

IN THE MATTER OF ARBITRATION BETWEEN

City of South Saint Paul
“Employer”

BMS Case No. 11-PA-0815

Decision and Award

and

AFSCME Council 5
Local 2535
“Union”

John W. Johnson, Arbitrator
November 15, 2011

Date of Hearing:

August 31, 2011

Date of submission of Post Hearing Briefs:

October 5, 2011

APPEARANCES

For the Union:

Cynthia M. Nelson, AFSCME Field Representative

Kim Hocking, Code Enforcement Secretary

Barb Cobenais, Senior Police Clerk

For the Employer

Frank Madden, Madden Galanter and Hanson, LLP

Stephen P. King, City Administrator

Shelly Anderson, City Human Resources Director

Statement of Jurisdiction

The hearing was held in the above matter on August 31, 2011 in the South St Paul City Hall in South St Paul Minnesota. The Arbitrator, John W. Johnson, was selected by the parties pursuant to the Minnesota Public Employment Labor Relations Act of 1971, as amended (PELRA).

At the hearing each party was given the opportunity to present evidence and arguments. The parties then submitted post hearing briefs, which were e-mailed on October 5, 2011.

ISSUES

1. Whether the grievance is untimely since it was not appealed to Step 4 of the grievance procedure, and therefore is procedurally non-arbitrable?
2. Whether the City violated Article 13, Seniority, by not allowing the Grievant to exercise her seniority rights for the positions of Clerical Staff Coordinator/Police Secretary, Deputy City Clerk/Accounting Clerk/Cashier, and Accounting Clerk/Utility since she did not meet the minimum qualifications for the positions?
3. Whether the City violated Article 16, wage Schedule and Appendix A, Salary Plan, following the appointment of the Grievant to the position of Code Enforcement Secretary by not placing her at Step 7 on the wage schedule?

RELEVANT CONTRACT PROVISIONS

Article 7 GRIEVANCE PROCEDURE

- 7.1 Definition of a grievance. A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this AGREEMENT.
- 7.2 Processing a grievance It is recognized and accepted by the UNION and the EMPLOYER that the processing of grievances as hereinafter provided is limited by the job duties and responsibilities of the employee and shall therefore be accomplished during normal working hours only when consistent with such EMPLOYER duties and responsibilities. The aggrieved employee and UNION Representative shall be allowed a reasonable amount of time without loss in pay when a grievance is investigated and presented to the EMPLOYER during normal working hours provided the Employee and the UNION Representative have notified and received the approval of the designated supervisor who has determined that such

absence is reasonable and would not be detrimental to the work programs of the EMPLOYER. The designated supervisor shall schedule an approved absence within five (5) workdays after the request for absence.

7.3 Procedure. Any grievance or dispute between the parties relative to the application, meaning or interpretation of this AGREEMENT shall be settled in the following manner.

Step 1. The UNION Steward, with or without the employee, shall take up the grievance or dispute with the employee's immediate supervisor within fifteen (15) days after the first knowledge that such alleged violation has occurred.

Step 2. If the immediate supervisor is the department head, Step 2 will be waived and appeals of step 1 responses shall be directed to Step 3. If the grievance has not been settled in accordance with Step 1, it shall be presented in writing, setting forth the nature of the grievance, the facts on which it is based, the provision or provisions of the agreement allegedly violated and the remedy requested, by the UNION Steward or the Steward's designee to the proper department head within seven (7) days after the supervisor's response is due. The department head or the department head's designee will respond to the Union Steward in writing within seven(7) calendar days.

Step 3. In the event that the reply from the Department Head of the Department Head's designee does not satisfactorily settle the grievance, the UNION may refer the grievance to a Joint Committee that shall consist of four (4) persons, two (2) persons selected by the UNION and two (2) persons selected by the City. The joint Committee shall meet promptly and shall try to settle the grievance. The Joint Committee may recommend a solution to the dispute by a majority vote of the members. IN the event that the Joint Committee is deadlocked, the UNION may refer the grievance to the City Administrator as provided herein.

Step 4. If the grievance has not been settled in accordance with Step 3, it shall be presented in writing, setting forth the nature of the grievance, the facts on which it is based; the provision or provisions of the AGREEMENT allegedly violated, and the remedy requested, by the UNION Steward or the Steward's designee and Union Business Representative to the City Administrator or the Administrator's designee within seven (7) days after the Joint Committee has reached deadlock. The City Administrator or the Administrator's designee will respond to the Union Steward in writing within seven (7) calendar days.

Step 5. If the grievance is not resolved in Step 4 of the grievance procedure, either the union or the Employer, within fourteen (14) days after the City Administrator's reply is due, may submit the matter to mediation with the Bureau of Mediation Services. Submitting the grievance to mediation preserves timeliness for step 5 of the grievance procedure.

Step 6. If the grievance is still unsettled in accordance with Step 4, the UNION may, within fourteen (14) days after the City Administrator's reply is due, give notice of its intention to submit the issue to arbitration by giving written notice, setting forth the nature of the grievance, the facts on which it is based, the provision or provisions of the contract allegedly violated, and the remedy requested, to the other party. The arbitration proceeding shall be conducted by an arbitrator to be selected by the EMPLOYER and the UNION within seven (7) days after the UNION requests such action. If the parties fail to select an arbitrator, the State Bureau of Mediation Services will be requested by either or both parties to provide a panel of five (5) arbitrators. Both the EMPLOYER and the UNION shall have the right to strike two names from the panel. The UNION shall strike the first name, the other party shall strike one (1) name, the process will be repeated, and the remaining person will be the arbitrator. The decision of the arbitrator shall be final and binding on the parties, and the arbitrator shall be requested to issue a decision within thirty (30) days after the conclusion of testimony and argument. Expenses for the arbitrator's services shall be borne equally by the EMPLOYER and the UNION. However, each party

will be responsible for compensation of its own representatives and outside witnesses. If either party desires a verbatim record of the proceedings, it may cause such record to be made, providing it pays for the record and makes copies available at reasonable cost to the other party and to the arbitrator.

7.4 Waiver. If a grievance is not presented within the time limits set forth above, it shall be considered “waived”. If a grievance is not appealed to the next step within the specific time limit or any agreed extension thereof, it shall be considered settled on the basis of the EMPLOYER’s last answer. If the EMPLOYER does not answer a grievance or an appeal thereof within the specified time limits, the UNION may elect to treat the grievance as denied at that step and immediately appeal the grievance to the next step. The time limit in each step may be extended by mutual agreement of the EMPLOYER and the UNION without prejudice to either party.

7.5 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 this AGREEMENT. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the EMPLOYER and the UNION, and shall have no authority to make a decision on any other issue not 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.

ARTICLE 13. SENIORITY [in part]

For purposes of this article seniority will be defined as Bargaining Unit seniority per Article 6, Section 6.

13.1 Seniority will be the determining criteria for transfers and newly created positions if the applicant meets the minimum qualifications for the position.

13.2 In the event it becomes necessary to lay off employees for any reason, employees within a given job classification shall be laid off in inverse order of their seniority in the following order.

- a) Probationary Part-time Employees
- b) Probationary Full-time Employees
- c) Permanent (*part-time and full-time*) Employees

13.3 In the event of layoff, employees may exercise their seniority rights to a job classification of higher, the same or lower pay, within the bargaining unit for which they meet the minimum qualifications.

ARTICLE 16 WAGE SCHEDULE

16.1 The schedule of salaries presented in Appendix A shall represent the monthly base salaries, exclusive of supplemental pay, for employees under this Contract for the duration of the Contract. These wage and salary schedules in Appendix A represent an increase of 1.5% to the top step (step7) of each classification for the year 2009. All other steps are calculated percentage derivatives as reflected in Appendix A. Part time employees covered by the terms of this Contract shall receive a pay rate on an hourly basis equivalent to the starting rate for the appropriate applicable position as shown in Appendix A.

