

BEFORE THE ARBITRATION BOARD

In the Matter of the Arbitration of a Dispute Between
HARTFORD POLICE UNIT EMPLOYEES UNION, LOCAL 1432A,
affiliated with DISTRICT COUNCIL 40, AFSCME, AFL-CIO

and

CITY OF HARTFORD (POLICE DEPARTMENT)

Case 61
No.67878
MA-14045

(Field Training Officer Compensation Grievance)

Appearances:

Lee W. Gierke, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 727, Thiensville, Wisconsin 53092, appearing on behalf of the Union.

James R. Korom, Von Briesen & Roper, S.C., 411 East Wisconsin Avenue, Suite 700, P.O. Box 3262, Milwaukee, Wisconsin 53201-3262, appearing on behalf of the City.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the Hartford Police Unit Employees Union, Local 1432A, AFSCME, AFL-CIO (hereafter Union) and the City of Hartford (hereafter Employer or City), the Wisconsin Employment Relations Commission designated Coleen A. Burns of its staff to Chair an Arbitration Board; the Union selected Thor Backus to serve as a member of this Arbitration Board; and the City selected Julie Hanrahan to serve as a member of this Arbitration Board. A hearing was held on July 15, 2008 in Hartford, Wisconsin. At the beginning of this hearing, the parties agreed that Mr. Backus and Ms. Hanrahan were selected by the Union and the City, respectively, as partial arbitrators. The parties submitted post-hearing written argument, the last of which was received on October 20, 2008.

Having considered the evidence, arguments of the parties and the record as a whole, the Arbitration Board makes the following Award:

ISSUES

The parties stipulated to the following statement of the issues:

1. Did the City violate the Collective Bargaining Agreement when it did not pay Communications Officers Laura Jossart and Barbara Dudec certified Field Training Officer pay in 2007?
2. If yes, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

AGREEMENT

City of Hartford and Hartford Police Unit

This Agreement is made and entered into at Hartford, Wisconsin, pursuant to the provisions of Section 111.70 Wisconsin Statutes, by and between the City of Hartford, hereinafter referred to as the “Employer”, and the Hartford Police Unit, hereinafter referred to as “Unit”, on behalf of the full-time employees and part-time Communications Officers of the Employer’s Police Department employed in the classification of Detective, Patrol Officer, Police Administrative Assistant, Communications Officer, Clerk-Typist and Parking Enforcement Aide Attendant hereinafter referred to as “Employees”. All other employees of the Employer’s Police Department, including the Chief of Police are not covered by any of the provisions of this Agreement.

. . .

ARTICLE II – NEGOTIATIONS

1.01 The Employer hereby recognizes the Unit as the bargaining agent for the full-time and part-time employees of the Employer’s Police Department employed in the classifications of Detective, Patrol Officer, Police Administrative Assistant, Communications Officer, Clerk-Typist and Parking Enforcement Aide for the purpose of negotiations on all matters concerning wages, hours and other conditions of employment. Although included in the bargaining unit and covered by this Agreement, the Police Administrative Assistant and Communications Officer, Clerk-Typist and Parking Enforcement Aide are not “police officers” within the meaning of that term in Sec. 111.70, Wisconsin Statutes.

. . .

ARTICLE III – MANAGEMENT RIGHTS

3.01 The Union recognizes the prerogatives of the Employer to operate and manage its affairs in all respects in accordance with its responsibility, and the powers or authority which the Employer has not specifically abridged,

delegated or modified by other provisions of this Agreement are retained exclusively by the Employer. Such powers and authority, in general, include, but are not limited to the following:

...

B. To manage and direct the employees of the Employer, to make assignments of jobs, to determine the size and composition of the work force, to determine the work to be performed by the work force and each employee, and to determine the competence and qualifications of the employees;

...

ARTICLE IV – WORK DAY AND WORK WEEK

...

4.04 Flexible Scheduling: Employees holding the position of Detective or officers assigned as Police School Liaison Officer may request to have their normal work schedule adjusted to provide for attendance at meetings and other work related events and activities which are outside of the normally scheduled workday or as otherwise approved by the Chief or designee. It is recognized that Detectives and Police School Liaison Officers may adjust their individual work schedules so that regular duties which are outside the normally scheduled workday may be performed without incurring overtime compensation. It is understood that Detectives or Police School Liaison Officers approved for flexible scheduling shall adjust his/her work schedule during the payroll period in which the normal work schedule was adjusted. Nothing contained in this paragraph shall be construed to undermine or take precedence over Section 4.01(B) of this Agreement.

