

**CASE: BARNES #1**

**MICHIGAN EMPLOYMENT RELATIONS COMMISSION  
ARBITRATION AWARD**

**THOMAS J. BARNES, ARBITRATOR**

IN THE MATTER OF THE ARBITRATION BETWEEN:

Teamsters, Chauffeurs Union

~ and ~

City of \_\_\_\_\_

\_\_\_\_\_ /

**OPINION AND AWARD**

MERC Case No. A03 B-0008

Sergeant Replacement Grievance

**Chronology**

Date of Grievance: November 15, 2002

Petition for Arbitration Filed: February 4, 2003

Date of Hearing: July 9, 2003

Date of Record Closing: August 8, 2003 (by Brief)

Date of Opinion: August 25, 2003

**Appearances**

For the City

City Attorney

For the Union

Union Attorney

**Witnesses**

For the City

Witness

Witness

For the Union

Witness

Witness

**STATEMENT OF ISSUES**

This matter came on to be heard on July 9, 2003. The issues are relatively clear.

Grievants and Patrolmen B., C., and H. allege as follows:

Officers responsible for Sergeants duties without the title or the higher wage. Two Sergeants have not been replaced making senior Officers on duty responsible for shift.

The remedy requested by the Union is:

Sergeants positions filled immediately and backpay for all Officers who were responsible for shifts without a Sergeant working.

(Jt. Ex. 2).

The Union alleges a violation of Article 15, Section 7, "and any others that apply."

The Employer responded to the grievance dated November 15, 2002, with a letter from the City Manager, dated November 22, (Jt. Ex. 2a) stating in part as follows:

After reviewing this section of the labor agreement I have determined that the City did not violated Article 15, Section 15.7 as you stated. For this reason the request for adjustment as stated in the grievance report is denied.

### **BACKGROUND FACTS**

Testimony established the following.

#### **Patrolman A**

Patrolman A. is currently a school liaison Officer but had been a Patrolman for 5 years and has also served as a Union steward for over 3 years. Officer A. testified that some time in January 2002 (he couldn't recall the specific date), he talked to the Deputy Chief about when the 2 open Sergeant positions would be filled. Officer A. initiated this discussion in his role as a Union steward and not as a grievant. Officer A. testified that he was aware of complaints by other Officers filling the Sergeants positions. He acknowledged on cross-examination when he asked the Deputy Chief "when would the positions be filled?" the Deputy Chief responded "the City wanted to do evaluations before filling the positions." He further acknowledged that he never said that any of the 3 Grievants were aggrieved in a discussion he had with the Deputy

Chief. He also testified that he never said they were performing Sergeants duties without compensation. He further testified "hopefully the Deputy Chief felt my concern for filling the positions." Further the Deputy Chief said he wanted the positions filled too. Steward A. testified that he has brought other issues to the Deputy Chief orally and if they are not resolved, they are put in writing by the Teamster Union.

**Officer B.**

Patrolman B. is a 7-year member of the Department this month and has been employed as a Patrolman. He testified that he talked to Steward A. about the vacant Sergeants positions in November of 2001 and that this matter was discussed at several Union meetings with regard to the need to fill the Sergeant positions. He testified he was responsible for the shift when a Sergeant isn't present. Prior to that, he testified the Sergeant made those decisions and if there was no Sergeant, then a senior Officer made the decisions. He testified that after January 2002 he worked 4 or 5 shifts as a senior Officer and that he worked beyond one pay period in that year and in 2003 he was the senior Officer every day that he worked. When asked whether he contacted Command Officers for serious problems while he was a senior Officer, he said that 90% of the time he would handle it and the remaining time he would contact 1 of 3 of the Command Officers. He further testified that he is certified in defense tactics but the Command Officers are not, testimony which was not refuted. He further testified that after the 2 Sergeants positions were filled, he still operated as a senior Officer from January 1 to April 1, 2003, and considered himself to be the acting supervisor on the shift. He acknowledged as of April 1, 2003, he became partners with Patrolman C. who at that time had become the Sergeant. He further testified he asked Steward A. several times to pursue the issue of acting as a Sergeant and

not getting paid. He further testified that he acted as a Sergeant in excess of 1 pay period and he could re-create the actual time he claimed he served as a Sergeant.

