FMCS Case # 190725-09395
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In the Matter of the Arbitration between:

International Union of Police Associations, Local 5004

Union,

-and-

Metropolitan Washington Airports Authority

Employer.

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BEFORE: James McKeever, Esq. Arbitrator

APPEARANCES

For the Union:
Heidi Meinzer,
Law Office of Heidi Meinzer, PLLC
515-B East Braddock Road
Alexandria, Virginia 22314
Counsel for Local 5004

For the Employer:
Juan Ramos, Labor Relations Specialist,
LaTonya Andrews, Labor Relations and Policy Specialist
Metropolitan Washington Airports Authority
1 Aviation Circle Washington, DC 20001-6000

OPINION & AWARD

The International Union of Police Associations, Local 5004 ("Union"), and Metropolitan Washington Airports Authority ("Employer" or "Authority") are parties to a collective bargaining agreement ("Agreement," "CBA" or "Contract") that provides for the submission of unresolved grievances to an

Arbitrator.

The Union filed the within grievance on June 6, 2019 and its demand for arbitration on July 19, 2019.

The undersigned was appointed as the arbitrator on August 6, 2019. I conducted the within hearing on December 3, 2019 at 2733 Crystal Drive, Sixth Floor, Arlington, Virginia.

Both parties were afforded a full opportunity to examine and cross-examine witnesses, submit evidence, and present arguments in support of their respective positions. Post-hearing briefs were received from the parties on or about January 31, 2020. Thereafter, the record was closed. In light of the intervening pandemic, the parties kindly extended the time in which to render the instant decision to May 30, 2020.

The evidence adduced and the positions and arguments set forth by the parties have been fully considered in the preparation and issuance of this Opinion and Award.

THE ISSUES

At the commencement of the hearing, the Union proposed the following issues for arbitral resolution:

1. Did the Authority violate the CBA by implementing the Workday MPP process?

2. If the Authority wishes to move the Bargaining Unit to a new evaluation system, must the Authority renegotiate Article 10, Section 2 with the Union under Article 37 of the CBA (as the Union contends), or does the

Union have only consultation rights under Article 4, Section 3 (as the Authority contends)?

The Authority proposed the following issues:

1. Whether the Authority made a change to the PMP evaluation policy in violation of Article 10 of the CBA?

2. Did the Authority violate Article 37 of the CBA when it requested to negotiate a new PMP with IUPA Local 5004?

3. Does Article 4 of the CBA bar the Authority from requesting negotiation over PMP changes?

4. Whether the grievance is ripe for arbitration.

The Parties agreed that the Arbitrator has jurisdiction to frame the issues after the Arbitrator has had the opportunity to review the record.

After studying the record and considering the evidence, the arbitrator finds the issues for arbitral determination to be as follows:

1. Whether the grievance is ripe for arbitration?

2. If the Authority wishes to move the Bargaining Unit to a new evaluation system, must the Authority renegotiate Article 10, Section 2 with the Union under Article 37 of the CBA, or does the Union have only consultation rights under Article 4, Section 3?

RELEVANT CONTRACT PROVISIONS

Article 4
Matters Appropriate for Consultation and Negotiation

Section 1:

All matters pertaining to conditions of employment of the Bargaining unit are negotiable, except as provided in the Labor Code.

Section 3:

Wherever any Departmental written directives are established or changes made to existing policies covered under Section 1 above, the Employer will submit such changes to the union. The union will have 15 calendar days to request consultation or negotiations, or submit written comments. Except where changes are necessary due to operational emergencies the proposed changes will not be implemented until the expiration of the 15 day calendar period, the conclusion of negotiations, or the decision to submit the matters to impasse procedures as appropriate.

Article 6

Managements Rights

Section 1:

Subject to Section 2, nothing in this agreement shall affect the authority of any Management official:

a. To determine the mission, budget, organization, number of employees, and internal security practices of the Airports Authority
b. In accordance with applicable laws:
   (1) to hire, assign, direct, layoff, and retain employees in the Airports Authority, or to suspend, remove, reduce in pay or grade, or take other disciplinary action against such employees;
   (2) To assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted.

Article 10

Arbitration

Section 1:

Each employee will be given a copy of the job description for the position he/she is assigned.

Section 2:

Performance evaluations will be in accordance with any PMP Performance Management Partnership agreement for the bargaining unit.

Article 32

Arbitration

The Arbitrator shall have no power to add to or modify any terms of this Agreement and will confine the hearing to the specific issues in dispute. The arbitrator will resolve any issues of grievability or arbitrability before proceeding on the merits.