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ARTICLE VI - OVERTIME

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6.06 Education and Training

A. For required education and training sessions when not on duty, employees will be compensated at their regular rate of pay for all hours involved in such classes, plus travel time at their regular rate of pay if required to travel outside the City of Hartford, provided, however, he/she shall receive a minimum of two (2) hours pay. If the actual education, training and travel time

is less than two hours, the remaining time shall be spent on duty at the discretion of the Chief or designee.

B. If an employee is assigned to attend a Department sponsored training session during a daytime period, and had been assigned to work the Third Shift on the prior day of the start of such training, the employee shall be given off the eight and one-half (8½) hours before the training is to commence.

C. If an employee is assigned to attend a Department sponsored training session during a daytime period, and had been assigned to work the Fourth Shift on the prior day of the start of such training, the employee shall not be scheduled between 10:30 p.m. and 6:00 a.m. before the training is to commence.

D. If an employee has been granted time off from a regularly scheduled shift due to training the following day, as defined in subsections (B) and (C), any time beyond eight and one-half (8½) hours, per day of training, shall be applied to the number of hours the employee had been granted off. Under this section, employees will be compensated at their regular rate of pay for all hours involved in such classes, including travel, after the number of hours granted off the night before have equalized.

...

ARTICLE XVIII – CLASSIFICATION AND WAGE SCHEDULE

...

18.03 Shift/Work Hour Differential:

A. Eligible employees shall receive a pay differential of twelve cents (\$.12) per hour for all regularly scheduled for second shift. Eligible employees shall receive a pay differential of twenty cents (\$.20) per hour for all regularly scheduled for third shift. These provisions shall not apply to those employees scheduled regularly to work the “power shift”. Those employees shall receive twenty five cents (\$.25) an hour for all regularly scheduled hours of work on “power shift”. In the case of Communications Officers, shift differentials shall apply to employees assigned to shifts beginning at 2:00 p.m. and 10:00 p.m.

B. Any other employees normally assigned to work more than half their work hours between the hours of 2:00 p.m. and 6:00 a.m. shall receive a proportion of the applicable differential pay based on the percentage of hours normally worked between those hours.

18.04 Certified Field Training Officer: Employees assigned as Certified Field Training Officer shall receive two hundred fifty dollars (\$250) annually in addition to the applicable hourly rate listed in Appendix "A".

...

18.06 Officer in Charge: Whenever a member of the bargaining unit is required to assume the duties and responsibilities of the officer in charge for a period of four (4) hours or more, he/she shall receive an additional \$0.50 per hour for 2008 and \$1.00 per hour in 2009 for all such time worked.

...

BACKGROUND

The City operates a Police Department. The Union is the exclusive bargaining representative of certain classifications of employees who work in this Department, including the classifications of Detective, Patrol Officer, and Communications Officer.

In an email of December 21, 2007, Communications Officer Barbara Dudec advised City Police Chief David Groves as follows:

THERE SEEMS TO BE SOME CONCERN RE:; FTO PAYOUT, APPARENTLY 612 GETS HIS FTO PAYOUT EVEN IF HE DOESN'T TRAIN DURING A YEAR. (CHECK PAST YEARS). IN CHECKING THE CONTRACT IT DOESN'T STATE YOU HAVE TO TRAIN TO GET THE \$250 PER YEAR. IT IS THE TITLE OF FTO THAT MAKES YOU ELIGIBLE FOR THE BONUS OF \$250

DON'T WANT TO MAKE WAVES, BUT JUST LETTING YOU NOW WHATS GOING ON

Later that day, the Chief sent an email to Department employees in which he stated:

APPARENTLY SOME MISINFORMATION IS BEING SPREAD THAT NEEDS TO BE ADDRESSED

SECTION 18.04 OF THE CONTRACT READS, "Certified Field Training Officer: Employees assigned as Certified Field Training Officer shall receive two hundred fifty dollars (\$250) annually in addition to the applicable hourly rate listed in Appendix "A"." (Appendix A refers to shift differentials.)

Two things are necessary for this bonus pay.

- 1.) The employee must be a Certified Field Training Officer. (Meaning they have successfully completed the required FTO course, and have not been removed from the program either by failing to maintain the certification or by the department.)
- 2.) The certified FTO must have been "assigned" to train a new employee during the previous year.

If an employee does not meet both of these two requirements they do not, and have not, received this bonus pay for that year.

I know for a fact this is the criteria that has been in place since my arrival, and I assured that it was also the practice under the previous administration as well.

Hopefully this will clarify the matter for those of you that have been misinformed in this area.

On or about February 18, 2008, the Union filed a grievance alleging that, for the 2007 year, Communications Officers Dudec and Jossart were actively assigned as Certified Field Training Officers and, at the conclusion of 2007, they were not paid the annual \$250 provided for in Sec. 18.04 of the parties' collective bargaining agreement. In this grievance, the Union also alleges that, in failing to pay the \$250, the City did not comply with Sec. 18.04 and did not follow the practice of paying FTOs based upon Sec. 18.04, regardless of whether or not they had trained employees within the year. In remedy, the Union requested that the City pay Communications Officers Dudec and Jossart \$250 pursuant to Sec. 18.04.

