

**IN THE MATTER OF ARBITRATION  
BETWEEN**

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**LAW ENFORCEMENT LABOR SERVICES, INC.**

**Union,**

**and**

**CITY OF APPLE VALLEY,**

**Employer**

**ARBITRATION DECISION AND  
AWARD**

**BMS Case No. 08-PN-0303**

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**Arbitrator:**

Andrea Mitau Kircher

**Date and Place of Hearing:**

August 21, 2008  
City of Apple Valley, Minnesota

**Date Record Closed:**

September 5, 2008

**Date of Award:**

October 6, 2008

**APPEARANCES**

For the Union:

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For the Employer:

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**BACKGROUND AND JURISDICTION**

Law Enforcement Labor Services, Inc. (“Union”) is the certified bargaining representative for all the eligible employees in the job classification, Sergeant, employed by the City of Apple Valley (“Employer” or “City”). The collective bargaining agreement (“Contract”) covering these employees was effective from January 1, 2004 through December 31, 2006. The

Employer and the Union met for negotiation and subsequently, mediation, but they were unable to agree upon all of the terms for a successor contract.

The parties petitioned the Bureau of Mediation Services for interest arbitration. The Bureau certified 14 issues for arbitration, and the parties duly submitted their final positions. By a letter dated June 13, 2008, the parties notified the undersigned that she had been selected as the neutral arbitrator.

A hearing was conducted on August 21, 2008 at the offices of the City of Apple Valley Municipal Building, Apple Valley, Minnesota. At the hearing, the arbitrator accepted exhibits into the record, witnesses were sworn, and their testimony was subject to cross-examination. Post-hearing briefs were received and the record closed September 5, 2008. Thirty days from that date is Sunday, October 5, so this opinion is timely issued October 6, 2008.

## **ISSUES**

The Bureau certified the following issues for arbitration:

1. Wages 2007- Amount of General Increase 2007 – Art. 32.1
2. Wages 2008 – Amount of General Increase 2008 – Art. 32.1
3. Wages 2009 – Amount of General Increase 2009 – Art. 32.1
4. Specialty Pay – (Investigative Sergeant & NCOP) Pay 2007, amount of specialty pay if any – New
5. Specialty Pay (same as “4” above) 2008
6. Specialty Pay (same as “4” above) 2009
7. Master Sergeant Program – How shall a sergeant be compensated 2007? – Art. 33
8. Master Sergeant Program – (same as “7” above) 2008 – Art. 33
9. Master Sergeant Program – (same as “7” above) 2009 – Art. 33
10. Uniforms 2007 – Amount of Uniform Increase 2007, if any – Art. 23.3
11. Uniforms 2008 – Amount of Uniform Increase 2008, if any – Art. 23.3
12. Uniforms 2009 – Amount of Uniform Increase 2009, if any – Art. 23.3
13. Definition of Immediate Family – What should the definition of immediate family be? – Art. 3.15
14. 14. Emergency Leave – What should the Emergency Leave/Funeral Leave Provision be? Art. 18.1 and 18.2.

## **INTRODUCTION**

The City of Apple Valley is located in the northwestern portion of Dakota County and is a suburb of the Twin Cities. It has a population of approximately 50,000. The City employs approximately two-hundred thirty people and operates a police department with approximately sixty-five employees. Nine of these employees are classified as “Sergeants”, and they supervise patrol officers. The patrol officers and the sergeants are in separate “essential employees” bargaining units represented by LELS. The parties have agreed that the duration of the new contract should be three years, 2007-2009. Neither of the other labor agreements from the previous round of bargaining extended through 2009. The City and LELS have a lengthy history of amicable labor relations and no prior history of interest arbitration.

### **Issues One, Two and Three: Amount of General Increase, 2007, 2008, and 2009 – Art. 32.1**

#### UNION POSITION

1. 2007 - a general wage increase of 4%
2. 2008 – a general wage increase of 4%
3. 2009 – a general wage increase of 4%

#### EMPLOYER POSITION

1. 2007 – a general wage increase of 3%
2. 2008 – a general wage increase of 3%
3. 2009 a general wage increase of 2.5%

#### DISCUSSION

Because interest arbitration is not designed to supplant collective bargaining, but to encourage it, an arbitrator’s decision should be compatible with the contract the parties themselves might have reached, had they been able to negotiate successfully all of the contractual provisions in dispute. To achieve this goal, the arbitrator has considered insofar as

possible, external market comparisons, internal compensation relationships, bargaining history, ability to pay, other economic factors, and applicable statutes. The following discussion is organized around these commonly accepted standards.

