
In the Matter

of the

Dispute

between

SAN ANTONIO POLICE OFFICERS'
ASSOCIATION

and

CITY OF SAN ANTONIO

Richard F. Dole, Jr.
Arbitrator

AWARD: January 8, 2018

APPEARANCES:

For SAPOA

Karl Brehm, Esq.,
CLEAT Staff Attorney

For the CITY

Alberto J. Pena, Esq.,
Denton Navarro Rocha Bernal & Zech

I BACKGROUND

The San Antonio Police Officers' Association (the SAPOA or the Union) and the City of San Antonio (the City) have entered into a Collective Bargaining Agreement (CBA) that is Joint Ex. 1, which governs this case. The case involves a class action grievance (the Grievance) filed with the SAPOA Grievance Committee by Michael Helle, SAPOA President (Helle), on 10/7/15 that is Union Ex. 4. The Grievance states in part:

The City of San Antonio has taken active steps to replace the sworn SAPD staff of the Off-Duty Employment office with non-sworn City civilian staff....Such violates the express terms of the SAPOA Collective Bargaining Agreement, Article 14...Section 2...and Section 3...Article 39...Sections 1 and 2 And the interpretation of Chapter 143 of the Texas Local Gov't Code as found in Lee v. City of Houston, 807 S.W.2d 290, 295 (Tex. 1991).
REMEDY OR ADJUSTMENT SOUGHT...Compliance with the Collective Bargaining Agreements terms as laid out in Article 14, Section 2, 3 and Article 39, Sections 1, 2 and Tex. Loc. Gov't Code 143....
Union Ex. 4, p.1.

The Union believes that the Grievance properly has been processed to arbitration. Union Brief p.1. However, the Respondents contend that the Grievance processing was untimely and that relief should be denied for failure to process the Grievance in a timely manner. City Brief pp.2-5.

Arbitration hearings were held in San Antonio on 9/25/17 and 10/2/17 at which the parties, both of which were represented by an attorney, presented sworn testimony, exhibits, and arguments. At the second hearing, the parties entered into the following stipulation:

The staffing shortage is not the reason for...creating ...civilian positions for the office of the off-duty employment office.

TR Vol. II p.75.

The case was submitted for final decision upon the basis of timely posthearing briefs. The Award must be e-mailed to the parties no later than 1/8/18.

II POSITIONS OF THE PARTIES

A. SAPOA

SAPOA considers that the issues are:

1. Did the City of San Antonio and the San Antonio Police Department [the Respondents] violate the collective bargaining agreement when they elected to employ civilian in the ODEU to perform the duties that sworn officers formerly performed?
2. If the answer to Question No. 1 is in the affirmative, what then is the appropriate remedy?

Union Brief p.1.

The Union submits that it has proved the allegations in the Grievance by a preponderance of the evidence and should be awarded an order requiring the City and its Police Department to bring themselves into compliance with Joint Ex. 1.

Union Brief p.2.

1. Procedural Issues

The Respondents admit that they failed to make a timely Step 2 response to the Grievance. In this event, the CBA provides that the City's response is deemed to be unsatisfactory and the Grievance automatically proceeds to the next step. The

Respondents imply that this means that the Grievance should be considered satisfied. But this is senseless and would allow the Respondents to benefit from their noncompliance with CBA. If this were the case, the Respondents would have no incentive to comply with the CBA. This would frustrate the grievance process and poison the relationship between the parties. Union Brief pp.2-3.

Moreover, when the Grievance was submitted, Interim Chief of Police Anthony Trevino (Interim Chief Trevino) headed the Department. Union Ex. 7 acknowledging receipt of the Grievance was signed by Chief McManus on 11/30/15. Chief McManus also signed the Respondents' Step 2 reply to the Grievance on 12/14/15. See Union Ex. 8. The Grievance was filed in October 2015 when the Department was changing to Chief McManus' command, which delayed its processing. The e-mail submitting the Grievance to the City, for example, was sent to both Interim Chief Trevino and Chief McManus. The CBA does not compel the Association to proceed with a grievance if the Respondents do not make a timely reply. In this case, the Association elected to allow the incoming Chief to handle the reply as he did. Union Brief p.4.

Furthermore, the Grievance initially was for anticipatory breach of contract. When it was filed, the City had advertised its intention to breach the CBA but had not yet done so. This hearing was delayed for many months as it took the

Respondents quite a while to act on their intention. Indeed, at present, two sworn officers remain in the ODEU. Union Brief p.4.

