

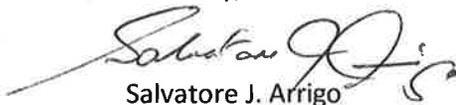
Salvatore J. Arrigo, Arbitrator  
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August 26, 2017

Matthew Clash-Drexler, Esq.  
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Re: FOP Lodge 4 and Baltimore County  
AAA Case No: 01-17-0002-3896

Enclosed is my decision and award in the captioned arbitration. My fee for services is \$4000.  
Please forward this invoice to the Union's financial disbursement office.

Sincerely,

A handwritten signature in black ink, appearing to read "Salvatore J. Arrigo", with a stylized flourish at the end.

Salvatore J. Arrigo  
Arbitrator



(sometimes herein the FOP), with a job-reclassification. I presided at an arbitration hearing on July 11, 2017, which was attended by the Union. Although properly notified of the arbitration, the County chose not to attend the proceeding. At the arbitration, testimony and documents were received in evidence and argument was made, and a transcript of the proceeding was produced.

## FACTS

The Union is, and has been at all relevant times, the recognized, exclusive collective bargaining representative of “all sworn personnel up to and including the rank of Lieutenant of the Police Department”, numbering approximately 1865 personnel. The Union and the County are parties to an MOU executed on June 28, 2016, and in effect at all relevant times, which provides in Article 6, Section 6.1.C.:

- C. For fiscal year 2017 if any other bargaining unit represented by a union receives a mutually agreed upon wage increase or any other form of compensation/fringe benefit, including but not limited to premium pay, allowances, special duty pay, reclassifications, pension and insurance, members of the bargaining unit shall receive the same amount of increase on the same effective date. If such other bargaining units receive different increases in wages or other forms of compensation/fringe benefits, the members of the Fraternal Order of Police bargaining unit shall receive the amount of increase which is the highest for each category of wages and compensation/fringe benefit, provided on the earliest effective date agreed by the County for each such improvement.

The MOU also sets forth the pay schedule for police including rate progressions for various categories.

With regard to Section 6.1.C., testimony reveals that the language indicating that if any other bargaining unit received a “mutually agreed upon wage increase . . .”, was inserted in previous years and was meant to exclude any benefits which came about through an interest arbitration award.

According to the testimony of Union President Cole Weston, which I credit, in June 2016 the Union first started to “hear rumblings” that firefighters may have received a pay reclassification. Firefighters are represented by the Baltimore County Professional Fire Fighters Association, International Association of Fire Fighters Local 1311, AFL-CIO (IAFF). For fiscal year (FY) 2017, which ran from July 1, 2016 to June 30, 2017, members of both the FOP and IAFF had received a two (2) percent cost of living wage increase, and Union President Weston was not aware of any IAFF reclassification. Indeed, Union President Weston believed that for FY 2017, all six (6) labor organizations that bargained with the County were limited to the same wage package. Thereafter, President Weston sent an email to the County on June 28, 2016, requesting it provide him with “. . . the cost of the pay grade adjustments for the Fire Department employees” along with other cost data not relevant herein. President Weston explained that the Union needed “cost” information to determine whether any reclassification resulted in additional compensation for firefighters within the meaning of Section 6.1.C. of the MOU.

On July 13, 2016, Union President Weston again contacted the County by email through George Gay, Director of the Office of Human Resources (OHR), stating: “(J)ust following up on my 6/28/16 email. Were you able to get it to the budget office?”

By October 21, 2016, the Union was aware that firefighters had received a reclassification of their pay grades but did not know what, if any, cost impact resulted. Accordingly, on October 21 President Weston made another email request from the County for the cost information for firefighters' upgrades, and other information, stating that this was the third request without having received a response from the prior requests of June 28 and July 13, 2016.

Director Gay, by email of November 14, 2016, acknowledged receipt of the Union's October 21, 2016 email, requesting cost information, but did not provide any information. The email did state: "Please be advised that the upgrades ... were not the result of negotiations with Local 1311, but were as a result of independent analysis performed by the Office of Human Resources as requested by the Fire Department". On that same date the Union, by email, noted the County's continued failure to provide the requested information, and its unresponsive reply, stating, in part, that the FOP:

. . . has consistently asked not for the results of negotiations between the County and the IAFF but instead for the "cost associated" with the Pay Schedule X Fire Department Supplementary Salaries and the cost of the pay grade adjustments for the Fire Department employees." Accordingly, please immediately provide the FOP with the requested cost information.

On December 12, 2016, Director Gay sent the Union documents related to its "request" which included "independent salary surveys conducted by Human Resources at the request of the

Chief of the Fire Department” and “cost information from the executive summary for the fire department.” The information provided revealed to President Weston for the first time that there was a cost resulting from the firefighters’ reclassification, and that cost amounted to over \$820,000.

Union President Weston sent the County an email on December 21, 2016, stating:

Thank you for your response to the FOP’s request for information. While we have not seen a copy of the MOU between the County and IAFF Local 1311 and understand from your email that no written MOU exists, based on our review of the information the County provided to us, it appears that the County has provided members of the IAFF bargaining unit with a reclassification of their wages effective in Fiscal Year 2017. As you know, Section 6.1(C) of the MOU between the County and the FOP provides that “if any other bargaining unit represented by a union receives a mutually agreed upon wage increase or any other form of compensation/fringe benefit, including but not limited to ...reclassifications . . . , members of the [FOP] bargaining unit shall receive the same amount of increase on the same effective date.” Accordingly, the FOP is entitled to a commensurate reclassification of the wages of its members on the same effective date. Please let me know when you have some time to discuss implementation of this increase....

The County responded to the Union on January 19, 2017, as follows:

. . . as I had stated in an earlier email the Office of Human Resources at the request of the Fire Chief independently performed the analysis that resulted in the recommendation to the administration to upgrade certain fire department classifications.

The county takes the position the upgrades of the fire department classifications were not part negotiations and Article 6.1 of the Memorandum of Understanding between the FOP Lodge 4 and the County is not applicable.

On January 20, 2017, the Union filed a grievance which stated, in relevant part:

On January 19, 2017, the Office of Human Resources Director Gay informed President Cole Weston of the Fraternal Order of Police Lodge #4 that members of Pay Schedule IV are not entitled to a reclassification as per Article 6.1 of the Memorandum of Understanding.

Members on Pay schedule IV should have their classifications upgraded by 1 classification as per Article 6, Section 6.1c of the Memorandum of Understanding. Members should be given appropriate back pay effective July 1, 2016.

The grievance was rejected, and an appeal to the Montgomery County Labor Commissioner was filed by the Union pursuant to Article 8, Section 8.3. Step 3 of the parties' MOU. A meeting commenced on February 3, 2017, at which the parties were represented, and was presided by Lawrence M. Stahl, Managing Administrative Law Judge for Baltimore County, acting on behalf of the Labor Commissioner. After reviewing the evidence placed before him, Judge Stahl, on February 9, 2017, issued his decision (the Stahl decision) denying the appeal, essentially concluding the grievance was untimely filed under Section 8.2 of the MOU which requires a grievance, to be timely, ". . . must be raised within ten (10) workdays following the event giving rise to the grievance, or within ten (10) workdays following the time when the employee should have reasonably gained knowledge of its occurrence". Judge Stahl also concluded the reclassification of firefighters was an "adjustment" and not a procedure subject to Section 6.1.C. of the MOU.

The action of the Labor Commissioner, while a required procedural step in the MOU, is not binding on the parties.

#### THE COUNTY'S REFUSAL TO ARBITRATE

On March 7, 2017, the Union timely notified the County of its intent to arbitrate the grievance decided by Judge Stahl on February 9, 2017, and sought a meeting to select an arbitrator. The selection process is set out in Section 8.3, Step 4 of the MOU and if the parties are unable to select a mutually acceptable arbitrator, the processes of the American Arbitration Association (AAA) are utilized, "in accordance with its rules". On May 2, 2017, the parties were sent notification that a demand for arbitration was received by the AAA and were sent a list of names from the AAA Panel of Labor Arbitrators.

On June 12, 2017, the AAA issued a "Notice of Arbitrator Appointment" to the parties which informed them that, among other things, I was appointed to be the arbitrator for these proceedings.

On June 13, 2017, Director Gay wrote to President Weston that the County "declines to participate" in the announced arbitration. Director Gay stated that "lack of timeliness for filing this grievance and other reasons as determined by Judge Stahl in his February 9th decision . . ." and "several other reasons, all of which are reserved" were why it declined to participate in the forthcoming arbitration. Director Gay contended that after Judge Stahl's decision, the "very

same issue” was argued and ruled on by another arbitrator in a decision issued on March 31, 2017, referring to an interest arbitration decided by arbitrator Joshua Javits (the Javits decision). Director Gay concluded that the matter had already been decided and the Union “should not get two bites at this apple....”