Article 37

Duration of the Agreement

Section 1:

This Agreement will remain in full force and effect for three years from the date it is approved by the Chief Executive Officer of the Metropolitan Washington airports Authority or designee. However, either party may give written notice to the other, not more than 120 calendar days or not less than 60 calendar days prior to the first and or second anniversary dates to request renegotiation of no more than five Articles of this Agreement. During these renegotiations, all provisions of the Agreement will remain in full force.

Section 2:

Either Party may give written notice to the other, not more than 120 days or not less than 60 days prior to the 3-year expiration date, for the purpose of renegotiating this Agreement. The present Agreement will remain in full force during the renegotiations and until such time a new Agreement is approved.

REMEDY SOUGHT

The Union requests that the Arbitrator: (1) uphold the Union's grievance; (2) find that the Authority violated the CBA, and in particular Article 10, Section 2 of the CBA, (3) enjoin implementation of the MPP Program against the Bargaining Unit; (4) order the Authority to continue to evaluate the Bargaining Unit employees under the PMP Agreement; (5) order that the Authority must negotiate with the Union under Article 37 of the CBA if the Authority wishes to pursue moving the Bargaining Unit employees to an MPP evaluation system.; and (6) issue an Opinion and Award in accordance with the Proposed Remedies above, and to include any other award or ruling the Arbitrator believes necessary and just.

The Authority requests that the grievance be denied.

STATEMENT OF FACTS

The Authority operates Ronald Reagan National Airport (DCA) and Dulles International Airport (IAD), which are located in the State of Virginia. The Authority's employees are represented by five separate (5) bargaining units, which include a Police Department, a Fire Department, communications and traffic control officers, and two trade unions.

The Bargaining Unit for the Police Union, which is the Union that filed the within grievance, is comprised of police officers and corporals in the Authority's police department.

Beginning in 2000 or 2001, the Authority changed its employee evaluation system from an automatic "step" system to a Performance Management Partnership ("PMP") for all of its employees. At the time, the

new evaluation system was negotiated with all five unions, which subsequently signed separate Memoranda of Understanding regarding the new evaluation procedures (hereinafter referred to as "MOUs"). According to the Authority's Labor Relations Specialist, the discussions and/or negotiations regarding the evaluation system occurred outside the formal contract negotiations that are typically held under Article 37 of the parties' Contract.

On or about March 18, 2018, the Authority adopted a Merit Pay Process ("MPP") evaluation system and sought to replace the PMM with all five of its unions.

The record shows that the MPP is a different evaluation system than the PMM.

As part of the MPP evaluation system, the Authority established work goals, which are incorporated into the MPP evaluation system. The specific goals include the following: (1) customer satisfaction; (2) people; (3) cost; and (4) revenue (Joint Exhibit 4).

The Authority's two trade unions are currently being evaluated under the MPP system. The Communication Center (dispatch and traffic control officers) and the Firefighters' Union will transition to MPP in 2020.

The police union filed the within grievance over the proposed switch to MPP because the Union believes that the new evaluation procedure violates Article 10, Section 2 of the parties' CBA, which states that: "Performance

evaluations will be in accordance with any Performance Management Partnership (PMP) agreement for the Bargaining Unit." Thus, the Union contends that because PMP is expressly referenced in the parties' Contract, the Authority is required to negotiate any change in the evaluation system and not just consult with the Union regarding the new MPP. The Union notes that the four other unions do not have similar language in their respective collective bargaining agreements with the Authority. (J1, U18 and U19). The Union also objected to the new evaluation system because the Authority included a goal for "revenue," which the Union submits can only be achieved by writing tickets, which is a violation of both the Virginia Code and the Police Department General Order, which prohibits accepting a financial reward for performance of one's duty as a law enforcement officer (Joint Exhibit 1 and Union Exhibit 13).

On or about March 15, 2018, the Authority sent an email to the Union regarding the new MPP, which included a Power Point presentation (Union Exhibit 2 and 3).

On March 26, 2018, the Union initiated a Step 1 grievance after it determined that the proposal to move to MPP should be negotiated (Union Exhibit 4).

On March 29, 2018, the Union initiated a Step 2 grievance on the same grounds (Union Exhibit 5).

On March 30, 2018, the Authority denied the grievance (Union Exhibit

6).

On April 5, 2018, the Union initiated a Step 3 grievance (Union Exhibit 7).

On May 2, 2018, Bryan Norwood, who was the acting Vice President of Public Safety, agreed to continue to evaluate the Bargaining Unit employees under the PMP Agreement for the year 2018 (Union Exhibit 9).

