

**THE PUBLIC REVIEW BOARD
INTERNATIONAL UNION, UAW**

APPEAL OF:

ANDREW HARTINGER, Member,
UAW LOCAL UNION 412
(Warren, Michigan),

Appellant,

-vs-

CASE NO. 1801

UAW REGION 1
(THE UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA),

Appellee.

DECISION

(Issued September 23, 2019)

PANEL SITTING: Prof. Janice R. Bellace, Chairperson,
Prof. James J. Brudney, Prof. Harry C. Katz, and
Prof. Maria L. Ontiveros.

At issue in this case is whether International Representative Thomas Brenner's decision to withdraw Andrew Hartinger's grievance seeking an additional 5% pay increase lacked a rational basis.

FACTS

Andrew Hartinger works for FCA US LLC ("the Company") as an OG4 Mechanic in the Stress Lab Department at the Chrysler Technical Center (CTC) in Auburn Hills, Michigan. His seniority date is April 22, 1985. He works in Unit 10 represented by UAW Local Union 412.¹

On October 12, 2007, Local 412 and the Company entered into an agreement for a "Master Technician" pilot program in the Stress Lab. Under the agreement, a joint

¹ Record, pp. 32, 33.

committee was tasked with developing the details of the program. The agreement also provided:

“In an effort to reward employees interested in the program the joint committee will work with the Corporate Union Relations staff to create a separate and distinct classification. The classification will consist of a grade 14 and the employees participating in the program will receive a 5% increase upon meeting the agreed upon requirements.”²

Ultimately, the program required the successful completion of designated coursework at a local community college in order to become a Master Technician.³

In 2009, Hartinger satisfied the coursework requirement and became a Master Technician.⁴ He received a 5% salary increase. In the Company’s payroll system, his position description was changed from “Prod & Syst Devlpmt Speclst” to “Master Technical Devlpmt Mechanic – 5” but he remained designated as grade 11.⁵

In 2012, Hartinger became a Leader. As a result, he received another 5% pay increase. His payroll position description changed to “Prod & Syst Devlpmt Spec – Ldr.” He was still listed as grade 11 in the payroll system.⁶

On April 26, 2017, Hartinger filed grievance No. 2017-10-106 with the assistance of Local representative David Chupko.⁷ The grievance claimed that Hartinger was entitled to an additional 5% increase in Leader pay as a result of the 2015 UAW-FCA National Agreement.⁸ Hartinger contended that:

“Leaders in Unit 10 have traditionally received 5% leaders pay and if they performed their job satisfactory they then could receive the additional 5% through merit raises. Merit raises were frozen during bankruptcy in 2009 and were agreed to continue after the 2015 National Contract.”⁹

He claimed that other Unit 10 Leaders had received an additional 5% Leader pay following the 2015 National Agreement.¹⁰

² Record, p. 4.

³ Record, p. 51.

⁴ Record, p. 5.

⁵ Record, p. 2.

⁶ Record, p. 2.

⁷ Record, p. 26.

⁸ The grievance form indicated that the dispute was based upon “Contract Violation, Past Practice” and cited Section 60 of the National Agreement entitled “Promotions.” Record, p. 26. However, Section 60 only addresses the order in which employees are to be considered for promotion and does not address pay issues. Record, pp. 7-10.

⁹ Record, p. 28.

¹⁰ Record, p. 27. Section 96 of the 2015 National Agreement is entitled “Merit Increases and Performance Reviews.” Record, pp. 11-13. This provision requires the Company to furnish the Union with a list of employees granted merit increases or lump-sum merit awards. The Union may grieve any objection to an

On two occasions, the Local met informally with Labor Relations representative Dan Grady to discuss the grievance, once in February 2017 and again in March 2017. According to the Local's notes, Grady took the position that Hartinger was receiving sufficient compensation because he was already paid above the maximum for pay grade 14. Hartinger responded that he should not be penalized for his unique position as the only OG4 Mechanic in Unit 10 designated both as a Master Technician and a Leader, especially since other Leaders were paid above their grade maximum in order to receive the entire 10% in additional Leader pay.¹¹ Management formally denied the grievance on May 15, 2017, stating only: "The grievance is improper, as there is no violation of the Local or National CBA."¹² Management also noted: "Time limits extended upon mutual agreement."¹³ On May 18, 2017, the Local served notice that management's response was not satisfactory.¹⁴

