DISTRICT OF COLUMBIA
WATER AND SEWER AUTHORITY

Board of Directors

Human Resources and Labor Relations Committee

Wednesday, May 8, 2013
11:00 a.m.

1. Call to Order .....Kathleen Boucher
   Chairperson

2. Union Presidents……..…….James Ivey, AFSCME 2091
   Barbara Milton, AFGE 631
   Jonathan Shanks, AFGE 872
   Michelle Hunter, NAGE R3-06
   Charles White, AFGE 2553

   Promotions and Workplace Violence at DC Water - Jonathan Shank
   Arbitration Decision Regarding Bonus Payments for Union Employees - Barbara Milton

3. Acting Assignments……Rick Green, Director, HCM

4. Hiring/Promotion Statistics……Steve Rogers, Manager, Compensation

5. Open Discussion

6. Executive Session – To discuss personnel matters pursuant to D.C. Official Code Section 2-575(b)(10).....Kathleen Boucher

7. Adjournment .....Kathleen Boucher

BEFORE ARBITRATOR
MARVIN E. JOHNSON

* *

In the Matter of:

American Federation of Government Employees,
Local 631, et. al.

(Unions)

and

District of Columbia Water and Sewer Authority

(Agency)

* *

Re: FMCS Case No. 12-02450-A (Performance Bonuses)

Appearances

For the Unions:

Barbara B. Hutchinson, Esq.

For the Agency:

Edward R. Levin, Esq.

BACKGROUND

This case concerns a grievance filed by the Unions (the American Federation of Government Employees, Locals 631, 2553 and 872; the American Federation of State, County and Municipal Employees, Local 2091; and the National Association of Government Employees, Local R3-06) representing Compensation Unit 31. The grievance alleges that the District of Columbia Water and Sewer Authority (WASA, Authority or Employer) violated the parties' Collective Bargaining Agreement (Agreement, Contract or CBA[1]) when it refused to pay performance bonuses for the rating period ending March 31, 2012.

FACTS

On April 20, 2012, the Unions filed a Step 3 grievance alleging, among other things, that the Employer violated Articles 4, 1, and 19 of the Agreement. The grievance alleged that the violation occurred when the Authority's Director of Human Resources/Human Capital stated that WASA was not going to pay performance bonuses for the rating period that ended on March 31, 2012 because the parties' Agreement expired on September 20, 2011. By letter dated April 20, 2012, the Authority denied the grievance alleging, among other things, that the grievance was premature since the performance evaluations upon which the bonuses are based were not due to be completed until May 31, 2012 and that the performance bonuses were not required because the parties' Contract had expired. Subsequently, the Unions invoked arbitration. A hearing was held on January 4, 2013. The parties were represented and afforded full opportunity

[1] In this decision, these capitalized abbreviations are the only terms that reference the parties' October 1, 2007 - September 30, 2011 Collective Bargaining Agreement.

to be heard, adduce relevant evidence, and examine and cross examine witnesses. The parties filed post-hearing briefs in lieu of closing arguments.

ISSUE

Whether Article 1, Section B and Article 19 require the Authority to continue paying performance bonuses until a successor agreement is negotiated? If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

ARTICLE 1

WAGES

. . .

Section B Performance-Based Bonus

Beginning with the March 31, 2008 annual ratings and each subsequent annual rating during the term of this contract, employees covered by this Agreement shall be eligible to receive a pay for performance lump sum bonus based on the employee's base rate of compensation for the first full pay period in Fiscal Year 2007, and each subsequent Fiscal Year during the term of this contract that shall be calculated as follows:

(A) Level 1 Performance Rating - 0%

(B) Level 2 Performance Rating - 1% lump sum bonus

(C) Level 3 Performance Rating - 2% lump sum bonus

ARTICLE 19

DURATION AND FINALITY OF AGREEMENT

. . .

The duration of this agreement is October 1, 2007 to September 30, 2011. This Agreement shall remain in full force and effect during the period of negotiations and until a new contract takes effect or in the event of an impasse, pending the completion of mediation and arbitration or both.

. .

POSITION OF THE PARTIES

Unions

Relying on Article 19 (Duration and Finality of Agreement) of the Contract, which states that "[t]his Agreement shall remain in full force and effect ... until a new contract takes effect," the Unions maintain that the terms and conditions of the Contract remain in effect until the parties sign a successor agreement. In support of its position, the Unions cite Arbitrator David Clark's decision concerning the parties' 1999-2003 contract and the Employer's nonpayment of performance bonuses in 2004. It maintains Arbitrator Clark held that the same language in the Duration and Finality of Agreement Article (Duration Article) made nonspecific duration provisions in the contract binding on the parties until a successor agreement is negotiated.

The Unions point out that, except for Article 1, Section B, the Authority has not rejected the duration of any other Contract article. It notes that the parties continue to adhere to the provisions of other articles in the Contract pending the execution of a new agreement. The Unions contend that the language in Article 19 and the parties' actions clearly reveal the parties' intentions to continue all Contract terms until a new collective bargaining agreement is signed. It argues that, if the term of the parties' Agreement was from October 1, 2007 to September 30, 2011, the entire Contract would have terminated on September 30, 2011.

As a remedy, the Unions ask that employees be awarded performance bonuses of 2% retroactive to the 2012 performance year plus interest for the unlawful withholding of the employees' pay and that the Unions be awarded attorney fees, and associated costs. They also request that the Arbitrator retain jurisdiction for ten days for submission of an attorney fee request.

Employer

As a preliminary matter, the Employer argues that because the Unions' grievance involves conduct that occurred after the expiration date of the parties' Agreement, the grievance is preempted by the parties' current negotiations over performance bonuses in a new collective bargaining agreement.

With respect to the substance of the grievance, the Employer maintains that there is no need to look outside the four corners of the Contract to interpret Article 1, Section B because the language clearly and unambiguously provides that performance bonuses are paid during the term of the Contract. Citing the contract interpretation principle that specific contract language controls general contract language, the Employer maintains that the Unions mistakenly rely on the general "rollover" language of Article 19 to evade the specific time and duration limits written into Article 1, Section B.

Contrary to other articles in the Contract, the Employer notes that Article 1, Section B is very specific about limiting the application of performance bonuses to the term of the Contract. Because of Article 1, Section B's specificity, it argues that the plain meaning of the language in the provision is determinative.

Citing Arbitrator Clark's decision, the Employer argues that the Contract preserves only the provisions that are written without any time limitation. Thus, it maintains that all articles which are not limited in time or duration remain effective and continue to apply in the post-expiration period of the CBA. Since Article 1, Section B specifically ends performance bonus awards on September 30, 2011, the Employer avers that its obligation to pay for performance bonuses terminated on that date.

Noting that the parties are currently in an impasse proceeding involving mediation and arbitration, the Employer contends that § 1-617.17(f)(4) of the D.C. Code, which states that "...no change in the status quo shall be made pending the completion of mediation and arbitration," prohibits the relief requested by the Unions. It contends the status quo (no 2012 performance bonus awards) can only be changed by negotiation, mediation or arbitration.

For the aforementioned reasons, the Employer requests that the Unions' grievance be denied.

DISCUSSION AND ANALYSIS

The threshold issue to be addressed is the arbitrability of the Unions' grievance. The Employer argues that the Unions' grievance is, in effect, not arbitrable because it involves conduct that occurred after the expiration of the Agreement and is part of the parties' current negotiations for a new contract. [2] Although the parties are currently in an impasse proceeding concerning negotiations over a new collective bargaining agreement, the subject grievance is over the interpretation and application of the parties' current Agreement which expired but "rolled over" pending the parties' execution of a new agreement.

The D.C. Public Employee Relations Board's 2008 decision in *D.C. Water and Sewer Authority and American Federation of Government Employees* (*D.C. WASA and AFGE*) held that an interest arbitration award preempts any subsequent grievance arbitration award that is issued under the auspices of a predecessor collective bargaining agreement and is inconsistent

[2] These issues were briefed and decided in response to the Employer's motion to stay the subject arbitration pending the parties' negotiations for a new collective bargaining agreement.

with the interest arbitration decision. Thus, if the subject grievance is not decided before an interest arbitration decision is rendered on the same subject in the parties' current impasse proceeding, the right to a decision on the interpretation of the language in the parties' existing Agreement will be lost. Where there is an opportunity to decide a grievance without violating *D.C. WASA and AFGE*, fairness considerations require that the grievance be heard and decided. Accordingly, in order to preserve the parties' right to a decision concerning the interpretation of the disputed language in their existing Contract, I fine the Unions' grievance to be arbitrable.

Having determined that the Unions' grievance is arbitrable, I turn to whether the Employer violated the parties' Agreement when it failed to pay performance bonuses in 2012. Specifically, the interpretation of Article 1, Section B and Article 19 are the gravamen of the Unions' grievance. Both parties rely on Arbitrator Clark's 2007 Decision (Clark Decision or Decision), issued under the parties' 1999-2003 collective bargaining agreement (effective 2001), to support their opposing positions in this matter.[3] In light of the parties' reliance on the Clark Decision to interpret both articles, the Decision deserves consideration in the interpretation of the disputed language in this case.

In its brief, the Unions argue the Clark Decision held that the parties' Duration Article (which is virtually identical to the language in the current Contract) kept the nonspecific duration provisions in the parties' agreement in effect until a successor agreement is negotiated. The Employer argues, in its brief, that the Clark Decision held that the Duration Article preserves

---

[3] The Decision held that the Employer violated the 1999-2003 collective bargaining agreement when it failed to pay performance bonuses in 2004. *D.C. WASA and AFGE* over turned the Decision because it was decided after the publication of an interest arbitration covering the same matter.

those contract provisions that are written without any time limitation. In addition, it maintains that those provisions that are written with time limitation language expire at the end of the specified contract term.

The Clark Decision held that the language in the Duration Article kept the contract in effect after the September 30, 2003 contract term, unless or until a new contract term was negotiated. The Decision noted that a 2002 agreement (performance bonus agreement or PBA) was incorporated into the parties' 1999-2003 contract (this agreement created, among other things, a new performance bonus system). It noted further that the PBA designated specific days and months for certain performance bonus actions and that the agreement used the term "annual" rather than a specific year that would have placed a limit on the duration of the program. In this regard, the Clark Decision specifically stated:

> In sum, this language indicates that the parties intended to create a system for granting performance bonuses that was not limited only to the first year that such bonuses would be paid, but would be ongoing.
>
> ...
>
> ...[T]he effect of the rollover provision of the [collective bargaining agreement] is to make negotiated provisions, such as this one that are nonspecific as to duration, binding on the parties unless or until a new provision is negotiated or awarded in its place. When the Employer negotiated the September 27, 2002 Agreement, it could have, but did not, insert a specific year for payment of performance bonuses. A specific year would have had the effect of preventing the rollover of what is otherwise a general obligation undertaken by the Employer.

The language in Article 1, Section B is the result of an interest arbitration decision which selected the Employer's Last Best Offer for that provision of the Contract. Testimony during the hearing revealed that the language in Article 1, Section B was not discussed during negotiations. In determining the meaning of terms adopted by a third party without discussion during

negotiations, one must look to the clear and unambiguous meaning of the language under the surrounding circumstances that existed at that time.

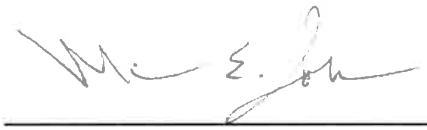
Article 1, Section B provides dates and years pertaining to when employees are eligible to receive performance bonuses and which pay period to use to determine an employee's base rate of pay. The provision has no specific time limitation (month and year) that would limit the duration of the provision. The Clark Decision, relied on by the parties, noted that the September 30, 2003 termination date of the contract was not *connected* to the dates set forth in the performance bonus agreement. The testimony and the evidence in this case demonstrate that the language in Article 1, Section B was predicated on the ambiguous language in the 1999-2003 contract and the 2002 performance bonus agreement. Both of these documents were reviewed in the Clark Decision. As was stated in the Clark Decision and is generally understood in labor-management relations, a rollover provision allows a collective bargaining agreement to stay in effect until a subsequent contract is negotiated. Under these circumstances, the term "during the term of this contract" in Article 1, Section B cannot be interpreted to limit the duration of the provision. The failure to provide a specific ending month and year for paying performance bonuses implies that the payment of performance bonuses would be rolled-over with the other nonspecific provisions of the Contract. If the Employer wanted to connect Article 1, Section B to the end of the *stated* Contract term in the Duration Article and sunset the provision at the end of that term, it could have written more specific language that would have clearly and unambiguously accomplished this objective. For example it could have stated "each employee covered by this agreement shall be eligible to receive a pay for performance lump sum ... until September 2011."

In light of the above findings, I conclude that the language in Article 1, Section B and Article 19 provide for the payment of bonuses until a new contract is executed. Accordingly, I find that the Employer violated Article 1, Section B when it failed to pay 2012 performance bonuses. However, noting the interest arbitrator's imposition of the Employer's Last Best Offer into Article 1, Section B and the absence of a discussion over the language during negotiations, I find no indication that the Employer's conduct was nefarious, unmindful or of furtive design. Accordingly, interest should not be paid to qualified bonus recipients unless the Employer continues to refuse to pay the 2012 performance bonuses.