He testified further about having meetings with the Deputy Chief in April 2002 when the Deputy Chief indicated no one was promotable. On cross examination, Patrolman B. testified that he never notified the Deputy Chief that he was seeking or concerned about Sergeant pay. He testified that during all of 2002, he worked several weeks as a senior Officer/Sergeant and again in the first 3 months of 2003 when he was the senior Officer every single shift. He testified to some of the actual weeks in 2002 when he worked as the senior Officer/Sergeant and that there were others as well. Officer B. stated that there were occasions when senior Officers would have been on duty at the same time as he was a senior Officer. He testified that on the previous Saturday and every Saturday and Sunday he would not have senior Officers on duty except when he was working with recently appointed Sergeant C.

From January to April 2003 he worked with less senior Officers and acted as a supervisor every single day; and while there were 3 senior Officers there as well, they were otherwise occupied. He acknowledged he was never ordered to perform Sergeant duties. When asked when he was performing the duties of a Sergeant he said "name a week up to April 2003" because he was the only certified Officer to work the road on his shift. He testified he had to make the decisions on the shift when he was working in that capacity. He testified on re-direct that as a senior Officer he makes the decisions and where there is another Officer senior to him, vice versa. He considered it his responsibility to make the decisions as a Sergeant would since this is a para-military type position. The Officer further testified that the Deputy Chief was not certified for patrol road because he was not defense certified, nor is the Director so certified. He

said training is required to be certified on defense tactics and that requires a 32-hour course and a 16-hour re-certification every year.

**Officer C.**

Officer C. has been a Sergeant as of January 20, 2003, and previous to that was a Patrolman since his date of hire on May 17, 1995. He also formerly served as a Union Steward. He testified he talked to Steward A. about senior Officers working as Sergeants. He did that in personal conversations and department meetings. He also talked to the Deputy Chief in the Deputy Chief's office in 2003 about not filling the Sergeant positions. He further testified that he also discussed that prior to November 2002. He further testified that he worked shifts from December 3, 2001, to January 20, 2003, in which he made decisions as a senior Officer and there may have been times prior to that. He testified that decisions had to be made and there was no one senior available so he made those decisions during that entire 13 month period of time. He further testified that the practice in filing grievances is to have Steward A. handle those and that there were discussions between the Union and management before anything was put in writing.

On cross examination this Officer acknowledged that he never personally notified anyone he was aggrieved but he did discuss filling the Sergeant positions. In reference to the former, the Officer honestly testified he may have "hinted it but not in so many words." He testified he was familiar with the job descriptions for the Patrolmen and for the Sergeant. He further stated he was never directed to perform Sergeant duties but he was the senior Officer and that when he was a senior Officer, he was acting as a Sergeant. According to his testimony, from December 3, 2001, until January 20, 2003, when he was appointed a Sergeant, every shift that he worked was as a Sergeant. He further stated that there were times when 3 senior Command Officers were on duty during that timeframe but he was still acting as a Sergeant when those 3 Command Officers

were on duty. He testified that he was in charge of the shift, made serious decisions, and would be held responsible for those decisions, including making sure that the work was getting done and that things went smoothly with the shift. He testified he was called to scenes where decisions had to be made including serious incidents and that there were "so many," however he did not provide any specific examples of those. The additional duties, in addition to attending to those decision making responsibilities according to the Officer, included making sure logs were completed and everyone was performing their duties. He testified as to whether he briefed on call, oncoming shift personnel and he said "not often." He further testified he reviewed the daily reports of Patrolmen prior to his promotion to Sergeant. He further testified that while he was not on call, during November 2001 to January 2003 he did get called by other Officers when he was not on duty. He testified that he was doing everything Sergeant R. was doing while functioning as a senior Officer. Finally he testified that he had a conversation with Lt. W. when one of the Sergeants terminated in December 2001 and Lt. W. supposedly said that he would see what he could do about getting Sergeant pay for Officer C. He never heard back from Lieutenant W. and he did not file a grievance then or otherwise pursue the matter with the City.

