

**IN THE MATTER OF ARBITRATION  
BETWEEN**

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**LAW ENFORCEMENT LABOR  
SERVICES, INC.**

**and Union,**

**CITY OF NORTHFIELD,**

**Employer.**

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**ARBITRATION DECISION  
AND AWARD**  
BMS NO. 12-PA-0680  
(Salary Schedule Grievance)

Arbitrator:	Andrea Mitau Kircher
Date and Place of Hearing:	August 24, 2012, City Hall, Northfield, Minnesota
Date Record Closed:	September 28, 2012
Date of Award:	October 22, 2012

**APPEARANCES**

For the Union:	For the Employer:
Kimberley Peyton Sobieck, Esq. LELS Business Agent Law Enforcement Labor Services, Inc. 327 York Avenue St. Paul, MN 55130	Susan K. Hansen, Esq. Madden, Galanter and Hansen, LLP 505 North Highway 169, Suite 295 Plymouth, MN 55441

**INTRODUCTION**

Law Enforcement Labor Services, Inc. (“LELS”) or (“Union”) and the City of Northfield (“Employer” or “City”) are parties to a Collective Bargaining Agreement (“CBA”), Joint Exhibit 1, effective January 1, 2011 through December 31, 2011. The Union filed a grievance on October 4, 2011, which the parties were unable to resolve, and

in accordance with the CBA, the matter was referred to arbitration. The parties duly selected the undersigned arbitrator from a list provided by the Minnesota Bureau of Mediation Services. On August 24, 2012, the Arbitrator convened a hearing at the City Hall in Northfield Minnesota. During the hearing, the Arbitrator accepted exhibits into the record; witnesses were sworn and testimony was presented subject to cross-examination. The parties filed post-hearing briefs electronically on September 28, 2012, and the record was closed.

### **BACKGROUND**

In 2006, the Bureau of Mediation Services certified a new bargaining unit for all licensed essential Sergeants in the City's police department, distinguishing them from patrol officers who were previously organized. At that time four eligible Sergeants were in the proposed bargaining unit. A first collective bargaining agreement with the Sergeants was concluded covering the employees in the new bargaining unit for the years 2006-08 (Union Ex. 5), and this grievance was filed under the 2011 successor agreement.

The Union challenges the City's interpretation of a wage provision that sets out salary progression for Sergeants and distinguishes between two sets of employees, those hired prior to January 1, 2007 and those hired on or after January 1, 2007. The parties had agreed that later hired employees were to be treated less generously than those initially covered by the CBA.

### **ISSUES**

1. Is the Grievance arbitrable?
2. Did the City violate Article 20.2 of the CBA when it promoted Scott Johnson to Sergeant in December 2010, set his base pay at Grade 10 Step 4 of the pay matrix, and has paid him accordingly to date?

## **RELEVANT PORTIONS OF CONTRACT AND COMPENSATION PLAN**

### Article 5. EMPLOYEE RIGHTS

#### ... 5.4 Procedure

Grievances, as defined by Section 5.1, 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 twenty-one (21) calendar days after such alleged violation has occurred, present such grievance to the EMPLOYEE'S supervisor as designated by the EMPLOYER... Any grievance not appealed in writing to Step 2 by the UNION within ten (10) calendar days shall be considered waived...

#### 5.5 ARBITRATOR'S AUTHORITY

...

#### 5.6 WAIVED-GRIEVANCE

If a grievance is not presented within the time limits set forth above, it shall be considered "waived." ...

### Article 20. WAGES

#### 20.1 Job Classification and Compensation Pay Plan

Effective January 1, 2007, Sergeants shall be compensated pursuant to the terms and conditions of the City's Job Classification and Compensation Pay Plan as originally formulated by Rod Kelsey of Riley, Dettman, and Kelsey, Inc., adopted by the Northfield City Council on May 15, 2006 and reviewed/modified annually by the Northfield City Council.

As per City Council motion on August 3, 2010, employees under the City's job classification and compensation pay plan will receive 0% wage increase and no step movement for calendar year 2011.

#### 20.2 Pay Progression on the Job Classification and Compensation Pay Plan:

EMPLOYEES hired prior to January 1, 2007 will be placed on the City's Job Classification and Compensation Plan at Grade 10 Step 8 (\$31,725). Step progression shall be pursuant to the terms and conditions of the pay plan. Effective for the duration of this AGREEMENT, pay plan step increases are subject to City Council reestablishing the step movement within the City's pay plan.