In construing collective bargaining agreements, doubts generally are resolved against a forfeiture of rights. If an employer fails to make a timely answer, a union should have to prove only that the requested relief is reasonable for that relief to be awarded. In this case, the circumstances indicate the parties had agreed that grievance processing would proceed notwithstanding the City's untimely reply. Indeed, the City supplemented its reply a few months prior to the hearing. See Union Ex. 18. The fact that the Grievance involved an anticipatory breach of contract made this agreement reasonable. There was not even a ripe issue to grieve when the Respondents' reply was due. For the above reasons, the arbitration should proceed. The Arbitrator should rule on the merits. Union Brief pp.4-5.

2. Substantive Issues

The Respondents contend that Joint Ex. 1, Art.14, Section 2 does not prevent them from staffing the ODEU with non-sworn civilians. Although the provision does not expressly provide that civilians can not work in the ODEU, this is implied. Sworn officers alone are mentioned as ODEU employees. If civilians also could be ODEU employees, this would have been mentioned expressly. Union Brief p.6.

Joint Ex. 1 defines an “officer” as “any sworn Police Officer employed in the Police Department of the City, with the exception of the Chief of Police.” Joint Ex. 1 p.10. When the CBA uses the word “sworn” as it does in Article 14, the reference is to City police officers. They are the only “officers” dealt with by the CBA. The Texas Attorney General’s longstanding practice has been to have Texas peace officers, like the City’s police officers, swear an oath; whereas civilian police department employees are not sworn. The CBA uses “sworn” to refer to “officers.” In its 30 years of existence, the ODEU constantly has been staffed by officers, not civilians. The Respondents have not controverted this and Article 14 contains no indication of an intention to change this long-standing practice. As Union President Halle testified, the parties were at odds during the pendency of this Grievance and litigated the meaning of another CBA provision. Yet they agreed to a new contract that carried over the language in Article 14 unaltered. Union Brief pp.6-7.

The Union’s interpretation of Article 14 is supported by Article 39, which lists nine department units that can be civilianized but does not mention the ODEU. The express mention of one thing is an exclusion of the alternative. Furthermore, Article 39 was not changed to list the ODEU in the current collective bargaining contract. When asked who had ordered that the ODEU be civilianized, now

Assistant Chief Trevino took responsibility but did not provide a straight-forward answer. Union Brief pp.7-8.

Although the Respondents argue that Article 39, Section 1 authorizes the civilianization of the ODEU, the units listed do not include the ODEU and the authorization is limited to the listed units. A separate article of the CBA addresses the ODEU. Union Brief p.9.

It is a universal rule of contract and collective bargaining agreement interpretation that, unless it is shown that a broader scope was intended, general language following a specific list applies only to the items in the specific list. Moreover, the aspect of Article 39 on which the City relies lists three of the nine units designated for civilianization. Specific terms more clearly reflect the parties' intention than general language. It is Article 14 that is specific with respect to the ODEU, not Article 39. Unless a contrary intent appears from the contract interpreted as a whole or from relevant external circumstances, exact terms should be given greater weight than general language. Yet the City relies on the Article 7 Management Rights Clause and general language in Article 39 to support its position. All Section 7 does is to refer to Article 39 for the treatment of civilianization and Article 39 is helpful primarily because it does not reference the ODEU. Article 14, which specifically addresses the ODEU, controls the Grievance. Union Brief pp.10-12.

The Respondents argue that ODEU employees do not need to have the “power of arrest.” The Grievance does not claim that civilians can not provide a support role in the ODEU. The issue is whether the Collective Bargaining Contract requires that ODEU positions be filled with sworn officers. Article 14, Section 2 refers to “sworn support personnel.” The ODEU unit is required to be “staffed” by a sergeant and additional “sworn support personnel.” Section 2 leaves only three designated variables to the discretion of the Chief:

- (1) the number of sworn support personnel for ODEU;
- (2) the amount of on-duty transportation for the ODEU; and
- (3) the amount of office equipment for the unit.

This implies there is NO discretion to include non-sworn civilian staff in the ODEU.

Union Brief pp.12-14.

