
City of Columbia Heights,

BMS Case No. 16-PA-092

Employer,

and

**GRIEVANCE ARBITRATION
OPINION AND AWARD**

Law Enforcement Labor Services, Inc.,
(Local No. 311),

Union.

- Pursuant to **Article VII** of the collective bargaining agreement effective January 1, 2015 through December 31, 2016 the parties have brought the above captioned matter to arbitration.
- The parties selected James A. Lundberg as their neutral arbitrator from a list of arbitrators provided by the Minnesota Bureau of Mediation Services.
- Following selection of the neutral arbitrator the Employer moved for summary dismissal of the above matter arguing that the Step 4 notice of appeal to arbitration was not timely made by the Union.
- The parties agreed to submit the timeliness issue to the arbitrator for a final and binding determination on July 22, 2016.
- The parties further agreed that, if the arbitrator finds that the appeal to Step 4 made by the Union is arbitrable, the arbitrator shall hear the above matter on the merits on September 1, 2016.

- Pre-hearing briefs were submitted on July 20, 2016 and the hearing was conducted at the Columbia Heights City Hall on July 22, 2016 and the record was closed.

APPEARANCES:

FOR THE EMPLOYER

Joan M. Quade
Barna, Guzy & Steffen, LTD.
400 Northtown Financial Plaza
200 Coon Rapids Blvd.
Coon Rapids, MN 55433

FOR THE UNION

Scott Higbee
Law Enforcement Labor Services
327 York Avenue
St. Paul, MN 55130

ISSUE:

Whether the grievance in the discharge of Joe Sturdevant is arbitrable?

RELEVANT CONTRACT PROVISIONS:

7.4 PROCEDURE

...Step 3. If appealed, the written grievance shall be presented by the UNION and discussed with the EMPLOYER-designated Step 3 representative. The EMPLOYER-designated representative shall give the UNION the EMPLOYER'S answer in writing within ten (10) calendar days after receipt of such Step 3 grievance. A grievance not resolved in Step 3 may be appealed to Step 4 within ten (10) calendar days following the EMPLOYER- designated representatives' final answer in Step 3. Any grievance not appealed in writing to Step 4 by the UNION within ten (10) calendar days shall be considered waived.

Step 4. A grievance unresolved in Step 3 and appealed to Step 4 by the UNION shall be submitted to arbitration subject to the provisions of the Public Employment Labor Relations Act of 1971. The selection of an arbitrator shall be made in

accordance with the rules governing the arbitration of grievances as established by the Public Employment Relations Board.

7.5 ARBITRATOR'S AUTHORITY

A. The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this AGREEMENT. The arbitrator shall consider and decide only the specific issues submitted in writing by the Employer and the Union, and shall have no authority to make a decision on any other issue not so submitted.

B. The arbitrator shall be without power to make decisions contrary to, or inconsistent with, modify or varying in any way the application of laws, rules, or regulations having the force and effect of law. The arbitrator's decision shall be submitted in writing within 30 days following close of the hearing or the submission of briefs by the parties, which ever be later, unless the parties agree to an extension. The decision shall be binding on both the EMPLOYER and the UNION and shall be based solely on the arbitrators' interpretation or application of the express terms of this AGREEMENT and to the facts of the grievance presented....

D. WAIVER

If a grievance is not presented within the time limits set forth above, it shall be considered waived. If a grievance is not appealed to the next step within the specified time limit or any agreed extension thereof, it shall be considered settled on the basis of the EMPLOYER'S last answer. If the EMPLOYER does not answer a grievance or an appeal there of within the specified time limits, the UNION may elect to treat the grievance as denied at that step and immediately appeal the grievance to

the next step. The time limit in each step maybe extended by mutual written agreement of the EMPLOYER and UNION in each step.

FACTUAL BACKGROUND:

Officer Joseph Sturdevant, who was employed by the City of Columbia Heights, as a Police Officer, was discharged from his employment by letter dated April 15, 2016. Officer Sturdevant was a member of Law Enforcement Labor Services, Inc., the Union.