On April 6, 2018, Hartinger filed Grievance No. 2018-10-37, again with the assistance of Local representative Chupko. The grievance stated:

"The union protests management for failing to pay brother Andrew Hartinger his additional 5% leader pay to equal 10% leader pay. The additional 5% leader pay is in addition to Andy's Master Technician pay which **contractually** has allowed Andy to earn **above** his traditional pay of pay grade 11 in his OG4 classification and into pay grade 14 pay (**But not classified as pay grade 14 in his records**) since **2009** when the Master Technician Program was first implemented. Since the 2015 contract other Unit 10 mechanics leaders have received their additional 5% leader pay. . . . **The Union demands that Brother Hartinger be paid his additional 5% leader pay so it equals a total of 10% leader pay, which has been paid in the past to other unit 10 leaders after the 2015 contract so he may be made whole. The union is also demanding that Andy be paid this additional 5% leader pay in addition to his Master Technician pay plus all past overtime he has worked since his 2016 PLM review.**"¹⁵

increase or award. The Union may also propose merit increases or awards for individual employees and the Company is obligated to bargain over the proposal. If the Company denies the Union proposal, the Union may file a grievance. Section 96 also states:

"Merit increases shall not be less than three (3.0%) of the employee's base salary but in no case shall the employee's salary be increased above the maximum of the salary grade for the employee's classification." Record, p. 12.

Employees at the maximum salary rate are eligible for lump-sum merit awards in lieu of rate increases.

¹¹ Record, p. 30.

¹² Record, p. 26.

¹³ Record, p. 26.

¹⁴ Record, p. 31.

¹⁵ Record, p. 32.

The grievance cited the Local agreement creating the Master Technician pilot program and past practice as the basis for the alleged violation.¹⁶

The Local discussed the grievance with the new Labor Relations Representative, Andrea Alder, in April 2018.¹⁷ By email dated April 16, 2018, Alder requested that Chupko provide a list of the other employees who participated in the Master Technician program and a list of the Leaders who received increases totaling 10%.¹⁸ Chupko responded that Hartinger and two other employees were the only OG4 Mechanics currently designated as Master Technicians and that another OG4 Mechanic, since retired, had been a Master Technician. Chupko also provided the names of eight Mechanics who had received the additional 5% Leader pay raise prior to the 2015 National Agreement and one Mechanic who received the additional 5% increase following the 2015 National Agreement as the result of a grievance settlement.

On April 19, 2018, Alder denied the grievance, writing:

“The employee was made a specialist in 4/13/09 and received a 5% increase for completion of the Master Tech program. The employee was made a leader on 04/09/12 and received the 5% increase for leader pay. This employee has continued to receive increases thru the merit system and will continue until he reaches his max. He is not currently entitled to any increase. No contractual violation exists and the grievance is denied.”¹⁹

The next day, the Local served notice that management’s response was not satisfactory.²⁰

On August 17, 2018, a Step 2.5 meeting was held between Adler and International Representative Thomas Brenner.²¹ Hartinger’s Grievance No. 2018-10-37 was placed on hold. The meeting notes do not provide a description of the parties’ discussion of Hartinger’s grievance. Another Step 2.5 grievance meeting was held between Alder and Brenner on November 9, 2018.²² At that meeting, Hartinger’s grievance was withdrawn without precedent. Again, the meeting notes do not provide a description of the discussion related to Hartinger’s grievance. By letter dated December 11, 2018, Brenner notified the Local 412, Unit 10 Chairman of the withdrawal of Hartinger’s grievance.²³ The letter did not provide an explanation of the reasons for the withdrawal.

Hartinger appealed the withdrawal of his grievance to the International Executive Board (IEB) by letter dated December 14, 2018. He wrote:

¹⁶ The grievance also cited Section 60 of the National Agreement regarding promotions. See note 8 above.

¹⁷ Record, p. 35.

¹⁸ Record, p. 37.

¹⁹ Record, p. 32.

²⁰ Record, p. 38.

²¹ Record, p. 39.

²² Record, p. 41.

²³ Record, p. 43.

