

IN THE MATTER OF THE ARBITRATION BETWEEN

LAW ENFORCEMENT LABOR)	MINNESOTA BUREAU OF
SERVICES, INC.,)	MEDIATION SERVICES
LOCAL 309,)	CASE NO. 07-PA-1040
)	
Union,)	
)	
and)	
)	
THE CITY OF ST. CLOUD,)	DECISION AND AWARD
)	OF
Employer.)	ARBITRATOR

APPEARANCES

For the Union:

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On October 13, 2009, in St. Cloud, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by

refusing to pay the grievants, Thomas J. Justin and David T. LaBeaux, compensation for out-of-classification work they performed. Post-hearing briefs were received by the arbitrator on November 29, 2009.

FACTS

The City of St. Cloud, Minnesota (the "Employer" or the "City"), is located in the central part of the state. The Union is the collective bargaining representative of employees of the City who work in its Police Department in the classifications, "Police Lieutenant" ("Lieutenant") and "Police Captain" ("Captain") -- both of which are supervisory classifications.

The grievant LaBeaux began working for the Employer in 1983 as a Patrol Officer. He was promoted to the rank of Sergeant in 1990 and to the rank of Lieutenant in February of 2005. The grievant Justin began working for the Employer in 1989 as a Patrol Officer. He was promoted to the rank of Sergeant in 1995 and to the rank of Lieutenant in September of 1997.

The first events out of which this grievance arose occurred in October of 2005. I note below that the parties disagree about the time at which the grievance was initiated and its timeliness under the grievance procedure established by their labor agreement. They also disagree whether the grievance asserts rights in behalf of both Justin and LaBeaux, to both of whom I refer, nevertheless, as "grievants" because the Union alleges a violation of the labor agreement that affects both of them.

According to the Union, the following memorandum which was addressed to Captain Richard C. Wilson (later promoted to Assistant Chief, as I note below) by both grievants on September 6, 2006, was the first written statement of the grievance:

Subject: Working out of class

Captain Wilson:

Please find attached job descriptions for Police Captain and Police Lieutenant. These were provided by the Human Resource Director.

From October 20, 2005 to July 29, 2006 Lieutenant Justin was assigned command of CID. From July 29 to present this has been assigned to Lieutenant LaBeaux.

It is our position:

- CID historically has been administered by a Police Captain or Assistant Chief.
- CID is a Division as defined in section 3.12 of the [labor agreement between the Union and the Employer.]
- The duties and responsibilities performed by the lieutenant assigned to CID is consistent with the duties and responsibilities set forth in the current Police Captain job description.
- Lieutenants assigned command of CID are working out of class and should be compensated as provided in section 14.18 of the [labor agreement].

It is our request we be compensated in accordance with section 14.18 of the [labor agreement] for all days assigned to CID and that any Lieutenant assigned to CID in this same capacity be compensated accordingly.

The evidence presented at the hearing before me includes several memoranda and emails that relate to steps in the grievance procedure, sent by Justin to Dennis L. Ballantine, Chief of Police, and to other management personnel. Though these are authored by Justin and not by LaBeaux, a fair reading of their text shows that they relate to the claims of both grievants for out-of-class pay, as first initiated in writing by the memorandum of September 6, 2006, which I have set out above.

On May 10, 2007, the Union sent a letter to the Minnesota Bureau of Mediation Services requesting that the Bureau provide a list of arbitrators "in the matter of LELS [the Union] and the City of St. Cloud involving the 'Out of Classification Pay'" of both grievants. The letter informs the Bureau of the name and address of the attorney representing the Employer, Jan Peterson, and it indicates that a copy of the letter was sent to Peterson.

Thereafter, the parties selected an arbitrator to hear and decide the grievance, and they presented evidence to him at a hearing held in March of 2009. The parties did not have a reporter transcribe that hearing. Unfortunately, that arbitrator died before issuing his award, and the grievance remained unresolved. The parties then restarted the arbitration process, selecting me to arbitrate the grievance, and, as noted above, on October 13, 2009, they presented evidence relevant to the grievance at a new hearing before me, with post-hearing written argument presented on November 29, 2009.