The grievance was denied at all steps of the contractual grievance arbitration procedure. In the Step 1 response, Lt. Scott MacFarlan states, *inter alia*, that the two things necessary to receive Sec. 18.04 FTO pay are set forth in the Chief's email of December 21, 2007 and that employees may have been paid in error due to a lack of communication between the police department and the finance department. City Administrator Gary Koppelberger's Step 3 response includes the following:

...

DATE: March 3, 2008

SUBJECT: Grievance dated February 18, 2008
Field Training Officer Compensation

On March 3, 2008 the City of Hartford received the attached grievance as Step 3 in the Grievance Procedure defined under ARTICLE XXVI of the current collective bargaining Agreement Between the City of Hartford and Hartford Police Unit Employees Union Local 1432A Affiliated with District

Council 40 of the AFSCME, AFL-CIO. The Step 3 grievance was filed in a timely manner.

On March 3, 2008 the City Administrator met with Detective Randy Abbott, Steward of Local 1432A, on behalf of the grievant(s), and in accordance with ARTICLE XXVI of the collective bargaining agreement.

The City notes two aspects of this grievance which must be addressed:

Does the collective bargaining agreement (Section 18.04) include “communications officer” within the definition of Certified Field Training Officer?

Are Certified Field Training Officers entitled to the \$250 annual compensation defined in Section 18.04 of the collective bargaining agreement, regardless whether or not field training was undertaken during the year?

At the time the collective bargaining agreement was amended to include Section 18.04, there was no consideration given to the inclusion of communications officers within the definition of Certified Field Training Officer. The term includes the word “field” which seems incongruous with the work of communications officers or the training of communications officers. However, a certification program does exist for communications officers, and these employees are specifically titled “officers” rather than “dispatchers” as is common in some communities. More importantly, the City’s position that the stipend is intended to compensate employees for the additional duties involved in training assignments would seem equally applicable to communications officers and patrol officers. The City concludes that the term Certified Field Training Officer includes both sworn and unsworn employees who are designated “officers”.

The larger question is the nature of the compensation provided. The union argues two points:

That the City has failed to comply with Section 18.04; and,

that the City has a past practice of compensating Certified Field Training Officers, regardless of assignment to training.

Compliance with Section 18.04 hinges on the definition of the word assigned. The collective bargaining agreement states:

18.04 Certified Field Training Officer: Employees assigned as Certified Field Training Officer shall receive two hundred fifty dollars (\$250) annually in addition to the applicable hourly rate listed in Appendix "A".

Presumably, if the intention of Section 18.04 was to compensate anyone completing the training necessary to serve as a field training officer, this section would have read: *certified field training officers shall receive \$250 annually...* The fact that this additional compensation is awarded instead to: *"Employees assigned as Certified Field Training Officer...* "(emphasis added) indicates the assignment of the employee is necessary to receive the compensation.

Because there is no definition of the word *assigned* to be found within the collective bargaining agreement, the ordinary dictionary definition must suffice. The *Random House Dictionary* defines the word *assign* as "to appoint, as to a duty". There can be no doubt that an employee appointed to the duty of field training officer does not indicate one who has achieved the training certification, but rather one who has been assigned to the duty of training. Duty assignments are made by the Chief of Police. They are not a consequence of education or training.

With respect to past practice the City notes that any compensation paid under Section 18.04 was intended to be paid only when actual field training was involved. The City is not demanding a repayment of field training stipends made erroneously. Neither does the City subscribe to the notion that past errors constitute past practice. The City notes its long-standing practice of compensating employees based upon the job duty performed; not the level of education, training, or experience provided. Although the City encourages the education and training of employees, and compensates for the cost of such training, the City does not engage in practices such as merit pay, longevity, or higher education compensation. The City's approach to the payment of field training by certified field training officers is consistent with its history and philosophy.

The grievance is denied.

Thereafter, the grievance was submitted to arbitration.

ARGUMENTS OF THE PARTIES

Union

Section 18.04 was negotiated into the collective bargaining agreement during the 2001-03 contract negotiations. This language was drafted by the City and presented to the Union through the mediator. Inasmuch as the City did not provide any interpretation of this

language, the Union reasonably concluded that the language meant that assigned certified field training officers would receive the \$250 annual payment whether they trained several people or none.

Each year from 2001-06, assigned certified field training officers were paid whether they trained or not. When two employees had their assignment as field training officers withdrawn by the City, they did not receive payment in subsequent years.

