

BEFORE
JAMES R. COX
ARBITRATOR

CITY OF DAVENPORT

and

COMPENSATION ISSUE
GRIEVANCE 12-GA-026

DAVENPORT UNION OF
PROFESSIONAL POLICE, INC.

DECISION AND AWARD

The Hearing in this matter was conducted in the City of Davenport February 14, 2012. Attorney Tom Warner represented the City while the Davenport Union of Professional Police case was presented by their Attorney, Alicia Gieck. Each Representative filed a Post-Hearing Brief March 14, 2012.

APPLICABLE CONTRACT AND CODE PROVISIONS

Scope of the Unit

The Recognition Clause set forth in Article 1 Section 1.1 of the Parties July 1, 2009 - June 30, 2012 Agreement excludes Captains from the Bargaining Unit.

The City recognizes the Union as the sole and exclusive Bargaining Unit consisting of Communication Clerks, Police Officers, Corporals and Sergeants but excluding the Chief of Police, Majors, Captains and Lieutenants along with all other City Employees excluded under Section IV of the Act.

Article VIII Section 8.1 addresses salary.

All Bargaining Unit Employees shall be paid in accordance with the Salary Schedule attached hereto as Appendix C and made a part of this Agreement.

The Salary Schedule lists Bargaining Unit Classifications represented by the Union of Professional Police providing specific rates depending upon Grade for Police Sergeants.

Demotion Finality under the Iowa Code

Iowa Code Chapter 400.18. Civil Service Regulations, states that "A Person holding civil service rights as provided in this Chapter shall not be removed, demoted or suspended arbitrarily, except as otherwise provided in this Chapter but may be removed, demoted or suspended after a Hearing by a majority vote of the Civil Service Commission for neglect of duty, disobedience, misconduct or failure to properly perform the person's duties".

Kevin Murphy had instituted a timely appeal of his demotion within the required fourteen calendar day period. Davenport properly filed a written Specification of the Charges and identified the grounds upon which the demotion had been based. A Hearing Date was set in accordance with the Code. There was no evidence that there had been any vote or other action by the Commission with respect to Kevin Murphy's demotion. As far as the Record shows, at the time of the Severance Agreement, the Appeal was still pending.

THE GRIEVANCE

August 1, 2011 the Union filed a Grievance Charging that Kevin Murphy had been paid more as a Sergeant than the Contract provides. They assert that, as a Sergeant at Step 13 on the Salary Schedule, while on Administrative Leave, Murphy should have been paid at \$74,136 rather than the much higher Captain's salary. Their Grievance reads:

"On 4-29-2011 Kevin Murphy was demoted from Captain to Sergeant. His rate of pay has not been revised to comply with Section 8.1 and Appendix C of the Agreement. Per the Agreement, 'All persons with a rank shall be paid equally according to their years of service'." This information was confirmed at a Labor/Management meeting July 26, 2011. The Union requests as a remedy the City is to, "increase all Sergeants pay to equal that of Sergeant Murphy, according to their years of service, retroactive to Kevin Murphy's date of demotion."

Answering the Grievance, Davenport responded that Murphy had been demoted to Sergeant, "due to a tentative Civil Service / Disciplinary / Separation Agreement currently being worked through with HR and the Legal Department. His Position remains status quo". When the Grievance was

moved to Second Step August 8th, the City replied that the "*Separation Agreement Murphy had with Legal and HR keeps him as Captain*".

THE ISSUE

The Issue before the Arbitrator is whether the City of Davenport violated salary provisions of the Collective Bargaining Agreement when they failed to pay all Sergeants at the rate of pay at which Kevin Murphy had been compensated on and after his May 1, 2011 demotion to Sergeant. The Davenport Union of Professional Police (hereinafter the Union) seeks back pay for the Bargaining Unit's 25 Sergeants in the total amount of \$399,536.80 through the November 4, 2011 date they identify as the day of Murphy's retirement or, alternatively, \$199,768.40 through the August 1, 2011 date of the Settlement Agreement which, the Union states, "*restored his rank to Captain*".

There are no issues of Arbitrability. This matter has been properly placed before me for final and binding determination.

THE FACTS

The Disciplinary Demotion

In April 2011, Kevin Murphy held the rank of Captain in the Davenport, Iowa Police Department. Following conduct not relevant to the outcome here and after an April 28, 2011 Disciplinary Hearing, Davenport Police Chief Donchez demoted Murphy to Sergeant, a rank reduction made effective Sunday May 1st. The demotion was imposed following findings of specific violations of City of Davenport Administrative Policy for "*Conflict of Interest – Employee Conduct*", "*Conduct Unbecoming an Employee*" and "*Reporting Violations*." Kevin Murphy was advised of his rights to appeal to the Iowa Civil Service Commission. In connection with an incident that had occurred at his home April 29th he was placed on Administrative Leave until a Fitness for Duty evaluation could be completed. There was no evidence that such an evaluation had ever taken place. Murphy never worked for the City thereafter either as a Sergeant or a Captain.

Chief Donchez signed the Administrative Leave Order April 29, 2011 and, that same day, demoted Murphy from his position as Services Division Commander and directed him to report the Patrol Division as a Sergeant. The Leave came with several conditions. Kevin was required to make himself available to an Internal Affairs Investigator or the Chief and not to take any police action, carry a weapon or wear the Davenport Police Department

uniform. A subsequent Order set the date his assignment to Patrol would become effective - May 1, 2011.

References to Murphy's post Demotion Status

While there is neither contention nor evidence that Murphy ever worked as a Sergeant after May 1st throughout the period after the demotion, the Union points out that his status had been described in City records and by spokespersons both as a Sergeant and Captain¹. Whatever the references, Kevin Murphy had officially been demoted to Sergeant, subject under Iowa law to a right to appeal the demotion to the Civil Service Commission.

Although he did not have either credentials or a medical release to work as a Sergeant, on Department records Murphy was still being scheduled as a Sergeant in July, obviously a clerical error. Departmental printouts of May 2, 2011 June 1, 2011, July 5, 2011 and July 25th displaying positions within the Department identify Murphy as a Sergeant on "*Long Term Leave*". He remained on Administrative Leave status as settlement talks progressed until August 1st when, according to a Department Order, "*Captain Kevin Murphy will be off duty due to an on the job injury until further notice*". The *Separation Agreement and Release* were executed and signed by the City, Murphy and his Attorney that same date. Retaining Kevin "*on OJI status until the conclusion of his disability pension application or his 55th birthday*" was part of the Agreement. Murphy continued to be paid as a Captain until his October 4, 2011 retirement in accordance with the Separation Agreement.

The Course of Settlement

The day after his demotion, Mr. Murphy had what appears to have been a brief conversation with Human Resources and suggested that, if the City would defer his demotion, he would attempt to obtain a disability pension and voluntary leave the employ of the City. Such a discourse was far from any agreement to retire. He retained attorney Dorothy O'Brien to contest his demotion.

¹ The morning of Wednesday, May 4th, a City representative referred to Grievant as Sergeant Kevin Murphy. In responding to a news reporter inquiring about Murphy's status that afternoon, the same person, answering another question, stated that "Captain Murphy had been placed on Administrative Leave at 12:01 a.m. Friday April 29, 2011". While we not know the date it was prepared, a Staff Roster with work schedules dated April 29, 2011 listed Murphy as a Captain in Property Evidence Custodian Services. However, that Roster had been prepared at an unstated time on or before the April 29, 2011 date of the Administrative Leave Order and the Demotion.

City Attorney Warner, advised Ms. O'Brien Monday May 2nd that Chief Donchez would hold, *"Kevin's discipline in abeyance based upon his understanding that Kevin would be signing a Separation Agreement today. ..."*. May 3rd Attorney O'Brien contacted Mr. Warner indicating that there was no interest in signing any Severance Agreement adding that Murphy intended to appeal his proposed demotion to the Civil Service Commission. Such an appeal would have the effect of preserving Murphy's status as a Captain until the Commission's determination. Although there would not be any settlement finalized until August 2011, during the succeeding three months there were continuing efforts by both O'Brien and the City to resolve the dispute over Murphy's demotion. A Separation Agreement continued to be a subject of settlement proposals despite Attorney O'Brien's initial rejection. In addition to timely invoking the Civil Service Appeal process, his attorney emphasized that Kevin was *"suffering from serious medical issues"* and that he was considering filing a Civil Rights Complaint alleging disparate treatment because of his asserted *"physical and/or mental disability"*.

First Murphy addressed the appeal of his demotion. May 11, 2011 Kevin Murphy filed Notice of his intention to appeal his demotion to the Civil Service Commission. Then Monday May 23rd Murphy completed and signed a required Iowa Civil Rights Commission Complaint Form relating to the case he would bring in late May. In the meantime talks with the City continued and the concept of resolving the dispute about his disciplinary demotion through a severance agreement resurfaced.