The events that gave rise to the grievance include a reorganization of the Police Department (the Department") that occurred in October of 2005. The reorganization consolidated several parts and sub-parts of the Department, and, as it did so, it changed or failed to change the titles given to some of those parts and sub-parts. The parties' arguments make relevant the way in which the word "division" was used before and after the reorganization. A chart showing the Department's organizational structure before the reorganization depicts

a box titled "Administration Chief" with three boxes shown below, titled, "Patrol Division," "Technical Services Division" and "Criminal Investigations Division." Just below the boxes depicting these three divisions, the following statement appears:

The Chief is responsible for the administration and operations of the Police Department.

The St. Cloud Police Department consists of 91 sworn officers and 21 civilian employees in four divisions. The Administration Division responsible for the following three divisions: Technical Services, Patrol Division and Criminal Investigations Division.

Thus, I note that, even before the reorganization of October, 2005, there was at least this dual use of the word "division" -- to show an "Administration Division" at the first level of organization, with administrative authority over three second-level "divisions" -- the Patrol Division, the Technical Services Division and the Criminal Investigations Division.

In the months preceding October of 2005, the bargaining unit had a complement of three Captains. Captain Wilson was in charge of the Patrol Division, Captain Susan L. Stawarski was in charge of the Criminal Investigations Division and Captain David Johnson was in charge of the Technical Services Division.

On October 10, 2005, Ballantine sent Justin the following Personnel Order:

With the retirement of Captain Johnson, effective October 20, 2005, you are transferred from the Patrol Division to the Criminal Investigations Division.

This communication did not specify what function Justin would perform in his new assignment, but Ballantine had explained

some of his intention in the following email to Justin sent earlier on October 10, 2005:

Captain Johnson's retirement at the end of this month has given us the opportunity to make some changes in the organizational structure of the department. The intent is to move the department to a two division organization which at present we will refer to as the Operations Division and the Support Services Division. This means I will not be promoting another Capt. but, instead will be creating another Lt. position. Most of the changes in organizational flow will occur on Jan. 1 2006 and I will be putting out more information when those are finalized.

The changes that I know will be occurring are as follows. On Oct. 20th Capt. Stawarski will move to the Administrator Capt. position and Lt. Justin will move to CID. On or about Jan. 1, 2006, Sgt. Beise and Sgt. Mortenson will be promoted to Lt. and assigned to the operations division.

On the following day, October 11, 2005, in a responsive email to Ballantine, Justin wrote, "we should talk, about one Assistant Chief." Apparently, Justin was addressing Ballantine's plan (which was, according to Wilson's testimony, implemented in early 2007) to make Wilson and Stawarski Assistant Chiefs, leaving the Captain's classification vacant.

The evidence shows that Justin's new assignment was to command what Ballantine referred to in his Personnel Order of October 10, 2005, as "the Criminal Investigations Division" and to what he referred to in his explanatory email of that date as "the CID." At that time, the initials "CID" were commonly used as an abbreviation referring to the Criminal Investigations Division. The evidence also shows 1) that Justin and Ballantine had discussions that began at about the time of Justin's reassignment concerning Justin's contention that he was working out of class in his new assignment and should receive a Captain's

pay for that work, and 2) that Ballantine was sympathetic to Justin's contention and sought to find some way to increase his compensation above that of a Lieutenant -- either by having the City's management approve his movement to the rank of Captain or by having Justin agree to move to a job title exempt from the requirements that he receive overtime pay.

By the reorganization of October 2005, the Employer reduced the number of second-level sub-parts of the Department's organizational structure from three to two -- the "Operations Division" and the "Support Services Division." Wilson, still a Captain, took charge of the Operations Division, and Stawarski, also still a Captain, took charge of the Support Services Division. At least some of the primary functions of what had been the Criminal Investigations Division were renamed, "Investigations" and placed at the third level of the Department's organizational structure, as a sub-part of the second-level Operations Division. "Investigations" was commanded by Justin who was subject to the authority of Wilson, the Captain in charge of the new Operations Division. Under this new structure, "Investigations" was one of four third-level sub-parts in the Operations Division, along with "Patrol 1," "Patrol 2" and "Plans and Operations," each of which was commanded by a Lieutenant. "Investigations," now a third-level sub-part of the Operations Division was in turn subdivided into four fourth-level sub-parts, each commanded by a Sergeant; they were named "CID," "SRO," "Forensics" and, after January, 2006, the "Gangs and Drugs Unit."