In 2007, the Police Department selected two (2) Communications Officers, *i.e.*, Laura Jossart and Barbara Dudec, to be assigned as Field Training Officers. The City sent these two Officers for training and they obtained their certification as field training officers. Late in 2007 was the first time that the City ever said anything regarding a requirement to train someone during the calendar year to be eligible for the annual payment provided for in Sec. 18.04.

Giving consideration to the ordinary language of Sec. 18.04, negotiations history and practices, as well as the contract as a whole, the most reasonable conclusion is that Communications Officers Dudec and Jossart are entitled to receive the pay provided for in Sec. 18.04 of the parties' collective bargaining agreement. The grievance should be sustained and the City should be required to pay the two employees the \$250 annual payment for 2007.

City

The language of Sec. 18.04 is clear and unambiguous. "Assignment" as an FTO in any given year requires the performance of duties.

Although no reference to external aides of contract interpretation are necessary, the overall language of the collective bargaining agreement, including references to the FTO Policy contained in Joint Ex. #8, confirms that the word "assigned" is not ambiguous. The evidence of bargaining history sheds no light on the "meeting of the minds" concerning interpretations of the word "assign."

The past practice evidence confirms a direct correlation between pay and performance of the duties. The Union's suggested interpretation that FTO status, standing alone, results in pay cannot be used to explain the treatment of Officers Koester, Wegner or Rose. Nor does the payroll error in 2006 demonstrate the intentional management act or decision that is indicative of a binding past practice.

Communications Officers are not eligible to be FTOs under the City Policy and, thus, cannot be "assigned" as FTOs. The Union's interpretation results in a clear windfall to employees.

Common sense and equity dictate that the City's interpretation is correct. The grievance should be denied.

DISCUSSION

As the City argues, Article III provides the City with certain management rights. As Article III recognizes, these rights are those “which the Employer has not specifically abridged, delegated or modified by other provisions of this Agreement.” With respect to the issue in dispute, *i.e.*, the Grievants’ entitlement to Certified Field Training Officer pay, there is an “other provision” of the Agreement that specifically abridges the City’s Article III Management Rights, *i.e.*, Sec. 18.04.

Section 18.04 states:

18.04 Certified Field Training Officer: Employees assigned as Certified Field Training Officer shall receive two hundred fifty dollars (\$250) annually in addition to the applicable hourly rate listed in Appendix “A”.

Under the plain language of Sec. 18.04, employees are entitled to receive \$250 annually if they are “assigned as Certified Field Training Officer.”

As the City argues, the position of Communications Officer did not exist at the time that the parties placed the language of Sec. 18.04 into the contract. This position, however, did exist at the time that the parties bargained their most recent contract. When a collective bargaining provision refers to “employees,” normally this reference is to the employees covered by the collective bargaining agreement.

In the preamble to their collective bargaining agreement, the parties have recognized that Communications Officers are among the classifications “hereinafter referred to as “Employees.” Additionally, under Article I-Recognition, the parties have recognized that the classification of Communications Officer is a classification of Police Department employees represented by the Union.

The testimony of Communications Officer Jossart establishes that the Department posted an opportunity for Communications Officers to receive training to become a Certified Field Training Officer, hereafter Certified FTO; that Jossart posted for and was selected by the Department for this training; and that, following this training, Jossart became a Certified FTO. It is undisputed that Communications Officer Dudec is also a Certified FTO.

Witness testimony establishes that Jossart and Dudec have received the same training and certification as Department Police Officers who are Certified Field Training Officers. Witness testimony further establishes that this certification is for life without any requirement for additional education/training. In the Step 3 response to the grievance, the City Administrator addresses Sec. 18.04 of the collective bargaining agreement and states: “The City concludes that the term Certified Field Training Officer includes both sworn and unsworn employees who are designated “officers.” Notwithstanding the fact that the existing Departmental policy states that FTOs must be sworn officers, the record reasonably establishes

that the Grievants are employees within the meaning of Sec. 18.04 and are entitled to receive the \$250 annual payment if they have been “assigned as Certified Field Training Officer.”

The word “assigned” is most reasonably construed as requiring some affirmative action upon the part of the City. The City argues that this affirmative action is the assignment of Certified FTO work. The Union argues that this affirmative action is the assignment to perform a duty of Certified FTO when the need arises.

Under the City’s construction of Sec. 18.04, an employee must perform the work of a Certified FTO during the year in order to be eligible to receive the annual \$250 payment. Under the Union’s construction of Sec. 18.04, the employee receives the \$250 payment because the employee has been given the “status” of Certified FTO by the Department and it is not necessary that an employee perform the work of a Certified FTO work during the year.