At the hearing, the Authority's Labor Relations Specialist confirmed that but for the Union's grievance, the MPP would have been implemented in 2018.

On May 9, 2018, the Union reiterated its position that the Authority had to continue to evaluate the Bargaining Unit employees under the PMP Agreement unless and until the Authority provided notice that it wished to renegotiate Article 10, Section 2 pursuant to the procedures outlined in Article 37 of the CBA.

At the end of 2018, a 120-day window opened for the Authority and the Union to seek negotiations on up to five articles of the CBA, pursuant to Article 37 of the CBA. Each side opened certain articles. However, the Authority did not propose any changes to Article 10.

In 2019, the Authority advised the Union that it would be using MPP to evaluate the Bargaining Unit employees and that the Union had only consultation rights with respect to the new evaluation system.

On June 6, 2019, the Union filed the within grievance (Step One Joint Exhibit 5),

On June 18, 2019, the Union initiated a Step 2 grievance to Police Chief David Huchler (Joint Exhibit 6).

On June 26, 2019, the Authority advised the Union that the Union had only consultation rights with respect to the new evaluation system and that the Union had waived its right to consultation (Joint Exhibit 7).

On June 27, 2019, Juan Ramos, on behalf of Chief David Huchler, denied the grievance (Joint Exhibit 8).

On July 3, 2019, the Union initiated a Step 3 grievance to Mr. Bryan Norwood (Joint Exhibit 9).

On July 16, 2019, Mr. Norwood denied the grievance (Joint Exhibit 10).

On July 19, 2019, the Union filed its demand to arbitrate (Joint Exhibit 11).

POSITIONS OF THE PARTIES

The Employer's Position:

The Authority submits that the Union has "put the cart before the horse" in this matter and that the issue is not "ripe" for arbitration because no action has occurred for the Union to grieve. Specifically, the Authority submits that because no change has occurred with respect to the Bargaining Unit's PMP, the Union's grievance must be dismissed. The Authority also submits that there is no provision in the CBA that allows a party to file a

grievance based on the other party's "intent." Thus, because there is no dispute that the Authority has not implemented or changed the PMP evaluation process for the subject Bargaining Unit, this case is not yet ripe for Arbitration and the grievance must be denied.

With respect to the merits of the grievance, the Authority maintains that the grievance must be dismissed because the right to change the PMP evaluation system without negotiation with the Union falls under its Management Rights provision, which is contained in Article 6 of the parties' Contract ("Article 6). Specifically, the Authority contends that any change in the evaluation system is within the category of the "assignment of work," which is the Authority's prerogative and is nonnegotiable. The Authority also notes that Article 6 of the CBA and the Labor Code explicitly state than management's rights cannot be abrogated in favor of a union's demand to either force management to make a work place change or refuse to comply with a work place change. Accordingly, the Authority submits that because the Union's grievance is an attempt to dissuade management from exercising its management's right with respect to the assignment work, the grievance should be denied.

Further, the Authority submits that the only item open to negotiation with respect to the MPP, is the implementation process for each of the bargaining units. According to the Authority, the Union was given multiple

opportunities to negotiate the process of implementation, but refused to negotiate.

The Authority also contends that the Union's position that the PMP can only be negotiated in accordance with Article 37 of the Contract during a specific window is flawed. The Authority submits that Article 37, which is titled "Duration of the Agreement," only pertains to the time the CBA is in effect and that nowhere in Article 37 are there any limitations on changes in working conditions.

Moreover, the Authority maintains that "past practice" demonstrates that the PMP evaluation system was never negotiated with the Union. The Authority submits that the testimony from the Labor Relations Manager, who has been working with the Airports Authority for 20 years, shows that all prior PMP discussions were conducted under Article 4 of the parties' Contract and memorialized in separate MOU's, which were not part of the contract negotiations. The Authority also notes that the current MOU for the Union was negotiated in accordance with Article 4, which only gives the Union the right to be consulted and not the right to negotiate.

Finally, the Authority contends that the Union's assertion that the Authority is attempting to set up a ticket quota system for police officers is nothing more than an unfounded conspiracy theory. The Authority submits that there is no evidence to demonstrate that the Authority has ever required quotas for its police officers. The Authority also notes that none of the

revenue from any citations would come back to the Authority, a fact which does not support the Union's contention. Thus, for all the above stated reasons, the Authority requests that the grievance be denied.

