

IN THE MATTER OF ARBITRATION

OPINION & AWARD

-between-

Grievance Arbitration

**THE POLICE OFFICERS FEDERATION
of MINNEAPOLIS**

**Re: Procedural Arbitrability;
Working out of
Classification**

-and-

**THE CITY of MINNEAPOLIS
MINNEAPOLIS, MINNESOTA**

**Before: Jay C. Fogelberg
Neutral Arbitrator**

Representation-

For the Union: Christopher K. Wachtler, Attorney

For the Trina Chernos, Assistant City Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties provides, in Article 5, for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial three steps of the procedure. Three formal complaints were submitted by the Federation on behalf of the Grievants in early October of 2007, and eventually consolidated for appeal to binding arbitration when the parties were unable to resolve these matters to their mutual satisfaction

during discussions at the intermittent steps. The undersigned was then mutually selected as the Neutral Arbitrator to hear evidence and render a decision. A hearing was convened in Minneapolis on September 21, 2009, and continued the following two days. At that time the parties were afforded the opportunity to present position statements, testimony and supportive documentation. At the conclusion of the proceedings, they agreed to submit written summary briefs, which were received on October 24, 2009, at which time the hearing was deemed officially closed.

The parties have stipulated that the following constitutes a fair description of the issues to be resolved.

The Issues-

- 1) Are the three grievances arbitrable?
- 2) If so, were any or all of the Grievants working out of class in the capacity of a Captain, or Deputy Chief of Police in violation of Article 30, Section 30.3 of the parties' 2005-08 Labor Agreement in 2007 and 2008?
- 3) If so, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The adduced evidence indicates that Lieutenants Matt Clark and Kevin Stoll have served as sworn law enforcement officers of the Minneapolis Police Department (hereafter "Department," "Employer," or "Administration") for a number of years. Clark was promoted to the rank of Lieutenant in 2004, and Stoll in 1998. Similarly, David Hayhoe has been a long term employee in the Department who was classified as a Captain in 2007 and who, during the time in question, was detailed to the Department's Criminal Investigation Division (CID).¹ All three Grievants are members of the bargaining unit represented by the Police Officers' Federation of Minneapolis ("Federation," "Union," or "POFM"). The parties have negotiated and executed a labor agreement (City's Ex. 1) covering terms and conditions of employment for all of the City's sworn law enforcement personnel, "...except those appointed to serve in the positions of Chief of Police, Assistant Chief of Police, Deputy Chief and Inspector" (*id.*; p. 1).

Federation's Exhibit 9, the Minneapolis Police Department Manual defines the organizational components of the Department as follows:

Unit: An organizational component within a Bureau, Division or precinct usually supervised by a Lieutenant or civilian equivalent.

¹ Grievant Hayhoe has since returned to the rank of Lieutenant with the Department.

Division: A major component of a Bureau

Bureau: A major organizational component of the Department, comprised of Precincts, Units and Divisions. A Bureau Head holds the rank of Deputy Chief or Director.

In August of 2007, Lt. Clark was detailed to the Emergency Services Unit within the Department's Special Operations Division ("SOD"), and remained in that assignment until November of the following year. Similarly, Lt. Stoll was detailed to the Special Operations Unit ("SOU") within the SOD in early September of 2007, holding the assignment until November 23, 2008. Officer Hayhoe, while holding the rank of Captain, was detailed to the Department's Criminal Operations Division ("COD") during the same time frame that Lt. Stoll was assigned to the SOU. All three men, according to the Federation, had responsibilities during this time that qualified them for higher pay as, pursuant to Section 30.3 of the Master Contract, more than 40% of the duties they performed were commonly assigned to a higher class and therefore entitled them to higher pay. In the case of Grievants Clark and Stoll, the Union claims that they should have received Captain's pay for the time in question. In addition, Lt. Hayhoe, classified as a Captain at the time, should have been compensated at the Deputy Chief's rate, according to the

Federation.

Each of these matters were grieved separately in early October of 2007, and eventually combined for the purpose of appealing them to binding arbitration for resolution.

Relevant Contractual Provisions & Civil Service Rules-

From the Master Agreement:

Article 3
Management Rights

The Federation recognizes the right of the City to operate and manage its affairs in all respects in accordance with applicable law and regulations of appropriate authorities. All rights and authority which the City has not officially abridged, delegated or modified by this agreements are retained by the City.

* * *

Article 5
Settlement of Disputes

* * *

Section 5.4 – Grievance Procedure.

* * *

Subd. 1 – Step One.