The text of the Notice of Termination said:

This letter constitutes written notice of your termination from employment with the City of Columbia Heights effective April 21, 2016 for the reasons outlined in the Notice of Intent to Terminate dated April 8, 2016.

Our records do not indicate that you are a veteran honorably discharged from the United States Military Service. If you are a veteran, there are certain rights available to you under the Veterans Preference Act. Specifically, you have the right to request a hearing regarding the termination of your employment. If you request a hearing, your request must be made in writing within 60 days of your receipt of this notice. If you fail to request a hearing within said 60 day time period, such failure will constitute a waiver of any right to have a hearing under the Veteran's Preference Act. Such failure shall also waive all other available legal remedies for reinstatement.

The discharge was grieved under the grievance procedure found at **Article VII** of the collective bargaining agreement. Officer Sturdevant's grievance was denied at all Steps through Step 3 of the grievance process.

The grievance was denied at Step 3 by letter dated April 26, 2016. May 6, 2016 is ten (10) calendar days from April 26, 2016. The Union argues, if three days for mail delivery per the “mailbox rule” is assumed, May 9, 2016 is ten (10) calendar days from constructive receipt of the April 26, 2016 letter. The Employer did not receive notice of an appeal to Step 4 from Step 3 within the ten (10) day period, regardless of the manner of calculation.

On May 2, 2016 the Union Business Agent, Mr. Kiesow, asked his Administrative Assistant, Ms. Garrison, to prepare and submit to the Minnesota Bureau of Mediation Services a request for a panel of arbitrators. The parties have treated the making of a request for a panel of arbitrators within the ten (10) day period as an action meeting the contractual requirement of an appeal from Step 3 to Step 4.

The Administrative Assistant, who was inexperienced, testified that she submitted the request to BMS. Ms. Garrison first attempted to complete the on-line form on the BMS website. She accessed the “read only” form and was unable to complete it. Ms. Garrison was not aware that a fillable format was available on the website. Ms Garrison testified that she wrote a letter directed to Commissioner Josh Tilsen at the Bureau of Mediation Services requesting a panel of arbitrators. She said that she mailed the request along with copies at a mail box in Vadnais Heights, Minnesota on her way home from work. According to Ms. Garrison, the mail box was very full and she had to “stuff” the letters into the box.

On May 3, 2016 Mr. Kiesow asked Ms. Garrison, whether a copy of the notice had been made. Ms. Garrison had not made a copy of the notice but generated a file copy upon Mr. Kiesow's request.

On May 10, 2016 the Business Agent, Mr. Kiesow, submitted the matter to the LELS grievance committee for approval to arbitrate. The committee approved the matter for arbitration. Clearly, Mr. Kiesow believed that the request for a panel of arbitrators had been made.

On May 17, 2017 the City's Human Resources Director, Ms. Burgeois, sent an e-mail to Mr. Kiesow informing him that the City had not received an appeal of the above grievance from Step 3 and the City deemed the grievance waived.

Mr. Kiesow forwarded the file copy of the request for a panel of arbitrators to Ms. Burgeois, who responded that the City had not received the letter. In fact, the letter requesting the panel was not received by the Bureau of Mediation Services or any of the people cc'd at the bottom of the letter.

In testimony Ms. Garrison said that she mailed the letter to Mr. Tilsen and BMS, Mr. Fehst at the City and the grievant. She did not mail the letter to Ms. Bourgeois (HR Director), Mr. Nadeau (Chief of Police), or Mr. Austin (Police Captain), who were cc'd at the bottom of the letter. There is no evidence that Mr. Fehst or anyone from the City received a copy of the letter.

