

IN THE MATTER OF ARBITRATION BETWEEN

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City of Duluth  
"Employer"

BMS Case No. 13PA0661

Decision and Award

and

AFSCME Council 5  
Local 66  
"Union"

John W. Johnson, Arbitrator

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Date of Hearing:

April 30, 2013

APPEARANCES

For the Union:

Diane Firkus, Business Representative

For the Employer:

Steven Hanke, Assistant City Attorney

Theresa Severance, Human Resources Representative

STATEMENT OF JURISDICTION

The hearing was held in the above matter on April 30, 2013 in the City Attorney's Office in Duluth 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 elected not to submit post hearing briefs.

ISSUE

Did the employer violate Article 35.5 (c) of the Collective Bargaining Agreement, with respect to the demotion of the grievant, and if so, should the demotion be withdrawn?

RELEVANT CONTRACT LANGUAGE

ARTICLE 2 DEFINITIONS

2.9. Demotion. Instruction from employer to Employee that the Employee shall work in a different job classification, which classification is in a lower salary range than the one the Employee had been in before receiving said instruction from the employer.

ARTICLE 5 - MANAGEMENT RIGHTS

5.1. The Employer and Union recognize and agree that except as expressly modified in this Agreement, the Employer has and retains all rights and authority necessary for it to direct and administer the affairs of the Employer and to meet its obligations under federal, state and local law, such rights to include, but not be limited to, the rights specified in Minnesota Statutes, Section 179A. 07, Subd. 1; the right to direct the working forces; to plan, direct and control all the operations of the Employer; to determine methods, means, organization and number of personnel by which such operation and services are to be conducted; to contract for services; to assign and Transfer Employees; to schedule working hours and to assign overtime; to make and enforce reasonable rules and regulations; to change or eliminate existing methods of operation, equipment or facilities.

ARTICLE 28 - VACATION

28.1. Employees shall receive vacation time in accordance with the following schedule in hours:

Years of Continuous Service	40 Hours/Pay Period	37.5 Hours/Pay Period	Vacation Days/Year
0 - 4	3.69	3.46	12
5 - 8	5.85	5.48	19
9 - 12	7.08	6.63	23
13 - 16	7.69	7.21	25
17 and over	8.62	8.08	28

28.2. In cases where an Employee has completed a sufficient number of years of service in the Police or Fire Department of the City to qualify for police or fire

pension benefits, the period of service of such an Employee in the Police or Fire Department shall not be considered in computing vacation benefits under this article.

28.3. Employees shall be allowed to have an accumulation of not more than three hundred fifteen (315) hours of paid vacation time for 37 ½ hour Employees and three hundred thirty-six (336) hours of paid vacation time for 40 hour Employees as of December 31 of each year. Employees with an accumulation of more than 315 hours for 37 ½ hour Employees or 336 hours for 40 hour Employees as of December 31 of each year shall forfeit the amount of paid vacation that exceeds these stated limits. Employer shall not pay Employees for paid vacation time forfeited pursuant to this section.

28.4. No Employee shall be allowed to use vacation time and no Employee shall be compensated for vacation time until he or she has been continuously and satisfactorily employed for not less than six (6) months. No Employee shall use vacation time except at such time or times as the Appointing Authority may approve.

28.5. In the event of death of any Employee, any vacation or compensatory time accumulated to the credit of such deceased Employee shall be compensated for and shall be paid in accordance with Minnesota Statutes, Section 181.58, as amended.

#### ARTICLE 35 - ASSIGNMENT, TRANSFERS & DEMOTIONS OF EMPLOYEES

35.1. The Transfer of an Employee from a Position in one class to another Position in the same class in the same department shall be called an Assignment and may be made by the Appointing Authority; provided, that if change in the rate of compensation is involved, the Assignment may be made only if the consent of the Union is obtained.

35.2. Departmental Transfers. The Transfer of an Employee from a Position in one job title to another Position in the same job title in a different department shall be called a departmental Transfer, and may be made only with the consent of the Appointing Authority or authorities concerned and the Employee; provided, that if, in the judgment of the Appointing Authority of the department to which the Employee is transferred, the services rendered by the Employee are not satisfactory, or if the Employee feels that the new Position is unsatisfactory, such Employee shall be returned to his or her original Position at any time within (30) calendar days after the department Transfer is made.

