May 13, 2010

TO: City of Lincoln Personnel Board Members

SUBJECT: Personnel Board Meeting
Thursday, May 20, 2010
1:30 p.m., Council Chambers
County-City Building

A G E N D A

ITEM 1: Request to amend Section 2.76.130 of the Lincoln Municipal Code — Compensation Plan; Position and Pay Range Allocation.

ITEM 2: Request for grievance hearing – Donray Wittstruck — Public Works/Utilities - Water.

ITEM 3: Miscellaneous Discussion.

PC: Joan Ross, City Clerk
Directors
Gary Young
Donray Wittstruck
Don Taute

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2.76.130 Compensation Plan; Position and Pay Range Allocation.

(a) In those cases where a classification prefixed by “M” is allocated to a higher pay range, the employee in the classification shall be paid at the minimum rate of the new pay range or at his current rate of pay if it is within the new pay range, whichever is greater. The Mayor may, with the recommendation of the Personnel Director and at the request of a department head, adjust pay when it is consistent with the spirit and purpose of the merit system. There shall be no change in the employee's eligibility date as a result of such allocation.

In those cases where a classification prefixed by “M” is allocated to a lower pay range, an employee in such classification shall be paid at the same rate of pay in the lower pay range; provided, however, if the employee's rate of pay exceeds the maximum rate of pay in the lower pay range, the employee's rate of pay shall be frozen until such maximum rate of pay in such lower pay range is increased so that it exceeds the employee's rate of pay. When the maximum rate meets or exceeds the employee's frozen rate, the employee's frozen rate of pay shall then be increased to the maximum rate, but if the maximum rate does not meet or exceed the employee's frozen rate of pay within one year after such allocation, the employee's rate of pay will be reduced four and one-half percent or to the maximum rate, whichever results in the smallest decrease in pay, and each year thereafter, the employee's rate of pay shall be similarly reduced until the employee's rate of pay equals the maximum rate.

(b) In those cases where a classification prefixed by “N”, “X” or “E”is allocated to a higher pay range, the employee in the classification shall be paid at the minimum rate of the new pay range, or at the next higher step in the new range above his present rate of pay, whichever is applicable. There shall be no change in the employee's eligibility date as a result of such allocation.

In those cases where a classification prefixed by “N”, “X” or “E” is allocated to a lower pay range, the employee in the classification shall be paid at the same rate until the pay range is increased to include the employee's rate of pay. However, if after one year the employee's rate of pay continues to exceed the maximum rate for the classification as reallocated, he shall begin receiving the maximum rate for that classification.

(c) In those cases where a position is reallocated to a classification prefixed by “M” with a higher maximum pay range, the reallocated employee shall be paid at the minimum rate of the new pay range, or five percent above his rate of pay prior to reallocation, whichever is greater, but in no case shall the employee’s rate of pay exceed the maximum of the pay range. The

effective date of the reallocation shall be used to establish a new eligibility date, which shall be one year from the date of the reallocation.

In those cases where a position is reallocated to a classification prefixed by “M” with a lower maximum pay range, the same provisions shall apply as have been established for the allocation of a classification to a lower pay range pursuant to subsection (a) of this section.

In those cases where a position is reallocated to a classification prefixed by “M” in the same pay range, but with a higher level of responsibility, the reallocated employee may be paid up to ten percent above his rate of pay prior to the reallocation, but in no case shall the employee’s rate of pay exceed the maximum of the pay range.

(d) In those cases where a position is reallocated to a classification prefixed by “N”, “X” or “E” with a higher maximum pay range, the rate of the reallocated employee shall be increased to that step in the new pay range next above his rate of pay prior to reallocation. The effective date of the reallocation shall be used to establish a new eligibility date, which shall be one year from the date of the reallocation.

In those cases where a position is reallocated to a classification prefixed by “N”, “X” or “E” with a lower maximum pay range, the same provisions shall apply as have been established for the allocation of a classification to a lower pay range pursuant to subsection (b) of this section.

(e) In those cases where a position is reallocated to a classification with the same maximum pay range, with the exception of “M” as outlined in subsection (c), the rate of the reallocated employee shall remain unchanged and there shall be no change in eligibility date.

LAW OFFICES OF

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CITY - COUNTY PERSONNEL
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January 8, 2010

VIA HAND DELIVERY

Mr. Mark Koller
City of Lincoln Personnel Department
555 South 10th
Lincoln, NE 68508

RE: Grievance of Donray Wittstruck

Dear Mark:

As you know, Don Ray Wittstruck filed a grievance regarding retaliation he received as the result of raising concerns relating to safety at the Ashland Water facility. Greg Maclean has recently denied the grievance. I am attaching the grievance hereto.

The letter is a resubmittal of the grievance to you for the purposes of appealing it to the Personnel Board of the City of Lincoln under the terms of the PAGE Bargaining Agreement. Please schedule the matter for hearing in the March meeting of the Personnel Board.

Also, please provide me at this time with all the documents and reports generated by the Personnel Department in the investigation of this grievance. Thank you.