* * *

A grievance must be commenced at step one no later than twenty (20) calendar days from the discovery of the grievable event(s) or from when the event(s) reasonably should have been discovered, or twenty (20) calendar days from the receipt of the Employer's response to a related letter of inquiry, whichever is earlier.

* * *

Section 5.7 – Time Limits.

Time limits, specified in this procedure may be extended by written mutual agreement of the parties. The failure of the City to comply with any time limit herein means that the Federation may automatically process the grievance to the next step of the grievance procedure. Failure of the Federation or its employees to comply with any time limit herein renders the alleged violation untimely and no longer subject to the grievance procedure.

* * *

Article 30 Incorporation of Civil Service Rules

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Section 30.2 – Job Classifications.

The parties recognize that work and methods of service delivery may change from time to time. The general responsibilities described below are intended to establish guidelines to determine which job classification work should be assigned. However, these descriptions are not intended to be exhaustive or to limit the ability of the City to respond to changing demands.

* * *

Lieutenant – Commands and supervises major areas of programs as defined by the Chief, enforces compliance with departmental policies, procedures and goals. Supervisor as defined by Minnesota Statute 179A.03, subd. 17.

Captain – Manages the operations of a division, takes responsibility for special assignments as defined by the Chief, directs resources to achieve goals and objectives consistent with the directives of the Chief. Supervisor as defined by Minnesota Statute 179A.03, subd. 17.

* * *

Section 30.3 – Working Out of Class.

a. *General Rule.* Generally, employees are considered as working within the correct class if at least sixty percent of their assigned duties are those commonly attributed to that class. If it is found that for a period of five consecutive scheduled work days or more an employee spends more than forty percent of the time performing assigned duties and responsibilities that are normally those of a different class than that to which the employee was certified, the duties assigned to that employee shall be reassigned to an employee in the correct classification and the employee who was working out of class shall receive compensation for the out of class work as if the employee had been properly detailed to the position in accordance with Section 1.5. In all cases the period of compensation shall run from the first work day on which he/she assumed the out of class duties to the day on which such out of class duties were reassigned.

From the Civil Service Rules:

Rule 4
Job Classification

4.04 – Reclassification Guidelines

Generally, employees are considered as working within the correct class if at least sixty percent of their permanently assigned duties are those commonly attributed to that class. If it is found through reclassification study that an employee spends more than forty percent of the time performing permanently assigned duties and responsibilities that are normally those of a different class than that to which the current employee was certified, the Human Resources Department will inform the department head that the person is working out of classification and the position should be reviewed and reorganized so that sixty percent of working time is spent in the employee's status class.

* * *

4.09 Responsibilities of City Departments

Each department head is responsible for maintaining the integrity of the Classification System by limiting employees to duties appropriate to their classes. Substantial change of duties will be reported to the Human Resources Department for study. It is not necessary to report changes if they are for a temporary period or the duties are incidental to the main function of a position...

Positions of the Parties-

The **FEDERATION** takes the position in this matter that the City violated Article 30, Section 30.3 of the parties' labor agreement by

working Lieutenants Clark and Stoll out of class as Captains, and Captain Hayhoe out of class as Deputy Chief in 2007. In support of their claims, the Union contends that the Master Contract clearly defines a Captain as one who manages the operations of a Division, who takes special assignments as defined by the Chief, and who directs resources to achieve goals and objectives consistent with the directives of the Chief. In the instant dispute, Lieutenants Clark and Stoll both commanded what the Department calls "Units," but which were actually functioning as Divisions, and therefore by the terms of the Labor Agreement, must be commanded by Captains. Lt. Clark actually worked out of class 100% of the time between August 12, 2007 and November 23, 2008, managing the operations of the Emergency Services Unit (ESU), which is a "Unit" in name only. In reality, the ESU is a Division which is defined in the Department's own policy manual as being a major component of a Bureau. Similarly, Lt. Stoll worked out of class 100% of the time from September 2, 2007 to November 23, 2008, managing the operations of the SOU which, not unlike the ESU, is a unit in name only. Section 30.3 of the Contract governs working out of class, and provides that employees are considered to be doing just that if they spend more than 40% of their time on assigned duties that are normally not attributed to their

classification. Under the terms of the Agreement, should that occur then the employee is to be reassigned to the correct classification and receive the appropriate compensation for the out of class work. According to the Union, there is no dispute regarding this mandate as the language in Section 30.3 is clear on its face. It is the Union's position that a Captain is a Captain, is a Captain whether he/she is drafting policy or writing a traffic ticket, they carry the supervisory responsibilities at all times and should be paid accordingly. Grievants Clark and Stoll worked 100% of the time as Captains in charge of Divisions during the time in question. Moreover, during the time that (then) Captain Hayhoe was detailed to the very sprawling and large Criminal Investigation Division ("CID") from September 2, 2007 until August 9th of the following year (again for 100% of the time), he supervised the most massive Division within the MPD.² Indeed, it was bigger than some precincts and effectively functioned as a Bureau. Therefore he should have been compensated as a Deputy Chief.