**Officer H.**

Officer H. testified that he had been a Patrol Officer for over 6 years before he was promoted to the Sergeant position on January 20, 2003. He testified that he was also a senior Officer on duty prior to being a Sergeant and that in that role, he was the decision maker, including matters involving arrests for drunk driving or any suicidal cases that might arise. He testified that he handled a fireworks complaint which turned out to be a fairly serious matter and later was questioned by the Deputy Chief as to why he didn't call in a Detective which the Deputy Chief believed would have been the proper procedure. He assumed from that discussion

that he should have taken that action, that he was responsible, and that he should have acted as a Sergeant. According to him, no one told him not to make a Command decision prior to becoming Sergeant. He testified that he made decisions very often as a senior Officer and since he worked with 2 junior Officers throughout 2002, he was the senior Officer for that year. There were times when there were Command Officers present when he was a senior Officer. He testified he never partnered with Sgt. R., a Sergeant during 2002, but he was his partner in 2000 and 2001. While partners, Sergeant H. observed Sergeant R. in that 2 year period and, according to Sergeant H., "He didn't do anything different than I did as a senior Officer. His decision making was the same as mine."

On cross-examination, Sergeant H. acknowledged that he never notified anyone that he was aggrieved and he wasn't sure how his grievance came to light. He testified that one of the additional duties under the new Sergeant position is reviewing activity logs. He also testified there could be more duties. On the other hand, he wasn't sure if the additional duties were new or came from Departmental meetings. Sergeant H. testified that he was never directed specifically to perform Sergeant duties but he thought that the decision making was his responsibility and the fireworks discussion he had with the Deputy Chief convinced him he'd better take charge. Sergeant H. testified he made many decisions as a senior Officer. He didn't recall seeing a job description for the Sergeant before the 2 positions were filled and he does not recall those job descriptions ever being passed out.

### **Union President**

The Union President and Business Agent was formerly a Corrections Officer for 22 years for the County. The Union President testified that she raised the issue about the vacancies in the Sergeants positions with the Chief Deputy on January 4, 2002. She had notes that she brought

this matter to his attention. She testified that the Deputy Chief told her that the Sergeants positions would be put in place and they would hire 2 new people. He thought the positions would be filled in March 2002. The Union President testified that she did discuss getting higher compensation and the Deputy Chief felt that the administrative people on the day shifts would be the acting Sergeants. She was given assurance by the Deputy Chief that the positions of Sergeants would be put in place.

The Union President testified that she made several attempts to settle a number of issues involving the Police Officers and that it was past practice to try to resolve issues and to work them out before filing a written grievance. The Union President sent letters to the City Manager making him aware of the problems (Union Ex. 1). In addition, she had meetings with the Director and others about these issues in mid 2002 in the City Hall in Council chambers. She was the spokesperson (because the Officers didn't want any repercussions) and she asked all the questions of the Director and the Chief. When they discussed the vacancies, the Director or the Chief answered that they did not have a promotion process in place for the Sergeant positions and, as a result, the Union President actually furnished them with a promotion process (Union Ex. 2). She felt that the Deputy Chief was dragging his feet on the promotions because he did not have a promotion process in place and that upset her and she urged that there be a promotional process for the Sergeants as there was for the Lieutenant position. She further testified that during the contract, she has not been given any of the job descriptions except for the school liaison position. Even when the position was posted, no job description was provided to her. She also searched the Teamster archives and was not able to find any previous job description for the Sergeant position. When asked why she waited until November 15, 2002, to



file a written grievance, she answered it was because she was attempting to resolve the matter before filing.

On cross examination the Union President acknowledged that the City Manager never agreed to waive the 30 day provision in the grievance procedure. On July 30, 2002, there was a meeting which resulted from the Officers airing their concerns and that meeting was for the purpose of "giving it another chance short of filing a grievance." She acknowledged she never told the City Manager that Officer B. or Officer C. or Officer H. was aggrieved prior to filing the written grievance. She further stated that the first time the grievance word was used was with her November 15, 2002, written grievance. She believes that when she discussed the matter with the Deputy Chief in January 2001 he was aware that Officers were doing Sergeant work.

On re-direct she re-emphasized that while she didn't use the word "grievance" in her meeting on January 4, 2002, with the Deputy Chief, she did tell him there was a pay issue for Sergeant work for Patrol Officers. She also acknowledged that the Union is not saying that the City is required to appoint Sergeants. With regard to the 30-day time limit for filing grievances, she testified that the City has not raised this issue prior to the arbitration hearing. Previously, she testified that past practice was to have oral discussions and many times those definitely went beyond 30 days and that the City has never previously raised the 30 day time limit on any grievance.