The Respondents argue that the existence of a long-standing civilian employee within the ODEU demonstrates that additional civilian employees can be added. But the Administrative Associate never performed the same tasks as the officers were doing or that civilians currently are doing. City Ex. 4 is the job description of the Administrative Assistant position that City Witness Ochoa filled. City Ex. 4 does not mention contracting or securing necessary sworn City personnel properly to staff events at City facilities. Even after the Administrative

Assistant position was changed to an Accountant position the job was not anywhere close to the assignments of the six officers listed in City Ex. 6. City Ex. 5 contains the civilian job descriptions complained of by the Union. They are vastly different from the Administrative Assistant and Accountant job descriptions. The Collective Bargaining Agreement does not deal with the Administrative Assistant position or the Accountant position, its replacement. Union Brief pp.14-15.

On the other hand, Ms. Van Kirk's (Van Kirk's) testimony established that she is performing the very same work that formerly was performed by a sworn City officer and is being performed by the two sworn officers still assigned to the ODEU. See City Ex. 3. Although Union Ex. 6 shows that the City initially intended to transfer all the ODEU sworn officers to patrol, these two officers apparently have been allowed to remain until attrition takes its course. Moreover, on paper, four additional sworn officer positions remain assigned to the ODEU. Union Brief pp.15-16.

However, in reality the work performed by the officers previously assigned to those positions is being performed by recently hired civilians. This is the essence of civilianization and is the basis for the Union's Grievance: work has been removed from the bargaining unit covered by the CBA and assigned to civilians or, as Assistant Chief Trevino put it, sworn officer positions have been converted to civilian positions.

Union Brief p.17.

The power point slide presentations of both the City Manager, Union Ex. 2, and the Interim Chief, Union Ex. 3, to the City Council said that the 6 officers assigned to the ODEU would be re-deployed to south side patrol. The Union has no objection to the transfer of individual personnel from the ODEU to patrol duties. But, when ODEU duties are removed from the bargaining unit and subcontracted outside the bargaining unit, the CBA is violated. If the six officers assigned to ODEU had been reassigned to patrol and replaced by six other officers, the Union would have no complaint. Union Brief pp.17-18.

The Respondents admitted during the hearing that there always are job vacancies in the Department. The consistency of vacancies provides no assurance that the officer vacancies at ODEU ever will be filled unless the City is forced to comply with the contract. The City has no need to fill these officer vacancies if the available work has been given to civilians. Moreover, the City staff has prevented the filling of vacancies with officers by canceling cadet classes. Creating more vacancies and claiming that a staff shortage prevents you from filling them is bad faith. Union Brief pp.18-19.

The Respondents have elected to thin out the number of sworn officers that must cover the increased demands caused by the City's annexations and to employ

civilians as needed to cover the thinning out. The City broke the CBA in doing this, forcing the Union to file the Grievance. Union Brief pp.19-20.

For the foregoing reasons, the Union requests that the Grievance be sustained and that the requested relief be granted. Union Brief p.20.

B. The City

1. Introduction

The Grievance does not allege either a violation of past practices or a violation of Article 8, the Maintenance of Standards provision of the CBA. It is a contract interpretation grievance. City Brief p.1.

The City denied the Grievance. The City contends that it is not required by Article 14, Section 2 to use only sworn personnel in the ODEU. Under Management Rights Article 7 and Civilianization Article 39, the City can use civilians to perform jobs traditionally performed by sworn officers after consulting with the Association over the effects of its decision to employ civilians. However, in this case, the Association waived its entitlement to consultation by canceling a meeting that had been scheduled and failing to schedule another meeting notwithstanding repeated requests. Furthermore, as long as the authorized number of sworn Police Officers, Detectives, and Supervisors is not reduced, the CBA allows the City to use civilians, in newly-created positions that do not require the power of arrest under the standards for distinguishing between classified and

civilian positions in *Lee v. City of Houston* as modified by the parties' agreement pursuant to the Article 39, Section 3 preemption provision. City Brief pp.1-2.

2. Procedural Issues

Article 15, Section 1 subjects disagreements regarding the interpretation and application of the CBA to the grievance procedure. Article 15, Section 3 requires a grievant to comply with several steps within specified time periods to submit a grievance to arbitration. A written agreement is required to waive noncompliance with these time periods. The City has objected to the arbitrability of the Grievance due to the failure of the Association timely to process the Grievance through the grievance procedure without requesting an agreed extension of time to do so. City Brief p.4.

The Grievance was submitted by the Association President to the Association Grievance Committee on 9/14/15. The Association Grievance Committee approved the Grievance on 9/30/15 and it was e-mailed to Miles Earwood and Chief McManus on 10/8/15. However, Chief McManus did not receive the Grievance until 11/30/15 and the Chief did not deny the Grievance until 12/14/15. No explanation has been given for the two-and-a-half month delay between the date that the Grievance was forwarded to the Police Department and the date that Chief McManus responded. City Brief pp.4-5.

