

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 : Case 67
 CITY OF ASHLAND : No. 50789
 : MA-8381
 and :
 :
 ASHLAND PROFESSIONAL POLICE OFFICERS' :
 ASSOCIATION, WPPA/LEER, LOCAL 209 :
 :

Appearances:

Mr. Gary Gravesen, Bargaining Consultant, Wisconsin Professional Police Association,
Mr. Scott W. Clark, City Attorney, City of Ashland, City Hall, 214 West Main Street,

ARBITRATION AWARD

The City of Ashland, hereinafter referred to as the City, and the Ashland Professional Police Officers' Association, WPPA/LEER, Local 209, hereinafter referred to as the Association, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for Arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over seniority. Hearing on the matter was held in Ashland, Wisconsin on June 29, 1994. Post hearing written arguments were received by the Arbitrator by August 11, 1994. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE:

During the course of the hearing the parties agreed upon the following issue:

"What is the appropriate seniority date for the purpose of selecting vacation?"

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 1 - RECOGNITION & UNIT OF REPRESENTATION

1.01 The employer recognizes the Association as the exclusive collective bargaining representative for all law enforcement personnel employed in the City of Ashland, excluding the Chief and all other employees, for the purpose of conferences and negotiations with the above named municipal employer, or its lawfully authorized representatives, on questions of wages, hours, and conditions of employment and the adjustment of complaints and grievances of the employees.

. . .

ARTICLE 8 - PROBATIONARY & EMPLOYMENT STATUS

8.01 All newly hired employees shall be required to take the basic police training course during the first year of service. All newly hired employees shall be considered probationary for the first twelve (12) months of their employment with the Employer. Such probationary employees may be disciplined or discharged

without recourse to the grievance procedure contained in this Agreement. Satisfactory completion of probation shall be certified by the Police and Fire Commission.

8.02 The seniority of the employee who has satisfactorily completed probation shall date from his/her original date of employment, and he/she shall be entitled to all benefits accruing to regular employees. Hospitalization insurance coverage is available to employees on the first (1st) day of the month following completion of sixty (60) days of employment, or in accordance with the current hospitalization contract.

ARTICLE 9 - SENIORITY

9.01 It shall be the policy of the Employer to recognize seniority. Seniority shall consist of the total calendar time elapsed since the date of original employment, provided, however, that no time prior to a discharge for cause or quit shall be included, and provided that seniority shall not be diminished by temporary layoff or leaves of absence or contingencies beyond the control of the parties to this Agreement.

9.02 A seniority list shall be delivered to the president of the Association between the first and tenth day of each year.

ARTICLE 10 - LAYOFF, HIRING

10.01 Whenever it becomes necessary to layoff employees, employees shall be laid off in inverse order of their seniority and whenever so laid-off shall possess re-employment rights as hereinafter defined.

. . .

ARTICLE 11 - JOB POSTING AND TRANSFERS

- C. Seniority for those applicants being considered will be determined by their number of full years of service to the City of Ashland Police Department. Each full year will constitute one (1) seniority point.

. . .

ARTICLE 12 - GRIEVANCE PROCEDURE

12.01 The arbitrator shall neither add to, delete from, nor modify the express terms or conditions of the Agreement in either procedure contained herein.

. . .

ARTICLE 15 - VACATIONS

15.01 The vacation policy for the Ashland City Police Department is as follows:

Twelve (12) working days of paid vacation for one (1) year of service;

Fifteen (15) working days of paid vacation for six (6) years of service;

One additional working day of vacation for each additional year of service up to a maximum of twenty-five (25) days at sixteen (16) years;

Starting with the twentieth (20) year of service, one additional vacation day per year shall be granted to a maximum of twenty-eight (28) working days of vacation at twenty-two (22) years.

15.02 Vacation time for the 1st and 6th year of service shall be pro-rated so as to keep all employees on a January 1st basis and ease administration of the vacation schedule.

15.03 The selection of vacation periods shall be according to seniority rights and employees will be allowed to take split vacations, for any vacation time over fifteen (15) calendar days only.

BACKGROUND:

Amongst its various governmental functions the City operates a Police Department. Employees of the Police Department are represented by two different Unions. Employees with the power of arrest have been represented by the Association since January 1, 1992. All other represented employees in the City's Police Department are represented by the American Federation of State,

County and Municipal Employees (AFSCME) which, prior to January 1, 1992, had also represented the employes with powers of arrest. The instant matter arose when Officer Joseph Belany, who had been hired by the City as a Police Officer on January 15, 1993, filed a grievance over the selection of vacation. Belany alleged that the Chief of Police had violated the collective bargaining agreement when he allowed an Officer with less bargaining unit seniority, Officer Michelle Tudor, to select vacation prior to him. Tudor, who had been hired by the City as a civilian dispatcher in the Police Department on August 25, 1990, was hired by the City as a Police Officer on November 11, 1993.

The record also demonstrates that a similar question was raised by AFSCME when it had represented the employes with powers of arrest. The seniority language in the AFSCME collective bargaining agreement with the City was identical to the seniority provision in the Association's collective bargaining agreement with the City. A dispute arose when a non-bargaining unit employe who had been hired by the City on June 1, 1950, a chief of police was hired as a bargaining unit employe on August 22, 1980. AFSCME challenged the City's actions of providing the employe with a June 1, 1950 seniority date. The matter was processed to arbitration and on June 8, 1981 Arbitrator Peter G. Davis held as follows:

"Given the clear and unambiguous reference to 'date of original employment', it must be concluded that the parties intended to grant seniority rights from the employe's initial date of hire without reference to the date on which the employe entered the bargaining unit." 1/

ASSOCIATION'S POSITION:

The Association contends seniority is a relationship between employes in the same seniority unit rather than a relationship between jobs. The Association argues seniority protects and secures an employe's rights in relation to the rights of other employes in their seniority group. It does not protect the employe in relation to the existence of the job itself. By use of the objective measure, length of service, the rights of one employe are balanced against the rights of other employes. The Association argues its position is supported by the collective bargaining agreement, Wisconsin Statutes, and the testimony of Chief of Police Gordon Gilbertson.

