

BEFORE THE ARBITRATOR

---

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

and

**CITY OF GREEN BAY**

Case 367  
No. 64977  
MA-13074

---

**Appearances:**

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

Ruder, Ware, L.L.S.C., by **Attorney Christopher M. Toner**, 500 First Street, Suite 8000, P.O. Box 8050, Wausau, Wisconsin 54402-8050, 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.

An arbitration award was issued on May 18, 2006 denying the grievance. Subsequently, the Union appealed to the Brown County Circuit Court under Sec. 788.10(2), Wis. Stats., seeking vacation of the award. On August 23, 2007, the Court issued a bench decision vacating the arbitration award and remanding the case to the arbitrator for rehearing. Subsequently a written order effectuating the bench decision was entered and the case was returned to the arbitrator for further proceedings. A second arbitration hearing was held on March 10 and April 14, 2009. The proceedings were transcribed. The parties filed briefs on June 24, 2009 and reply briefs on August 5, 2009, whereupon the record was closed.

## ISSUES

The issue remains the same as in the first arbitration, 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?

### 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. At the time of the events at issue herein, the Operations Commander was 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. Over the years, many of the officers who sign up and are scheduled for game duty have developed a practice of requesting one of a number of specific job assignments at Packer games at the beginning of the season. Typically, but not uniformly, the requests have been honored, where possible, on the basis of seniority, but ultimate discretion with respect to making specific duty assignments has remained with the Commander. 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 many 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 them, 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. 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 where he was told that his game assignment was being changed and his Transport position was being given to a female officer, Officer Karla Krug, who was lower in seniority than Peters. Brodhagen indicated that he had decided to use a female in one of the Transport positions. Since Peters was less senior than the other male officer already assigned, he was the one to be 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 to arbitration. An arbitration hearing took place on September 21, 2005, and an award was issued on May 18, 2006 denying the grievance. The Union appealed the award to the Brown County Circuit Court and on August 23, 2007, the Court issued a bench decision, and a subsequent written order, vacating the award under Sec. 788.10(2), Wis. Stats. and remanding it to this arbitrator for a rehearing. The rehearing of this matter took place on March 10, 2009 and April 14, 2009. 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. Sec. 6.06 of the contract specifies the manner of allotting overtime for Packer football games, which is done by seniority. Although the witnesses did not agree whether seniority determined actual job assignments, the evidence is clear that officers did request specific assignments and that senior officers were entitled to assignments that offered more overtime.

Officer Peters requested and received an assignment as a Transport Officer for the November 14, 2004, Packer game. Prior to the game, however, Commander Brodhagen removed Peters from the assignment and told him he was giving it to a less senior female officer. 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."

There is no question here that sex is not a bona fide occupational qualification for the position of Transport Officer. Removing Peters from the assignment, therefore, was an impermissible act of discrimination.

The Union further asserts that Officer Peters suffered economic harm as a result of being removed from the assignment. He was informed by another officer that he lost out on 1.5 hours of overtime and actually received 10.8 hours pay in a settlement of his claim before the Equal Rights Division arising from the same circumstances.

Further, Sec. 2.02 of the contract stands alone and does not require the violation of another contract right to support a claim of discrimination. Wisconsin courts and the WERC have long held that labor contracts can include provisions permitting enforcement of statutory rights through the grievance arbitration process. The language of Sec. 2.02 was specifically bargained to allow for arbitration in cases of discrimination. As such, the arbitrator is not intruding on the jurisdiction of the courts or the Equal Rights Division by determining whether there was discrimination in this case. Officer Peters exercised contractual rights when he filed his grievance and statutory rights when he filed his ERD complaint. These rights arise in different ways, are asserted in different for a and are not in conflict.

In this case, the City took a job assignment away from Officer Peters, which is an action of the kind contemplated by Sec. 2.02. The section forbids discrimination in any way whatsoever. Moreover, Peters' assignment was certainly a part of the terms, conditions and privileges of his employment, as set forth in the statute. There can be no question, therefore, that Sec. 2.02 covers the circumstances of this case. The Arbitrator should find that Sec. 2.02 was violated when Peters' assignment was given to a less senior female officer and uphold the grievance.

