

Case: GLAZER #7

In The Matter Of The Voluntary Arbitration Between:

City (Employer)

And

Police Union (Union)

Arbitration Opinion and Award

ISSUES

I

IS THE GRIEVANCE TIMELY?

II

SHOULD THE GRIEVANT HAVE BEEN
PERMANENTLY PROMOTED TO CAPTAIN?

Lt. Mike Bell, in his grievance of August 30, 2004, protests that he was improperly demoted from his provisional rank of captain. He wrote:

Statement of Grievance (Give time, dates, who, where, what and why):

On May 25, 2003, while there was an active and valid Eligibility List for the rank of Police Captain, Mike Bell, who was #1 on that active list, was provisionally promoted to the rank of Captain. Mike Bell successfully and completely performed his duties as a Police Captain from that date forward, and the eligible list for Police Captain expired on December 18, 2003. On August 29, 2004, Mike Bell was demoted from the rank of Captain and returned to the rank of Lieutenant.

Desired Settlement of Grievance

Reinstate Mike Bell to the rank of Captain and make him economically whole.

The grievance was denied on November 2, 2004 as follows:

City of Someplace
Labor Relations Department

To: Terry Slow Police
Lieutenants and Captains Union

From: Tom Jar
Labor Relations Coordinator

Date: 11/2/04

Subject: Mike Bell grievance # 4.06

Discussions have taken place regarding the grievance of Mike Bell #4.06 regarding the issue of the provisional promotion to the rank of Captain.

It was alleged that the City violated the following articles of the collective bargaining agreement: 37, 48, 50.

Our review of your arguments and the facts surrounding your grievance leads us to the conclusion that the collective bargaining agreement was not violated. In addition, the grievance was submitted untimely. The event giving rise to the grievance was when the Grievant was provisionally promoted to the position of Captain, based on your argument that since there was an active list, the grievant should have been promoted at that time on a permanent basis (May 25, 2003). The grievance was submitted 8/30/04, a year and a half past the event giving rise to the grievance.

Therefore, the grievance is denied.

If you have any questions regarding this matter, please feel free to contact me at 237-2023.

Sincerely,
/s/
Thomas Jar
Labor Relations Specialist

An arbitration hearing was held on December 21, 2005. Testifying was Lt. Bell.

Comprehensive post-hearing briefs were submitted by the parties.

BACKGROUND

Lt. Bell was #1 on a promotional list for captain dated June 18, 2002. This list was set to expire on December 18, 2003. On May 25, 2003, Lt. Bell was temporarily or provisionally appointed to captain. This was because Captain Gary Glass was provisionally appointed to deputy chief.

On December 17, 2003, the day before the expiration of the Grievant's eligibility list, the Human Resources director extended the eligibility list until March 18, 2004. Ms. Deirdre Bottle wrote:

DEPARTMENT OF HUMAN RESOURCES

MEMORANDUM

TO: Chief Cake

DATE: December 17, 2003

FROM: Deirdre G. Bottle
Human Resources Director

RE: Extension of Police Captain Eligibility List

Please be advised that I am extending the Police Captain eligibility list for a period of ninety (90) days. The aforementioned eligibility list was originally set to expire December 18, 2003. The new expiration date will be March 18, 2004.

I have made this decision pursuant to the authority granted to me under Personnel Rule VI section 2 which states: "All persons shall take rank upon the consolidated list in the order of their relative excellence as determined by the respective examinations, and shall

remain thereon for one year from date of promulgation unless extended by the Chief Personnel Officer for an additional period not to exceed one year from the date they originally became eligible, after which their names shall be dropped from the new consolidated list".

Should you have any questions, please do not hesitate to contact me.

/s/

Deirdre G. Bottle

This extension was grieved by the Union on January 12, 2004 on the basis that Article 37 of the contract limited the length of promotional lists to 18 months. The Union wrote:

Statement of Grievance (Give time, dates, who, where, what and why):

On January 12, 2004, Union President Deborah Lake and Trustee Bethany Stream were informed verbally by the City of Someplace Personnel Department employee Pat River the Promotional list for Captain that expired on December 17, 2003 had been extended until March 2004. This action adversely affects this bargaining unit and is in direct violation of Article 37 Section 1 which states, "The promotional Lists for Captain and Deputy Chiefs shall have a duration of 18 months.