Under the CBA, the Chief had until 10/26/15 to respond to the Association e-mail. Because there was no timely response, the Grievance automatically proceeded to Step 3. There being no extension or waiver in writing, the Association should have presented the Grievance to the City Human Relations Director by 11/2/15 but did not do so until 12/17/15. The Association having failed to process the Grievance in timely fashion, the CBA considers that no further action shall be taken. The Grievance should be denied for lack of timely Association processing. City Brief p.5.

In the first hearing, the Grievant requested an order requiring the City to staff the Unit only with sworn officers; whereas the Grievance merely required compliance with the CBA and not removal of the existing civilian employees from the Unit. The Grievant's request was an impermissible enlargement of the Grievance in light of the evidence that civilian employees had been in the Unit for at least two years prior to the date of the current CBA. There is no provision for amendment or enlargement of a grievance in Article 15 and no supplementary agreement by the parties allowing amendment. Because of the absence of a demand for removal of civilian employees from the Unit in the Grievance, the City has had no opportunity to respond to this issue. Furthermore, the Arbitrator is limited by the CBA to "the precise issues submitted for arbitration." To permit enlargement of the Grievance to include issues not timely asserted would violate

Article 13. The request at the hearing for an order removing civilian employees should be denied. City Brief pp.5-6.

III Argument

The Association dropped its initial contention that the City had violated Article 14, Section 3. Its remaining argument is violation of Article 14, Section 2. The Association also conceded during the hearings that the number of personnel assigned to the ODEU is within the discretion of the Chief. City evidence showed that a civilian has been assigned to the Unit since October, 2006. The current CBA took effect on 10/1/09. Stephen Ochoa (Ochoa) was hired in 2006 as an Administrative Aide and subsequently reclassified as an Administrative Assistant. Ochoa's duties primarily involved the processing invoices, creating sales orders, posting payments, reconciling customer accounts, making reminder phone calls to officers, processing payroll for the off-duty officers working events, and handling payments and bank deposits for events at the Alamodome and La Villita. At no time did Ochoa perform police work or need substantial knowledge of police work or the power of arrest. Lila Garza replaced Ochoa until at least October, 2016. Jasmine Berlanga (Berlanga) and Frank McDonald (McDonald) were added in July, 2016. City Brief pp.7-8.

Ms. Van Kirk (Van Kirk), a currently assigned civilian, began working in the Unit in March, 2017, joining Berlanga, McDonald, and Patricia Carlson. Van Kirk

does not supervise any officers. She performs customer service by working with event clients to schedule officers. She communicates with customers, obtains a signed lease agreement, explains the number of officers necessary, and obtains a final agreement. She fills the needed officer posts through established selection procedures. On the day of an event, she meets with the selected officers and explains the customer's special instructions and confirms officer attendance and hours for invoicing purposes. She does not work in the Police Department, require substantial knowledge of police work, or exercise the power of arrest. Her most important job requirement is knowing how to plan an event. City Brief p. 8.

Sergeant Powers, the current Unit Sergeant, testified that he currently supervises two sworn officers, one of whom is dedicated to handling security arrangements for the NSA. Powers also testified that the civilians that he supervises do not need to exercise the power of arrest, to have substantial knowledge of police work, or to work in the Police Department. Persons assigned to the Unit are not required to man posts in the event of absences. They fill vacancies with other officers who have agreed to receive assignments on short notice. In-house security handles event attendees that do not obey event restrictions. Sergeant Powers hired three civilians and had another officer develop a training manual to familiarize the civilians with Unit procedures. Civilians are not trained on the Police Department General Manual or police procedure.

Civilians do not need knowledge of police work to develop a security staffing plan or written post instructions. With nine persons assigned to the Unit, two of whom are officers, there are sufficient personnel to handle Unit work. The current schedule is for the two officers to work weekdays from early morning to mid-afternoon. The five civilians work from noon to early evening. Civilians do not supervise sworn officers assigned to events. The accountant job description does not require substantial knowledge of police work, work in the Police Department, or exercise of the power of arrest. City Brief pp.9-10.