### **City Manager**

The City Manager testified that he has been the City Manager for 6 years and that his responsibilities include acting as Personnel Director and handling employee grievances under the labor contracts the City has. Previous to that, he had worked for 9 years as a clerk/administrative assistant and handled grievances in that capacity as well. He testified that on November 18,

2002, he became aware of the instant grievance since it was on his desk on a Monday morning after a weekend. He testified that unless a grievance is reduced to writing in 30 days, it is waived pursuant to the contract as he understands it. On cross examination he acknowledged that he has never been involved in a Section 6.3 grievance concerning the 30 day time limit. According to the City Manager, it was never necessary to invoke that provision previously. He acknowledged that oftentimes issue discussion extends beyond 30 days but on the other hand, there have not been occasions where the matter has been presented and not reduced to writing in 30 days. He acknowledged that initially grievances may be handled by administrative staff and a dispute would not reach him in 30 days if the staff handled it. The City Manager further testified that he knew about the meeting on July 30 even though he did not attend and he was aware of several issues at that meeting but he could not tell whether they were a contractual dispute because he wasn't aware of the specific issues.

### **Deputy Chief**

The Deputy Chief has been employed in the Department since September of 1984. He was a Union member for 10 years, a Steward for part of that time, a Patrol Lieutenant in 1994 and became Deputy Chief in October of 2000. The Deputy Chief acknowledged that in early 2001, Union members discussed the filling of the Sergeant positions. He testified that once the prior Chief retired, he was under the impression that the Department would revert back to the old work rules and he discussed that with two Officers in terms of needing a policy for the Sergeant promotions. He testified that in October or November of 2001 he discussed this process with the Union President and communicated that he wanted to hear from the Union on the promotion process. The Union then faxed a promotional policy on December 1, 2001 (Employer Ex. 2). The Deputy Chief then discussed the procedures with the Director and went to the City Manager

to begin discussing the procedure for the evaluation process. The Deputy Chief testified that he and the Director spent a lot of time looking for good procedure. In late 2000, the Deputy Chief went to the City Manager about putting a training program in place for the Sergeant and the City Manager agreed to this. Subsequently, on November 12, 2002 (Employer 3), the Deputy Chief described what the procedure would be and posted the Sergeant jobs on December 10 (Employer 4). Four Officers applied for the 2 Sergeant positions. Interviews were conducted and 2 of the Grievants herein were selected as Sergeants. The Deputy Chief testified that Patrol Officers serve the public, investigate crimes, answer calls, and do other basic and fundamental police work. According to the Deputy Chief, the Sergeant supervises the Patrol Officers on particular shifts and makes sure that orders are carried out by being available. The Deputy Chief stated that there have been times in the past when the Department operated with 1 Sergeant. For example in 1984, for 3 years that was the case. He testified that he never ordered the 3 Grievants to perform Sergeant duties and was not aware of any instances where Patrolman B. performed Sergeant duties for more than 1 pay period. Further, the Deputy Chief was not aware of anyone "ordering" any of the 3 Grievants to perform Sergeant duties. According to his recollection of the fireworks incident with Sergeant H., the Deputy Chief went over the report, brought it to the attention of a Detective, and said to then Patrol Officer H. "maybe someone should have been called on this." The Deputy Chief thought that the incident wasn't handled completely and that is why he had the conversation with Sergeant H.

### **Director of Police and Fire**

The Director of Police and Fire has served in that position for 3 years. The Director has been with the Department in every position, from a Patrol Officer on up, for the past 25 years. He was a Union member, a Union Steward, and on the Union bargaining committee. He testified