### **The City**

The City asserts at the outset that the grievance is untimely. Peters was informed by Commander Brodhagen on November 11, 2004 that his assignment was being given to a female officer. The grievance was filed on December 8, 2004. Article 3.06 of the contract states that a grievance must be filed within fifteen working days after the grievant or the Union knew or should have known of the event giving rise to the grievance. Here, the grievance was filed twenty-seven days after Peters had knowledge of the events giving rise to it and is, therefore, untimely. A vast majority of arbitrators strictly enforce contractual timelines and refuse to hear grievances that are filed in an untimely fashion. Elkouri and Elkouri, *How Arbitration Works*, p. 198, (6<sup>th</sup> ed., 2003), and cases cited therein. The arbitrator here should apply the contractual timelines strictly and find the grievance to not be arbitrable.

On the merits, the evidence also shows that the City never agreed to honor specific assignments requests at Packer games, either based on seniority or otherwise. This arbitrator found in the original arbitration that the City did not solicit requests for game assignments nor did it promise to honor them. The evidence presented here was consistent with that presented in the original case. The contract does not provide for game assignments to be based on seniority, only the right to work at games. City witnesses all testified that game day assignments were not based on seniority and that, although there was an attempt to honor assignment requests, the City never waived its discretion to make assignments as it saw fit. Currently, the City tried to streamline assignments so that the pre-game, game and post-game assignments are close in proximity. It would be impossible to do this if all assignment requests had to be honored.

This is also a case where the arbitrator should decline to take jurisdiction because arbitration is a matter of contract and the Union is seeking the enforcement of a statutory right. The particular language of Sec. 2.02 forbids discrimination in any way whatsoever. This is vague and overbroad language which does not indicate whether it only applies to contractually guaranteed rights, or to any alleged violation of the Wisconsin Fair Employment Act. Statutory claims are properly brought before the Department of Workforce Development and the arbitrator should decline to assert the Commission's jurisdiction over them. Indeed, the grievant already pursued a claim before the DWD on this matter, resulting in a settlement of that claim, so this would be a case of the Union getting two bites of the same apple. The WERC has ruled that parties may not pursue identical claims before the Commission and the Circuit Court. The same rule should apply here. The City maintains that Sec. 2.02 applies only

to other rights specifically guaranteed in the contract. This matter was resolved by settlement in the DWD proceeding and the grievant has been working as a Transport Officer since that time. The only reason for pursuing this matter is for the Association to attempt to obtain the right to pick game day assignments. The arbitrator should reject this attempt.

Further, there was no discrimination here. Sec. 111.36(1)(a), Stats. makes it illegal to discriminate in conditions of employment, among other things, which is generally understood to mean wages, benefits and other matters affecting the interests of employees. Peters received everything to which he was contractually entitled. He received the hours to which he was entitled under Sec. 6.06, the same rate of pay and he was assigned to the Packer game security detail. He had no legally protected interest in selecting his game day assignment. Whether he preferred the Transport Officer assignment over another is beside the point. In any quantifiable sense, there was no meaningful difference between the Transport Officer position and the one to which he was ultimately assigned. The grievance should, therefore, be denied.

### **Union Reply**

The Union asserts that the grievance should not be dismissed on account of untimeliness. The City did not raise the issue of timeliness when the grievance was originally filed, in any of its step responses, during the first arbitration, or the circuit court proceedings thereafter. It was not mentioned during the stages leading up to this arbitration and was only first raised by the City at the time of the rehearing. It is generally accepted by arbitrators that if a timeliness defense is itself not raised in a timely manner it may be deemed waived. Here, where the City did not raise the timeliness defense until the first day of the rehearing, several years after the grievance was originally filed, the defense should be deemed waived.

The Union also asserts that the City's argument regarding "conditions of employment" has no merit. The City suggests that its action of giving Officer Peters' assignment to a female officer did not fit the definition of that wording. The term "conditions of employment," as used in collective bargaining, has a different meaning than the phrase "terms, conditions, or privileges of employment," used in the statute, which is much more expansive. The City maintains that Peters got everything to which he was contractually entitled, but it ignores the fact that he was given the assignment of Transport Officer and had it taken from him and given to a female officer when sex was not a bona fide occupational qualification for the position. He had a legal protectable interest in not having his assignment taken for an impermissible reason. The Transport Officer job was a preferred position by the Grievant and he had a right under the statute and the contract to not have it taken away for discriminatory reasons. This is true whenever an employment decision is made based on a sex stereotype.

It should be further noted that Sec. 2.02 goes beyond conditions of employment and forbids discrimination in any manner whatsoever. This distinction was noted by the judge in his decision to remand the case for rehearing. Any manner whatsoever would include taking a job from one employee and giving it to another based on gender and the arbitrator is required to give contract language its plain meaning.