35.3. Any Employee who desires to be transferred may inform the Chief Administrative Officer or his/her designee in writing of such desire, stating the reasons therefor, and the Chief Administrative Officer or his/her designee shall, if he or she considers the reasons sufficient and if he or she thinks such Transfer will be for the good of the City service, call to the attention of the Appointing Authorities concerned the desire of the Employee to be transferred when a Position in some other

departmental unit becomes vacant; provided, that the Chief Administrative Officer or his/her designee may himself or herself take the initiative recommending Transfer when he or she considers such actions for the good of the City service.

35.4. The voluntary Transfer of an Employee shall result in suspension of seniority in the original department; provided, that return to the original department shall revive the seniority so suspended. No seniority shall be lost in Involuntary Transfers.

35.5. Demotions:

(a) Upon the request of an Employee or by the Appointing Authority, an Employee may be reclassified from a higher to a lower paid classified Position, which in the discretion of the Appointing Authority, the Employee is eligible to fill.

(b) The Appointing Authority proposing the Demotion of an Employee shall make his or her recommendation in writing to the Chief Administrative Officer or his designee, and shall supply the Employee with a copy of such recommendation, and such recommendation shall give the future date on which the proposed Demotion is to become effective, the class to which it is proposed to demote the Employee, the new rate of pay, and any other information that the Chief Administrative Officer or his designee may require; provided, that the recommendation shall also advise the Employee that he or she may grieve pursuant to Article 45 of this agreement if he/she does not agree with the Appointing Authority's recommendations.

(c) Upon the decision of the Chief Administrative Officer or his designee to approve a recommendation of Demotion, the Chief Administrative Officer or his designee shall submit said approved recommendation to the next Civil Service Board meeting for the appropriate classification changes.

#### ARTICLE 36 - DISCIPLINE, SUSPENSIONS, REMOVALS

36.1. Discipline: Disciplinary action may be imposed upon an Employee only for just cause. Disciplinary action may be grieved by the Employee through the regular Grievance procedure as provided in this agreement. Disciplinary action shall include only the following: 1) written reprimand; 2) suspension; 3) Demotion; and 4) removal. Except in the case of a severe breach of discipline any suspension, Demotion, or removal action shall be preceded by a written warning. An Employee shall be given the opportunity to have a Union representative present at any questioning of the Employee during a meeting with a Supervisor for the purpose of determining what disciplinary action against the Employee will be taken. If the Appointing Authority has reason to reprimand an Employee, it shall be done in a manner that will not embarrass the Employee before other Employees or the public.

36.2. Suspensions:

(a) The Appointing Authority or any Supervisor acting for him or her in his or her absence, may for disciplinary purposes suspend without pay any Employee under his or her supervision from the performance of his or her duties for one (1) or more periods aggregating not more than fifteen (15) working days in a calendar year for each disciplinary incident unless the union and the Employer mutually agree to a longer period of time.

(b) Employee to be notified of suspension: In case the Appointing Authority or the Supervisor acting in his or her place suspends any Employee, he or she shall forthwith give written notice to the suspended Employee stating the reason for the suspension and the duration thereof, and shall forthwith personally deliver such written notice to the Employee or send by certified mail to his or her last known address; he or she shall also forthwith send to the Union a copy of such notice sent to the Employee. Such notice shall also advise the Employee that he or she may grieve pursuant to this agreement if he or she disagreed with the action of the Appointing Authority.

### 36.3. Removals:

(a) An Appointing Authority may, except as provided in Article 37, remove any Employee who has completed the probation period prescribed in accordance with Section 13-69 of the Civil Service code only for just cause.

(b) Any charges filed against any Employee shall state specifically the just cause or causes the Appointing Authority feels are sufficient to constitute grounds for removal, and in addition, the specific act or acts of such Employee constituting such cause; provided, that in no case shall such vague and indefinite charges as "for the good of the City" be considered for removal and that in no case may an Employee be removed on account of their religious or political opinions or affiliations or for refusing to contribute to a political fund or to render political service.