The Association argues Article 9 states seniority shall consist of the total calendar time since the date of original employment and that Article 29 states the civilian dispatchers shall not have any police powers. The Association points out that Wisconsin Statutes 62.13 [5m{a}] et. seq. is clear when it states in part, "... thereafter subordinates, if any, shall be dismissed in the order of shortest length of service in the department,...". The Association also points out Article 1 excludes the Chief and all other employes from the terms and conditions of the collective bargaining agreement.

The Association points out Chief Gilbertson testified that during Officer Tudor's tenure as a civilian dispatcher she did not have any powers of arrest nor was she a protective participant in the Wisconsin Retirement Fund. Further, that if he was required by the City to lay off a sworn officer that sworn officer would be Officer Tudor. The Association concludes this testimony supports its position that the City by its actions violated the collective

1/ Employer Exhibit No. 1.

bargaining agreement.

The Association also contends the City's assertion that there is a past practice and the City's reliance on the June 8, 1981 Arbitration Award is distinguishable from the instant matter. The Association points out the employe involved in the 1981 case had been a Chief of Police with the powers of arrest. While in the instant matter a civilian dispatcher did not have such powers. Further, that Chief Gilbertson testified he used bargaining unit seniority, the date started as a police officer, to determine points on promotional exams.

The Association also contends an individual cannot be credited generally with seniority for any service performed prior to entry into the bargaining unit. The Association argues that when Tudor entered the bargaining unit her seniority in her new bargaining unit placed her at the bottom. The Association also acknowledges that Tudor will accrue vacation and longevity credits back to her date of hire as a civilian dispatcher.

The Association does not dispute the City contention that the City has for several years allowed employes to exercise their vacation selection on the basis of original employment. However, the Association asserts that the instant matter is the first time an employe crossed bargaining unit lines, civilian to sworn officer, and there has been an impact on seniority dates. As there was no prior instance similar to the instant matter the Association concludes there is no past practice to support the City's position.

The Association concludes that the City can not turn seniority off and on. Being a creature of the collective bargaining agreement it must be consistently applied. The Association contends the City has unilaterally concluded that as Officer Tudor has prior service outside of the police officer's collective bargaining unit she should be allowed to select vacation in front of police officers who have greater bargaining unit seniority.

The Association would have the Arbitrator find that selection of vacation be by the police officer's date of hire as a sworn police officer.

CITY'S POSITION:

The City contends the sole issue in the instant matter is what is the appropriate seniority date for the purpose of selecting vacation. The City argues seniority is clearly defined by Article 9 of the collective bargaining agreement. The City also stresses the matter had already been a subject of an arbitration and that in the 1981 arbitration award the arbitrator concluded the employe's original date of hire was the employe's seniority date. The City contends it has followed this precedent in establishing seniority for vacation selection. The City acknowledges that Tudor was originally hired by the City as a civilian dispatcher in the Police Department. However, the City asserts original date of hire has been regularly used for vacation selection for many years. The City concludes the seniority provision, as interpreted in the previous arbitration award, together with the parties past practice, compels dismissal of the grievance. Further, that Tudor's seniority date for vacation selection should be her original date of hire, August 25, 1990.

DISCUSSION:

The phrase "date of original employment" in Article 9 of the parties' collective bargaining agreement has been construed as date of original employment with the City since at least 1981. There is no evidence that the language of the seniority provision has changed since that interpretation was rendered. Herein the Association does not dispute that "date of original

employment" with the City should be used for the accrual of vacation and longevity benefits but contends that vacation selection should be by seniority dating with entry into the bargaining unit. A careful review of Article 15, Vacations, demonstrates that a two tier seniority system for vacations is not identified in this provision. Vacation is accrued by years of service and scheduling is determined by seniority rights. The additions of the phrases years of service "to the City" and seniority rights "in the bargaining unit" would be necessary to reach the conclusion sought by the Association. Article 12.04 clearly directs the Arbitrator not to add to the terms of the agreement.

The Association's reliance on the Wisconsin Statutes would have some merit in the instant matter had it involved a layoff or had the matter not been previously addressed by an arbitrator. There is nothing in the statute cited by the Association which bars the parties from developing a seniority provision for the purposes of scheduling vacation which takes into consideration all of an employee's years of service with an employer, whether the years be as sworn officer or as non-sworn officer. Further, the Association's reliance on Chief Gilbertson's testimony concerning promotions is also without merit. Article 11.02, paragraph C., clearly defines seniority for purposes of promotions as years of service with the City's Police Department. This provision clearly establishes a separate date for seniority for promotional purposes.

The 1981 Arbitration Award clearly defined original date of hire as date of hire by the City and not entry into the bargaining unit. There is no evidence that the City has provided benefits to bargaining unit employees based on any factor other than their original date of hire. Had the parties desired a two tier seniority system for vacation purposes they clearly have had the opportunity, as in the promotion provision, to establish such a system.

Therefore, based upon the above and foregoing, and the testimony, evidence and arguments presented the Undersigned concludes the City did not violate the collective bargaining agreement when it established Tutor's seniority date as her original date of employment with the City, August 25, 1990 and allowed her to use this seniority date for vacation selection. The grievance is therefore denied.

AWARD

The appropriate seniority date for vacation selection is original date of hire by the City.

Dated at Madison, Wisconsin this 21st day of November, 1994.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator