CASE: McDonald #2•
ARBITRATION

SOMEPLACE

Employer, ***Grievance: FMCS: 06-540***
T. BOAT

and

UNION

_____/

DECISION AND AWARD

PATRICK A. McDONALD
Arbitrator

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II. INTRODUCTION

This dispute arose when the grievant, a police officer with the SOMEPLACE, wrote a letter to SOMEPLACE authorities dated December 9, 2005, claiming that he should have been placed at the one year step for a patrol officer in 2003 when he was hired as a full-time officer rather than at the entry level rate. (Joint Exhibit 4). He supplemented that letter with a second letter dated January 14, 2006. (Joint Exhibit 5). The manager for the SOMEPLACE, Ms. VESSEL, did not respond to either letter, initially. The letter of Officer BOAT eventually was answered on March 3, 2006. (Joint Exhibit 7). As a result, the matter was submitted for final and binding arbitration. Utilizing the services of the Federal Mediation Conciliation Service, your undersigned arbitrator was jointly selected by the parties to receive evidence and render a final and binding decision. An evidentiary hearing was held on July 25, 2006. At that time, both parties were ably represented by legal counsel and had the full opportunity of presenting testimony and exhibits. They supplemented this opportunity with helpful post hearing briefs. This matter is now ready for decision and award.

III. FACTS

Many of the facts are not in dispute, although the interpretation of the facts and contract are very much in dispute. Both the Employer and the Union are parties to a Collective Bargaining Agreement, which was executed on November 16, 2005. (Joint Exhibit 1). The agreement, however, is in effect from July 1, 2003 through June 30, 2007. According to the grievant, after receiving the Collective Bargaining Contract, he

specifically reviewed Article 42, Section E. Because of the language which refers to a salary schedule and steps on the wage rates, he contacted Chief of Police, J. SKIFF. Chief SKIFF advised the grievant to contact W. POTATO, the Assistant Treasurer for SOMEPLACE, to obtain a list of part-time hours worked as a relief officer. Officer BOAT did make such a request dated November 23, 2005. (Joint Exhibit 2). Ms. POTATO provided a list for each year. (Joint Exhibit 3). The total hours for all years combined was 2,176 hours. (Joint Exhibit 3).

As a result of this information, Officer BOAT wrote a letter to the SOMEPLACE bringing Article 42(e) of the Collective Bargaining Agreement, to the attention of SOMEPLACE Manager, Ms. VESSEL. It was Officer BOAT's assertion that he be placed on the one year step as a patrol officer, effective when he was hired as a full-time officer on September 27, 2003. (Joint Exhibit 4).

According to Officer BOAT, he began his employment with SOMEPLACE as a member of the police reserve in 1995. (Joint Exhibit 13). Eventually in August 2000, the grievant was sent for training so he could become a part-time or relief officer. Part-time or relief officers in SOMEPLACE are included in the Collective Bargaining unit along with full-time officers. (Joint Exhibit 1). Reserve officers are not part of the unit.

The grievant commenced his employment with SOMEPLACE as a member of the police reserve in 1995. Later, he was sent for training so that he could become a part-time or relief officer. (Joint Exhibit 12). He began this training on August 21, 2000, and his

rate of pay was the minimum wage. The grievant's training was completed at the Community College on February 13, 2001. At that time, he was brought on as a part-time or relief officer and became a member of the bargaining unit. The grievant became a full-time officer on September 27, 2003.

The parties immediately proceeding contract ran from July 1, 1999 through June 30, 2003. The parties new contract occurred only after protracted negotiations. That new agreement was not executed until November 16, 2005. (Joint Exhibit 1). That was over two (2) years after the prior agreement had expired. The parties continued working on a day-to-day basis under the old contract. The new contract, among other things, contained new language under Article 42, wage schedule; specifically, paragraph B, pertaining to retroactivity of payment and paragraph E, regarding relief officers. (Joint Exhibit 1).