"I disagree with the decision of the Grievance procedure by Human Resources/Labor Relations under National Contract Section 18 and how it was handled at the 2 ½ step (UAW Region 1). The data provided by my Local Union (UAW Local 412 Unit 10) should have substantiated the facts in my grievance for the shortages in my pay (Pay Grade 14). My rights as a Master Tech were violated upon becoming Leader in my Department. The coding in the Job Classification 597,1S0 as a Master Tech changed when becoming Leader to 597,1E0. The Company's/FCA stance was I stopped performing the work as a Master Tech upon becoming a Leader. I never stopped performing tasks required to be in that position. . . . In closing the violation was the company never provided my final 5% increase on my weekly pay as a Leader that is reflected with data provided by my local union. My total compensation should be 15% over the rate of Pay Grade 14. I am also asking for all retroactive pay from the date the violation took place" ²⁴

The International President's staff requested information from Region 1 regarding Hartinger's grievance. Thomas Brenner responded with documents and a statement setting forth the reasons for the withdrawal of the grievance. He explained that his decision was based upon the National Agreement, Memorandum No. M-1, Section (4)(b) regarding intra-plant transfers to a higher grade.²⁵ He identified the following as the relevant contract language:

"An employee promoted from one grade to a higher grade will be paid not less than the minimum of the higher grade. If such increase is less than four percent (4%) for an employee promoted to grades 2 through 8, the employee's salary will be increased to provide at least a four percent (4%) increase. If such increase is less than five percent (5%) for an employee promoted to grades 9 through 18, the employee's salary will be increased to provide at least a five percent (5%) increase. Notwithstanding any of the foregoing, in no event will the employee's salary be increased above the maximum for the grade to which the employee is promoted. The employee will begin a new progression period effective with the date of transfer."²⁶

Brenner asserted that "[p]romotions to leader positions follow" Section (4)(b), such that "[e]mployees whose rates are at the assigned grade's maximum are to receive either a 4 percent or 5 percent [increase], depending on their assigned grade level."²⁷ With respect to Hartinger's situation, Brenner explained:

²⁴ Record, p. 44.

²⁵ Record, p. 47.

²⁶ Record, pp. 15-16.

²⁷ Record, p. 47.

- “April 13, 2009 – Hartinger was promoted to Master Technical Development Mechanic 5, Job code 5971SO – Grade 11 – SP29 and given a 5 percent promotional increase.
- April 9, 2012 – Hartinger was promoted to Team Leader, Job code 5971E0 – Grade 11 – SP29 and given another 5% increase.
- Moving from Grade 11 – SP29 to a different Grade 11 – SP29 is not a promotion since the Specialist [is] treated the same as a Team Leader and already given the Team Leader benefits.”²⁸

On this basis, Brenner concluded that the Company had abided by the agreement language and withdrew the grievance.

International President Jones’s staff determined that a hearing was unnecessary to decide Hartinger’s appeal. Acting on behalf of the President, staff prepared a report to the IEB concluding “that UAW Servicing Representative Brenner exercised reasonable judgement and the grievance settlement was not devoid of a rational basis.”²⁹ Staff gave two grounds for this conclusion. First, staff asserted that Brenner had “quashed allegations of disparate treatment” by providing examples of other members who received 5% increases for Leader pay, as did Hartinger.³⁰ Attached to staff’s report were employment records for six individuals which showed 5% salary increases upon attaining the Leader designation.³¹ The earliest example was from 2005 and the latest from 2013. In three cases, the employee was promoted from a “Prod & Syst Devlpmt Speclst” to a “Prod & Systems Devlpmt Spec – Ldr,” the same title held by Hartinger.

Second, staff concluded that Hartinger’s grievance failed on the merits because Hartinger had not established that he was entitled to a 10% increase. In the “Facts” section of the report, staff discussed Leader pay and asserted: “There is not a formal agreement for leader’s pay in either the local union or national collective bargaining agreements. This designation survives because of established pay practices.”³² As a result, staff concluded:

“ . . . in evaluating the merits of this appeal, consideration is given to the fact that the leader pay program is not a negotiated program. The Appellant did not, or perhaps could not, offer details of this program that would support his claim of a 10% benefit. At the end of the investigations by this office, we have concluded that there is simply no leader pay program provided for in the record.”³³

²⁸ Record, p. 47.

