

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Arbitration Between

TROY UNIFORMED FIREFIGHTERS ASSOCIATION,

Grievant,

-against-

CITY OF TROY,

Employer.

DECISION AND AWARD

PERB Case No. A2015-001

Before:

Ivor R. Moskowitz, Esq., Arbitrator

Parties:

Gleason, Dunn, Walsh & O'Shea

(Ronald G. Dunn, Esq.)

For the Troy Uniformed Firefighters Association

Goldberger & Kremer

(Bryan J. Goldberger, Esq.)

For the City of Troy

Dated: November 30, 2015

PRELIMINARY STATEMENT

This is a final and binding decision and award in the matter of the Troy Uniformed Firefighters Association, Local 86, IAFF, AFL-CIO ("Union" or "Association") and the City of Troy ("City" or "Employer") determining certain contractual grievances. There were two days of hearing, August 4, 2015 and September 9, 2015, held before Arbitrator Ivor R. Moskowitz, Esq. who was duly appointed by the Public Employment Relations Board at the behest of the parties. At these hearings both sides were given a full and fair opportunity to call, examine and cross examine witnesses and to present such other and further evidence into the record of proceedings. There were 26 exhibits entered into the record: 14 joint exhibits by the parties (Jt.); eight exhibits entered into evidence by the "Association" (U.); and four exhibits entered into evidence by the City (E.).

The Union called four witnesses: Captain Jeff Gordon, Association President and firefighter Frank Razzano, retired Captain Gary Favro, Captain Michael Spinelli; the City called five witnesses: retired Battalion Chief Ray Davis, Chief Tom Garrett, Dr. Michael Dailey, Battalion Chief Dave Paul and Captain Richard Cellucci.

ISSUES PRESENTED (Jt. 14)

The parties agreed upon the following issues to be determined by the Arbitrator:

1. Did the City violate the CBA when it filled the EMS Captain position?
2. Did the City violate the CBA when it allegedly failed to post bid and fill training opportunities as alleged in the four grievances?
3. If so, what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

Article VI. Management Rights and Responsibilities

A. Except as otherwise provided herein, and subject to other controlling provisions of this Agreement, statutes and laws, the government and management of the City, the control and management of its properties and the maintenance of municipal functions and operations are reserved to the City and all lawful prerogatives of the City shall remain and shall be solely and exclusively the City's rights. Paramount among these rights, but by no means exclusive, are the rights involving public policy, determination of the mission, purpose and duties of the various departments and bureaus within the City, their budgets, organization, numbers, types, and grades of positions of employees assigned to an organization unit, work project, tour of duty, technology of performing the work, the rights to manage and direct work forces, to decide the number and location of stations and other facilities, to determine the work to be performed within the unit...in order to operate and manage its affairs in all respects in accordance with law.

D. The City is obligated, legally and morally, to provide equality of opportunity, consideration and treatment of all employees and to establish policies and regulations that will insure such equality of opportunity, consideration and treatment in all phases of the employment process.

Article XI. Seniority

A. Seniority shall be determined as of the date of the employee's appointment from a Civil Service List as a firefighter in the City of Troy...

D. Seniority shall be a major factor in filling job openings, unless the senior employee is not qualified to perform the duties required. It is recognized, however, that the public safety must not be jeopardized through artificial constraints resulting from the application of strict seniority.

Article XX. Professional Training and Improvement Courses

A. The City and the Association agree that as many employees as possible participate in professional, educational and training courses whenever available. To facilitate the availability of such courses, the following criteria are hereby adopted.

1. The City shall post on bulletin boards located at all fire houses, announcements of all courses to be given which are either compulsory for a segment of the staff, are prerequisites to promotion or improved assignment, or may be optional for the purpose of improving the professional standing of the employee.

All eligible employees shall have the opportunity to bid for the prerequisite and optional courses. In the event that there are more bids than openings available, the senior personnel will be given preference subject an any special requirements by the institution giving the course.

4. Prerequisite Courses: Whenever a course is given, which is a prerequisite for promotion or for improved or advantageous assignment, the timing of such course shall be so arranged as to permit all eligible and interested personnel to register in sufficient time to become a candidate for the position.

Candidates in number up to three times the numbers of positions available selected on a seniority basis from the candidates for such positions shall, if necessary, be reassigned for the duration of such course so that they may participate in such course during duty time.