Testifying for SOMEPLACE was Ms. VESSEL, the Manager of SOMEPLACE since 1999. She indicated that she was involved in the negotiations leading to the new contract. According to Ms. VESSEL, when Section E of Article 42, a new provision was negotiated, there was no discussion about this provision being retroactive or the grievant's situation being retroactive. According to Ms. VESSEL, only the pay schedule or pay was retroactive under Article 45 and under Section B of Article 42.

Ms. VESSEL testified that from 1999 when she began employment with SOMEPLACE, through 2005, she had not received a grievance from the UNION unit. When she answered Officer BOAT's letter of December 9, 2005, she did not consider it a

grievance but merely an individual request. (Joint Exhibit 7).

IV. RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 3

RECOGNITION

A. Pursuant to the Public Employment Relations Act, as amended, SOMEPLACE hereby recognizes the Union, during the entire term of this Agreement, as the sole and exclusive collective bargaining agent on behalf of all its Employees in the appropriate unit set forth below with respect to wages, hours and other terms and conditions of employment. SOMEPLACE further agrees that it will not recognize, deal with, nor enter into contractual relations, either written or oral, with any labor organization, agency, committee or group in regard to wages, hours or other terms and conditions of employment in behalf of any of its Employees coming within the meaning of this Agreement at any time during the term of this Agreement. Employees covered by this Agreement are:

All regular Police Department Employees including:

- Patrolmen
- Sergeants
- Relief Patrolmen
- Dispatcher
- Relief Dispatcher
- Ordinance Officer

ARTICLE 8

GRIEVANCES

A grievance shall be defined to mean any dispute over the meaning or application of the expressed provisions of this Agreement which dispute arises under or during the term of this Agreement. The following procedure shall be utilized to adjust the matter; provided that any

individual Employee at any time may present grievances to the Employer, and have said grievance adjusted without intervention of the Union if the adjustment is not inconsistent with the terms of this Agreement provided that the Union has been given the opportunity to be present at such adjustment.

Step One:

When an employee feels that he/she is aggrieved, he/she shall, within 14 calendar days after the act or incident complained of, present his/her grievance to his/her supervisor. The Steward and/or alternate steward shall be present at this step if so requested by the Employee.

Step Two:

If the Employee and the supervisor are unable to adjust the grievance, it shall be reduced to writing setting forth the facts necessary to an understanding of the issues involved, signed by the Employee or his representative, and submitted by the Steward and/or alternate steward to the supervisor for resolution. The written grievance shall be submitted no later than twenty)20) working days after the actual incident complained of occurred. The grievance must designate the contract provision violated.

Step Three:

If the grievance still cannot be satisfactorily adjusted in Step Two, it shall be submitted to SOMEPLACE Manager who will endeavor to resolve the matter with the Union's Staff Representative and Steward and/or alternate steward.

Step Four:

In the event that the grievance shall not have been satisfactorily settled in the three preceding steps, either party, within ten (10) working days after the date of the conclusion of Step Three above, may by letter to the Federal Mediation and Conciliation Service, submit the matter to said Board for mediation and earnest effort shall be made by both parties to expedite mediation.

ARTICLE 9

GRIEVANCE PROCEDURE - TIME OF ANSWERS AND APPEALS

A. SOMEPLACE will answer in writing any grievance presented to it in writing by the Union within ten (10) working days from the date of the meeting at which the grievance was discussed.

B. Any grievance not appealed from an answer at any steps of the grievance procedure

within ten (10) working days shall be considered settled on the basis of the last answer and not subject to further review.

D. The jurisdiction and authority of the Arbitrator shall be confined exclusively to the interpretation and/or application of express provisions of the Agreement and that the Arbitrator shall not have the authority to add to, detract from, alter, amend or modify any provision of the Agreement, to impose on SOMEPLACE a limitation or obligation not explicitly provided for in the Agreement or to establish or alter any wage rate or wage structure.

ARTICLE 42

WAGE SCHEDULE (Formerly Article 43)

A. The wage schedule is attached as Appendix A

B. A retroactive payment consisting of the difference between the wage rate set forth above and the wage rate actually paid between July 1, 2004 and the date the contract is signed will be made within thirty (30) days after the contract is signed by the principal parties.