Former Interim Chief Trevino testified that Management Rights Article 7 gave the City the right to determine the personnel by which operations are carried out, to assign officers to positions, and to use civilians to perform duties that do not require a commissioned officer or the power of arrest. The positions in the ODEU do not require a commissioned officer or the power of arrest. Officers assigned to the Unit can be reassigned elsewhere. Van Kirk and Ochoa testified that their positions did not require substantial knowledge of police work, work in the Police Department, or the power of arrest. City Brief p.10.

Furthermore, the reference to Article 39 in Article 7 Section 1(J) permits the use of civilians in the ODEU per Article 39, Section 2. Article 7, Section 1(D), retains the City's right to maintain the efficiency of governmental operations. The City Auditor's Report, dated 3/12/15, recommended converting support staff to

civilians, allocating operating costs to the respective departments, and updating the administrative fee. Former Interim Chief Trevino responded indicating that the Department would explore the use of more economical civilian staff. Trevino presented budget proposals, which were never implemented, transferring the six police officer positions to the City South Annexation. These six positions remain allocated to the ODEU, four being vacant at the present time. Civilians subsequently were hired. City Brief pp.10-11.

The Union contends that only sworn support personnel can staff the Unit. But the CBA does not define “support personnel.” This leaves the determination of the number of personnel and the tasks to be performed by civilians to the discretion of management under retained Article 7 Management Rights. City Brief pp.11-12.

The Grievant contends that the plain language of Article 14, Section 2 requires that the Unit be staffed only by sworn personnel. However, the CBA must be read as a whole and not in isolated parts. Furthermore, the practice of the parties can establish the meaning of language in past contracts that has been continued in later agreements. The parties knew and allowed a civilian to be part of the staff of the ODEU for the last four years of the prior CBA under a provision that also is in the new CBA. The Grievant could not explain why a civilian administrative aide who assisted officers in contacting off-duty officers in addition to his other tasks did not violate the prior CBA in performing support tasks. This practice showed

that the prior CBA did not preclude placing civilians in the Unit with duties that included some of the duties performed by officers as reflected in the Administrative Aide Position description. City Brief p.12.

The wording of Article 14, Section 2 does not limit the City's determining the number of officers assigned to the Unit and their tasks. There is no comma after the nouns "personnel" and "transportation and equipment" thus the modifying phrase "to handle officers' requests to work at City facilities" does not apply to "personnel." Furthermore, even if the modifying phrase were applicable, officers' "requests" to work at City facilities are fulfilled when the officers are selected and notified. All other tasks can be performed by any Unit personnel, civilian or sworn, assigned to do so by the Unit Sergeant. Civilians currently working in the Unit perform tasks unrelated to handling officers' requests to work off duty. City Brief pp.12-13.

In addition, Unit Officer Reynaldo Reyna works only on NSA assignments, which do not involve a listed "city facility" and are not covered by Article 14 of the CBA. The assignment of off-duty officers to NSA is totally within the discretion of the Department. City Brief pp.13-14.

The TX Private Security Acts are not relevant to this case. The statutes exempt officers or employees of TX political subdivisions in the performance of

their official duties. Moreover, the Grievance did not allege a violation of Article 14, Section 1(H) and the Arbitrator's authority is limited to the issues submitted. City Brief p.14.

Section 2 of Management Rights Article 7 gives the Chief the exclusive right, subject to review by the City Manager, to transfer Department officers in the most efficient manner. Section 3 of Article 7 provides that the City, acting through the City Manager and the Chief, retains all rights and enforcement authority except as specifically provided in the CBA. The Grievant contends that the list of units in Section 1 of Article 39 Civilianization, which does not include the ODEU, limits the units that can be civilianized. The Grievant stresses that the expression of one thing implies the exclusion of other things. However, the TX Court of Criminal Appeals has said that this rule of statutory construction should be applied with great caution. Moreover, the rule can be applied only if there is no other applicable provision in the entire CBA. But the preamble of Section 1 to Article 39 says that it does not alter any other CBA provision. Also Section 1 does not expressly state that it is limited exclusively to the units listed. The Section proceeds to discuss other functions previously performed by sworn personnel that can be civilianized. See the 5th paragraph. Furthermore, the San Antonio Court of Appeals in reviewing the Management Rights provision in a Fire Fighters CBA regarded a similar listing as a nonexclusive list of the City's rights. Finally, Section 1 of Article 39 also

provides that jobs traditionally performed by sworn officers can be civilianized upon 90 days prior notice to the Association President for consultation and possible mutual agreement concerning the *effects* of civilianization, not the decision to civilianize. This language also includes a nonexclusive listing of three of the Units to which it applies. The inclusion of this broader category of traditionally performed jobs in the notification and consultation provision demonstrates that the parties did not limit civilianization to the units listed in the first paragraph. City Brief pp.14-18.