there was no requirement to maintain the position of Sergeant. He further testified that Section 15.7 of the contract was in the agreement when he first joined the Department so it has been in the contract for at least 25 years. He testified that in 1985 he was given duties as an Acting Sergeant after the Sergeant resigned and that he had the Sergeant duties and responsibilities. He testified that again in 1991 when an Officer was injured and 3 Sergeants were promoted, an Officer K. was given the Acting Sergeant responsibilities. There were a total of 4 times when someone received duties and were given the pay for the higher position according to the Director. He further testified that his understanding of the pay period would be that an Officer working the pay period from 6:00 a.m. Sunday to the following 6:00 a.m. Sunday would qualify for the shift before or after that. It is his understanding that consecutive pay periods needed to be involved and that the time clock starts over when there is a lapse in consecutive hours served in a higher position. The Director testified there have been shifts where only 2 Patrol Officers were on duty and they know what is expected. If they feel they need additional help, they can call in. When asked about why the Grievants were making decisions, he stated that it is expected that they would make decisions and that going to a more senior Officer doesn't mean that it has to be a Sergeant. With regard to Sections 6.2 and 6.3, the Director testified they have been in the contract for probably 15 years when the Teamsters agent became the bargaining representative. With regard to the 10-day provision, he said the Union has to inform management there is a dispute and, to his knowledge, there has never been a problem where the 30 day time limit expired. In other words, there are no previous cases like this and he has no recollection of the City ever having waived the provision. He testified he was not aware of instances where the Grievants performed Sergeant duties for more than 1 pay period prior to their promotion.

On *voir dire* the Director testified that the Sergeant and Patrol job descriptions were developed in 1993 and they have been modified with the Sergeant position last amended in 1996. He has no record of transmitting these job descriptions to the Union and they were not discussed with the Union to his knowledge.

On cross examination, the Director testified that there were periods where the Department had 1 Sergeant for a substantial period of time but there were other times, like in 1985, when there was an Acting Sergeant plus 3 regular Sergeants. With regard to Sections 6.3 and the 30-day provision, he is not aware of any grievances on that issue, nor on 6.2, nor 6.1, nor 15.07 ever having been before an arbitrator before. He also acknowledged that the consecutive pay period issue has never been the subject of a grievance until now and that finally, the 30 day provision, to his knowledge, contained in Section 6.3, has never been invoked. He states that there have been disputes lasting 30 days where the disputes were always reduced to writing in 30 days.

#### **Officer B.**

Finally, Officer B. was called as a rebuttal witness and asked whether anyone ever told him the shift was "yours." He responded that Lieutenant W. told him that, more than once: "Okay, you're in charge, it's your shift now." He also testified that when an Officer calls in sick, he contacts the senior Officer on the shift and that is documented. He has taken sick calls from Patrol Officers and he fills out the slips and signs that absence and has the employee sign.

#### **ANALYSIS AND OPINION**

Analyzing the above testimony, the facts are not in dispute in any significant fashion. The conclusions I draw are as follows. Grievants, who have each been with the Department for a number of years, claim Sergeant's pay for the hours they worked in excess of 1 pay period in that

capacity. They make their claims based on their observations of what prior Sergeants did, the duties they assumed beyond those of patrol and their own work as Sergeants since the 2 Grievants (H. and C.) were promoted to Sergeants on January 20, 2003.

The City counters that no one ever appointed them as Sergeants (not denied by the Grievants), they did not perform the job duties of Sergeant per the job description, and in any event, their grievance is untimely under the contract.

I first consider the Sergeant duty pay issue and then take up the matter of grievance timeliness. There is no dispute between the parties that the City is not required to fill Sergeants positions. The positions remained open from November, 2001, to January, 2003.

Presumably these positions are important to the Department's functioning or they would not have been filled in January 2003 with two of the Grievants being promoted. Clearly, there was little, if any, evidence that Command Officers performed the Sergeant's function. The City asserts that if Grievants did make decisions commensurate with Sergeant-type decision making, these were decisions typically made by the senior Officer on duty, which does not require any additional pay.

I find to the contrary. Grievants were very familiar with the predecessor Sergeants and with their own Sergeant duties they assumed. They were concerned (and perhaps even somewhat irked) that the Sergeant positions went unfilled for 15 months. It was apparent they also had no particular desire to file this grievance, but did so only when the Sergeant openings went unfilled for so long. They are in a position to know whether they did Sergeant duties and I find that they did. Grievants recounted particular instances where they exercised Sergeant responsibilities and all testified they made the critical decisions when they functioned without a Sergeant. Their testimony is uniform, informed, and believable.

The City cannot claim it did not know these Grievants were acting as Sergeants. It is a small Department but nevertheless there can be no denying that when these Officers were on the road, they took charge.

