

IN THE MATTER OF ARBITRATION BETWEEN

LAW ENFORCEMENT LABOR
SERVICES, INC.
And its affiliated Local 366
St. Paul, Minnesota
Union

and

CITY OF SAUK RAPIDS, MINNESOTA
Sauk Rapids, Minnesota
City/Employer

OPINION AND AWARD

Contract Interpretation
Shift Bidding Grievance
BMS Case No. 13 PA 0748

Award Dated: January 17, 2014

Date and Place of Hearing:

Offices of the City
Sauk Rapids, Minnesota

Date of Receipt of Post Hearing Briefs:

December 11, 2013

APPEARANCES

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ISSUE

Did the Employer violate the Collective Bargaining Agreement by the manner it assigned shift hours and days off effective on or about January 1, 2013? If so what shall the remedy be?

WITNESSES TESTIFYING

Called by the Union

Eric Norsten, Grievant
Officer, Sauk Rapids Police Department
Steward, LELS Local 366

Tim Sigler, Grievant
Officer, Sauk Rapids Police Department

David Rosenkrans, Officer
Sauk Rapids Police Department

Called by the Employer

Brent Bukowski, Sergeant
Sauk Rapids Police Department

Perry Beise, Chief
Sauk Rapids Police Department

Ross Olson,
Sauk Rapids City Administrator

JURISDICTION

The issue in grievance was submitted to the Arbitrator for a final and binding resolution under the terms set forth in Article 22 of the Collective Bargaining Agreement (Employer Exhibit 9; Union Exhibit 1) between the parties and under the rules of the Bureau of Mediation Services of the State of Minnesota. The Arbitrator was mutually selected by the parties from a list of names of arbitrators submitted to them by the Bureau of Mediation Services. The parties stipulated that the Arbitrator had been properly called and that the issue was properly before him for a decision. The Arbitrator inquired at the hearing if the parties had any objection to the decision in this case being offered for publication through the Bureau of Mediation Services or recognized agencies that publish arbitration awards. No objection was raised. The Arbitrator tape-recorded the hearing as an extension of his notes for his personal use.

At the hearing the parties were given full and complete opportunity to examine and cross-examine witnesses and present their proofs. Final argument was provided through post hearing briefs submitted by each party, which were received on the agreed deadline as amended. The parties served their briefs to opposing counsel. With the receipt of the post hearing briefs by the Arbitrator, the record in this matter was closed. The issue is now ready for determination.

STATEMENT OF THE ISSUE

At the hearing the parties stipulated to the following framing of the issue:

Did the Employer violate the Collective Bargaining Agreement by the manner it assigned shift hours and days off effective on or about January 1, 2013? If so what shall the remedy be?

In their post hearing briefs the parties stated the issue with somewhat greater detail that did not change the substance of the dispute. The Union framed the issue in their brief as follows:

1a. Does the City of Sauk Rapids violate the Collective Bargaining Agreement by unilaterally assigning a probationary Patrol Officer to a shift in preference over a more senior Patrol Officer?

1b. If so, what is the appropriate remedy?

2a. Does the City of Sauk Rapids violate the Collective Bargaining Agreement by unilaterally assigning Patrol Officers to certain days off without regard for the officers' seniority and the days off that they have requested?

2b. If so, what is the appropriate remedy?

In their post hearing brief the City framed the issue to be resolved as follows:

Did the City violate the Collective Bargaining Agreement related to awarding shift preferences by seniority when Officer Norsten was not given his preferred shift and when Officer Sigler was not given his preferred days off?

The grievance documents behind this issue are contained in Union Exhibit 5. The initial complaint, dated November 16, 2012, centered on Officer Norsten not being granted his shift bid by seniority. As the grievance proceeded through the steps of the grievance procedure a complaint by Officer Sigler expanded the grievance to the effect that the City violated the Collective Bargaining Agreement by not granting him his shift preference based on his seniority and not granting him his work day assignment preference based on his seniority. No procedural dispute was raised at the arbitration hearing, and both issues are in front of the Arbitrator for a decision. The City denied the grievance and it was subsequently moved through the steps of the grievance procedure without resolution. It was heard in arbitration on November 4, 2013.

The sections of the Collective Bargaining Agreement which bear on this issue are as follows:

ARTICLE 3 – DEFINITIONS

* * * *

3.8 SCHEDULED SHIFT: A consecutive work period including rest breaks and a lunch break.

* * * *

ARTICLE 4 – MANAGEMENT RIGHTS

4.1 It is recognized that, except as expressly stated herein, the City retains the right and authority necessary for it to operate and direct the affairs of the Police Department in all of its various aspects. Including, but not limited to the right to plan, direct and control all of its operations and services of the Police Department; to determine the methods, organization and number of personnel by which such operations and services are to be conducted to assign employees, and schedule working hours and to assign overtime; to determine whether goods or services should be made of purchased; to hire promote, demote, suspend, discipline, discharge or

layoff employees due to lack of work or other legitimate reasons; to make and enforce reasonable rules and regulations; and, to change or eliminate existing methods, equipment or facilities.

ARTICLE 7 – SENIORITY

* * * *

7.4 Senior employees shall be given shift assignment preferences.

ARTICLE 8 – WORK SCHEDULING

8.2 Overtime hours include all hours worked in excess of a normal work week as defined in Art. 8.1. Overtime hours shall also include hours in excess of the employee’s regularly scheduled shift or an employee’s regular scheduled days off. However, the City may change an officer’s regularly scheduled hours in a particular work day in order to accommodate training. Such change shall not be considered call in time. The City shall provide the affected officer with 36 hours notice of a change in his/her shift hours to accommodate training.

ARTICLE 22- GRIEVANCE PROCEDURE

* * * *

22.6 Arbitrator’s Authority. The arbitrator shall have no right to amend, modify, nullify, ignore, add to or subtract from the terms and condition of this contract. ...

FACTUAL BACKGROUND

Involved herein are two issues. The first arose when the City scheduled Officer Eric Norsten for his fourth choice shift preference [midnights] and scheduled a less senior officer [Austin Young] for the evening cover shift which Officer Norsten had indicated was his third choice. The second issue arose when Officer Timothy Sigler was not given the days off he requested [Thursday and Friday] and those days off were given to a less senior officer [Jeremy Welsh]. The Employer is a municipal corporation chartered under the laws of the State of Minnesota. As such it is a public employer and provides a variety

of services to the Sauk Rapids community, including police services that are involved herein. The Union represents the full time and part time police officers as described in Article 2 of Collective Bargaining Agreement. Representation of the police officers of the City has changed between Teamsters Local 320 and Law Enforcement Labor Services Local 366 over the years. The Teamsters represented the police officers through December 31, 2010. Effective on January 1, 2011 the police officers were represented by Law Enforcement Labor Services.

The “Seniority” Article found in the 2008-2010 Teamster agreement, the 2011-2012 LELS agreement and the 2013-2015 LELS agreement all contain unchanged language that provides “Senior employees shall be given shift assignment preferences”. The first issue in this case turns on the interpretation and application of that language in relation to the provisions of the Management Rights Article.

The facts in this case are not seriously disputed. The Sauk Rapids Police Department operates with five shifts as follows:

Day Shift	07:00-17:00 Hours
Day Cover Shift	08:00-18:00 Hours
Afternoon Shift	17:00-03:00 Hours
Evening Cover Shift	18:00-04:00 Hours
Midnight Shift	21:00-07:00 Hours

As provided for in Article 7 of the labor agreement officers bid in October on their shift preference for the coming year. It is not disputed that certain shifts have been “pre-assigned”. Specifically, Sergeants have been pre-assigned to the afternoon shift, newly

hired officers are assigned to the afternoon shift, and school resource officers have been assigned hours corresponding to the schools where they work.

In July of 2008 Chief Beise became Chief of the Department. In October he issued a memorandum detailing the shift bidding process for 2009. In that memorandum Chief Beise directed that the two Sergeants in the Department would work the 17:00-03:00 [afternoon] shift. That was done so that the Sergeants would be available to the officers working on all shifts. The Union does not grieve in this case the practice of pre-assigning Sergeants to the afternoon shift.

In April of 2009 the Teamsters Union filed a grievance when the City changed an officer's work hours to accommodate training. That grievance was ultimately resolved by a Memorandum of Agreement [MOA] wherein the City agreed to provide 96 hours of notice of such schedule change and the Teamsters agreed to drop the grievance. The MOA further provided that it would be in effect through the period of the 2009-2010 labor agreement and would not be considered a past practice.