Finally, the Union maintains that these three grievances were timely filed by the Federation as the City's actions were continuous, and once discovered, written complaints were appropriately submitted. For all

² Officer Hayhoe has returned to the rank of a Lieutenant since the incident giving rise to the grievance occurred.

these reasons then, they ask that they be sustained and that these three officers be made whole.

Conversely, the **CITY** takes the position in this dispute that the Union's grievances are untimely and therefore must be dismissed. In the alternative they assert that the Federation has failed to meet their burden of proof demonstrating by a preponderance of the evidence that the Grievants were performing duties outside of their normal classifications over 40% of the time to the extent that they are entitled to any relief under the terms of Article 30 in the parties' master agreement. In support, the Department contends that each of the three complaints were not submitted in writing within the proscribed twenty day limit as clearly set forth in Article 5 of the Contract. The assignments given to Lts. Clark and Stoll began in August of 2007, and to Captain Hayhoe in September of the same year. Yet, the grievances were not submitted by the Union until October 2007 – well beyond the twenty day limitation referenced in Section 5.4. In the alternative, they urge that an arbitrator is limited in his/her jurisdiction under the express terms of the parties' collective bargaining agreement, and cannot issue any decision that is contrary to law or public policy. Here a special law, adopted by the City Council, prohibits the MPD from having more than three Deputy Chiefs as the

same time. Moreover, Deputy Chiefs are not in the bargaining unit; are unclassified, salaried positions, and those who occupy them serve at the pleasure of the Chief. Therefore they are not subject to scrutiny by the reviewing neutral for purposes of ordering any relief. As regards all three complaints, the Administration asserts that each were performing duties commensurate with their respective (normal) job classification. If they performed any duties that were outside their normal classification the work did not meet the definition as set forth in Article 30. In addition, Section 30.2 states that a "Division" is to be "determined by the Chief." The Employer maintains that there is some overlap in the job descriptions for lieutenant and captain which is reflected in the master contract. It is not enough for the Grievants to claim that they performed duties commensurate with that of a higher rank. Rather, it must meet the 40% threshold of the distinct duties of a superior job class for five consecutive scheduled work days to be eligible for relief. Moreover, Section 30.3 states that the various definitions for the classifications of sergeant, lieutenant and captain are "guidelines" and are not intended to be exhaustive or to otherwise limit the ability of the City to respond to changing demands. The Employer argues that there was a Captain and a Deputy Chief in place in the units where the Grievants claim they were

working out of class. The Chief of Police for the City has the managerial right to organize the Department's structure and to determine the number of personnel, as a basic reserved managerial right. Yet the Union here is seeking a ruling that adds new language to the collective bargaining agreement which would usurp Management's right to decide what is a "division" and what rank should be in charge of it. The evidence demonstrates, according to the Department, that Lts. Clark and Stoll did not perform the work of a Captain, and even if they did it was less than 40% of their time. What is occurring here is that the Federation is attempting to gain through the arbitral process, that which they were unsuccessful in obtaining in negotiations. While the MPD agreed to accept "recommendations" from the Union regarding the organizational structure of the Department at that time, they did not surrender their prerogatives in this regard. Accordingly for all these reasons, they ask that each of the three grievances be denied in their entirety.

Analysis of the Evidence-

Initially, the City's procedural objection regarding the timeliness of the Union's grievance must be considered for if, as the Employer

contends, the grievances are not arbitrable under the applicable terms of the parties' contract, then I am necessarily precluded from considering the substantive evidence placed into the record.

There is no dispute but that the controlling language relating to timeliness is contained in Article 5, *supra*. More particularly, Section 5.4, subd. 1 establishes a twenty calendar day time limit in which to file a grievance. Further, there has been no issue raised concerning the amount of time that elapsed prior to the submission of the three complaints. Each of them fell outside of the negotiated twenty calendar day parameter. Finally, the language found in Section 5.7 provides for consequences to each side in the event they are remiss in compliance with the "[T]ime limits specified in this procedure." For the Employer, failure to follow the restrictions means that the Union can "automatically process the grievance to the next step....." For the Federation a breakdown in the process, "...renders the alleged violation untimely and no longer subject to the grievance procedure" (*id.*).

The foregoing then serves to establish a *prima facie* case for the City relative to the procedural objection they have made. Necessarily then, the burden of proof transfers to the Union to refute the argument.

