

Arbitration

In The Matter of Arbitration

Between:

**Law Enforcement Labor Services, Inc., Local 232,
Union**

And

**City of Mounds View,
Employer**

**BMS Case No. 11PA1144
(Sergeants Zender and Wolf)**

**Carol Berg O'Toole
Arbitrator**

Representatives:

For the Union:

**Scott Higbee, Staff Attorney
Law Enforcement Labor Services, Inc.
327 York Avenue
Saint Paul, Minnesota 55130-4039**

For the Employer:

**Jim Ericson, Mounds View City Administrator
2401 County Road 10
Mounds View, Minnesota 55112**

Witnesses

For the Union:

**Sergeant Ben Zender, Grievant
Sergeant Tim Wolf, Grievant**

For the Employer:

Jim Ericson, Mounds View City Administrator

Preliminary Statement

The hearing in the above matter commenced shortly after 1:00 PM at the Mounds View City Hall, 2401 County Road 10, Mounds View, Minnesota 55112. The parties involved are the City of Mounds View (City or Employer) and the Law Enforcement Labor Services, Inc., Local 232, (Union) , representing all police personnel in the sergeant classification. The parties presented opening statements, oral testimony, oral argument, exhibits, and closing statements. Post hearing briefs were waived by both parties. The arbitrator closed the hearing at the end of the presentation on September 20, 2011.

Issue Presented

The parties agreed on the following issue: Whether the grievants, Sergeants Ben Zender and Tim Wolf, were entitled to be advanced from Step 3 to Step 4 of the wage progression upon completion of their 6 months probationary period following their promotion to sergeant?

Contractual and Statutory Jurisdiction

The Union is the certified bargaining representative for all sergeants at the City. The Employer and the Union are signatories to a collective bargaining agreement (Agreement) covering the period from January 1, 2010 to December 31, 2010, which provides in Article 40 that, if the grievance is unresolved at Step 3 of the grievance procedure and appealed by the Union, it shall be submitted to arbitration. Joint Exhibit 1. The dispute is properly before the arbitrator. Joint Exhibits 2, 3, 4, 5, 6, and 7. There were no timeliness issues raised by the parties, nor were there any procedural issues in dispute.

Union's Position

The Union maintains that the issue in dispute relates to the Agreement, Appendix A, Wages, and Article 9, Probationary Periods and past practice. Joint Exhibit 1. In their opening argument, the Union stated that this is a straightforward case about where the two Grievants should be placed on the wage schedule. The Union characterizes the City Administrator's action as a look at the wage progression provision of the Agreement in isolation, which fails to consider Article 9 of the Agreement.

The Union called Sergeant Bob Zender, Grievant, as the first witness. Zender testified that he had been in law enforcement for over seven years, starting as a CSO at White Bear Lake, Minnesota, and then hired in 2004 at Mounds View. He is the Field Training Officer in Mounds View. In December, 2010, he was promoted to sergeant. Zender saw the sergeant's position as an challenging opportunity involving an increase in responsibility. He described the application process as including filing a Letter of Intent and his resume, completing a written exam and undergoing an oral interview. Zender spoke to the Deputy Chief of Police about the pay and it was determined that he would come in on Step 3 with the first pay increase at 6 months and the next at 12 months, totaling 18 months after the initial promotion. He did not attend the City Council meeting when his promotion was considered, but Chief of Police Thomas Kinney informed him that the promotion was accepted by a vote of four to one. Joint Exhibit 8, page 6, shows that the "one" vote was a council member who abstained. It was his understanding that the placement on the pay schedule was not discussed at the City Council meeting. Zender stated that he understood the pay step progression he is arguing for is what Sergeant Menard had received. Zender testified that it was his understanding that the 6 month/18 months arrangement was amended to 12 months/ 24 months arrangement a

couple of days after the City Council meeting. Zender stated that in his sergeant position he has responsibility for the Field Training, scheduling, overseeing the officers and review paperwork.

The second and last witness for the Union was the other Grievant, Sergeant Tim Wolf. He testified that he was in law enforcement for thirteen years, first in Eagle Bend, Minnesota, and then in Webster City, Iowa. He has been at Mounds View for over seven years. He testified about his work as a patrol officer, field training officer, fire arms instructor and DNR gun safety officer. Wolf testified that he applied for the position as sergeant because it advanced his career. Wolf said it involves extra meetings and “heads on the chopping block”. Wolf described the application process in much the same way as his fellow grievant, Zender. He testified that he thought three others (Kampa, Nelson and Menard) had been brought in at Step 3 and moved to Step 4 in 6 months. Wolf testified that he thought he would be treated the way Zender was treated and accepted the additional duties. He thought the difference in pay step progression amounted to about \$4900 over two years. The Union and Employer agreed at the close of the hearing on the exact dollar amount in dispute as \$3941.60.