AWARD

The grievance is sustained. The Employer shall pay qualified bargaining unit employees 2012 performance bonuses in accordance with the established criteria in the Contract. Interest shall not be paid to the bonus recipients unless the performance bonuses are not issued within 90 days from the date of this decision. If the 2012 performance bonuses are not paid to qualified bargaining unit employees within 90 days of this decision, interest shall be paid to the recipients based on the sum of their bonus and compounded from the date of this decision. The Unions' request for attorney fees and other costs are denied. The Arbitrator retains jurisdiction for 120 days to monitor the implementation of this award.

Dated: March 26, 2013



Marvin E. Johnson
Arbitrator

Human Capital Management
Acting Assignments

HR Labor Relations Committee

Kathleen Boucher – Chair

May 8, 2013

dc water is life

1

water is life

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY | 5000 OVERLOOK AVENUE, SW | WASHINGTON, DC 20032

Response to HR/LR information request regarding Acting Assignments

I. Criteria for selection

The appropriate manager selects the employee for the acting assignment and forwards a Personnel Action Report to the Compensation unit to initiate the process. These assignments are subject to Human Capital Management (HCM) review to ensure minimum qualifications are met and to determine appropriate compensation.

II. Compensation

Employees selected for acting assignments are compensated based on the Authority's promotion policy.

Non-union acting compensation is 8% per grade increase

A union employee's acting compensation depends on the pay scale they are currently under along with pay scale of the "acting position. The union employee must be in the acting position for more than 20 consecutive workdays to receive the higher pay.

The minimum increase for a union employee moving into an acting assignment is 4%.

III. Experience Consideration

An internal applicant must be in an acting assignment for a minimum of 4 months to be counted towards the experience requirement for the position

IV. Assignment Duration

Per the collective bargaining agreement, union employees' acting assignments shall not exceed 120 days.

Non-union employee assignments are not restricted to the 120 day assignment limit.

water is life

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY | 5000 OVERLOOK AVENUE, SW | WASHINGTON, DC 20032

V. Comparison to other local organizations

10 organizations surveyed (no response received from PEPCO)

Organization	Formal policy	Consider Acting Exp in hiring	Addt'l compensation
WSSC	Yes	Yes	Yes
Prince George's County	Yes	Yes	Yes
DC Gov't	Yes	Yes	Yes
Prince Wm County	Yes	Yes	Yes
BGE	Yes	Yes	Yes
Loudon County	No	N/A	N/A
Fairfax County	No	N/A	Yes
Montgomery County	No	N/A	Yes
Constellation Energy	No	N/A	N/A

Human Capital Management

Hiring & Promotion Statistics
January 2010 – March 2013

HR Labor Relations Committee

Kathleen Boucher – Chair

May 8, 2013

dc water is life

2

DC WATER EMPLOYEE PROMOTIONS
JAN 2010 - MARCH 2013
During this period 14 out of 99 (14%) union promotions were into non-union positions

	ACTUAL	% OF TOTAL DC WATER PROMOTIONS	AFGE 631	AFGE 872	AFSCME 2091	AFGE 2553	NAGE	Non-Union
2010 TOTAL UNION PROMOTIONS	27	55%	7	11	2	2	0	5
2010 TOTAL NON- UNION PROMOTIONS	22	45%						
2010 TOTAL DC WATER UNION PROMOTIONS	49							
2011 TOTAL UNION PROMOTIONS	23	52%	3	11	4	1	0	4
2011 TOTAL NON-UNION PROMOTIONS	21	48%						
2011 TOTAL DC WATER UNION PROMOTIONS	44							
2012 TOTAL UNION PROMOTIONS	41	66%	3	22	11	0	0	5
2012 TOTAL NON-UNION PROMOTIONS	21	34%						
2012 TOTAL DC WATER UNION PROMOTIONS	62							
2013 TOTAL UNION PROMOTIONS	8	73%	3	4	1	0	0	0
2012 TOTAL NON-UNION PROMOTIONS	3	27%						
2012 TOTAL DC WATER UNION PROMOTIONS	11							
TOTAL UNION PROMOTIONS Jan 2010 - March 2013	99	60%	16	48	18	3	0	14
TOTAL NON - UNION PROMOTIONS Jan 2010 - March 2013	67	40%						
TOTAL DC WATER PROMOTIONS Jan 2010 - March 2013	166							

DC Water

Positions Filled

Jan 2010 – March 2013

Positions Filled:	480	
Promotions:	166	34.6%