²⁹ Record, p. 53.

³⁰ Record, p. 53.

³¹ Record, pp. 62-67.

³² Record, p. 51.

³³ Record, p. 53.

Staff's report did not address Representative Brenner's assertion that he withdrew the grievance based upon Memorandum No. M-1, Section (4)(b) of the National Agreement, as he indicated in his response to staff's information request.³⁴

The IEB adopted staff's report as its decision on April 5, 2019.³⁵ Hartinger promptly filed an appeal to the Public Review Board (PRB).

ARGUMENT

A. Andrew Hartinger:

The documents submitted in support of my appeal to the IEB should have been sufficient to substantiate my grievance seeking to be made whole. The National Agreement and Local Contract language submitted should have provided sufficient grounds to reverse International Representative Brenner's decision on the pay issue, specifically: (1) the Local Supplemental Agreement "Letter I" Master Technician Pilot Program dated October 12, 2007, and (2) the National Agreement, Memorandum No. M-1 "Salary Grades and Progression Applicant Supplement" Section (4)(b) regarding intra-plant transfers to a higher grade.

The IEB decision denying my appeal states that there is not a formal agreement for Leader pay in either the local contract or national collective bargaining agreement. The IEB found that the Leader pay "designation survives because of established pay practices." The established pay practices that the IEB recognized in its decision should also be recognized as "past practice," which would negate the claim by the IEB that the Appellant did not, or perhaps could not, offer details of this program that would support his claim for a 10% benefit. Historically, "past practice" can and has won many grievances that were brought forward.

The IEB decision also recognized that the Local provided a list of other employees who were given the additional 5% Leader pay increase after the 2015 contract through

³⁴ In a footnote, the staff report states: "It is unclear why the grievance was written six years after the Appellant was awarded the leader pay and Master Technician Classification. It appears to be grossly untimely, although that position has not been taken by any previous grievance handlers or challenged by the Company." Record, p. 51. The International Union's position statement before the PRB also questions the timeliness of Hartinger's grievance in a footnote: ". . . under Appellant's theory, he would not be eligible for the second 5% raise until 2015. Even under this theory, how a grievance filed three years later would be timely is unclear. The Company, however, does not appear to have relied on timeliness through its initial denials of the grievance." Record, p. 78.

In response to the International Union's suggestions that his grievance may be untimely, Hartinger states: "I also did not wait six years from when I became Leader in 2012 to notify my steward of a pay shortage. After the company's bankruptcy there [were] a few years when the additional 5% was frozen, and it wasn't until the 2015 contract that the company started giving the additional 5% Leader pay increase again. The last few years I was given a lump sum for my PLM bonus instead of the additional 5% raise which I did not fully understand until early 2017." Record, p. 84.

³⁵ Record, p. 49.

the PLM/Merit program.³⁶ The other Leaders in Unit 10 who were given the additional 5% increase all had their pay increase to 10% over their respective pay grades.³⁷ The fact that there are other Unit 10 Leaders who have received the additional 5% increase, but not me, shows unequal treatment. Whether this unequal treatment is because I am the only one of 700 Unit 10 members who is classified as both a Master Technician and a Leader, or some personal reason that the Union is unaware of, is not known. What is known is that I am being treated differently every day from my co-workers who are also Leaders, and this is unfair and should not be accepted.

B. International Union, UAW:

International Representative Brenner had a rational basis for withdrawing Hartinger's grievance. Appellant was seeking pay for which there is no contractual language. Instead, he purports to rely on a past practice without identifying any person who is actually comparable. Success from further pursuit of the grievance was speculative at best, and the decision to withdraw the grievance was wholly rational.

Appellant does not have any contractual basis for the extra 5% pay increase he seeks. His appeal from the IEB decision does not rely on any language from any contract between the UAW and FCA, either at the local or national level. The parties did enter into an agreement which provided him with an extra 5% pay increase when he was certified as Master Technician, which he received. However, the entire basis for the "Leader" pay is extracontractual.

Appellant argues that his claim could have been pursued under a "past practice" theory. Although past practice can form the basis for a successful grievance, the standards required to show an established past practice were not satisfied in this case. In fact, there is no "past practice" regarding the specific issue involved: the pay rate for someone certified as both a Master Technician and a Leader. Given this lack of directly comparable cases, establishing a "past practice" would be highly unlikely. As Elkouri & Elkouri note in the treatise *How Arbitration Works*:

"In the absence of a written agreement, 'past practice', to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as fixed, and established practice accepted by both Parties."