Employees who are promoted shall have their salary raised to the step of the new classification that provides the employee with an increase of a minimum of four percent (4%). The promoted employee will then receive step increases in

accordance with the wage schedule. Employees shall move through the salary steps as outlined in Appendix a. The City may hire new employees at any step and by mutual agreement of the parties move employees through the steps more quickly than the scheduled increases.

ARTICLE 4 MANAGEMENT RIGHTS

The EMPLOYER and the UNION recognize and agree that except as expressly stated herein, the EMPLOYER has and retains all rights and authority necessary for it to direct and administer the affairs of the City, and to meet its obligations under Federal, State and Local Law, such rights to include the right to direct and control all the operations of the City; to determine the methods, means and organization and numbers of personnel by which such operations are to be conducted; to assign and transfer employees, to schedule working hours and assign overtime; to make and enforce reasonable rules and regulations; and to change or eliminate existing methods of operation, equipment or facilities,

FACTS

Testimony and exhibits at the arbitration hearing establish the following facts:

The grievant, Kim Hocking, was informed by the City in a letter dated-October 14, 2010, that her position of code enforcement officer was to be eliminated, and that her last day of work would be November 12, 2010. Employer exhibit 2. The notice was given to her at a meeting with Shelley Anderson, HR Director, Stephen King, City Administrator and John Sachi, City Engineer. The grievant was advised to contact her Union about her rights under the Collective Bargaining Agreement. Testimony of Anderson.

On October 22, 2010 the grievant sent notice to Mr. Stephen King informing him that the City that she intended to exercise her seniority rights to a position in another classification within her bargaining unit. She stated that she believed she met the

minimum qualifications for the following four classifications in the unit; Account Clerk/Utility, Deputy City Clerk/Accounting Clerk/Cashier, Code Enforcement Secretary and Police Clerical Staff Coordinator/Secretary, in that order of preference. Employer Exhibit 10

The grievant was informed by the employer that she did not meet the minimum qualifications for the Accounting positions because she did not have the necessary accounting background. To assess the grievant's qualifications for the other positions the employer gave her a typing test and a test in using excel spread sheets. The grievant's score on the typing test, as shown in Employer exhibit 11, did not meet the 70 word per minute standard for Police Clerical Staff Coordinator/Secretary. The employer determined that she did not meet the minimum qualification for Police Clerical Staff Coordinator/Secretary.

The grievant also failed to successfully complete the test for using an Excel spread sheet. Employer Exhibits 12 through 16. the grievant was supposed to use excel to derive balances and percentages of budget used, having been given the budgeted amount of an account and the amount spent from the account, and was unable to do so. Testimony of Anderson.

The qualifications for Clerical Staff Coordinator/ Police Secretary require, in addition to the 70 word per minute typing standard, "Ability to operate a personal computer, have a mastery of the Microsoft operating system, Microsoft Office suite programs and be able to quickly master specialized software programs for use in the department." Employer Exhibit 20.

The qualifications for Code Enforcement Secretary also require some skill in the use of a computer. The position description states this as "Excellent knowledge of Microsoft Windows applications (Word, Excel), including ability to work with formulas in excel spread sheets." Employer Exhibit 22. Ms. Anderson testified that there is a different

standard for Microsoft proficiency for Code Enforcement Secretary compared to the Clerical Staff Coordinator/Police Secretary position.