The POFM's response is essentially three-fold. First, they contend

that the Union “owns” all grievances, as they are a party to the labor agreement, and initiate all complaints with the Administration. In fact they sometimes initiate grievances without the assistance or cooperation of any given member/employee. Thus if an employee, for personal reasons, intentionally fails to bring forth a complaint in a timely fashion, it cannot be the case that the Federation is then precluded from bringing the matter in order to defend what is perceived as a violation of the contract, once it learns of the event.

In addition, they posit the affected employees do not necessarily always recognize that the agreement has been violated. Here, Officers Stoll, Clark and Hayhoe were assigned to work out of class according to the Union, but no complaint was brought to the Federation's attention by any of them. Accordingly, it is argued that they cannot be prevented from defending the terms of the contract they negotiated with the Employer, due to the failure of the employee(s) to recognize a potential violation within the first twenty days of the event.

Finally, the assertion is made that inasmuch as the violations were “ongoing,” and continued for many months after the grievances were filed, the Union cannot now be foreclosed from grieving an out-of-class assignment based upon the twenty day limitation as to do so could

potentially allow the Department to violate Section 30.3 for years thereafter.

The record demonstrates that this is at minimum, the fourth dispute between these same parties that has involved, to one extent or another, the issue of working out of class. In each, the City has advanced the threshold argument that the matter is not arbitrable. In 1995 two cases were arbitrated (B.M.S. Case Nos. 94-PA-1892; and 95-PA-1402) which addressed, substantive issues of arbitrability, whereas in the 2008 matter heard by Arbitrator Gallagher, and the instant dispute as well, the objections lodged by the Administration are based on what they perceive to be procedural failures by the grieving party. In 1995 each of the presiding neutrals ruled that the matter was properly a subject of arbitration and ultimately reached their decision based upon the substantive evidence (Union's Ex. 19). Last year, Arbitrator Gallagher determined that the resolution of the procedural issue could best be answered through a review and consideration of the evidence relating to the work the grievant did (Employer's Ex. 14).

With all due respect to those who have addressed and ruled on the City's various arbitrability objections in the past relative to this issue, I must conclude the facts and applicable provisions in the parties' labor

agreement in the instant case, warrant a different conclusion.

Initially, there is a dearth evidence to support the Federation's claim that the Union owns all grievances under the terms of the master contract. A careful review of Section 5.4 demonstrates that it is the employee covered by the agreement who is designated as the one to bring a (non-disciplinary) complaint. While the language in subdivision one allows the POFM to bring an action, the language is quite clear that they do so, "acting on behalf of" the aggrieved bargaining unit member. The same opening paragraph then continues by providing that if the "...employee has initiated the grievance without the assistance of a Federation representative, the employee shall present a copy of the grievance to the Federation..." Moreover, the same provision does not support the Union's contention that they are the ones that initiate all complaints with the Administration. Subdivision one in Section 5.4 declares that there are three ways for an employee to proceed to a first step meeting with his/her supervisor. One is to be accompanied by a representative of the Union. Another is for the Federation representative to have the discussion, " *if* the employee so requests." And the third option is for the employee to have the meeting "...alone on his/her behalf."

Further the Union's argument is less than compelling when paragraph one of the negotiated grievance procedure is paired with the language pertaining to the twenty day time limit found in the third paragraph of the same sub-section. The particular wording crafted by the parties demonstrates that it is the affected employee who drives the grievance procedure. The opening sentence in the subdivision plainly indicates that the employee, within the time limit called for in the third paragraph, is the one who is to "initiate" the non-disciplinary complaint by informing his/her supervisor of the grievance in writing. Thereafter, the first step meeting specified in the same sub-division, is to be held between the employee and his/her superior with or without a representative of the Union present, or with a Federation representative alone, "...if the employee so requests."³

Even assuming that the grievance here "belonged" to the Federation, the additional language found in Article 5 regarding forfeiture of claims, provides forceful evidence supporting the City's procedural objection. Specifically, Section 5.7 mandates that failure

³ The Union argues that counsel for the City agrees with their position on this matter as she commented, during the course of questioning Union Officer Bruce Jensen during the hearing, that the Federation owns the grievance (Tr. p. 125). This alone however, does not constitute proof sufficient to support the POFM position in light of the plain language contained in Section 5.4, subd. 1 of the parties' agreement.

“...to comply with any time limit herein renders the alleged violation untimely and no longer subject to the grievance procedure” (emphasis added). The wording could not be any clearer. The Elkouris in their treatise, *How Arbitration Works*, BNA Books, 6th Ed., comment that if the agreement contains clear time limits for filing and prosecuting grievances, “...failure to observe them generally will result in dismissal of the grievance if the failure is protested” (at. p. 220).

