

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION of the
WISCONSIN PROFESSIONAL POLICE ASSOCIATION,
SUPERIOR LOCAL NO. 27**

and

CITY OF SUPERIOR

Case 201
No. 66271
MA-13477

Appearances:

Gary Gravesen, Bargaining Consultant, WPPA/LEER, 16708 South Lee Road, Danbury, Wisconsin 54830, for the Law Enforcement Employee Relations Division of the Wisconsin Professional Police Association, Superior Local No. 27, which is referred to below as the Association.

Cammi Koneczny, Human Resources Administrator, 1316 North 14th Street, Suite 301, Superior, Wisconsin 54880, for the City of Superior, which is referred to below as the City.

ARBITRATION AWARD

The Association and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, as Arbitrator to resolve a grievance filed on behalf of Christopher Moe. Evidentiary hearing, which was not transcribed, was held on December 6, 2006, in Superior, Wisconsin. The parties filed briefs by February 2, 2007.

ISSUES

The parties stipulated these issues for decision:

Did the City violate the WPPA Local #27 union contract when the Police Chief selected Michael Jaszczak to fill a Detective vacancy?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 20

APPOINTMENT, PROBATIONARY PERIOD AND SPECIAL ASSIGNMENT

- A) Whenever the City elects to fill a vacancy in a position, the job shall be posted a minimum of seven (7) days prior to the filling of said vacancy. Posting shall include prerequisites.
- B) Each qualified applicant of the Department who makes written application shall be accorded a personal interview with the Chief of Police or his/her designee.
- C) A police officer who failed to qualify for promotion shall be informed in writing by the Chief of Police the reason he/she was not selected.
- D) In the case of equal qualifications, the most senior officer shall be selected for the position.
- E) The above notwithstanding, the detective positions to be filled will be filled as follows:
 - 1) Application. Procedure A) shall be followed.
 - 2) Past Experience. Officers applying for the position of detective shall have a minimum of forty-two (42) months of service as an Officer with the Superior Police Department. . . .
 - 3) Selection. All qualified applicants shall take a written test. All written tests will be furnished by the International Association of Police Chiefs, the State of Wisconsin Testing Service or other mutually agreed source.
 - a) The written test will be worth a maximum of forty points per applicant. Each applicant shall receive a number of points equal to his/her test score percentage multiplied by forty (40). Applicants must attain a written test score of seventy (70) in order to qualify to proceed in the selection process.

- b)** Applicants shall be awarded seniority points on a pro rata basis with the most senior applicant receiving twenty-five (25) points and all other applicants receiving a number of points determined by multiplying twenty-five (25) by a fraction, the numerator of which is the applicant's months of seniority and the denominator of which is the months of seniority of the most senior qualified applicant.
- c)** The twenty-four (24) qualified applicants having the combined highest points allocated for the written test, and points credited for seniority, shall proceed to the interview stage of the selection process. The interview shall be conducted by an interview board consisting of two (2) law enforcement supervisors and one (1) law enforcement Association member, all of whom shall be from law enforcement agencies outside Douglas County. The law enforcement supervisors shall be designated by the City, and the Association member shall be designated by the Association. . . .
- d)** For the term of this working agreement, upon a vacancy, considering the final score, the top three candidates will be referred to the Chief of Police for selection. In the event of a tie score at the third candidate, the most senior tie score candidate is referred. After a candidate is passed over for a third time the Chief will put the reason for non-selection into writing to the candidate within five days. The candidate may then request a meeting with the Chief. The candidate will remain on the list for future consideration.
- e)** Eligible List: The listing of officers based on scoring shall be known as the eligible list and it shall be in effect for a period of eighteen (18) months or longer by mutual agreement. When a person on an eligible list passes up a promotion opportunity, they will not be offered the promotion opportunity again until all others on the eligible list have been offered the promotion opportunity. When a person on an eligible list passes up a promotion opportunity two times, they shall be removed from the eligible list. An officer must always apply for a position in order to be considered.

F) PROBATIONARY PERIOD

Police Officer – Initial probationary period: . . .

Promotional probationary period: Officers selected for the position of detective shall serve a probationary period of one hundred eighty (180) days duration on the new job. . . .

G) Special Assignment:

1) Detective: Detectives selected shall perform detective duty for a four (4) year period. Detectives may reapply for the position of detective.

