

IN ARBITRATION PROCEEDINGS PURSUANT TO THE
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

East Bay Municipal Utilities District,	]		RECEIVED
	]	Opinion and	
	]	Decision	FEB 14 2020
Employer/District,	]		WR & R
	]	of	
and]		
	]	Joe Lindsay	
	]	Arbitrator	
]		
American Federation of State, County,]		
and Municipal Employees, Local 444,]		
]		
Union.	]	February 12, 2020	
]		
	]	Oakland, California	
Re: Grievance No. 19-444-039]		
Bryan Wolverton, et al, Civil Service]		
Examination]		

APPEARANCES:

For the Union: Alan Crowley, Attorney at Law, Weinberg, Roger & Rosenfeld

For the Employer: Jesse Lad, Attorney at Law, Meyers, Nave, Riback, Silver & Wilson

This case was heard on January 24, 2020, at the headquarters of the Employer (hereafter “EBMUD” or the “District”) under the provisions of Section 22.6, Procedural Steps for Limited Civil Service Examination Grievance Procedure, of the parties’ 2017-2021 Memorandum of Understanding (MOU). That section provides for an expedited process, with an informal hearing, no transcripts or recordings, and no application of the rules of evidence. The parties chose not to have witnesses sworn. All witnesses

(including the grievants) were present throughout the hearing. The parties agreed to waive some of the timelines provided in Section 22.6. Present and testifying at the hearing for the Union were the three grievants, Bryan Wolverton, Tyrell Jackson, and Gil Paredo, all of whom are Water Distribution Plumber IIIs (WPDIIIs or Plumber IIIs) for the District. In addition, Jackson is a member of the Union's Executive Board, and Paredo is a union shop steward. Present at the hearing for the District were Antonio Martinez, *Manager of Distribution, Maintenance & Construction*, Richard Jung, *Manager of Recruitment and Classification*, and Jill Gaskin, a Human Resources representative for the District. Martinez and Jung also testified.

ISSUE:

Both parties submitted Pre-Hearing Statements as provided in Section 22.6. In addition, each party presented an oral opening at the hearing. In their Pre-Hearing Statement, the Union include the following:

The Union's position is that the District violated the MOU and the District's Civil Service Rules by disqualifying the three grievants from the civil service examination process for the position of Assistant Construction and Maintenance Superintendent (ACMS) classification allegedly because the grievants did not and could not meet the minimum qualifications for the ACMS position because of their current positions as WPDIIIs. The amended issue is whether the District violated the Civil Service Rules because it lacked cause to specifically disqualify WDPDIII Bryan Wolverton.

Further, in their oral opening, the Union laid out the issues as:

- Did the District violate Civil Service Rules 4 and 5 when it determined that none of the grievants had the requisite minimum qualifications for the ACMS position; and
- Whether the District unreasonably relied on a 1985 Job Description for WPD IIIs, since Rule 4 says that examples provided in job descriptions are illustrative only; and
- Whether the District failed to consider the grievants' Work Out of Class records; and
- Whether the District violated Rules 4 and 5 by not ensuring that the WPDIII job description is accurate.

The District, in their Pre-Hearing Statement, contended that the issue is whether “time served as a Plumber III must count towards the required three years of experience necessary to be an ACMS.”

Since the parties did not formally agree on an issue, the issue to be decided is as follows:

Did the District violate the Civil Service Rules when it determined that none of the grievants met the minimum requirements for the ACMS opening in August, 2019, and if so, what shall be the remedy?

BACKGROUND:

The District is a public agency that provides drinking water to customers over large parts of the East Bay. The Union is the exclusive representative for the grievants in this dispute. As provided by the MOU, hiring and promotion processes are controlled by the Civil Service Rules, and the MOU includes a Limited Civil Service Examination Grievance Procedure, under which this dispute is covered. The ACMS position under

consideration here is not represented by the union, and the MOU's seniority rules do not apply. Instead, the District posts a position and employees are able to apply. Those employees who meet the minimum qualifications are then eligible to take a Civil Service examination for the position, and if successful in the exam will be interviewed for the opening. Ultimately, the District compiles a list of up to five eligible candidates, constituting the hiring pool. The District then make the final hiring decision. Thus the question here is not whether any of the grievants should have been awarded the ACMS position, which is solely a management decision, but rather whether they met the minimum qualifications and therefore should be eligible to take the exam and be duly considered.