(c) Any Employee proposed to be removed for just cause, shall be notified in writing of the charges against him or her, the date of separation, and the rights of the Employee to file a formal Grievance under the union contract. The Appointing Authority shall forthwith personally deliver such written notice to the Employee or send by certified mail to the Employee's last known address and shall also forthwith send to the Union a copy of such notice sent or delivered to the Employee.

(d) If the Employee being removed files a Grievance, or demands a veterans hearing, the Employee shall be placed on suspension without pay until the Grievance is resolved except during the time where suspension without pay is prevented by law.

36.4. Personnel Records. Initial minor infractions, irregularities, or deficiencies shall first be privately brought to the attention of the Employee and if corrected shall not be entered into the Employee's personnel office record. Investigations which do not result in disciplinary actions shall not be entered into the Employee's personnel office records.

Each Employee shall be furnished with a copy of all disciplinary entries into all his or her personnel record and shall be entitled to a written response included therein. All disciplinary entries in the personnel record shall state the corrective action expected of the Employee.

The contents of an Employee's personnel office record shall be disclosed to him or her upon request and to the Employee's union representative upon the request of the Employee in accordance with state law. In the event a Grievance is initiated under

Article 44, the Appointing Authority shall provide a copy of any items from the Employee's personnel office record upon request of the Employee.

ARTICLE 45 - GRIEVANCE PROCEDURE

45.1. An Employee or group of Employees with a Grievance shall, within twenty-one (21) calendar days after the first occurrence of the event giving rise to the Grievance, present such Grievance through the Union in writing to the appropriate first line or division manager or, in the absence of such manager, to his or her authorized representative with a copy of the Grievance being sent to the Department Director. Within five (5) working days of receipt of the Grievance, the manager shall meet with the grieving Employee/s and the steward to try to fairly and equitably resolve the Grievance.

45.2. Should the manager and grieving Employee/s be unable to easily resolve the Grievance, the manager and the Union steward will meet and collaboratively prepare a written report of the specific contract language, facts, and circumstances pertaining to the Grievance. Such fact and circumstances report shall be prepared within five (5) working days of the initial meeting between the manager and Employee/s. Both sides shall make a good faith attempt to make the report as complete and accurate as possible. Preparation of the report shall include jointly interviewing all those affected by or with knowledge of the facts and circumstances surrounding the Grievance.

45.3. The manager, in consultation with the department head shall present the Employer's position in writing to the Employee or Employees and the Union within seven (7) working days after receipt of the fact and circumstances report. Grievances not resolved within the department must be presented by the Employee or Employees through the Union in writing to the Chief Administrative Officer or designee within twelve (12) working days after the Employer has given its reply to such Grievance. The Chief Administrative Officer or designee shall reply in writing to the aggrieved Employee or Employees and the Union within twelve (12) working days after receipt of such Grievance. The resolution of Grievances settled by the procedures set forth in this paragraph shall be reduced to writing and signed by the Employee or Employees, the Union and the Employer.

45.4. If the Grievance is not settled in accordance with the foregoing procedure, the Union may, within twelve (12) working days after receipt of the reply of the Chief Administrative Officer or designee submit the Grievance to arbitration by serving notice in writing of such submittal upon the Chief Administrative Officer or designee. In the event the parties are unable to agree upon an arbitrator within said twelve (12) day period, either party may request the Bureau of Mediation Services of the State of Minnesota to submit a panel of at least five arbitrators. The parties shall each have the right to alternately strike names from the panel until one name remains. If the parties are unable to agree on who shall strike the first name, the question shall be decided by a flip of the coin. The remaining person shall be the arbitrator. The arbitrator shall be notified of his or her selection by the parties.

45.5. The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. He or she shall consider and decide only the specific issue(s) submitted to him or her in writing by the parties, and shall

have no authority to make a decision on any other issue not so submitted to him or her. More than one Grievance may be heard by the same arbitrator by mutual agreement of the parties. Either party may, if it desires, submit a brief to the arbitrator setting forth its position with respect to the issue(s) involved in a Grievance. 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 and rules and regulations having the force and effect of law. The arbitrator shall submit his or her decision in writing within 30 days to the parties and shall file a copy of such decision with the Bureau of Mediation Services of the State of Minnesota. The decision shall be based solely upon his or her interpretation of the meaning or application of the express terms of this Agreement to the facts of the Grievance presented.

