

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 VILLAGE OF MENOMONEE FALLS : Case 48
 : No. 48705
 and : MA-7684
 :
 MENOMONEE FALLS POLICE ASSOCIATION, INC.:
 :

Appearances:

Mr. Patrick J. Coraggio, Labor Consultant, Labor Association of Wisconsin, Inc., appearing on behalf of the Union.
 Quarles & Brady, Attorneys at Law, by Mr. David E. Jarvis, appearing on behalf of the Employer.

ARBITRATION AWARD

The Labor Association of Wisconsin, Inc., herein the Union, pursuant to the terms of its collective bargaining agreement with the Village of Menomonee Falls, herein the Employer, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and decide a dispute between the parties. The Employer concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Menomonee Falls, Wisconsin, on April 29, 1993. A stenographic transcript was made of the hearing. The parties completed the filing of post-hearing written briefs on July 14, 1993.

ISSUES:

The parties were unable to stipulate to the wording of the issues and agreed that the undersigned would frame the issues in his award.

The Union stated the issues as follows:

Did the Chief of Police violate the expressed and implied terms of the collective bargaining agreement by not assigning the grievant to the traffic unit? If so, what is the appropriate remedy?

The Employer stated the issues as follows:

Did the Employer violate the collective bargaining agreement by not assigning the grievant to the traffic unit? If so, what is the appropriate remedy?

The undersigned believes the following to be an accurate statement of the issues:

Did the Employer violate the collective bargaining agreement by not assigning the grievant to the traffic unit? If so, what is the appropriate remedy?

BACKGROUND:

The instant grievance arose in the Employer's Police Department. For a number of years the Employer had operated a traffic unit, which unit was disbanded in 1986. In 1991 the Chief of Police reestablished the traffic unit, primarily to focus on traffic enforcement problems. Because the Village Board had not authorized additional personnel for the Police Department, the traffic unit had to be staffed by existing personnel. A sergeant, an accident investigator and a patrol officer were assigned to the traffic unit. To avoid bumping an officer from the day shift to another shift, the Chief announced the vacancy to the day shift employees in the patrol bureau. Gerald Guetzke was the only officer who expressed an interest in the position. Guetzke was the junior officer on the day shift at the time. The Chief testified that he selected Guetzke for the position because he felt Guetzke was qualified to do the job. If Guetzke had not moved to the traffic unit, he would have been assigned to a different shift to replace the officer who did move to the traffic unit.

In 1992 there was a vacancy for a patrol officer in the traffic unit due to the reallocation of a position to that unit. The vacancy was posted on October 19, 1992. The posting read as follows:

In 1993, an additional Patrol Officer will be assigned to the Traffic Unit. This assignment will work varied hours with initial plan being a 10:45 am to 7:00 pm; 5-2, 4-2 work schedule.

Consideration for assignment to this position will be given to interested officers who show an aptitude and interest in traffic related enforcement and have prior traffic related training. Seniority will be considered when evaluating interested officers who show a similar aptitude and history of traffic enforcement activity or training.

Submit your interest by Special Report to Lt. Hansen via the chain of command no later than October 28, 1992.

At least eight officers applied for the vacancy. The five most senior applicants and their seniority dates were as follows: Arthur Lunde 2-14-72, Dennis Moran 11-26-79, Rodney Nap 1-21-80, Georgene Srsen 8-13-84, and Timothy Schwabenlander 5-19-86. The applicants were reviewed by a newly established selection panel consisting of Captain Jack Pitrof and Lieutenant Terry Hansen.

The panel examined the six month evaluations of the past three years and the written training history for each applicant, except that an additional year of evaluations were included for the grievant since he had been assigned outside of the department for one year during the three year period. The panel concluded that Lunde and Moran were equally qualified and were more qualified than the other applicants. Lunde was more senior than Moran and was offered the position. When Lunde refused the position, the position was offered to Moran, who also refused. The panel considered Schwabenlander to be the next most qualified applicant and he was offered the position, even though he had less seniority than either Nap or Srsen. Schwabenlander accepted the position.

Schwabenlander was scheduled to start working in the traffic unit on January 1, 1993, however, because of an injury to Daniel Olson, Schwabenlander was temporarily assigned to the day shift in the patrol bureau where he worked until early February.

POSITION OF THE UNION:

The Union argues that the language of the contract is clear and unambiguous in requiring that shifts which are regularly assigned on an annual basis must be filled on the basis of seniority. Additionally, the past practice clearly demonstrates that seniority has been observed in the past when the Employer selected a person from the patrol division to focus on traffic enforcement.

Even if the language is ambiguous, the intent of the parties, when the language was added to the 1991 contract, was to provide for patrol officers to bid by seniority on any shifts. The Union articulated said intent to the Employer on several occasions during face-to-face negotiations. There is no doubt the Employer was aware of the Union's position that seniority was to be used for selecting shifts, whether a new shift or an existing shift.