The employer determined that the grievant would be placed in the Code Enforcement Secretary position. She was placed at step 3 in the salary schedule for the position. It was later explained, in the response from John Sachi to step one of the grievance process, that the placement at step 3 was because “There is no way to evaluate whether or not the grievant will be performing the job responsibilities in that new position at a level expected of someone at a step 7 level and The grievant possessing many skills but those skills are not necessarily indicative of the skills needed for this new position. Customer service skills, Excel spreadsheet skills, several multitasking skills, etc, etc, are skills that need to be developed or observed.” Employer Exhibit 5

The union filed a grievance, grieving both the placement of the grievant in the Code Enforcement Secretary position instead of one of the others she requested to be considered for, and her placement in step 3 of the salary grade for Code Enforcement Secretary, instead of Step 7, the top step. The grievance was addressed at step 1, and responded to by John Sachi, County Engineer, in a memo dated November 5, 2010. Mr Sachi denied the grievance with respect to the placement of the grievant at step 3 in the salary schedule, and referred to the HR Director that part of the grievance pertaining to denial of the grievant’s request to be placed in other positions. Employer Exhibit 5.

The Union appealed to step 3, requesting as the remedy “Allow employee first choice of bumping option and/or place employee on step appropriate for her years of service.” Union Exhibit 8.

In accordance with the grievance procedure, a joint committee consisting of Josh Feldman, Finance Director, Shelley Anderson Human Resources Director, Barb Cobenais, Acting AFSCME President, and Cindy Nelson, AFSCME Business Representative was convened on December 2, 2010 to discuss the grievance. The joint committee did not reach agreement on a resolution to the grievance, and was therefore

deadlocked. Ms Anderson wrote notes summarizing the discussion on the same afternoon. These notes are Employer Exhibit 27. Testimony of Anderson.

Under the grievance procedure, the union had 7 days to file an appeal to step 4, in writing, to the City Administrator. The Union did comply with this requirement.

On December 15, 2010, 13 days after the joint committee meeting, Cindy Nelson mentioned to Shelley Anderson that she wanted to talk to the City Administrator about this grievance. Ms Anderson notified Ms. Nelson that the employer considered the grievance to be settled, since the union had not proceeded to step 4 as required by the collective bargaining agreement. Employer Exhibit 8.

On January 14, 2011 Ms. Nelson sent a letter to the City Administrator notifying him that the union intended to arbitrate the grievance. Union Exhibit 9.

ANALYSIS

Arbitrability.

At the hearing the employer made the argument that the grievance was not arbitrable, because the grievance procedure was not followed. The Union countered that even though the grievance procedure in the collective bargaining agreement was not followed, the grievance was still arbitrable because the acts of the employer that were being grieved constituted a “continuing violation.” The employer’s argument is straightforward. The grievance procedure was not followed. The grievance procedure, in Article 7.4 states that if the Union does not appeal a grievance to the next step in accordance with the timelines in the collective bargaining agreement, the grievance “shall be considered settled on the basis of the employer’s last answer.” This same article provides for mutually agreed upon extensions of the time limits, but no evidence of any such extension was provided.

Elkouri and Elkouri , *How Arbitration Works*, 6th Edition p. 217 states, “In the vast majority of cases, arbitrators strictly enforce contractual limitations on the time periods within which grievances must be filed, responded to, and carried through the steps of the grievance procedure, where the parties have strictly enforced such time limits.” No evidence was presented at the hearing to show that the parties have not strictly adhered to the time limits in their contract. .

The union relies on the argument that the employer’s actions, both in placing the grievant in the Code Enforcement Secretary position instead on one more desirable to the grievant, and in placing her at step 3 instead of the top of the pay scale for Code Enforcement Secretary, constitute continuing violations.

According to Elkouri and Elkouri, some contract violations are “continuing violations, in that the violation occurs on an on-going basis: “Many arbitrators have held that “continuing violations of the agreement, (as opposed to a single isolated and completed transaction) give rise to “continuing grievances in the sense that the act complained of may be said to be repeated from day to day, with each day treated as a new “occurrence” Those arbitrators permit the filing of such grievances at any time, although any back pay would occur only from the date of filing.” Elkouri and Elkouri *How Arbitration Works*, 6th Ed., pp. 218-219.

Examples of actions arbitrators have found to be continuing, and therefore a basis for the continuing violation exception, include:

- a. Rate of pay for a Leadworker. Diamond Brands Incorporated and Paper, Allied-Industrial, Chemical and Energy Workers Local 7-0970 FMCS Case No. 99-0526-09593-7, (Reynolds, 1999),
- b. Longevity pay for nurses. Fairview Southdale Hospital and Local 13 SIEU, FMCS Case No. 010905-15772-7, (Ver Ploeg, 2002),

- c. Rate of vacation accrual City of Minneapolis and AFSCME Council 14, BMS Case No. 99-PA-1588, (Jacobs, 1999)
- d. Social Workers paid in a grade alleged to be too low. Carver County and AFSCME Council 65 Local 2789, BMS Case No. 02-PA-341 (Berquist, 2002),
- e. Sick leave accrual rate. Special School District 6 (South St Paul) and Education Minnesota Local 7312, BMS Case No. 05-PA-1106, (Gallagher, 2005),
- f. Proration of benefit accruals for and employee on workers compensation. Independent School District 316 (Coleraine MN) and AFSCME Local 456, BMS Case No. 10-PA 1207, (Daly, 2011); City of St Louis Park and LELS BMS Case 02 PA 1107, (Jensen, 2007)
- g. Alleged improper rate of pay for an LPN. ISD No.77 Mankato Public Schools and Minnesota School Employees Association MSEA, BMS Case No. 09-PA-0423, (Jacobs, 2008)

As shown in the above examples, the pay an employee receives, since it recurs every pay period, has been determined by many arbitrators to be continuing. The employer argues in its post hearing brief however, that an act that might otherwise be viewed as continuing may not necessarily trigger an exception to the grievance processing time limits in a collective bargaining agreement. The Employer relies on a decision by Arbitrator Flagler, Independent School District No.281 and Robbinsdale Federation of Teachers, BMS Case No. 88-PP-1632 (Flagler 1988), which stated that:

“The continuing grievance exception requires that the grievance meet the following conditions:

1. The time elapsed between expiration of the filing deadlines and the actually [sic] filing is not unreasonably protracted.
2. The grievant offers good and sufficient reasons for late filing.
3. The late filing poses no undue burden or prejudice to the employer in defending against the grievance.”

The facts in the grievance addressed by Arbitrator Flagler included that the grievant waited more than 4 years before filing his grievance. In concluding that this was an unreasonable length of time, arbitrator Flagler also stated that he could conceivably see a delay of several months as still allowing for the continuing violation exception. With respect to the “good and sufficient reason” Arbitrator Flagler ruled that the reason given by the grievant for the long delay was not supported by the evidence. With respect to the undue burden or prejudice to the employer’s defense, Arbitrator Flagler was referring to the difficulty of witnesses recalling what occurred almost 5 years ago, and the lack of availability of a relevant witness, also resulting from the long delay.

Comparing Arbitrator Flagler’s case to the present grievance, there is no delay approaching 4 years. To comply with the grievance procedure, the union needed to appeal to step 4 within 7 days of December 2, 2010, or by December 9. Instead the union sent a letter to Mr. King on January 14, 2011 stating its intent to arbitrate the grievance. While not in compliance with the grievance procedure, this delay would arguably not have been viewed by Arbitrator Flagler as unreasonable. As for lack of sufficient reason for the delay, the union in this case did not provide any evidence of a reason for not following the grievance procedure, so if Arbitrator Flagler’s standard is applied to the facts of this grievance, the lack of a sufficient reason for delay would provide some support for the employer’s position on arbitrability. With respect to undue burden or prejudice, the time elapsed from December 9, 2010 to January 14, 2011 does not create such a burden.

