

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF WAUKESHA

and

WAUKESHA PROFESSIONAL POLICE ASSOCIATION

Case 144

No. 60267

MA-11567

(Beglinger Grievance)

Appearances:

Mr. Steven J. Urso, Wisconsin Professional Police Association, Law Enforcement Employee Relations Division, 340 Coyier Lane, Madison, Wisconsin 53713, appeared on behalf of the Association

Mr. Vincent D. Moschella, Assistant City Attorney, City of Waukesha, 201 Delafield Street, Waukesha, Wisconsin 53188-3633, appeared on behalf of the City.

ARBITRATION AWARD

On August 23, 2001, the Wisconsin Professional Police Association and the City of Waukesha filed a request with the Wisconsin Employment Relations Commission requesting the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. A hearing was conducted on December 14, 2001, in Waukesha, Wisconsin. A transcript of the proceedings was made and distributed on December 26, 2001. Post-hearing briefs and reply briefs were submitted and exchanged by March 25, 2002.

This Award addresses the appropriate rate of pay for Officer William Beglinger.

BACKGROUND AND FACTS

William Beglinger, the grievant, has been employed as a Police Officer by the Waukesha Police Department since 1981. His rank is Patrol Officer, though he has held a number of assignments throughout his tenure with the Department. For a portion of 1992 Beglinger was assigned to the Crime Prevention Bureau. In January of 1998 Beglinger was again assigned to the Crime Prevention Bureau for that calendar year. That assignment was repeated in calendar 1999, and again in calendar 2000. Beglinger remained a Patrol Officer, but was considered to be an acting detective, was paid at the Detective rate of pay, and progressed on the Detective pay scale while assigned to the Crime Prevention Bureau. Beglinger signed to work in the Crime Prevention Bureau in 2001, but was denied that assignment and placed in the D.A.R.E. program in 2001. Under the terms of the parties collective bargaining agreement the assignment to the Crime Prevention Bureau is a temporary assignment. Despite the fact that Beglinger was assigned to the Crime Prevention Bureau for three successive years he was never formally promoted to Detective. Upon his assignment to the D.A.R.E. program, Beglinger suffered a reduction in pay. He caused this grievance to be filed alleging that the reduction in pay violates the collective bargaining agreement.

The Waukesha Police Department posts and fills shifts and temporary assignments on an annual basis. The process by which slots are announced and filled begins in August of the year preceding the year for which shifts are posted. The Department posts shifts and temporary assignments for the upcoming year, and allows for a period of time for bargaining unit members to sign for the various openings. Each bargaining unit member is allowed to indicate his/her preference for the work. Shift assignments and temporary assignments are announced together, are subject to a common application timeline, and are filled simultaneously. The Memorandum announcing the 1998 Shift/Bureau and Temporary Assignments included the following:

...The temporary assignments for 1998 will include positions in the Criminal Investigative Division and the Crime Prevention Bureau. Each of these temporary assignments are intended to be one year in duration unless circumstances dictate otherwise....

The Memorandum announcing the assignments for 1999 indicated; “The Crime Prevention Bureau position is being extended for an additional year while a review and reevaluation of the position is undertaken.”

The Memorandum announcing the assignments for 2000 provides as follows:

CRIME PREVENTION BUREAU POSITION

In the best interests of the Department and to meet the overall needs of the Department, The Crime Prevention Bureau position will be designated as an indefinite assignment made by the Chief of Police. All current parameters pertaining to the position will remain intact. Continued assignment to this position will be based upon the officer's personal preference, level of performance, and continued funding.

By late 1999, the City had invested heavily in Beglinger's training in the Crime Prevention Bureau position and felt Beglinger was doing a good job. Grant funding for the position was also set to expire and the City was concerned about training another individual for the job, only to have it discontinued. However, a grievance was filed, contesting the right of the Department to set an indefinite time frame for the temporary assignment. That grievance was resolved in August of 2000, on the following basis:

SETTLEMENT AGREEMENT

The Waukesha Professional Police Association and the City of Waukesha agree as follows:

1. Temporary assignments in the Crime Prevention Bureau made pursuant to Article 22 of the Collective Bargaining Agreement ordinarily will be for one (1) year.
2. At the Chief's discretion, such an appointment may be for an additional one (1) year Period.
3. Any extension beyond two (2) years shall be determined on a case-by-case basis and Would require the Department to meet and confer with the Association.
4. Grievance 99-375 is withdrawn with prejudice.
5. Any cancellation fees of the arbitrator shall be divided equally between the Department and the Association.

