

**IN THE MATTER OF ARBITRATION BETWEEN**

<b>LAW ENFORCEMENT LABOR SERVICES, INC.</b>	)	<b>OPINION AND AWARD</b>
<b>LOCAL NO. 273</b>	)	
	)	
<b>AND</b>	)	<b>BMS CASE NO. 07-PN-0824</b>
	)	
<b>THE CITY OF NEW HOPE</b>	)	<b>INTEREST ARBITRATION</b>

.....

ARBITRATOR: Charlotte Neigh  
HEARING: October 12, 2007  
POSTHEARING BRIEFS RECEIVED: October 29, 2007  
AWARD: November 11, 2007

**REPRESENTATIVES**

For the Union:

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For the Employer:

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**JURISDICTION AND PROCEDURE**

In accordance with the Minnesota Public Employment Labor Relations Act (PELRA), Charlotte Neigh was selected to arbitrate this matter and the Commissioner of the Minnesota Bureau of Mediation Services certified the issues to be arbitrated. A hearing was held in New Hope, at which time both parties had a full opportunity to offer evidence. By agreement of the parties, posthearing briefs were postmarked by October 26th, and the record was closed upon their receipt.

**ISSUES AS CERTIFIED AT IMPASSE**

1. Duration - What Shall The Term of the Contract Be? - Art. 3.2
2. Salary Schedule - If Applicable, Amount of Wage Increase in 2009? - Art. 21
3. Compensatory Time - Should Employees in Captain Classification Receive Compensatory Time? If So, How Much? - NEW
4. Premium Pay - Should Employees in Sergeant Classification Assigned to Administrative Duties Receive Additional Compensation? - NEW

## **BACKGROUND**

The City of New Hope has a population of about 21,000 and 100 employees, about 54 of whom are not represented by a union. Local 49 of the IUOE represents 18 maintenance employees. The Police Department has about 22 police officers in another bargaining unit (BU), which is also represented by LELS. The BU involved in this proceeding consists of the police supervisory employees: currently one Captain and five Sergeants. Negotiators for this BU and the City's negotiation team reached a tentative agreement on terms and conditions for a collective bargaining agreement (CBA) for 2007 and 2008. This agreement was submitted to the City Council for ratification and was rejected in February 2007. The parties reached impasse on some of the issues and they proceeded to binding interest arbitration because these are essential employees. This is the first time these parties have resorted to arbitration to establish terms and conditions of the CBA.

## **ISSUE NO. 1 - DURATION**

### *UNION'S POSITION*

The Union seeks a three-year duration and proposes this language: "This AGREEMENT shall be effective as of January 1, 2007, except as herein noted, and shall remain in full force and effect until the 31st of December, 2009."

### *CITY'S POSITION*

The duration of the contract shall be two years, January 1, 2007 through December 31, 2008.

### *UNION'S ARGUMENTS*

The Union argues that:

- The parties need a break from bargaining because: the BU has lost faith in the ability of the City's negotiation team to receive approval of its work by the City Council; these parties have never before resorted to arbitration; and the City is in the process of hiring a new city manager who will need time to get up to speed as a key player in negotiation decisions.
- The stated policy of PELRA is to promote orderly and constructive relationships, which would be best served by avoiding an immediate return to bargaining.
- There has not been any internally consistent pattern regarding the length of CBAs that would preclude a three-year duration.

*CITY'S ARGUMENTS RE: DURATION*

- This BU has a history of one-year or two-year contracts, specifically during the last three CBAs. There is no internal or external comparison wage data for 2009. The other two BUs of the City have a one-year and a two-year CBA; LELS agreed to a two-year CBA for the police officers BU. A two-year agreement would keep both police BUs in sync, and that was the length of the tentative agreement between these parties. By the end of 2008 the parties will have gathered information regarding internal and external comparisons for 2009, including CPI trends and the City's financial condition.
- The City Council acted within its authority when it rejected the tentative agreement. A number of tentative agreements in the state have been rejected by members of BUs, including some represented by LELS.
- The Union is not harmed by a two-year agreement; negotiations for the 2009 CBA will start in late 2008, which allows a one-year period which is sufficient to address any concerns about the need for a "cooling off" period.