On June 26, 2017, AAA issued a “Notice of Hearing” to all parties setting July 11, 2017, as the hearing date for the arbitration, to be held at the office of the Fraternal Order of Police, Lodge 4.

By letter of July 5, 2017, counsel for the County wrote to the AAA protesting the arbitration scheduled for July 11, 2017. After reciting the County’s prior objections to the proceeding, the letter stated:

This is not a case where the County is opting-out of participating in arbitration; the County objects to the arbitration being held. Moreover, we object to the notion that an arbitrator can decide to conduct an arbitration if one side has declared its intention not to participate because the matter has already been decided, in a prior forum chosen by the FOP.

The county will not participate, the county will not pay the arbitrator’s fees, and the county will not abide by any decision of the arbitrator that purports to award the benefit the FOP is demanding.

On July 6, 2017, in an email to AAA with a copy to the County, counsel for the Union responded, in relevant part:

While it is unfortunate that the County is refusing to participate in the contractually-agreed upon grievance procedure, that decision is the County's to make. Put simply, the County has the right to forego its ability to present evidence to the arbitrator in support of any alleged procedural objections or evidence in support of its position on the merits. What the County does not have the authority to do is to stop that arbitration from proceeding or to prevent the arbitrator from issuing an award following the presentation of evidence. The County's assertion that it has not violated the CBA does not make it so and does not provide any basis to prevent the arbitration from occurring.

Having failed to exercise any of the well-settled mechanisms for raising its objections, the County has no basis to prevent the arbitration from proceeding as scheduled on July 11, 2017

As stated above, a representative of the County did not make an appearance at the arbitration after having received notice. It made its decision to voluntarily absent itself from the proceeding at the peril of not putting on its best case to controvert the allegations of the grievance. In any event, it appears the MOU was accurately followed by the Union in its pursuit to have the grievance lawfully arbitrated, and there is no evidence to the contrary.

## DISCUSSION AND CONCLUSIONS

The Union's position is that within the meaning of Section 6.1.C. of the MOU, the firefighters reclassification was a "mutually agreed upon" form of compensation, expressly provided for in the parties' agreement, and the amount of compensation firefighters received resulting from the reclassification is due to FOP unit employees. The Union argues it first heard "rumblings" that firefighters may have received a reclassification of pay grades from the County in June of 2016. Thereupon it sent requests to the County for the costs of such adjustments in

pay grades on June 28, July 13, and October 21, 2016. It received no cost information from the County until December 12, 2016, after which it requested discussion on the matter on December 21, 2016. Upon the County's refusal on January 19, 2017, the Union immediately and timely filed the instant grievance.

It appears from documents received in evidence at the arbitration, that the County has various objections to the arbitration, which arguments go to the viability of the grievance. Thus, the County argues that the grievance is untimely; the Stahl decision is dispositive of the matter, and; the Javits decision dealt with the Union's claim, and held against it.

Under the MOU, the Stahl decision is not binding on the parties. In any event, the Union disagrees with the County on all of its objections.

The timeliness of the grievance.

The County in its correspondence contends the grievance was untimely as the Stahl decision found. The MOU clearly requires a grievance to be filed within ten (10) workdays from the event giving rise to the grievance or when the grieving party should have reasonably gained knowledge of its occurrence. The Stahl decision essentially found that the County Office of Human Resources reviewed firefighter's salaries and made a recommendation for reclassification upward to the County Personnel Salary Advisory Board (PSAB). Thereafter, PSAB approved the recommendation and referred it to the Baltimore County Council who passed a bill enacting

classification changes for firefighters for FY 2017, which began July 1, 2016. Judge Stahl, after noting the PSAB and County Council have open proceedings, held the Union had an inherent obligation to monitor these proceedings and would have gained knowledge of the reclassification at the time of the PSAB meeting when the recommendations of the OHR were accepted or when the reclassification was enacted into law by the County Council.

I disagree with Judge Stahl. I do not find it reasonable to expect the Union to have constantly monitored each and every meeting of the PSAB and the County Council for wage information which might affect its members. There is no indication in the Stahl decision that either the PSAB or the Council published notices of the subjects of their meetings nor when specifically these bodies occurred. Nor is there any evidence that detailed classification information was otherwise available to the Union. Moreover, as President Weston credibly testified for the Union, an essential element in the reclassification was what, if any, was the cost that accompanied the reclassification. From the beginning, the Union was constantly seeking cost information. Until such was known, it is reasonable to conclude the Union was unable to prudently evaluate whether the matter was actionable. In the circumstances herein, I conclude the Union had not “reasonably gained knowledge” of an actionable occurrence until it received the specific information supplied by the County on December 12, 2016, related to costs of the reclassification, and therefore, the grievance was timely filed.

