

IN THE MATTER OF ARBITRATION BETWEEN

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City of Red Wing, Minnesota  
“Employer”

BMS Case No. 12-PA-0893

Decision and Award

and

Teamsters Local 320  
“Union”

John W. Johnson, Arbitrator  
June 12, 2012

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ADVOCATES:

For the Union:

Paula R. Johnston, General Counsel  
Teamsters Local 320

For the Employer

Amy E. Mace, Attorney  
Trevor S. Helmers, Attorney  
Ratsik, Roszak and Maloney, P.A.

Statement of Jurisdiction

This matter was presented to the Arbitrator for Summary Disposition, in accordance with Minnesota Statutes Section 572B.15(b). The Arbitrator, John W. Johnson, was selected by the parties pursuant to the Minnesota Public Employment Labor Relations Act of 1971, as amended (PELRA).

ISSUE

The issue before the arbitrator is whether or not the grievance is arbitrable. The employer’s position is that the union did not follow the requirements of the grievance procedure in submitting its appeal to step 4 within the stated time limits, and that the grievance is therefore waived by the union. The union claims that it did follow the procedure for appeal to step 4 within the stated time limits, and that the grievance is therefore arbitrable.

## PROCEDURE

This arbitrability issue is being addressed under the provisions of Minnesota Statutes Section 572B.15(b), allowing for summary disposition in arbitration proceedings. The parties submitted a joint stipulation of relevant facts, and joint exhibits. The parties also submitted briefs supporting their respective positions. This decision is being made based on the stipulations, the joint exhibits, and the briefs, without a hearing.

## RELEVANT CONTRACT LANGUAGE

### Article 7.4 Procedure

Grievances, as defined in Section 7.1, shall be resolved in conformance with the following procedure:

Step 1. An EMPLOYEE claiming a violation concerning the interpretation or application of this Agreement shall within ten (10) calendar days after such alleged violation has occurred, present such grievance to the EMPLOYEE'S supervisor as designated by the EMPLOYER, which shall be the Shift Sergeant. The EMPLOYER-designated representative will discuss and give an answer to such step 1 grievance within ten (10) calendar days after receipt. A grievance not resolved in step 1 and appealed to step 2 shall be placed in writing setting forth the nature of the grievance, the facts on which it is based, the provision or provisions of the Agreement allegedly violated, the remedy requested, signed by the EMPLOYEE involved, and shall be appealed to step 2 within ten (10) calendar days after the employer designated representatives final answer in step 1. Any grievance not appealed in writing to step 2 by the UNION within ten (10) calendar days shall be waived.

Step 2. If appealed, the written grievance shall be presented by the UNION and discussed with the EMPLOYER-designated Step 2 representative, which shall be the Police Chief or designee. The EMPLOYER-designated representative shall give the UNION the EMPLOYER'S answer in writing within ten (10) calendar days after receipt of such step 2 grievance. A grievance not resolved in step 2 may

be appealed to step 3 within ten (10) calendar days following the EMPLOYER-designated representatives' final answer in Step 2. Any grievance not appealed in writing to step 3 by the UNION within ten (10) calendar days shall be considered waived.

Step 3. If appealed, the written grievance shall be presented by the UNION and discussed with the EMPLOYER-designated Step 3 representative, which shall be the Council Administrator. The EMPLOYER-designated representative shall give the UNION the EMPLOYER'S answer in writing within ten (10) calendar days after receipt of such step 3 grievance.

A grievance not resolved in step 3 may be appealed to step 4 by means of requesting a list of arbitrators from the Bureau of Mediation Services within ten (10) calendar days following the EMPLOYER designated representative's final answer in step 3. Any grievance not appealed in writing to step 4 by the UNION within ten (10) calendar days shall be considered waived.

Step 4. A grievance unresolved in step 3 and appealed to step 4 shall be submitted to arbitration subject to the provisions if the Public Employment Labor Relations Act of 1971, as amended.

#### Article 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 so submitted.

## Article 7.6 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.

## FACTS

Discipline of an employee in the bargaining unit was grieved, and processed through step 3 of the grievance procedure. The employer’s step three response denying the grievance was dated October 21, 2011 (Joint Exhibit 8). The union then wrote a letter to the employer dated October 28, 2011 (Joint Exhibit 9), stating the following: “This letter is to advise you that we are proceeding to Step 4 of the grievance procedure which is Grievance Arbitration on the above-referenced matter. I will contact the Bureau of Mediation Services for a list of arbitrators from which one may be selected.”

In a letter to the Union dated December 29, 2011, (Joint Exhibit 10) the employer stated that the City considered the grievance closed, because the Union had not requested a list of arbitrators from the Bureau of Mediation Services within 10 days of receipt of the employer step 3 response.

