

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**GREEN BAY POLICE PROTECTIVE ASSOCIATION**

and

**CITY OF GREEN BAY**

Case 366  
No. 64976  
MA-13073

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**Appearances:**

Parins Law Firm, S.C., by **Thomas J. Parins, Esq.**, 422 Doty Street, P.O. Box 817, Green Bay, Wisconsin 54305-0817, on behalf of the Union.

**Assistant City Attorney Steve Morrison**, 100 North Jefferson Street, Rm. 200, Green Bay, Wisconsin 54301-5026, on behalf of the City.

**ARBITRATION AWARD**

The Green Bay Police Protective Association (herein the Union) and the City of Green Bay (herein the City) were at all times pertinent hereto parties to a collective bargaining agreement covering the period from January 1, 2002 through December 31, 2004. On July 18, 2005, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration concerning an allegation that the City had engaged in discriminatory practices against Officer Scott Peters by specifically assigning a female officer to work transport duty at Green Bay Packers football games. John R. Emery, a member of the WERC's staff, was appointed to arbitrate the dispute. A hearing was conducted on September 21, 2005. The proceedings were not transcribed. The City filed its brief on December 31, 2005 and the Union filed its brief on January 31, 2006. The City filed a reply brief on February 16, 2006, whereupon the record was closed.

**ISSUES**

The parties did not agree to a statement of the issues.

The Union would frame the issues as follows:

Did the City discriminate against Officer Scott Peters in violation of Section 2.02 of the Labor Contract?

If so, what is the appropriate remedy?

The City requested that the Arbitrator frame the issues.

The Arbitrator adopts the issues as framed by the Union.

### **PERTINENT CONTRACT LANGUAGE**

#### **ARTICLE 2. PURPOSE OF AGREEMENT**

2.02 **DISCRIMINATION.** Neither the Employer nor the Union shall discriminate in any manner whatsoever against any employee as defined in Section 111.32 et seq. of the Wisconsin Statutes.

#### **ARTICLE 5. SHIFT ASSIGNMENTS**

5.01 **ASSIGNMENTS IN GENERAL.** Assignments to shift positions shall be by seniority among those persons possessing the qualifications for the position to be filled. Assignments shall be made and persons with appropriate qualifications and seniority may bid for shift positions only when a vacancy exists in such a position. In the case of Detective Sergeants, seniority shall mean seniority in rank.

#### **ARTICLE 6. OVERTIME**

6.06 **OVERTIME FOR GREEN BAY PACKER GAMES.** (1) Two postings shall be placed on the bulletin board once each year by July 1. All officers interested in working Packer games or working any extra overtime beyond what would be normal for traffic or field assignments are requested to sign the respective postings. These postings shall contain the anticipated manpower needs for the games.

(1) Officers who sign the above said posting shall be assigned to work each of the Packer games in the year in question on the basis of departmental seniority.

### **BACKGROUND**

For many years, the City of Green Bay Police Department has provided officers to perform security services at home games of the Green Bay Packers professional football team on a contract basis and at any given game approximately 85 officers may be on security duty.

Security for Packer games is currently coordinated by the Department's Operations Commander, Commander Kenneth Brodhagen. Under the collective bargaining agreement, officers are allowed to bid for opportunities to work at Packer games, which are awarded on the basis of departmental seniority. Officers who sign up and are scheduled for game duty are permitted to request one of a number of specific job assignments and traditionally the requests have been honored, where possible, on the basis of seniority. Specific assignments that often are requested include skyboxes, specific stairwells, transport, bicycle patrol, car patrol and walking patrol.

Officer Scott Peters, the Grievant herein, is a long time member of the Department, who has been working at Packer games for nearly 20 years and, at the time of the events herein, was Vice-President of the Union. For the past several years he had requested to be, and had routinely been, assigned as one of two Transport Officers. Transport Officers are responsible for picking up arrested persons, performing pat-downs, filling out information sheets, transporting arrested persons to holding cells in the communications center at Lambeau Field, assisting in fingerprinting and photographing detainees, taking them to the bathroom when necessary and, ultimately, transporting them to the Brown County jail after the game.