The American Heritage College Dictionary (3rd Ed.) defines the word “assign” in a number of ways. One definition is “to set apart for a purpose; designate.” Another definition is “to give out as a task.”

Under the former definition, being “assigned as Certified Field Training Officer” means that the employee has been given the “status” of Certified FTO by the Department. Notwithstanding the Union’s arguments to the contrary, under the latter definition, being “assigned as Certified Field Training Officer” means that the employee has been given the work of a Certified FTO by the Department. Thus, either party’s definition is supported by plain language of Sec. 18.04.

The City argues that to interpret Sec. 18.04 as requiring payment to employees who are not actually performing the work of a Certified FTO would be illogical, provide a windfall to the employee and be inequitable to the employer. The undersigned disagrees.

As the City argues, the Department pays for the costs of the Certified FTO training and for employee time to attend this training. Employers, however, commonly pay employees for possessing a certification that may be of benefit to the employer. Historically, the work of the Certified FTO has been to train newly hired employees. The City is benefited by having employees available to train newly hired employees; whether they be Police Officers or Communications Officers. Moreover, an annual payment of \$250 is not so exorbitant as to compel the conclusion that such an amount only would be paid if an employee performed the work of a Certified FTO.

As discussed above, the plain language of Sec. 18.04 is susceptible to more than one reasonable interpretation. Accordingly, it is appropriate to consider whether other provisions of the parties’ collective bargaining agreement provide a context for ascertaining the interpretation of Sec. 18.04 mutually intended by the parties.

Section 18.04 is contained within Article XVIII – Classification and Wage Schedule. In addition to Sec. 18.04, Article XVIII contains two sections that provide payments other than the hourly wages set forth in Appendix “A,” *i.e.*, Sec. 18.03 and Sec. 18.06.

Sec. 18.03 is entitled “Shift/Work Hour Differential.” As the Union asserts, the parties have stipulated that the shift differential provided for in Sec. 18.03 is paid to employees based upon the shift for which the employee is regularly scheduled. The stipulation further states that “. . . an employee regularly scheduled to 1st shift does not receive any shift premium even when working other shifts, an employee regularly scheduled to 2nd shift receives the twelve cent (\$.12) per hour shift differential when working 1st, 2nd or 3rd shift, an employee regularly scheduled for 3rd shift receives twenty cents (\$.20) per hour when working 1st, 2nd or 3rd shift.”

As the Union argues, the parties’ stipulation indicates that pay is not always linked to a specific work function. The stipulation, however, also indicates that, in order to receive the shift differential, the employee must perform work.

Sec. 18.06 provides Officer in Charge pay to a bargaining unit member who is required to assume the duties and responsibilities of the Officer in Charge for a period of four or more hours. The Officer in Charge pay is a specified hourly add-on for “all such time worked.”

In summary, Sec. 18.04 is one of three sections in Article XVIII that provides pay in addition to the hourly wages set forth in Appendix “A.” The language and application of Sec. 18.03 and Sec. 18.06 reasonably indicates that the purpose of Article XVIII is to identify work for which employees receive pay that is in addition to the hourly wages set forth in Appendix “A.” Given this purpose, Sec. 18.04 is most reasonably construed as providing the \$250 annual payment to employees who perform FTO work.

As the Union argues, the word “assigned,” or a variation of this word, is found in Sec. 18.03(B), as well as in other provisions of the collective bargaining agreement. Section 18.03(B) contains the phrase “assigned to work.” Section 6.06(B) and (C) contain the phrases “assigned to attend” and “assigned to work.” These phrases reasonably indicate that, when the parties intend the word “assigned” to involve an employee performance obligation, the performance obligation is stated in the contract language. Thus, the failure of Sec. 18.04 to state “Employees assigned to work as Certified Field Training Officer. . .” could mean that the parties did not intend the \$250 annual payment to be conditioned upon the performance of Certified FTO work.

The City relies upon the language of Section 4.04 that states:

4.04 Flexible Scheduling: Employees holding the position of Detective or officers assigned as Police School Liaison Officer may request to have their normal work schedule adjusted to provide for attendance at meetings and other work related events and activities which are outside of the normally scheduled

workday or as otherwise approved by the Chief or designee. It is recognized that Detectives and Police School Liaison Officers may adjust their individual work schedules so that regular duties which are outside the normally scheduled workday may be performed without incurring overtime compensation. It is understood that Detectives or Police School Liaison Officers approved for flexible scheduling shall adjust his/her work schedule during the payroll period in which the normal work schedule was adjusted. Nothing contained in this paragraph shall be construed to undermine or take precedence over Section 4.01(B) of this Agreement.

As the Union argues, this provision does not address payment of monies to employees. As the City argues, the language of Sec. 4.04 is the contract language that most closely mirrors that of Sec. 18.04.