RELEVANT PROVISIONS

CIVIL SERVICE RULE IV -- CLASSIFICATION

Section 4. Interpreting Class Descriptions. Class descriptions are to be considered descriptive and explanatory and not restrictive. They are intended to be illustrative of the kinds of positions allocated to the various classes and should not be construed as limiting assignments which may be made to a particular position. Typical duties outlined shall be representative of work performed but are not intended to prescribe all duties of positions in the class, or to exclude duties of similar kind or level. Knowledges, skills, abilities, and other qualifications shall include only those which are job-related and considered necessary for proficient job performance. Nothing in a class description is to be interpreted as restricting the assignment of an employee to perform duties of a higher class for limited periods during the absence of others. Procedures governing the assignment of and compensation for such duties shall be adopted as necessary.

Section 5. Revision of Class Descriptions. The Manager of Human Resources shall take necessary steps to ensure that class descriptions are accurate by directing the study of position duties, responsibilities, and

qualifications, and recommending revisions of class descriptions as appropriate. Such revisions shall be approved and adopted by the General Manager.

CIVIL SERVICE RULE V – RECRUITMENT AND APPLICATION

Section 5. Disqualification of Applicants. An applicant may be refused an opportunity to take an examination and an eligible on an open or internal list may be refused certification or removed from an eligible list for any of the following reasons:

a. Failure to fulfill the qualifications of the class for which application is made. [subsections b.-i. omitted]

Section 6. Notice of Disqualification. Whenever any person is disqualified for any of the reasons outlined in Section 5 above, the reasons for disqualification shall be given to the person in writing. A person who has been disqualified may request in writing that the Manager of Human Resources reconsider the disqualification, stating the reasons for the request and submitting additional information as necessary. The request of an applicant disqualified from taking an examination must be received prior to the date of the examination. The decision of the Manager of Human Resources on any request for reconsideration shall be in writing and shall be final.

MOU Section 22.7. ELECTION OF REMEDIES.

22.7.2. It is specifically and expressly understood and agreed that taking a grievance appeal to arbitration constitutes an election of remedies and a waiver of any and all rights by the appealing employee, the Union, and all persons it represents to litigate or otherwise contest the appealed subject matter through the District Complaint Procedure or the District Civil Service Procedure. Litigation or any other contest of the subject matter in any court or other available forum shall constitute an election of remedies and a waiver of the right to utilize this Grievance Procedure or to arbitrate the matter. This paragraph is not intended to bar an employee from pursuing any cause of action which has been established by statute.

FACTS

In August, 2019, the District posted an opening for an Assistant Construction and Maintenance Superintendent position. The three grievants in this case were among those who submitted applications. All three grievances included in their applications their past experience with the District, their Work-Out-of Class (WOC) records, and their prior out-of-District experience. All three had their applications denied. Wolverton received a letter from Brian Noeth, a Human Resources Analyst for the District, telling him that his application was “not selected for further consideration,” but not providing any explanation. (see UX5) Wolverton had a phone conversation with Richard Jung a few days later, during which he was told that his outside experience looked more residential than industrial. Wolverton asked about the requirement in Rule 4 that job descriptions be accurate, and Jung responded that the District has been doing it this way (not considering WPDIII experience as applicable to ACMS positions) for 30 years. Wolverton also said that Jung told him that HR had not talked to Wolverton’s supervisor, and didn’t need to, and that the District did not consider his Plumber III time as applicable because of the Career Ladder (EX3).

Jackson testified that after he found out his application had been denied, he talked to Jung and others, and was told that he had not met the minimum qualifications, but was not told told why. Laredo said that after his bid was denied he had a short phone call with Noeth, the HR Analyst, who told him that outside experience was not counted. Laredo testified that he had applied for a previous ACMS vacancy in 2013, sat for the

exam, was interviewed and was put on the eligible list for some period of time. According to Jung, the District made an error in 2013 in allowing Plumber IIIs to progress to the exam and interview, but that once the mistake was discovered it was corrected. None of the grievants were told that the 2013 event was a mistake. Jung said that the 2019 grievants had been denied because the Plumber III job description does not meet the minimum requirements for ACMS, as laid out in his grievance response. (see EX8) Jung did not know whether the District's HR Analysts had read the detail of the grievants' applications.

The Union cited the case of Dave Gonzalez, who was a Plumber III when he applied for and was promoted to ACMS, but Jung testified that Gonzalez had prior relevant experience outside the District, which had been verified and which met the minimum qualifications. Jung did not know whether anyone in HR had checked the grievants' outside experience or talked to their former employers or supervisors to evaluate whether that experience would go toward meeting the minimum qualifications for the ACMS job. He testified that relevant outside experience would be considered the equivalent of inside experience, and further that the District does not necessarily call former employers to check.