Traffic enforcement is a part of the normal duties of a patrol officer. Officers from the traffic unit are utilized for normal patrol duties, e.g., investigating complaints and burglaries and responding to alarms, and often work side by side with officers assigned to the patrol bureau. Clearly, the traffic unit is a part of the patrol bureau, rather than a new bureau or work unit.

Even if skill and ability are to be used for selecting the person to fill the new traffic position, the grievant should have received the assignment.

POSITION OF THE EMPLOYER:

The contract does not support the grievance. The selection of Schwabenlander to fill the vacancy in the traffic unit was neither an assignment to a shift nor an assignment of working hours, which are the only two situations described in Section 20.04 of the contract. Thus, the Chief was not bound to follow seniority in filling the traffic vacancy.

A shift is a conventional patrol bureau work unit within the meaning of Section 20.04. The shift concept only applies within the patrol bureau. There are four shifts worked by the officers in the patrol bureau. The shift concept does not apply to the traffic unit. The traffic officers are not assigned to any of the established shifts and their hours of work are not referred to as a shift.

More importantly, Section 20.04 does not apply to the initial assignment of an officer to the work unit. Rather, that language applies to individuals who are already in the work unit when those individuals are assigned to working hours within that unit.

While all patrol bureau officers are responsible for traffic enforcement, the traffic unit has specialized functions which are not performed by employes outside that unit. Also, the officers in the traffic unit have specialized technical skills related to traffic accident investigation. The Union is incorrect in claiming that there is no difference between the duties of the traffic unit and the duties of the other patrol bureau units.

During negotiations for the 1990-91 contract, the Union proposed precisely the language it seeks to have applied in this case. The Employer rejected that language in negotiations. Thus, the Union is seeking to achieve through this arbitration a result which it was unable to achieve in bargaining.

Evidence regarding past practice supports the position of the Employer. The Chief's uncontradicted testimony was that, since his appointment, he has

routinely selected officers to fill non-premium pay vacancies without regard to seniority.

Finally, Schwabenlander was more qualified and had more training than did the grievant.

DISCUSSION:

Contrary to the Union's assertion, the language of Section 20.04 of the contract is not clear and unambiguous. Said language can be interpreted in support of either party's position in this case. Although the first paragraph initially appears to be fairly straight forward, as the Union argues, upon further reflection, the language fails to meet the test of having only one possible interpretation. For example, the paragraph does not distinguish between different work units, such as the patrol bureau and the investigative services bureau, in providing for shift selection by seniority. Arguably, an employe could select a shift in either of those bureaus by seniority, if qualified to perform the duties in either bureau. In fact, the language does not even restrict the selection by seniority to qualified employes. Apparently, based on the arguments of the parties, they assume and operate on the assumption that such a restriction exists, even though the restriction is not stated.

Moreover, there would seem to be no reason for the existence of the second paragraph in Section 20.04 unless the parties had anticipated a need to modify the first paragraph because there would be other work units in addition to the patrol bureau. Thus, the traffic unit would appear to be covered by the second

paragraph as a separate work unit, unless the Union is right in asserting that the traffic unit is simply another shift in the traffic bureau, rather than a real work unit.

The record fails to support a finding that the traffic unit is simply another shift with different hours within the patrol bureau. Even though there are overlaps in the activities performed by the traffic unit and the patrol bureau, it is clear that the traffic unit is structured to provide a more intensive and specialized focus on the function of traffic law enforcement than the regular shifts in the patrol bureau are able to provide.

During the negotiations culminating in the 1990-91 contract, the Union may have expressed its belief that the language of Section 20.04 required all shifts to be assigned on a seniority basis. However, there is no evidence to show that the parties ever discussed the relationship of Section 20.04 to the traffic unit, which is not unusual, since the traffic unit was not reestablished until 1991. Further, the second paragraph of Section 20.04 was not included in the Union's final offer for the 1990-91 contract. The Union fails to persuade the undersigned that said language was not designed to cover potential situations such as the traffic unit.

Since Guetzke was the only interested officer in 1991, his assignment to the traffic unit does not establish a past practice of those assignments being based on seniority.

There is nothing in the record to indicate that the selection panel failed to adequately consider the training and qualifications of Nap in comparing him to the other applicants for the position in the traffic unit. The decision to judge Schwabenlander to be more qualified than Nap was not unreasonable in view of their respective training records and performance evaluations.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the Employer did not violate the collective bargaining agreement by not assigning the grievant, Rodney Nap, to the traffic unit; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin this 1st day of October, 1993.

By Douglas V. Knudson /s/

Douglas V. Knudson, Arbitrator