The analogy to be drawn is that which is often cited in the wage-hour arena where work time is concerned. In that area, if an employee is "suffered to work" he is on work time and must be paid. If an employer permits the services to be performed or does nothing to disabuse the employee of performing such work, the hours are determined to be work time in the higher capacity. The Grievants had expressed their concerns to management about the Sergeant positions not being posted. While that may or may not have signaled a grievance (see *supra*), it surely was fair notice to the City that someone was performing the work. In that connection, the City's candid acknowledgement that it was "unaware of anyone ordering any of the Grievants to perform Sergeant duties" pretty clearly implies that management was aware the duties were being performed. I would also observe that the management representatives who testified were veterans of police work and had worked as Patrol Officers in the bargaining unit. They appeared at the hearing to be knowledgeable, bright, and well aware of the Department's activities. I believe they were most certainly aware of the Sergeant duties being performed by the Grievants (Patrol Officers), albeit they never ordered it. The fact that the Sergeant's job description was not ever provided to the Union does not help the City's position. If it had been provided, there would have been clear admissions or denials at the hearing on which duties were or were not performed.

Arbitral authority strongly supports the Union's grievance. It is well established that employees performing higher rated work than their regular work are entitled to the higher rated

pay. Elkouri and Elkouri, *How Arbitration Works*, 5th Ed., p. 710. Several cases illustrate the point.

In *City of Sioux City*, 79 LA 439 (Hon, 1982), the arbitrator determined that a police officer temporarily assigned duties of the higher classification was entitled to the higher classification pay. In *Pittsburgh and Midway Coal Mining Co. and UMW of America*, LA 98-2, Arb. 5316, p. 6822 (1998), an arbitrator also awarded the higher pay where the employer temporarily assigned the grievant to a different position requiring the performance of duties in a separate classification. In that case, the arbitrator stated that while management does have the right to reallocate job duties within a classification, that right must be exercised in good faith and must be based on objective considerations and cannot be a subterfuge to avoid the payment of higher wages.

In perhaps the paradigm case, *City of Duluth, Minnesota, and Duluth Police Union*, 90-PA 1052; 90-1 Arb ¶ 8297, p. 4461 (Bognanno, 1990) the arbitrator awarded the grievant pay commensurate with the higher classification job she performed. In that particular case, grievant was a police sergeant who alleged she had performed the duties of a lieutenant. The contract in that case provided as follows:

8.2 An employee assigned to work in a job classification different from his or her own, shall, while assigned to work in such different classification, be compensated at the pay range provided for such different classification or at the same step within such pay range as the employee is at within his or her own classification at the time such assignment is made.

The arbitrator found the fact that the grievant was not actually assigned the duties was not important and did not impinge upon the City's right to direct and assign its workforce:

If in fact an employee is performing the duties of a different position with the full knowledge and consent of the City, then the



employee is entitled to the increased compensation. Moreover, although the City has certainly retained the right to direct and assign employees, this interpretation of Article 8.2 does not impinge upon that right. For example, if a lieutenant is absent from work, the City could simply choose to not assign, or allow, an employee to perform the regular duties of a lieutenant. If the City takes this course of action, it avoids Article 8.2 and has retained its management right. At the same time, when the City assigns or allows an employee to perform work in a different classification, it has also exercised its management rights.

The arbitrator in that case also noted that the contract in that case did not depend upon the City taking formal action to appoint an employee to a higher paid classification. "Rather, the inquiry is whether an employee performs different duties with the full knowledge and consent of the City." 90-1 Arb. ¶ 4461, 4464.

Also directly on point is *Capitol Manufacturing Co. and IAM Local Lodge 2306*, 94-2 Arb. ¶ 4318, p. 4593 (Duda, 1994). In that case, an employee who occupied a labor grade 11 had performed labor grade 13 leadman tasks and had not been paid for such work. The supervisor in that case did not expressly order the grievant to perform the leadman duties but he did say "do whatever is necessary to run the department." The arbitrator in that case found "the company's night shift supervisor authorized, directed, and assigned grievant by implication if not expressly to perform the leadman duties." 94-2 Arb. ¶ 4318, p. 4601 (emphasis added). Still other cases are to the same effect. *Warren and IAFF Local 1383*, 8 LAIS 40 (Ott, 1980) (Captain's pay awarded to Sergeant); *Stone Container and UPIU Local 1576*, 16 LAIS 1010 (Byars, 1988) (higher pay awarded even where the higher classification was "on the job training").

Therefore, for the foregoing reasons, it is determined that Grievants did perform Sergeants duties for which they should be compensated under Article 15.7 of the contract.