C. For regular Dispatchers (full-time), there shall be a shift premium of $0.10 per hour for afternoon and $0.15 per hour for midnights and the swing shift.

D. Should a Relief Dispatcher accept a position as a full-time Dispatcher, then he shall receive, starting wages that are greater than what he was paid as a Relief Dispatcher.

E. Should a Relief Dispatcher accept a position as a full-time Officer, then he shall receive, for purposes of placement on the salary schedule only, pro-rata credit for hours worked. In no instance shall a Relief Officer be placed higher on the salary schedule than the one-year step for a Patrol Officer.

F. Effective July 1, 2004, the hourly rate for Relief Patrol Officers shall be two-thirds (66 2/3%) of the corresponding Regular Patrol Officer's hourly rate.

ARTICLE 45

COMPUTATION OF RETROACTIVE PAY (new)

A. Upon ratification and signing of this Agreement by SOMEPLACE and by the Union, retroactive pay for an eligible employee shall be computed by multiplying the wages paid to said employee during the time period covered by the percentage of wage increase agreed upon for that time period.

B. Retroactive pay shall be paid by SOMEPLACE within thirty (30) days of being computed.

V. CONTENTIONS OF THE PARTIES

A. <u>For the Employer</u>

First, from a procedural standpoint, the Employer submits that the grievance is not arbitrable. It takes a three-pronged approach. It argues that, 1. the grievance was not properly filed, 2. it was not timely filed, and 3. the grievance was not timely processed under the provisions of the contract. Concerning the assertion that the grievance was not properly filed, the Employer cites Step 1, which provides that within 14 days after the act or incident, the employee will present the matter to his supervisor. While arguing that the grievant might have satisfied the requirements of Step 1 by mentioning the matter to the police chief, he did not follow the specific requirements set forth in Step 2. According to the Employer, Step 2 calls for the grievance to be reduced to writing and submitted no later than twenty (20) days after the actual incident. The Employer contends that the grievant at no time, filed a written grievance with the police chief or anyone else at SOMEPLACE and therefore, it is not a proper grievance because it fails to meet the clear requirements of Article 8. The Employer cites several cases to this effect.

The second ground for which the grievance is not arbitrable is that it was not timely filed, according to the Employer. Article 8 provides a series of specific time lines that must be met for a grievance to have been timely filed. More specifically, the Employer submits that the grievant failed to meet the time limits under Steps 2 and 3 of the grievance procedure. A written grievance is to be submitted no later than twenty (20) working days after the actual incident occurred. In

this case, the grievant's original letter was filed December 9, 2005, twenty days thereafter would be December 29, 2005. Instead, the grievant filed an amended letter on January 14, 2006. (Joint Exhibit 5). No adjustment was made by SOMEPLACE. As a result, by February 3, 2006, the twenty day period expired. Hence, the grievance is not arbitrable.

The final procedural hurdle presented by the Employer is that the grievance is not arbitrable because it was not processed on a timely basis in accordance with the contract provisions. The Employer submits that no grievance was submitted to SOMEPLACE manager or no filing with the Federal Mediation Conciliation Service within ten working days after the conclusion of Step 3. In this case, Ms. VESSEL testified that had she known she was dealing with a grievance, she would have contacted legal counsel and taken steps to make the appropriate statements. As a result, the Employer submits the grievance is not arbitrable.

On the merits of the case, the Employer contends that the grievance is without merit because the contract does not provide for retroactive application of Article 42(E). The Employer stresses the testimony of SOMEPLACE Manager Ms. VESSEL, indicating that there was no discussion with respect to making Article 42(E) retroactive or any discussion of having the provision apply to Officer BOAT. One item was made retroactive, and that was wages. The parties, in two different contract articles, dealt with retroactivity of wages. Article 42, subsection B, and Article 45, computation of retroactive pay. The Employer argues that had the parties intended to make other contract provisions retroactive, they would have so stated and specified in the Collective Bargaining Agreement. In this case, the grievant's conversion from a part-time or relief officer to full-time status occurred over two (2) years prior to the parties agreement being executed. In the absence of an agreement concerning retroactivity, the new contract provisions do

not control his situation.