Article XXI. Vacancies and Transfers

In selecting personnel hereunder, the following criteria shall be applied:

A. Vacancies shall be posted and employees desiring to be transferred to such assignments shall submit their written request to the Chief of Fire. The Bureau shall prepare a list of such applicants and appointments thereto shall be made by seniority unless the assignment requires special qualifications which the senior applicant is not eligible to meet. Therefore, whenever a position is available for which special

qualifications or skills are required, the Bureau immediately shall arrange for training programs and those interested in filling the position shall be required to satisfactorily complete the course of program. The filling of the position on a permanent basis shall be deferred until the prerequisite training program has been completed and the selection made in accordance with the Article. Any firefighter bypassed in selection for such assignment shall be advised in writing of the reason therefore and may, if he/she believes the employer is in error, file a grievance.

POSITIONS OF THE PARTIES

The Association

The Union in policy grievances and Captain Michael Spinelli of the Troy Fire Department in individual grievances maintain that Captain Spinelli was improperly denied the position of Emergency Medical Service Captain ("EMS") in the EMS Office despite the clear seniority bid rights guaranteed in the collective bargaining agreement ("CBA") between the Union and the City of Troy. This resulted in the loss of thousands of dollars to Captain Spinelli in salary, benefits and pension credits.

The City also wrongfully deprived Captain Spinelli of training and career opportunities despite clear seniority bid rights guaranteed in the CBA.

The remedy sought is "make whole" relief for the Union and Captain Spinelli.

The Employer

A crisis situation occurred in the City's EMS/Ambulance service provided by the Troy Fire Department due to the unexpected coincidence of incumbent Captain Cruickshank's retirement in January 2014 and the abrupt medically related retirement of Battalion Chief Davis in February 2014. In effect, all institutional knowledge about administering the City's EMS/Ambulance services disappeared.

Although Chief Garrett quickly assigned Battalion Chief David Paul to oversee the EMS/Ambulance services, Battalion Chief Paul had no prior knowledge of its operations. In view of this and to protect the public safety and the ability of the Department to fulfill its State and federal requirements, Chief Garrett properly determined that an experienced hand was needed to assist Battalion Chief Paul. When Chief Garrett initially posted the position of EMS Captain in February 2014, he determined that the level of knowledge and experience required to ensure that the City's EMS/Ambulance services would meet all applicable NY State and federal rules and regulations was five years of experience administering an EMS agency.

Captain Richard Cellucci met the organizational needs of the City and was selected as EMS Captain in April of 2014: he was the sole candidate with requisite experience in administering an EMS agency.

The City thus filled the position of EMS Captain in accordance with CBA Article VI(A), in which the City has the sole right to set "the numbers, types and grades of positions of employees assigned to an organizational unit".

DISCUSSION AND FINDINGS OF FACT

The Union and the City are parties to a collective bargaining agreement dated January 1, 2007-December 31, 2010 (Jt.1, Ex. A) which has been extended by a Memorandum of Agreement dated April 13, 2012 (Jt.1, Ex. B) which covers the period January 1, 2011-December 31, 2012. Since there has been no successor agreement, the agreements between the parties are extended by law (CSL sec. 209(a)(1)(e)).

For many years the Troy Fire Department has provided Advanced Life Support and Medical Transport to the City of Troy by employing firefighter paramedic and ambulance transport. The program is overseen by a Medical Director-Dr. Kevin Crisafulli. The Department has assigned one or more officers to perform the program administration. The City's program generates billing of more than three million dollars annually.

The program is both State and federally regulated including provisions for licensing and training. Other requirements include following rules and regulations concerning medical equipment, medication-its use and control-and requisite documentation and reports.

At the beginning of 2014, Battalion Chief Ray Davis and Captain Eric Cruickshank were working together to oversee the City's EMS/Ambulance services. Battalion Chief Davis had 18 1/2 years of experience and Captain Cruickshank had 5 1/2 years of experience administering the EMS/Ambulance program. As set forth previously, both of these officers retired abruptly and Chief Garrett assigned the vacant position to Battalion Chief David Paul. Paul had no experience in administering an EMS/Ambulance program. Chief Garrett determined that public safety would be jeopardized if an experienced EMS/Ambulance administrator was not installed as EMS Captain to assist and serve as backup to Battalion Chief Paul. Thus, Chief Garrett determined that five years of EMS agency administration (Jt.8) was a prerequisite for filling the vacant EMS Captain position.

On April 9, 2014, Chief Garrett appointed Captain Richard Cellucci as EMS Captain. On April 10, 2014, the Union filed a policy grievance regarding Cellucci's appointment. (Jt.2, Ex. C.) On January 30, 2015, the grievance was settled without an admission of guilt or back pay (E.1, 2, 3). The position was posted on February 2, 2015 (Jt.8). Both Spinelli and Cellucci bid on the posting. Captain Cellucci was appointed.