In February of 2007, Wilson and Stawarski were promoted to the management classification, Assistant Chief, outside the Union's bargaining unit and made exempt from the requirement that they receive overtime pay. The Captain's classification has been vacant since then, though the Union is still certified as the collective bargaining representative of anyone who may be employed in that classification in the future.

In July of 2006, LaBeaux was assigned to take Justin's place as the Lieutenant in charge of "Investigations," and Justin was assigned to the Gangs and Drugs Unit. In January of 2007, these assignments were changed again, moving LaBeaux to the Gangs and Drugs Unit and Justin back to command "Investigations," both of them still classified as Lieutenants.

Justin testified that, in September of 2006, it became clear that his discussions with Ballantine would not resolve the claim for out-of-class pay and that, he and LaBeaux then sent Wilson the memorandum of September 6, 2006, which I have set out above, thus initiating the present grievance.

On September 28, 2006, Justin sent Ballantine the following memorandum, signing it in his capacity as President of the Union:

Subject: Step one Grievance (Out of Class pay)

Please consider the following as Step One of the Grievance Procedure as defined in the [labor agreement] Article 8.

Grievance: From October 20th, 2005, to July 29th, 2006 Lieutenant Justin was assigned command of CID. From July 29th, to present this has been assigned to Lieutenant LaBeaux. A Police Captain or Assistant Chief historically

has administered CID. CID is a division as defined in Section 3.12 of the [labor agreement]. The duties and responsibilities performed by the lieutenant assigned to CID is consistent with the duties and responsibilities set forth in the current Police Captain job description. Lieutenants assigned to command of CID are working out of class and should be compensated as provided in section 14.18 of the [labor agreement].

Resolution of this Grievance would be to make whole, by providing compensation in accordance to section 14.18 of the [labor agreement] for all days assigned to CID and that any Lieutenant assigned to CID in this same capacity be compensated accordingly.

Relevant parts of the job descriptions for the Lieutenant's classification and for the Captain's classification are set out below;

LIEUTENANT

Nature of Work. This is responsible, second-level supervisory administrative work with command and leadership responsibilities as an aid to the Chief of Police or a division captain.

Work involves the responsibility for functioning as the executive officer to the Chief of Police or a police captain, managing a division at times, or shifts when the captain is absent, or at the direction of the Chief of Police. The employee may supervise, lead and manage a unit or division or a specialized group organized to address specific problems; the employee will provide a continuity of direction, communication, leadership and control as their primary duties for the division or the department head. They may direct or participate in investigating citizen's complaints or other internal affairs assignments; applicant backgrounds, and criminal and internal investigations of a complex nature; assess training needs; develop and provide remedial solutions; develop departmental procedural and policy drafts; represent the department at public meetings and serve as liaison to special interest groups in the community; assess the performance of first line supervisors; promote team work and facilitate cooperation and coordination among the different divisions for the smooth and efficient operation of Patrol or other assignments. Work is reviewed by a police captain and the Chief of Police.

Examples of Work. . . . Takes direction from the Chief of Police and/or division captain. Supervises sergeants within the division assigned, usually during work shifts

when the captain of the division is absent.
Is assigned command of work shifts and the first line supervisors assigned to those shifts. Provides leadership, direction and control within the parameters of departmental policy and directives and meeting the needs of the division captain. . . .
Takes command of a shift or shifts, provides leadership, direction and control as directed by the captain.
Schedules, plans and directs the training of personnel.
Performs research and in-depth analysis of complex problems, issues and technological advances.
Completes staff reports facilitating administrative decision making. Prepares and assists others in the preparation of program budget documents. Interviews and assesses the quality of applicants for employment or promotion. Performs related work as required.