Finally, the Employer submits that the grievance is also without merit because the claim by the grievant is based upon overstated hours of prior work. The Employer points out that the grievant did not become a part-time relief officer until February 13, 2001. Prior to that time, he was a reserve officer, from 1995 through 2001. While the grievant was selected to go through training at the Community College during that period of time and was paid the minimum wage, he was still on reserve status. As a result, he was not part of the bargaining unit.

When he submitted his resume to become a full-time officer (Joint Exhibit 13), he stated that he became a part-time officer in February of 2001. In this case, according to the Employer, the Assistant Treasurer, W. POTATO, did not make the distinction between a reserve officer and a part-time officer. Hence, she included 728 hours in 2000 and hours in January of 2001, when the grievant was a reserve officer and not a part-time officer. These 728 hours should not have been included in the total, so the grievant actually only had 1448 hours as a part-time or relief officer. For all of these reasons, then, the Employer contends that the grievance is not arbitrable, is not proper before the arbitrator and should be dismissed, or in the alternative, that the grievance is without merit and should be denied.

B. For the Union

On the question of arbitrability, the Union submits that there was a written grievance and that the grievance steps of the Collective Bargaining Agreement were sufficiently met for an arbitrator to decide the case on the merits. The Union points out that the law abhors a forfeiture and that a general presumption exists that favors arbitration over dismissal of grievances on

technical grounds.[1]

The Union emphasizes the fact that the Employer in this case is represented by a Manager who had never worked for municipality or public employer prior to her commencement of employment in 1999. As a result, she had little or no experience dealing with the Union or Collective Bargaining Agreement. Likewise, the Local Union members had no experience in filing grievances, since no grievances were filed from 1999 until this grievance was filed in 2005.

The Union asserts that the Collective Bargaining Contract supports an informal approach in that a grievance is defined by the parties in Article 8, and also mandates that employees can address disputes without interference of the Union. In this case, according to the Union, Officer BOAT discussed the issue with Chief of Police SKIFF and was told to get his hours from the Employer and submit his claim. As a result, Step 1 of the grievance procedure was satisfied. Step 2 demands a grievance be put in writing. There is no form mandated in the Collective Bargaining Agreement. As a result, Officer BOAT's letter of December 9, 2005, certainly meets that requirement. SOMEPLACE did not response to Officer BOAT's letter. That response did not occur until March of 2006. Ms. VESSEL's response did not raise any timeliness issues but did deny the claim of Officer BOAT. Hence, Step 3 was satisfied.

According to the Union, the facts as a whole demonstrate the parties have sufficiently satisfied the grievance procedure in the Collective Bargaining Agreement. The inexperience of both the Employer and the Local Union members with formal grievance procedures should not be grounds to technically deny Officer BOAT the right to have his legitimate dispute decided on the merits.

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[1]Elkouri & Elkouri, How Arbitration Works, 6th Edition, page 206.

On the merits of the case, the Union points to the language of Article 42(E) as being clear and unambiguous. That language states that an officer hired from the part-time or relief ranks to a full-time police officer position shall be bumped up in pay for up to one (1) year, based upon his part-time hours worked. According to the Union, the effective date of Article 42(E) is July 1, 2003, when the Collective Bargaining Agreement became effective.

As is commonly the case, many times negotiations over Collective Bargaining Agreements go beyond a contract expiration date. That was the situation here when the current Collective Bargaining Agreement was not signed until November of 2005, although it was effective as of July 1, 2003. The parties, however, unequivocally state, that Article 42 is retroactive to July 1, 2003. That article is entitled wage schedule and includes section E governing the grievant's situation. The Union emphasizes that section E of Article 42 does not state a different effective date and therefore, the parties intent was the effective date as stated in Appendix A. Moreover, according to the Union, Article 24 acknowledges that each party had an unlimited right to make demands and proposals on any subject matter. Hence, the Employer could have addressed the effective date of Section E in Article 42 as being different than other articles. It did not do so. Therefore, the Employer is estopped from attempting to change the effective date of Section E after the signing of the contract.