The foregoing analysis demonstrating that the grievance procedure is clearly employee-driven, is relevant when considering the Union's argument that the Grievants here did not know that their new assignments given to them in August and September of 2007, violated the parties' contract in terms of causing them to work out of class. Had the relevant language allowed for the POFM to bring a grievance itself then this defense might well have been more persuasive. Indeed, a number of labor agreements make just such an allowance. In this instance however, there is no similar provision. Again, the step one subdivision begins with the instruction that the aggrieved employee is the one who is to initiate a non-disciplinary complaint. The Federation becomes involved at the initial stage, as the designated representative, in the

event the employee so chooses.⁴ The record is void of sufficient evidence that any of the three Grievants sought the Union's representation believing their contractual rights were being violated under the terms of Section 30.3.

The pivotal language in the step one procedure relative to when the twenty day "clock" begins to run, is couched in terms of "discovery of the grievable event," or from "...when the event reasonably should have been discovered...." I would concur with the City's assertion that the twenty calendar days began to run as soon as the Grievants reasonably should have discovered a potential working out of class situation.⁵ It is not illogical to conclude they would have been aware within the allotted time, that their work assignments following their transfer were potentially out of class - particularly after they received their pay checks. Moreover, the contract does not support the Federation's claim that the time period began to run once they discovered the possible violation. None of the three events listed in subdivision 1 of Section 5.4 triggering the twenty calendar days makes reference to the POFM. Again, the wording in step

⁴ The Union maintains that they have initiated grievances in the past without the assistance or cooperation of any given member/employee of the bargaining unit. There was however, little if any evidence placed into the record to adequately support the claim.

⁵ Under cross-examination, Grievant Stoll acknowledged he could not state with certainty that at any time during his reassignment to the Special Operations Division he was performing Captain's duties (Tr. p. 143).

one indicates that it is the employee's responsibility to initiate the process.

Nor am I persuaded by the Federation's alternative argument that this matter falls within the continuing grievance exception. In order to circumvent the time limits in a collective bargaining agreement for submitting a grievance, at least one of the events alleged to have resulted in a violation of the contract, normally should have occurred within the limitation period.⁶ In this instance the record provides insufficient proof out-of class duties were being performed inside the first twenty days of reassignment for any of the three complainants that would comport with the 60/40 rule for a period of five consecutive work days as mandated in Section 30.3.

In the Davis decision Arbitrator Gallagher, commenting on the language contained in Section 5.4, subd. 1, noted that the initiation of a non-disciplinary complaint under its terms is undertaken by the employee, or by the Union on "*behalf of the employee*" (Employer's Ex. 14, emphasis added). He also made the following instructive observation:

"If the language were interpreted as the Union proposes in this case – that the twenty day time limit does not begin running when the employee discovers the grievable event, but instead begins only when the Union discovers the grievable event, *the provision would have virtually no limiting*

⁶ See: *Scott v. St. Paul Postal Service*, 720 F.2d. 524 (8th Cir. Minn. 1983).

effect – an interpretation that appears to be unreasonable”
(*id.* at p. 23; emphasis added).

It is widely held that within the process of employment dispute resolution, there is a strong presumption favoring arbitration. (See: *San Francisco Community College Dist.*, 92 LA 108; also” *State of Minnesota vs. Euclid Berthiaume*, 259 NW 2nd 904; Minn. 1977). Consequently, an employer raising a procedural arbitrability argument normally carries a heavy burden of proof before a grievance will not be decided on its merits. I share the view held by many other arbitrators that the dismissal of a complaint based upon relatively minor procedural flaws is normally counter-productive, and certainly not the preferable way to resolve disputes that arise in the work place. At the same time however, it is beyond question that the facts of any case in application to clear and specific language crafted by the parties and placed into their labor agreement, should not and cannot be ignored. If it is adequately demonstrated that one side has taken an action (or failed to act) in a manner that is contrary to the plain intent of the bargained grievance procedure – and there is language present in the contract that clearly delineates limitations within the process, including the consequence of forfeiture – then the reviewing neutral would indeed be remiss in his/her

obligations should such evidence be disregarded.

Applying this premise to the instant dispute, I must conclude, albeit reluctantly, that the City has put forth a clear and convincing argument adequately supporting their position that the written complaints of Officers Clark, Stoll and Hayhoe are not arbitrable.

Award-

Accordingly, for the reasons set forth above, the grievances are denied.

Respectfully submitted this 20th day of November, 2009.

Jay C. Fogelberg, Neutral Arbitrator