

IN THE MATTER OF ARBITRATION BETWEEN]	DECISION AND AWARD
]	
]	
CITY OF AUSTIN, MINNESOTA]	OF
]	
(EMPLOYER)]	
]	ARBITRATOR
and]	
]	
LAW ENFORCEMENT LABOR SERVICES, INC.]	BMS CASE: 13-PA-0107
]	
(UNION)]	

ARBITRATOR: EUGENE C. JENSEN

DATE AND LOCATION OF HEARING: June 17, 2013
City of Austin – City Hall
500 4th Avenue NE
Austin, Minnesota 55912

DATE OF FINAL SUBMISSIONS: July 12, 2013

DATE OF AWARD: July 26, 2013

ADVOCATES: For the Employer

Cyrus F. Smythe, Consultant
David Hoversten, City Attorney
Tricia Wiechmann, Human Resources Director

For the Union

Isaac Kaufman, General Counsel L.E.L.S.

GRIEVANT: Officer Brian Blake

ISSUE

The Union was prepared to present exhibits and testimony relating to two different issues on the day of the hearing: Is the grievance arbitrable? And, if arbitrable, did the Employer have “just cause” to give the Grievant an oral reprimand for an alleged violation of the Uniform Standards of Conduct?

The Employer was prepared to present exhibits and testimony relating to the Union’s first issue mentioned above and did not believe it would be necessary to prepare for the second.

The Parties agreed to bifurcate the issues: addressing the arbitrability issue first, and, if necessary, addressing the just cause issue at a later date.

JURISDICTION

In accordance with the Minnesota Public Employment Labor Relations Act (PELRA), the Minnesota Bureau of Mediation Services (BMS) and the 2010 through 2011 Labor Agreement between the parties, this issue is properly before the Arbitrator.

PERTINENT CONTRACT LANGUAGE¹

ARTICLE 5 EMPLOYEE RIGHTS – GRIEVANCE PROCEDURES

5.1 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. . . .

PROCESSING OF A GRIEVANCE

It is recognized and accepted by the UNION and the EMPLOYER that the processing of grievances hereinafter provided is limited by the job duties and responsibilities of the EMPLOYEES and shall therefore be accomplished during normal working hours only when consistent with such EMPLOYEE duties and responsibilities. The aggrieved EMPLOYEE and the 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.

¹ Taken from the 2010 – 2011 Labor Agreement between the parties.

PROCEDURE

Grievance, 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. 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, and the remedy requested and shall be appealed to Step 2 within ten (10) calendar days after the EMPLOYER-designated representative's final answer in Step 1. Any grievance not appealed in writing to Step 2 by the UNION within ten (10) calendar days shall be considered waived.

Step 2. If appealed, the written grievance shall be presented by the UNION and discussed with the EMPLOYER-designated Step 2 representative. The EMPLOYER-designated representative shall give the UNION the EMPLOYER'S Step 2 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 representative's final Step 2 answer. Any grievance not appealed in writing to Step 3 by the UNION within ten (10) calendar days shall be considered waived.

Step 3. A grievance unresolved in Step 2 and appealed in Step 3 shall be submitted to arbitration. The EMPLOYER and the Union representative shall endeavor to select a mutually acceptable arbitrator to hear and decide the grievance. If the parties cannot agree on an arbitrator, the selection of an arbitrator shall be made in accordance with the Rules established by the Bureau of Mediation Services.

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.
- 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, rules, or regulations having the force and effect of law. The arbitrator's decision shall be submitted in writing within thirty (30) days following the close of the hearing or submission of briefs by the parties, whichever be later, unless the parties agree to an extension. The decision shall be binding on both the EMPLOYER and the UNION and shall be based solely on the arbitrator's interpretation or application of the express terms of this AGREEMENT and to the facts of the grievance presented. . . .

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 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 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.

BACKGROUND

The Employer is the City of Austin Police Department in Austin, Minnesota, and the Grievant is a seven year member of the police department, serving as an officer. The Grievant is represented by the Law Enforcement Labor Services, a union that represents many police jurisdictions throughout the State of Minnesota.