The Union acknowledges that the Step 3 appeal was not received by the Employer. However, it argues that a "good faith" attempt was made by LELS to appeal the grievance. In support of its' position the Union contends that a discharge grievance should be heard on the merits; the Union's good faith delay in appealing

the grievance to arbitration was due to the inexperience of an employee and the City suffered no harm by the short delay in obtaining a panel of arbitrators. See: **17 LA 7, Bethlehem Steel Company, (7/26/1951) Selekman.**

The Employer contends that the contract clearly and unequivocally requires the Union to give written notice of appeal from Step 3 to Step 4 within ten (10) business days. The parties have never deviated from the express terms of the agreement, which allows for an extension of the time limits by “mutual written agreement” but does not provide for mishandling of a grievance by an employee who has been given the responsibility of requesting a list of arbitrators from BMS.

The Employer points out that the Union Business Agent is very experienced. If the Administrative Assistant was not thoroughly trained in her job duties at the time she was given the task of obtaining a list of arbitrators from BMS, closer supervision and monitoring of her work was appropriate. However, the employee’s inexperience or failure to follow directions does not change the plain language of the contract nor does it change the practice of the parties, which has been to consistently follow the agreement, as it is written.

OPINION:

The arbitrator’s authority is limited by **Section 7.5** of the collective bargaining agreement. The contractual limitation prevents the arbitrator from re-writing the agreement or changing the agreement to conform to the arbitrator’s personal sense of justice. There is no evidence that the parties have deviated from the agreed upon grievance procedure at any time in the past nor have the parties recognized any exceptions to the established time frames.

In this case there is no confusion over when the Step 3 denial was made. Even if, there is a dispute over whether the ten (10) day period lapsed on May 6, 2016 or May 9, 2016, it is a fact that the City did not receive the appeal within either time limit.

While the arbitrator is convinced that the Business Agent believed the appeal had been made within the contractual time limits, a breakdown within the Union's internal system does not excuse the failure to notify the Employer that an appeal will be taken from Step 3 to Step 4.

Step 3 of the grievance procedure says, "*A grievance not resolved in Step 3 may be appealed to Step 4 within ten (10) calendar days following the EMPLOYER-designated representative's final answer in Step 3.*" The appeal must be in writing but there is no requirement that the appeal take any specific form nor must a request of a panel of arbitrators be made in order to meet the minimal requirements of the contract. Based on the plain language of the contract, the Union could merely have sent an e-mail to the City saying something like, the Union is appealing the Step 3 decision in the Sturdevant grievance to Step 4 or a hand written or typed note conveying the message could have been passed to the City's representative.

Given the minimal effort necessary to make an appeal to Step 4 established in the collective bargaining agreement and the fact that no notice of appeal to Step 4 in any form was received by the City within the agreed upon time limits, the arbitrator must rule that the grievance of Officer Sturdevant is not arbitrable.

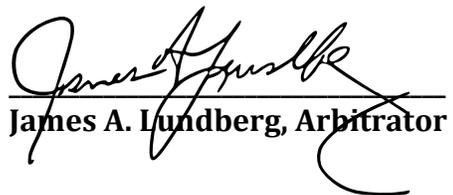
In arriving at the decision in this case, the arbitrator is strictly applying the terms and conditions of the collective bargaining agreement. However, the

arbitrator is deeply concerned over the potentially adverse impact that the decision may have on the future relationship between the Union and the City. The grievance involves a hotly contested discharge of a Police Officer. If the arbitrator's ruling on arbitrability is followed, the Police Officer will not have a full and complete opportunity to have his "side of the story" presented in a neutral forum and the City may appear to members of the bargaining unit and the grievant to have "won on a technicality." Moreover, the grievant has his job and his career at stake and there is simply no evidence that the City was harmed in any way by receiving a list of arbitrators perhaps a week later than anticipated. Few situations could present a more inequitable set of facts than this one, where an employee's contractual right to defend his job and career is negated by the mistake of an inexperienced office employee, who failed to complete a simple task. The arbitrator must apply a strict application of the contractual terms but strictly following the grievance time line in this case may not be the wisest path for the Employer to follow.

AWARD:

- *The grievance of Officer Sturdevant was not timely appealed from Step 3 of the grievance procedure to Step 4 of the grievance procedure.*
- *The grievance is not arbitrable.*

Dated: July 28, 2016


James A. Lundberg, Arbitrator