POSITIONS OF THE PARTIES

The Union argues that the District HR Analysts did not consider the content of the grievants' applications, but rather categorically excluded them from the process based

solely on the fact that they were WPDIIIs; that the District violated the Civil Service Rules which require the District to have accurate job descriptions since the current WPDIII job description was last revised in 1990, despite many changes since then in actual duties and responsibilities, including that the Plumber IIIs have taken over more supervision and planning work since the supervisors and foremen have taken on more administrative and technical work; that the denial of the grievants' applications was arbitrary and unreasonable, and imprudent, in violation of the MOU Management's Rights provision; that the ACMS minimum qualifications do not restrict experience to directing at the level of supervisor or foreman; that several WPDIIIs, including the grievants, had met the minimum qualifications for ACMS in 2013, had never been told that it was a mistake, and have since had more experience and education; that it would be unreasonable for the District to now say that WPDIII experience does not qualify for ACMS minimum qualifications, when they did not so state in the bid; that the District did not meet its responsibility of analyzing the grievants' applications, and failed to present any evidence that they had done so; that the grievance response (EX8) does not say that the District examined the grievants' applications, but only that they were denied because the grievants were WPDIIIs; that actual duties are more important than what is written in a job description and that it is unreasonable for the District to deny the applications simply on the basis of the job description; that Rule 4 provides that job descriptions are to be read as being explanatory, not restrictive, and therefore it is unreasonable to deny applications simply based on existing job descriptions; that grievant Jackson listed in his application two years prior outside experience plus more than one year work-out-of-class;

that grievant Wolverton listed more than 1000 hours work-out-of-class, plus previous outside experience, and the fact that there is no foreman in his division; that grievant Laredo listed more than three years prior outside experience; and therefore that the three grievants all listed sufficient relevant experience to meet the ACMS minimum qualifications; that the District thus violated Rule 5 regarding disqualification for failure to meet qualifications, and never looked at the grievants actual qualifications; that the District should consider for promotion WPDIIIs who go above and beyond, allow talent to rise to the top, and not simply follow bureaucratic rules; that the career ladder is not reasonable given that the WPDIII job description has not been updated for 29 years, and current responsibilities go far beyond; and that the fact that the grievance was written by a tradesman, not an attorney, should be considered in interpreting the breadth of the grievance.

The District argues that the MOU's management rights clause confers on the District the exclusive rights to set standards for employment and promotion; that the District may unilaterally exercise those rights; that decisions based on the exercise of their rights cannot be reversed unless found to be arbitrary, capricious or discriminatory; that the District's exercise of its rights was consistent with the reporting structure and field responsibilities of the various classifications at issue; that the Plumber IIIs are two levels below the ACMS, with the General Pipeline Supervisors (GPS) and Crew Foremen (WDCF) at the level in between; that the GPS, for Main Line Pipeline Installations, and the WDCF, for Pipeline Repair Projects, have overall project responsibilities and report

to the ACMS, who is responsible for supervising the operation, strategic planning, and work prioritization; that the Plumber IIIs are responsible for surveying and preparing the work, setting up the job, installing or repairing the pipeline, and backfilling and cleaning up the worksite; that through the Career Ladder, the District has exercised its discretion to establish the minimum qualifications for ACMS since at least 1998; that the District's conclusion that time worked as a Plumber III does not count toward the experience necessary to qualify for ACMS is not arbitrary, capricious, or discriminatory; that direction of the workforce and determination of what work is to be performed by employees is a well-established management prerogative; that the District has complete discretion in hiring decisions as long as no law is violated; that the practical construction of language in a controversy, when reasonable, should be adopted and enforced; that the fact that the District has not considered time as a Plumber III as counting toward promotion to ACMS since at least 1998 (with the exception of the mistake in 2013, which was corrected at the time) confirms it as a past practice; that if the Plumber III work had actually met the criteria for promotion to ACMS, the union would have brought a grievance decades ago; that the historical application demonstrates the true intent of the minimum qualifications for ACMS; that the grievance is limited to whether time as a Plumber III counts toward qualification for ACMS, not whether prior experience out of the District applies; that the District did consider the grievants' work-out-of-class; that given the District's right to determine relevant experience, it is reasonable to say that GPS and WDCF experience are applicable for promotion to ACMS, as confirmed by the career ladder and job descriptions; that to allow the Plumber III job description as written

to meet the minimum qualifications for ACMS would result in too large an applicant pool; that the scope of the grievance here should be just the current job description, not out of district work; that the district is not required to revise the job description; that for those Plumber IIIs who were hired into ACMS positions in the past, the District did not consider their Plumber III time at all; that the District has never considered Plumber III time for ACMS positions, other than the one mistake which was corrected; and that the District's discretion was consistent, not arbitrary.