On November 14, 2004, the Packers were scheduled to play a home game and Peters was originally assigned to work as a Transport Officer for the game. On November 11, Peters was called to a meeting with Commander Brodhagen and Lieutenant Lurquin where he was told that his game assignment was being changed and his Transport position was being given to Officer Karla Krug. Brodhagen indicated that he had decided to use a female in one of the Transport positions and that since Peters was less senior than the other male officer already assigned, Officer James Swanson, he was the one being replaced. Peters was given a choice among positions assigned to less senior officers and ultimately worked a Field Security position on the day in question. Swanson continued to work Transport with a female officer for the remainder of the season.

On December 8, 2004, the Union filed a grievance on Peters' behalf, alleging sex discrimination, contrary to the collective bargaining agreement. The City denied the grievance and the matter proceeded through the contractual grievance process, resulting in this arbitration. Additionally facts will be referenced, as necessary, in the Discussion section of this award.

### **POSITIONS OF THE PARTIES**

#### **The Union**

The Union asserts that in removing the Grievant from the Transport position for the November 14, 2004 football game and replacing him with a female officer, the City violated Sec. 111.36(1)(a), Wis. Stats. and Sec. 2.02 of the collective bargaining agreement. The City has conceded that the Grievant was replaced in the Transport position solely on the basis of gender. The letter of the Chief denying the grievance at Step 1 clearly states that the City had

determined to place a female officer in one of the two Transport positions. At the hearing, both Chief Van Schyndle and Commander Brodhagen acknowledged that the Grievant was replaced on the detail with a less senior female officer. Thus, it is uncontroverted that the Grievant was discriminated against on the basis of sex.

Sec. 111.36(1)(a), Wis. Stats. prohibits gender based discrimination in situations “...where sex is not a bona fide occupational qualification.” Sec. 111.36(2), Wis. Stats. defines a bona fide occupational qualification as follows:

“For the purposes of this subchapter, sex is a bona fide occupational qualification if all of the members of one sex are physically incapable of performing the essential duties required by the job, or if the essence of the employer’s business operation would be undermined if employees were not hired exclusively from one sex.”

Physical capabilities are not at issue here. The Grievant has served as a Transport Officer in the past and is fully physically capable of performing the duties of the position. The City produced no evidence to suggest that the other statutory criterion – that the employer’s business operation would be hampered if employees weren’t hired exclusively from one sex – was in any way a factor in the decision.

The evidence produced at hearing would suggest that the duties of a Transport Officer are gender neutral. Both the Chief and Commander Brodhagen testified that male officers routinely transport female prisoners in their daily duties and that, in the past, male officers have transported female prisoners at Packer games. Further, there was no evidence of any problems or incidents in the past that would require the use of female officers for transport duty, nor have there been past complaints from the public or anyone else about males performing this role.

The City has admitted that it made the assignment change on the basis of sex and presented no evidence that sex is a “bona fide occupational qualification” for the position of Transport Officer. Instead, it admitted that transport duties are gender neutral. Its defense is based solely on the proposition that it has some type of unrestricted discretion to make position assignments at Packer games as it sees fit. The Union disagrees and contends that the record clearly establishes that such assignments are to be made on the basis of seniority. Even if the City were right, however, it still does not have the discretion to make the assignments based on impermissible reasons. Sex discrimination is prohibited by law and by the contract and the City’s action was, thus, impermissible and the Arbitrator should so find.

### **The City**

The City contends that there was no discrimination in the assignment of the Transport Officer position. Officers are invited to bid to work at Packer games and the bids are posted and selected on the basis of seniority. The bids, however, are only for the ability to work at

the game, not to receive a preferred assignment. Commander Brodhagen does try to consider seniority and accommodate requests in making game assignments, but the ultimate decision is his. The sign-up sheet makes it clear that officers may indicate their interest in working at games, but does not invite them to post for specific assignments. Some officers, such as the Grievant, do make specific requests, but others do not.

The Grievant is a day shift employee whose regular schedule does not always permit him to work at Packer games. On one such occasion, Commander Brodhagen assigned a female officer to work Transport with a male officer. He observed that this combination worked well due to the fact that females, as well as males, were arrested and the female arrestees seemed to respond better to a female officer, causing fewer control problems. Brodhagen, therefore, decided to continue the male/female Transport Officer combination, which he explained to the Grievant on November 11. He told the Grievant that he would reassign him to another position and would reinstall him as Transport Officer if the other male officer were unable to work at the game, which has, in fact, occurred subsequently. The Grievant did not receive a demotion or suffer lost work or pay due to the change.