Officers who have previously served as detectives for a full term of four (4) years, may be appointed by the Chief of Police as a detective for a ninety (90) day special assignment without retesting or interviewing again. . . .

ARTICLE 25
MANAGEMENT’S RIGHTS AND DISCIPLINE FOR JUST CAUSE

The City possesses the sole right to operate the City Government and all management rights reside in it, subject only to the provisions of this Contract and applicable law. These rights include:

. . .

C) To hire, promote . . . and assign employees to positions with the City.

. . .

BACKGROUND

Grievance 06-347, filed on June 2, 2006 (references to dates are to 2006, unless otherwise noted) alleges that the City violated Articles 20 and 25 by awarding a vacant detective position to Michael Jaszczak rather than to Christopher Moe. The grievance alleges that the City denied “the special assignment promotion because . . . (Moe) was on ‘probation’ due to . . . a ‘Last Chance’ agreement.” The form also alleges the “Grievant placed second in the testing process, five places ahead of” Jaszczak. Floyd Peters is the Chief of the City’s Police Department, and answered the grievance in a letter dated June 15, which states:

It continues to be my opinion that I have appropriately exercised my authority under . . . article 20(E)3(d), in which I chose . . . Jaszczak as one of the top

three candidates in the Detective selection process for the current vacancy. As you know, this has been my past practice on several occasions as Chief and has not been grieved previously by the Association.

This decision was carefully considered, however, we believe that upon our evaluation of all three available candidates, that Officer Jaszczak's education, training, experience, current responsibilities, performance record, and maturity make him the more qualified candidate at this time. . . .

The vacancy at issue resulted from a retirement.

The City received applications from unit members in February, then conducted a written and an oral exam in March. Moe's test scores ranked second of seven applicants on the written exam. Jaszczak's ranked seventh. They received identical scores on the oral exam, ranking them fourth of seven. As of the end of March, Moe's overall score ranked third. Jaszczak's score ranked fifth. Moe has greater seniority than Jaszczak.

Of these seven applicants, the one with the highest overall score was reappointed to the Detective position prior to the filling of the vacancy at issue here. The applicant with the second highest overall score resigned from the Police Department to take other employment. At the time the Human Relations Department furnished a list of the top three applicants to Peters, Moe had the highest overall score, Adam Poskozim the next highest and Jaszczak the next highest. With the addition of seniority points to the test results noted above, the total scores of the three highest applicants were 74.13, 64.67 and 64.51. The list furnished to Peters did not, however, include the scores. Rather, the Human Relations Department furnished Peters a list of three names in alphabetical order. Peters viewed each as qualified, but felt Jaszczak was the most qualified, and awarded him the Detective position on June 10.

The background to this point is undisputed. The balance of the background is best set forth as an overview of witness testimony.

Christopher Moe

Moe began his employment as a City Police Officer in January of 1992. He has an Associate Degree in Police Science from Chippewa Valley Technical College. He served in the Douglas County Sheriff's Department in 1991 and 1992, prior to taking his current position. He has held a number of positions with the City including at least seven collateral assignments. He served as Sergeant from 1999 through 2001. The City demoted him from the Sergeant position. Through resignation or removal by the City, he has not filled any collateral assignment since March of 2002. He noted that he was, at the time, concerned regarding the City's handling of his demotion and that he felt he had handled so many collateral assignments that they had become a burden.

In April of 1993, while on patrol alone, Moe responded to a woman who stopped his squad, told him her boyfriend was armed with a knife, had cut people and was threatening to kill himself. Moe called for backup and entered a dimly lit apartment, finding two males struggling, with one bleeding heavily. One of the males got a butcher knife from a drawer, slit his wrist, and then advanced on Moe. After repeatedly and unsuccessfully ordering the man to stop, Moe fatally shot him. City post incident investigation found the use of lethal force justified and Moe was ultimately commended for his action.

In November of 2004, Peters issued Moe a document entitled "Notice of Imposed Discipline." The letter states:

. . .

My issues and concerns that I expressed concerning your performance failures not only create liability for the department, but also bring professional embarrassment to our organization, and will no longer be tolerated. As agreed upon by you and the WPPA in lieu of more serious discipline at this time, you are hereby notified that you will be required to serve a one day unpaid suspension on Thursday, December 2nd, 2004.