The City's brief also makes several misrepresentations of fact. It claims that Officer Resch testified that he did not know how the City made Packer assignments and that the City disregarded seniority rights without the consent of the Union. In fact, Officer Resch was talking about qualifications for overtime. The City also mischaracterizes the testimony of Attorney Parins by stating he did not have specific information about agreements reached with the City about Packer game assignments, when in fact he did not refer to agreements, but said the parties had discussed the subject during negotiations and that he was given the impression that assignments would be based on seniority. Further, although City witnesses testified that they did not make game assignments based on seniority, witnesses Ebel and Gille testified that seniority would control if more hours were involved. The City also offered a statistical analysis of the comparative hours involved with different assignments, while the Union was precluded from doing the same. The Union notes, however, that Jt. Ex. #12 shows that Officer Peters actually received 3 hours less of overtime than the other Transport Officer in 2004.

The Arbitrator should retain jurisdiction of this case. Sec. 2.02 must be interpreted to apply beyond the other specific rights set forth in the contract otherwise it would be superfluous and it is axiomatic that contracts should be interpreted to give meaning to all of their provisions. Further, there is no conflict with enforcing a statutory right through arbitration. Contract rights and statutory rights are different and where the parties have negotiated language that allows employees to enforce statutory rights, the Commission should assert the authority to arbitrate such claims.

### City Reply

The City reasserts its positions that the grievance is untimely and should be dismissed and that the arbitrator should refuse jurisdiction inasmuch as the matter has already been resolved in the settlement of the Grievant's claim before the ERD, as well as restating its position that the City has never agreed to honor officers' specific assignment requests at Packer games.

The City further maintains that Sec. 2.02 is only applies to other rights specifically set forth in the contract. As such, it provides no independent general protection against discriminatory conduct or practices, but only guarantees that other contract rights cannot be impaired on the basis of discrimination. It asserts that the statutory remedies available under Sec. 111.32 et seq, Stats. exist to protect employees from acts of discrimination that arise outside of the specific provisions of the contract. Here, the Union advanced parallel claims on the same legal principles before the WERC and ERD and is continuing its claim before the WERC long after the ERD proceeding was resolved. Further, due to the settlement of that claim, the Grievant is entitled to no monetary remedies here even if he should prevail. The City should not be thus subjected to endless litigation in multiple forums.

The City further asserts that Peters was not discriminated against in any condition of employment. The courts have defined conditions of employment as being wages, benefits and other matters of interest to employees. The evidence shows that Peters suffered no economic

harm as a result of the assignment change. Nevertheless, the City settled his ERD claim for 10.8 hours of pay, giving him the benefit of the doubt as to his alleged losses, so he experienced no pecuniary harm. Further, beyond the amount of pay involved, there is no meaningful distinction between one Packer game assignment and another. Reassigning Peters from one position to another, therefore, did not result in discrimination against him.

The City points out that officers have no contractual rights to specific Packer game assignments. The Union, for the first time, claims this issue is moot, because there is no evidence supporting such a finding and it is pressing its argument that officers have the right to specific assignments based on seniority in a separate prohibited practice proceeding. The City, however, has spent a great deal of time and resources defending itself in this matter and requests a ruling on this issue to settle it once and for all. All the City witnesses testified that they did not grant specific game assignments based on seniority and there is no evidence of any express or implied agreement to do so. Were there such, one would expect a posting of specific assignments that officers could sign, rather than the generic sign-up sheet currently used, which merely solicits interest in working at Packer games.

### DISCUSSION

The original award in this case was issued on May 18, 2006. On August 23, 2007, the Brown County Circuit Court vacated the award under Sec. 788.10, Wis. Stats. and remanded it for a rehearing. The effect of the vacation of the original award is to make it null and void. Upon remand, therefore, the Arbitrator conducted a *de novo* arbitration hearing on the original grievance, addressing the identical issue submitted in the first arbitration.

#### Arbitrability

At the rehearing, the City asserted that the grievance should be dismissed because it was untimely. Section 3.06(1) of the contract requires that a grievance be filed within fifteen working days of the date on which the Grievant or Union knew or should have known the circumstances giving rise to the grievance, working days being defined as Monday through Friday. Further, Sec. 3.04 provides that failure to file a grievance in a timely fashion constitutes a waiver of the grievance. Here, the Grievant was told on Thursday, November 11, 2004 that he was being reassigned for the November 14 Packer game and that his position was being given to a female officer. The grievance was filed on December 8, 2004, the nineteenth working day thereafter.

