the individual performing out-of-grade, fill-in service for Deputy Chief is "the senior District Fire Chief

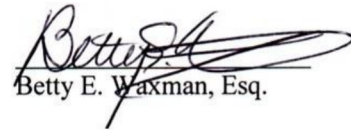
in the group involved. . . . and where there is no District Fire Chief in the group involved available and/or willing to fill-in for an absent Deputy Fire Chief, a District Fire Chief from an off-duty group will be called in" Thus, Article 22 requires that the Employer adhere to seniority in filling vacant positions where civil service eligibility lists are not used. The section does not explicitly reference provisional promotions but sets forth circumstances which amount to the same thing.

Requirements in collective bargaining agreements which restrict provisional promotions to individuals with the most seniority have been upheld as consistent with civil service law. See City of Fall River v. Teamsters Union, Local 526, 27 Mass. App. Ct. 649 (1989). In the City of Fall River case, the Appeals Court determined that such seniority considerations in the provisional promotion process did "not distort" any policy of civil service law. 17 Mass. App. Ct. at 653.

The seniority requirement in Article 22 applies to the provisional promotion at issue in this case notwithstanding the City's argument that the restrictions set forth in Article 22 are inapplicable to the situation in dispute which involved a permanent vacancy in the position of Deputy Fire Chief. The City construes Article 22 as pertaining to short-term absences only. The term "absence," however, may also be interpreted broadly, as applicable to all vacancies, temporary and permanent. An expansive interpretation in this case is supported by the following considerations. First, section 1 of Article 22 refers to absences for "any reason" not just for short-term reasons. Second, Article 21 of the CBA refers to filling permanent vacancies caused by termination, promotion, transfer, or the creation of a new job through out-of-grade, fill-in service pursuant to Article 22. These references provide contextual support for a determination

that under Article 22, seniority governs the filling of provisional promotions, including out-of-grade, fill-in service for a Deputy Chief. Pursuant to this determination, the senior District Fire Chief "in the group involved" should have been provisionally promoted to Deputy Fire Chief in 2018.

Based on the foregoing, I conclude that the City violated Article 22 of the parties' Collective Bargaining Agreement when it provisionally promoted District Chief Andrew White to the rank of Deputy Fire Chief, effective March 26, 2018. District Fire Chief Samuel Richesson was entitled to the provisional promotion, provided he was the "senior District Fire Chief in the group involved" in accordance with Article 22, section 2. If so, he is entitled to be made whole for lost wages and benefits for the loss of said provisional promotion beginning from the time of his non-selection and continuing throughout the duration of the provisional promotion.



Betty E. Waxman, Esq.

Date: November 4, 2019