EMPLOYEES hired on or after January 1, 2007 will be compensated pursuant to the terms and conditions of the City's Job Classification and Compensation Pay Plan. Effective for the duration of this AGREEMENT, pay plan step increases are subject to City Council reestablishing the step movement within the City's pay plan.

(Emphasis in original)

**Relevant Portion of Pay Matrix for 2010 and 2011:**

Grade	Step 1	Step 2	Step 3	Step 4	Step 5	Step 6	Step 7	Step 8	Step 9	Step 10	Step 11
10	\$59,580 28.644	\$61,070 29.360	\$62,559 30.076	\$64,049 30.793	\$65,538 31.509	\$67,028 32.225	\$68,517 32.941	\$70,007 33.657	\$71,496 34.373	\$72,986 35.089	\$74,475 35.805
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8	\$50,923 24.482	\$52,196 25.094	\$53,469 25.706	\$54,742 26.318	\$56,016 26.931	\$57,289 27.543	\$58,562 28.155	\$59,835 28.767	\$61,108 29.379	\$62,381 29.991	\$63,654 30.603

**Compensation Policy** (Passed by the City Council May 15, 2006 and Effective 10/1/2007)<sup>1</sup>

**Hiring** Employees may be hired at Step 2, 3 or 4 if warranted by their qualifications, market conditions ...

The City Administrator may approve Steps 5 and 6 for a beginning wage at the recommendation of the Department Director and the Human Resource Director. The Director must substantiate in writing the need for a higher starting wage based on the applicant's existing wage rate, his/her exceptional performance contributions, his/her work-related achievements, scarcity of qualified candidates and other circumstances relative to the individual candidate.

Starting wage exceeding step 4 in the pay plan is the exception not the rule.

...

**Promotion** A promotion is defined as an assignment to another position with a higher base pay grade than the one previously held (typically only one to two grade levels higher)... If the selection process results in the promotion of a current employee, that employee will be eligible for a base pay adjustment.

The base pay adjustment resulting from a promotion should be determined after considering all of the following:

- The grade and base pay progression steps for the new position.
- The time elapsed since the employee's last base pay adjustment.
- The combination of the employee's qualifications and experience that resulted in the final selection.
- The employee's current base pay relative to the base pay of other incumbents, if any, in the position to which being promoted.

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<sup>1</sup> Employer Exhibit 4.

- Current base pay of employees, if any, to be supervised by the employee.

Once these considerations are made, the employee's base pay adjustment should consist of:

- Transitioning from one pay grade and step to another pay grade and step is done by placing the employee on the appropriate grade for the position and on the appropriate step in the new grade such that the employee does not lose money...
- A step increase beyond the initial placement is dependent on the promoted employee's qualifications, pay history, experience and scarcity of qualified candidates, at the recommendation of the department manager in consultation with the Human Resource Director.
- The City Administrator must approve any placement on the pay plan outside the initial placement as documented above.

## **FACTS**

### *History of the Dispute.*

Under the first CBA, the parties agreed in Article 20 that the Sergeants would be compensated pursuant to a new Classification and Compensation Plan for all Non-Union City employees ("Compensation Plan".) This plan was drafted by a consultant, approved by the City Council in 2006 and incorporated into the CBA. Article 20.2 inaugurated a two tier compensation approach for the Sergeants' unit so that employees hired before January 1, 2007 would have certain benefits that exceeded the benefits to which employees hired after that date were entitled under the Compensation Plan.

The City hired Scott Johnson as a Patrol Officer in 1992. He was promoted to Sergeant in December 2010. Prior to his promotion he earned an hourly rate of \$29.99 (Pay matrix, Grade 8, Step 10.) After his promotion the City paid him at Grade 10, Step 4. This placement on the pay matrix meant that he would earn an hourly rate of \$30.79, a 2.7% per hour increase over his pay as a Patrol Officer. The other three Sergeants in the bargaining unit earn more. Monte Nelson, for example, the last officer promoted to Sergeant was promoted just prior to January 1, 2007 and received an increase as part of

the new CBA. His promotion was to Grade 10 Step 8 in the amount of \$31.72, which he testified was a 20% increase over his last salary as a Patrol Officer. His pay increase probably owed something to good timing and history. The historical precedent was that in 1999, the previous City Administrator and the Sergeants had signed a memorandum in which the City Administrator agreed that effective January 2000, "Sergeants will be paid a flat 20% over patrol." (Union Ex. 6)

*The Grievance.*

The Grievant claims that the Employer violated Article 20.2, by paying him as a Grade 10 Step 4 employee rather than as a Grade 10 Step 8 employee. The sentence in Article 20.2 upon which the Grievance relies has been the same from the first CBA to date: "EMPLOYEES hired prior to January 1, 2007 will be placed on the City's Job Classification and Compensation Plan at Grade 10 Step 8 (\$31.725)." The Union claims this means the City must place all patrol officers promoted to Sergeant on Grade 10 Step 8 of the pay matrix if the officer was initially hired before January 1, 2007, even if he was not in the bargaining until after 2007.