CAPTAIN

Nature of Work. This is responsible administrative, management, and supervisory work with command and leadership responsibilities as head of a division including Patrol, Investigations, Technical Services, or professional Standards. Work involves the responsibility for managing a division consisting of lieutenants, sergeants, patrol officers, investigators, technicians, and non-licensed support staff. The employee will plan, organize, direct, control, lead, instruct, assign, support, evaluate the performance of, reward and discipline the supervisors specifically, and all persons assigned to the division in general; develop and manage the division budget; assess the personnel needs of the various functional aspects of the division and assign resources to meet those needs; determine the amount and type of equipment and technical resources necessary to meet the demand and conduct inspections to assure its safe and proper use. Work is performed under the supervision of the Chief of Police.

Examples of Work. . . . Manages and directs personnel and activities in a division in the department;
Assesses the training needs of the division and assures its application;
Conducts frequent inspections and audits of unit leaders, including equipment, files, documents, reports, performance assessments, and disciplinary actions taken by unit sergeants to assure a fair, correct, consistent application of departmental policy and procedure;
Receives and acts upon requests for transfer, vacation, sick leave, career development, and promotion from unit sergeants and lieutenants;
Organizes and moderates interviews of prospective employees and those seeking promotions and makes recommendations to the Chief of Police;
Conducts staff meetings with division personnel and unit sergeants; Receives citizen's complaints and assigns the conduct of investigations of same, conducts investigations

of alleged acts of serious misconduct;
Resolves problems, interprets and applies department policies and procedures within defined parameters;
Promotes by example and skill a cohesive spirit of cooperation among divisions;
Manages division-wide goal setting and assists team leaders in the development and achievement of operational objectives;
Meets daily with the Chief of Police and keeps him/her fully informed of division status;
May act in the Chief's capacity when the Chief is absent and assigned by the Chief of Police to do so;
Performs related work as required.

The events that are relevant to this grievance occurred during the terms of two labor agreements between the parties -- a two-year agreement covering calendar years, 2004 and 2005, and a three-year agreement covering calendar years, 2006, 2007 and 2008. Except for an amendment of Section 14.18, the relevant provisions of the two labor agreements, which are set out below, are identical, and I refer to them as if they are in one agreement, except when discussing Section 14.18:

Article III - Definitions

- 3.6. Class means one or more positions sufficiently similar with respect to duties and responsibilities that the same descriptive title may be used with clarity to designate each position allocated to the class, that the same general qualifications are needed for performance of the duties of the class, that the same tests of fitness may be used to recruit employees, and that the same schedule of pay can be applied with equity to all positions in the class under the same or substantially the same employment conditions.
- 3.12. Division means a branch of a department of the City service.

Article V - Management Rights

- 5.1. It is recognized that, except as expressly stated herein, the City shall retain whatever rights and authority that are necessary for it to operate and direct the affairs of the City in all of its various aspects, including, but not limited to:

- 3) To determine the methods, means, organization, and number of personnel by which such operations and services are to be conducted.

Article VIII - Grievance Procedure

- 8.1. a) Definition of a Grievance. Grievance is defined as a dispute or disagreement as to the interpretation or application of any terms or provisions of this contract.

d) Procedure. Grievances, as defined by Section (a) above, shall be resolved in conformance with the following procedure:

Step 1: An employee filing a grievance shall, within ten (10) calendar days of an alleged violation, present such grievance to the department head. The department head will discuss and give an answer to such Step 1 grievance within ten (10) calendar days after receipt. A grievance not resolved at Step 1 and appealed to Step 2 shall be placed in writing setting forth the nature of the grievance, the facts on which it is based, the provision or provisions of the contract allegedly violated, the remedy requested, and shall be referred to Step 2 within ten (10) calendar days after the final answer in Step 1.

Article XIV - Salaries

From the 2004-2005 labor agreement:

- 14.18. Working out of Class/Temporary Promotion. Employees temporarily assigned to work out of class will receive two (2) hours pay at their current rate, as Daily Compensation.

From the 2006-2008 labor agreement:

- 14.18. Working out of Class/Temporary Promotion. Employees temporarily assigned to work out of class will receive an additional four and one-half (4 1/2) hours pay at their current rate of pay as daily compensation if an Assistant Chief or the Chief of Police is not available when an employee is assigned to work out of class. If an Assistant Chief or the Chief of Police is available when an employee is assigned to work out of class, employees temporarily assigned to work out of class will receive an additional three (3) hours of pay at their current rate of pay as daily compensation. The Chief of Police has sole discretion in determining when an Assistant Chief or the Chief of Police is available.

DECISION

The Procedural Issue.

The Employer argues that the grievance was not brought within the time limits established by the grievance procedure set forth in Article VIII of the labor agreement. It urges 1) that Justin failed to bring his grievance within ten days following his assignment to command "Investigations," which was effective on October 20, 2005, and 2) that LaBeaux failed entirely to initiate a grievance. In support of this argument, the Employer describes the memorandum of September 28, 2006, from Justin to Ballantine as the first statement of his grievance, and the Employer asserts that even that memorandum failed to assert a claim in behalf of LaBeaux.

I make the following rulings. First. I repeat below the text of Step 1 of the grievance procedure, as established in Section 8.1(d) of the labor agreement:

Step 1: An employee filing a grievance shall, within ten (10) calendar days of an alleged violation, present such grievance to the department head. The department head will discuss and give an answer to such Step 1 grievance within ten (10) calendar days after receipt. A grievance not resolved at Step 1 and appealed to Step 2 shall be placed in writing setting forth the nature of the grievance, the facts on which it is based, the provision or provisions of the contract allegedly violated, the remedy requested, and shall be referred to Step 2 within ten (10) calendar days after the final answer in Step 1.

The evidence shows 1) that Justin presented his claim for out-of-class pay to Ballantine orally at the time of his October 2005 assignment to command "Investigations," which, it is alleged, had been called the Criminal Investigations Division just previous to that assignment, and was under the command of

Captain Stawarski, 2) that Ballantine did not immediately deny the claim, but discussed with Justin and with City management the possibility of settlement, 3) that LaBeaux was assigned to command Investigations in late July of 2006, 4) that the settlement discussions went on into the summer of 2006 and were not concluded when Justin and LaBeaux reduced the claim to writing in the memorandum to Wilson of September 6, 2006, and in the grievance letter to Ballantine on September 28, 2006. I rule that with the knowledge and consent of Ballantine, and, impliedly of City management, the settlement discussions suspended the ten-day time limit expressed in Step 1 of the grievance procedure.

Second. The September 6, 2006, memorandum to Wilson clearly makes the claim for out-of-class pay in behalf of both Justin and LaBeaux; indeed, LaBeaux was a co-author of that memorandum. Justin's grievance letter to Ballantine of September 28, 2006, though not authored by LaBeaux, asserts a claim in his behalf as one of the Lieutenants assigned to command Investigations. As President of the local Union, Justin had authority to present the grievance in behalf of members affected by the refusal to provide out-of-class pay -- Justin and LaBeaux. I rule, therefore, that the grievance before me met the time requirements of the labor agreement and that it asserts a claim in behalf of both LaBeaux and Justin.

The Substantive Issue.

The evidence and the parties' arguments establish the primary substantive issue -- whether the grievants are entitled

to out-of-class pay under Section 14.18 of the two labor agreements. Though the 2006-2008 labor agreement amended the text of Section 14.18 as it appeared in the 2004-2005 labor agreement, the amendment changed only the amount of compensation to be paid to an employee who is working out of class -- four and one-half hours' pay if an Assistant Chief or the Chief of Police is not "available" when the employee is working out of class, and three hours' pay if an Assistant Chief or the Chief of Police is "available." As I read the word "available," it means merely that the employee working out-of-class is entitled to the greater amount only when he or she cannot consult readily with an Assistant Chief or the Chief of Police during the out-of-class assignment. I do not read the word, "temporarily," as having any significance in this case. Indeed, the Employer has made no argument here that the grievants would be entitled to out-of-class pay only if the assignments at issue were temporary, but not if the assignments were permanent.