As the City further argues, the use of two terms, *i.e.*, “holding the position” and “assigned as,” in the same sentence reasonably implies that the parties did not intend the terms to have the same meaning. In “holding the position” of Detective, the employee has the “status” of Detective. It follows, therefore, that the term “assigned as” refers to something other than having a “status.” This “something other” is most reasonably interpreted to be an assignment to perform the duties of the Police School Liaison Officer. A conclusion that Police School Liaison Officer is a duty assignment is consistent with witness testimony and is also supported by the fact that Sec. 4.04 recognizes that there are “regular duties” associated with being “assigned as Police Liaison Officer.”

In summary, there is contract language to support each party’s interpretation of Sec. 18.04. However, inasmuch as Sec. 4.04 most closely mirrors the language of Sec. 18.04, Sec. 4.04 is the language that is most likely to demonstrate the parties’ mutual intent with respect to the meaning of the phrase “assigned as.”

The language of Sec. 4.04 supports the City’s interpretation that “assigned as Certified Field Training Officer” means the employee has been given the work of a Certified FTO by the Department. This interpretation is also consistent with the conclusion that the purpose of Article XVIII is to identify work for which employees receive pay in addition to the hourly wages set forth in Appendix “A.”

Construing the language of the contract as a whole, the most reasonable interpretation of Sec. 18.04 is that the parties mutually intended Sec. 18.04 to provide the \$250 annual payment to those bargaining unit employees who have been assigned by the Department to work as a Certified FTO during the year. The undersigned turns to the evidence of bargaining history and past practice to determine if such evidence establishes that the parties mutually intended another construction of Sec. 18.04.

Bargaining History

It is undisputed that the language of Sec. 18.04 was first placed into the collective bargaining agreement in 2001. As stipulated by the parties, this language has not been changed in subsequent negotiations.

At hearing, several members of the then Union bargaining team provided testimony regarding the 2001 contract negotiations. These team members are Troy Fassbender, Richard Rose, Ken Kluck, and Randall Abbott. No member of the City's 2001 bargaining team testified at hearing.

Members of the Union's bargaining team recall that FTO pay was not a subject of discussion in the 2001 bargain until the mediator made an oral proposal on FTO pay to the Union caucus; this oral proposal was accepted by the Union; that the Union bargaining team did not discuss this oral proposal with the City bargaining team; and that the language of Sec. 18.04 was subsequently placed into the 2001 contract.

In 1997, the Union made a bargaining proposal that requested that Field Training Officers and Training Officers receive \$.50 per hour when performing such duties. Inasmuch as this record does not indicate that the parties had any discussion regarding this proposal during the 2001 negotiations, the 1997 proposal does not provide any guidance with respect to the parties' mutual intent in 2001.

Patrol Officers Fassbender, Kluck, and Abbott, as well as Sgt. Rose, characterize the FTO pay proposal as a City proposal. Assuming *arguendo* that the mediator represented to the Union caucus that she was presenting a City proposal, oral statements made by the mediator to the Union caucus are hearsay. According to Rose, the language from the City became part of the collective bargaining agreement and he does not know if the mediator or the city wrote the language.

As the Union argues, one rule of contract construction is that ambiguous contract language should be construed against the drafter of the language. The Union further argues that the City was the drafter of the Sec. 18.04 language. The evidence of bargaining history, however, does not establish to a reasonable certainty that the City drafted the language of Sec. 18.04.

According to Detective Abbott, the Union understood that the annual payout was received whether or not any employee was trained. While Abbott recalls Union discussions on this point, he could not recall with any certainty whether these discussions occurred during or after the mediation session which resulted in the contract settlement.

As Officer Fassbender recalls the mediation session, the Union discussed and decided that the employee would get the \$250 once the employee was certified. Fassbender did not recall any discussion that employees would perform work to get the FTO pay. As Officer

Kluck, the current Union President, recalls the mediation session, the Union discussed that the FTO would receive the \$250 if no employees were trained or if multiple employees were trained.

Officer Kluck's recollection of "bargaining history" reflects a Union unilateral understanding that the \$250 would be paid whether or not the employee receiving the FTO pay had performed FTO work. Inasmuch as there were no direct discussions between the parties regarding the meaning of the Sec. 18.04 language prior to the time that it was placed into the 2001 contract, the only "bargaining history" evidence of the parties' mutual intent is the language that was placed into the contract as Sec. 18.04.

Past Practice

It is not evident, from the time that the parties adopted the Sec. 18.04 language until Communications Officer Dudec broached the subject of FTO pay with the Police Chief at the end of 2007, that the parties had any bilateral discussions regarding the meaning of Sec. 18.04. Jt. Exhibit #6 shows that, beginning with the year 2001; six Department employees have trained employees, *i.e.*, Fassbender, Koester, Wegner, Zywicki, Thickens and Rohrer. Of these six employees, Wenger and Fassbender testified at hearing.