More than 90 days before the City began assigning civilians to the Unit in July, 2016, the City gave the Association three notices of its intent to civilianize the Unit and requested consultation. The Association initially accepted an invitation to negotiate and then abruptly canceled the scheduled meeting. The civilian positions were created in the 2016 Budget, which did not reduce any authorized police positions. The Association by its conduct has waived, or at least should be estopped to assert an objection to lack of negotiation with respect to civilianization of the Unit. City Brief pp.18-19.

Section 2 of Article 39 expressly allows the City to utilize civilians in “any position” created in the future that does not require the individual to have and to exercise the power of arrest under the standards in *Lee v. City of Houston* or a later decision by the TX Supreme Court. *Lee* provides that, if a particular position

requires substantial knowledge of police work and work in the Police Department, the position must be a civil service classified position. Otherwise, with one exception, it does not. The exception is positions entailing supervision of classified employees also must be classified. Section 2 of Article 39, which otherwise adopts the *Lee* standards, adds a second exception. A position that requires exercise of the power of arrest also must be a classified position. Under Section 3 of Article 39, the provisions of Article 39 preempt Chapter 143 and the *Lee* case by adding that positions requiring exercise of the power of arrest can not be civilianized. Thus, the six newly-created civilian positions in the ODEU permitted by Section 2 and authorized by the Section 1 “other provision of this Agreement” language are contractually allowed provided that the positions do not “exercise the power of arrest,” and, under *Lee*, do not require substantial knowledge of police work and work in the Police Department. Satisfaction of these conditions was confirmed by the testimony of Sergeant Powers and civilian employees Ochoa and Van Kirk. These civilian employees also do not supervise the off-duty officers who are supervised by the command staff assigned to events. The additional newly-created civilian positions accordingly satisfy Section 2 of Article 39 and are not a violation of Section 1 of that Article. City Brief pp.19-20.

Article 39, Section 2 permits the use of civilians under the conditions discussed and thus the list of units in Article 39, Section 1 is not exclusive. The

absence of any express limiting provision in Section 1, together with the permissive provisions in Section 2, show that the parties have agreed that, under specified conditions, civilians can be used in additional units of the Police Department. City Brief p.20

The Grievant's position is that Section 2 of Article 14 is unambiguous and means that *only* sworn support personnel can be used. This is contradicted by the conduct of the parties as the Unit has had a civilian working with sworn officers before the effective date of the current CBA and throughout the term of the current CBA. The current CBA spells out the rank and number of supervisors in the Unit but leaves the other staff unspecified. The Grievant wants to add "only" to the Article 14, Section 2 reference to "sworn support personnel." The Grievant also wants to exclude the ODEU from the Article 39, Section 2 permission to add civilians to "any future position." But Article 15, Section 4 (4th paragraph) limits an arbitrator to interpretation of the CBA, depriving an arbitrator of power to modify the CBA, City Brief p.21.

The Association did not obtain a restriction upon the composition of the Unit staff or the creation of new civilian positions. The Arbitrator should resist the Grievant's invitation to modify the CBA, which he, in any event, has no authority to accept. City Brief p.21

For the foregoing reasons, the City requests that the Grievance be denied.

City Brief p.22

On 12/18/17 The City e-mailed a Supplemental Brief to the Arbitrator with a cc to the Union's Attorney. The Supplemental Brief addresses the issue of subcontracting work outside the Collective Bargaining Unit, which was raised for the first time by the Union's Posthearing Brief. City Supplemental Brief p.1.

The City Supplemental Brief objects to the Union's attempt to include an issue not within the scope of the original Grievance. The original Grievance did not assert a violation of the Recognition Clause, any other provision in Article 3 on Association Rights, any provision in Article 4 on Management Duties to the Association, any provision in Article 8 on Maintenance of Standards, or any other provision of the CBA related to subcontracting outside the Bargaining Unit. Having failed to pursue violation of any CBA provision except Article 14, Section 2 and Article 39, Section 1, the Association is precluded from raising a new issue not within the original Grievance. As stated in the City's Posthearing Brief, to permit subsequent enlargement of the Grievance to include new issues would allow consideration of issues not timely raised and permit amendment of the Grievance not specifically allowed by the CBA and not submitted by mutual agreement. This would violate Article 13. Consideration of new issues would improperly bypass the grievance procedure and sanction an untimely presentation. The Association's

attempt to enlarge the Grievance through its Posthearing Brief is impermissible and should be disregarded. City Supplemental Brief p.1.