45.6. The decision of the arbitrator shall be final and binding upon the parties, except that an appeal may be taken to the District Court on the grounds that the order of the arbitrator violates the provisions of Minnesota Statutes Annotated.

45.7. The fee and expenses of the arbitrator shall be divided equally between the parties: provided, however, that each party shall be responsible for compensating its own representatives and witnesses. If either party desires a verbatim record of the arbitration proceedings, it may cause such a record to be made, providing it pays for the record. If both parties desire a verbatim record of such proceedings, the cost shall be shared equally.

45.8. 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 specified 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 Employee or Employees or Grievance Committee 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 written agreement of the parties involved in each step.

### FACTS

The grievant received discipline dated July 6, 2011, consisting of a suspension of five business days, and a demotion from Senior Engineering Technician to Engineering Technician, along with a change in duties. The discipline was grieved. The grievance was denied at step one, and timely appealed to step two. The grievance was then denied at step two in a letter dated August 30, 2011. The Union then appealed to step three, Arbitration, in a letter dated October 13, 2011. The employer responded that the appeal

to step three was not timely, citing Article 45.4 of the collective bargaining agreement, which requires that a grievance must be appealed to step three within 12 working days of the employer's step two response, and stated that it was denying the Union's request to arbitrate. No further action was taken on this initial grievance.

Following this grievance, the employer did not reduce the grievant's pay consistent with the demotion, until July 30, 2012, when an internal audit revealed that the pay had not been reduced. The grievant was also notified, in a letter dated August 16, 2012, that he had been overpaid \$7,092.95 for the period from July 7, 2011 through July 29, 2012. The employer proposed that this repayment be accomplished through a reduction of the grievant's vacation bank, such that the grievant would not have to return the overpayment identified by the employer.

The Union grieved this action, citing Article 35.5 (c), which states "Upon the decision of the Chief Administrative Officer or his designee to approve a recommendation of demotion, the Chief Administrative Officer or his designee shall submit said approved recommendation to the next Civil Service Board meeting for the appropriate classification change." The employer did not submit the demotion of the grievant to the Civil Service Board as described in Article 35.5 (c).

#### UNION POSITION

The Union asserts that the employer did violate Article 35.5 (c) by not referring the grievant's demotion to the Civil Service Board in the manner described the article, and

that because of this violation, the demotion should be voided, and the grievant made whole.

#### EMPLOYER POSITION

The employer contends that Article 35.5 (c) does not apply to disciplinary demotions, that its position is supported by past practice, and that therefore, the discipline should stand, the reduction of the employee's pay should not be rescinded, and the identified overpayment should be paid back. Further, the employer asserts that the provisions of the Minnesota Public Employment Labor relations act, Minnesota Statutes Sections 179A.01-25, prohibits the grievant, having availed himself of the grievance procedure in the collective bargaining agreement, from then appealing his discipline to the Civil Service Board

#### DISCUSSION

Both the Union and the employer provided exhibits showing the course of processing the grievant's demotion and subsequent grievance under Article 45 of the Collective Bargaining Agreement; the subsequent discovery that the grievant's pay had not been reduced; the action taken following that discovery; and the course of the current grievance. The Union presented no witnesses, relying on its understanding of what it contends is the plain language of Article 35.5 (c). The Union did not claim that the grievance procedure described in Article 45 was violated, but that the alleged violation of Article 35.5 (c) requires that the grievant be made whole.

The employer presented one witness, Theresa Severance, Human Resources Representative. Ms. Severance testified that there has never been an instance where disciplinary demotions were brought to the Civil Service Board; that only non-disciplinary demotions are processed in that manner. The Union presented an exhibit showing that two demotions had been referred to the October 2, 2012 meeting of the Civil Service Board. The employer then provided exhibits showing that neither of those demotions had been disciplinary. The employer's past practice argument is supported by the testimony of Ms Severance, and the exhibits submitted showing that only non-disciplinary demotions had been referred to the Civil Service Board. Although limited documentary evidence was presented to corroborate Ms Severance's testimony, the union provided no evidence which refutes either her testimony or the documentary evidence presented.