In addition, as negotiated by the City of Superior, and the Wisconsin Professional Police Association, you are required to follow a probationary/last chance agreement for a period of two years, in which you must comply with all requirements of your position as a police officer, or face termination as a member of this department. . . .

Moe felt the City and Association acted fairly in the creation of this agreement. He did not receive any discipline after the execution of this agreement, and there is no dispute that he complied with its terms.

In late May, Moe learned from Captain La Lor that Peters had not selected him to fill the detective position. Peters was not in Superior at the time. Although they did not have Peters' explanation for selecting Jaszczak, Moe and the Association filed Grievance 06-347 to avoid timeliness issues.

Moe has received numerous commendations for his work as a police officer. For example, he received a letter of commendation for his conduct in February of 2005, when he successfully talked a man, who was threatening suicide from a platform outside of the safety railing on Bong Bridge, back onto the bridge. The man had refused to talk to the first two officers to report to the scene but responded to Moe. Roughly a year and one-half later, Moe again assisted in a successful intervention involving another man who was leaning over a bridge railing, threatening suicide.

Moe has served as an instructor for Wisconsin Indianhead Technical College and maintains a private business for training police officers.

Jack Curphy

Curphy has served the City as a Detective since 1995, and began employment as a City Police Officer in May of 1991. Curphy has worked with Moe as a Patrol Officer and as a Sergeant. Moe is a “self starter” whose work is consistently good and consistently more conscientious than other patrol officers. In fact, Moe is one of a few patrol officers who can take a case from beginning to end. Moe is often assigned to assist in investigations, including high profile cases. Curphy understood that Jaszczak wants to become a supervisor at some point in his career, and is “doing his job” as a Detective.

Kirk Anthony Hill

Hill has served the City as a police officer for about 15 years, the last three as a Detective. Hill regards Moe as “a good investigator who happens to be in patrol.” He does excellent work and is “absolutely qualified” to be a Detective. Moe, unlike other Patrol Officers, can take a case from beginning to end, and does not end his involvement with the filing of an initial report. Hill noted that Jaszczak’s Detective work centers on financial crimes and his work product is “excellent.”

Chad La Lor

La Lor is a Captain, who serves as Investigation Division Commander. He reports directly to Peters. On May 31, La Lor discussed the Detective vacancy with Moe. He explained to Moe that the primary reason he did not become Detective was the inconsistency of his work performance. La Lor linked the Last Chance Agreement to that inconsistency, at one point noting it as “one of the primary reasons” Moe did not become Detective. La Lor viewed the Last Chance Agreement as the creation of a probationary type status for Moe. La Lor did not necessarily link that status to that of a new hire, but felt the probationary period reflected fundamental inconsistency in work performance.

La Lor met with Peters and other departmental command staff after the March tests to discuss the top three applicants. La Lor did not recommend that Moe be made Detective. Prior to the selection process, La Lor told Moe to keep up the quality of his work, stating that he could make Detective.

La Lor did speak to one of the seven applicants, Jeff Felton, to determine whether Felton wanted to participate in the interview process. La Lor denied pressuring Felton to withdraw. La Lor considers Moe qualified to be a Detective. The command staff met to consider the three top applicants, and Jaszczak was the consensus choice. La Lor felt this reflected that Jaszczak had a four-year degree; that Jaszczak had a consistent work performance record, including consistent performance of collateral assignments; and that Jaszczak performed well as an instructor.

La Lor informed Moe of Jaszczak's selection because Peters was out of town and they did not want to delay the announcement. La Lor told each unsuccessful applicant to speak to the Chief when he returned. Moe informed La Lor he saw no purpose to such a meeting.

Like Moe, La Lor has been involved in a line of duty fatal shooting. He acknowledged that such incidents can impact work performance over time.

Scott Campbell

Campbell has served the Department for thirty years. He is currently its Assistant Police Chief. During the Last Chance Agreement, Campbell informed Moe that he was doing a good job and should keep it up. He felt Moe's performance had "dramatically improved" by the completion of the Last Chance Agreement. He denied telling Moe that the Last Chance Agreement is the sole reason he did not make Detective. Campbell was only "vaguely" familiar with the terms of the Last Chance Agreement, but did not feel it precluded Moe's receiving a promotion.