As the City points out where parties set specific time deadlines for filing grievances in their contracts, arbitrators typically will honor them. Thus, where a grievance is not filed within the time lines specified by the contract, arbitrators commonly will refuse to hear them. If, however, a party wishes to assert a timeliness defense, the defense must also be asserted in a timely fashion. Here, the City did not assert a timeliness defense at the time of the filing of the grievance, or indeed throughout the entire original proceeding. The first assertion of the timeliness defense was on the first day of the rehearing, March 10, 2009, more than five years



after the filing of the grievance and nearly four and a half years after the original arbitration. Having processed the grievance through one arbitration and having failed to raise the issue of timeliness for such an extent of time, in my view, constitutes a waiver of the contractual time limits. Thus, I find that the timeliness defense is, itself, untimely brought and the grievance is, therefore, arbitrable.

### The Merits

The substantive issue in the dispute is whether the City violated Sec. 2.02 of the parties' collective bargaining agreement when it removed Officer Peters from his assignment of Transport Officer for the November 14, 2004 Green Bay Packers football game and replaced him with a female officer. Sec. 2.02 provides, as follows:

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.

Sec. 111.321, Wis. Stats. provides that "no employer... may engage in any act of employment discrimination, as specified in s. 111.322 against any individual on the basis of age, race, creed, color, handicap, marital status, sex..."

Sec. 111.322(1) defines acts of employment discrimination as follows:

- (1) To refuse to hire, employ, admit or license any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment or labor organization membership because of any basis enumerated in Sec. 111.321.

Further, Sec. 111.36 provides, in pertinent part:

- (1) Employment discrimination because of sex includes, but is not limited to, any of the following actions by any employer, labor organization, employment agency, licensing 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.
- (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 a job, or if the essence of the employer's business operation would be undermined if employees were not hired exclusively from one sex.

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. In so doing, the parties have subjected claims of illegal employment discrimination to the grievance arbitration process.

The City maintains that the Arbitrator should decline to rule on this grievance because the subject matter is more properly addressed in an employment discrimination claim before the Equal Rights Division of the Wisconsin Department of Workforce Development and, in fact, Peters pursued a parallel claim on this matter before the ERD, which resulted in a monetary settlement. The grievance in this matter was filed before the discrimination action, however, and potentially touches upon issues of contract interpretation and administration that would not necessarily arise in an employment discrimination action. For that reason, therefore, and inasmuch as the Association and Grievant have contractual rights to grieve alleged acts of discrimination, clearly intending for such to be subject to the arbitration process, I find that this is an appropriate matter for arbitration.

As to the scope of Sec. 2.02, I do not concur with the City that it is restricted only to other specifically enumerated contract rights. The language of the section prohibits discrimination “in any manner whatsoever against any employee as defined in Section 111.32 *et seq* of the Wisconsin Statutes.” By tying the provision in this fashion to the Wisconsin Fair Employment Act, the parties essentially made it possible for an individual employee to grieve and arbitrate any acts of alleged employment discrimination that would constitute violations of the WFEA, regardless of whether they are based on some other enumerated contract rights. By the same token, by adopting the definitions contained in Sec. 111.32, *et seq*, Stats., the parties thus restricted the meaning of the term “in any manner whatsoever.” It is not, as the Association suggests, an omnibus term that encompasses any act that might constitute discriminatory conduct, but is, as set forth above, a codification within the contract of the WFEA, and nothing more. Thus, to the extent that a grievance raises allegations of conduct that would arguably violate the discrimination provisions of the WFEA, Sec. 2.02 applies, but it does not encompass conduct that would not otherwise be actionable under the WFEA.