There was no discrimination. The Grievant simply was not chosen to work as a Transport Officer based on a good faith, reasonable and fair appraisal of the security force needs by Commander Brodhagen. Brodhagen continually assesses the strengths and needs of the security force and makes adjustments accordingly. His actions with regard to the Grievant were not discrimination, but were a valid exercise of his authority and discretion.

Sec. 5.10, cited by the Union, is not relevant, because it addresses bidding for duty positions within the Investigative Division and Operations Department, not Packer games. Under Sec. 5.10, officers bid for duty positions, which are assigned based on seniority. Job assignments within duty positions are not bid on, however, but are assigned by management. The Grievant bid for his Day Shift Patrol duty position, but management determines his work assignment during his shift.

Sec. 6.06 governs Packer game assignments. Officers may sign up to work Packer games and are chosen based on seniority. Seniority determines which officers are chosen and when their shifts start, as more senior officers are eligible for more overtime. Specific work assignments are the prerogative of the Commander. The Grievant had no pre-existing right to a Transport position and there is no contractual or unofficial bidding process for those positions, contrary to his assertions. The Arbitrator should not, therefore, create a right where none previously existed. This should be accomplished through bargaining.

### **The Union in Reply**

The Union declined to file a reply.

### The City in Reply

The City points out that the contract does not provide for Packer game assignments to be made on the basis of seniority. The Union has been unable to obtain this benefit through bargaining and the arbitrator cannot modify the contract to provide it, which is what the Union seeks.

The Union argues that the Grievant is the victim of sex discrimination. This is a false claim. The City does not disagree with the Union that male and female officers are equally qualified to perform the Transport position. That is not at issue. In this case, Commander Brodhagen used his discretion to replace one officer with another whom, in his opinion, was better suited to the position. This was his prerogative and was not barred by contract nor restricted by seniority.

### DISCUSSION

The essence of the grievance is the claim that the Grievant was the victim of sex discrimination because he was replaced by a junior female officer as a Transport Officer for the Green Bay Packers football game on November 14, 2004. It is the Union's contention that the Grievant was entitled to the position on the basis of seniority, was fully qualified to perform the duties of the position and was replaced by a female officer strictly on the basis of gender.

It has been recognized by arbitrators that employers have a duty to abide by state and federal anti-discrimination laws, but that typically the appropriate forum for alleged violations is before a hearing officer empowered to enforce such statutes, rather than a grievance arbitrator, whose authority is restricted to interpreting and applying the language of the collective bargaining agreement. Here, however, the parties have negotiated language into their contract specifically requiring adherence to the anti-discrimination provisions of the Wisconsin Fair Employment Act. Specifically, Article 2, Section 2.01 prohibits discrimination against employees in any way contrary to Sec. 111.32, et seq., Wis. Stats. In so doing, the parties have subjected claims of illegal employment discrimination to the grievance arbitration process.

Sec. 111.36(1)(a), Wis Stats., states as follows:

- (1) Employment discrimination because of sex includes, but is not limited to, any of the following actions by any employer, labor organization, employment agency or other person:
  - (a) Discriminating against any individual in promotion, compensation paid for equal or substantially similar work, or in terms, conditions or privileges of employment or licensing on the basis of sex where sex is not a bona fide occupational qualification.

Sec. 111.36(2), Wis. Stats. defines a bona fide occupational qualification as follows:

- (2) For the purposes of this subchapter, sex is a bona fide occupational qualification if all of the members of one sex are physically incapable of performing the essential duties required by the job, or if the essence of the employer's business operation would be undermined if employees were not hired exclusively from one sex.

In light of the language of Article 2, Section 2.01 of the contract, if the action of the City meets the definition of discrimination under this statutory standard, the action would constitute a violation of the contract and the grievance must be sustained. I now turn to that inquiry.

At the outset, it should be noted that the evidence clearly establishes that the decision to replace the Grievant with Officer Krug in the Transport position was based on gender. At the hearing, Commander Brodhagen, who made the decision, testified that he used female officers for Transport duty on two previous occasions that season when the Grievant was not available, that they worked well and, therefore, he decided to use a female officer permanently thereafter. He further testified that in his opinion female officers have a calming influence on female detainees and are less likely to generate complaints of improper conduct by female detainees. The Grievant testified that he met with Brodhagen on November 11, 2004, the day the assignment list was changed, and that Brodhagen told him he wanted a female Transport Officer to handle female detainees.<sup>1</sup> Finally, Chief Craig Van Schyndle testified that he spoke to Brodhagen after the fact and Brodhagen told him that he replaced the Grievant with a female officer because he felt a female officer would be a more effective team member. It cannot be seriously disputed, therefore, that Brodhagen's decision was gender-based.