The 2008 bid sheets completed by the officers provided a place for the officer to indicate his/her shift preference and also a place for the officer to indicate his/her preference for days off. Days off were either Monday and Tuesday or Thursday and Friday. The bid sheets that were completed by the officers in 2011 for the shifts to be worked in 2012 eliminated the place for indicating a day off preference. Officers continued to indicate

their preference for days off, however, by noting their preference in the comments section of the form.

In negotiating the 2011-2012 labor agreement LELS proposed language to then Article 7.2 that would have permitted the City to change an officer's regular days off and/or hours in a particular work day for mandated POST Board training, but would have required mutual consent for the City to make schedule changes for non-mandated training. That proposal was rejected by the City, and the language remained unchanged and appeared in Article 8.2 in the 2011-2012 agreement.

In negotiating the 2011-2012 labor contract the parties also agreed to certain definitions found in Article 3 that were not present in the preceding Teamster agreement. Among those definitions was one defining a scheduled shift as follows: "A consecutive work period including rest breaks and a lunch break." That definition continued in place in the 2013-2015 labor agreement.

The bidding process for 2013 began with an October 24, 2012 memorandum from Chief Beise requesting officers to indicate their shift preference. The form, actually the bottom portion of Chief Beise's memo had places for officers to indicate their shift preference, but had no specific place for officers to indicate their day off preference. Some officers indicated a preference for certain days off by writing that preference in the "comments" space. After receiving the officer's preference indications Chief Beise issued a memorandum dated November 8, 2012 [Union 4, City 11] in which he assigned shifts to

the officers. Officer Norsten was assigned the midnight shift, which was his fourth choice. Officer Norsten was senior at the time to only Officer Bosma, who also was assigned midnights, and Officer Young who had just joined the Department in June of 2012. In his assignment memorandum Chief Beise stated that "...while Officer Young is on probation he will be assigned to an evening shift, but at times will fill in for absences of the mid-night officer. After he completes his probation there may be some reassignment and your shift preferences that you submitted will be used for that adjustment." ... At the arbitration hearing Chief Beise testified that Officer Young was assigned to an evening shift for training purposes. Ultimately Officer Young did not satisfactorily pass his probationary period and was released in July 2013. The Union filed the instant grievance on or about November 16, 2012.

The shift bidding for the period from September 2013 through the end of 2014 began with Chief Beise issuing a memorandum dated July 9, 2013. In that memorandum he requested officers to again indicate their shift preference. There was also a place for the officers to indicate what days off they would prefer. The Officers completed the forms and the assignment schedule [Union 7] was developed. For purposes of that schedule Officer Norsten remained senior to only Officer Bosma and Officer Young. Officer Norsten was assigned the evening cover shift, which was his third preference. He continued to work midnights, however, due to the separation of Officer Young which created a vacancy in the Department. The Union does not assert that Officer Norsten continuing to work midnights due to the temporary shortage of staff in the Department constitutes a contract violation.

The parties were not able to resolve the November 16, 2012 grievance, and it was heard in arbitration on November 4, 2013.

POSITION OF THE PARTIES

Position of the Union

It is the position of the Union that the grievance be sustained in its entirety, and an order be entered requiring the Employer to assign patrol shifts according to the seniority of the Patrol Officers, including probationary officers, based on the officers' stated shift preferences for shift and days off. In support of this position the Union offers the following arguments:

The City violates the Collective Bargaining Agreement by unilaterally assigning a probationary patrol officer to a shift in preference over a more senior patrol officer. The language of Article 7.4 provides that "senior employees *shall* be given shift assignment preferences." The language is clear and unequivocal and the "plain meaning rule" of contract interpretation requires that it be given the meaning expressed. The use of the word *shall* makes its implementation mandatory.

The management rights article relied on by the City are general in nature and must be limited by the specific language of Article 7.4 which provides for seniority based shift assignment preferences. Allowing a newly hired patrol officer to bump a senior officer would render the seniority provision of the labor agreement meaningless and ineffective.

It is not necessary to consider past practice when, as here, the language of the contract is clear and unambiguous. Even if past practice is considered it weighs strongly in favor of the Union. For all relevant times prior to the 2012 incident that gave rise to instant dispute, the City assigned patrol shifts based strictly on seniority.

The City violates the Collective Bargaining Agreement by unilaterally assigning patrol officers to shifts without regard for which days of the week those officers have requested to have off. The labor agreement provides no definition of “shift assignment: or “shift assignment preference”. It is ambiguous as to the matter of days off. As such the practice of the parties should govern. Days off were always assigned according to seniority. There is no evidence of any precedent for unilaterally assigning preferred days off to a less senior officer.

