



the procedure to resolve grievance issues. The parties stipulated that the instant grievance is properly before the undersigned Arbitrator for a final and binding decision. The parties further stipulated that this matter does not involve contract arbitrability or any other substantive or procedural issues.

## **APPEARANCES**

### **For the Employer**

John B. McCormick, Assistant City Attorney  
Angela Nalezny, Human Resource Director  
Jason M. Schmidt, Labor Relations Manager  
Angela Anderson, Human Resource Consultant  
John Harrington, Chief of Police  
Gayle Porter, Police Officer Sergeant  
Ben Reber, Labor Relations Specialist  
Tracy Bles, Labor Relations Specialist

### **For the Union:**

James P. Michels, Attorney  
David A. Titus, Federation President and Police Officer  
Brian Mefford, Grievant and Police Officer  
Layne Lodmell, Federation Treasurer and Police Officer

## **THE ISSUE**

The City of St. Paul, hereinafter the City or Employer, described the issue as, *“Whether the City violated Article 23 of the current collective bargaining agreement and/or the Accelerated Entry Program Memorandum of Agreement by delaying the longevity salary step increase of Officer Brian Mefford due to less than satisfactory performance.”* The St. Paul Police Federation, hereinafter the Federation or Union, described the issue as, *“Did the Employer violate the labor agreement by failing to compensate the Grievant at the 7-*

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<sup>1</sup> Federation Exhibit No. 1 and City Exhibit No. 3.

*year step on the wage schedule as of the first payroll period following the Grievant's seventh anniversary of service?"*

## **BACKGROUND**

The City is a municipality located in Ramsey County. The Federation is the collective bargaining representative of approximately 650 employees that includes the classification of Police Officer, hereinafter Officer. The Federation has represented this unit since 1997.

Officer Brian Mefford, hereinafter the Grievant, was due a 7-year longevity step increase in late November or early December 2008. However, while he was in a meeting on December 12, 2008 with his former supervisor Sergeant Gayle Porter to discuss his annual performance evaluation, he was informed that he would not be receiving his 7-year step increase due to his poor work performance.<sup>2</sup> That same day, the Grievant contacted the Federation whereupon Federation President David Titus immediately filed a grievance on his behalf.<sup>3</sup> On December 19, 2008 Police Chief John Harrington in writing denied the grievance pursuant to the parties' Step 1 and 2 grievance meeting held on December 18, 2008.<sup>4</sup> On December 23, 2008, the Federation in writing then appealed the grievance to Step 3.<sup>5</sup> After the parties' Step 3 meeting on January 12, 2009, City Labor Relations Specialist Steven Barrett notified the Federation in writing on January 16, 2009 that the City was denying the grievance.<sup>6</sup> Thereafter, Federation Counsel James Michels notified the City on January 26, 2009 in writing that it was moving the grievance to Step 4 [arbitration].<sup>7</sup>

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<sup>2</sup> The Grievant had transferred out of patrol duty to the crime lab approximately 2-3 weeks before this meeting. Sergeant Porter had been his supervisor while he worked patrol duty and had prepared this evaluation. The Grievant received a Needs Improvement in this evaluation.

<sup>3</sup> Federation Exhibit No. 2, p. 1 and City Exhibit No. 2A.

<sup>4</sup> City Exhibit No. 2B and Federation Exhibit No. 2, p. 2.

<sup>5</sup> Federation Exhibit No. 2, p. 3 and City Exhibit No. 2C.

<sup>6</sup> City Exhibit No. 2D and Federation Exhibit No. 2, p. 4.

<sup>7</sup> Federation Exhibit No. 2, p. 5 and City Exhibit No. 2E.

The undersigned Arbitrator was notified in writing on October 12, 2009 by Federation Counsel Michels that I had been selected as the neutral arbitrator in this matter.

## **RELEVANT CONTRACT PROVISIONS**

### **ARTICLE 5—EMPLOYER AUTHORITY**

**5.1** *The FEDERATION recognizes the prerogatives of the EMPLOYER to operate and manage its affairs in all respects in accordance with applicable laws and regulations of appropriate authorities. The prerogatives and authority that the EMPLOYER has not officially abridged, delegated or modified by this AGREEMENT are retained by the EMPLOYER.*

**5.2** *A public employer is not required to meet and negotiate on matters of inherent managerial policy which include, but are not limited to such areas of discretion or policy as the functions and programs of the EMPLOYER, its overall budget, utilization of technology, and organizational structure and selection, and direction and number of personnel.*

### **ARTICLE 6—EMPLOYEE AND FEDERATION RIGHTS GRIEVANCE PROCEDURE**

#### **6.1 DEFINITION OF GRIEVANCE**

*A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of the AGREEMENT.*

*It is specifically understood that any matters governed by Civil Service Rules or statutory provisions shall not be considered grievances and subject to the grievance procedure hereinafter set forth. Disciplinary actions may be appealed to either the Civil Service Commission or to an arbitrator. However, reprimands may not be appealed to the Civil Service Commission. If disciplinary action is grieved under the terms of this contract, the union's Step 2 written grievance must state whether the grievance, if still unresolved after Step 3, will be appealed to the Civil Service Commission or to an arbitrator.*

#### **6.4 PROCEDURES**

**Step 4** *A grievance unresolved in Step 3 and appealed to Step 4 shall be submitted to arbitration subject to the provisions of the Public Employment Labor Relations Act of 1971. The selection of an arbitrator shall be made in accordance with the "Rules Governing the Arbitration of Grievances" as established by the Board Bureau of Mediation Service.*

#### **6.5 ARBITRATOR'S AUTHORITY**

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

**B.** *The arbitrator shall be without power to make decisions contrary to or inconsistent*

with or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law. The arbitrator's decision shall be submitted in writing within thirty (30) days following the close of the hearing or the submission of briefs by the parties, whichever is later, unless the parties agree to an extension. The decision shall be based solely on the arbitrator's interpretation or application of the express terms of this AGREEMENT and to the facts of the grievance presented.

**ARTICLE 23—WAGE SCHEDULE**

**23.1** Salary ranges applicable to titles covered by this AGREEMENT shall be as shown below. Increases are effective on the first day of the pay period closest to the indicated effective date.

**POLICE OFFICER/ POLICE TRAINEE W/O PREMIUM**

	(A)	(B)	(C)	(D)	7-yr (E)	10-yr (F)	15-yr (G)	20-yr (H)
01/05/08	1714.68	1883.25	2095.40	2206.20	2283.42	2348.80	2390.65	2514.26
04/26/08	1770.41	1944.46	2163.50	2277.90	2357.63	2425.14	2468.35	2595.97
03/28/09	1827.95	2007.65	2233.81	2351.93	2434.25	2503.96	2548.57	2680.34
01/02/10	1915.67	2103.99	2341.01	2464.80	2551.06	2624.12	2670.87	2808.96

**ARTICLE 28—DISCIPLINE**

**28.1** The Employer may discipline employees in any of the forms listed below:

- Oral reprimand
- Written reprimand
- Suspension
- Demotion
- Discharge

The Employer will discipline employees for just cause only and in accordance with the concept of progressive discipline.

**MEMORANDUM OF AGREEMENT**  
**BETWEEN**  
**THE CITY OF SAINT PAUL**  
**AND**  
**THE SAINT PAUL POLICE FEDERATION**

This agreement is entered into by the City of Saint Paul (City) and the Saint Paul Police Federation (Federation) for the purpose of extending the agreement to provide an accelerated entry program for police officers to join the Saint Paul Police Department. The continuing high levels of retirements of police officers and the ever present need to insure that the Saint Paul Police Department continues to have the experience and quality of workforce needed to efficiently and effectively carry out its mission has necessitated this agreement.

*The Saint Paul Police Department Accelerated Entry Program shall operate under the following terms and conditions:*

**3.** *The discretion to start candidates hire<sup>4</sup> under this program up to and including the five-year step of the Police Officer Wage Schedule in effect at the time of hire shall rest solely with the Chief.*

**4.** *Any candidate who starts employment beyond the entry level salary as per #3, must meet the minimum hours required and have satisfactory performance to receive further step advancements per the Civil Service Rules and Saint Paul Salary Plan and Rates of Compensation. In no case will an employee receive a longevity step without first satisfying the years of service requirement.*

**11.** *The parties agree that this MOA shall in no manner establish a precedent regarding the interpretation and/or application of the terms of the labor contract, Civil Service Rules, or other legislation governing the transfer and hiring of employees.*

## **CITY CHARTER**

### **CHAPTER 12. PERSONNEL**

#### **Sec. 12.01 Merit System**

*A merit system shall be permanently established for positions in the City of Saint Paul. All personnel practices shall be implemented consistent with the following principles:*

**(D).** *Compensation, retention, advancement and separation of employees on the basis of job performance and productivity;*

**(F).** *Protection of employees from arbitrary action, personal favoritism, political coercion or discrimination.*

## **SALARY PLAN**

### **SECTION 1 SALARIES PAYABLE**

#### **E. Advancement In Salary:**

**1.** *Except as provided in Section 28.B of the Civil Service Rules and except as hereinafter provided, increases in salary above Step A in a classification assigned to a grade may be granted to regular and provisional employees as follows:*

## CIVIL SERVICE RULES

### 1. INTRODUCTION

*The following rules, approved by the Civil Service Commission and the City Council in accordance with the City Charter, shall govern employment by the City of Saint Paul.*

*These rules have been written for the purpose of giving direction and uniformity to the merit system and for attaining the objectives listed below for the City of Saint Paul.*

*1. The recruitment and selection of qualified applicants for positions in the City service through adequate publicity, for entry-level positions, suitable promotion procedures, and legally and professionally approved testing programs.*

*2. The provision of adequate and equitable compensation for all employees.*

*4. The retention of employees on the basis of adequate performance, and the separation of employees on the basis of inadequate performance of job duties.*

### 2. Definitions

*The term “**longevity step**” includes the five-year step and all steps thereafter.*

## MINNESOTA STATUTE CHAPTER 471 PAY EQUITY ACT

### 471.9981 Counties and Cities Pay Equity Compliance

#### Subd. 5a. Implementation report.

*By January 31, 1992, each political subdivision shall submit to the commissioner an implementation report that includes the following information as of December 31, 1991:*

*6. the minimum and maximum salary for each class, if salary ranges have been established, and the amount of time in employment required to qualify for the maximum;*

*7. any additional cash compensation, such as bonuses or lump-sum payments, paid to the members of a class; and...*

## FACTS

The facts are generally not in dispute. The Grievant began his employment with the City as a Police Officer on November 26, 2001. The Grievant was hired at the accelerated starting salary commensurate with the three-year step<sup>8</sup> due to his previous

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<sup>8</sup> The Agreement labeled the Steps A (starting), B (1-yr.), C (3-yr.), and D (5-yr.); and specifically labeled Steps E (7- yr.), F (10-yr.), G (15-yr.) and H (20-yr.) as longevity steps.

experience as a University of Minnesota Police Officer pursuant to the Memorandum of Understanding (MOA),<sup>9</sup> which permitted accelerated entry for lateral hires.<sup>10</sup> The Grievant received “Fully Competent” or better ratings during his initial five years of employment. On his fifth anniversary in 2006, the Grievant received his five-year step advancement (Step D).<sup>11</sup>

The Grievant’s performance began to deteriorate following his five year performance rating whereupon he received a “Needs Improvement” rating in several evaluation categories and an overall rating of “Needs Improvement” in his 2007 evaluation. During the remainder of 2007 and continuing throughout 2008, his job performance did not improve. During this period the Grievant also developed issues involving tardiness, according to the testimony of his supervisor Sergeant Porter. Sergeant Porter testified that on November 1, 2008 she sent a Memorandum to Eastern District Commander Kevin Casper apprising him of the Grievant’s continued performance problems and reporting issues.<sup>12</sup> In her Memorandum, Sergeant Porter indicated corrective action for the Grievant’s poor performance and reporting issues. She stated, “*As we discussed today, we will take the following action regarding Officer Medford: 1. Oral Reprimand; 2. Mandatory EAP (Employee Assistance Program; East desk duty until the 2009 bid takes effect; and 4. Performance Improvement Plan*”. Subsequently, Sergeant Porter referred the Grievant to the City’s Employee Assistance Program and drafted an Oral Reprimand to the Grievant dated November 3, 2008 for Senior Commander William Martinez’s

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<sup>9</sup> City Exhibit No. 4 and Federation Exhibit No. 14.

<sup>10</sup> The term “lateral” reflects entering employment at an accelerated wage level.

<sup>11</sup> City Exhibit No. 8(b) and Federation Exhibit No. 7.

<sup>12</sup> City Exhibit No. 8(h).

signature.<sup>13</sup> The Grievant never received this Reprimand because it was never issued according to the City.<sup>14</sup>

On November 22, 2009, the Grievant transferred to the Crime Lab. He testified that this was his decision because even though he had become “burned out” doing street patrol duty, which he testified led to his poor performance and reporting issues, he still wanted to remain with the Police Department. On November 25, 2008, Sergeant Porter completed the Grievant’s yearly performance evaluation.<sup>15</sup> In this evaluation, she indicated that the Grievant needed to improve his performance in a number of categories and gave him an overall rating of “Needs Improvement”.

On November 25, 2008, Sergeant Porter also completed a payroll form indicating that the Grievant would “*soon be eligible for a merit pay increase*”.<sup>16</sup> She recommended that the Grievant not be approved for the increase at this time. This negative recommendation was approved by the District/Unit Commander, Assistant Chief and finally by Chief John Harrington. Sergeant Porter testified that she did not know that the Grievant was specifically eligible for the 7-year Longevity Step increase when she made her no merit increase recommendation.

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<sup>13</sup> Federation Exhibit No. 6.

<sup>14</sup> The Federation received a copy of this Reprimand during its request for the Grievant’s employment records. The City maintained that this document was never placed in the Grievant’s personnel file; rather, it was obtained from Sergeant Porter’s personal records for the Grievant. According to Sergeant Porter, after she drafted the Memorandum for Senior Commander Martinez’s signature, she retained a copy which was ultimately given to the Federation when she was asked to furnish records relevant to the Grievant’s employment history. She never gave the Grievant this Reprimand and has no knowledge that anyone else ever did.

<sup>15</sup> Although the evaluation was dated November 25, 2008, it was signed the next day by Sergeant Porter. City Exhibit No. 8(i) and Federation Exhibit No.4.

<sup>16</sup> City Exhibit No. 8(j) and Federation Exhibit No. 7.

On December 12, 2008, the Grievant met with Sergeant Porter and was given his 2008 evaluation. He was also informed that he would not be receiving his 7-year Longevity Step increase until his performance improved. According to the testimony of the Grievant, he never was informed prior to this meeting that he would not receive this longevity step increase if his performance did not improve. The Grievant further testified that even though he subsequently filed a grievance over this longevity step increase denial<sup>17</sup>, he never contemplated filing a grievance over his negative evaluation. The reason being is that he agreed that both the 2007 and 2008 performance evaluations accurately reflected his job performance.

The Grievant finally received his longevity step increase after a 90-day performance review and recommendation for a merit pay increase that was initiated to payroll on March 23, 2009. During seven payroll periods that transpired between the first payroll date following his seven year anniversary date until he received his longevity step increase, the Grievant lost a total of \$688.79 in wages. This was equivalent to his being suspended for three days.

Human Resource Director Angie Nalezny, who has been the Director since 2002 and previously was with the Human Resource Department for approximately five and one half years during the 1990's, testified that during her tenure the City has always had a salary step system tied to performance. She acknowledged that she did not directly supervise payroll, however, many aspects of her job involved payroll issues including regularly answering payroll questions from supervisors, managers and employees. HR Director

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<sup>17</sup> The term denial and delay will be used interchangeably throughout this Decision since most Officers eventually receive the step increase.

Nalezny further testified that the City Charter, which dates back to 1916 and last updated in the 1960's, established a merit system. Section 12.01 (Merit System) mandates that "*compensation, retention, advancement, and separation of employees*" be based on "*job performance and productivity*".<sup>18</sup> According to HR Director Nalezny, this document may not have been given out directly to employees; however, it is on the City's web site and was discussed in new employee orientation meetings. It is this Policy which directs the Office of Human Resources to take performance into consideration for every decision regarding compensation, and prohibits the City from rewarding compensation to poorly performing employees.

HR Director Nalezny further testified that all steps are considered merit steps and longevity is a subset of merit. Longevity is defined in Section 2 of the Civil Services Rules (CSR) to "*include the five-year step and all steps thereafter*".<sup>19</sup> She added that performance has always been a part of all step increases including the longevity step increases in the City's compensation system.

James Schmidt, who has been the Labor Relations Manager since 1998, testified that there are 22 bargaining units in the City with 13 being non-trade units. With the exception of the City Attorney unit which has a pay for performance salary schedule, the rest of the non-trade units have similar wage schedules to the one involved herein with no specific language on how an employee moves through the steps.<sup>20</sup> HR Manager Schmidt further testified that it is a well-established past practice that employees do not automatically move from one step to another in any of these contract settings unless their performance

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<sup>18</sup> City Exhibit No. 6.

<sup>19</sup> City Exhibit No. 7(b).

<sup>20</sup> The number and length of steps may vary.

warrants movement. This includes the longevity steps as defined in Section 12 of the CSR.

Also, HR Director Nalezny as well as Human Resource Consultant Angela Anderson, who has been a Consultant since 1987, and Chief Harrington, who has been with the Police Department for approximately 33 years and Chief since 2004, all testified that during their tenure there has been no distinction between pay for performance and longevity pay. This was disputed by Federation President David Titus who testified that the Union has always maintained that only non-longevity steps (A-C) of the wage progression schedule are based upon merit or pay for performance, adding that the City can tie performance to any of these step; however, they just cannot deny contractual longevity step increases based upon performance.

Manager Schmidt testified that the City has a Salary Plan that forms the basis for merit increases including longevity increases based upon performance. The language in Section 1(D)(1) last updated in 2002 states “*Except as provided in Section 28.B of the Civil Service Rules and except as hereinafter provided, increases in salary above Step A in a classification assigned to a grade may be granted to regular and provisional employees as follows.*”<sup>21</sup> Similar language is reflected in Salary Plans dating back to at least 1954.<sup>22</sup> According to HR Manager Schmidt, the term “*may*” implies discretion on the part of the City; adding, that it was a practice consistently applied by the City. According to HR Consultant Anderson, this practice continued even after the seven and 20-year steps were added and the Salary Plan language was not amended to reflect this.

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<sup>21</sup> City Exhibit No. 5(a) and Federation Exhibit No. 13. According to HR Manager Schmidt, the Salary Plan has not been updated to reflect the new seven and 20-year Steps negotiated in 2004; however, the discretionary authority still applies.

<sup>22</sup> City Exhibit No. 5(b).

Chief Harrington and HR Consultant Anderson testified that performance has been taken into account regardless of whether an Officer is being considered for a merit or longevity wage increase. Chief Harrington testified that all step increase forms [City Exhibit 8(j)] are only approved by the Assistant Chief if the Officer's performance warrants it.<sup>23</sup> If Chief Harrington does not approve a step increase, it will be delayed and reviewed again within 90-days when most step increases are then granted. HR Consultant Anderson testified that 100-150 step increase requests are processed each year with only one or two being delayed.

A document introduced through HR Manager Schmidt reflects that 20 employees in the Police Department have had longevity step increases delayed since 1997 where no grievance was filed.<sup>24</sup> Of these 10 were Officers while four others were non-officers who were members of other bargaining units. Four grievances were filed when Officers had their longevity step increase denied, which were settled by the City during grievance discussions. In settling the grievances neither party conceded that longevity steps were or were not tied to performance.<sup>25</sup> According to HR Manager Schmidt, the grievances were sustained when it was determined that the Officers in fact had no performance issues.

Federation President Titus testified that the Federation was not aware of all the longevity step increase delays in City Exhibit No. 14 since it does not get copies of the step increase denials forms [8(j)].<sup>26</sup> The Federation would only file a grievance after it

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<sup>23</sup> Although Chief Harrington does not personally sign off on the merit increase form when the Assistant Chief approves it, he does review this action. He only signs off when an increase is not to be approved.

<sup>24</sup> City Exhibit No. 14.

<sup>25</sup> City Exhibit Nos. 15(a), (b), and (c).

<sup>26</sup> It appears that the Federation was not furnished the "denials" because of Data Practice issues.

received a complaint from an Officer. During cross-examination, he did recall that he had discussed the City's salary step increase process after he became president with former Federation presidents, who were aware of the City delaying longevity increases because of performance issues.

During the 2004-2005 negotiations the parties agreed to eliminate the six-month and two-year steps from the Agreement. During these negotiations, the Federation proposed additional contract language that acknowledged the right of the City to delay step increases for Steps B and C due to performance issues; but reserved the right to grieve any delay in granting a longevity step increase because of performance issues.<sup>27</sup> The Federation also proposed to add the following language with respect to the longevity steps, "*the 7, 10, 15 and 20 year steps are longevity steps. An employee shall be paid at the applicable longevity step upon completing the requisite number of years of service with the City of St. Paul.*" This proposal was rejected by the City.

During the 2006 contract negotiations, the Federation proposed that "*longevity be automatic*", which was again rejected by the City.<sup>28</sup> During the negotiations for the 2007 Agreement, the Federation revived its proposal to make longevity pay automatic. It proposed the following language in a new section (Pay Upon Promotion), "*Subsequently to the initial placement upon promotion, an employee who, prior to the promotion, had completed the years of service necessary to be eligible for advancement to a "longevity step" shall be entitled to move to the next step which is warranted based on his/her years of service on each successive promotional anniversary date until he/she has attained the*

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<sup>27</sup> City Exhibit No. 10(a).

<sup>28</sup> City Exhibit No. 11(a).

*longevity step commensurate with his/her years of service.*<sup>29</sup> After this was rejected, the Federation did not revive similar proposals during contract negotiations for the 2008 or subsequent Agreements. Federation President Titus testified that the Federation was proactively attempting to put language into the contract to avoid issues similar to the one present herein during the negotiations in 2004 through 2007.

As stated earlier herein, the Grievant was able to enter employment at a higher rate than the Officers' starting rate pursuant to the negotiated MOA. The language in Paragraph 4 of the MOA states, "*Any candidate who starts employment beyond the entry level salary as per #3, must meet the minimum hours required and have satisfactory performance to receive further step advancements per the Civil Service Rules and Saint Paul Salary Plan and Rates of Compensation.*"<sup>30</sup>

Section 471.9981 (Counties and Cities Pay Equity Compliance) Subd. 5a. (Implementation Report) of the Minnesota Statute Chapter 471 (Pay Equity Act) requires that each State political subdivision report to the Commissioner of Labor every three years "*the minimum and maximum salary for each class, if salary ranges have been established, and the amount of time in employment required to qualify for the maximum*".<sup>31</sup> In its 2009 Report the City listed five years as the time period necessary for the Officer classification to reach maximum salary range (top pay) where Officers are then eligible for additional compensation in the form of longevity pay.<sup>32</sup>

An Administrative Rule is a general statement adopted by an agency to make the law it enforces or administers more specific or to govern the agency's organization or

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<sup>29</sup> City Exhibit No. 12(b).

<sup>30</sup> City Exhibit Nos. 4 (a) thru (d) and Federation Exhibit No. 14.

<sup>31</sup> Federation Exhibit No. 15.

<sup>32</sup> Federation Exhibit No. 18.

procedure. A State agency may adopt a rule only after the legislature has enacted a law granting this authority to the agency. An agency rule that is adopted under the rulemaking provisions of Minnesota Statutes, Chapter 14, has the force and effect of law. The Department of Management and Budget has adopted Rule 3920.0100 involving Local Government Pay Equity. Under Subp. 6 (Exceptional Service Pay), “*Exceptional service pay*” means longevity pay or performance pay, as defined in items A and B.” Item A defines “longevity pay” as, “*Longevity pay means payment above the salary range maximum to employees with specified years of service or seniority*”. Item B defines “performance pay” as, “*Performance pay means payment above the salary range maximum to employees who meet specified performance or production standards*”.

### **UNION POSITION**

The Union’s position is that the Employer violated the Agreement by failing to compensate the Grievant at the 7-year Longevity Step on the wage schedule beginning on the first payroll period following the Grievant’s seven-year anniversary. In support of this position, the Union argues that the plain language of the Agreement supports the Federation’s position. The Federation states that a fundamental principal of contract interpretation is that all terms must be given meaning.<sup>33</sup>

The Federation, contrary to the City, asserts that there is a difference between Steps A-C and the Longevity Steps (D-H).<sup>34</sup> The City argues that since there is no difference between a longevity step and the other steps in the pay schedule, it has the right to deny a longevity step based on the Officer’s performance even though the Agreement contains

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<sup>33</sup> Elkouri & Elkouri *How Arbitration Works*, pp.440-448 (Sixth Edition) (2003).

<sup>34</sup> While Step D is not labeled a longevity step, the Federation considers it such based upon the CSR and the City’s Pay Equity Act Reports.

no language assigning conditions which must be satisfied for an employee to be paid at the longevity steps above Step C.

While the Federation acknowledges that the Officers must satisfy multiple conditions (years of service and satisfactory service) for Steps A-C, the plain language of the Agreement establishes that there is something different and distinct with Steps E-H that are specifically titled “Longevity Steps” in the Agreement. As the steps indicate, the only requirement is longevity.<sup>35</sup>

The City’s Pay Equity Reports also draw a distinction between wages and longevity. The Minnesota Rules established under the Pay Equity Act define “wages” and “longevity” as separate and distinct components of compensation. “Longevity” is defined by the Rules as a payment to “*employees with specific years of service*”. Years of service is the only criterion for longevity pay and contrary to the City’s assertions pay for performance is a separate form of Exceptional Service Pay under the Pay Equity Act and therefore cannot be considered a part of longevity pay.

By reporting that Officers reach their maximum salary in five years, the City has represented to the State that Steps A-D of the wage schedule are wage steps; and by reporting that Officers receive longevity pay, the City has represented that the seven through 20 year Steps (E-H) are longevity pay steps. Since the City uses the terms “wages” and “longevity pay” consistent with the Pay Equity Act compliance report, it cannot use a different interpretation of those same terms in how it actually compensates the Officers.

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<sup>35</sup> Although not labeled a Longevity Step in the Schedule, it is the Federation’s position that the 5-year step(Step D) is a longevity step

The City's argument that longevity pay is a subset of merit pay is contrary to industrial practice where it is a practice to base longevity pay solely on length of service.<sup>36</sup> It is also the common usage definition in Webster's New World Dictionary Second College Edition where "merit" is defined as *"(1) to deserve, earn; (2) a reward or honor given for superior qualities or conduct"* and "longevity" is defined as *"length of time spent in service, employment"*.<sup>37</sup>

The Federation also argues that the only two City policies that are applicable to the Agreement language in question are the Civil Service (CSR) and Salary Plan, neither of which provides a basis to deny an Officer who has completed seven years of service to be paid at the 7-year Longevity Step in the Agreement. Under CSR 2, the 7-year Longevity Step in the wage schedule is clearly and unequivocally a longevity step. The only other germane civil service rule is CSR Rule 15, entitled "Performance Appraisal", which provides when they must be done, the process to follow and the consequences.<sup>38</sup> Nothing in Rule 15 ties performance to longevity or even represents any wage step advancement. Thus, there is nothing in the CSR to even suggest that performance may be used as a basis to deny an Officer compensation at the 7-year Step when the Officer reaches his/her seventh anniversary of employment with the City.

The City's Salary Plan, which was not negotiated with the Federation, also contains no language regarding any reference to the seven and 20-year longevity steps of compensation for Officers or any criteria by which an Officer may be compensated at those steps. In fact, it does not even identify the classification of Officer. It is clear that

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<sup>36</sup> The Federation cites the contract between the City of Minneapolis and the Minneapolis Police Federation (Federation Exhibit No. 19) and the definition of longevity in the Kansas State University compensation for Classified Employees Policy Manual (Federation Exhibit No. 20).

<sup>37</sup> Federation Exhibit No. 21.

the language in Section E of the Plan entitled “Advancement in Salary” is not applicable nor followed by the City for Officers. Moreover, the City’s use of the word “*may*” in Section E of the Salary Plan was not intended to be a grant of discretion to deny Officers negotiated longevity step increases contained in the Agreement. Thus, as in the CSR, there is nothing in the Salary Plan to even suggest that performance may be used as a basis to deny an Officer compensation at the 7-year Step when the Officer reaches his/her seventh anniversary of employment with the City.

The Federation further argues that the City Charter cannot and does not preclude longevity pay. While Section 12.01(D) of the Charter does state that personnel practices shall be implemented consistent with the principle of “*compensation, retention, advancement and separation of employees on the basis of job performance and productivity*”, this general statement of policy does not confer on the Employer an unfettered right to compensate employees however it wants. Even if the longevity pay provisions of the Agreement were contrary to the meaning of Section 12.01 D of the Charter, the Agreement would take precedence over the language in the Charter.

Moreover, Section 12.01 F of the Charter requires, “*Protection of employees from arbitrary action, personal favoritism, political coercion or discrimination.*” The City’s interpretation that it can unilaterally deny negotiated longevity step advances is arbitrary action that would violate Section 21.01(F).

The Federation also argues that it does not agree with the City’s interpretation that the MOA allows it to tie longevity pay with pay for performance. The MOA has no bearing on this case. In fact, the City’s use of the MOA is contrary to the expressed terms of the

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<sup>38</sup> Federation Exhibit No. 11, p.6.

MOA. Paragraph 11 of the MOA contained in City Exhibit No. 4 states, “*The parties agree that this MOA shall in no manner establish a precedent regarding the interpretation and/or application of the terms of the labor contract, Civil Service Rules, or other legislation governing the transfer and hiring of employees*”.

The Federation further argues that there is no binding past practice that ties longevity pay step advancement to performance. The rules of arbitration as set forth in *Elkouri & Elkouri* (page 608) states that in order for a past practice to be binding, it must be “(1) *unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice as accepted by both Parties*”. The evidence adduced at the hearing through the testimony of Federation President Titus, HR Director Nalezny and HR Manager Schmidt demonstrated that there is not a clearly annunciated past practice for considering or reconsidering step movement to and through the longevity steps.

More importantly, there is no evidence that the Federation has ever accepted this alleged past practice; rather when it obtained knowledge that Officers were denied longevity step advancement, the Federation filed grievances. Indeed, if there had been a clearly articulated practice or an agreement between the parties on this practice, there would have been no need for the Federation to propose language to resolve an on-going dispute over the issue or to grieve the issue four times since 2007.

Federation President Titus disclosed at the hearing that the Federation proposed language in the 2004-2005, 2006 and 2007 negotiations to demonstrate that there was no nexus between longevity step advancement and performance in order to codify the wage

schedule in order to avoid grievances.<sup>39</sup> The City submitted Exhibit No. 9 citing page 454 of *Elkouri & Elkouri* to support its position that the Federation was attempting to “*obtain through arbitration what it could not achieve through negotiations*”. The Federation argues that it is common to propose language during negotiations to avoid disputes in contract interpretation. While the Federation agrees with the City that “[I]t is fundamental that it is not for the Labor Arbitrator to grant a party that which it could not obtain in bargaining”, a caveat follows.<sup>40</sup> This caveat states, “[T]his restriction, however, has its limitations. If, in fact, the parties were in dispute, on the proper interpretation of a contract clause and one of them unsuccessfully sought in collective bargaining to obtain clarification, it would not necessarily follow that the interpretation sought by the unsuccessful party was wrong”<sup>41</sup>.

Finally, the Federation argues that the City’s ability to deny longevity pay is not an essential to correcting the performance of long-term Officers. The City’s argument is undermined by its own documents. The November 1, 2008 memorandum from Sgt. Porter to Commander Casper outlined a series of actions to be taken by the Grievant to improve his performance. These actions included oral discipline; referral to EAP; change of assignment; and placement on a performance improvement plan, but did not include the withholding of the Grievant’s 7-year Longevity Step. A performance management tool cannot legitimately be deemed “critical” if it is not even considered by management in addressing performance problems that had been on-going for more than a year and a half.

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<sup>39</sup> This was the Federation’s position at the hearing. There was no evidence proffered that this position was made known to the City during negotiations.

<sup>40</sup> *Elkouri & Elkouri*, p. 454.

<sup>41</sup> *Id.*

Even if the denial of a longevity step was a tool to improve his performance, the same financial sanction could have been attained by suspending him for three days, something that could have been grieved under the disciplinary provisions of the Agreement. Clearly, the longevity step increase denial was punitive since it was assessed after he had transferred to the Crime Lab. Moreover this punitive action could not be grieved under the Agreement's disciplinary provisions because it was not a recognized form of discipline in that provision. In fact, the denial of the Grievant's longevity step increase amounted to double jeopardy since it was not listed as an action that was summarized in Sergeant Potter's memorandum to Commander Casper.

### **CITY POSITION**

It is the City's position that it did not violate the Agreement when it delayed the Grievant's 7-year Longevity Step increase. The delay of the Grievant's 7-year Longevity Step increase was consistent with the MOA and past practice. The Wage Schedule in Article 23 lists the step increases but makes no mention on how an Officer moves through the various steps of the schedule. The Federation argues that because the 7-year step of the Wage Schedule is defined as a longevity step in the City's Civil Service Rules, the Arbitrator should fall back on default rules and use laws, dictionary definitions or industry language to fill in the gaps and come up with a new process for granting employees' step increases. This Federation argument of creating a new step progression process is outrageous when the clear language of the MOA, established past practice and bargaining history supports the City's action in granting step increases based upon satisfactory performance.

The City argues that the MOA, which is an amendment to the Agreement that has the full force and effect of the Agreement, is clear and relevant proof to support its position. Paragraph 4 of the MOA states, “*Any candidate who starts employment beyond the entry level salary as per #3, must meet the minimum hours required and have satisfactory performance to receive further step advancements per the Civil Service Rules and Saint Paul Salary Plan and Rates of Compensation*”. Nothing in the MOA limits the right of the City to consider an Officer’s performance in granting step increases. The plain meaning of the MOA indicates that all employees, including the Grievant, who enter the Police Department as lateral hires are subject to performance review prior to being granted any salary step increase including those involving the longevity steps.

The Federation argues that while the second sentence of Paragraph 4 mentions longevity, the first sentence must be read only to apply to how employees proceed through the second and third steps of the wage schedule, which the Union claims are merit steps, even though merit is never mentioned in the MOA. However, Paragraph 4 clearly applies to employees on all steps, including longevity, based on the reference in Paragraph 3 to employees at the five-year step—a longevity step. Paragraphs 3 and 4 must be read together and meaning must be given to both. The first sentence of Paragraph 4 applies to longevity steps; making it necessary for employees to have satisfactory performance in addition to the minimum hours required to receive further step advancements.

Because Paragraph 3 of the MOA includes the five-year step of the Wage Schedule, a longevity step, as defined by the City’s CSR, it is clear that the City has the right to delay step increases for all steps. This fits the established practice and the testimony of HR

Director Nalezny, Chief Harrington and HR Consultant Anderson. And it makes sense that the City would want to confirm its right to consider performance especially with an unknown transfer employee. The second sentence of Paragraph 4 reinforces the City's position that Officers must serve the requisite number of years in the Police Department prior to becoming eligible for longevity step increases. Thus, the language of the MOA could not be any clearer. When an MOA with plain, clear language exists, it is not necessary for the Arbitrator to look at external sources for guidance in contract interpretation.

It then follows that the delay in the Grievant's 7-year Longevity Sep increase was consistent with the language of Paragraph 4. It is undisputed that the Grievant admittedly had performance problems. To grant a salary increase to an Officer who had a poor performance record would violate the MOA.

The City additionally argues that past practice also supports its position. The evidence through the testimony of HR Manager Schmidt, HR Director Nalezny, Chief Harrington and HR Consultant Anderson clearly demonstrates that pay for performance has always been uniformly and consistently taken into consideration whether the increase was for merit or longevity. Since 1997, 20 employees in the Police Department, 14 of who were in the Officer bargaining unit, had their longevity step increases delayed. There were three bargaining unit members who also had their longevity increases delayed but were restored after a grievance was filed and the City's investigation determined that they did not have a performance problem.<sup>42</sup>

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<sup>42</sup> The Federation maintains this number was four.

The City has been basing salary increases on hours worked and performance without any objection until Federation President Titus assumed his office. To grant a salary increase to an Officer who had a poor performance record would contradict the established past practice used for all City employees over the past 25 years.

The Federation claims no knowledge that merit increases were tied to performance prior to initiating its grievances after Federation President Titus assumed office. However, Sergeants and Commanders, who are all members of the bargaining unit, were actively involved in processing merit Increases throughout this period. They never differentiated between merit and longevity when approving merit increases. It would be impossible for the Federation to claim no knowledge when its members were actively involved in this process. Further, while Federation President Titus initially testified that he was never made aware of any longevity step denials because of performance, HR Manager Schmidt testified that on at least one occasion he was included in an e-mail regarding the delay involving Officer M; and it was never grieved by the Federation. Also, Federation President Titus admitted during cross-examination that he discussed the City's wage increase step process in which there were delays because of performance issues with former Federation presidents when he became president.

The City also argues that the Federation has repeatedly sought in negotiations to separate longevity from performance without success. Nowhere in its proposals did the Federation refer to its provisions as a clarification or codification of the Wage Schedule. It is apparent that the Federation is using the grievance procedure to change the Agreement.

Paragraph 4 of the MOA also requires that step increases be “*per the Civil Service Rules and Saint Paul Salary Plan and Rates of Compensation.*” Section 2 of the CSR states, “*These rules have been written for the purpose of giving direction and uniformity to the merit system*”; and, “*Longevity includes the five-year step and all steps thereafter.*” The Salary Plan explicitly states that the City “*may*” grant longevity increases, which according to the testimony of HR Manager Schmidt indicates discretion, and no salary step increase is automatic; rather, it is tied to performance. He further testified that this principle is applied to all bargaining units in the City.

The City argues further that Human Resources Director Angie Nalezny testified that all personnel policies must be consistent with the City Charter, as it is the governing document for the City. The City Charter is not a guideline for City policy; it is a mandate. All personnel policies pertinent to compensation, retention, advancement and separation of employees must be consistent with the City Charter. Because the City Charter requires all personnel decisions regarding compensation to be based on performance and productivity, it would be completely contrary to the City Charter for an employee to be given a raise simply based on the fact that he is an employee of the City. As such, an award granting an automatic raise to employees, in contrast with the City Charter, would be a violation of Minnesota law.

The City also argues that this Arbitrator’s authority is limited by the Agreement and Minnesota and U. S. Supreme Court law that confines arbitrators to the interpretation and application of the collective bargaining agreement and he/she cannot dispense his/her own brand of industrial justice. An award is only legitimate if it draws its essence from the agreement. If this Arbitrator would grant the Federation’s request to automatically grant

Officer's longevity steps solely on reaching anniversary dates, he would be adding to the Agreement, which he is prohibited from doing. The City has never automatically granted wage increases to any employees; nor has it ever been a past practice; nor is it contained in the explicit terms of the Agreement.

The City argues further that the Federation is erroneously interpreting the provisions of the Pay Equity Act and the City's Pay Equity Report by concluding that because the City included longevity increases in its Pay Equity Report, the definition for longevity pay as provided by the administrative rules for the Act should apply to the City's longevity steps for all purposes. The Federation's interpretation is flawed since the language of the definition does nothing to limit the City's ability to consider performance in determining whether an employee is eligible for a longevity salary step increase. With respect to this, HR Director Nalezny testified that there is nothing in the statute or administrative rules requiring longevity pay to be automatic. The definition in the administrative rules serves not as a mandate for all collective bargaining agreements throughout the State, but as a guide for those responsible for reporting data.

The Federation asserts that the Salary Plan does not apply to Officers, and the City may not use its discretion in approving or delaying salary step increases. The City agrees that the term "Officer" is not included in the Salary Plan, and the years in the Agreement's Wage Schedule do not directly correspond to the Advancement in Salary section of the Salary Plan. Also the City admits that the Salary Plan has not been updated after the 2004 changes to the Wage Schedule where the 7-year and 20-year steps were added to the Agreement. However, the City in no way concedes that this discrepancy means that

the Salary Plan and the City's discretion regarding salary step increases do not apply to Federation members.

When the new Wage Schedule was created, nothing in the Agreement changed except the number of years for which Officers would be eligible for various step pay increases; nor did the addition of the new longevity steps change the past practice of tying step wage increases to performance. Further, while the Salary Plan gives the City the power to use its discretion in approving and delaying salary step increases, the practice of approving and delaying such increases also exists independently of the Salary Plan.

The most obvious way to demonstrate that the Salary Plan still applies to the parties is by examining the parties' actions since the change in Salary Steps took place in 2004. Except for four documented incidents, including the current dispute, the Union has acquiesced to the City's practice of approving and denying salary step increases based on performance over the past five years.

In support of its position, the Federation argues that this Arbitrator should look to the dictionary to provide a definition for longevity, a definition that it used in its bargaining proposals. However, the parties' bargaining history demonstrates that the City has refused to accept the dictionary definition of "longevity". The City has its own definition of longevity step and it does not include automatic approval. The City has maintained its current practice of approving and delaying salary step increases based on performance. For the Union to argue that the Arbitrator should now "fill in the gaps" with language that was outright rejected by the City during negotiations disregards the bargaining history of the parties and is inconsistent with arbitral jurisprudence.

Although, the Federation initially agreed at the beginning of the hearing that the delay of the Grievant's longevity step increase was not discipline, it later advocated this argument. The City has never used the delay of a merit salary step increase as discipline in response to individual instances of misconduct. The delay of salary steps is an instrument used by the City to motivate employees after long periods of less-than-satisfactory performance.

Finally, the Federation cites industry practice to support its position and cites examples in its evidence book proffered at the hearing.<sup>43</sup> However, the specific language in the examples cited by the Federation remove any nexus between longevity and pay for performance. Thus, it is clear that those parties specifically agreed that employees would receive longevity salary step increases without any performance considerations.

### **OPINION**

The issue before the undersigned Arbitrator is whether the City violated the Agreement when it initially withheld the Grievant's 7-year Longevity Step increase on the seventh anniversary of his employment. The Federation argues that the clear language of the Agreement compels the City to grant a 7-year Longevity Step increase effective the first payroll period after the Grievant's seventh anniversary of his employment irrespective of his performance. In addition, the Federation argues that the MOA, CSR, Salary Plan and City Charter do not hold otherwise; nor is there a past practice that supports the City's "action".

The City argues that the Agreement does not preclude its "withholding action" since there is no language in the Wage Schedule in the Agreement that spells out the

movement from one step to another, or prohibits granting wage increases based on performance factors. It also argues that the MOA, CSR, Salary Plan and City Charter grant it authority to use discretion in granting wage increases including those in the Longevity Steps. The City further argues that there is a longstanding past practice that supports its “action”.

The Federation bears the burden of proof in this contract interpretation dispute. The City is correct that my authority as an arbitrator is limited by specific language in the Agreement. Article 6 Section 5(A) limits my power “*to interpret and apply the express written provisions of the Agreement. The arbitrator shall have no right to amend, modify, nullify, ignore, add to or subtract from the terms and conditions of the Agreement.*” Section 6.5(B) further states, “*The arbitrator shall be without power to make decisions contrary to or inconsistent with or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law.*” This language does not, however, preclude me from going outside the literal language of the Agreement and considering past practice. There are, however, limitations to the role that past practice plays in contract interpretation. It is common for arbitrators to consider past practice along with bargaining history where the contract provision in dispute is subject to more than one meaning.<sup>44</sup> The Courts have also sanctioned the arbitrator’s reliance on past practice to interpret “ambiguous” contract provisions.<sup>45</sup>

The parties have negotiated successive labor agreements that have included specific longevity wage step increases. The Agreement involved herein contains eight wage step

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<sup>43</sup> The Federation proffered contracts involving the City of Minneapolis and Kansas State University. Federation Exhibit Nos. 19 and 20.

<sup>44</sup> Elkouri & Elkouri, p.434.

<sup>45</sup> Fairview Southdale Hospital v. Minnesota Nurses Association, 943 F.2d 1809 (1991)

increases in the Wage Schedule with five (E-H) specifically labeled as Longevity Step increases. The Federation concedes that wage increases due on the first and third anniversary of employment (Steps B&C) are not automatic and can be tied to performance even though not specifically stated in the Wage Schedule. It is clear that Officers are eligible for wage increases on their 7, 10, 15 and 20-year anniversaries of employment (Steps E-H). However, it is not clear whether those longevity increases are automatic as the Federation argues, or are subject to employment conditions, as the City argues. The Federation would also argue that the five year step (Step D) is also a longevity step even though it is not labeled as such in the Wage Schedule.

The MOA, which was negotiated as an addendum to the Agreement to cover terms and conditions of employment for Officers who are hired laterally, states, “*Any candidate who starts employment beyond the entry level salary as per #3, must meet the minimum hours required and have satisfactory performance to receive further step advancements per the Civil Service Rules and Saint Paul Salary Plan and Rates of Compensation.*” [Emphasis added] This provision clearly and unambiguously establishes wage increase movement based upon both performance and longevity. The Federation argues that Paragraph 4 has no meaning because it conflicts with the Wage Schedule; and, therefore, is rendered inoperative because of the “savings” language in Paragraph 11 of the MOA. I disagree that there is a conflict; rather, the “plain language” of Paragraph 4 clearly establishes that the parties intended longevity wage increases to be tied to performance for Officers entering employment laterally in accordance with the City’s CSR and Salary Plan.

The CSR in its “Introduction” language established a compensation system based on “merit” as follows, “*The following rules, approved by the Civil Service Commission and the City Council in accordance with the City Charter, shall govern employment by the City of Saint Paul.*” Further, “*These rules have been written for the purpose of giving direction and uniformity to the merit system and for attaining the objectives listed below for the City of Saint Paul.*” The merit system was established by City Charter. Section 12.01 of the City Charter states, “*A merit system shall be permanently established for positions in the City of Saint Paul.*” Further, “*All personnel practices shall be implemented consistent with the following principles: (D) Compensation, retention, advancement and separation of employees on the basis of job performance and productivity.*”

The Salary plan gives the City discretion in granting step increases based upon merit through the term “*may*” in Section 1 (E) which states, “*Except as provided in Section 28.B of the Civil Service Rules and except as hereinafter provided, increases in salary above Step A in a classification assigned to a grade may be granted to regular and provisional employees as follows:...*”<sup>46</sup>

Thus, it is clear that the language in Paragraph 4 of the MOA ties wage increases based on performance with longevity for all Officers, including the Grievant who entered employment through lateral hiring.<sup>47</sup> Even in the absence of the MOA, the City would still prevail in its position since the Wage Schedule is ambiguous on how an Officer moves through the various step increases. In the absence of clear and unambiguous language, it is common for arbitrators to consider past practice along with bargaining history and

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<sup>46</sup> The language that follows spells out the number of hours required to move through various wage progression steps for City employees.

<sup>47</sup> Rewarding employees whose performance is admittedly deficient is also an affront to sound employment practices.

other relevant factors such as industry practice. Before this examination, the other factors need to be addressed.

How the City's Pay Equity Report reported longevity has no bearing in this matter on what contractual longevity entails. It is how the parties have identified longevity in the Agreement that is dispositive herein and not how the City reports longevity to the State. The Agreement clearly identifies what the parties have agreed constitutes the Longevity Steps, and they are so identified as such in Steps E-H of the Wage Schedule. The same holds true for the dictionary term for "longevity". As for the Federation's industry practice argument, it appears that the parties in the Minneapolis Police and Kansas State University situations specifically separated pay for performance from longevity in their respective contracts.

The City presented overwhelming evidence of a 25-year past practice of tying wage step increases, including those involving longevity steps, to performance through the testimony of Director Nalezny, Manager Schmidt, Consultant Anderson and Chief Harrington. There was also uncontroverted evidence through the testimony of Manager Schmidt, albeit limited, that pay for performance is considered with all represented bargaining units and with all unrepresented employees in the consideration in granting step increases including those for longevity. Based on the evidence, including the testimony of Federation President Titus, it appears that the Federation was familiar with the past practice of the City tying performance with all types of step increases.

The history of bargaining also supports the City's position. The Federation unsuccessfully tried to remove any nexus between longevity and performance in its bargaining proposals during the 2004 through 2008 negotiation sessions for successor

agreements. Although the Federation now claims that it was merely trying to clarify or codify a separation between the two factors, it presented no evidence that it informed the City that this was their objective during the aforementioned negotiations. Absent this, I can only assume that the Federation is now attempting to gain through arbitration what it could not secure through contract negotiations.<sup>48</sup>

Although this decision will be limited solely to the situation involving the Grievant, it appears unlikely that I would have reached a different conclusion had the grievant not be a lateral hire.

In view of the foregoing, I conclude that the Federation has failed to establish its burden of proof that the City violated the Agreement when it initially withheld the 7-year Longevity Step increase of the Grievant. I will, therefore, dismiss the grievance in its entirety.

### **AWARD**

IT IS HEREBY ORDERED that the grievance be and hereby is dismissed in its entirety.

**Dated: April 26, 2010**

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**Richard R. Anderson, Arbitrator**

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<sup>48</sup> See Elkouri & Elkouri, pgs, 454-456.