DISCUSSION

MANAGEMENT RIGHTS

In this limited civil service arbitration, management rights are key to both parties' arguments. It is clear that the District acted within its rights in establishing the minimum qualifications for the ACMS position. Similarly, the District is well within its rights in requiring that applicants meet the minimum qualifications in order to progress to the examination and interview phases of the recruitment process. As well, the District was within its rights in promulgating the Career Ladder. However, the open question here is whether the District's decisions to deny the applications of the three grievants was a prudent and reasonable exercise of its rights, as explicitly required in MOU Section 3.1.3. Additionally, the Civil Service Rules are to be "interpreted and administered in a manner consistent with the District policy to provide equal opportunity for all persons in all

aspects of employment.” (See Civil Service Rule 3, Section 4) Evidence provided at the hearing raises questions about whether that was done.

THE WPDIII JOB DESCRIPTION

The Civil Service Rules, as well as commonly accepted standards, require that job descriptions be up to date. The evidence in this dispute shows that the WPDIII job description was last revised December 6, 1990, despite significant changes in actual job duties over the intervening decades, and despite the development of internet technology since 1990. The ACMS job description has a revision date of 4/11/11, with a previous revision in 2008 (see EX2); the General Pipe Supervisor job description shows the same 2011 revision date, and the Water Distribution Crew Foreman job description shows a revision date of 3/19/2018. Combined with the uncontroverted testimony of all three grievants that the GPS and WDCF positions have taken on more and more administrative and technical work over recent years, leaving other of their duties to the Plumber IIIs, it makes sense that the actual duties of the Plumber IIIs have changed to some degree as well, and may encompass some of the planning and supervision previously reserved for the GPS and WDCF positions.

The District seems to have adopted an “all or nothing” approach to the WPDIIIs who applied for the ACMS position. In their Pre-Hearing Statement, the District contended that the issue was whether time as a Plumber III must count toward meeting the ACMS minimum qualifications. At the same time, it appears that in the bidding

process, the District decided that none of the Plumber III time would be counted. If this dispute had arisen in the early 1990s, when the current Plumber III job description was fresh, such an across-the-board treatment might have been reasonable; but in 2019 it is at least questionable.

Jung testified that Plumber III experience was not considered because it did not have the depth required to qualify for ACMS . It is troubling that the District appears to have relied so substantially on the written WPDIII job description in reaching its conclusions that the grievants did not meet the minimum qualifications for ACMS, rather than reviewing the actual duties of the Plumber IIIs. On the other hand, the failure of the District to consider the actual current duties of the WPDIII classification does not in and of itself demonstrate conclusively that the grievants did, in fact, meet those minimum qualifications.

THE CAREER LADDER

The District points to their Career Ladder as evidence that WDPDIII time should not count toward qualifying for an ACMS position. By its nature, the career ladder is an illustrative piece, useful for laying out to staff the normally envisioned promotional sequence for the positions shown. On the face of it, it makes good sense that the normal sequence would be WPDIII, then GPS or WDCF, and then ACMS. However, nothing in the career ladder precludes “jumping” steps, as long as an employee has the qualifications to do so, and the District selects that employee for the promotion. Indeed, that appears to

be what happened in the case of Dave Gonzalez, who was the subject of testimony from both parties.

WORK OUT OF CLASS

Both parties agreed that work performed in a higher classification should count toward the minimum experience necessary for the ACMS position, and all three grievants listed WOC time in their applications. The District went so far as to establish a conversion factor for WOC, with 2080 WOC hours equalling one year of experience. That conversion factor is certainly a reasonable exercise of the District's rights. It is not clear, however, whether any of the grievants were actually given WOC credit in determining whether or not they would move forward in the ACMS process.

OUTSIDE EXPERIENCE

As part of the application process, employees are expected to list any relevant experience, whether it involved work for the District or for another employer. All three grievants listed significant prior outside experience, but it is unclear how much if any of that outside experience was actually taken into consideration by the District. In his response to the amended grievance, Jung states that in the response to the original grievance he discussed Wolverton's past work experience, but that subject does not appear in Jung's original response. (see UX7 and UX8) However, Wolverton testified that in his phone conversation with Jung a few days after the application was denied, prior to filing the grievance, Jung said that Wolverton's outside experience appeared to

be more residential than industrial; Wolverton also testified that no one from the District had contacted his former employers.