In April of 2010, the Grievant “was involved in apprehending [a] suspect [name deleted], “placing [him] in his squad car and transporting him to the county jail. [The suspect] filed a complaint against the Grievant based on his alleged conduct during the arrest and the ride to the jail. Following an Internal Affairs investigation, the City determined that [the Grievant] had violated Section 01 of the Uniform Standards of Conduct . . . and placed a documented verbal reprimand in [the Grievant’s] file.²

Following the receipt of the verbal reprimand, the Grievant met with then Detective Sergeant Brian Krueger and Lieutenant John Mueller, and he had them sign a memo that he and his Union representative had prepared. It is this document that is at the heart of the arbitrability

² Taken from the Union’s Post Hearing Brief (UPHB) p. 1

issue. Did it suspend the time limits for filing a grievance as the Union contends, or was it merely an effort to have the discipline removed outside of the grievance process?

JOINT EXHIBITS

1. 2010 – 2011 Collective Bargaining Agreement (CBA) between the parties.

2. July 9, 2012, second step grievance letter from L.E.L.S. Local President, Eric Blust, to James Hurm, City Administrator. The grievance cites two different issues: 1) Under “Nature of the Grievance,” failure to remove the verbal reprimand from the Grievant’s personnel file; and 2) Under “Articles Violated,” the absence of “just cause.”

3. a. June 29, 2012, email from Eric Blust to Brian Krueger in which Blust clarifies a step one grievance. And a July 6, 2012, email from Brian Kreuger to Eric Blust, in which he denies a step 1 grievance on behalf of the Grievant.

b. June 27, 2012, email from Eric Blust to Brian Krueger, in which he files a step 1 grievance on behalf of the Grievant. This is the same grievance mentioned in 3.a. above.

4. July 26, 2012, letter from James C. Hurm, City Administrator, to Len McFarland, Business Agent for LELS, Local 73. Hurm denies the grievability or arbitrability of the Union's grievance on behalf of the Grievant.
5. July 31, 2012, letter to Josh Tilsen, Commissioner of the Bureau of Mediation Services, from Len McFarland, requesting a list of arbitrators to hear the case at bar in this hearing.
6. February 5, 2013, letter to the Arbitrator confirming his selection.

UNION'S EXHIBITS

1. May 11, 2010, memo from the Grievant to "Chief Law Enforcement Officer."³

Chief, I have acknowledged receiving an oral reprimand that has been documented in writing and will be placed permanently in my personnel file with Human Resources. It is my understanding that this letter's intent is to effect positive change on my part when interacting with citizens and representing the department. I also understand that this letter is not intended to be a permanent blemish on my service record. However, without recourse or the ability to have it removed it appears to be just that. I request the Police Department provide

³ Because of the importance of this document to this matter, The Arbitrator has reproduced it here in its entirety.

me a guideline for redemption and an avenue to have this disciplinary record removed from my permanent public record in the future. I further request that the Chief Law Enforcement Officer agree to revisit this letter of discipline in 2 years for

possible removal provided there are no further disciplinary actions against me.

Respectfully

[Signature of Grievant]

CLEO Acknowledgement

[Signatures of John Mueller and Brian
Krueger]

2. May 7, 2010, memo from Lt. John Mueller, Acting Chief, to the Grievant.⁴
3. June 7, 2012, memo from Tricia Wiechmann to the Grievant.⁵
6. 2010 Austin Police Department Patrol Officer Conference for the Grievant.⁶

⁴ This document contains the original verbal reprimand given the Grievant.

⁵ This memo denies the Grievant's request to have the verbal reprimand removed.

⁶ Grievant's performance review.

7. 2011 Annual Performance Review for the Grievant.
8. 2012 Annual Performance Review for the Grievant.
9. Several letters of commendation to the Grievant individually, or to the Grievant as one member of a team.
10. Minnesota Department of Administration Advisory Opinion 01-055 regarding the Minnesota Government Data Practices Act.⁷

EMPLOYER'S EXHIBITS

ARBITRATOR'S NOTE: The Employer offered no additional exhibits into evidence.

UNION'S WITNESS

- Brian Blake, Austin Police Department Officer (Grievant).

EMPLOYER'S WITNESSES

⁷ I.e., governmental entities are required to maintain information, but they are not required to keep that information in an employee's personnel file.

