

IN THE MATTER OF INTEREST ARBITRATION BETWEEN

City of Prior Lake

BMS Case No. 13-PA-0756

“Employer”

Decision and Award

and

Minnesota Teamsters Public and .

John W. Johnson, Arbitrator

Law Enforcement Employees’ Union

Local 320

“Union”

Date of Hearing:

October 17, 2013

Date of submission of Post Hearing Briefs:

October 31, 2013

ADVOCATES:

For the Union:

Paula R. Johnston, General Council
Teamsters Local 320
3001 University Ave. S.E.
Minneapolis MN 55414

For the Employer:

Mark Girouard
Nilan Johnson Lewis PA
120 S. 6th Street, Ste. 400
Minneapolis, MN 55402

WITNESSES:

For the Union:

Terry Neuberger
John Stanger
Brad Cragoe
Tom Kahlert

For the Employer:

Kelly Meyer

STATEMENT OF JURISDICTION

The hearing was held in the above matter on October 17, 2013 in the City Hall in Prior Lake 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 to submit post hearing briefs, which were received on October 31, 2013.

ISSUES

1. Was the Union's grievance filing timely?
2. Did the employer violate the Collective Bargaining Agreement by refusing to pay the grievant Educational Incentive Pay after his promotion to Sergeant?

RELEVANT CONTRACT LANGUAGE

ARTICLE VII – EMPLOYEE RIGHTS – GRIEVANCE PROCEDURE (*selected provisions*)

7.1 Definition of a Grievance. A grievance is defined as a dispute or disagreement as to the application of the specific terms and conditions of the agreement.

7.4 Procedure: Grievances, as defined by 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 twenty-one (21) 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 answer to such Step 1 grievance within ten (10) 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 and shall be

appealed to Step 2 within ten (10) days after the Employer-designated representatives' final answer in Step 1. Any grievance not appealed in writing to Step 2 within ten (10) days shall be considered waived.

(Descriptions of steps 2, 3, and 4 are not relevant to the issues in this grievance)

7.6 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 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 thirty (30) days following the close of the hearing or the submission of briefs, whichever is 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 the facts of the grievance presented.

ARTICLE XXIX. EDUCATION INCENTIVE PAY PLAN *(selected provision)*

29.1 The employer agrees to pay each employee an additional percentage of his/her base pay rate plus longevity pay or working out of class pay, if any, for each year of college level education as part of the following schedule after starting with the department:

Three percent (3%) for one (1) year

Six percent (6%) for two (2) years

Nine percent (9%) for three (3) years

Twelve percent (12%) for four (4) years.

New members of the bargaining unit hired after January 1, 2009 are not eligible for education incentive pay.

- 29.3 The employer agrees to provide reimbursement for the cost of books and tuition for any successfully completed college level course provided that the course is associated with law enforcement (to include the social sciences and required electives). Effective December 31, 2009, this provision shall not apply to Master's or higher level course work.

ISSUE 1. Was the Union's grievance filing timely?

FACTS

On July 27, 2012, a position for Police Sergeant in the Prior Lake police department was posted for application. It was an internal posting, open only to qualified employees of Prior Lake. The posting stated that "new members to Teamsters are not eligible for education incentive pay, regardless if currently earned." Employer Exhibit 12. The grievant, Brad Cragoe, submitted an application, and was ultimately selected for the position. He received a letter dated October 31, 2012, informing him of his selection, and that he would start on December 30, 2012. In this letter was the statement, "New members of the teamster bargaining unit are not eligible for education incentive pay." Employer Exhibit 13. Mr. Cragoe began working in the Sergeant position on December 30, 2012. On January 25, he received his first paycheck as a Police Sergeant. The check did not include any education incentive pay. On February 4, 2013, the union filed a grievance on behalf of Mr. Cragoe, claiming that he was improperly denied education incentive pay. Union Exhibit 1. The City of Prior Lake's responses to this grievance asserted that the grievance was not timely, in addition to denying the grievance on its merits. The grievance was not resolved in earlier steps, and proceeded to arbitration.