Jt. Ex. #6 shows that, since 2001, employees have been trained in each year except for 2006. Jt. Ex. #7 shows that, since 2001, FTOs who trained employees during the year have received the \$250; with the exception that in 2006, Fassbender, Zywicki and Thickens received the \$250 payment without having trained any employee. Fassbender states that he was not surprised that he was paid in 2006 because he expected to be paid even when he did not train.

Chief Groves has been the Chief of Police since July of 2006. Prior to that time, he worked at another Police Department.

Chief Groves recalls that, in December 2006, payroll contacted his office and questioned how FTO pay should be paid and that Chief Groves responded that payroll should do what they had done the previous year; with the effect that three employees received FTO pay in 2006. Given the evidence that the 2006 payments resulted from a single act of managerial approval, these payments fall short of the "well-established" standard associated with a binding past practice.

According to Chief Groves, it was not until Communications Officer Dudec questioned FTO pay in 2007, that he reviewed the contract and past records and reached the conclusions set forth in his email of December 21, 2007. The record provides no reasonable basis to discredit Chief Groves' testimony regarding the rationale underlying his decision to approve the 2006 payments and to not approve payments to Dudec and Jossart in 2007.

Crediting the Chief's testimony, it is evident that the 2006 payments were authorized without any management consideration of the underlying contract language. Accordingly, the

evidence of the 2006 payments does not provide a reasonable basis to conclude that the City has acknowledged, or accepted, that Sec. 18.04 provides the annual \$250 to FTOS who do not perform FTO work during the year.

A Personnel Action dated December 12, 2001 and signed by former Chief Jones and the City Administrator states: "Officer Fassbender has served as a Field Training Officer during 2001, and will continue in that capacity in 2002, therefore entitling him to \$250 each year pursuant to Section 18.04 of the 2001-2003 Labor Agreement." Fassbender's testimony reasonably indicates that, in December 2001, he and Department management knew that Fassbender was training individuals whose training would continue from December 2001 into January 2002.

Officer Wegner has been with the Department for nineteen years and has occupied a number of Union positions, including President, Vice-President and Steward. Wegner recalls that he told prior Chief Jones that he was interested in FTO; that Jones sent him to FTO training; that he received his FTO certification; and that he was an FTO for the City in 2000 and 2001. As Jt. #7 indicates, Wegner was assigned FTO duties in 2001 and received the \$250 annual payment in 2001.

Wegner further recalls that Sergeant Hayes, who is the supervisor of FTOs, advised Wegner that there would be multiple hires and that Wegner would need to train on 2nd shift; that Wegner told Hayes that he was only interested in working 1st shift; and that Hayes then took away Wegner's FTO ribbon and that he (Wegner) was no longer an FTO. Sgt. Hayes did not testify at hearing. Sgt. Hayes' conduct in taking Wegner's FTO ribbon is consistent with the conclusion that, in order to be "assigned as" Certified FTO within the Department, an employee must perform the duties of an FTO.

The Personnel Action dated December 12, 2001 and signed by former Chief Jones and the City Administrator states that "OFFICER WEGNER WAS ASSIGNED AS A FIELD TRAINING OFFICER FOR A PORTION OF 2001, THEREFORE ENTITLING HIM TO \$250 PURSUANT TO SECTION 18.04 OF THE 2001-2003 LABOR AGREEMENT. 2001 ONLY." As discussed above, Wegner performed some FTO duties in 2001.

Wegner states that, after this happened, he did not expect to receive any FTO pay and that he accepted that management had the right to decide that he was no longer an FTO. In their testimony, Fassbender and Abbott agree that FTO assignments are decided by management.

Jt. Ex. #6 and #7 indicate that Officer Koester, who did not testify at hearing, trained employees in 2001 and 2002 and received the \$250 payment in each of these two years. Koester was the subject of a Personnel Action dated May 2, 2002 and signed by then Chief Jones and the City Administrator and which states:

THIS EMPLOYEE IS NO LONGER ASSIGNED AS A CERTIFIED FIELD TRAINING OFFICER, AND IS NO LONGER ENTITLED TO RECEIVE \$250 ANNUALLY PURSUANT TO 18.04 OF THE CURRENT AGREEMENT. 2003 & SUBSEQUENT YEARS.

Fassbender states that Koester was removed from the FTO program, but that he does not know the reason for this removal. Abbott recalls that management told Koester and Wegner that they were no longer authorized and assigned in the Certified FTO position. Consistent with Jt. Ex. #7, Fassbender states that Koester has not received FTO pay from the Department since he was removed from the FTO program.