The Stahl decision.

The Stahl decision also found that the actions of the OHR was as “administrative adjustment” and not a bargained event subject to the provisions of Section 6.1.C. of the MOU. Judge Stahl concluded the reclassification of firefighters was not a “bargained event”, tracing the reclassification back to being initiated by the Fire Department Chief, an OHR analysis, then an independent decision by the PSAB to recommend and, then another independent decision by the County Council. Judge Stahl concluded, in denying the grievance, that none of the actions giving rise to the reclassification are “. . . tied in any way to the Union’s MOU”.

I reject Judge Stahl’s analysis. The language of Section 6.1.C. is very expansive. According to that Section, for FY 2017, as in this case, if any other collective bargaining unit “receives a mutually agreed upon wage increase or any other form of compensation . . .”, including “reclassifications”, members of the FOP bargaining unit are to “. . . receive the same amount of increase on the same effective date”. There was uncontroverted testimony that the “mutually agreed upon” compensation language that the FOP unit members were to receive was inserted in the MOU so that compensation imposed through interest arbitration awards, which obviously was not mutually agreed upon, would be excluded from the requirement.

I find and conclude the wage increase brought about through the reclassification of firefighters was mutually agreed upon. It certainly did not come about through disagreement

between firefighter unit employees and the County, nor was it forced upon them in any manner. It would challenge the imagination to believe other than that the firefighters' unit was supportive of a reclassification of positions and the attendant increase in pay, and the County also found such reclassification to be desirable. The parties had a common interest. To me, this constitutes a "mutually agreed upon" situation within the meaning of Section 6.1.C. of the MOU.

The Javits decision.

The County contends that the subject matter of the grievance was "thoroughly litigated before and decided by arbitrator Jacob Javits . . ." on March 31, 2017. The Union challenges this position arguing that the issue in the case before arbitrator Javits is not the same as the issue in the present arbitration.

The Union is correct. The issue before arbitrator Javits dealt with "the appropriate wage rates for police officers employed by Baltimore County for the period covering July 1, 2017 through June 30, 2018". It was an interest arbitration where the arbitrator was called upon to decide between the "last best and final offer" of a wage increase as put forth by the Union and the County. While a firefighter reclassification was an element involved in the Union's submission, that case dealt with a contract period distinct from that in the arbitration herein, i.e., 2016 to 2017 vs. 2017 to 2018. Nor was the question of whether Section 6.1.C. of the MOU had been violated before arbitrator Javits.

Therefore, since the nature of the proceedings, the time encompassed, and the totality of the subject matter of the proceedings were substantially different in the Javits decision and the case before me, I do not find that the Javits decision was in any way dispositive of the issues in the case herein.

The Union also suggests that if the grievance is found to be untimely, the County's conduct of refusing to abide by the terms of Section 6.1.C. of the MOU constituted a continuing violation. In such a situation, police department employees were continuously harmed each time the County failed to provide them with the financial benefits of a reclassification similar to that received by the firefighters, beginning with the filing of the grievance.

I find and conclude, the County's failure and refusal to abide by the terms of Section 6.1.C. of the MOU constituted a continuing violation of the agreement by failing to provide police personnel with the financial benefits of a reclassification each pay period beginning with the filing of the grievance, payment to commence ten (10) workdays prior to January 20, 2017. See Elkouri & Elkouri, How Arbitration Works, 6<sup>th</sup> ed. (BNA Books 2003) 218-219 and See Schoonhoven, Practice and Procedure in Labor Arbitration, 3<sup>rd</sup> ed. (BNA Books 1991) 86.

Accordingly, in view of the entire foregoing, I issue the following:

AWARD

The grievance is sustained.

The County shall provide FOP unit employees with a reclassification as provided to firefighters represented by IAFF Local 1311, effective July 1, 2016.

If the grievance is ultimately found to be untimely, FOP employees will be provided with commensurate pay beginning ten (10) workdays prior to January 20, 2017.

August 24, 2017

Dated

Salvatore J. Arrigo

Salvatore J. Arrigo

Arbitrator