Position of the Employer

It is the position of the City that the grievance should be denied. In support of this position they offer the following arguments:

Important management rights are at stake, especially when the restriction of those rights impacts the safety of the community and the efficient operation of the Police Department.

The Management rights clause recites specific rights such as the right to assign employees to scheduled working hours, and to plan, direct and control all operations the Police Department. This includes the right to determine which officer will work which shift, after considering preference.

Even if the Union argues that a right exists in the contract, the failure to exercise that right does not indicate a negative past practice. It does, however, indicate the intent of the parties.

Deciding which officer to assign to a shift is a management right in the exercise of authority and discretion to direct and control the methods of operation of the Department. It has not been unambiguously waived by the City.

Operational and community needs justify management’s right to assign employees in light of their skills, experience, personalities, and personal situations.

The City has consistently considered an officer’s preference, according to his or her seniority, when scheduling. It only deviates from assigning shifts by seniority when scheduling a sergeant or school resource officer (neither of which have ever been grieved), or when training of a new officer is needed.

The days off grievance should be summarily denied. The Collective Bargaining Agreement does not require the City to consider, much less award, employees' preferences for days off. The record is quite clear that the definition of "shift" only includes consecutive hours of work, and does not include days off, for purposes of Article 7. While the City has provided officers the opportunity to express a preference of days off it has not assigned days off strictly by seniority.

As to the shift bidding grievance there are three sources of guidance to determine the parties' contractual intent. First the ordinary standards of contract interpretation; second the concept of past practice; and third the principle of reasonableness.

The City has enjoyed a long standing practice of making certain shifts unavailable to bid on, either because they are pre-assigned to sergeants or because the shift is temporarily unavailable because it is designated for training purposes, and because prior to the present grievance the Union has not grieved the City's practices. The City's interpretation of the Collective Bargaining Agreement as a whole is not a unilateral, subjective understanding, but rather is a reflection of a mutual understanding of how to handle scheduling.

The Arbitrator should interpret the Collective Bargaining to determine that an employee's right to be given shift preference is subject to the City's superior right to schedule employees to accommodate training, supervision, and address community safety.

Past practice is that the Chief has pre-assigned certain shifts to sergeants, school recourse officers and officers in training to meet the needs of the Department before considering officers' shift preferences. In the present case, the initial written agreement is not the best evidence of the parties' contractual intent. Instead, the parties' conduct over the course of the fourteen-plus years that the language has been in effect is a clear expression of their intent.

It is unreasonable to interpret the contract as elevating an employee's shift preference over the Police Department's right to schedule and assign employees to accommodate an officer in training. The City has acted reasonably in that it found the balance between the employer's right to control the methods of operation and assignment of employees and the employee's right to receive the benefit of the bargain reached at the negotiating table. The record shows that most of the time the officers are given the assignments that they request, according to seniority. The only exceptions to that general rule come when a new officer is hired or training for a particular officer is necessary. The City has an operationally related,

non-arbitrary reason for temporarily awarding shifts to a less senior, new employee.

ANALYSIS OF THE EVIDENCE

The facts in this case are not seriously disputed. What is disputed is the interpretation and application of the facts to the controlling language of the collective bargaining agreement.

This dispute presents the classic challenge to management rights by specific contract language agreed to by the parties. In undertaking an analysis of the evidence in this case this Arbitrator is mindful of the restrictions on his authority imposed by Article 22.6. That Article makes it clear that the parties require that the Arbitrator not “amend, nullify, ignore, add to or subtract from the terms and conditions” of the contract. Such a restriction appears in most labor agreements, and appropriately limits an arbitrator from imposing his or her own sense of “industrial justice”. The foundation of such a restriction is the reasonable expectation that the parties have carefully crafted each word and phrase in the contract and have given full consideration of the implications of the terms they have agreed to. It is not reasonable to believe the parties placed terms into their binding agreement that they would later simply ignore or give a meaning that is other than what the words would compel. The limitation on an arbitrator’s authority may require an interpretation that one side of a dispute strongly disagrees with. That could be the case here. Having said that, however, if the terms of a labor agreement are clear and unambiguous they must be given their “plain meaning”. If it is necessary to give some

other meaning to the terms of an agreement, the place to achieve such clarification is at the negotiating table.