The grievance procedure not only describes clearly the process to be followed in pursuing a grievance, but also identifies specific consequences for the Union and the grievant for failure to make a timely appeal to the next step. On the other hand, Article 35 identifies no specific consequence for any failure to adhere to its provisions. It is a principle of contract interpretation that more specific provisions restrict the meaning of a general provision. Elkouri and Elkouri, How Arbitration Works, Ch.9.3.A.xiv, (7<sup>th</sup> ed. 2012). Based on this, the more specific language of Article 45.4, stating the deadline for appeal to arbitration, and of Article 45.8 stating the consequences for failure to adhere to the processing deadlines, has more weight than the less specific language of Article 35. Further, it is not logical to believe that the parties to this agreement ever intended that

specific language in Article 45 could be voided by any interpretation of less specific language elsewhere in the collective bargaining agreement..

Regarding the employer's assertions about a statutory prohibition against appealing through a union grievance procedure, and then appealing to a Civil Service Board, Minnesota Statutes, Section 179A.20 (c) states:

“ Employees covered by civil service systems created under chapter 43A, 44, 375, 387, 419, or 420, by a home rule charter under chapter 410, or by Laws 1941, chapter 423, may pursue a grievance through the procedure established under this section. When the grievance is also within the jurisdiction of appeals boards or appeals procedures created by chapter 43A, 44, 375, 387, 419, or 420, by a home rule charter under chapter 410, or by Laws 1941, chapter 423, the employee may proceed through the grievance procedure or the civil service appeals procedure, but once a written grievance or appeal has been properly filed or submitted by the employee or on the employee's behalf with the employee's consent the employee may not proceed in the alternative manner.”

This provision of Minnesota Statutes supports the employers position. The employee did avail himself of the grievance procedure under the collective bargaining agreement. To allow the grievant what amounts to a second opportunity to appeal, based on a process involving the Civil Service Board, would be inconsistent with the provisions of Minnesota. Statutes Section 179A.20 (c).

Based on the above, the grievant's demotion remains in effect. Evidence of past practice supports the employer's position. A principle of contract interpretation supports the employers position. Logic supports the employer's position. In addition, Article 45.5 of the Collective Bargaining Agreement states in part, “The arbitrator shall be without power to make decisions contrary to or inconsistent with the application of laws and rules and regulations having the force and effect of law.” For an arbitrator to overturn the

grievant's demotion based on an alleged defect in following a Civil Service Board process, after after it has been appealed through the grievance procedure in the collective bargaining agreement, is not only inconsistent with the provisions of Minnesota Statutes Section 179A.20 (c), but because of that inconsistency, is also prohibited by Article 45.5 of the collective bargaining agreement.

This leaves the question of overpayment, including repayment of the \$7092.95. The question of recouping overpayment has been addressed by Elkouri and Elkouri, Supra, at 10, Ch 18.3.K iii. Citing several arbitration awards, the authors conclude that while such an error is not remedial under general contract theories, arbitrators do occasionally allow correction. Another source, Hunt and Sinacropi, Remedies in Arbitration, p. 428-429 (2<sup>nd</sup> Ed. 1991), also citing several arbitration awards, concludes that while in general overpayments may be recovered, based on a theory of unjust enrichment, in some cases they may not. Notwithstanding these opinions and the arbitration decisions supporting them, Article 45.5 of the Collective bargaining agreement requires that an arbitrator's decision "shall be based solely on his or her interpretation of the meaning or application of the *express terms of this Agreement* (italics added) to the facts of the Grievance presented." Therefore, the question of repayment must be answered based strictly on the provisions of the collective bargaining agreement. I find no language in the collective bargaining agreement prohibiting the employer from correcting an overpayment of any kind. Article 5.1 of the Collective Bargaining Agreement reserves to the employer all rights and authority to direct and administer the affairs of the employer, except as expressly modified by the agreement. I also find no language in the Vacation Article of

the agreement, Article 28, that would prohibit the employer's proposed method of recouping the overpayment.

AWARD

The grievance is denied. The grievant's demotion remains in effect. The reduction of the grievant's pay consistent with the demotion therefore remains in effect. The employer is entitled to recoup the overpayment made to the grievant. The method for recouping the overpayment proposed by the employer is permitted under the terms of the collective bargaining agreement.

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Date

\_\_\_\_\_  
John W. Johnson