Desired Settlement of Grievance

1. Establish a new eligibility list for Captain based on contractual agreements with his Union.

Ms. Bottle granted the grievance and terminated the eligibility list on December 18, 2003.

She wrote:

TO: Chief Cake
Police Chief

DATE: 2/18/04

FROM: Deirdre G. Bottle
Human Resources Director

RE: Extension of Police Captain Eligibility List

This is in reference to the December 17, 2003 memo sent to you regarding the extension of the Police Captain eligibility list for 90 days. The original list was to expire December 18, 2003.

I have decided to rescind the letter dated December 17, 2003. The original expiration date of the Captain's eligibility list will remain at December 18, 2003.

Should you have any questions, please do not hesitate to contact me.

Deirdre G. Bottle

A new promotional list was promulgated on August 20, 2004. Lt. Bell was #8 on that list. Thereafter, Gary Glass, who had become the permanent deputy chief of police, promoted the two top candidates on the new list to captain. The chief wrote:

SOMEPLACE POLICE DEPARTMENT

MEMORANDUM

FROM: Chief Gary Glass Date: August 24, 2004

TO: All bureau Commanders
All Police Personnel

SUBJECT: Promotions

The following promotions are effective Sunday, August 29, 2004:

- Lieutenant David Water is promoted to Captain and is assigned to the Criminal Investigations Bureau
- Lieutenant Scott Sun is promoted to Captain and is assigned to the Administrative Services Bureau.

Gary Glass
Chief of Police

On August 29, 2004, Mike Bell was returned to his position of lieutenant as follows:

SOMEPLACE POLICE DEPARTMENT

MEMORANDUM

FROM: Chief Gary Glass Date: August 25, 2004

TO: All bureau Commanders
All Police Personnel

SUBJECT: Transfer

The following transfer is effective Sunday, August 29, 2004:

Lieutenant Mike Bell is assigned to the
Criminal Investigations Bureau, Support Services
Division

Gary Glass
Chief of Police

Lt. Bell testified that he thought that he would be made the permanent captain, and in fact, he indicated that, "I thought I was the captain." Lt. Bell said that he didn't know that his promotion to captain was provisional. However, he did say that Gary Glass's promotion to deputy chief was

provisional, and that he understood that Glass would be returned to captain if his position was not made permanent.

Gary Glass was promoted to the permanent position of deputy chief on May 9, 2004, fourteen months after his provisional appointment. Lt. Bell testified that he successfully performed all the duties of a captain.

PERTINENT CONTRACT PROVISIONS

A R T I C L E 1 0 GRIEVANCE PROCEDURE

Section 2. Procedure

Step 1. Within five (5) working days of the time of the event giving rise to the grievance, an employee must present the grievance orally to his immediate supervisor. The Association Representative may be in attendance if the employee so requests. In the event that the grievants immediate supervisor is of the same rank as the grievant or in the case of a suspension or discharge, Steps 1 and 2 will be....

A R T I C L E 3 7 PROMOTIONS

The Personnel Director, or his designee, will meet and confer with the Association prior to the posting of the job opportunity announcements for promotion to the position of Captain in the Someplace Police Department.

The Association will be provided the opportunity to discuss with the Personnel Director, or his designee, such matters as eligibility, service ratings, seniority credit, method of examination and such other criteria used to obtain the final examination score.

Section 1. The promotional lists for Captain and Deputy

Chiefs shall have a duration of eighteen (18) months.

Section 2. The Personnel Director, or his/her designee, will meet with the Union prior to establishing each promotional examination, it being agreed that the promotional selection procedure shall be job related and shall satisfy the Uniform Guidelines on Employee Selection Procedures, 29 CFR Sec. 1608, et seq.

Section 3. For promotion to the rank of Captain, candidates for promotion shall be selected from among the top three (3) persons appearing on the then current eligible list.

Section 4. The parties wish to assure that the obligation of providing for equality of opportunity for all members of the bargaining unit is satisfied. Consistent with the provisions of the Uniform Guidelines on Employee Selection Procedures, 29 CFR Sec. 1608, future selection procedures shall be construed to minimize or eliminate adverse racial impact.

Section 5. For promotion to the rank of Deputy Chief, candidates for promotion shall be selected from among the top three (3) persons appearing on the then current eligible list.