Very truly yours,

Gary L. Young
FOR THE FIRM

CC: Don Taute

CITY OF LINCOLN
NEBRASKA
MAYOR CHRIS BEUTLER
lincoln.ne.gov

Public Works and Utilities Department
Gregory S. MacLean, Director
555 South 10th Street
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Lincoln, Nebraska 68508
402-441-7548
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January 4, 2010

Gary L. Young
Attorney at Law
Keating, O'Gara, Nedved & Peter, P.C., L.L.O.
530 South 13th St., Suite 100
Lincoln, NE 68508-2795

RE: GRIEVANCE FILED BY DONRAY WITTSTRUCK

Dear Gary:

I have reviewed the grievance filed by Mr. Donray Wittstruck on November 17, 2009 asking for a rescission of the schedule change initiated by Rick Roberts. The grievance alleges that the change in schedule is a retaliatory action by Mr. Roberts for Mr. Wittstruck's filing a safety report.

Our investigation of the allegations in Mr. Wittstruck's grievance included interviews of Water Production personnel at the Ashland facility, interviews of Utilities Safety personnel, and members of Water Department Administration. We also reviewed Department policies and procedures, and emails relevant to the incidences cited in the grievance. Interviews were conducted by the Personnel Department. The investigation and this response was extended beyond the required timeline as cited in the PAGE contract due to several unanticipated events including severe weather conditions, holiday schedules, and the number of individuals that were interviewed. An open-ended extension had been agreed to between you and Mark A. Koller via telephone messages on December 18, 2009.

As I read the grievance, there are two issues that are subjects of the grievance: (1) a disregard for appropriate and required safety practices by Rick Roberts; and (2) retaliatory action on the part of Rick Roberts by changing the work schedule of the Building and Maintenance team led by Diane Poole (Donray Wittstruck is a member of that team) for filing a 'Near-Miss' report on October 30, 2009.

Safety Practices at the Ashland Water Plant

Our investigation found that Mr. Roberts actively participates in monthly safety meetings. He actively seeks input from Mr. Martinez, Utilities Safety-Training Specialist, prior to undertaking major maintenance activities such as the removal of calcium deposits on the ammonia diffusers in the west plant clear well and the removal and replacement of caustic soda in the chlorine scrubber. Mr. Martinez confirms that he and Mr. Roberts have a good working relationship and is not reflected by the alleged caustic remarks contained in the grievance.

The incident cited in Mr. Wittstruck's Near-Miss report referenced a man lift that he was going to be using to perform a work assignment. When he went to retrieve the man lift he found a safety hazard. The incident occurred on October 29, 2009. According to Mr. Gerardo Martinez, Utilities Safety-Training Specialist, and Mr. Rick Roberts the safety issue repairs were made almost immediately and in compliance with Safety Policy.

I find that there is no evidence that Mr. Roberts has a disregard for appropriate and required safety practices.

Retaliatory Action on the part of Rick Roberts

Mr. Wittstruck alleges the reason for the schedule change was to carry out threats made by Rick Roberts in retaliation for filing the complaint by Mr. Wittstruck.

Lincoln Water System Rules and Regulations (dated June 1, 2001) set the work schedule in Section 1:

a) The work schedule will be established between the hours of 7:00 a.m. and 5:00 p.m. Monday through Friday, except for Water Operations at the Ashland Plant (which is a 24 hour, 7 day per week operation).

Work schedules since that date have been adjusted around that time frame for the Building & Maintenance crew to reflect seasonal needs and budgetary limitations.

Mr. Wittstruck began work at the Ashland Plant on July 4, 2002, and therefore his tenure began after the establishment of the work schedule in the LWS Rules and Regulations. The allegation in the grievance that this crew started work at 6:00 a.m. so that "he may pick up his children from school and tend to them without paying for child care" is not true. The reason this crew started work that early was to avoid working outdoors in the heat of the day. It started out that they would begin this schedule in the Spring/Summer months and revert back to normal hours in the Fall/Winter months. It happened this way for several years but eventually slipped to being full time on the 6:00 am schedule.

Management has the responsibility and authority to determine, effectuate and implement the objectives and goals of the City in the most efficient manner possible. Budgetary constraints have necessitated review of work hours and work assignments. If Management sees a problem, it has the responsibility to address it. When this issue was discussed between Mr. Jerry Obrist, Division Manager, Mr. John Miriovsky, Superintendent of Water Production, and Mr. Roberts, Mr. Obrist told Mr. Roberts to make the schedule change by issuing a memo to the crew per compliance with the LCEA and PAGE union contracts.

I find no correlation between the schedule change and Mr. Wittstruck's allegations that the change was motivated by retaliation on the part of Rick Roberts.

In conclusion, I do not find a basis to grant your requested remedy to rescind the schedule change.

Respectfully submitted,

Greg MacLean
Director of Public Works

Cc: Mark Koller
Don Taute
Jerry Obrist

A. The name of the **Department Head** or other **City Representative** whose action or non-action is the subject of the grievance:

The Department Head is Greg Maclean. This grievance is raised concerning the actions of Rick Roberts.