The Union argued in its closing statement against the City’s position, that three cases are not enough past practice. The Union pointed to Elkouri as giving no “magic number” to make past practice dominate. The Union argued that the accelerated pay step is “consistently applied” and that the Grievants are entitled to a pay increase in 6 months.

Employer's Position

The City Administrator, Jim Erickson, stated in his opening argument that the Agreement's language doesn't provide for the accelerated pay step the Grievants are requesting. The Employer stated that previous administrators made a mistake when they accelerated the pay step and he was not privy to their actions, nor to the prior agreements. Employer Exhibit 1, 2, and 3. The Employer argued that if the accelerated pay step is the correct it should be in the Agreement. He said the present Agreement is clear. The pay step increase occurs at 12 months. The Employer stated that the "plain language needs to prevail".

Erickson was sworn in, testified for the Employer and was cross examined by the Union, upon agreement of the parties. Erickson stated that the Agreement should guide the interaction between the employees and the employer. He stated that if "something is not in the Agreement" past practice might rule, but the Agreement trumps past practice, if the Agreement is clear. Erickson testified that he thought the accelerated pay step was an error and that is why he amended it prior to the last two promotions. Erickson testified that when Zender's promotion came before the City Council, the resolution was incorrectly drafted by the Police Chief. Erickson "researched beyond the three sergeants...no way to disagree...we don't know either way." Erickson stated that three examples provide a weak case for past practice. Erickson argued in his closing argument that the "wage scale has to be numbers and timing" for a step increase and that the City has the ability, according to the Agreement, to start someone at Step One with a six month increase.

Discussion

This dispute involves the interpretation of the language of the Agreement. Two provisions of the Agreement are at issue: Appendix A: Wages; Article 9: Probationary Periods. There is no dispute about the Grievants serving a probationary period upon promotion to sergeant. The provision in the Agreement, Article 9, relates only to those periods of time to be served, not the wage paid during the period of probation. Article 9 of the Agreement has no wage language at all in any of the three sections, 9.1, 9.2, and 9.3. It operates apart from the wage grid in Appendix A.

Appendix A: Wages deals with the very heart of this dispute. It is a grid with a step designation, time and hourly rate. These words and numbers are clear.

“[T]he existence of an ambiguity must be determined from the “four corners of the instrument” without resort to extrinsic evidence of any kind. Calamari & Perillo, *The Law of Contracts*, Section 3.10 at 148 (4th ed. 1998). See also *Primeline Indus*, 88 LA 700, 700(Morgan, 1986), as cited by Elkouri & Elkouri, *How Arbitration Works* (6th ed. BNA 2003) at 434. This plain meaning rule holds that if words are plain and clear, there is no need for interpretation. Elkouri at 434. Even if parties argue over language, the question is whether the arbitrator finds the language ambiguous. *City of Independence*, Mo. 111 LA 637, 642 (Neas, 1998), as cited by Elkouri at 434.

I find the words of Appendix A: Wages to be clear and unambiguous. They provide that if one is at Step 3, one advances to Step 4 of the wage progression upon completion of 12 months.

Because the words are clear and unambiguous, there is no need to consider whether the parties have a past practice, that is, if three instances constitute a past practice.

“While custom and past practice are used very frequently to establish the intent of contract provisions that are susceptible to differing interpretations, arbitrators who follow the “plain meaning” principle of contract interpretation will refuse to consider evidence of a past practice that is inconsistent with a provision that is “clear and unambiguous” on its face.” Elkouri at 627.

Assuming, for a moment, the language was unclear and ambiguous, there are other problems with the accelerated wage step argument. The testimony of Ericson was that the three individuals who received the accelerated wage step were under different agreements, not the Agreement at issue here. In addition, the Union is correct in saying Elkouri does not give us a magic number. If the language were ambiguous would three be enough?

Elkouri does give guidance in considering disputes where there is a practice contrary to clear language in the Agreement between the parties. If a mistake has been made, the Employer can announce it and correct it. It need not be allowed to continue. Elkouri at 628. That is what has been done here. The Union’s real remedy is at the bargaining table. There is no violation of the Agreement.

The Grievants here display why they were promoted. They are articulate and clearly capable of doing the sergeant’s duties. They appear to be good role models for the rest of the police force to emulate. They are likely worth much more than they are paid for all the extra work and responsibility this job entails. Even an accelerated pay step, which they do not achieve here but may achieve at the next round of negotiations, will not compensate them fully for the important and difficult job they do.

Award

The grievance is denied.

Dated this 17th day of October, 2011

Carol Berg O'Toole