In mid-May, evaluating what he perceived to be Murphy's apparent change of position, the City Attorney rejected two of his demands and identified preliminary factors that needed to be worked out including resolution of a Pension Application that Murphy had submitted to MFPRSI. It was indicated that there would be consideration of restoring Murphy's rank of Captain and paying him Captain wages through his next birth date, October 9, 2011. Exploration of such options is not unusual in resolving disciplinary disputes involving long service employees like Murphy.² From a City standpoint, considering that Murphy had 34 years of service and a medical condition, exploring a settlement alternative to a Civil Service Procedure was a fiscally prudent procedure.

In the meantime the appeal to the Commission moved forward. The City filed the required Specification of Charges in late May. A Hearing on the demotion was scheduled.

²In a Davenport document setting forth Sworn Officer Ranks as of August 1, 2011 Kevin Murphy is listed as one of 25 Sergeants with an appointment date of July 27, 1977 – the date he was employed by the Department. He was one of the most senior Officers on the Department.

On or about June 1, 2011 Murphy filed his Complaint with the Iowa Civil Rights Commission claiming physical and/or mental disability discrimination. That Complaint, referencing his demotion and alleged harassment, maintained that he was being treated disparately because he had filed a "*prior civil rights complaint, opposed a discriminatory practice of participating as a witness in an anti-discrimination proceeding.*"

Thereafter Kevin Murphy's attorney indicated a willingness to consider a City offer to settle the demotion issue. Thereafter settlement talks finalizing details steadily progressed eventually bringing about resolution. August 1, 2011 Captain Kevin Murphy and the City of Davenport entered into a Separation Agreement which recognized, among other things, Murphy's long service with the City of Davenport. His voluntary retirement was to become effective upon the approval of his MFDRSI Disability Pension Application or his 55th birthday (whichever came first). It was recited that his "*last full day to report to work was April 28, 2011 and that he would remain on OJI status until the conclusion of his Disability Pension Application or his 55th birthday.*" There are other provisions not relevant here. He was restored to Captain August 11, 2011. While Murphy's status was resolved, a claim not previously asserted was initiated by the Union.³ Their timely Grievance was filed not long after a Labor-Management Meeting.

ANALYSIS

The outcome here turns primarily upon three considerations. Was Murphy ever covered by the Sergeant's Collective Bargaining Contract; had his demotion to Sergeant become final during the period he continued to be paid as a Captain prior to signing the Separation Agreement and, if either of these factors brought him under the Labor Agreement, was there a violation of the Sergeant's Collective Bargaining Agreement by paying him above scale which would warrant, as a remedy, that all Sergeants in the Bargaining Unit be paid at a salary higher than required under the negotiated salary schedule.

Did Murphy ever perform bargaining unit work?

The evidence established that Murphy had never worked or was paid as a Sergeant and, from the time of his change in rank, was on administrative leave until August and then on OJI status. From the time of his demotion, not only did Kevin lack credentials to perform any law enforcement work but he failed to demonstrate that he was physically and/or mentally qualified to perform the work of a Sergeant. The Union acknowledges that, although Murphy had been demoted from Captain to Sergeant, he had never performed

³ There was no contention that the Grievance was untimely for failure to comply with Section 4.6 of the Contract.

any work in that classification. As Sergeant Linborn credibly testified, while Kevin had asked how he could join the Union and whether legal defense fund benefits would be available were he a member, neither he nor the Union pursued the matter further. There was no effort by the Union to ask him to sign an authorization form for dues check off.

The demotion took Kevin Murphy off the Captain's job but, in such circumstances, there was no contractual basis to compensate him as a Sergeant. He had in effect, a paper title and a nominal position which he retained as the City looked for a permanent way to get him off the payroll permanently. There is no evidence that Murphy ever became a member of the bargaining unit. He would have no claim for any benefits under the Sergeant's Contract and was not provided any. Under traditional labor law standards, there is no reason to consider him as having any coverage under the Sergeant's Labor Agreement. The City did not have any obligation to pay Murphy as a Sergeant especially since his demotion had not been finalized by the Civil Service Commission.

Did the Murphy demotion to Sergeant ever become effective?

Despite the lack of evidence that Murphy's appeal to the Civil Service Commission had been acted upon; the Union asserts that Murphy's demotion to Sergeant became final after the initial Appeal Hearing had been cancelled. As they put it, *"when Murphy's demotion to sergeant became final following his failure to timely prosecute his appeal, he became a member of the Bargaining Unit, subject to the Agreement"*. Since there is no evidence that Murphy or his Attorney had failed to timely pursue his appeal, this basis for considering him a Bargaining Unit member is without support.

The Union acknowledges that Murphy had properly appealed starting with the Notice of Appeal filed May 11th and that the City had filed a timely Specification of Charges May 24th. As the City correctly states, the Commission is, in effect, *"the employer's final word on whether a civil service employee is suspended, demoted or discharged once the proper appeal is initiated"*. As a matter of law, the demotion did not become final during the period his appeal had been pending.

The Hearing is to be held within 20 days after the Specification is filed. There is no evidence to support the contention that, because the initial Hearing had been cancelled, the appeal process terminated at that point and the demotion became final. There is no evidence to support the Union claim that Murphy had failed to prosecute his appeal prior to entering into the Settlement Agreement or that he was responsible for the cancellation. There was no evidence that the Civil Service Commission had denied Murphy's right to further proceedings, upheld the demotion or dismissed the Appeal. There was no support for the Union claim that Murphy had waived his right to

continue the appeal of the demotion or their assertion that the demotion became effective. The Union has not established that the Captain became a Sergeant subject to the terms and conditions of their Labor Contract. Murphy never became an member of the Sergeant's Bargaining Unit though performance of bargaining unit work and his demotion into that Unit was never finalized before his status was permanently resolved through the August Severance Agreement.

Even if there had been an effective demotion and Kevin were paid more as a Sergeant than others, such an exception would not entitle any other Sergeant in the Unit to a higher salary than expressly provided by the terms of the Collective Bargaining Agreement. Moreover, even if Murphy had a higher rate than others, no Sergeant lost any wages as a consequence.

Based upon their assumption that Murphy had been covered by their Collective Bargaining Agreement as a Sergeant, the Union reasons that, since he was paid more than the salary rates set forth for Sergeants in the Appendix C Salary Schedule, others covered by that Contract had been treated disparately and, as a remedy, the City should pay all Sergeants what he was being paid. They maintain that damages should be determined by calculating the salary differential between each Sergeant and Captain at equivalent steps from May 1, 2011 (the effective date of Murphy's demotion) through November 4, 2011 (the date they state his retirement became effective⁴) or, in the alternative, through August 1, 2011 (the date of the Separation Agreement) which restored his rank to Captain. . Not only do they ask the Arbitrator to ignore Contract language but they seek a temporary wage increase for a limited period. There is no precedent for such a remedy.

The City argues that granting the Grievance and providing the remedy sought would, in effect, work an amendment of the Contract since the Parties have negotiated rates of pay for Sergeants. There is no evidence that the City has failed to pay any Sergeant in according with agreed upon salary schedule provisions. Payment of one employee above scale is not remedied by paying all employees in the same classification the rate of the overpayment. In the

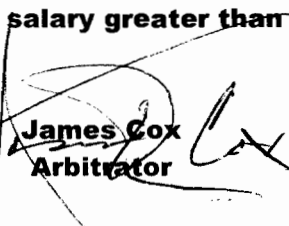
⁴ A January 23, 2012 printout of Murphy's 2011 salaries indicate that May 1, 2011 Murphy had been denoted involuntarily and that he would go to Patrol as a Sergeant with an annual salary of \$74,136.99. The entry date was May 4, 2011 and a second entry of that same date repeats that the action was as an involuntarily demotion and that he would go to Patrol as a Sergeant but the annual salary due to an entry May 4, 2011 would be \$104,017.50. May 11, 2011 shows a wage adjustment effective May 1, 2011 of Murphy back to Captain in accordance with Severance Agreement - then Captain salary of \$106,633.55. There was an adjustment, entered October 4, 2011 indicating that Murphy would retire from the Davenport Police Department effective that date again showing the \$106,633.55 salary. His last check from the City is dated October 21, 2011. The correct retirement date was October 4, 2011.

long experience of this Arbitrator, such errors are properly remedied by requiring the overpaid employee to reimburse the employer. Looking at the reverse side of the coin, as Davenport explains, underpayment of one Sergeant should not lead to under payment of all Sergeants.

All Bargaining Unit Employees are to be paid in accordance with the Contract Salary Schedule set forth in Appendix C. There is no evidence that this provision or any other contract requirement has been violated through the failure of Davenport to pay Sergeants a salary greater than the Contract provides.

AWARD

The Grievance is denied. Considering the circumstances reviewed above and for reasons discussed, I find that City of Davenport did not violate the Sergeant's Collective Bargaining Agreement when they paid an employee excluded from that Agreement a salary greater than contractually provided Sergeants.


James Cox
Arbitrator

Issued this 29th day of March 2012