Elkouri, *How Arbitration Works*, Ch. 12.2 (quoting *Celanese Corp. of Am.*, 24 LA 168, 172 (Justin, 1954)). The unique nature of Hartinger's position as both a Master Technician and a Leader substantially undermined any argument that a past practice could be

³⁶ This appears to be a reference to the April 18, 2018 email from Local representative Chupko to management. Record, p. 37. That email listed eight employees who were provided with the additional 5% Leader pay before the 2015 National Agreement and one employee provided with the 5% increase after the 2015 National Agreement as the result of a grievance settlement.

³⁷ There are no documents in the Record indicating the pay rates or grade levels for the other eight employees identified by the Local as having received 10% in Leader pay.

established. He was being paid the full 10% above the base salary that he says past practice could potentially establish for a Leader position. Moreover, he was being paid more than 5% above the base pay required under the side letter for Master Technicians. Whether these two provisions should be stacked together is not something that had been dealt with previously. Without clear precedent, it would be difficult to establish some entitlement to 15% above his base pay as a fully established past practice.

Even under Appellant's version of the facts, further pursuit of the grievance would have been difficult. However, as detailed in the IEB decision, records indicate that many other people did not receive a 10% pay increase in the Leader position. The IEB's decision identifies six people who were treated in the same fashion as Appellant. This record thus demonstrates numerous examples of 5% increases for Leader pay. In his appeal to the PRB, Appellant does not refute the IEB's conclusion that other members were treated in the same fashion as him. The record suggests that some Leaders did receive a 10% increase. This discrepancy, however, is just further evidence that any effort to establish a "past practice" would have been unlikely to succeed and that the decision to withdraw the grievance was rational.

The inconsistency is likely a result of the fact that this Leader program is not negotiated. No specific details are available regarding how the program should be implemented, when increases above the base should be provided, or, most relevant in this case, how the pay interacts with the Master Technician program. This lack of clarity led the IEB to conclude that there was no actual pay "program." The inconsistency and lack of detail make the decision not to pursue a "past practice" grievance reasonable.

C. Rebuttal by Andrew Hartinger:

In response to the International Union's position statement in this appeal, I believe that there is a misunderstanding regarding how my Local Supplemental Agreement for the Master Technician Pilot Program works. Upon successful completion of the Master Technician requirements, the initial 5% was an increase into pay grade 14, not a 5% bump over the grade. The second part was when I became a Unit 10 Leader, at which point I was already at the top of pay. Through our past practice, the initial 5% increase put me above the grade of 14, which is clearly provided for in our local contract. The third part was the second 5% pay increase as a Leader which would establish my pay at 10% over my grade of 14. The answer the International Union gave of 15% over the grade was an incorrect answer. My current weekly pay is \$1705.93 which is not 5% above grade 14; \$1737.24 would be 5% above grade 14 and 10% above grade 14 would be 1824.10, which would make me whole.

In order to show past practice, my Local identified nine other Unit 10 Leaders who were given an additional 5% in Leader pay, bringing their total additional Leader pay to 10%. I am just asking for 10% above my pay grade like these other Leaders have received based upon past practice. Because I am the only person in Unit 10 who is both a Master Technician and a Leader qualified to be in pay grade 14, I should not be penalized because there is no specific language written for my classifications. The past

practice among the other mechanics identified by my Local should be sufficient to establish the fairness of my claim for the same 10% above my pay grade. My local management even agreed that I should be paid the full 10% because of the quality of my job performance.

