
In re the Arbitration between:

The City of Minneapolis, Minnesota,

Employer,

and

**GRIEVANCE ARBITRATION
OPINION AND AWARD**

The Police Officer Federation of
Minneapolis, Minnesota,

Union.

Pursuant to **Article 5** of the collective bargaining agreement effective October 15, 2005 through October 14, 2008, the parties have brought the above captioned matter to arbitration.

James A. Lundberg was appointed by the parties as the neutral arbitrator to hear the above matter and issue a final and binding decision.

Grievance **No. 09-05** and grievance **No. 09-06** were brought by Lieutenant Robert Skoro and by Lieutenant Kevin Stoll respectively on February 2, 2009.

A hearing was conducted on April 16, 2011 and April 20, 2011.

Post Hearing Briefs were submitted on June 10, 2011 and the hearing was closed upon receipt of briefs.

APPEARANCES:

FOR THE EMPLOYER

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FOR THE UNON

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ISSUES:

1. *Whether grievance 09-05 and grievance 09-06 are arbitrable?*
2. *If grievance 09-05 is arbitrable, was Lieutenant Robert Skoro working out of class as a Captain in violation of Article 30, Section 30.3 of the parties' 2005-2008 labor agreement?*
3. *If grievance 09-06 is arbitrable, was Lieutenant Kevin Stoll working out of class as a Captain in violation of Article 30, Section 30.3 of the parties' 2005-2008 labor agreement?*

WHETHER GRIEVANCES No. 09-05 and 09-06 ARE ARBITRABLE:

In a decision dated November 20, 2009 Arbitrator Jay Fogelberg determined that working out of job classification grievances **No. 07-29** and **No. 07-30** brought in 2007 on behalf of Lieutenant Clark and Lieutenant Stoll¹ were not arbitrable. In his review of relevant language found in the collective bargaining agreement effective October 15, 2005 through October 14, 2008, Arbitrator Fogelberg found that it is “the affected employee that drives the grievance process.” “An employee within the time limit called for in the third paragraph [20 days] is the one who is to ‘initiate’ the non disciplinary complaint.”

Arbitrator Fogelberg determined “Each of them [the three complaints] fell outside of the negotiated twenty calendar day parameter. Consequently, the grievances were untimely and not subject to the grievance procedure.

Arbitrator Fogelberg did not resolve the three out of job classification grievances “on the merits”. In fact, he acknowledged:

¹ A third similar grievance was brought by Lieutenant Hayhoe.

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

On November 23, 2008 Lieutenant Kevin Stoll was assigned to command the Emergency Services Unit (ESU) of the Minneapolis Police Department. Lieutenant Stoll was in command of the Police Department's Special Operations Unit (SOU), when working out of job classification grievances **Nos. 07-29** and **07-30** were determined to be untimely by Arbitrator Fogelberg. The Emergency Services Unit was commanded by Lieutenant Clark when the working out of job classification grievances **Nos. 07-29** and **07-30** were found by Arbitrator Fogelberg to be untimely. Grievance **Nos. 07-29** and **07-30** filed by Lieutenant Stoll and Lieutenant Clark raise the same issues as grievances **No. 09-05** and **No. 09-06** and involve the same Unit command positions. However, Lieutenant Stoll's grievance dated February 2, 2009 is a "new grievance", since he is claiming that while commanding the Emergency Services Unit, he has been working out of job classification as a Captain. The merits of previous grievances involving Lieutenant Stoll and involving the Emergency Services Unit were not addressed by Arbitrator Fogelberg.

On November 23, 2008 Lieutenant Robert Skoro was assigned to command the Special Operations Unit (SOU) of the Minneapolis Police Department. Although Arbitrator Fogelberg previously determined that Lieutenant Stoll's claim that he was working out of job classification, as a Captain, while he commanded the Special Operations Unit was not timely, Lieutenant Skoro's grievance is a "new grievance" because the questions relating to command of the Special Operations Unit were not

addressed by Arbitrator Fogelberg and Lieutenant Skoro's February 2, 2009 grievance relates specifically to his command assignment.