The City disagrees with the Union interpretation of Article 20.2, and also, claims that the arbitrator has no authority to decide the Grievance because the Union did not file the grievance in the 21 days allotted and thus, has waived its right to proceed.

*Timing of the Grievance.*

Approximately ten months elapsed between the Grievant's promotion in December 2010, and the filing of the Grievance on October 4, 2011. During that ten-month period, the parties were engaged in negotiating a successor CBA for the year 2011, which was finally signed in February 2012. During negotiations, the Union sought a

change in the language of Article 20 so that the Grievant's initial placement on the pay matrix upon promotion to Sergeant would have been at Grade 10 Step 6, halfway between the Grievant's Step 4 placement and the Step 8 language of Section 20.2.

Despite the City's belief that the grievance should fail because it was untimely, the Grievance was processed according to Article 5, and at each step, the City duly noted that it was untimely.

### **UNION POSITION**

The Union argues that the grievance is timely even though ten months passed between Sergeant Johnson's promotion and the filing of the grievance, because the City continues to pay him a significantly lower wage than the wage to which the language of Article 20.2 entitles him. Under the continuing violation doctrine, a new grievance arises each time he is paid at the wrong step.

The Union claims that the grievance should be sustained because the Grievant was hired by the City prior to 2007 and was promoted to Sergeant in 2010. Article 20.2 addresses hiring before or after 2007, and the Grievant was hired before 2007. Such employees "will be placed on the City's Job Classification and Compensation Plan at Grade 10 Step 8 (\$31.725)." Because the City did not place him at Step 8, it violated the CBA. The Union contends that the grievance turns on the plain meaning of the word "hired." The Grievant was hired prior to 2007, and he is entitled to be paid at Grade 10 Step 8 after promotion.

### **EMPLOYER POSITION**

The Employer argues that the grievance is not arbitrable because it was not filed within 21 days of Sergeant Johnson's promotion as required by Article 5.4. The

Employer claims that under Article 5 of the CBA, the Union has waived its right to pursue grievances that are untimely, so the arbitrator has no authority to decide the dispute.

The Employer also contends that on its merits, the grievance must be denied because Sergeant Johnson's step placement conformed to Article 20.2 and the Compensation Pay Plan. The uniform citywide interpretation of language like that in Article 20.2, according to the Employer, has been to read "hired" to mean "hired into a position covered by the collective bargaining agreement."<sup>2</sup> Accordingly, the Grievant was not part of the group hired prior to January 1, 2007, because he was not hired into the bargaining unit until 2010.

Further, the Employer claims that it would violate accepted labor relations principles to grant the Union the change it seeks through this grievance when the Union previously sought and failed to achieve the change through negotiations.

## **DISCUSSION AND DECISION**

### Issue 1. Is the Grievance Arbitrable?

The Employer argues that the arbitrator has no authority to hear and decide this grievance because the Union waived its right to arbitration when it allowed ten months to elapse between the time the Grievant was promoted to Sergeant and the date the grievance was filed. (See, Article 5, quoted above.) The Union relies on the "doctrine of continuing violation" claiming that when a dispute involves improper and continuing payment of wages, a new violation occurs, and a new 21-day opportunity to timely file a

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<sup>2</sup> Employer's Post-hearing Brief at 13.

grievance arises each time the employee is paid.<sup>3</sup> Both parties have collected an impressive array of arbitral precedent supporting their positions, as arbitrators are not unanimous in their opinions about delay. The Union cites arbitrators who have adopted the doctrine of continuing violation in cases of alleged pay violations. *Elkouri and Elkouri* cites similar decisions and notes that arbitrators may limit their remedy in these cases to back pay accruing only from the date of filing.<sup>4</sup> The Employer relies on Arbitrator John J. Flagler's 1988 case, *ISD No. 281 and Robbinsdale Federation of Teachers*, BMS Case # 88-PP-1632, where the arbitrator decided that the grievance was not arbitrable because of the Union's failure to adhere to the CBA's timeliness requirements, but nevertheless, proceeded to decide the merits of the case. *id.*, at 8-10.

The fact that the Employer continues to pay the Grievant an amount that the Union argues constitutes a CBA violation is sufficient for me to invoke the doctrine of continuing violation. Even though the grievance was filed after the first 21-day window expired, it is not unreasonable to view each allegedly unfair payment as initiating another 21-day time frame in which to file a grievance. The usual reasons for contractually limiting the time for a Union to file grievances are: to expedite the solutions to workplace disputes, to insert predictability into the procedure, to avoid surprise, and to clear the air of unresolved animus. Although the City may dislike the procedural posture of this case, it has not alleged that it is handicapped in presenting its evidence. No important witnesses were unavailable, and it is not alleged that the case turns on memories that have faded. Nor has the City been surprised to learn of this grievance, since it has been under discussion all along. Nothing about the delay causes the City undue prejudice, so

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<sup>3</sup> See, e.g., *City of South St. Paul and AFSCME*, BMS Case # 11-PA-0815, citing other similar cases.

<sup>4</sup> *Elkouri and Elkouri, How Arbitration Works*, 6<sup>th</sup> ed. At 218-219.

adopting the continuing violation theory, I conclude that the Union has the right to arbitration of this grievance.

Issue 2. Did the City violate Article 20.2 of the CBA when it promoted Scott Johnson to Sergeant in December 2010, set his base pay at Grade 10 Step 4 of the pay matrix, and paid him accordingly to date?

The parties disagree on the meaning of the following language as applied to Sergeant Johnson, who was hired as a patrol officer prior to 2007, and promoted to the Sergeant's bargaining unit in 2010. The Union claims that the following language means the City had no choice but to place the Grievant at Grade 10 Step 8 in 2010 when he was promoted to Sergeant:

“EMPLOYEES hired prior to January 1, 2007 will be placed on the City's Job Classification and Compensation Plan at Grade 10 Step 8 (\$31.725)...

EMPLOYEES hired on or after January 1, 2007 will be compensated pursuant to the terms and conditions of the City's Job Classification and Compensation Pay Plan...” (Article 20.2)

In a dispute concerning the meaning of contract language, arbitrators seek to determine and carry out the intent of the parties. Certain standards of contract interpretation are designed to assist in this effort. For example, the “plain meaning rule” has been described as follows:

There is no need for interpretation unless the agreement is ambiguous. If the words are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation and arbitrators will ordinarily apply the clear meaning.

Elkouri and Elkouri, How Arbitration Works (5<sup>th</sup> ed. 1997), p. 470.

The Union claims the language is unambiguous and the City disagrees. The Union claims that placement on the pay matrix at Step 8 is required because “hired” means, “hired by the City,” and the Grievant was hired by the City in 1992. Thus, the

argument continues, the plain meaning is that the Grievant should have been placed at Step 8, and it is unnecessary to consider any factors outside the disputed language.

The City claims instead that the language was intended to apply only to placement of Sergeants under the first CBA, when \$31.725 was the hourly amount Step 8. It points out that the hourly dollar amount for Step 8 was \$33.657 in 2011. (Joint Ex. 1.) That the CBA still uses the outdated dollar amount of \$31.725 for Step 8 means that the language is merely of historical interest. The parties intended the language to apply only to the first placement of Sergeants on the pay matrix. Later promotions were “hires into” the bargaining unit after 2007 and subject to pay based on the Compensation plan.<sup>5</sup>

Both of the parties make reasonable arguments about how Article 20.2 should apply to the Grievant. Thus, the disputed language is ambiguous as applied to the Grievant, or reasonably susceptible to two meanings, and I shall consider evidence outside the four corners of the document. Three factors persuade me that the Union’s interpretation of the language should not prevail, and I will address each below. First, with limited, stated exceptions, the parties intended the Sergeants to be governed by the new Compensation Plan, incorporating it by reference. The Grievant was promoted, not hired, and Article 20.2 does not address promotion, although the Compensation Plan does. Second, the parties amended two other Articles to save benefits for employees hired before 2007, but not Article 20. Although the Union argued that failure to amend Article 20 was an oversight, it is more likely that the parties did not intend to amend it. Third, that the Union attempted to negotiate a change in the Grievant’s pay through the collective bargaining process tends to weigh in favor of the belief that it was understood

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<sup>5</sup> Testimony of Human Resources Director Elizabeth Wheeler.

by both parties that the current agreement as it stands did not solve the Grievant's problem.

1. Article 20.2 incorporates the Compensation Plan, which governs promotion.

## 20.2 Job Classification and Compensation Pay Plan

Effective January 1, 2007 Sergeants shall be compensated pursuant to the terms and conditions of the City's Job Classification and Compensation Pay Plan as originally formulated by Rod Kelsey of Riley, Dettman, and Kelsey, Inc., adopted by the Northfield City Council on May 15, 2006 and reviewed/modified annually by the Northfield City Council. See Appendix.  
(This paragraph is renumbered 20.1 in 2010.)

EMPLOYEES hired prior to January 1, 2007 will be placed on the City's Job Classification and Compensation Plan at Grade 10 Step 8 (\$31,725). Step progression shall be pursuant to the terms and conditions of the pay plan.

EMPLOYEES hired on or after January 1, 2007 will be compensated pursuant to the terms and conditions of the City's Job Classification and Compensation Pay Plan.

(Original language from 2006-08 CBA.)

The Compensation Plan includes definitions of the term "hired" and the term "promoted". The Grievant was "promoted" to Sergeant, not hired as a Sergeant. He was promoted and his pay was set in accordance with the language concerning promotion under the Compensation Plan. The Human Resources Director stated that the Grievant's 2.7% increase upon promotion as compared to the 20% increase granted the last Sergeant promoted (who was in on the ground floor of the first contract) was based on the Grievant's comparative lack of previous supervisory experience. Nonetheless, the Grievant's pay upon promotion appears to be a very small increase to compensate for the additional duties and responsibilities of a supervisor. Yet, the Compensation Plan allows the Employer considerable flexibility. The Employer has discretion within a range to place promoted employees on the pay matrix based on several criteria, such as the

employee's qualifications and experience, his current base pay relative to the base pay of other incumbents in the position, and the current pay of employees to be supervised. (See, Plan, a relevant portion of which is cited above.) The Employer had authority under the CBA to look to the Compensation Plan and place the Grievant on Step 4 when it promoted him.

2. The goal of contract interpretation is to determine the likely intent of the parties, and it is not likely that failure to amend Article 20.2 was an oversight.

In the 2010 Contract, the parties clarified Article 13, Sick Leave Accrual, and Article 15, Severance Benefits, by adding this sentence: "This provision shall not apply to employees who are promoted from within into the position of sergeant and were hired by the Employer prior to January 1, 2007." Adding this language made it clear that the City intended to save the more advantageous sick leave accrual and severance benefit system for the Grievant and others like him despite the new Compensation Plan. The Union's claim that not including this sentence in Article 20, Wages, was an oversight is not persuasive. The arbitral principal "the expression of one thing is the exclusion of another" means that where the parties exclude one thing from a group or list, it is more likely that they intended to exclude it, than that they forgot about it.<sup>6</sup> The lack of a saving sentence in Article 20.2 weighs against the Union's proposed interpretation.

3. The Union tried to negotiate a change in the Grievant's pay through the collective bargaining process in 2011 prior to filing this grievance.

Bargaining history weighs against the Union's position. Employer's Exhibit 2, dated May 4, 2011, states the Union proposals for its successor agreement. The third proposal is: "Article 20 Wages: The Union is seeking to adjust step movement for newly

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<sup>6</sup> An oft-cited arbitral assumption is that "the expression of one thing is the exclusion of another" is discussed in *Common Law of the Workplace*, ed., T.J. St. Antoine, National Academy of Arbitrators, BNA, (1999.) at 70-71.

promoted sergeant(s).” The Union sought agreement from the City to “adjust” step movement for newly promoted sergeants to Grade 10, Step 6. The City did not accept this proposal, and thereafter, in October 2011, the Union filed this Grievance.

4. Conclusion.

The Article 20.2 distinction between those hired prior to 2007 and those hired after 2007 divides Sergeants into two groups, those Sergeants covered by the first agreement and those Sergeants who were not covered by the agreement until a later date. It does not deal with promotions at all. The most reasonable interpretation of the language is that the parties agreed to grant special status to the four Sergeants who were to be in the newly certified bargaining unit in 2006. These existing Sergeants would be placed on an agreed upon step (Grade 10 Step 8) as of January 1, 2007. Those promoted to the Sergeants’ bargaining unit thereafter would be subject to the new Compensation Plan, incorporated by reference into the CBA. The City did not violate Article 20.2 when it promoted the Grievant to Sergeant and set his pay at Grade 10 Step 4 of the pay matrix.

**AWARD**

The Grievance is denied.

Dated: \_\_\_\_\_

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Andrea Mitau Kircher  
Arbitrator