Campbell felt Moe became dispirited at times during the Last Chance Agreement, and Campbell tried to encourage him to "hang in there." From his view, the point was less an issue of compliance with the agreement than an issue of encouraging a good employee that the Department wanted to keep. Campbell and La Lor were involved in the incident that resulted in a line of duty fatal shooting. Campbell was aware that Moe was also involved in such an incident and that Moe had gone through a painful divorce. Campbell has supervised Moe, and noted his work record was good, but subject to periods of inconsistency.

Michael Jaszczak

The City hired Jaszczak in January of 1995. Jaszczak received a BS degree from Bemidji State University. He majored in Criminal Justice, with a minor in Psychology and Sociology. He has a number of collateral assignments and serves as an instructor at Wisconsin Indianhead Technical College. While a Patrol Officer he participated with investigations, typically with school-related matters, in conjunction with liaison work he performed for the school district. He did not routinely receive investigation assignments while a Patrol Officer.

No one ever informed Jaszczak where he ranked during the selection process. He acknowledged an interest in becoming a supervisor, but did not see that as defining his interest in becoming a Detective. He currently specializes in financial crimes.

Floyd Peters

Peters has served the Department for twenty-seven years, the last five and one-half as Chief. As he reads the labor agreement, Article 25 and Section E) of Article 20 govern Detective assignments. Section D) of Article 20 applies to assignments other than Detective. Peters has appointed seven Detectives, and always chooses from a list of three. He does not

restrict his choice by seniority. He has discussed this with Association representatives and understood their position to be that this was an appropriate interpretation of the labor agreement. Grievance 06-347 is the first of its type during his tenure.

Peters did not know the overall score of any applicant until after he had selected Jaszczak. In his view, Moe and Jaszczak are qualified to be Detectives, but Jaszczak is the most qualified. In his view, Jaszczak has better education credentials, a more expansive training record and has demonstrated better performance at a consistent level than either of the two other finalists for the position. Jaszczak's personnel file shows sixteen letters of commendation, eighteen positive performance documentations and two counseling documentations. Moe's shows fourteen letters of commendation, five positive performance documentations and ten counseling documentations. In addition, Jaszczak possesses better communication skills. Seniority, while a factor in generating the overall score, was no factor in his analysis of the top three applicants.

The Last Chance Agreement did not preclude Moe from a promotion. Rather, it reflected a way to encourage him to correct deficiencies that would have forced Peters to seek his termination. The conduct underlying the agreement did play a role in Peters' decision to prefer Jaszczak.

After the March examination process had been completed, Peters discussed the appointment with La Lor and another officer. After that meeting, Peters discussed the appointment with the rest of his command staff. Jaszczak was the consensus choice. Peters acknowledged there is a subjective element to this part of the process, but in his view, Moe was qualified to be a finalist and could be a finalist again. Moe is qualified to be a Detective, but needs to stay the course to demonstrate a consistent level of work performance. The Last Chance Agreement does not constitute a bar to Moe's becoming a Detective.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Association's Brief

After a review of the evidence, the Association contends that Moe meets "the requisite requirements of Article 20" . . . and "has more training and experience, plus greater bargaining unit seniority than . . . Jaszczak". The evidence establishes that Moe ranked third of seven for the Detective vacancy. Jaszczak ranked sixth. Jaszczak ranked in the top three for selection purposes only because three other candidates either became Detective or withdrew from consideration.

Peters' conclusion that Jaszczak was more qualified than Moe reflects his conclusion that Moe was essentially probationary because working under a Last Chance Agreement between November of 2004 and November of 2006. This conclusion is contractually flawed

and ignores evidence of Moe's superior qualifications. The Last Chance Agreement acknowledges that Moe manifested some behavioral issues between January of 1995 and November of 2004. However, closer examination of this period shows that Moe manifested symptoms that "could be a byproduct of a line of duty traumatic event." In the line of duty in April of 2003, Moe was forced to take the life of another person. Subsequent sick leave abuse and resignation/removal from all collateral assignments point more to post-traumatic stress than to a lack of qualifications. Moe did not, and the Association does not, fault the City for its response to the April 2003 incident. However, the inevitable result of the incident should not preclude Moe from promotion.

The evidence amply demonstrates his qualifications. Even ignoring his superior test scores, the evidence establishes that Moe was not disciplined during the effective period of the Last Chance Agreement; received commendations for his service; consistently performs investigative duties at a higher level than most officers; and has greater seniority than Jaszczak. Peters' consideration of the Last Chance Agreement as a factor negatively impacting Moe's qualifications misreads the Last Chance Agreement and improperly leads to a conflict between Subsections D) and E) of Article 20. Those two sections need to be applied together, since the use of "notwithstanding" is used "as a conjunction" thus connoting "although or in addition to." To adopt the City's view leads to the inappropriate result that an otherwise unqualified applicant was permitted to become one of the three top applicants. Whatever qualms Peters had with Moe should have been addressed by the application of Article 20, Section F, after Moe's selection.

The evidence thus establishes that the Arbitrator should "sustain the grievance and order the City . . . to appoint Officer Chris Moe to a four (4) year appointment to detective, effective the date of the award, with full back pay as a detective, retroactive to the date of the grievance, June 2nd, 2006."

The City's Brief

After a review of the record, the City contends that Section E) of Article 20 governs the grievance, since the "notwithstanding" reference precludes application of Section D) to a Detective vacancy. Even if Section D) applies, Jaszczak is more qualified for Detective than Moe. Jaszczak holds more collateral assignments, and Moe acknowledged he relinquished his in 2002, concluding they "were a burden and he'd had enough." Jaszczak has received more commendations, more positive performance documentations and fewer counseling documentations. Jaszczak possesses "a four year college degree in Criminal Justice, with minors in Psychology and Sociology" while Moe "has a two year associate degree in Law Enforcement." Beyond this, Moe's work history "shows regression" including demotion from Sergeant. The attempt to link his disciplinary history to the incident of "officer involved shooting" ignores that Moe denied that it had the impact the Association asserts. Nor will the record support the assertion that the City held the Last Chance Agreement against Moe. Rather, the City considered the behavioral problems underlying that agreement. The City has never disqualified Moe from promotional opportunities, even though Moe has "just dropped

out of the process without notice.” Whether Jaszczak is interested in assuming a supervisory position has no bearing on his qualifications to be a Detective.

The Association’s concern with the contractual propriety of Peters’ use of the list of three is unfounded. The labor agreement leaves the selection of one of the list of three to the Chief alone. The Human Resource Department does not submit a list of three in ranked order. Rather, the Human Resources Department submits to the Chief, “three names . . . in alphabetical order for him to choose.” Even if Article 20, Section E) did not exist, Article 25, Section C) grants the Chief the authority he exercised in his selection of Jaszczak. Past openings establish that the Chief has not considered seniority determinative. The evidence will not support any assertion that the Chief manipulated the list of three.

Since the evidence demonstrates that the Chief selected the most qualified applicant for the Detective vacancy, the “grievance should be denied.”

DISCUSSION

The stipulated issue is broad, but Article 20 is the governing provision. Article 25, Section C) generally authorizes the City to make promotions and to assign employees to City positions, but Article 20 specifically addresses the move from patrol to Detective and there is no persuasive reason to look beyond it.

The parties’ arguments highlight that the grievance poses a dispute concerning the relationship of Sections D) and E) of Article 20. Strictly speaking, this begs a determination of fact, since the two sections conflict only in “cases of equal qualifications.” If the City is correct that Jaszczak is more qualified than Moe, then Section E) can be applied without regard to Section D). As a matter of contract, however, the contention demands consideration of the hiring procedure. More specifically, the issue is whether the referral of a list of the top three candidates to the Chief, without any designation of seniority, poses a conflict between Section E), 3), d) against Section D).

The parties dispute whether the “notwithstanding” reference of Section E) makes Section D) irrelevant to the application of Section E) regarding Jaszczak’s selection. The Association’s assertion that the dictionary does not determinatively favor the City’s view is persuasive. Acknowledging this point cannot obscure that the dictionary definition favors the City’s view. More significantly, Section E) unlike Section D) and notwithstanding the “notwithstanding” reference, specifically addresses promotion to the detective position. For the same reason that the specific applicability of Article 20 to the filling of detective vacancies makes it more applicable than Article 25, the specific applicability of Article 20, Section E) to the detective position makes its application preferable to Section D). More significant than the dictionary, however, are the provisions of Section E). Section E), 1), specifically makes the provisions of Section A) applicable. It is difficult to conclude that the same parties that agreed to the explicit inclusion of a section preceding Section E) also agreed that the remaining sections apply implicitly.