*ANALYSIS AND DISCUSSION RE: DURATION*

The City correctly points out the lack of comparison and economic data for 2009, which should serve as the basis for determining wage rates after 2008. Although the parties might agree to venture so far into the future, they did not do so in their tentative agreement. Absent compelling circumstances that are not found in this case, an Arbitrator should not establish wages so far into the future in the absence of adequate guidance. Although these supervisory employees are understandably discomfited by the conflict with the City Council, there is not sufficient reason to override the need for more information before establishing wages for 2009.

**AWARD: DURATION**

This AGREEMENT shall be effective as of January 1, 2007, except as herein noted, and shall remain in full force and effect until the 31st of December, 2008.

**ISSUE NO. 2 - 2009 GENERAL WAGE INCREASE**

*UNION'S POSITION:* The Union is proposing a four percent general wage increase for 2009.

*CITY'S POSITION:* The City is opposed to any award for 2009.

**AWARD: 2009 GENERAL WAGE INCREASE**

No wage increase for 2009 is awarded because of the determination that the CBA shall be of a two-year duration.

### **ISSUE NO. 3 - COMPENSATORY TIME FOR CAPTAIN**

#### *UNION'S POSITION*

Include this new language:

“Police Captains assigned overtime by the Employer or required by the Employer to report for work on their scheduled time off for court or special duty will receive compensation at the rate of one hour for one hour at the Police Captain’s base rate. The form of compensation shall be in compensatory time. Police Captains may accumulate compensatory time for each straight time hour worked more than 40 hours a week.”

#### *CITY'S POSITION*

The City is opposed to any compensatory time provision for the Captain classification.

#### *UNION'S ARGUMENTS*

- The Captain, as an exempt employee, is the sole employee within the City of New Hope who does not have specific contract language or personnel rules providing for compensatory time in lieu of overtime in times of excess workload. Employees who are not members of a BU, both exempt and non-exempt, can receive compensatory time pursuant to the personnel rules. Members of the three BUs have CBA language providing for compensatory time, but the CBA for this BU specifically excludes the Captain from earning any compensatory time. The employee in the classification of Captain is the only employee who is denied the opportunity to earn compensatory time.
- The City of Crystal is the most important comparable to the City of New Hope, and it provides compensatory time for its Captain.

#### *CITY'S ARGUMENTS*

- The Captain is designated as an exempt employee under the Fair Labor Standards Act, which is not disputed by the Union. The Captain is in one of 27 classifications of City employees who are designated as exempt. None of these 27, including the Police Chief who works more hours than the Captain, receives compensatory time. The practice in the City is to allow these employees to adjust their work schedules by taking time off during the workday without using their personal leave accruals. An exempt employee is required to use personal leave time only when taking off an entire workday. There has been no situation where an exempt employee has been allowed time off after working extended periods beyond the normal workweek. The exclusion of exempt employees from compensatory time is historical at the City and the employees knew this when they accepted employment.

*City's Arguments re: Compensatory Time for Captain (continued)*

- The value of compensatory time added to the wage of the Captain classification would disrupt the pay equity compensation system by resulting in this male-dominated classification's receiving a wage maximum that would exceed that of other classifications with a higher number of work points, some of which are female-dominated.
- Although the Captain works more than 2080 hours a year, he also has managed to take substantial personal leave time in 2005, 2006 and 2007.
- Compensatory time for the Captain would negatively affect operations in the Police Department. The Captain and the Chief generally try to assure that one of them is available during business hours and they share on-call duties and responsibilities during the weekend. Compensatory time for the Captain would result in additional hours and weeks when he is not available, which would likely cause the Chief to have to work even more hours to assure command staff coverage.
- The vast majority of other Police Departments in the DCA Stanton Group VI comparison group do not provide compensatory time to Captains. The comparison to the City of Crystal fails because it allows all exempt employees to accrue compensatory time, in contrast to the City of New Hope which does not allow any exempt employee to do so.
- This proposal constitutes a significant structural change, which arbitrators have determined requires compelling supporting evidence and argument, which the Union has not shown. Nor has the Union provided a *quid pro quo* for such a change.