It is undisputed that Officer Peters signed up to work overtime at Packer games during the 2004 football season and, when he did so, that he indicated a preference to work as a Transport Officer. Initially, Commander Kenneth Brodhagen, who was in charge of the security detail at that time, assigned Peters to work as one of two Transport Officers for the game scheduled for November 14, 2004. On November 11, 2004, Brodhagen informed Peters that he was changing his assignment and was assigning a female officer, Karla Krug, to work as one of the two Transport Officers instead. Peters was given the option of working in another assignment of his choosing. Brodhagen’s rationale apparently was that he wanted a female officer working a transport position in order to deal with any female fans who might be

arrested during the game. It is further undisputed, however, and the evidence so indicates, that both male and female officers are required as part of their regular duties to search and transport persons of the opposite sex. In fact, the Department's Policies and Procedures regarding transportation of persons in custody in effect at the time (Assoc. Ex. #2) assumed that officers will be called upon to transport persons of the opposite sex and made provision for it. Likewise, there is no guarantee that Transport Officers at Packer games will be dealing only with persons of the same gender as themselves, and statistically there is probably a likelihood that more males will be taken into custody at any given game than females. Thus, it is probably true that a female officer would be more likely to have to search and/or transport a male prisoner at a Packer game than the reverse. Preference aside, therefore, based on the statutory language above, it cannot be said that sex is a bona fide occupational qualification for the position of Transport Officer.

The Association argues in the alternative. It asserts, as it did in the first proceeding, that Packer game assignments are awarded on the basis of seniority and that Peters, being more senior than the female officer who supplanted him, had a right to the Transport Officer position based on his greater seniority. It further maintains, however, that regardless of the issue of seniority, Peters was subjected to discrimination because an assignment that had been given to him was withdrawn and given to another on an impermissible basis. The City asserts that there is not, nor ever has been, a right to select Packer game assignments by seniority, that Sec. 2.02 is not enforceable standing alone, but must be tied to an alleged violation of some other contract right due to discrimination and that the City's decision to give the Transport Officer assignment to a female officer and reassign Peters did not discriminate against him, because he lost nothing.

In the first instance, I find no merit to the Association's contention that officers have the right under the contract, or past practice, to select specific game assignments on the basis of seniority. Section 6.06 of the contract only specifies that in July of each year a posting will be placed for Packer game overtime. Officers interested in working at Packer games are to sign the posting and "shall be assigned to work each of the Packer games in the year in question based on departmental seniority." Nothing is said about posting or bidding for individual game assignments, only the right to work at games generally. The sign-up sheet for the 2004 season (Jt. Ex. #13), which is also in the same format as sign up sheets for other years, only provides for signing up to show interest in working at games; it does not list individual assignments. Thus, it is clear that the intention of the parties in adopting Sec. 6.06 was only to assure that the right to work at Packer games would be governed by seniority, not the right to any specific game assignment.

Past practice also does not support the Union's position. In order for a binding past practice to exist it must have certain characteristics. It must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. One hundred eleven officers signed the posting

for Packer game overtime during the 2004 season. Of these, seventy indicated a desire to be assigned to a specific duty location during games, sometimes only stating "same as last year" or words to that effect. Forty-one indicated no preference. Testimony was offered from Officer Peters, Officer William Resch and Attorney Thomas Parins supporting the Association's position. Peters and Resch testified to having worked at Packer games over many years. They stated that historically officers were permitted to sign up for game assignments and that they would be awarded on the basis of seniority. Less senior officers would request less preferred assignments, or none at all, until they gained enough seniority to be awarded the more popular assignments, which they would then be awarded for as long as they wished to work that assignment. Parins, who has served as the Association's attorney and collective bargaining representative for many years, testified to his understanding that game assignments were awarded on the basis of seniority, although there was never a formal agreement between the parties to that effect.

The City witnesses, however, testified that there was never any understanding from the City's perspective that individual game assignments were to be awarded on the basis of seniority. Captain Larry Gille, who made game assignments in the late 1980s testified that he would assign officers to the same positions year after year for purposes of consistency, but not on the basis of seniority, and that he had learned this practice from his predecessor. He stated that he did not always make assignments according to the officers' stated preferences and that ultimately he had discretion to make assignments as he saw fit. Captain Karl Fleury, who made game assignments in 1999 and 2000, testified that game assignments were made based upon the needs of the department, and that consistency was a consideration, so that officers were frequently assigned to their preferred positions, but that seniority was not the controlling factor. Lieutenant Paul Ebel, who made game assignments in 2001 and 2002, testified that he did not understand that game assignments were to be made by seniority. The stadium was under construction, so manpower needs were in flux and assignments would regularly change. For continuing assignments, however, Ebel went off old assignment lists, thus giving officers assignments they had held in prior years, again for the sake of consistency.

The conclusion supported by the cumulative testimony is that there was not a mutual understanding between the parties as to how individual game assignments were to be made. Certainly, it was not mutually agreed that officers would be awarded their requested assignments based upon their seniority. From the standpoint of the Association members assignments may have appeared to have been awarded on the basis of seniority, but from the Department's position the controlling factor was not departmental seniority, but the fact that an officer had worked the same assignment for a number of years and was familiar with it. The command personnel in charge of making game assignments consistently testified that, while stated preferences were a factor, they retained discretion to make assignments as staffing needs required. Thus, while it is quite possible that a senior officer was more likely to receive a requested assignment, it is just as possible that this was the result of his or her having held the same assignment for a number of years as it is that departmental seniority was the determining factor. It is clear to me, therefore, that there was no clear existing practice requiring the City

to assign officers to their requested positions on the basis of their departmental seniority and the City retains discretion to make particular game assignments as it sees fit.

The only caveat to the foregoing is that seniority does play a part where the number of hours are in question. Thus, more senior officers are entitled to priority as to assignments that offer more hours of overtime. It appears from Association Exhibit #7, and the testimony of Lt. William Bongle, however, that this is only a factor in determining when an officer is called in, not what particular assignment he or she is given. As the testimony reveals, how long an officer's duties continue after the game depends on what is happening on a given day and cannot be predicted accurately from week to week.<sup>1</sup> Here, there is no conclusive evidence that Officer Peters actually worked fewer hours than the officer who replaced him on Transport duty on the date in question. It appears that the figure used in settling the ERD claim was derived from giving him the benefit of the doubt as to his claimed losses rather than actual payroll figures.

Prior to the assignments for a particular game being made, therefore, except as to starting time, which was not in issue here, an officer cannot have an enforceable expectation interest in receiving any particular assignment. The fact that an officer does not receive priority as to his or her requested game assignment based on departmental seniority, therefore, does not give rise to a claim of a violation of contract or past practice. Furthermore, the fact that an officer's particular requested assignment is given to a less senior officer of the opposite gender does not *per se* give rise to a claim of discrimination under Sec. 2.02.

Here, however, Commander Brodhagen had already made game assignments for the November 14 game, and Officer Peters was already slotted in as a Transport Officer, when Brodhagen decided to replace Peters with Officer Krug, specifically because she was a female officer. In other words, after Peters was assigned to serve as a Transport Officer, a position he clearly desired, he was removed in favor of a female officer, because she was a female officer, even though, as previously noted, gender was not a bona fide occupational qualification for the Transport Officer position. In my view, a specific job assignment at a Packer game, once made, becomes a "term, condition, or privilege of employment," as that term is used in Sec. 111.322. Stats. Once made, that assignment decision is subject to the anti-discrimination provisions of Sec. 2.02. Once Brodhagen posted the original game assignments, Peters had an expectation interest in the Transport Officer position. By deciding he wanted a female to work as a Transport Officer, and removing the assignment from Peters, Brodhagen discriminated against Peters, by making a gender-based decision where gender was not a legitimate consideration under the law, as incorporated into the contract. To take the assignment away under the circumstances reflected in this record did, therefore, constitute discrimination, as

---

<sup>1</sup> Officers are called in for pre-game assignments at differing hours, depending on their seniority, with more senior officers being called earlier, but game time and post game assignments last until they are completed. The evidence indicates that the amount of time necessary to complete different assignments after games varies from week to week, so it is virtually impossible to assign such positions on the basis of seniority in order to guarantee more senior officers the greater number of hours.

that term is used in Sec. 2.02. This is not to say that once game assignments are made the City cannot change them. It still retains discretion under its management rights to “determine the methods, means and personnel by which City operations are to be conducted.” It does mean, however, that any such changes cannot be made on a basis that would constitute discrimination under Sec. 111.32, Wis. Stats., *et seq.*

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

**AWARD**

The City discriminated against Officer Peters in violation of Sec. 2.02 of the contract by reassigning him for the November 14, 2004 Packer game and giving the Transport Officer position to which he had been assigned to a female officer, based on her gender, where gender was not a bona fide occupational qualification for the position. In light of the resolution of Officer Peters’ ERD claim, and the fact that no proof of economic loss was established, no backpay is awarded. The City is, however, ordered to cease and desist from reassigning Peters for future Packer game for any reason that would constitute discrimination under Sec. 2.02 of the contract.

Dated at Fond du Lac, Wisconsin, this 29th day of October, 2009.

John R. Emery /s/

---

John R. Emery, Arbitrator