On February 13, 2012, the Union requested a list of arbitrators from the Bureau of Mediation Services (Joint Exhibit 11)

## POSITIONS OF THE PARTIES

The Union asserts that its letter of October 28, 2011 complies with the grievance procedure, and is timely. The union states that the following language in the grievance procedure addressing appeal to step 4, “may be appealed to step 4 by means of requesting a list of arbitrators from the Bureau of Mediation Services” means that requesting a list of arbitrators from the Bureau is only one of the ways that a grievance may be appealed to step 4. The Union views the phrase “may be appealed” as permissive with respect to how

a grievance may be appealed to step 4. The Union further asserts that since its letter of October 28, 2011, was sent within 10 days of receiving the employer's step three response, the union is in compliance with the contract requirements.

The employer claims that the phrase "may be appealed" is permissive with respect to whether or not the grievance may (or may not) be appealed to step 4, and the phrase "by means of requesting a list of arbitrators from the Bureau of Mediation Services," describes how an appeal must be made. Since the union did not request a list of arbitrators until February 13, 2012, the employer regards the union's appeal to step 4 as not timely.

## DISCUSSION

The Union argues that the contract language is clear, and that all the union must do within 10 calendar days is appeal in writing. Therefore, asserts the Union, its letter of October 28, 2011 complies with the procedure. The Union further argues that even if the contract language describing the grievance procedure is ambiguous, there is a well established principle that ambiguity should be resolved in favor of allowing a grievance to move through the grievance process, and to be considered on its merits. The union cites the discussion in "How Arbitration Works" (Elkouri and Elkouri *How Arbitration Works*, 6<sup>th</sup> Ed., A.M. Ruben, Editor-in-Chief, p.221, and also cites several arbitration awards supporting this principle.

The Employer in turn argues that where language describing the grievance procedure is clear, with specific language and requirements, there is a well established principle that arbitrators will deny a grievance when the procedure is not followed. The Employer also cites "How Arbitration Works" (Elkouri and Elkouri *How Arbitration Works*, 6<sup>th</sup> Ed., A.M. Ruben, Editor-in-Chief, p. 217, and cases supporting this principle.

This arbitrability issue is about whether the language of the grievance procedure is clear or not, and if clear, what it means. In their joint stipulation of facts, their joint exhibits, and their separate briefs, the parties provided no information to the arbitrator about

previous interpretation of the grievance language. Therefore my conclusions about what the language means, and whether it is clear or ambiguous, are drawn from the language itself. I also note that the mere fact that two parties advance different interpretations of contract language does not constitute proof of ambiguity. If that were so a party could prove ambiguity simply by asserting it.

It is clear from reading the whole of Article 7.4, and Article 7.6, that each step of the grievance procedure is optional, with the union having the option to file or not, the option to appeal to the next step, or not, and that the Union must do so within stated time limits, or the grievance is waived by the Union. In step 1, the union has 10 days after the occurrence of an alleged violation to file a grievance. If the union doesn't exercise its option to file within 10 days, the grievance is waived, according to Article 7.6. Also in the description of step 1 in Article 7.4, it states that if the grievance is not appealed to step 2 within 10 days of the employer's answer, it is waived.

In the description of step 2, there is a reference to "if appealed," further indicating that the union has the option to appeal to step 2 or not. This same phrase, "if appealed" is repeated in the description of step 3.

The description of step 2 also states the following:

"A grievance not resolved in Step 2 *may be appealed* (italics added) to step 3 within ten (10) calendar days following the EMPLOYER designated representative's final answer in step 2 Any grievance not appealed in writing to step 3 by the UNION within ten (10) calendar days shall be considered waived."

In this language from the grievance procedure, the phrase "may be appealed," can mean only that the union has the option to appeal or not appeal.

The language in Article 7.4 addressing appeal to step 4, arbitration, states:

“A grievance not resolved in step 3 may be appealed to step 4 *by means of requesting a list of arbitrators from the Bureau of Mediation Services* (italics added) within ten (10) calendar days following the EMPLOYER designated representative’s final answer in step 3. Any grievance not appealed in writing to step 4 by the UNION within ten (10) calendar days shall be considered waived.”

The only difference between the language describing appeal to step 3, (except for the step designations) and the language describing appeal to step 4, is that the language describing appeal to step 4 includes the phrase, “by means of requesting a list of arbitrators from the Bureau of Mediation Services.” Since the phrase “may be appealed” is the same in both descriptions, I conclude that in both descriptions it means the same thing: that the union has the option to appeal or not. The difference between these two descriptions is that the way in which an appeal to step 4 is to be made is described. That way is “by means of requesting a list of arbitrators from the Bureau of Mediation Services.” The Union’s interpretation that this is only one of the ways that an appeal to step 4 may be made is not supported by the language itself. In order to support the union’s position it would be necessary to read into the language something that is not there, about alternative ways to appeal. Article 7.5 prevents an arbitrator from doing so.

I do not find this language to be ambiguous. The phrase “by means of requesting a list of arbitrators from the Bureau of Mediation Services,” is in the contract to describe how to appeal to step 4. The Union did not follow this language within the stated time limits.

#### CONCLUSION

The grievance is denied on the basis that it is not substantively arbitrable.

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Date

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John W. Johnson, Arbitrator