POSITION OF THE UNION

It is argued that the grievance in this matter is timely, insofar as Lt. Bell grieved as soon as he suffered a harm through his demotion to lieutenant. The Union maintains that there is nothing in the contract that required the Grievant to file a grievance at an earlier point in time. Regarding the merits, it is contended that the City improperly extended the Grievant's provisional appointment beyond the allowed 90 days. The Union argues that the Employer had to either withdraw the provisional appointment at the end of 90 days or permanently promote the Grievant. The Union contends that by doing neither, the Employer waived the ability to remove Mike Bell from the provisional captain position.

It is argued that the Employer cannot be permitted to use Mike Bell for an excessive amount

of time, for over 15 months, as a provisional captain, and then displace him in favor of two other candidates. The Union strongly argues that the City misused the promotional process.

POSITION OF THE CITY

It is argued that the grievance is untimely, since it was filed more than 15 months after the Grievant was provisionally appointed to captain. In particular, the Employer contends that the Grievant should have filed at the expiration of the original promotional list on December 18, 2003. Also, it is maintained that a grievance could have been filed at the end of the 90 day extension on July 19, 2004. The grievance, when it was filed, is argued to have been too late.

Regarding the merits, it is asserted that the City properly selected the two top candidates for captain from the applicable, new promotional list. The Employer contends that it properly followed Article 37, and that the arbitrator is required to follow the written provisions of the collective bargaining agreement.

DISCUSSION

TIMELINESS

Step 1 of Section 2 of the Grievance Procedure requires a grievance to be filed within five working days of "the event giving rise to the grievance." The transfer of Mike Bell back to lieutenant from his provisional captain position on August 29, 2004 can be regarded as an event giving rise to the grievance. Had the provisional appointment lasted indefinitely, there would have been no reason for Lt. Bell to have filed a grievance. Until he was actually transferred back to his

previous position, he had not suffered a demonstrable harm. Therefore, the transfer to lieutenant did give rise to a grievable event, and the grievance filed in this matter was timely.

THE MERITS

It is apparent that Mr. Bell was kept in the provisional captain position until it was determined that the provisional deputy chiefs position would become permanent. Until that point, Mr. Bell recognized that Gary Glass could have been returned to captain.

Lt. Bell did not grieve when his provisional appointment to captain extended beyond 90 days. He also did not grieve when the promotional list that he was #1 on expired. These events occurred while he was still a provisional captain.

Absent a grievance protesting the continued use of Lt. Bell as a provisional captain, or a challenge to the new promotional list, the City was in the position of having to follow the contract when it made a permanent promotion to captain.

Article 37 of the contract states that a promotional list for captain expires after 18 months. This meant that the first promotional list, where the Grievant was #1, expired on December 18, 2003. As a matter of contract, the City was required to create a new promotional list. It is not challenged that the Grievant was listed #8 on that list.

The City then was required to pick among the top three candidates from the second list to select two permanent captain positions. Section 3 of Article 37 says:

Section 3. For promotion to the rank of Captain, candidates for promotion shall be selected from among the top three (3) persons appearing on the then current eligible list.

Since the Grievant was #8 on the second, current eligible list, the City, as a matter of contract, could not select him as one of the two permanent captain positions.

The Union, however, argues that the City became obligated to place the Grievant in a permanent captain slot because it kept him as a provisional captain beyond 90 days, and in fact for many months. However, the contract in Article 37, Section 3 requires that promotions to the rank of captain **shall** be selected from the **current** eligible list.

This means that neither the City nor an arbitrator can change the contract by promoting the Grievant to captain, since he wasn't one of the top three candidates on the applicable and current promotional list. To do so would violate the contract. Therefore, a permanent promotion to captain is not a remedy available to the Grievant for his continued placement as provisional captain.

If the Grievant was dissatisfied with not being promoted to permanent captain after 90 days, he was required to file a grievance while he was still #1 on the existing promotional list. That way if had prevailed in the grievance, he would have been eligible to have been promoted to permanent captain under Article 37.

However, once the first list expired, and the Grievant was no longer in the top three, he lost his opportunity for promotion. I understand that this seems unfair and contrary to his expectations, but the contract requires that only the top three candidates from the current promotional list be considered for a permanent promotion to captain. Accordingly, I have no choice but to deny the grievance.

AWARD

For the foregoing reasons, the grievance is denied.



Mark J. Glazer
Arbitrator

March 15, 2006