Notwithstanding notice of the City's Supplemental Brief, the Union has not objected to its consideration. The issue addressed by the Supplemental Brief accordingly will be considered.

III ANALYSIS

A. The Timeliness of the Grievance

The City has objected to the timeliness of the Grievance due to SAPOA's failure both to process it in timely fashion and to obtain the City's written consent to an extension of the Article 15 deadlines for doing so. City Brief pp.2-5. The City's position is that, when the City failed to make a timely Step 2 Response, Article 15, Section 2 of Joint Ex. 1 automatically deemed the City's Response to be unsatisfactory and required SAPOA to make a Step 3 Submission to the City's Human Resources Director within 7 days, which did not occur. Article 15, Section 2 of Joint Ex. 1 consequently deemed the Grievance to be satisfied.

After the City made an untimely Step 2 Response on 12/14/15, Union Ex.8, SAPOA made an untimely Step 3 Submission on 12/17/15. Union Ex. 9. Prior to the City's Posthearing Brief, both parties consistently ignored the earlier untimely conduct by the other party. The Chief's terse and untimely Step 2 Response, for example, did not assert that SAPOA had not complied with Step 3 requirements.

See Union Ex. 8. Neither did the City's 3/13/17 Supplemental Response, see Union Ex. 18. Although the City explored timeliness issues during the first hearing, see TR Vol. 1 pp.72-76, it did not assert untimeliness during that exploration. For its part, SAPOA's untimely Step 3 Submission ignored the untimeliness of the City's Step 2 Response. Union Ex. 9.

Section 15, Section 2 of Joint Ex. 1 requires the mutual written consent of the parties to waive untimely grievance processing and there is no single exhibit in the record signed by both parties excusing either the City's untimely Step 2 Response or SAPOA's untimely Step 3 Submission. But Article 15, Section 2 of Joint Ex. 1 does not require that the consent of both parties to the waiver of processing deadlines be expressed in the same writing. There are numerous exhibits subsequently executed individually on behalf of each party that ignored the prior untimely action of the other party, treating it as irrelevant to the processing of the Grievance. Upon the basis of a preponderance of the evidence in the hearing record considered as a whole, this course of conduct provided both parties' written consent to the prior untimely action.

B. The City's Scope of the Grievance Objections

The City contends that two claims by SAPOA are beyond the scope of the Grievance and can not be considered: the Grievant's request at the first hearing for

an order requiring removal of existing civilian employees from the Unit, City Brief pp.5-6, and subcontracting outside the Bargaining Unit. City Supplemental Brief.

The factual description in the incident grieved is:

The City of San Antonio has taken active steps to replace the sworn SAPD staff of the Off-Duty Employment Office with non-sworn City civilian staff. Union Ex. 4.

The CBA provisions violated are listed as Article 14, Sections 2 & 3 and Article 39, Sections 1 & 2. The Remedy Requested is compliance with these Articles and Chapter 143 of the Texas Local Government Code as found in the Lee case. Id.

Upon the basis of a preponderance of the evidence in the hearing record considered as a whole, to the extent that the CBA provisions listed in Union Ex. 4 (with the exception of Article 14, Section 3, which was not pursued) entitle SAPOA to the remedy requested, the City's scope of the grievance objection is denied.

C. The Heart of the Grievance

The heart of the Grievance is Article 39 on civilianization. SAPOA dropped its initial assertion that Article 14, Section 3 was involved. See Helle's testimony in TR Vol. 1 at pp.60-61. Article 14, Section 2 at a minimum requires only one sworn sergeant and an indeterminate number of sworn support personnel. Furthermore, Section 1(J) of Article 7 on Management Rights authorizes use of civilians to perform duties that do not require a Commissioned Officer or the power of arrest as provided in Article 39.

Article 39, Section 1 first paragraph lists nine units in which civilianization is authorized notwithstanding any contrary CBA provision. The list does not include the ODEU. Article 39, Section 1 first paragraph, Joint Ex. 1. Article 39, Section 1 second paragraph adds to the nine listed units administrative service positions titled Service and Support Office designated on an Organizational Chart that is omitted from Joint Ex. 1 provided that the civilians shall at no time supervise or command sworn civil service personnel.