Some of the facts upon which the Union bases the claims made in grievance **Nos. 09-05** and **09-06** are the same as facts presented in grievance **Nos. 07-29** and **07-30**. However, the grievances are brought by new commanders of command positions that were previously challenged. The previous challenge was resolved on the basis of timeliness, not on the merits of the claims.

Lieutenant Jensen, the Secretary of the Police Officers Federation of Minneapolis, testified that the City and Union were in negotiations at the time that the grievants were assigned their new commands. Lieutenant Jensen further testified that during negotiations the City and the Union entered into a written memo of understanding wherein they agreed that they would try to resolve new grievances while negotiating over the new contract and no new grievances would be filed. Lieutenant Jensen explained that grievance **Nos. 09-05** and **09-06** were not filed until February 2, 2009, when it was clear that they would not be resolved during negotiations. The Union contends that the grievances were filed in a timely manner that was consistent with the parties' agreement. The agreement between the parties created a temporary waiver of the twenty day rule.

The Employer does not dispute the existence of the agreement referenced by Lieutenant Jensen. The Employer does not dispute the claim that the agreement created a temporary waiver of the twenty day time limit. However, the Employer argues that grievance **No. 09-05** and grievance **09-06** are not "new grievances" that fall within the meaning of the agreement.

The agreement between the parties was not entered into the hearing record but no testimony or documentation was submitted to rebut Lieutenant Jensen's testimony. Consequently, the preponderance of the evidence supports the Union's position that the filing of grievances **No. 09-05** and **No. 09-06** were delayed due to the memorandum of agreement between the parties and consistent with the terms of the memorandum of agreement. Therefore, grievances **No. 09-05** and **No. 09-06** were filed in a timely fashion and are arbitrable.

RELEVANT CONTRACT LANGUAGE AND CIVIL SERVICE PROVISIONS:

ARTICLE 3 – Management Rights

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

ARTICLE 30 – Incorporation of Civil Service Rules

Section 30.2 – Job Classifications.

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

Lieutenant – Commands and supervises major areas of programs as defined by the Chief, enforces compliance with departmental policies, procedures and goals.

Supervisor as defined by Minnesota Statute 179A.03, subd. 17.

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

Section 20.3 – Working Out of Class.

- a. General Rule. Generally, employees are considered as working within the correct class if at least sixty percent of their assigned duties are those commonly attributed to that class. If it is found that for a period of five consecutive scheduled work days or more an employee spends more than forty percent of the time performing assigned duties and responsibilities that are normally those of a different class than that to which the employee was certified, the duties assigned to that employee shall be reassigned to an employee in the correct classification and the employee who was working out of class shall receive compensation for the out of class work as if the employee had been properly detailed to the position in accordance with Section 1.4. In all cases the period of compensation shall run from the first work day on which he/she assumed the out of class duties to the day on which such out of class duties were reassigned.

From the Civil Service Rules:

Rule 4 – Job Classification

4.04 – Reclassification Guidelines

Generally, employees are considered as working within the correct class if at least sixty percent of their permanently assigned duties are those commonly attributed to that class. If it is found through reclassification study that an employee spends

more than forty percent of the time performing permanently assigned duties and responsibilities that are normally those of a different class than that to which the current employee was certified, the Human Resources Department will inform the department head that the person is working out of classification and the position should be reviewed and reorganized so that sixty percent of working time is spent in the employee's status class....

4.09 Responsibilities of City Departments

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

SUMMARY OF UNION'S POSITION:

The command positions of both Lieutenant Stoll and Lieutenant Skoro cover a broad range of police functions for the City of Minneapolis. Both commands are demanding and both Lieutenants are responsible for a relatively large number of Sergeants and Patrol Officers. Unlike most positions commanded by Lieutenants in Minneapolis, the Emergency Services Unit and the Special Operations Unit do not have a singular focus.