POSITIONS OF THE PARTIES

In the hearing the employer took the position that the union knew of the employer's intended action when the posting was made on July 27, 2012, and that the union should therefore have filed the grievance within 21 days of that date. Alternatively, the employer asserted that the clock began to run on the grievance when Mr. Cragoe received the October 31, 2012 letter appointing him to the position, and informing him that he would start on December 30 2012 . In its post hearing brief, the employer conceded that until Mr. Cragoe became a member of the bargaining unit, on December 30, 2012, he did not have standing as a potential grievant, so the grievance was not ripe, but that effective December 30, it was, and the union had 21 days from December 30, 2012 to file, thus making the grievance untimely.

The Union took the position that there was no adverse action to grieve until January 15, 2013, when Mr. Cragoe received his first paycheck, which did not include the education incentive pay, and that therefore, the 21 day time period for filing began on January 15, 2013. Since the Union filed the grievance within 21 days from that date, the grievance was timely.

DISCUSSION

Elkkouri & Elkouri, 7th Edition p. 5-33 states:

“A party sometimes announces its intention to perform a given act, but does not culminate the act until a later date. Similarly, a party may perform an act whose adverse effect on another does not result until a later date. In such situations, arbitrators have held that the “occurrence” for purposes of applying time limits, is that later date.”

In its post hearing brief, the Union argued that this principle should apply. The Union also pointed out the language in the collective bargaining agreement, from Article 7.5, stating that an employee “claiming a violation concerning the interpretation or application of this Agreement shall, within 21 days after such violation has occurred,

present the grievance...”. The Union argues that the phrase “after such violation has occurred,” supports its position.

The employer on the other hand, argues that the Union had notice of the employer’s intent as early as July 27, 2012, that the October 31, 2012 letter to Mr. Cragoe reiterated that intent, and that therefore, upon Mr. Cragoe’s entry into the bargaining unit, effective December 30, 2012, the clock began to run.

I agree with the Union’s position. Both the language of the agreement, referring to “after such violation has occurred”, and the principle cited in Elkouri, that expressed intent is not occurrence, and even action by the employer may not be an occurrence until the grieving party is actually affected, support the Union’s position.

CONCLUSION

The grievance is timely.

ISSUE 2: Did the employer violate the Collective Bargaining Agreement by refusing to pay the grievant Education Incentive Pay after his promotion to Sergeant?

FACTS

In their negotiation of a new collective bargaining agreement covering the years 2009 through 2011, the parties changed Article 29.1 by adding the following language:

“New members of the bargaining unit hired after January 1, 2009 are not eligible for education incentive pay.”.

The substantive issue in this grievance is over what this language means. The employer believes it means anyone either promoted into the bargaining unit from within the City, or hired from outside the City into the bargaining unit, after January 1, 2009, will not receive education incentive pay. The Union, on the other hand, believes the new language means anyone hired into their initial employment with the City after January 1, 2009, does not receive education incentive pay if they later become a Police Sergeant. Both parties point out that to the best of their knowledge, no one has ever become a

Police Sergeant with the City as a result of being hired directly from the outside. All Sergeants have become Sergeants by promoting from a Police Officer position within the City. The City's understanding means that any Police Officer promoted to Police Sergeant after January 1, 2009, even if they have been receiving education incentive pay as a Police Officer, will no longer receive it after the promotion. The Union's understanding means that an employee hired as a Police Officer prior to January 1, 2009, and later promoted to Police Sergeant, will receive education incentive pay if otherwise qualified.

Both parties presented evidence about what occurred during negotiation and mediation leading to the adoption of this language.

According to the testimony of Kelly Meyer, Assistant City Manager, who represented the City in negotiating the 2009-2011 collective bargaining agreement, the employer made a proposal to eliminate the education incentive pay for sergeants, effective January 1, 2009. Ms Meyer's chronology of bargaining, Employer Exhibit 7, shows proposals exchanged from the teamsters initial demands dated July 6, 2009, through an employer response dated July 27, 2009, revised teamster demands dated July 28, 2009, and a City response dated September, 4, 2009. In this document, it states that in both its proposals, the City proposed to eliminate the education incentive pay for new members of the Sergeants bargaining unit effective January 1, 2009, and that the Union, in its July 27, 2009 response, did not agree. The parties entered mediation, with a resulting agreement described in the mediator's handwritten notes, and signed by representatives of the Union and the City. Employer Exhibit 8; Union Exhibit 8. Ms Meyer testified that the mediator initially wrote, with respect to educational incentive pay, "No EI for new EE." (no education incentive for new employees). But then, after being prompted by Ms Meyer, the mediator added the phrase "of CBA." (of the collective bargaining agreement). The relevant language in the mediator's description of the agreement reached in mediation then stated "No EI for new EE. of CBA." Ms Meyer stated she clearly understood that this meant new members of the Sergeant bargaining unit, whether promoted from among patrol officers or hired from the outside, would not receive education incentive pay. She reported this to the City Council in her Agenda Report for their December 7, 2009, meeting. Employer Exhibit 9. The report stated, regarding Education Incentive Pay

“Adds language that eliminates education incentive pay for new members to the bargaining unit beginning January 1, 2009. This language is consistent with language achieved with LELS.”

Ms Meyer had previously communicated to the City Council the City’s intention to make this change, in confidential communication in an executive session, Employer Exhibit 6, recommending that education incentive pay be eliminated for future members of the Sergeant bargaining unit.

In presenting its case the union offered testimony from Sergeant Tom Kahlert, who was a union steward at the time of the negotiation, and was in attendance at negotiation sessions and in mediation of the 2009-2011 agreement. Mr. Kahlert stated that he had no idea the change in education incentive pay was intended to affect Police Officers already hired before January 1, 2009, who were later appointed to Sergeant. He thought instead that the change was meant to apply only to employees hired by the City after January 1, 2009. On cross examination Mr. Kahlert was asked why there were two periods in the sentence, “No EI for new EE. of CBA.” He stated he did not know. When asked if he had any discussion with Ms. Meyer about the mediated settlement he said he had, but that it had not included any discussion of education incentive. After being recalled as a rebuttal witness, he stated that he “did not recall” any discussion with Ms Meyer about the education incentive pay portion of the mediated settlement.

Another Sergeant, John Stanger, also testified that he was in attendance at the negotiation and mediation of the 2009-2011 Sergeants contract, although he was not a steward at the time. He described his understanding of the change in the education incentive language as applying to employees newly hired by the City after January 1, 2009. He recalled no discussion of applying the change to newly promoted employees hired before January 1, 2009. In further testimony he stated that he became aware of the City’s position on education incentive pay when the Posting for Sergeant was made in July 2012, then called his union business agent, and was informed that the City’s understanding was incorrect.

On cross examination, when asked what was meant by the two periods in the sentence from the Mediator's notes stating, "No EI for new EE. of CBA." , he said he did not know.

POSITIONS OF THE PARTIES

Employer:

The employer, in its post hearing brief, makes the following arguments:

1. The Union has the burden of proof to show, by a preponderance of evidence, that its position is correct.
2. The word hired means hired into the bargaining unit, not hired into the City. The word hired appears two other places elsewhere in the contract, and the term used is "newly hired," to distinguish it from promoted. If the use of the word hired in Article 29.1 were meant to denote hired into the City, it should have said "newly hired"
3. The bargaining history for the disputed provision clearly shows that the City's interpretation is correct, based on Meyer's testimony, the bargaining log she shared with the union throughout the process, and the report to the City Council.
4. The Union's position will result in prolonging the existence of the benefit, which is contrary to the goals of the City in proposing its elimination.

Union:

The Union asserts that:

1. Based on the testimony of both Kahlert and Stanger, the clear understanding was that the change was to apply to employees hired by the Employer after January 1, 2009.

2. The contract language, drafted by the City, clearly supports the Unions position that the intent of the language was that it apply to only to those hired by the City after January 1, 2009. The Union compares the change made in Article 29.1 regarding Education Incentive Pay to a change made in Article 29.3, adding the language “Effective December , 2009, this provision [pertaining to tuition reimbursement] shall not apply to Masters or higher level course work “ The Union asserts that the comparison between these two changes shows the parties intent was not to eliminate the benefit (education incentive pay) for all new members of the bargaining unit.

3. The City will achieve its stated purpose of eliminating the benefit over time, under the Unions interpretation.

DISCUSSION

I find that the preponderance of evidence shows that the language at issue, restated below, is ambiguous.

“New members of the bargaining unit hired after January 1, 2009 are not eligible for education incentive pay.”

Based on the language itself, the word “hired” could mean either what the Union says it means, or what the Employer says it means.

In support of its argument that the work “hired” means hired into the bargaining unit the employer cites Law Enforcement Labor Services and City of Northfield, BMS Case No. 12-PA- 0689 (Kirchner 2012), in which there was a similar disagreement about what the word “hired” meant, in this case applied to salary progression for employees “hired” before a specific date, and those “hired” on or after that date. The arbitrator determined that “hired” meant entering the bargaining unit, rather than becoming employed by the City. The City of Northfield case can be distinguished from the present one however, in that part of the evidence relied on by Arbitrator Kirchner was that a compensation plan

had been incorporated into the LELS contract by reference, and that compensation plan supported the City's position. In the present case, there is no similar evidence to rely on.

The Union on the other hand, argues that if the City's intent was to eliminate the benefit for new members of the bargaining unit, effective 1/1/09 it could have written into the contract that effective January 1, 2009, "new members of the bargaining unit are not eligible" or "new members of the bargaining unit, including new members who have been promoted from the officer's unit, are not eligible" or even more simply, "effective January 1, 2009, new members of the bargaining unit are not eligible." Any of these choices, according to the Union, would have clearly expressed what the City says the language means, but that's not what was written.

With regard to the bargaining history for the language, I find it to be inconclusive regarding the meaning of what was finally agreed upon. It is quite clear that the education incentive pay was to be eliminated for some Sergeants, but it is not clear which ones. Equally credible witnesses describe different outcomes of bargaining. The Employer clearly understood what it intended to negotiate. The notes from bargaining, prepared by Ms. Meyer and shared with the union during bargaining, however, do not show that the Union ever agreed to what the employer intended. I think it is also significant that even the mediator did not clearly understand what that intent was when initially writing up what had been agreed to in mediation.

If the Union's position were awarded, there would indeed be a longer time period to eliminate the benefit, as the employer asserts. But how much longer? Mr. Cragoe is the first new Sergeant since the 2009-2011 contract was ratified and approved in December of 2009. It is reasonable to conclude that most City Police Officers, whether eligible for education incentive pay or not, if they work for the City until retirement, will not become Sergeants before they retire.

Where there is ambiguity in contract language, and that ambiguity cannot be resolved by looking at bargaining history, some arbitrators have relied on the principle that if

language supplied by one party is reasonably susceptible to two interpretations, the one that is less favorable to the party that supplied the language is preferred. Elkouri & Elkouri, 7th Edition, p. 9-48. It is my judgment that this principle applies to the present case. It was incumbent upon the Employer to make clear to the Union what was being proposed in mediation, and to express that clearly in the change to Article 29.1. The evidence shows that the Employer did not accomplish that. The testimony of Kahlert and Stanger, supports the conclusion that the Union did not share or agree to the City's understanding of the disputed language. In addition, the testimony of the grievant, reporting the advice he received from his Union when he enquired about the job posting language addressing education incentive pay, also indicates that the Union did not understand the language to mean what the City intended it to mean.

CONCLUSION

The grievance is sustained.

John W. Johnson, Arbitrator

December 31, 2013
Date