In addition, Article 26 addresses the duration of the contract. It says the grievance shall be in effect as of July 1, 2003 and shall remain in force and effect through June 30, 2007. Hence, that duration must be applied to Article 42(e).

The Union argues that Officer BOAT is entitled to a prorated credit for hours worked up to the one (1) year step. He was hired as a full-time officer in September of 2003. That was after

the effective date of Article 42 and therefore, he qualifies for credit for hours worked. Moreover, beginning August 21, 2000, Officer BOAT was working for and being paid by the SOMEPLACE Police Department. He attended the police academy and received training, which was to benefit the Employer. Hence, his work as a relief officer began to accumulate from August 21, 2000. (Joint Exhibit 3).

In summary, the Union submits that the grievance procedure was sufficiently followed to put all parties on notice of Officer BOAT's dispute. In addition, on the merits, the Union contends that the grievant is entitled to be made whole, pursuant to the change in the weight scale under Article 42 of the Collective Bargaining Agreement.

VI. ISSUE

1. Did the Employer compensate the grievant at an improper salary rate in violation of the Collective Bargaining Agreement? If so, what is the remedy?

VII. DISCUSSION AND DECISION

In ultimately answering the issue posed in this case, it is first necessary to discuss and decide the issues concerning the arbitrability of this matter. The Employer asserts that the grievance is not arbitrable because it was not properly filed, was not timely filed and was not timely processed. On the other hand, the Union submits that the grievance steps in the Collective Bargaining Agreement were sufficiently met for an arbitrator to decide the case on the merits.

The parties have negotiated a formal grievance procedure. It sets forth five (5) steps, ultimately concluded in arbitration. The parties have defined a grievance as meaning, *"...any dispute over the meaning or application of the expressed provisions of this agreement, which*

dispute arises under or during the term of this agreement." This dispute certainly falls within that definition.

Step 1 indicates that, *"When an employee feels he/she is aggrieved, he/she shall within 14 calendar days after the act or incident complained of, present his grievance to his supervisor."* In this case, the testimony of the grievant is that he went to Chief of Police Jerry SKIFF and mentioned this problem and claim to him. Although an exact date is not stated, I do conclude that this action meets and complies with Step 1 of the grievance procedure.

The Police Chief advised Officer BOAT to contact the Assistant Treasurer of SOMEPLACE and obtain part-time hours worked. He did obtain such a list. (Joint Exhibit 3). The grievant then wrote a letter to SOMEPLACE dated December 9, 2005, stating his claim and specifically mentioning Article 42(E) of the Collective Bargaining Agreement. Once again, I believe that this complies with Step 2 of the grievance procedure. It was reduced to writing and set forth the facts necessary to an understanding of the issues involved. It was signed by the employee in compliance with Step 2 of this procedure. A copy of this letter went to Chief of Police SKIFF.

A copy of the letter also went to SOMEPLACE Manager, Ms. VESSEL. This action resulted in compliance with Step 3 of the grievance procedure, which states, "If the grievant still cannot be satisfactorily adjusted in Step 2, it shall be submitted to SOMEPLACE Manger who will endeavor to resolve the matter with the Union staff representative..." While receiving the letter, Ms. VESSEL acknowledged that she did not respond to it. As a result, on February 17, 2006, an email was sent to her from the Union indicating that the grievance was being taken to the next step. While I certainly believe Ms. VESSEL when she testified that she did not

recognize the grievant's letter of December 9, 2005 as a grievance, I also believe that it was intended to state a dispute and claim under the Collective Bargaining Agreement. As a result, it complied with the definition of a grievance.