The Emergency Services Unit is comprised of 40 full time employees together with officers who volunteer for SWAT duty and is organized as follows:

1. **Bomb/Arson**, which contains three Sergeants and four Officers, who respond to bomb threats, suspicious packages and investigate possible incidents of arson.

2. **SOD Patrol**, which is designed to respond to crime trends by assisting and supplementing precinct patrols.
3. **SWAT**, which responds to serious incidents involving situations such as the taking of a hostage. High risk warrants are also served by members of the SWAT team.

The Union contends that Emergency Services is comprised of the same elements that constituted the Tactical Services Division in the 1990s.

The Special Operations Unit commanded by Lieutenant Skoro is comprised of fifty (50) department employees in the following:

1. **Traffic Unit**, which serves the entire City 24 hours per day, seven days per week on two shifts. The Traffic Unit does accident reconstruction, traffic law enforcement and hit and run investigations. In the past, Traffic was a Division.
2. **Public Housing Unit**, which has one Sergeant and six Officers who handle housing issues, work on crime prevention, resident education, addresses problem tenant situations, investigates narcotics trafficking and performs undercover and patrol work.
3. **Police Athletic League** consists of several hundred volunteer officers who coach youth sports in the community, take children on camping trips and engage in other activities with youth. The PAL also includes the police explorer unit, which works with young people who are interested in becoming police officers. The SOU commander is responsible for coordinating PAL and making sure that officers get paid for their time.

4. **Special Operations Center** is converted office space rented from the Minneapolis Public Schools that contains City inspections, the Training unit, SOD Patrol and lead management for SOD. The SOD commander meets with City personnel, is responsible for maintaining the office space, meets with contractors and employees of the public school system, coordinates contractor schedules to arrange replacement of air conditioning and deals with OSHA.
5. **Canine Unit** contains two Sergeants and Officers. Canine is a City wide patrol that responds to various crimes including burglaries.²

The Union's argument has four main elements. First, the commands of both the Emergency Services Unit and the Special Operations Unit include Units that were previously defined as Divisions and commanded by Captains. Second, both Units are larger than most Divisions within the Police Department. Third, Lieutenants typically supervise one Unit and both Emergency Services and Special Operations are composed of multiple Units, as are Divisions. Finally, both grievants testified that they reviewed the job description of Captain and believed that they performed all of the job duties 100% of the time.

SUMMARY OF EMPLOYER'S POSITION:

The City argument focuses primarily on the analysis that must be performed in order to determine how a position is classified. The job evaluation and classification system adopted by Minneapolis Civil Service evaluates jobs using six factors. The six factors are given a designated weight and the overall weight is used in the job evaluation. A job review requires surveys, interviews and observations before an accurate evaluation is completed. The job evaluation system is not driven by workload or by the

² Canine was previously part of the Emergency Services Unit.

accomplishment of personnel. It is based upon a multiple factor review of duties, responsibilities and the complexity of the job.

The six factors used to evaluate a job classification are:

1. Pre-requisite job knowledge,
2. Decisions and actions,
3. Supervisory responsibility,
4. Relationships responsibility,
5. Working conditions and
6. Effort.

The City called upon Ms. Betty Stanifer, HR Senior Consultant with more than 17 years of experience. She listened to the testimony of witnesses at hearing and offered the opinion that the Lieutenants were not performing the duties of Captains.

The Union failed to prove that the grievants met all of the conditions found at **Article 30, Section 30.3**. The contract requires that all of the following conditions be met before a determination of working out of job classification can be made:

If it is found that for a period of five consecutive scheduled days or more an employee spends more than forty percent of the time performing assigned duties and responsibilities that are normally those of a different class than that to which the employee was certified...³

The Union did not establish with any specificity when the grievants were performing specific duties that are normally those of the Captain job class. The testimony of both grievants was that for 100% of the time they did all of the work of a Captain.

³ Emphasis added.