The Union's Position:

The Union submits that the Authority's position that this issue is not ripe because the Authority has not yet implemented the MPP evaluation system is "ludicrous." The Union notes that the Authority's implementation of MPP system began in March 2018, and that the only reason it was stopped was because the Union filed a grievance.

The Union also notes that two of five unions are already being evaluated under the MPP system, and that the other two unions will move to the MPP system in 2019. Thus, the Union submits that there is no dispute that the issue is ripe for arbitration.

With respect to the merits of the grievance, the Union submits that the language of Article 10, Section 2 of the parties' Contract, which states that– "performance evaluations for the Bargaining Unit employees must be done in accordance with the PMP Agreement," is "clear and unambiguous." As such, the Arbitrator must enforce its language and require the Authority to negotiate with the Union with regard to any change to the evaluation system.

The Union also submits that the highly specific language contained in Article 10, Section 2, which requires performance evaluations to be done in accordance with the PMP Agreement, is controlling over the generic language

in the CBA and Labor Code citing "work conditions" (Condominium Services, Inc. v. First Owners' Association of Forty Six Hundred Condominium, Inc., 281 Va. 561, 709 S.E.2d 163, 170 (2011). ("a specific provision of a contract governs over one that is more general in nature").

The Union further contends that the performance evaluation system is a "process or procedure," which is not like the setting of "pay," or the assignment work, which the Union agrees is not negotiable under the CBA and/or the Labor Code. However, notwithstanding the Authority's right to determine pay and assign work, the Union maintains that it has the right to negotiate procedures or processes that do not amount to a direct interference with the Authority's rights under the Management Rights clause of the parties' Agreement. American Federation of Government Employees, AFL-CIO, Local 2303 and Metropolitan Washington Airports Authority, Case No. MWAA 1-2003 before Arbitrator Mary Jacksteit, ("Jacksteit Opinion"), p. 15 (finding that a wage review proposal was negotiable as not inherently imposing a direct interference with management's right to set pay).

Further, the Union maintains that its "consultation" rights under Article 4 of the parties' Agreement are only applicable to situations such as implementation of a new general order or other general policy. Thus, because performance evaluations are subject to a specific article in the CBA, a proposal to replace the PMP evaluation system requires full negotiations under Article 37.

Additionally, the Union notes that it is the only union in the Authority that has a Contract that contains the very specific language of Article 10 regarding the PMM evaluation system. Accordingly, the Union submits that any significant change to the evaluation process for their union must be negotiated as per Article 37 of the parties' Contract.

Finally, the Union contends that because its bargaining unit consists of law enforcement officers, which is a unique profession, the corporate goals like "costs" and "revenue" are counterproductive, and possibly illegal. In support of its position, the Union cites the Virginia Code Section 46.2-102 and the Authority's Code of Conduct, which indicate that an officer's pay should only be a salary. The Union notes that other local jurisdictions have been criticized for focusing on revenue through ticket and arrest quotas, which the Union believes is inappropriate.

Discussion

Issue 1:

Whether the grievance is ripe for arbitration?

The Authority contends that the issues raised in the grievance are not ripe for arbitration because no change has actually occurred with respect to the Union's PMP. The Authority also submits that there is no provision in the CBA that allows a party to file a grievance simply based on the other party's "intent."

The Union submits that this issue is ripe for arbitration because the Authority advised the Union in March 2018 that it planned to change the PMP evaluation system to the MPP evaluation system. The Union contends that the only reason it was stopped was because the Union filed a grievance in 2018, and then again 2019.

The Union also notes that two of five unions are already being evaluated under the MPP system, and that the other two unions will move to the MPP system in 2020. Thus, the Union submits that there is no dispute that the issue is ripe for arbitration.

"Ripeness" in the legal context "prohibits a court from exercising jurisdiction over a case until an actual controversy is presented, which created an injury, or threat of an injury, which is real and immediate (Ripeness Doctrine Merriam-Webster Law).

Here, there is no dispute that the Authority advised the Union in March 2018 that it intended to replace the PMM evaluation system with the MPP evaluation system. The evidence also shows that the MPP was not implemented at that time because the Union filed a grievance and the Authority agreed not to implement the MPP for the remainder of 2018. Thereafter, the Authority advised the Union that it intended to proceed with the implementation of the MPP in 2019, which gave rise to the within grievance. Thus, I find that the Authority's intention to implement a new

evaluation system, to which the Union objects, presents an actual controversy and is ripe for arbitration.

Issue: 2:

If the Authority wishes to move the Bargaining Unit to a new evaluation system, must the Authority renegotiate Article 10, Section 2 with the Union under Article 37 of the CBA, or does the Union have only consultation rights under Article 4, Section 3?