*ANALYSIS AND DISCUSSION RE: COMPENSATORY TIME FOR CAPTAIN*

The City's Personnel Rules and Regulations address overtime payment and compensatory time for both non-exempt and exempt employees. Non-exempt employees who are authorized to work overtime are to be compensated at 1 1/2 times the regular rate of pay, or they may take time off in lieu of overtime payment with the approval of the department head. The provisions for exempt employees are: "(W)ill not be compensated for hours worked in excess of the normal work week of (40) hours"; and "Extended periods of scheduled work beyond the normal work week may be compensated for by allowing the employee time off, as approved by the department head or City Manager".

The Union's primary argument for granting compensatory time to the Captain classification is not supported by the evidence. It is true that the incumbent Captain is the only exempt employee who is covered by a CBA. However, he testified that: the Personnel Rules and Regulations apply to him if they don't conflict with the CBA; and he may be gone for part of a day without charging it against personal leave time if it is approved by the Chief.

*Analysis and Discussion re: Compensatory Time for Captain (continued)*

The Director of Administration testified that the consistent practice has been that exempt employees who put in extra time may take off part of a day by coming in late, leaving early, or taking time off during the day for personal business, without charging the absence to leave time. She also testified that there has been no instance where an exempt employee was allowed a full day off without charging it to personal leave time.

The record shows that the Captain classification has been treated the same as all of the exempt classifications and the City's arguments for keeping it that way outweigh the Union's comparison to compensation time for the Captain classification in the City of Crystal, where all of its exempt employees may earn compensation time. The Union has not justified the disruption to the City's compensation system or addressed how command coverage would be maintained without undue burden to the Chief if the Captain is unavailable for additional days or weeks. The Union has not met its burden of compelling evidence and argument to support such a significant structural change.

**AWARD: COMPENSATORY TIME FOR CAPTAIN**

No compensatory time provision for the Captain classification will be added to the CBA.

## **ISSUE NO. 4 - PREMIUM PAY**

### *UNION'S POSITION*

The Union seeks premium pay for a sergeant assigned to administrative duties previously handled by a captain in the form of an additional 6.5% of compensation based on the top wage for the sergeant classification. (The statement of this issue by the Union differs somewhat from the statement as certified by the BMS Commisisoner but the substance and underlying situation are unchanged.)

### *CITY'S POSITION*

The City submits that the above-noted item is nonarbitrable. The submission of this final position does not constitute a waiver of jurisdiction to the arbitrator and the City opposes the inclusion of this new item in the collective bargaining agreement.

### *UNION'S ARGUMENTS RE: ARBITRABILITY*

The Union argues that:

- Arbitrators generally presume that issues are arbitrable, especially in cases involving essential services where employees cannot strike.
- The issue involves a wage differential for additional duties assigned within the same job classification; an arbitrator's authority to award such pay diffentials is inherent in the authority under PELRA to determine wage awards.
- Arbitrators hold that where members of a BU are customarily and consistently assigned additional responsibilities on a regular basis, that should be recognized and compensated. In another case an arbitrator awarded an administrative sergeant differential due to the significance of added responsibilities, which the Union has shown in this case.
- This issue is arbitrable.

### *CITY'S ARGUMENTS RE: ARBITRABILITY*

The City argues that:

- The Arbitrator has no jurisdiction to entertain any issue that is not a term and condition of employment, unless it was included in the Employer's final position.
- The City has an inherent managerial right to establish its organizational structure and select and direct personnel, which encompasses the right to establish classifications, set the number of employees within a classification, and assign employees certain duties.

*City's Arguments re: Arbitrability (continued)*

- The City eliminated one of its Captain positions in accordance with a decision by the City Council to limit the Police Department's command staff to one Captain position in light of a drop in local government aid for 2007. When an Employer has determined to limit a higher level classification to one full-time equivalency (FTE), the establishment of a differential for a lower level job when assigned tasks associated with the higher level classification is the *de facto* creation of another FTE in that higher level classification, which usurps inherent managerial rights and is not a term and condition over which an Arbitrator has jurisdiction.
- The assignment to a Sergeant of administrative duties that were previously performed by a Captain falls within the City's inherent managerial rights, and is not a term and condition of employment over which the Arbitrator has jurisdiction.