On February 18, 2015, both the Union and Captain Spinelli filed grievances (Jt. 1, Exs. D, E, F and G). The grievances were denied and appealed to the Mayor (Jt.1, Ex. J). The Mayor did not rule on the appeals and by contract, the Union filed a Demand for Arbitration on March 31, 2015 (Jt. 1).

Before the Arbitrator are four individual and policy grievances filed respectively by Captain Michael Spinelli (individual) and the Troy Uniformed Firefighters (policy) pursuant to CBA Art.VIII-Grievance Procedure, relating to the bid and filling of training opportunities for an EMS Captain position (Jt.1, Exs. D,E,F and G). There is no issue concerning the arbitrability of these grievances.

This case presents close questions concerning several inter-related contract provisions and the differing views of the Union and the City over their interpretation and harmonization.

On the one hand, the Union believes that the seniority staffing and training provisions of the contract, i.e., Article XX-Professional Training and Improvement Courses and Article XXI, together with Article VI(D) describe the clear intent of the parties to favor seniority as a prerequisite for promotion or for improved or advantageous assignment while the City claims a superior right due to the exigencies which arose requiring the hiring of Captain Richard Cellucci under CBA Articles VI-Management Rights, Section A and XI-Seniority, Section D.

Insofar as the grievances on access to training are concerned, on its face, Article XX appears to be clear. The City and the Union both "agree that as many employees as possible participate in professional educational and training courses whenever available." To carry out this provision , the City "shall post on bulletin boards located at all firehouses announcements of all courses to be given which...are prerequisites to promotion or improved assignment..." Further: "All eligible employees shall have the opportunity to bid for the prerequisite courses. In the event that there are more bids than openings available, the senior personnel will be given the preference subject to any special requirements by the institution giving the course..."(Jt. 1, Ex. A, Art. XX at p.37).

"Prerequisite Courses" are courses given:

"...which are a prerequisite for promotion or for improved or advantageous assignment, the timing of such course shall be so arranged as to permit all eligible and interested personnel to register in sufficient time to become a candidate for the position.

Candidates in number up to three times the number of positions available selected on a seniority basis from the candidates for such positions shall, if necessary be reassigned for the duration of such course so that they may participate in such course during duty time." (Jt. 1, Ex.A, p.38.)

Clearly, the Fire Department considered the CIC training to be a prerequisite for promotion or for improved or advantageous assignment. It did not post that opportunity or offer training to Captain Spinelli while at the same time it offered such prerequisite courses to less senior employees such as Captain Cellucci.

Seniority is defined at Article XI(A):

"Seniority shall be determined as of the date of the employee's appointment from a Civil Service List as a firefighter in the City of Troy...Officer seniority shall be determined as of the date of Civil Service promotion...(Jt. 1, Ex. A, p.19.)

There is no question that Captain Spinelli is more senior to Captain Cellucci (Jt.3).

Access to training is also recognized in CBA Art. VI(D) as a legal and moral obligation upon the City to insure equality of opportunity, consideration and treatment of all employees during all phases of the employment process. Thus, failure by the City to offer the requisite training to Captain Spinelli despite his seniority rights is also a violation of the CBA.

Article VI-Management Rights and Responsibilities is cited by the City to bolster its argument that it has the right to supersede Articles XX and XXI by imposing additional requirements for the EMS Captain position. Thus:

"Except as otherwise provided herein, and subject to other controlling provisions of this Agreement, statutes and laws, the government and management of the City, the control and management of its properties and the maintenance of municipal functions and operations are reserved to the City and all lawful prerogatives of the City shall remain and shall be solely and exclusively the City's rights. Paramount among these rights, but by no means exclusive, are the rights involving public policy, determination of the mission, purpose and duties of the various departments and bureaus within the City..." (Jt.1, Ex. A, pp.5-6.)

Further, the City cites CBA Article VI(D) for the proposition that the five year requirement of EMS agency administration as a matter of public safety trumps the application of contractual seniority. I find that this has no merit in fact and is thus insufficient to overcome the Union's arguments.

Three witnesses testified that when they accepted the EMS Captain position they had no prior experience in running and administering an EMS program (Captains Jeff Gordon, Gary Favro and Battalion Chief Davis). The forms required to be filled out by the EMS Captain are not of a sufficiently complex nature as to prevent Captain Spinelli's appointment as EMS Captain. Captain Spinelli as an experienced paramedic is not a blank slate. Dr. Dailey testified that he was the medical director for all six counties of the Capital District and unofficial advisor to the Medical Director of the City of Troy- Kevin Crisafulli. Further, he testified that he was available as a resource to the Battalion Chief Paul and to whoever was the EMS Captain. (See, E.4, Dailey curriculum vitae showing extensive medical and EMS training.) Also available for consultation is the present Troy Medical Director, Battalion Chief Paul and questions regarding the completion of requisite forms may also be addressed by the EMS Captain to the requiring agencies of government.