It is also clear that sex is not a bona fide occupational qualification for being a Transport Officer. The testimony of Chief Van Schyndle indicates that the duties of a Transport Officer at Packer games is essentially the same as the duties regularly performed by Patrol Officers when transporting detainees in their ordinary daily duties. Police officers of both genders are required to transport detainees, whether male or female. Likewise, Transport Officers at Packer games do not just transport detainees of their same gender, but are required to transport detainees of both genders. Thus, while it may be preferable to have detainees transported by officers of the same gender, there is nothing intrinsic in the position of Transport Officer that requires it being performed by officers of one gender or the other.

The City's argument is, in effect, that the allocation of positions for Packer games is not subject to a discrimination analysis. It is the City's position that Section 2.02 applies to the generic opportunity to work at Packer games, as set forth in Section 6.06, and that, pursuant to contract, these opportunities are posted and awarded based on seniority, without respect to gender. Once the security force for a game is established through the contractual process, it is

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<sup>1</sup> Earlier that day, the Grievant, in his capacity as Union Vice President, filed misconduct charges against Brodhagen, which Brodhagen knew. Brodhagen testified, however, that his decision was not based on anti-Union animus or personal animus toward the Grievant and the Union does not seriously contend otherwise.

the Commander's prerogative to allocate the officers among the various security positions available, as he sees fit, based on his assessment of security needs at the game. In support of its position, the City notes that the sign-up sheets provided for Packer game overtime assignments do not indicate specific positions, but only the opportunity to work at Packer games in an unspecified security role, although many officers do indicate a preference when they sign up.

The Union asserts that officers routinely indicated position preferences when they signed up for Packer game assignments, as indicated in City Ex. #1, and that there was a practice of honoring those preferences, when possible, according to seniority. Thus, the officers had an expectation interest in receiving the position assignments they had requested. By denying the Grievant's request for gender-based reasons, therefore, the City violated the anti-discrimination provision in the contract.

The Grievant testified that he assumed Packer game assignment requests were usually honored on the basis of strict seniority. He admitted, however, that he doesn't know how game assignments are handled, but only sees the assignment sheets after they are posted. Commander Brodhagen testified that, where possible, he tries to honor assignment requests and, all else being equal, he gives consideration to seniority. He asserted, however, that management had no obligation to honor the requests and, in fact, he often assigns junior officers to certain positions over senior officers where they are deemed to be more qualified. A comparison of City Ex. #1 with Union Ex. #5, which is the November 14, 2004 game assignment sheet, indicates that of the assigned officers 46 had made specific assignment requests. Of those 46 officers, 21 received the assignment they requested and 25 did not. The remaining assignments were allocated among officers who had signed up, but who had not made specific requests. Sometimes officers who had requested particular assignments were passed over for officers who had not made specific requests. It appears, therefore, that making a specific assignment request is no guarantee of receiving it, even based on seniority.

On balance, I am persuaded that the evidence favors the position of the City. The Commander did not solicit specific requests for game assignments, nor did he promise that they would be honored. It is plausible that officers would be allowed to express preferences and that the Commander would try to accommodate them where possible, but this does not raise specific game assignments to the level of a contractually protected interest. The City has no contractual obligation to allow officers to express preferences or to honor them. Its only obligation under the contract is to offer generic game assignments to officers signing the interest sheet on the basis of seniority and without discrimination. As far as this record shows, the City fulfilled its obligation, in that the Grievant was offered a game assignment, to which he was entitled based on his seniority. I am satisfied that once game assignments were made Commander Brodhagen retained the discretion to determine how to best allocate the security force and appears to have done so on a rational basis. Had the City not permitted the officers to express preferences, or had it refused to honor them in any way whatsoever, there would have been no basis for a grievance. I do not find that its willingness to honor requests where possible constituted a waiver of its discretion to make the assignments according to the Security Commander's assessment of how best to allocate the security force.



For the foregoing reasons, and based upon the record as a whole, I hereby enter the following

**AWARD**

The City did not discriminate against Officer Scott Peters in violation of Section 2.02 of the Labor Contract. The grievance is denied.

Dated at Fond du Lac, Wisconsin this 18th day of May, 2006.

John R. Emery /s/

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John R. Emery, Arbitrator