Thus, I must determine whether the grievants were "assigned to work out of class," i.e., whether they were doing the work of a Captain when they commanded "Investigations" after the Department was reorganized in October 2005.

A primary argument made by the Employer is that its right to reorganize the Department is protected by its management right to do so -- the right under Section 5.1 of the labor agreement to "determine the methods, means, organization, and number of personnel by which [its] operations and services are to be conducted."

I make the following ruling with respect to this argument. Clearly, Section 5.1 of the labor agreement reserves the Employer's management right to reorganize the Department. That right, however, is subject to the exception that appears in the first sentence of Section 5.1. The Employer can exercise its management rights "except as expressly stated" in the labor agreement. The Employer cannot obviate the terms of the labor agreement under the guise of an exercise of management rights, and it cannot defeat the out-of-class requirements of Section 14.18 by a claim that it is exercising a management right to organize the structure of the Department. In other words, the Employer has the right to place the functions of what used to be called the Criminal Investigations Division at any organizational level it prefers, but, even after doing so, the Employer is still obligated to honor the out-of-class compensation requirements of Section 14.18. Thus, the issue remains, notwithstanding the Employer's management rights argument, whether the grievants were doing the work of a Captain when commanding the Investigations sub-part of the newly organized Operations Division.

A primary argument made by the Union is the following. The Captain's job description contemplates that the management of a division is the work of a Captain and not the work of a Lieutenant. Even after the reorganization, many statements of management personnel, made orally and in documents, referred to the new "Investigations" sub-part of Operations as a "division" or as the "CID," i.e., the "Criminal Investigations Division."

According to the Union, these continued references by management to the Investigations sub-part of Operations as a "division" or as the "Criminal Investigations Division" or as the "CID," should be regarded as an admission by management that the grievants were doing the work of a Captain when they commanded the reorganized Investigations sub-part of Operations.

A reading of the Captain's job description shows that the primary responsibility of the classification is to command a "division," an attribute of the job confirmed by the manner in which Captains were assigned before the classification was vacated in February of 2006. The Lieutenant's job description shows that the command of a "division" is not the primary responsibility of that classification -- though a Lieutenant may act as "an aid to the Chief of Police or a division captain" and may fulfill "responsibility for functioning as the executive officer to the Chief of Police or a police captain, managing a division at times, or shifts when the captain is absent, or at the direction of the Chief of Police." The evidence confirms that, before the reorganization of October 2005, Lieutenants were assigned in a manner consistent with the job description.

Thus, the ongoing management of a "division" rather than doing so when the division Captain is absent is the characteristic that distinguishes a Captain's work from that of a Lieutenant. To resolve the grievance, I must determine whether the grievants' work after the reorganization was substantially the same as the ongoing performance of management functions that would have been included in a Captain's work when commanding a "division" before the reorganization.

Though Section 3.12 of the labor agreement defines a "division" as "a branch of a department of the City service," nothing defines what is meant by "branch" -- whether a "branch" is a second-level, third-level or fourth-level sub-part of a department. Therefore, I find that the definition of "division" that appears in the labor agreement is insufficient.

The evidence shows that before the reorganization, "division" was primarily applied to second-level parts of the organizational structure of the Department -- though, as I have noted above, "division" has also been used to refer to the first-level, as in the "Administration Division," consisting of the Chief of Police and his immediate staff. After the reorganization, both management and non-management employees have used the word "division" in a manner that does not rigorously distinguish between second-level and third-level or even fourth-level levels of organization. Accordingly, in this state of the parties' usage, I cannot determine conclusively that referring to the Investigations sub-part of the post-reorganization structure as a "division" (or as the "CID" or even occasionally as the "Criminal Investigation Division") establishes that the command of Investigations is the work of a Captain.