Two other matters are quite important drawing this conclusion. First, the parties have a right to enforce contractual limitations set forth in the grievance procedure. However, if a grievance is moved from step to step without objections as to timeliness, the right to object may be deemed to have been waived. Moreover, in making this determination, a general presumption exists that favors arbitration over dismissal of grievances on technical grounds.[2] In making a determination concerning arbitrability, an arbitrator also has to take into account the relationship between the two parties and the grievance procedure. In this case, testimony was received into evidence indicating that this was the first grievance received by SOMEPLACE Manager since her employment in 1999 through the present. Hence, both parties had little experience dealing with grievances and the Collective Bargaining procedure. There was no formal grievance form at the time this grievance was filed. Potential disputes were probably informally solved to both parties satisfaction without the formal grievance procedure being followed. Hence, I can understand why Ms. VESSEL did not recognize the December 9, 2005 letter as a grievance and why it was not stamped grievance when it was filed with SOMEPLACE.

A second point that I think deserves attention is the fact that this matter involves prorata credit for hours worked and an officer being placed at a certain level at a salary schedule. As such, I believe it would be a, "continuing violation" of the agreement as opposed to a single isolated and completed transaction. This would give rise to a continuing grievance in the sense

that the act may be said to be repeated from day to day and each day treated as a new occurrence with each new paycheck. [3]

As a result of these considerations, I do conclude that the grievance is deemed to be arbitrable and should be decided on its merits.

Having found the grievance to be arbitrable, did SOMEPLACE compensate the grievant at an improper salary rate in violation of the parties Collective Bargaining Agreement?

In deciding this issue, Article 42(E) and Article 45 are particularly controlling. As set forth in the facts, the present Collective Bargaining Agreement was executed over two years after the expiration of its predecessor contract on June 30, 2003. During that interim period, the grievant became a full-time police officer on September 27, 2003. He already was working in that capacity for over two years by the time the contract was finally executed on November 16, 2005. (Joint Exhibit 1).

There appears to be little dispute that when the parties negotiated Section 42(E), there was no discussion concerning retroactivity of this subsection. Nor was there any discussion concerning its applicability to Officer BOAT. The parties did, however, specifically discuss retroactivity through Article 42, subsection B, of the agreement. That section reads:

"A retroactive payment consisting of the difference between a wage rate set forth above and the wage rate actually paid between July 1, 2004 and the date the contract is signed will be made within thirty (30) days after the contract is signed by the principle parties."

Hence, the parties expressly agreed that wage rates would be retroactive, at least to July 1, 2004.

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[2]ID at Page 206.

[3]ID, at Page 219.

Article 42(B) however, does not appear to concern Article 42(E). First of all, the wage schedule, as mentioned in Article 42(B), is above, while Section 42(E) is below subsection B in Article 42.

Article 45, likewise, confirms this same understanding. Article 45 speaks about retroactive pay for eligible employees being computed and being paid within thirty (30) days after being computed. Once again, no reference is made to Article 42(E) being retroactive.

The parties expressly made exceptions concerning retroactivity of the contract in certain areas. One express area was the wage schedule. Under the general rules for interpreting contract language, a contract that specifies certain exceptions implies that there are no other exceptions. [4] To put it another way, the parties obviously discussed retroactivity. Some matters were made retroactive while the majority were not. By not expressly stating that Article 42(E) was to be retroactive, the implication is that it clearly was not to be.

In this particular case, the grievant and the Union have the burden of demonstrating a contractual violation. I do conclude after carefully reviewing the evidence, that the grievant has not sustained that burden of proof.

[4]This is the doctrine of Expressio Unius est Excousio Alterius (The expression of one thing is the exclusion of another.) Elkouri & Elkouri, How Arbitration Works, at Page 467.

VIII. AWARD

1. The evidence indicates that the grievance is arbitrable.

1. On the merits, insufficient evidence has been produced to demonstrate a contractual violation and an improper payment of wages. As a result, the grievance is denied.

Respectfully Submitted,

Patrick A. McDonald

PAM/clbh

Enclosure

Dated: September 11, 2006