More significantly, the Association's reading of Section D), taken to its extreme, cannot be reconciled to the provisions of Section E). Section E), 3), d) mandates the referral of the "top three candidates . . . to the Chief of Police for selection." If the highest overall score under Subsections a), b) and c) of Section E) dictates selection, then there is no reason for the referral to the Chief under Section E), 3), d). If inclusion within the top three candidates under Section E), 3), d), definitively establishes "equal qualifications" under Section D) and mandates selection for the vacancy, then there is no reason for a referral to the Chief. Section E), 3), d) has no meaning unless the Chief exercises discretion over the final determination of qualifications. A number of references within Subsection E), 3) underscore the impossibility of incorporating Section D) into Section E). The incorporation of Section D) into Section E) makes the express statement of the value of seniority under Subsection 3), b) problematic. The impossibility of incorporating Section D) into the testing process is also reflected by the reference of Subsection E), 3), d) which moves the senior of four qualified applicants onto the list of three in "the event of a tie score at the third candidate." There is no reason for the resolution of tie scores for third on the list of three if Section D) applies implicitly. More significantly, the specific limitation to tie scores at third place underscores that Section D) does not bind the determination of qualifications, and underscores that the Chief exercises discretion within the list of three. Finally, the reference that the "Chief will put the reason for non-selection into writing to the candidate" at Subsection E), 3), d) demands that the Chief have a reason for selection, thus presuming the exercise of discretion rather than a rote application of seniority under Section D).

Like the dictionary, evidence of bargaining history and practice cannot be considered determinative, but each points to the strength of the City's assertion that Section E), standing alone, governs City selection of a detective. The Association's attempt to interject Section D) into the procedures of Section E) is not, then, a persuasive reading of Article 20. This does not mean the Chief has unfettered discretion over the selection of a detective. Rather, it highlights that the review of his selection of an applicant must focus on compliance with the procedures of Section E) and on whether a specific selection constitutes an abuse of the discretion granted him under Subsection E), 3), d). Section D), even if not directly applicable, highlights that the attempt to undermine seniority can constitute such abuse.

Thus, resolution of the grievance demands determination whether City selection of Jaszczak over Moe abused its authority under the subsections of Article 20, Section E). An exercise of discretion has a procedural and a substantive component. The procedural focuses on whether the City appropriately compiled the list of three and the substantive focuses on whether the Chief selected a more qualified applicant.

Arbitration does not typically involve discovery and in this case, the grievance altered over the course of the hearing in response to the exchange of information. One of the crucial procedural objections concerned whether La Lor exerted pressure on Felton to withdraw from the selection process. This is a significant point if Felton, rather than Jaszczak, should have been third of the list of three. At hearing, one exhibit (joint exhibit 8) indicated Association presumption that Felton's overall score placed him fifth, rather than sixth. This reflected that

the scores were listed by number, not name. It became evident during the course of the hearing that Felton's overall score placed him sixth, not fifth. Jaszczak's overall score in fact placed him fifth. With the elimination of the two highest scorers noted above, Jaszczak was thus appropriately included in the list of three. There is no basis to conclude the Human Relations Department inappropriately compiled the list of three or that the Police Department improperly influenced it.

A more troublesome point concerns City use of the Last Chance Agreement to preclude Moe's consideration as a finalist. La Lor's testimony on this point was troublesome. At one point, La Lor appeared to state that he informed Moe that the Last Chance Agreement was the sole factor that kept him from becoming detective. Prior to hearing, the City notified the Association that it would challenge the arbitrability of the grievance. It abandoned the challenge at the start of the hearing, which makes the nature of the challenge speculative. If the challenge reflected a belief that Moe need not be considered for the position because the Last Chance Agreement created a probation period that made City conclusions not reviewable through arbitration, then the grievance poses a significant issue regarding whether Moe in fact received consideration as a finalist, and La Lor's testimony bears directly on the point. Ignoring the speculative nature of this point, it cannot obscure that La Lor testified that the Last Chance Agreement played a role to the extent it addressed inconsistent job performance separating Jaszczak from Moe. More significantly, Campbell's and Peters' testimony establishes that the Last Chance Agreement had no independent meaning to them. Rather, they noted that the conduct underlying it affected their evaluation of Moe's job performance over time. Each of them testified that Moe was a valued officer, qualified to be a detective. His performance had, however, been subject to inconsistency over time and to a sufficient degree to pose issues concerning his retention. However the Last Chance Agreement is read, the consistency and quality of job performance over time are relevant criteria in the evaluation of the qualifications of candidates for a promotion. None of the command staff who testified viewed the Last Chance Agreement as a probation period shielding their exercise of discretion. Significantly, the testimony reflects a reasoned assessment of the objective factors noted in Article 20. Against this background, there is no reason to conclude that Moe failed to be considered as a qualified finalist.