## **Timeliness**

I now turn to timeliness and the time period for backpay. All of the testimony regarding the time this matter was discussed between the parties can be distilled to the following: There were numerous discussions between the employees and their Union Steward and their Union representative and management representatives regarding the Sergeant vacancies that started as early as November of 2001 and continued until December 2002 when the jobs were eventually posted. There is little doubt that the City was on notice that this was an issue of substantial concern to the Patrol Officers, to the Union Steward, and to the bargaining agent representing these Officers. It was even brought to the City Manager's attention.

However the foregoing does not establish that the City was on notice that the Patrol Officers intended to claim Sergeant pay for the Sergeant responsibilities they were performing. As much as the Sergeant vacancies were discussed, there was not any cogent testimony whatsoever that the City or its agents were advised that this matter was going to result in a grievance for the Sergeant's pay. For example, the Union brought to the attention of the City Manager a number of serious concerns in its letter of August 8, 2002 (Union 1), but there was no mention of Sergeant's pay. As is usually the case, I am a creature of the contract and Article 6, Section 6.6, memorializes my charter that I am confined to the terms and conditions of the contract. Section 6.3 of the grievance procedure clearly encourages the parties to resolve grievances internally without reducing them to writing first. However the contract clearly goes on to state that "however any dispute resolution initiated under 6.2 will not extend beyond 30 calendar days or it will be considered dropped and not subject to the grievance appeal procedure." Thus under any interpretation, the Union must commit its dispute to writing within 30 calendar days of notifying the City under Section 6.2 of a contractual dispute. Thus, even if

the Union had notified the Chief Deputy or the Chief of the Department or the City Manager as early as January 2002 of the existence of the dispute (the Union President discussed with the Deputy Chief on January 4, 2002, getting higher compensation), the Union could not process a grievance unless it was filed within 30 days after that existence of the dispute was made known (e.g., February 3, 2002). The Union filed its grievance on November 15, 2002, and therefore the earliest under the contract it could have notified the City of the existence of the dispute would have been 30 days prior thereto, or October 15, 2002.

There is a fair question of whether the pay should begin to run from the date the grievance was filed or 30 days prior to, and in this case I determine that it ran 30 days prior thereto since that is a permissible contract interpretation and it is not unfair in that limited period of time (30 days) to charge the City with some knowledge of the more generalized dispute since the City's admitted delay in filling the Sergeant's positions. In addition, the City basically got the benefit for over 10 months of the higher rated duties being performed and not being required to compensate albeit that was the Union's responsibility to pursue which, of course, it is not required to do. I further determine that a reasonable interpretation of the contract is that an employee under Section 15.7 must work more than 1 pay period at the higher rate of pay. It is unreasonable to construe this requirement to be an "evergreen" provision, meaning that every time there is a break in continuous weeks worked the 1 pay period becomes a qualifier for the subsequent week. In the absence of testimony to the contrary, the reasonable construction is that once the condition of working one week in a higher classification is met, it is met for all such subsequent work which is part of the same continuous work pattern, or in this case part of the same continuing contract violation.

### **DECISION AND AWARD**

Therefore the Grievants are awarded backpay from October 15, 2002, up to January 20, 2003, for Grievants H. and C. (when they were awarded Sergeant positions) for the pay periods in excess of 1 where they worked in the higher rated Sergeant positions. The parties indicated at the hearing that if an award was made of higher pay, that they were capable from the records that existed of determining what that backpay amount would be. For Grievant B., his backpay will commence being awarded on October 15, 2002, through the period of time that he continues to perform Sergeant duties. If Officer B., at the date of this award, is still performing such work, the City, as previously indicated, has the right to discontinue receiving such services upon notice to Officer B. The backpay is awarded for all the period of time in which the Grievants were the senior Officers on duty regardless of the shift that they worked as there was no showing that when Command Officers were present that Command Officers assumed those duties.

In summary, the testimony was clear that the 3 Grievants performed Sergeant duties and the contract required them to be compensated for the time spent performing those duties. The parties agreed they can mutually work out the amount of that pay from existing records. I retain jurisdiction in the event the parties are unable to make that determination. I hereby require the parties to make that determination within 30 days and to advise me it has been done or that the matter cannot be resolved and that a backpay hearing would be necessary.

One half of the costs are assessed to the City and one half to the Union according to the parties labor agreement.

Respectfully submitted,

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