A. Ability to pay. Both parties included considerable data about the financial health of the Employer. According to a letter from the City Administrator to the Mayor and City Council dated August 9, 2007, the city is a healthy, growing suburb enjoying a well-deserved “reputation of strong fiscal integrity and stability.” As an example of its careful approach, the City balanced its budget assuming that it will receive no LGA funding from the Minnesota Legislature in 2008. It also planned for rises in energy costs.<sup>1</sup> Because of the rather sudden recent economic downturn, the City’s present financial situation is not clear, and it is obvious that the City and the Union find themselves in a different financial position than at the time when the parties negotiated the other contracts for 2007 and 2008. The City claims, essentially, that it is hard to make ends meet, citing the state legislature’s 3.9% levy limit for local government trying to recover lost state aids in 2009. The Union countered that there is a special levy for law enforcement allowed, but the Finance Director did not find comfort in this fact.<sup>2</sup> After reviewing the material presented by both parties, and taking into account the extraordinary national financial issues surfacing in the last month, I am even less in a position to prognosticate about the City’s ability to pay than usual. Whatever difficulties this prudent City faces will not be so unexpected that with 2008 general revenue funds in the neighborhood of \$24 million it will be unable to pay the wage increases requested by the Union. It is more a matter of priorities.

B. Internal Equity. Many arbitrators have placed primary importance on internal consistency when considering the pros and cons of labor-management disputes about wage

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<sup>1</sup> Preliminary Budget message to Mayor and City Council from Administrator dated August 9, 2007.

<sup>2</sup> Testimony of George Ballenger, Finance Director, on cross-examination.

increases. This makes sense from the perspective of the appearance of fairness among employees. Unless there is an unusual set of circumstances, it is not clear to other city employees why a small group of “essential” employees should win a larger wage increase through arbitration than the employees whose pay is the result of a negotiated settlement. Moreover, if advantages that cannot be won at the bargaining table are gained through arbitration, the effectiveness of the negotiation process may be seriously undermined.

Now, in October 2008, the parties are essentially asking me to deal with two years of pay increases retroactively. Two other bargaining units settled for a 3% wage increase for 2007 and 2008, and a 3% increase was given all City employees for those years. Internal consistency weighs heavily in favor of maintaining the status quo for those two years.

For 2009, the third year of this Contract, no internal settlements are in place. The Employer’s final offer of 2.5% indicates that it would like to hold the line there, and the Union desires a 4% increase arguing that consideration of other factors should prevail.

C. Local Government Pay Equity Act. Minnesota statutes require that the arbitrator consider equitable compensation relationship standards involving a job class that is not a “balanced class” such as the Sergeants’ class. The City is currently in compliance with the Local Government Pay Equity Act, Minn. Stat. Sections 471.992-471.999. Using the software provided by the Minnesota enforcement agency to assist local units of government in determining compliance with the Act, the Union analyzed its wage increase proposal for this bargaining unit. The computer analysis showed that the City would remain in compliance with the Act if the Union’s wage proposals were awarded. No contrary data was presented. Considering that this bargaining unit covers such a small percentage of the City’s workforce, no adverse impact on the City’s compliance with the law would be expected.

D. External Market. In specialized professions such as law enforcement, arbitrators give considerable attention to pay increases in other comparable jurisdictions. Theoretically, peace officers could easily move to a neighboring jurisdiction if pay were better there.<sup>3</sup> Where there is no internal pattern for 2009, market comparisons are especially important. The parties agree that the appropriate salary survey comparison group would be the cities within DCA Stanton Group V, suburbs with populations over 25,000.<sup>4</sup>

The Union argues that if the Employer's proposed wage increases are granted, the members of this bargaining unit will decrease in pay ranking among comparable cities. After three years of ranking ninth among its peers for top pay, wages for sergeants in 2006 dropped them to eleventh, and by 2009, its members will be ranked fourteenth among the Stanton V cities if the Employer's proposal is implemented. The Union argues that with the increases it seeks for 2007, 2008, and 2009 it will again be ranked ninth, and that is the result it seeks.