B. The specific action or non-action which is the subject of the grievance:

Donray Wittstruck is an employee in the Lincoln Water System. On Monday, November 2, 2009, Wittstruck contacted his departmental safety coordinator, Gerardo Martinez and reported a "near miss" report, indicating the existence of a serious safety hazard in his department. Gerardo Martinez indicated that he would address the matter with management of his division sometime thereafter. Thereafter, Gerardo Martinez contacted Rick Roberts to address the situation and resolve the safety complaint. Rick Roberts is a member of management of the Lincoln Water System and has responsibility for this area of the department.

Rick Roberts then began a series of actions that indicate that he is carrying out his management of employees in his division in retaliation for the filing of the complaint by Mr. Wittstruck. First, Rick Roberts has made it clear that he is unhappy with the scrutiny of his division's safety practices by safety officials. On Friday, November 6, Mr. Roberts reportedly was in the work area of several employees and said "if Gerardo would get into the fucking real world and not worry so much about safety, we could get our work done."

On Monday, November 9, 2009 near the beginning of the shift, Rick Roberts approached a number of us on our crew, and in anger said the following: "What the fuck is this? A safety meeting?" Two people among us said "yes". Rick Roberts replied: "Bullshit. I don't fucking believe this!." Roberts then told Diane Poole – Wittstruck's supervisor -- that he wanted her in his office that morning. There were four witnesses to these statements by Roberts: Diane Poole, Don Wigle, Larry Mitera and Donray Wittstruck.

During the meeting with Ms. Poole, Rick Roberts threatened that he was going to change the schedules of her employees to address complaints he had with their work. This was not an new statement. In the past, Rick Roberts had threatened the employees of Diane Poole that he would change their shift to punish them. Roberts is aware that it is necessary for Donray Wittstruck to have his current schedule so that he may pick up his children from school and tend to them without paying for child care. It was for this reason that 6.5 years ago the group changed their schedule. It has gone unchanged since that time.

Later on November 9, Roberts followed through on his threat. He issued a memo changing the schedule of Wittstruck's crew from 6:00 AM to 2:30 AM to 7:30 AM to 4:00 PM. Roberts gave no explanation for the change to Diane Poole other than to punish the employees.

Roberts took this action in the immediate context of the filing of Mr. Wittstruck's safety complaint and its investigation by Gerardo Martinez. His comments to the office staff indicate that he was very upset about the complaint. His comments on the morning of November 9 indicate that he was angry at the staff regarding the complaint at the

same time he issued the schedule change. His record of threatening to change the schedule in the past to punish the employees indicates his willingness to undertake such an action. In light of these circumstances, Mr. Roberts apparently undertook the schedule change in direct retaliation against Mr. Wittstruck for filing his safety complaint.

C. The date upon which the action or non-action occurred: November 9, 2009.

D. The specific provisions of the PAGE-CITY of Lincoln Agreement, or of the Personnel Code, which were violated by said action or non-action:

Article 15 of the PAGE bargaining agreement provides that:

"The Union will support and assist in the implementation of methods of increasing department productivity and maintaining safe workplaces. The City will endeavor to develop policies with Union assistance to increase department productivity, maintain safe work places, and otherwise increase and maintain the morale of employees. Furthermore, employees are encouraged to communicate ideas and suggestions to their supervisors without retribution."

This provision encourages employees to communicate safety issues to management without fear of retribution. The actions of Rick Roberts to retaliate against Donray Wittstruck and his crew for the reporting of a safety hazard violate this provision.

Article 16, Section 2 of the PAGE bargaining agreement, provides that:

"[t]he City hereby agrees it will endeavor to provide efficient and safe equipment and material to protect the health and safety of employees."

The actions of Rick Roberts to retaliate against Donray Wittstruck and his crew for the reporting of a safety hazard violate this provision.

E. The name, job classification, and City Department of the employee filing the grievance:

Donray Wittstruck, Utility Plant Mechanic, Lincoln Public Works Department

F. The name and address of the Union Representative or Attorney, if any presenting the grievance for the employee:

Gary L. Young, 530 South 13th, Suite 100, Lincoln, NE 68508 and Jeff Stump, PAGE President, 615 Eldora Ln., Lincoln, NE 68505.

G. The reasons for concluding that the action or non-action complained of is in violation of the Agreement or the Personnel Code:

Employees are entitled to communicate safety concerns to their management without fear of reprisal.

H. The remedy sought by the employee making the grievance:

Rescission of the schedule change initiated by Rick Roberts as retaliation for this safety report.

Respectfully submitted for Donray Wittstruck:

BY: _____
Gary L. Young

Keating, O'Gara, Nedved and Peter, P.C., LLO, 530 South 13th, Suite 100, Lincoln, NE 68508
Attorney for the Grievant: Donray Wittstruck, 601 N. 29th St., Ashland, NE 68003
Telephone# (402) 944 2241