The statements contained in the three Personnel Actions are consistent with the City's position that, in order to receive the \$250 annual payment, an employee must perform the work of a Certified FTO during the year. Neither the statements contained in the three Personnel Actions, nor witness testimony regarding these Personnel Actions, reasonably establish that any City representative has acknowledged, or otherwise accepted, that Sec. 18.04 provides the annual \$250 payment to FTOs who do not perform FTO work during the year.

Rose is a retired Detective Sergeant and Certified FTO. Rose recalls that he had trained employees as an FTO prior to 2001; that he never trained employees as an FTO after 2001 and that he never received the \$250 annual payment. Rose further states that he never grieved the fact that he was not paid the \$250 because he considered FTO to be a Patrolman's position and, in his mind, he was a Detective.

Detective and Patrol Officers are positions that are included in the Union's bargaining unit. It is evident that one Detective, who provided a few hours of FTO training to an employee, has received the \$250 FTO pay.

It is not evident that any management representative told Rose that he was not entitled to the \$250 payment because Rose occupied the position of Detective. The evidence that, as a Detective, Rose, a Certified FTO, did not train employees and did not receive the \$250 FTO pay is consistent with the City's position that, in order to receive the \$250 annual payment, an employee must perform the work of a Certified FTO during the year.

Conclusion

Each party has cited arbitration cases in support of their position. Given the differences in fact and contract language between this case and those cited by the parties, the undersigned does not find any of these cases to be persuasive.

For the reasons discussed above, under the plain language of the contract, the Sec. 18.04 phrase "Employees assigned as Certified Field Training Officer" is most reasonably construed to mean that the employees have been given FTO work by the Department. Neither the evidence of bargaining history, nor the evidence of past practices, provides a reasonable basis to conclude that the parties mutually intended another construction of this phrase.

Inasmuch as Grievants' Dudec and Jossart have not been given FTO work by the Department in 2007, they are not contractually entitled to receive the annual \$250 payment in 2007. Accordingly, the grievance has been denied and dismissed.

On the basis of the foregoing, and the record as a whole, the Arbitration Board has made the following

AWARD

1. The City did not violate the Collective Bargaining Agreement when it did not pay Communications Officers Laura Jossart and Barbara Dudec certified Field Training Officer pay in 2007.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 23rd day of March, 2009.

Coleen A. Burns /s/

Coleen A. Burns, Neutral Chair

I concur:

Julie Hanrahan /s/

Julie Hanrahan, City Representative to the Arbitration Board

Date: 3-25-2009 /s/

Thor Backus, Union Representative to the Arbitration Board

Date: _____

I dissent:

Thor Backus /s/

Thor Backus, Union Representative to the Arbitration Board

Date: 4-11-2008 /s/

Julie Hanrahan, City Representative to the Arbitration Board

Date: _____

CAB/gjc

7416

[Dissenting Opinion of Union-Appointee Thor Backus]

I respectfully submit a dissenting opinion with regard to your decision issued in the above referenced case, The dissent is based on issues related to bargaining history and past practice as outlined below.

Bargaining History

At the hearing, four members of the Union bargaining team testified that the disputed language was delivered to the Union by the mediator. Bach testified that it was their understanding that this was a counterproposal from the City. It is understood in mediation circles that if a mediator proposes a bargaining item, as opposed to bringing forth a proposal from the other party, they will clearly explain that their proposal is a "mediator's proposal." Repeated Union testimony was clear that the mediator never claimed that a "mediator proposal" was presented. The City had ample opportunity to testify to that effect, but chose not to, even though members of the 2001 City bargaining team were present at the hearing. The general rules that govern contract construction regarding ambiguous language should be construed against the constructor and should have resulted in a decision favoring the Union.

Past Practice

There is only one example since the 2001 Certified Bargaining Agreement (CBA) was negotiated-the document in question-in which employees were paid with no training. To completely dismiss this fact and rely on the fact that there was never an expectation for Detective Rose to train since the 2001 CBA is a disservice to the Union. Detective' Rose was never expected to perform as a Certified Training Officer (CTO) prior to the 2001 CBA, It had been years since he had performed those functions and he was not considered one of the members of the department assigned to this duty. Additionally, Officer Thickens was not a detective (as referenced in the decision) when he received the pay in 2007, but was serving as a patrol officer.

The 2006 payment, to the three officers who did not perform CTO work, was dismissed as a mistake by the Chief of Police. While the Chief may not have been familiar with the labor agreement, usually not a credible excuse, as the Department's Chief operating officer he must have been aware that there were no new hires in 2006. These facts cast a long shadow of doubt on his explanation that he was just continuing a previous practice.

Thank you for the opportunity to reply.

Thor Backus
AFSCME Council 40