The Employer argues that the very nature of the collective bargaining process makes changes in ranking from contract to contract inevitable. It also contends that the Union has used some inaccurate figures in its calculations. For example, the Union miscalculates split wage increases (i.e., a 2% increase in January and 1% additional in July is counted as a 3% increase for the year, rather than something closer to 2.5% for the year.) See, also, an anomalous 12.54% wage increase in 2007 for the City of Woodbury. The Employer points out that the City's final

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<sup>3</sup> The City reports that no Sergeants have left the City in the last ten years for law enforcement positions with other jurisdictions. Employer Ex. 23.

<sup>4</sup> The City prefers to compare itself to the Stanton Group V cities, minus the Eden Prairie Police Department because it has no unions, but it is not clear from the data whether other suburbs might be similar. The Union sees no reason to delete Eden Prairie. The dispute makes little difference because Eden Prairie is not a jurisdiction that has granted pay increases for 2009. For purposes of this opinion, I have followed precedent and have not deleted Eden Prairie from Stanton Group V, where data is available.

position for 2007 and 2008 exceeds the average maximum salary in the comparison group.<sup>5</sup>

Determining the value of this fact is difficult without further data comparing the jurisdictions.

Comparing the percentage rate of general adjustments in Stanton Group V based on Employer's Exhibit 29, shows that for 2009, 10 of 23 jurisdictions have agreed to a general wage adjustment. The average increase, taking into account split year increases, is approximately 3.225%. Because neither the Employer's nor the Union's final offer for 2009 appears realistic compared with other similar jurisdictions and there is no internal pattern to consider, it is not unreasonable to use this average to support a 3.25% wage increase.

E. Cost of Living. The Bureau of Labor Statistics publishes the Consumer Price Index, a portion of which was received as evidence. For 2007, the annual increase in the CPI for Urban Wage Earners and Clerical Workers was 2.9%. For the first six months of 2008, the increase averaged 4.6%. While a 6-month figure is not determinative, it is worth noting. When the cost of living rises, the City must be prepared to increase wages if it wishes to maintain its fine employee retention rate in the future.

CONCLUSION AND AWARD:

For the years 2007 and 2008, internal factors weigh in favor of awarding members of this bargaining unit the same rate of increase as other City employees. For 2009, internal wage increases for other bargaining units are not a factor. External market comparisons and the increase in cost of living suggest a greater rate of increase than the City's final offer, and less than the Union's final proposal:

- 2007 – a general wage increase of 3%
- 2008 – a general wage increase of 3%
- 2009 – a general wage increase of 3.25%

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<sup>5</sup> This calculation was based on the Stanton Group V without Eden Prairie.

**Issues 4, 5, and 6: Specialty Pay – (Investigative Sergeant & NCOP) Pay 2007, 2008, and 2009, amount of specialty pay if any – New**

POSITIONS OF THE PARTIES

The Union seeks to improve the pay of two supervisors in the unit, the neighborhood collaboration officer project supervisor (NCOP) and the investigative sergeant position. It argues that these employees do different and specialized work compared to the other sergeants, and they should receive premium pay for work in these positions. The Union proposes a differential of \$250.00, \$275.00 and \$300.00 per month for 2007, 2008, and 2009, respectively. The City opposes the inclusion of the new item.

DISCUSSION

The Union makes three main arguments in favor of this wage item. First, premium pay for positions with additional job duties and responsibilities is not a unique concept. Patrol bargaining unit employees earn premium pay based on additional job duties and responsibilities, and other jurisdictions in the metro area pay differentials for additional job duties and responsibilities. In the patrol bargaining unit the investigators and school liaison officer receive premium pay based on their job duties, and they report to the investigative supervisor and the NCOP supervisor. Second, the organization chart shows that the detective sergeant and the NCOP sergeant report to a different captain than the other sergeants. Their duties are wide-ranging and different in scope than the other sergeants. Third, the investigative sergeant and the NCOP sergeant work a Monday through Friday “administrative” schedule, so have less opportunity to earn overtime pay than the patrol sergeants.

The City argues that these assignments are advantageous in themselves, and often more than one sergeant applies for them. They are three-year temporary assignments. The detective sergeant job has been in existence since at least 1981 and has never had a premium pay

component. According to Employer Exhibits 39, no sergeant held this post for more than 3 years between 1992 and 2007.<sup>6</sup> It has been considered a stepping stone to the Captain position. The NCOP assignment was initiated in July 2006, and two sergeants applied. It oversees a cluster of community outreach programs. Of the 23 Stanton Group V cities, 16 do not provide any type of specialty pay differential for sergeants. The recent City of New Hope arbitration resulted in a premium pay award for sergeants, but the facts were significantly different from the present case, and the City argues that the negotiations history for the City of New Hope premium pay provision was unique.<sup>7</sup>

Initiating a new type of premium pay for two positions in the unit is the type of provision better suited to the negotiations process prior to arbitration. Arbitrators often take the position that new contract provisions require a showing of some sort of quid pro quo for the inclusion of an added benefit.