*ANALYSIS AND DISCUSSION RE: ARBITRABILITY*

The Union cited arbitration cases where arbitrators have created a pay differential within a classification for assignment of additional duties, including a case where the issue of arbitrability was raised and the arbitrator determined that the issue was arbitrable. The City did not cite any cases where the issue was found not to be arbitrable. Neither party provided any court cases on this issue.

The City argues that awarding this item would violate protected management rights. However, the Union is not seeking to interfere with management's rights to: establish organizational structure, classifications, and number of employees within a classification; and assign duties to employees. The City's argument that premium pay for one of the sergeants is the *de facto* creation of another Captain position is not persuasive. In New Hope's Police Officer BU, the pay differential for special duties for Investigator, Canine Officer and School Liaison Officer does not make them Sergeants. In New Hope's Maintenance BU the premium pay for "lead workers" does not make them supervisors. In other municipalities' police and fire departments differential pay for special duties within a classification does not effectively create a new classification.

**DECISION: ARBITRABILITY**

It is concluded that the issue of a pay differential for a sergeant who is assigned special duties falls within an Arbitrator's authority to set wages under PELRA and is arbitrable.

*UNION'S ARGUMENTS ON THE MERITS OF PREMIUM PAY*

The Union argues that premium pay for the Sergeant who is assigned to administrative duties previously handled by a Captain is warranted because:

- The City routinely compensates members of its other two BUs with premium pay based on additional duties and responsibilities.
- This Sergeant is assigned significant additional responsibilities on a regular basis, which other members of this classification don't perform, as supported by substantial evidence.
- The City's organizational chart clearly shows the Sergeant of Support Services as a separate position with unique duties and responsibilities for managing staff, and he reports directly to the Chief rather than to the Captain as the other Sergeants do.
- City budgetary documents show the progression from the previous second Captain position to the current structure and its effect on the department's budget, illustrating that this Sergeant's position is defined as a necessary one. These documents state that the Support Services Sergeant handles "many, but not all of the duties previously handled by the captain". This position continues to appear in the budget document for 2008, after the position was allegedly no longer classified by "title or specific job duties".
- The City argued in its recent arbitration with the Police Officers BU that no increase in the pay differential was warranted because there had been no significant change in duties, responsibilities, workload and training requirements. The converse of the City's reasoning is that differentials should increase when these factors are present.
- The Sergeant took full, permanent responsibility for the administrative/support services position in January 2007 and continues to be responsible for the majority of the job duties within the captain's classification, although with less authority. His duties are wide-ranging and in excess of those of the Response/Patrol Sergeants.
- Premium pay differential for additional duties and responsibilities within the Sergeant classification is not unique in the metro area.
- A 6.5% differential is appropriate and fair within the current departmental pay structure.

*CITY'S ARGUMENTS ON THE MERITS OF PREMIUM PAY*

The City argues that:

- The Sergeant's authority and responsibilities are not the same as those of the Captain and the Chief. The Sergeant: does not have the authority to make command level decisions; reports to the Captain in the absence of the Chief; would be in charge only if the Captain and the Chief were not available, which they try to avoid; and is not part of the weekly rotation of on-call duties and responsibilities shared by the Captain and the Chief.
- The Sergeant's authority and responsibilities are the same as those of the other Sergeants. All have some responsibility for sections of the Department budget and the administrative Sergeant has no greater authority over budget development than the others have. All Sergeants work on special projects. Like the other Sergeants, the administrative Sergeant has no authority to select new employees. All of the Sergeants supervise employees, assign and direct work, and complete and sign performance evaluations. Like all the other Sergeants, the Special Services Sergeant does not have authority to transfer a Patrol Officer. None of the Sergeants can discharge or suspend a Patrol Officer without pay but all can issue an oral reprimand.
- Because of the assigned administrative duties, the Sergeant has his preferred schedule of working straight days, Monday through Friday, and is not required to rotate 12-hour shifts every few months. He works primarily in an office and does not encounter the same stress, risks and safety issues associated with the Patrol/Response Sergeants. This assignment is a great resume and career builder, and exposes the Sergeant to many of the professional-level functions of the Department and networking opportunities. This is clearly a preferred assignment because of the potential for professional growth and two other Sergeants were interested in this assignment.
- A differential of 6.5% based on the top wage for the Sergeant classification is substantial and significantly greater than any of the specialty pay amounts provided at the City. The former Detective Sergeant position in the Department did not receive more compensation than the Patrol/Response Sergeants. Awarding additional compensation for this assignment would create a serious compression problem with the Captain position, decreasing the salary difference from the traditional 12% to 5%.
- The vast majority of the cities in the DCA Stanton Group VI comparison group have no or only one Captain position. None of them provides premium pay for a Sergeant assigned to administrative duties.
- Awarding higher compensation to one of five Sergeants could create a "boomerang" effect and result in whipsaw bargaining in the future, with the Sergeants assigned to Patrol/Response demanding greater compensation to equal the one assigned to administrative duties.
- The Union has not provided a compelling reason or offered any *quid pro quo* for making such a substantial change in the CBA.

*ANALYSIS AND DISCUSSION RE: PREMIUM PAY*

The history of how the Support Services Sergeant assignment evolved is relevant to understanding the parties' positions, and probably why this CBA went to arbitration. In June 2005 it was known that one of two Captains would retire in 2006 and it was agreed to make the position available to existing Sergeants and to make the vacated Sergeant position available to existing Patrol Officers. In November 2005 the Captain position was posted and in January 2006 all three candidates were certified by the Civil Service Commission.

The Mayor disagreed with the Chief and the City Manager regarding filling the second Captain position. In March 2006 the Chief reorganized the Department to operate for the rest of the year with one Captain, four patrol Sergeants, and one administrative Sergeant in place of the second Captain. The Commission was to review the need for a second Captain at the end of 2006, and in the meantime the administrative position was to be filled on a three-month rotation by the three certified candidates for the Captain position. The disagreement between the Mayor on one side and the Chief and the City Manager on the other side about filling the second Captain position continued. In December 2006 the Chief designated one of the three Sergeants (hereafter the Incumbent) to permanently fill the administrative position, indicating that this Sergeant was his choice for Captain and he was still working on making that happen.

On 1/16/07 the Incumbent was notified in a memorandum from the City Manager headed "Administrative Sergeant Assignment" that: "I am pleased to assign you to the position of Administrative Sergeant effective January 8, 2007. Your duties and work schedule will be determined by (the Chief). Your compensation will be in accordance with the 2007 LELS labor agreement for police supervisors. . . .". At that time the parties were negotiating a new CBA, which included "specialist" pay for the Administrative Sergeant position. The minutes of the 1/30/07 meeting of the Civil Service Commission state: "(The Incumbent) was named Administrative Sergeant (in lieu of the requested captain position)."

The 2/12/07 agenda for the City Council included a Request for Action by the Director of Administration to ratify the 2007-2008 labor agreement with this BU. It stated: "There is a new provision for specialist pay of \$377 per month for 2007 and \$388 per month for 2008 for the administrative sergeant assignment. Since the administrative sergeant is handling most of the responsibilities from the eliminated captain position, the specialist pay recognizes the demands and expectations are greater than those of the sergeants assigned to the patrol division."

This item was moved from the agenda to the Council's next work session on 2/20/07, at which time they declared a closed meeting to discuss the proposed agreement. The result was stated as: "The consensus of the Council was not to ratify the 2007-08 labor agreement as presented to Council on February 12, 2007. Staff was directed to continue labor negotiations." A subsequent newspaper report quoted the Mayor as objecting to the "sizeable pay raise for the administrative sergeant", which conflicted with the desired savings from eliminating one Captain position. The Mayor reportedly opined that "When someone comes off shift work to the same level position, there is not to be a pay raise."