The parties subsequently modified certain provisions of the collective bargaining agreement to address the duration of temporary assignments. Those changes are set forth below.

ISSUE

The parties did not stipulate to an issue.

The Association views the issue to be:

Did the City violate Articles 3, 16 and 22 of the Collective Bargaining Agreement when it reduced the rate of pay of Officer Beglinger? If so, what is the appropriate remedy?

The City regards the issue presented to be:

Pursuant to the contract, what is the proper rate of pay for Officer William Beglinger for 2001?

I agree with the Association's statement of the issue.

**RELEVANT PROVISIONS OF THE 1998-2000
COLLECTIVE BARGAINING AGREEMENT**

3.05 Dare/Crime Prevention.

A. Officers assigned to the Crime Prevention Unit will work a 5-2 work week, have regular duty hours and are not required to report fifteen (15) minutes prior to the start of the shift.

B. Officers assigned to the Crime Prevention Unit in instructional roles will have duty hours consistent with the regular school year schedule (e.g., 8:00 a.m. to 4:00 p.m.).

C. Holidays shall be scheduled in accordance with Article 6.06(B), with vacations scheduled according to Article 6.05 of this Labor Agreement.

D. When scheduling conflicts arise, only certified Dare Instructors will be utilized to fill temporary vacant positions until the return of the original Dare Instructor.

E. Duty hours outside the regular school year will be Tuesday through Saturday, 8:00 a.m. to 4:00 p.m., unless mutually agreed.

...

ARTICLE 22 – Out of Classification Assignments

22.01 Any officer assigned to the Detective Bureau as acting detective for a period of at least six (6) months who there performs the duties of a detective shall be compensated at the detective's starting salary level for a period of time assigned to perform those duties. Employees filling acting assignments which last beyond a one year period will automatically progress through the salary schedule.

RELEVANT PROVISIONS OF THE 2001–2003 COLLECTIVE BARGAINING AGREEMENT

3.05 Dare/Crime Prevention.

A. Officers assigned to the Community Policing Unit (C.P.U.), Crime Prevention Unit (C.P.), the D.A.R.E. Program, and the School Resources Officer (S.R.O.) shall have those hours as described in Article 3.03 of this Labor Agreement.

B. Officers assigned in instructional roles will have duty hours consistent with the regular school year.

C. Vacations and holidays shall be scheduled in accordance with Article 6.05 and 6.06(B), with vacations scheduled according to Article 6.05 of this Labor Agreement.

1) The individual officer's hire date shall determine the seniority selection order for officers assigned to the C.P.U., C.P., D.A.R.E., and S.R.O.

2) No more than two (2) officers assigned to the C.P.U., C.P., D.A.R.E., or S./R.O. may be on vacation at the same time.

D. Officers assigned to the C.P.U., C.P., D.A.R.E., and the S.R.O. Program, shall be compensated, in accordance with the terms of this Labor Agreement, as a uniformed acting specialist during the length of their assignment.

E. The duty hours and work week of those assigned to instructional roles, outside of the regular school year will be Tuesday through Saturday, 8:00 a.m. to 4:00 p.m.

F. When scheduling conflicts arise, only certified D.A.R.E. or S.R.O. officers will be utilized to fill temporary vacant positions until the return of the primarily assigned officer.

G. Assignments to the C.P.U., C.P., D.A.R.E., and the S.R.O. Program, shall be made by the Chief of Police from interested and qualified officers regardless of specific shift assignment.

H. Assignments to the C.P.U., C.P., D.A.R.E., and the S.R.O. Program, shall be for the following periods of time unless circumstances dictate otherwise, such as personal reasons or lack of performance:

- 1) C.P.U. for two (2) years.
- 2) C.P. for two (2) years.
- 3) D.A.R.E. for two (2) years.
- 4) S.R.O. for three (3) years.
- 5) C.P.U., S.R.O., D.A.R.E., and C.P. are not available for minimum staffing or special event overtime in the uniform division.
- 6) Following the completion of any of these assignments, an officer may not serve in any of these assignments for a period of one (1) year, unless another qualified officer is not available to be assigned to the vacated position – in such case, the Chief may extend an officer's assignment for one (1) additional term.

I. The officers currently assigned, or officers to be assigned to the C.P.U., C.P., D.A.R.E., and the S.R.O. Program, will remain in their current assignments and will be compensated in accordance with 3.05, D upon the effective date of this Labor Agreement.