The substantive component of Jaszczak's selection concerns whether he is more qualified than Moe. This does not mean the issue here is an abstract professional or moral determination whether Jaszczak or Moe is the more qualified police officer. Even assuming such a determination is possible, the contract places it in the hands of the Chief, not an arbitrator. The issue for arbitration is whether the Chief abused his authority under the agreement. If he had a reasonable basis in proven fact for preferring Jaszczak, then he did not.

More specifically applied to the evidence, the difficulty of the choice posed here should not be understated. Both officers have impressive resumes, including significant amounts of training and of instruction. The Association offered evidence indicating Moe has a better record of making arrests and issuing citations than Jaszczak. Whether the numbers vary due to quality of work; to hours of work; to position; or to a combination of these and other factors is

a difficult issue. The evidence summarized above highlights enough about Moe's work to establish that he is capable of and has performed outstanding work.

As noted above, however, the issue is the quality of the Chief's review of the list of three. His testimony establishes that he viewed Moe as well qualified for the position. This recognizes proven fact. His testimony also establishes that he viewed Moe's performance over time as inconsistent. This also recognizes proven fact. In the Chief's view, Jaszczak had superior educational training, which, as applied to an undergraduate degree, reflects proven fact. This does not make Jaszczak the better officer, but does reflect objective fact, upon which judgment can reasonably be exercised whether or not a four year degree is preferred. Beyond this, his conclusion that Jaszczak's performance has maintained a higher level of consistency over time has an objective basis. He put his preference for Jaszczak to his command staff, achieving a consensus view. The significance of this point should not be overestimated, since it is debatable how independent the views of subordinate officers can be. It would be a more cynical reading of the evidence than is appropriate, however, to conclude that Peters sought or received rubber stamp opinions. On balance, the evidence establishes that Peters' conclusion that Jaszczak was more qualified has a reasonable basis in proven fact. There is, then, no basis to conclude that he abused his authority under Article 20.

Before closing, it is appropriate to tie this conclusion more closely to the parties' arguments. Even if Section D) of Article 20 could be considered to apply to the vacancy at issue here, the conclusion reached above establishes that Peters had a reasonable basis in proven fact to conclude that the two officers were not equally qualified.

The Association's concern with the Last Chance Agreement and with La Lor's testimony on the decisional process is understandable. This cannot, however, obscure that Peters was the ultimate decision maker. Whatever La Lor said to Moe at the end of May cannot detract from the persuasive force of Peters' testimony. The factors specified in the subsections of Article 20, Section E) produced a close issue regarding qualifications. Peters' testimony reflects a balanced assessment of the work records of two qualified candidates, consistent with the terms of Article 20.

Association arguments with City use of a February 17 Performance Documentation reflect a concern that the Last Chance Agreement has come to live a life of its own, even though Moe has complied with it. More to the point, the Association argues it reflects a command staff which cannot assess Moe's performance objectively. For the City, it indicates that Moe continues to have problems documenting incidents. The February 17 Performance Documentation is not discipline. The incident it covers is not significant enough to merit inclusion in the **BACKGROUND** above, and merits no analysis here. If this was the only fact the City's preference for Jaszczak rested on, the conclusions stated above would have no basis.

The argument prefaces another concern. Moe's withdrawal from a selection process after the vacancy at issue here, coupled with his statement to La Lor that he could not make detective is perhaps the most troubling aspect of the grievance. Peters' testimony and that of

his command staff contradict this in theory. That theory cannot be tested without Moe's active participation. This Award cannot reach this concern, which points to the future. This Award stands only for the proposition that Peters' preference for Jaszczak concerning the vacancy at issue here was within his discretion under Article 20.

AWARD

The City did not violate the WPPA Local #27 union contract when the Police Chief selected Michael Jaszczak to fill a Detective vacancy.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 21st day of March, 2007.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