With respect to civilianization of three of the units listed in Section 1 first paragraph – Vehicle Storage, Communications, and Youth Services - Article 39, Section 1 fifth paragraph requires at least 90-calendar day prior notice to the Association President of intended civilianization, consultation, and agreement to the extent possible upon the effects of the proposed civilianization. However, the City commits that a proposed civilianization of the three designated units will not reduce the authorized number of sworn Officers, Detectives, and Supervisors. Article 39, Section 1 fifth paragraph, Joint Ex. 1.

Article 39, Section 2 of Joint Ex. 1, additionally authorizes the City to utilize civilians

in any position created in the future, that does not require the individual to have and to exercise the power of arrest under the standards for distinguishing between classified and civilian positions set forth in *Lee v. City of Houston*, or any later decision by the Supreme Court of Texas.

Lee v. City of Houston, a 1991 Texas Supreme Court decision that is Joint Ex. 2, held that the Fire and Police Civil Service Act applies to all municipal employees working in the police department whose position requires substantial knowledge of police work, including supervisors of individuals protected by the Fire and Police Civil Service Act.

Many of the Article 39 restrictions upon civilianization are derived from *Lee v. City of Houston*. The condition that a position not require the power of arrest, for example, is implicit in *Lee*. A municipal position requiring the power of arrest ordinarily is in the police department and requires substantial knowledge of police work.

The City has two basic contentions: (1) Article 39, Section 1 is not limited to the nine listed units and includes the ODEU and (2) Article 39, Section 2 authorizes civilianization of “any position created in the future that does not require an individual to have and to exercise the power of arrest” and conforms to the *Lee* standards. See City Brief pp.14-21.

Article 39, Section 1 covers more than the nine units listed in the first paragraph. Article 39, Section 1 second paragraph adds administrative services positions titled Service and Support Office as reflected on an organizational chart that is not included in Joint Ex. 1. But there is no record evidence of how Section 1 second paragraph affects the ODEU and there is no other indication that Article 39,

Section 1 first paragraph covers more than the nine units listed. Section 1 fifth paragraph, which has been referenced by the City, see City Brief pp. 17-19, is limited to the Vehicle Storage, Communications, and Youth Services units listed in Section 1 first paragraph.

It is reasonable to interpret civilianization provisions literally and to limit Section 1's authorization of civilianization to the nine units listed in the first paragraph, plus the positions added by the second paragraph. Due to their importance to both parties, civilianization provisions typically are drafted more precisely than less significant CBA provisions.

Because Article 39, Section 1 deals with civilianization of positions previously performed by sworn officers, it is reasonable to interpret Article 39, Section 2 as dealing with new City positions involving work that previously has not been performed by sworn officers. So interpreted, Article 39, Section 2 does not apply to the civilian positions at issue, which involve work that previously was performed by sworn officers. Upon the basis of a preponderance of the evidence in the hearing record considered as a whole, Article 39, Section 2 applies to new City positions that do not involve work previously performed by sworn officers and is not applicable to this case.

The City has emphasized that Ochoa performed Unit work in 2006 under a prior CBA without objection by SAPOA. City Brief pp.7-8, 12. However,

SAPOA President Helle was not aware of this. See TR Vol. 1 pp.68-69. Helle stated that SAPOA has no objection to civilians providing the type of accounting and clerical services to the Unit that that Ochoa provided as long as the civilians do not replace sworn personnel. TR Vol. 1 p.83.

Because the civilianization at issue is not authorized by the CBA, SAPOA is entitled to a remedy. The most appropriate and equitable remedy is that requested in Union Ex. 4: a declaration that the City has violated Article 39 of Joint Ex. 1 and must correct the violation.

At the first hearing, Helle testified that correction should include an order to replace with sworn personnel the civilian employees hired to work in the ODEU. TR Vol. 1 pp.62-63. But Joint Ex. 1's treatment of civilianization is complex and good faith disputes over its application have and will occur. The parties may be able to negotiate a correction of the City's violation without unnecessary harm to the civilians that accepted ODEU positions in good faith, and, in some cases, have worked there for some time.

IV AWARD

The Grievance has been proved.

The City is to correct its violation of Article 39 of Joint Ex. 1.

The parties are to share the expenses of this proceeding as provided in Article 15, Section 4 of Joint Ex.1.

Richard F. Dole, Jr.
Richard F. Dole, Jr.
Arbitrator
Houston, Texas
January 8, 2018