In cases involving the interpretation of contractual language, the arbitrator must decide whether the language in dispute is clear on its face, or ambiguous. It is well-established that if contract language is found to be clear and unambiguous, then, in most instances, the arbitrator will conclude that the plain meaning of the words themselves are the best evidence of what the parties intended when they negotiated that language. Only when the contract language is found to be ambiguous will the arbitrator look beyond the words themselves in an attempt to ascertain their meaning. The arbitrator does so by analyzing evidence of the parties' bargaining history and/or their past practices. To be binding, a practice must be a clear and consistent course of conduct, which was mutually accepted by the parties over a substantial period of time.

Article 10, Section 2 of the parties Contract states that:

> "Performance evaluations will be in accordance with any PMP Performance Management Partnership agreement for the bargaining unit."

Based upon a review of this language, I find that the contract is clear and unambiguous with respect to the issue of performance evaluations. Specifically, I find that the parties agreed that the performance evaluations for the bargaining unit would be in accordance with any PMP. Thus, because the new evaluation is not a PMP evaluation system, but something very different, the Authority's attempt to replace the PMP evaluation system, without the agreement of the Union, is a violation of this provision of the parties' Contract. I note that although this section also includes the word "any," which was highlighted in the Authority's brief, presumably in support of its contention that the performance evaluation could be changed to another system, the word "any" was followed by the PMP evaluation system and the word "agreement," which supports the Union's contention that any change to the PMP evaluation system would have to been negotiated and agreed to by the parties. Accordingly, because the PMP is expressly referenced in the parties' Contract, I find that if the Authority wishes to change the PMP evaluation system to something else, the Authority is required to negotiate the change with the Union pursuant to Article 37 of the parties' Contract.

Additionally, contrary to the Authority's contentions, I find that the Union "consultation" rights under Article 4 of the parties' Agreement are not applicable to this matter because the performance evaluation system is the subject of a specific article in the parties' Contract. As such, I find that a proposal to replace the evaluation system would require full negotiations

under Article 37.

For the same reasons, and contrary to the Authority's contentions, I find that because the evaluation system was negotiated by the parties and expressly referenced in the parties' Contract, the Union's request to negotiate any replacement of the evaluation system would not improperly infringe upon the Authority's rights contained in the Management Rights provision of the parties' Contract. Specifically, I find that because the Authority agreed to include the subject provision in the parties' Contract, it is understood that the subject performance evaluation system would be outside the subject matters reserved to the Authority under the Management Rights clause and the Labor Code. Thus, I find that the requirement to negotiate any change to the evaluation system under Article 37 would not improperly interfere with the Authority's right to assign work and/or violate the Labor Code.

Moreover, based on my finding that the language of Article 10, Section 2 is clear and unambiguous, I need not consider the parties' "past practice" to determine the meaning of the subject provision. Nevertheless, assuming *arguendo* that the language in question was not clear, I do not find that the parties' MOU from 2001 established a past practice that would limit the Union to only the consultation rights under Article 4 of the parties' Contract because there is insufficient evidence contained in this record to make a finding that it was actually a practice, or that it was long standing and consistent. Additionally, I note that although the testimony of the Authority's

Labor Relations Specialist may have established that the parties' consulted on issues relating to the PMP evaluation system in the past, her testimony did not establish that the Union agreed to replace the evaluation system without negotiations. As such, I find the Authority's past practice claim is unpersuasive.

Finally, I do not find that the fact that the Authority's other bargaining units agreed to move to the new evaluation system without any negotiations is persuasive. I note that the Union is the only bargaining unit with the Authority that has a contract which contains the specific language contained in Article 10, Section 2 of the parties' Contract. As such, I do not find the Union is similarly situated to the other unions with the Authority. Thus, for all the foregoing reasons, the Union's grievance is sustained.

Therefore, for the reasons stated hereinabove, I render the following

AWARD:

The grievance is sustained.

The Authority must negotiate with the Union under Article 37 of the CBA if the Authority wishes to move the Bargaining Unit employees to an MPP evaluation system.

Dated: New York, New York
May 11, 2020

James McKeever
James McKeever, Esq.,
Arbitrator

AFFIRMATION

State of New York)
) SS:
County of New York)

I, James McKeever, do hereby affirm upon my oath as an Arbitrator that I am the individual described herein and I am the person who executed this document, which is my Opinion and Award.

Dated: May 11, 2020

James McKeever
James McKeever
Arbitrator