J. An assignment to the C.P.U., C.P., D.A.R.E., and the S.R.O. Program, is a uniformed patrol position requiring additional training and responsibilities but does not relieve the officer, even though compensation is at a higher rate, of any job related responsibilities specifically related to patrol officers in general.

...

ARTICLE 16 – Rights of Employer

16.01 It is agreed that the rights, functions and authority to manage all operations and functions are vested in the Employer and include, but are not limited to, the following:

...

B. To manage and otherwise supervise all employees in the bargaining unit.

C. To hire, promote, transfer, assign and retain employees and to suspend, demote, dismiss or take other disciplinary action against employees for just cause.

1) During a department investigation the Administration shall assign a Supervisor, who has not been a direct witness to the event, to conduct the investigation.

...

F. To determine the methods, means and personnel by which such operations are to be conducted.

...

ARTICLE 22 – Out of Classification Assignments

22.01 Any officer assigned to the Detective Bureau as an acting detective for a period of at least six (6) months who there performs the duties of a detective shall be compensated at the detective's starting salary level for a period of time assigned to perform those duties. Employees filling acting assignments which last beyond a one year period will automatically progress through the salary schedule.

22.02 Out of Classification Assignment Pay. An employee temporarily assigned to a higher classification who works eight (8) consecutive hours shall receive the lowest rate of pay in that assigned higher classification.

Out of Classification Assignment Pay would not include those times when an employee is temporarily assisting an employee in that higher classification.

It is understood that temporary out of classification assignments are at the discretion of the Chief of Police or his designee.

POSITIONS OF THE PARTIES

The Association contends that the City violated the parties collective bargaining agreement when it reduced officer Beglinger's rate of pay after three years continuous service at the higher rate of pay. The Association asserts that the right of the City to unilaterally adjust the wages to be paid for the type of work performed does not appear in the collective bargaining agreement. To the contrary, the contract specifies that wages are set in consideration of rank and in consideration of the work week. The Association believes that Officer Beglinger was removed from the Crime Prevention position without consideration for the economic impact it would have on him and without apparent regard for the expertise, skills and traits of successful performance he had demonstrated over a continuous 36 month period.

It is the view of the Association that the City's contention that Officer Beglinger's assignment was only temporary should not be the basis for determining his current rate of pay. The Association argues that the continuous assignment of Officer Beglinger to Crime Prevention for a three year period constitutes the *de facto* creation of a permanent wage rate for him. The Association takes this position based upon the belief that by continuously reassigning Officer Beglinger over a three year period to the same job, the City moved him beyond temporary status and cannot reduce his rate of pay without cause.

The Association cites *Black's Law Dictionary* for a definition of temporary as "that which is to last for a limited time only, as distinguished from that which is perpetual, or indefinite, in its duration." The Association contends that a three year term of assignment is not a limited time. For the year 2000, the assignment to the Crime Bureau was initially posted as indefinite. That designation prompted a grievance, which was subsequently resolved. The City made no attempt to reduce Beglinger's pay following the grievance settlement, nor to apply the settlement terms to Beglinger. The Association argues that the City has waived its right to do so.

It is the view of the Association that over the passage of time Beglinger had come to rely upon his pay status, and to have a reasonable expectation that it would continue, and not be reduced. The City relied upon his skills throughout the period.

The Association contends that nothing in the grievance settlement addresses the appropriate rate of pay for Beglinger. The grievance resolution addresses the right of the Chief to extend indefinitely a voluntary assignment.

The City contends that there is no language in the contract or Departmental policy that supports the grievant's claim. To the contrary, the City contends that the language of the contract and Department policy directly contradicts Beglinger's claim. The City has promulgated Rule 25 which makes the duration of a temporary assignment a matter of discretion of the Chief. Each memo leading to an assignment for Beglinger makes clear the fact that the assignment would be temporary. The City also cites *Dictionary* definitions of "temporary", which contrast the term with "permanent". Beglinger's assignments were temporary in nature.

Article 22.02 is the provision which regulates both the assignment and the rate of pay in this matter. The pay is provided to those filling an acting assignment. Since Beglinger no longer holds the assignment he no longer qualifies for the accompanying pay. Sections 3.05 A and B refer to "officers assigned to the Crime Prevention Unit..." Use of the term "officer" makes clear that the person assigned to these positions are Officers, and not Detectives or any other category of employee. Use of the term assigned is contrasted with the term "Promotion" found in Article 23. The City notes that promotion is specifically addressed by these parties in the contract. Beglinger was not promoted.