*Analysis and Discussion re: Premium Pay (continued)*

A 3/21/07 memorandum from the City Manager to the Incumbent was headed "Sergeant Classification" and stated: "This memo replaces my memo to you dated January 16, 2007. Upon further consideration, I have decided not to differentiate the classification of sergeant by assignment title or specific job duties. Your duties and work schedule will continue to be determined by (the Chief)."

The Union points out that despite the 3/21/07 Memorandum, the organizational chart and other documents used during budget meetings in September and October 2007 still showed "Sergeant Support Services" in a separate box, reporting directly to the Chief and supervising three Divisions: Community Service, Investigation, and Animals & Parks. The four "Response Sergeants" are shown as reporting to the Captain, and supervising the response/patrol units. The budget personnel document for 2007 states: "The personnel requests for 2007 include some changes. The city council eliminated the funding for one captain, replacing it with funding for a sergeant. The remaining captain will be in charge of Response Services. The sergeant assigned to Support Services will handle many, but not all of the duties previously handled by the captain overseeing this section. . . .". The budget personnel document for 2008 states: "The sergeant assigned administrative type duties in the Support Services section and office supervisor report to the director (Chief). . . . (T)he sergeant oversees the other support functions within the Police Department."

The Union has not claimed that the Incumbent's assigned duties are at the same level of authority and responsibility as the Captain and the Chief, nor has it sought the same pay level as the Captain. The Union's claim is that the Incumbent is regularly assigned responsibilities that exceed those of the other Sergeants and that this should be recognized with compensation. The City's attempt to discredit this claim is hindered by the fact that the City's negotiating team recognized and admitted that the demands and expectations from this assignment are greater than those of the Sergeants assigned to the patrol division. The Union correctly points out that the City's argument in the Patrol Officer arbitration case concedes that significant changes in duties, responsibilities, workload and training requirements are factors to be weighed when considering premium pay.

The Union's exhibits and the testimony of the Incumbent and the Captain support that the Incumbent is performing nearly all of the assignments and responsibilities formerly performed by the second Captain, although he does not supervise the Office Supervisor or the other Sergeants. There is no formal job description for Support Services Sergeant; the Incumbent testified that he performs nearly all of the "Major Areas of Accountability" listed in the Captain's job description. The Incumbent also testified that: he is in charge if neither the Chief nor the Captain is available; and he participated in budget planning with the Chief, the City Manager, and the Finance Director.

The advantages of having a preferred work schedule and less street duty are not a substitute for fair compensation for additional duties and responsibilities, even considering that it is a valuable advancement on a career path. Under the circumstances, the absence of a similar differential in the comparison group is not persuasive. There is no evidence that any other Sergeant in the comparison group is similarly performing so many duties historically done by a Captain.

*Analysis and Discussion re: Premium Pay (continued)*

It is concluded that the Union has met its burden of showing that a premium pay differential is warranted for the Support Services Sergeant assignment. A differential of 6.5% is reasonable, considering that: it reflects the significant new responsibilities and duties of the assignment; and it is within \$30/month of the amount to which the City's negotiating team agreed. Although the City has demonstrated a significant decline in local government aid from the state, and the City Council obviously is concerned about living within its means, there has been no showing that the budget cannot accommodate about \$5,000/year to compensate the Support Services Sergeant for his work.

The fact that the Incumbent is performing nearly all of the duties previously done by the second Captain justifies compressing the wage difference between the Incumbent's assignment and the Captain's position. The concern that such a premium for the Support Services Sergeant might cause a counterclaim by the Response Sergeants is speculative and not a reason to deny appropriate compensation.

**AWARD: PREMIUM PAY**

The Support Services Sergeant shall be compensated an additional 6.5% based on the top wage for the Sergeant classification.

**SUMMARY OF ITEMS AWARDED**

1. This AGREEMENT shall be effective as of January 1, 2007, except as herein noted, and shall remain in full force and effect until the 31st of December, 2008.
2. No wage increase for 2009 is awarded because of the determination that the CBA shall be of a two-year duration.
3. No compensatory time provision for the Captain classification will be added to the CBA.
4. The Support Services Sergeant shall be compensated an additional 6.5% based on the top wage for the Sergeant classification.

November 11, 2007

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Charlotte Neigh, Arbitrator