None of the cases cited in “a” through “g” above rely on the factors put forth by Arbitrator Flagler for deciding if the continuing violation exception applied. Delays in filing ranged from 5 months, Carver County and AFSCME Council 65 Local 2789, BMS Case No. 02-PA-341 (Berquist, 2002) to 3 ½ years. Fairview Southdale Hospital and Local 13 SIEU, FMCS Case No. 010905-15772-7, (Ver Ploeg, 2002). Reasons for the delay were not always mentioned in the award in the cases cited in “a” through “g”, and when identified, were not always considered in determining that a particular action was “continuing.” I conclude that the factors identified by Arbitrator Flagler are not in general use, and are not controlling in analyzing the facts of this grievance.

This grievance differs from the others cited in “a” through “g” above, and the Flagler award addressed in the employer’s brief, in that the arbitrability issue in this grievance was not about when the grievance was filed, but about failure to adhere to the subsequent timelines within the grievance process. As the union pointed out in its brief, however, a continuing matter can be grieved at any time, as long as the action being grieved qualifies as continuing. Therefore, whether the lack of timeliness is at the beginning of the grievance process or within the steps of the grievance process, the continuing violation exception should still be applicable.

It is necessary however, to determine if the continuing violation exception applies to either or both of the substantive issues.

Substantive Issues

Substantive Issue A. Whether the City violated Article 13, Seniority, by not allowing the Grievant to exercise her seniority rights for the positions of Clerical Staff Coordinator/Police Secretary, Deputy City Clerk/Accounting Clerk/Cashier, and Accounting Clerk/Utility since she did not meet the minimum qualifications for the positions?

I conclude that placing the grievant in the Code Enforcement Secretary position instead of another, following layoff, is not “continuing” as the term is used to identify a “continuing violation.” This placement was a discrete act, or to use the Elkouris’ term “a single isolated and completed transaction” Elkouri, 6th Ed p. 218. The nature of continuing matters is that they recur. This does not apply to the determination of an appropriate job placement following layoff. Many discrete acts of the employer have effects that continue over time. To conclude that this alone makes an alleged violation “continuing” would lead to a result that any act of the employer that has more than a momentary effect is “continuing,” which would render agreed upon timelines in a grievance procedure largely inoperative. Since the continuing violation exception does not apply to this issue, I rule that the grievance, with respect to this issue, is not timely. This issue is therefore barred for lack of timeliness, and its merits need not be addressed.

Substantive Issue B. Whether the City violated Article 16, wage Schedule and Appendix A, Salary Plan, following the appointment of the Grievant to the position of Code Enforcement Secretary by not placing her at Step 7 on the wage schedule?

Based on the above discussion of “continuing violation,” I rule that in this grievance the rate of pay for the grievant as a Code Enforcement Secretary is continuing. That leaves the question of whether or not placing the grievant at step 3 instead of the top of the pay grade, step 7, violates the collective bargaining agreement.

Article 16 of the contract describes how a person’s salary is to be determined upon promotion. It says nothing about how salary is to be determined upon demotion. Evidence presented in the hearing showed that there was no consistent past practice for setting pay upon demotion, since there had been no previous demotions in the bargaining unit. The union took the position that the information on Appendix A of the agreement, showing the number of hours for each step, meant that an employees total hours as a City employee were to be the basis for placing them in a salary step upon demotion. Testimony of Hocking. The City countered that the hours were there to indicate that part time employees had to serve the required number of hours to move to the next step.

Testimony of Anderson. Ms. Anderson also testified that the grievant had not been moved to the top of the salary range when previously promoted, even though she had previously been at step 7. Since there is no contract language or practice determining how salary is to be set when an employee demotes, and no language or practice to support the union's contention about what the hours designation in Appendix A means when applied to initial placement of an employee in a salary range, it is left to management's discretion to determine an employee's step assignment upon demotion, consistent with Article 4, the management rights clause. I rule that the placement of the grievant at step 3 of the salary range for Code Enforcement Secretary did not violate the agreement.

Based on all the above, the grievance is denied.

date

John W. Johnson, Arbitrator