The Union seeks to change the status quo, and thus has the burden of presenting evidence of a compelling need for change. Here, testimony differed on whether the job duties and responsibilities of these positions varied in such a way that premium pay was necessary to fairly compensate the incumbents during their term in the position. For example, Captain Marben, who had served in the detective sergeant position, believed that the administrative schedule offered the incumbent an additional benefit because he had free weekends. Others might believe that loss of overtime pay would make the position unsuitable for them. The choice, however, is really in the hands of the bargaining unit members themselves who must apply for these two positions. The system is sufficiently transparent so that employees who find the lack of overtime a disadvantage or the administrative duties onerous need not apply. Although the Union

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<sup>6</sup> Er. Ex. 40 shows that in 2008, Sgt. Dyer was given a second 3-year appointment.

<sup>7</sup> Law Enforcement Labor Services, Inc. and City of New Hope, BMS Case No. 07-PN-0824 (Neigh, 2007). In that case, the duties had been primarily transferred from a captain position.

established that the duties of the positions were different from those of other sergeants, there was insufficient evidence to establish a compelling need for premium pay. Three-year assignments to the detective sergeant position appear to have been operating for some time without the added inducement of premium pay, and two sergeants applied for the new NCOP position despite the lack of premium pay. There is no compelling need for this new wage package item to be instituted at this time.

AWARD:

The City's position is awarded.

**Issues 7, 8, and 9: "Master Sergeant Program" – Compensation 2007 – Art. 33**

**"Master Sergeant Program" – (same as "7" above) 2008 – Art. 33**

**"Master Sergeant Program" – (same as "7" above) 2009 – Art. 33**

POSITIONS OF THE PARTIES

The Master Sergeant Program provides sergeants with the opportunity for potential additional compensation for successful completion of various health goals and educational goals. The Union seeks to change both the activities to be evaluated and the amount of compensation for participants' successful completion of those activities. The City has provided the sergeants' unit with different goals to accomplish and a smaller percentage increase awarded for completion of the goals than it provides through the Master Patrol Program for patrol officers. The Union seeks parity with the patrol officers in terms of opportunities for additional pay. The Employer asks that the Master Sergeant Program remain unchanged.

BARGAINING HISTORY.

The Master Sergeant Program is similar but not identical to a program initiated for patrol officers in 1989. The Master Patrol Program began as a negotiated incentive for the patrol officer unit to give up longevity pay. The sergeant's unit was not organized until later and never

had a longevity pay system, but the Master Sergeant Program was offered them through negotiation nonetheless. The Master Patrol Program pays a compensation maximum of 12% of the employee's base salary. The Master Sergeant Program began with a possible 2.5% potential add-on and has increased over the years to a maximum of 6.5%.

## DISCUSSION

The Union has proposed modifications to the Master Sergeant Program standards or goals. For example, the Union seeks changes in fitness standards based on research they presented in various articles. I am not in a position to make this decision for the parties for two reasons: Most importantly, any revised standards should be determined on a reasonable basis by the parties or through negotiating a process for making change. Because the Sergeants have different duties and responsibilities than the patrol officers, it is not readily apparent that the standards for their program should be identical to the patrol officer program. Second, neither party provided sufficient expert testimony for me to form an opinion about how different fitness and education program standards might meet the needs of the City, the public and the peace officers.

As to the second prong of the Union's request, it seeks to increase the Master Patrol Sergeant's compensation from 6.5% to 12%. The union has not met the burden of proof necessary to award such an increase. The Union argues that wage compression between the patrol officers and the sergeants is at an unacceptable point, but this argument is not persuasive in light of the City's data. The wage differential between the 2007 top Patrol rate (\$29.630) and the top Sergeant rate (\$37.182) is 25%. When the 2007 average Master Patrol Program rate (\$32.458) is compared to the 2007 average Master Sergeant Program rate (\$38.444), the wage

differential is still 18.4%.<sup>8</sup> Although internal parity in this compensation add-on may be desirable from the Union's point of view, the evidence does not provide a compelling reason for change.