Although Captain Spinelli applied to take the requisite CIC course to be eligible to give instruction to EMS personnel and ambulance transporters, he was denied this opportunity by the Department (Jt.10, U.3, Jt.11, 12). His seniority was such that he was entitled to take the course given had he been given notice of the opportunity pursuant to CBA Article XX.

The Department gave no specifics on why the public health and safety would be compromised had the EMS Captain position been given to Captain Spinelli. The mere failure to presently hold a CIC certification is insufficient to show that public safety would be jeopardized by the appointment of Captain Spinelli; the "Position Open for Bld" (Jt.8), mentions no CIC certification as a requirement for the EMS Captain position.

Even though the City retained considerable management rights in the CBA between the parties, Article XX clearly gave the Firefighters the right to training and education as a prerequisite to promotion. Further, the contract permits a position to remain open until an employee completes necessary training. In this case, the prerequisite training would not have taken very long to complete. Captain Spinelli is a certified paramedic with many years of experience. He, at the time of this arbitration, had only to complete a 55 hour internship to be CIC qualified. The requirements of the EMS Captain position were ones which could have been completed by Captain Spinelli and would have met the agreement of the parties as set forth in CBA Article XX with the exception of the five year experience requirement. It is to be noted that Captain Cellucci had not completed his CIC training at the time he was appointed to the EMS Captain position. As Battalion Chief Paul testified that both he and Captain Cellucci grew into

their EMS/Ambulance position. Given the resources and experience of Battalion Chief Paul, the City of Troy's medical director and Dr. Dailey, the public and the City would not have been unfavorably affected.

The five year experience requirement imposed by Chief Garrett was never required historically. Indeed, previous history shows that the most senior applicant who bid for the EMS position was awarded it. This was done regardless of prior EMS administrative experience. The surface explanation of the need to back up and assist Battalion Chief Paul (when he had no such requirement imposed on him) appears tailor made for Captain Celluci's appointment and in opposition to Captain Spinelli's contractual seniority rights. Since the testimony doesn't support the argument that the EMS Captain's position is so complex as to require the five years of experience administering an EMS agency, I find the five year experience requirement is arbitrary and doesn't overcome the intent, spirit and clear meaning of the contract concerning rights to bid and fill positions (e.g., CBA Arts. VI(D), XI, XX and XXI).

DETERMINATION OF THE ISSUES PRESENTED

1. Did the City violate the CBA when it filled the EMS Captain position?

For the reasons set forth above, I find that it did.

2. Did the City violate the CBA when it allegedly failed to post bid and fill training opportunities as alleged in the four grievances?

For the reasons set forth above, I find that it did.

3. If so, what shall the remedy be?

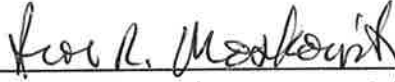
The City shall provide Captain Spinelli the opportunity to take the CIC qualifying course and internship which he may lack at present at no cost to him. If he is already so certified, he is to be reimbursed for his expense, if any, in obtaining such certification and internship. The City is to appoint Captain Michael Spinelli to the position of EMS Captain effective the date of Captain Cellucci's appointment as EMS Captain in February, 2015 with all accrued overtime pay without interest in an amount equivalent to that received by Captain Richard Cellucci during the same period to the date of compliance consistent with this determination. The amount of Captain Spinelli's overtime back pay award shall be applied toward a calculation of his pension credits. In sustaining the grievances, the City is directed to pay the arbitrator's fee for services.

AWARD

1. The City is directed to appoint Captain Michael Spinelli to the position of EMS Captain effective the date of Captain Cellucci's appointment as EMS Captain in February, 2015 with all accrued overtime pay, without interest, to be determined by the amount paid to Captain Richard Cellucci for overtime in that same position during the same period.

2. Captain Michael Spinelli shall be provided by the City with the opportunity to take the CIC qualifying course and internship which he may lack at no cost to him, or, if he is already so certified reimbursed his cost, if any, of obtaining that certification and internship.
3. The City shall apply the amount of Captain Spinelli's back pay award toward a calculation of his final average salary for purposes of credit toward retirement.
4. The City is responsible for paying the arbitrator's fee per CBA Art.VIII(C).


Dated: November 30, 2015



Ivor R. Moskowitz, Esq., Arbitrator

I, Ivor R. Moskowitz, Esq., am the arbitrator duly selected by the parties to hear and determine the instant matter. The above constitutes my decision and award herein and is solely based on the record of proceedings before me after a full and fair hearing on the merits of the dispute.

Dated: November 30, 2015



Ivor R. Moskowitz, Esq., Arbitrator