- Tricia Wiechmann, Human Resource Director
- John Mueller, Lieutenant, City of Austin Police Department
- Brian Krueger, Chief, City of Austin Police Department

UNION'S ARGUMENT

NOTE: The following excerpts are from the Union's Post-Hearing Brief:

[The Grievant] did not believe that he had violated any policy through his contact with [the suspect], nor did he believe that he deserved the reprimand. [The Grievant] considers it extremely important to keep discipline out of his file; however, he was also reluctant to “stir things up” or to be adversarial with the City administration. . . . For these reasons, he arranged a meeting with Detective Sergeant Brian Krueger and Lieutenant John Mueller At that meeting, [the Grievant] presented a letter drafted by Officer Todd Clennon, who was Union steward at that time [see Union Exhibit 1]. . . . Both Detective Sergeant Krueger

and Lieutenant Mueller signed and dated the letter on May 11, 2010, under the heading "CLEO Acknowledgment".⁸

[The Grievant] disagreed with the reprimand and certainly would have filed a grievance right away; the record is clear that by not filing a grievance at that time, he was acting in reliance on a good-faith understanding of his agreement with [Krueger and Mueller]. When [Krueger and Mueller] met with [the Grievant] on May 11, 2010 and signed the letter that had been drafted on his behalf, whatever their intentions may have been, they communicated to [the Grievant] that the reprimand would be removed from his file in two years. Moreover, it is undisputed that Officer Blake held up his end of the bargain by completing those two years without any further discipline and with an excellent overall record of performance.⁹

[B]oth Chief Krueger and Ms. Wiechmann acknowledged at the hearing, that [the Grievant's] reprimand could be removed from his personnel file and placed in another accessible location without running afoul of the Data Practices Act. Therefore, the City's stated reason for keeping the reprimand in [the Grievant's] personnel file should be disregarded. . . . For the reasons stated above, the grievance to challenge [the Grievant's] documented verbal reprimand was timely

⁸ pp. 1-2 Union's Post-Hearing Brief (UPHB)

⁹ p. 4, UPHB

filed. The Union should be permitted to proceed with its grievance to challenge the reprimand on its merits.¹⁰

In essence, the Union is arguing that the Grievant secured a waiver of the timelines when his representative created a document that was signed by the Grievant and members of management in May of 2010. Hence, the timeline for filing a grievance was extended to the time when management two years later denied his verbal request to have the oral reprimand removed. In addition, the Union argues that there is no outside requirement, such as the Data Practices Act, for the reprimand to exist only in the Grievant's personnel file.

EMPLOYER'S ARGUMENT

NOTE: The following excerpts are from the Employer's Post-Hearing Brief:

The Step 2 grievance submitted by LELS on July 9, 2012 by LELS Local Union President stated as a basic premise for consideration by the City, an allegation which was a fabrication of fact and, therefore, a false accusation.

The Section of the LELS Step 2 grievance labeled: "Nature of Grievance" stated:

¹⁰ p. 4, UPHB

“As a part of the discipline ordered in the letter of May 7, 2010 Officer Blake was informed that the verbal reprimand would be removed from his personnel file.”¹¹

The Step 2 grievance submitted by LELS on July 9, 2012 also alleges in the Section “Articles Violated” that “The action by the Employer is in violation of Article 17 Discipline is [and] that the discipline ordered is without just cause.”

This accusation is neither an accurate or valid statement as the Exhibits and Testimony of the LELS and City Witnesses demonstrated. The facts that the Union and City witnesses verified at the hearing are:

no grievance was filed by [the Grievant] under Article 17 of the AGREEMENT despite the fact that the procedures specifically mandated by the AGREEMENT in Article 17, Section 17.6 and Step 1 of Article 5 are that the employee receiving the discipline of an oral or written reprimand must personally file the grievance challenging the discipline.