In their opening statement, the District stated that outside experience was counted, and therefore that Plumber IIIs might have qualified for ACMS (if their experience was sufficient and relevant). However, grievant Laredo testified that HR Analyst Noeth told him that outside experience was not counted.

BREADTH OF THE GRIEVANCE

The District objected late in the hearing to testimony dealing with outside experience, and asserted that the grievance did not deal with outside experience, but solely with the nature of Plumber III work. The union pointed out that the grievance was written by Bryan Wolverton, a tradesman, and not by an attorney, and that the grievance should be construed broadly.

On its face the grievance mentions only Wolverton, not any of the other grievants, and the denial of his ACMS application on the basis of his Plumber III classification. There is no provision in the MOU that limits the consideration of grievance to only the explicit words used there. If the grievance were to be interpreted literally, it would limit the issue as the District contends, but would also exclude two of the three grievants, which the District has not suggested should be done. It is understandable that the grievance was presented in the manner it was, given the circumstances at the time,

including the fact that Wolverton had been told that it was because of his current classification that his application was denied.

Nevertheless, the employer has correctly recognized that the grievance covers all three of the grievants. In addition, the employer presented evidence and argument regarding the issue of work-out-of-class time, as well as prior outside experience, neither of which would be at issue if the the District's argument on this point were to be accepted. In fact, when the Union raised the case of Dave Gonzalez as a Plumber who had been hired directly into an ACMS position, the District took the position that Gonzalez met the qualifications because of his outside experience, and that in fact his Plumber III time had not been considered at all. That position is consistent with the District's current argument on whether WPDIII time should be counted, but is inconsistent with the District's position that outside experience is irrelevant here.

The Civil Rules require that employees be treated equally in hiring and promotion. It would be unequal and unfair therefore to fail to consider the grievants' prior outside experience, and the grievance is construed to include that aspect. In fact, Jung referred to Wolverton's prior experience in confirming the denial, although it is not clear that the District actually considered it.

DECISION AND AWARD

The employer has the responsibility to apply its Management Rights and the Civil Service rules in a reasonable, prudent, nonarbitrary, and nondiscriminatory manner. In

this case, the employer presented no evidence or testimony from the HR Analysts whose job it was to review the applications and uphold the standards, other than the actual denial memo Noeth sent to Wolverton, which had no explanation for the denial. On the other hand, evidence provided by the Union showed that the Plumber III job description that the employer relied so heavily upon was at minimum out of date, and possibly omitted actual current duties which might have shown more advanced responsibilities that could have had some effect on qualifying for the ACMS position.

But the employer still holds the management right of determining whether the grievants met the minimum qualifications, as long as that determination is based on reasonable criteria. It is not for this arbitrator to determine whether the grievants actually met those minimums. However, it is incumbent on the District to ensure a fair process. To that end, the District must evaluate the in-district experience of the grievants based on what they actually did, not simply based on a decades-old job description; the District must credit the grievants with their work-out-of-class time, based on the stated conversion rate; and the District must objectively evaluate the grievants' out of district prior experience to determine whether or not it qualifies as relevant toward meeting the ACMS minimum qualifications. If the result of such review of the grievants' applications results in a determination that any or all of them met the minimum qualifications, then those who did so should advance in the process. In the case of any of the grievants who still do not meet the minimum qualifications, a full and detailed analysis of the reasons why must be provided by the District.

AWARD

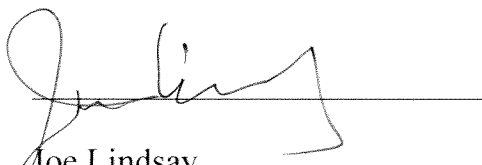
The District violated the Civil Service Rules when it determined that none of the grievants met the minimum requirements for the ACMS opening in August, 2019. It is therefore ordered that:

1. The District review and update the WPDIII job description, based on current conditions.

2. The District reevaluate the applications submitted by Bryan Wolverton, Tyrell Jackson, and Gil Paredo for the ACMS position, giving full credit for any WPDIII time spent in activities that would qualify them for the ACMS opening, for any work-out-of-class time, and for any prior out-of-district experience that would qualify them for the ACMS opening.

3. Any grievant thus found to have met the minimum qualifications shall be moved forward in the process; any grievant found to have not met the minimum qualifications shall be provided a detailed response of why their application has been rejected.

February 12, 2020, at Oakland, California



Joe Lindsay
Arbitrator