DISCUSSION

The PRB's jurisdiction to review appeals concerning grievance handling is limited to allegations that the matter was improperly dealt with due to fraud, discrimination, or collusion with management or that the disposition of the matter was devoid of any rational basis.³⁸ In this case, Hartinger does not claim that the withdrawal of his grievance was motivated by fraud, discrimination, or collusion with management. Nor is there any basis on the Record to believe that any such factors influenced the handling of his grievance. Instead, Hartinger takes issue with Representative Brenner's assessment of the strength of his claim for additional pay. As we have stated many times, however, it is not our role to second-guess the grievance-handler's good-faith assessment of a grievance's merit, provided the assessment rests upon a rational basis.³⁹

One fact is key to our determination of this matter. As all parties agree, Hartinger is unique in holding designations both as a Master Technician and a Leader. The Master Technician program was first introduced in 2007. Since then, the Record reflects that only a handful of employees have attained the Master Technician designation. Given the small number of participants in the program, it is hardly surprising that Hartinger is the only Master Technician who is also designated as a Leader.

As the IEB correctly explained, there is no contract language specifically addressing pay increases for an employee holding both designations. To be sure, as Hartinger emphasizes, the Local agreement establishing the Master Technician program specifies that employees who meet the criteria for this designation shall receive a 5% pay increase. Accordingly, Hartinger received a 5% increase in 2009 when he became a Master Technician. But the agreement does not address what, if any, impact that pay increase might have upon the employee's eligibility for other compensation increases.

The UAW-FCA bargaining agreement also does not explicitly set forth requirements for pay increases for Leaders, much less dictate that those increases are in addition to other pay increases previously awarded to employees.⁴⁰ According to

³⁸ UAW International Constitution, Article 33, §4(i).

³⁹ *Mitz v. Region 1D*, 13 PRB 565, 574 (2007); *Perez v. Region 2B*, 12 PRB 650, 655 (2005); *Long, et al. v. UAW Local Union 2089*, 12 PRB 431, 434 (2004).

⁴⁰ In response to the International staff's information request, Representative Brenner indicated that he relied upon Memorandum No. M-1, Section (4)(b) of the National Agreement in deciding to withdraw Hartinger's grievance. This contract provision relates to promotions to a higher grade and provides for salary increases related to such promotions. According to Brenner, Hartinger's promotion to a Leader was not a promotion to a higher grade and therefore the requirements of Section (4)(b) did not apply and the Company did not violate the bargaining agreement. In its decision, however, the IEB did not identify Section (4)(b) as relevant to the analysis of Hartinger's grievance and instead characterized Leader pay as

Hartinger himself, half of the 10% pay increase previously awarded to some Leaders was in the form of a 5% merit increase. Although the bargaining agreement permits the Union to grieve the denial of a merit increase, the Company nevertheless appears to have considerable latitude under the contract in awarding such increases.⁴¹ In order to prevail on a grievance involving merit pay in arbitration, the Union would likely have to show that other similarly situated employees were granted merit increases. It would be difficult to make such a showing in the case of Hartinger who acknowledges that he is uniquely situated.

Although Hartinger asserts that the Union should have pursued his grievance based on past practice, there is no past practice which is directly applicable to his situation given that he is the only employee designated as both a Master Technician and a Leader. Moreover, even with respect to Leader pay, the Company does not appear to have a consistent past practice with respect to increases. Hartinger's Local union representative cited several examples of employees who received pay increasing totaling 10% upon becoming Leaders. However, Representative Brenner also identified several instances in which employees only received 5% pay increases after attaining the Leader designation, similar to Hartinger who received a 5% increase in 2012 when he became a Leader. We agree with the International that in order to prevail on a past practice theory the Union would need to demonstrate a consistent practice over time. The Record indicates that the Union would not be able to make such a showing with respect to Leader pay increases.

For all these reasons, the Board agrees with the IEB's conclusion that it was rational for International Representative Brenner to withdraw Hartinger's grievance seeking an additional 5% pay increase.

The decision of the IEB is affirmed.

"extracontractual." The International Union's reading of the agreement appears to be the correct one since there is nothing in Memorandum No. M-1 which suggests that it is intended to provide for Leader pay increases.

Even if Hartinger's designation as a Leader could be considered a promotion subject to Section (4)(b), that provision would not entitle him to the increase which he seeks. Section (4)(b) provides "in no event will the employee's salary be increased above the maximum for the grade to which the employee is promoted." Record, pp. 15-16. As Hartinger acknowledges, he is formally classified by the Company as a grade 11, but he has received pay increases placing him above the maximum for grade 14. Thus, he is receiving more compensation than the maximum amount provided for in Section (4)(b).

⁴¹ See Section 96 of the 2015 National Agreement, Record at pp. 11-13.