The Union showed that before the reorganization of October 2005, the Employer paid out-of-class pay to Lieutenants and even Sergeants who were assigned to command the Criminal Investigations Division in the absence of its Captain. The Union argues that those occurrences establish a past practice

that should be interpreted as supporting its claim for out-of-class pay in this case. I rule that those pre-reorganization payments, whether or not they are characterized as establishing a binding practice, have no relevance to the case before me. What was done before the reorganization is not at issue. Indeed, Section 14.18 of the labor agreement, unaided by practice, establishes the right of lower ranking personnel to out-of-class pay when filling in for a division Captain. In the present case, however, the issue I must decide is whether, after the reorganization of October 2005, the work of commanding the Investigations sub-part of the Operations Division remained substantially the same as what had been the work of commanding a division, notwithstanding the name applied to it.

To determine whether the grievants were doing the work of a Captain when commanding the Investigations sub-part of the new Operations Division, I look to the evidence about the work they performed and compare that to the evidence about the work that was performed by Wilson and Stawarski as division Captains before the reorganization.

Stawarski testified that, before the reorganization of October 2005, when she commanded the Criminal Investigations Division as its Captain, she had authority to change procedures and to make policy decisions, and that the grievants did not have that authority when, after the reorganization, they commanded the Investigations sub-part of the Operations Division. According to Stawarski, the Assistant Chiefs have those powers now.

Wilson testified that, before the reorganization, when he commanded the Patrol Division as its Captain, he could "sign off" on training and on budgeting in the the division, but that the grievants do not have such authority. According to Wilson, since 2007, the Assistant Chiefs and the Chief of Police confer and make decisions about the budget, with recommendations from the Lieutenants, whereas before the reorganization, he prepared the budget for his division and reviewed it with the Chief of Police, who made the final budgetary decisions. Wilson conceded that in late 2005 and in 2006, the grievants participated in the budget process in a manner similar to his participation when he was a division Captain, but he testified that they have not done so since 2006. Wilson still asks for information relevant to budgeting from Justin, but he, Wilson, prepares the budget recommendations to the Chief of Police, making whatever alterations to amounts that Justin may have asked for.

Wilson testified that he thought the grievants were not functioning as Captains during the times they commanded the reorganized Investigations sub-part of the Operations Division. He conceded, however, that he probably has told the grievants that he thought they were working out-of-class at times. He explained that he was referring to times when he was not working and the grievants made some of the decisions that he usually made. When he is absent now, however, he no longer assigns such decision making to Justin; instead, he has Stawarski make the division managing decisions that are appropriate to an Assistant

Chief and that were appropriate to a Captain before the reorganization.

Ballantine testified that when he decided to reorganize the Department, he wanted to move to a two-division organization, Operations and Support Services, retaining the two Captains who remained after Johnson's retirement, and continuing the participation of the Captains in what he referred to as "upper management," but with the new titles, "Assistant Chief."

Ballantine testified that Lieutenants, Sergeants and even Patrol Officers always have had some input into the budget process, but that they do not make budget decisions. Before the reorganization, those decisions were made by a process that included the Captains and him and now includes the Assistant Chiefs and him. On cross-examination, Ballantine conceded that Investigations continues to do some of the functions that were performed by the former Criminal Investigations Division, but he testified that the management-level functions that were once performed by the division Captains are now performed, not by Justin, but by Wilson as Assistant Chief. Ballantine conceded that, as Justin testified, he may have told Justin in October of 2005 that he thought commanding the reorganized Investigations sub-part of the Operations Division was "a Captain's job," but he testified that he does not believe that to be the case. He pointed out that when Stawarski commanded the Criminal Investigations Division as a division Captain, she had authority to sign off on spending decisions, but that Justin does not have that authority.

Justin testified that when he was first assigned to command the reorganized Investigations sub-part of the Operations Division, Ballantine was sympathetic to finding a way to pay him more than a Lieutenant's pay. Ballantine told him that he would try to have City management approve his promotion to the rank of Captain, but Ballantine told him that he could not get that approval. Justin testified that in late 2005, when he first had the command of Investigations, he reported directly to Ballantine, but that after that he reported to Wilson. Ballantine denied that Justin ever reported directly to him. Justin described several changes in the work assigned to Investigations, such as enforcement of parking, responsibility for the laboratory and the addition of responsibility for the Gangs and Drug Unit. According to Justin, he continued to participate in the budgeting process in 2006 and 2007, but he conceded that he has not had the same participation in 2008 and 2009. Ballantine conceded that Justin had full participation in the budget process during 2006 and 2007, but he also testified that such work was not a lead responsibility of a Captain.