The Union grieved the appointment of Beglinger for an indefinite term. The parties settled that grievance with an agreement that this assignment would be for one year, with a possible one year extension. They then also settled a new collective bargaining agreement which reflected that same commitment. The City contends that the grievance settlement and the terms of the new contract make it even clearer that Crime Prevention Unit assignments are temporary.

DISCUSSION

This grievance arises under the terms of the parties' 2001 – 2003 collective bargaining agreement, which took effect January 1, 2001. The issue presented is addressed by three Articles of the contract. Article 3.05 addresses the terms and conditions of employment of the Crime Prevention program. Par. D. provides that compensation "... be in accordance with the terms of this Labor Agreement, as a uniformed acting specialist during the length of their assignment..." This language appears to be new to the 2001-2003 agreement. As argued by

the City it does set the compensation for the term of the assignment. Par. H. sets the term of the assignments. C.P. is for two (2) years, “..unless circumstances dictate otherwise...” The phrasing suggests a temporary assignment. It cannot reasonably be construed as a permanent assignment. Par. H.6) confirms the temporary nature of the assignments. The paragraph calls for a rotation of officers, if possible.

Par. J. confirms that assignment to C.P. is a patrol position. This confirms the City claim that there has been no promotion to a Detective position.

Article 16 is relevant only in that it confirms the right of the City to assign and manage employees in general. It is silent on the question of level of pay for work assignments.

Article 22 does address compensation for officers assigned to the Detective Bureau, in the capacity of acting detective. Beglinger was paid under this provision prior to 2001. The Article sets a pay standard, and provides for progression through the schedule for assignments beyond one year. The language of the current agreement, also found in the predecessor contract, specifies that the higher pay is provided “ for a period of time assigned to perform those duties...” Wage progression is provided to those “Employees filling acting assignments which last beyond a one year period...”. Article 22 also confirms that out of classification assignments are at the discretion of the Chief. Nothing in the Article suggests a permanent upgrade in pay for an officer rotated out of an out of classification assignment.

The Association argues that the City should not be allowed to unilaterally change Beglinger’s wage. This claim ignores the words of the contract that tie pay to the period in which an officer performs the acting assignment. Thus, the City’s action is not unilateral. The Association goes on to complain that the City acted without regard to the economic impact upon Beglinger, and without regard to the expertise, skills and successful performance demonstrated. However, this is inherent in the concept of a temporary assignment, which is paid at a differential. At some point the assignment ends, as does the accompanying pay. These parties negotiated a provision into the 2001–2003 Agreement (3.05 H. 6) which restricts officers in repeating C.P. assignments. This provision requires that the City rotate the assignments notwithstanding the performance of the outgoing officer.

The Association contends that the three year duration of the assignment operated to create a permanent wage rate as a *de facto* matter. This contention is not supported by the language of the collective bargaining agreement. As a practical matter, the Association challenged the Department’s decision to make the Crime Prevention assignment indefinite. With Beglinger occupying the position the Association filed, and settled a grievance on the duration of assignment. That grievance resolution, executed in August of 2000 does address the time frame for temporary assignments for the Crime Prevention Bureau. It sets limits on those assignments, confirming their temporary status. It is silent on pay. The grievance settlement occurred in a contract hiatus period.

The parties subsequently renegotiated the Labor Agreement. The contract was modified to specify that "Officers assigned to the ... C.P. ... shall be compensated, in accordance with the terms of this Labor Agreement, as a uniformed acting specialist during the length of their assignment." This provision ties assignments to C.P. to uniform acting specialist pay. Sec. 3.05 J is specific that assignment to C.P. is a uniformed patrol position. It is in the face of this contract language, negotiated subsequent to the grievance resolution, that the Association contends that Beglinger is entitled to retain Detective pay. The resolution of the grievance and evolution of the contract is inconsistent with the Association's claim.

The Association argues that by making no attempt to reduce Beglinger's pay at the time of the grievance settlement the City has waived its right to adjust his pay status at the end of 2000. However, Beglinger was compensated as an acting detective for his C.P. service in 2000. This was the operative rate of pay for that assignment in 2000. The parties' successor collective bargaining agreement changed that rate of pay, effective January 1, 2001. The City's adherence to the pay provisions of the effective contract cannot operate as a waiver. Beglinger continued in his assignment following the grievance resolution. This appears consistent with the terms of that settlement. The City continued to pay Beglinger under the terms of the 2000 Agreement for its duration.

There is nothing in the collective bargaining agreement to support the Association's claim in this matter. These parties had abundant opportunity to change the words of the agreement to reflect Beglinger's situation. They did not do so.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 7th day of August, 2002.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