Rather than addressing the contractual requirements, the Union argued that the Emergency Services Unit and Special Operations Unit are “in reality” Divisions. The claim that grievants spend 100% of their time working as Captains follows from the assertion that Captains command Divisions and Lieutenants command single Units. The collective bargaining agreement does not define either Division or Unit. The collective bargaining agreement contains no requirement that one Lieutenant be assigned to oversee one function or Unit.

There is no evidence of any vacant positions in the rank of Captain during the time grievants claim they were working out of classification nor is there any evidence that the grievant’s Captains have failed to perform their duties. Hence, all work at the level of Captain was being performed, during the period covered by the grievances. There are areas where the work of a Captain and the work of a Lieutenant overlap but overlapping duties are normal in an organization like the Minneapolis Police Department.

The City has exercised its managerial right to organize the Police Department by creating the current structure. According to Rob Allen, Deputy Chief of the Patrol Bureau, the current structure distinguishes Captains from Lieutenants by ranks supervised, participation in Disciplinary Panels, in creating budgets and the complexity of tasks. There is no question that the work load of the grievants is considerable. However, the nature of the work performed by the grievants is comparable to the work being performed by other Lieutenants and distinguishable from the work being performed by Captains.

Finally, the authority that the two grievants may exercise is limited to the same scope of authority that other Lieutenants within the Police Department may exercise. The

Lieutenants do not have final authority to select personnel and their decisions in many areas can be over ruled by their Captains.

The City asks that the grievance be denied.

OPINION:

The Union did not establish by a preponderance of the evidence that Lieutenant Stoll and Lieutenant Skoro have been working out of classification as Captains of the Emergency Services Unit and the Special Operations Unit. The position taken by the Union primarily addressed the substantial work loads of Lieutenant Stoll and Lieutenant Skoro but did not identify with specificity particular duties and responsibilities of Captain performed by the grievants during specific time periods. The Union must demonstrate with specificity that the elements found in the collective bargaining agreement at Article 30.3 have been met.

The proof in this case must necessarily track with **Civil Service Rule 4** “Job Classification” **Section 4.04** which calls for a “reclassification study” to determine whether an employee is working out of classification. It is not enough to demonstrate that a Lieutenant is currently commanding a work group that is larger than some Divisions or that the work group being commanded is made up of a number of Units, one of which previously appeared on the organizational chart as a Division. A Lieutenant who claims that he is working 100% out of classification as a Captain, when not filling a vacant Captain position, must demonstrate that his assigned command requires reclassification under the established classification criteria.

The City of Minneapolis has adopted a classification system, which was discussed by Ms. Stanifer, an experienced Senior Human Resources Consultant. The job

classification system evaluates a classification using six weighted factors. The Union did not produce evidence that the command positions to which Lieutenants Stoll and Skoro were assigned would be classified as Captains work under the existing job classification system or under a comparable classification system. Conspicuously absent from the evidentiary record was any job evaluation study or a body of evidence equivalent to a job classification study. A job classification study or the functional equivalent thereof would presumably provide an evidentiary basis for assessing the current work being done by Lieutenants Stoll and Skoro and comparing their roles to the role of Captain.

The argument that the Emergency Services Unit and the Special Operations Unit are Divisions that have been redefined as Units to circumvent the cost of Captain salaries, is not supported by evidence. The evidence supports the position that the Captain who now oversees both the Emergency Services Unit and the Special Operations Unit is performing the functions that Captains of the former Divisions performed. The Employer has the right to organize and reorganize the organizational structure. Within the organizational structure it may not require employees to perform work out of classification as defined in **Article 30.3** without appropriate compensation. However, the Union did not establish by a preponderance of the evidence that the work being performed by the grievants ought to be classified as Captain's work.

AWARD:

- 1. Grievance No. 09-05 is hereby denied.*
- 2. Grievance No. 09-06 is hereby denied.*

Dated: July 8, 2011

James A. Lundberg, Arbitrator