LaBeaux testified generally that the work done in Investigations after the reorganization was the same as was done in the Criminal Investigations Division before the reorganization. His testimony did not address in particular the Employer's position that the management functions that had been assigned to division Captains were not transferred to the Lieutenant who commanded Investigations.

Stawarski testified that until mid-2007, the Lieutenants commanding sub-parts of divisions, including Investigations, "signed off on the white sheets" -- expense claims of personnel -- but that, since mid-2007, the Assistant Chiefs have done that work.

I make the following additional findings of fact and rulings. The evidence shows that the October 2005 reorganization of the Department, as originally planned, had the goal of changing what had been the Criminal Investigations Division so that some, but not all, of the functions of commanding it would be performed by a Lieutenant in the new Investigations sub-part of the organizational structure, at the third-level of organization. In addition, as originally planned, the remainder of the functions needed to command what had been the Criminal Investigations Division were to be exercised by Wilson, the Captain in command of the new, second-level Operations Division, and eventually by Wilson, as Assistant Chief.

The evidence shows, however, that the original plan for this separation of command functions was not fully implemented at the outset, leaving some of a division Captain's duties to be exercised by the Lieutenant in command of Investigations. At intervals, Wilson took on more of a division Captain's command functions that had been retained by the Lieutenant in command of Investigations, so that eventually, Wilson performed them as commander of the second-level Operations Division.

The award below is based on the testimony of witnesses for both parties in which they have given general estimates

about the dates when command functions falling within a division Captain's duties were removed from the Lieutenant in command of Investigations and transferred to Wilson, in accord with the original plan of reorganization. Because the testimony describing the transfer of these functions consists of estimates of dates, the award is necessarily based on those estimates, and it is necessarily only approximate in its assessment of what the recoverable out-of-class pay should be.

The award assumes a gradual transfer of functions, thus reducing the obligation to pay out-of-class pay from three days per five-day week, to two days per five-day week and then to one day per five-day week till the obligation ends in early 2007.

The award takes into account the rate of compensation for out-of-class work as specified in Section 14.18 of the 2004-2005 labor agreement and then, as changed in the 2006-2008 labor agreement, using the three-hour rate that is payable when as Assistant Chief or the Chief of Police is available.

AWARD

The grievance is sustained in part. For the period between October 20, 2005, and December 31, 2005, the Employer shall pay the Lieutenant who was in command of the Investigations sub-part of the Operations Division, out-of-class pay for three days out of each five days he worked as such. The rate of such compensation shall be as provided in Section 14.18 of the parties' 2004-2005 labor agreement.

For the period between January 1, 2006, and June 30, 2006, the Employer shall pay the Lieutenant who was in command

of the Investigations sup-part of the Operations Division, out-of-class pay for two days out of each five days he worked as such. The rate of such compensation shall be as provided in Section 14.18 of the parties' 2006-2008 labor agreement -- with an Assistant Chief or the Chief of Police available.

For the period between July 1, 2006, and March 31, 2007, the Employer shall pay the Lieutenant who was in command of the Investigations sub-part of the Operations Division, out-of-class pay for one day out of each five days he worked as such. The rate of such compensation shall be as provided in Section 14.18 of the parties' 2006-2008 labor agreement -- with an Assistant Chief or the Chief of Police available.

After March 31, 2007, the Employer shall not be obligated to pay out-of-class pay to the Lieutenant in command of the Investigations sub-part of the Operations Division for his or her work as such. This award should not be interpreted as eliminating the Employer's obligation to pay out-of-class pay in accord with Section 14.18 for work done by a Lieutenant who is assigned to command the Operations Division, the Support Services Division or the Administration Division.

February 9, 2010


Thomas P. Gallagher, Arbitrator