¹¹ Page 1, Employer’s Post-Hearing Brief (EPHB)

This lack of conformance with the specific requirements of the AGREEMENT negates the validity and arbitrability of the Step 1 grievances filed by LELS and not the employee [the Grievant] who received the oral reprimand.¹²

There is no indication in Union Exhibit 1 that the City made any commitment to removal of disciplinary action of May 7, 2010 and the Union allegation that such commitment or agreement was made is completely false and, therefore, no more than a fabrication.¹³

There is no provision of the AGREEMENT which deals with, mentions or specifies a specific term or condition of employment relating to or providing for the removal of a disciplinary action previously accepted (not grieved with the Agreements time limits for grieving a disciplinary action) cited in any of the forms outlined in Article 17.1, Article 5 or elsewhere in the AGREEMENT. The AGREEMENT only provides for the modification or overturning of a discipline action through the grievance process in Article 5 if properly filed as provided by Article 17.¹⁴

In essence, the Employer argues that the Grievant did not file a grievance within the twenty-one day period required by the parties' Agreement. In addition, the Employer does not

¹² pp. 2-3 (EPHB)

¹³ pp. 4-5 (EPHB)

¹⁴ p. 6 (EPHB)

recognize the legitimacy of Union's assertion that Union Exhibit 1 somehow tolled those same time lines for over two years. And finally, the Employer argues that the grievance at issue in this arbitration is not arbitrable for those very same reasons.

DISCUSSION

The collective bargaining agreement between the parties calls for five different levels of discipline, up to and including discharge. The discipline given to the Grievant in this case represents the least serious level of discipline possible, a verbal reprimand. And, although it is not spelled out in the Agreement, the Employer has consistently memorialized verbal reprimands in employees' personnel files.

The Grievant is a capable and highly regarded Officer of the Austin, Minnesota Police Department who sincerely feels that his service record was marred by the verbal reprimand he received. So much so that he sought relief through his superiors. He was on a mission to prove that he wasn't the type of Officer who might receive such a complaint. Instead of filing a grievance, however, he and his Union representative came up with the idea of a letter that would spell out the conditions under which he might be eligible to have it removed.¹⁵ He

¹⁵ Union Exhibit 1

presented the letter to the two Acting Chiefs and they both signed it. It was not until two years later when he asked the Chief to remove the verbal reprimand from his personnel file that he realized it would likely remain in his file. A grievance was then filed alleging that the Employer reneged on its end of the “bargain,”¹⁶ and that the original discipline lacked just cause.

The Grievant’s version of what happened at the meeting with the two Acting Chiefs in May of 2010 is quite credible. He did present the letter in good faith, and he more than likely left that meeting confident he would be able to have it removed. It is not credible, however, that the letter was ever intended to act as a waiver of the grievance procedures contained in the collective bargaining agreement. If it had been intended to toll the time, as the Union now contends, it would have included specific language to that effect. It is much more likely that this was an attempt to have the reprimand removed outside of the grievance process. And if it had worked, the parties would not have had an issue to resolve in arbitration. But it didn’t work, the Human Resources Director -- someone more sophisticated in grievance procedures, policies and contract interpretations -- looked at the letter and recognized it as falling short of a valid agreement between the Union and the Employer to waive contractual language: the “deal” was off.

If the Grievant didn’t file a grievance because he didn’t want to “stir things up,” especially following the negative attention he just received, he cannot now claim that an obscure side agreement somehow put a potential grievance on hold. Especially an agreement that doesn’t

¹⁶ As referenced in Union Exhibit 1

even mention the word grievance, or allude to any discipline or grievance related sections of the Agreement. At the heart of the grievance process is the notion that matters should be processed efficiently and without delay. It would be unreasonable to expect an employer to reestablish the supporting facts for a disciplinary action two years after the fact. If the Grievant wanted to delay the resolution of the matter at hand, he (and/or his Union) could have filed a grievance and then, as part of a grievance settlement, made a proposal to meet certain expectations in exchange for its removal.¹⁷

After reviewing all of the exhibits, testimonies and arguments, and for the reasons cited above, the undersigned supports the Employer's position in this matter.

AWARD

The Union's grievance violates the Procedure section of Article 5, Employee Rights – Grievance Procedures of the 2010 – 2011 Agreement between the Parties, in that it was filed outside of the required timelines. For this reason, the grievance is not arbitrable under Step 3 of the same article.

¹⁷ This may or may not have worked; it's offered here only as an example of a strategy that would have left the parties clearly aware of the bargain they were striking.

Respectfully submitted this _____ day of July, 2013.

Eugene C. Jensen, Neutral Arbitrator