#### AWARD

The City's position is awarded. No change in the Master Sergeant's Program.

**Issues 10, 11, and 12: Uniforms 2007 – Amount of Uniform Increase 2007, if any – Art. 23.3  
Uniforms 2008 – Amount of Uniform Increase 2008, if any – Art. 23.3  
Uniforms 2009 – Amount of Uniform Increase 2009, if any – Art. 23.3**

#### POSITIONS OF THE PARTIES

The Union seeks a \$25.00 increase in Uniform Allowance for each year of the Contract.

The Employer contends that there should be no change.

#### DISCUSSION

During 2006, the last year of the old contract, the Union members were entitled to an annual \$825.00 Uniform Allowance. This placed the sergeants' unit \$50.00 ahead of the patrol unit, which received only \$775.00 for both 2006 and 2007. The patrol unit failed to reach a negotiated settlement of their 2008-2009 contract, and arbitration is pending concerning the amount that will be awarded for their Uniform allowance. The patrol unit seeks \$800.00 for 2008 and \$825.00 for 2009.<sup>9</sup>

If the City's position is awarded, both units will have the same uniform allowance for 2009. From the City's standpoint, this is the equitable solution. From the Union's perspective, that result is inequitable, because the unit members will not have a uniform allowance increase for four years,

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<sup>8</sup> Er. Ex. 54 and 56.

<sup>9</sup> Er. Ex. 66.

even though the cost of living continues to rise. The Union presented letters from three uniform retailers who expected increases in equipment and uniform price in the range of 3-10% annually.

It is difficult to compare the City's rank among the Stanton Group V cities for uniform allowance, because some of the cities provide uniforms and equipment instead of an allowance to purchase these items. It is clear that this jurisdiction is near the top of the group, however.

From 2000-2005, the parties agreed that the sergeants' unit should receive \$25.00 per year more than the patrol for an annual uniform allowance.<sup>10</sup> For 2006, the differential between the two units increased to \$50.00. Based on this bargaining history, I will reinstate the 2000-2005 internal pattern, a \$25.00 differential favoring the sergeants, by granting no increase for 2007 and 2008, and a \$25.00 increase for 2009.

#### AWARD

There will be no increase in uniform allowance for 2007 and 2008. For 2009, a \$25.00 annual uniform allowance increase is awarded.

#### **Issues 13 and 14 – Definition of Immediate Family and Emergency Leave**

##### POSTIONS OF THE PARTIES

The City seeks to change Article 18, Emergency Leave to "align" the LELS sergeants' unit with the rest of the employee groups at the City. The language change proposed by the City is:

Article XVIII: ~~Emergency~~ Bereavement Leave:

A full-time employee may request up to three (3) days of bereavement leave in the event of a death in the immediate family. Immediate family is defined per Section 3.15. The Police Chief will be responsible for approving or denying requests for bereavement leave. Bereavement leave shall not be charged against the employee's leave balance.

~~18.1 An Employee shall be allowed up to three (3) days of emergency leave in the event of a death in the Employee's or the Employee's spouse's immediate family.~~

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<sup>10</sup> Neither party explained whether there was a good reason why sergeants should have a larger uniform allowance than patrol officers.

~~18.2 An Employee may request paid leave to attend emergency situations or additional emergency leave under Section 18.1. The Employee shall provide the Employer with the reasons for requesting such leave. The granting of paid leave for emergency situations or emergency leave under Section 18.1 in excess of three days shall be at the discretion of the City Administrator or designee. Emergency leave shall not be charged an Employee's leave account. Section 18.2 of this Agreement shall not be grievable.~~

In conjunction with this change, the City proposes to broaden the definition of "immediate family" to include aunts and uncles. The Union's final position is not to change existing language because in practice, it reduces the current benefit. It does not dispute the City's proposal to broaden the definition of immediate family, but the City is not offering one change without the other.

#### DISCUSSION

This proposal falls into the same category as previous items where, for purposes of arbitrator-imposed solutions rather than negotiated or mediated ones, the party seeking change has the burden of showing that change is necessary through clear and convincing evidence. There is no evidence of abuse of the current language, and despite the City's desire for consistency, there is insufficient evidence to impose this change through arbitration.

#### AWARD

There will be no change in the definition of immediate family and Emergency Leave.

Dated: October 6, 2008

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Andrea Mitau Kircher  
Arbitrator