This dispute presents two issues. The first involves how an officer's seniority enters into the assignment of shift hours. The second involves how an officer's seniority enters into the days off he is assigned. The City points to the Management Rights Article in support of its position that it has the right to assign shifts to officers in a manner that it believes enhances community safety and promotes training of a newly hired officer. The Union points to the language of Article 7.4 that unequivocally provides that "Senior employees shall be given shift assignment preferences".

The City's reliance on the Management Rights Article was carefully examined. Clearly, some discretion can be granted to a public employer that is charged with the responsibility for the safety of the community. That discretion is limited however, when the parties, as here, have provided the clear language of Article 7.4 that provides senior employees with shift assignment preferences. It is reasonable to believe that the parties fully considered the safety of the community when they agreed to that language.

In particular this case involves denial of a senior officer his shift preference in order to assign a newly hired junior officer to a shift for training purposes. In making the argument that it has a right to reserve a shift for a junior officer for training purposes, in the face of the clear language of Article 7.4, the City is burdened to show that such

training was possible only on the reserved shift. Sufficient evidence was not presented to convince a reasonable person of the City's argument.

It is noted that the City had previously pre-assigned the Sergeants to the afternoon shift and the School Resource Officer to a shift that would correspond to the schedule of the schools he was assigned to. Those pre-assignments were not grieved by the Union. Perhaps more fundamentally, providing supervisory coverage to all shifts is a viable reason for having Sergeants work the afternoon shift. Similarly, having the School Resource Officer work the hours that the school is open is basic to performing the duties of that position. Such justification is not found, however, in the case of a junior officer being assigned to a shift for which a senior officer had expressed a preference. The reasoning behind the Sergeants and School Resource Officer being assigned the shifts they were does not easily transfer to the case of a newly hired officer being assigned a shift for training purposes.

It is noted that Article 8.2 of the labor agreement provides for changing an officer's regularly scheduled hours in order to accommodate training. Clearly, if a junior officer was assigned to work midnights his hours could be changed for a short period to accommodate training. In doing so, it is recognized that a more senior officer may have to have his hours changed as well in order to cover for the junior officer who is in training for a short period. What the City seeks here, however, is to assign a junior officer to the evening cover shift for an indefinite time for training purposes that are not adequately defined. The clear and compelling language of Article 7.4 does not permit that.

It is well established that general rights reserved to an employer in a management rights article are limited by the specific provisions of other articles in a labor agreement. That is the case here. The specific language of Article 7.4 providing that senior employees shall be given shift assignment preferences effectively trumps the more general terms of the Management Rights Article. It is important to note that the language in Article 7.4 uses the mandatory word “shall” in providing shift assignment preferences to senior employees. In using that term it is reasonable to believe that the parties understood its impact. The language they settled on did not provide for simply considering seniority in assigning shifts, but instead mandated that preferences be honored based on seniority. If that is not their intent at the present time, the language would need to be changed at the bargaining table.

As to the second issue presented in this dispute, that of assignment of days off, a quite different picture is revealed when considering the evidence. While the shift assignment issue is supported with clear contract language, the days off issue is not. The Union argues here that “days off” are an inseparable part of a work shift. The language of the labor agreement does not support that position. To the contrary, the parties have defined a work shift at Article 3 as “a consecutive work period including rest breaks and a lunch break”. There is nothing in that definition to suggest that “days off” could reasonably be considered a part of a work shift. Accordingly, the issue of “days off” is entirely separate from that of shift assignments. Importantly, there is no language found in the labor agreement that would grant an officer preference for days off based on his or her seniority. The reservation of rights found in Article 4 mandates that assignment of days

off is at the discretion of the City. Should the parties desire to somehow tie seniority to preference for days off the place to do that is at the negotiating table. To grant the Union's position on the "days off" issue would require the Arbitrator to modify the terms of the labor agreement. He lacks the power to do that.

For all the above cited reasons, the first issue must be sustained and the second issue must be denied.

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Award Dated: January 17, 2014

Based on the evidence and testimony taken into the record in this case, the grievance is sustained in part and denied in part. The City is directed to assign patrol shifts based on an officer's stated shift preferences according to his/her seniority. Shift preferences and assignments under this order are to include non-probationary and probationary officers. The City did not violate the Collective Bargaining Agreement by unilaterally assigning patrol officers to certain days off without regard to their seniority and the days off that they requested. The days off issue is denied.

January 17, 2014
Dated: _____

James L. Reynolds

James L Reynolds
Arbitrator