BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE POLICE SUPERVISORS' ORGANIZATION

and the

CITY OF MILWAUKEE

Case 608
No. 72207
MP-4767

AWARD NO. 7889

Appearances:

William Rettko, Attorney, Rettko Law Offices S.C., 15460 W. Capitol Drive, Suite 200, Brookfield, Wisconsin, 53005-2621, appearing on behalf of the Milwaukee Police Supervisors' Organization.

Thomas Beamish, Assistant City Attorney, Milwaukee City Hall, 200 E. Wells Street, Suite 800, Milwaukee, Wisconsin, 53202-3551, appearing on behalf of the City.

ARBITRATION AWARD

Although this decision is captioned as an arbitration award, this case didn't start out as a grievance arbitration. This case originated when the Milwaukee Police Supervisors' Organization (MPSO) filed a prohibited practice complaint on August 7, 2013, with the Wisconsin Employment Relations Commission (WERC) against the City of Milwaukee (City). The complaint alleged that the City had violated a specific provision of the 2010-2012 collective bargaining agreement between the City and the MPSO. The complaint further alleged that three lieutenants in the Milwaukee Police Department (MPD) had been assigned in 2012 to day shift duties, despite insufficient seniority for day shift assignment, in violation of Article 44 of the parties' collective bargaining agreement. The complaint identified the three lieutenants as Lieutenants Henschel, Jackson and Obregon. The complaint further alleged that by doing that, the City had violated Sec. 111.70(3)(a)5, Stats. The section just referenced is part of the Municipal Employment Relations Act (MERA) which is administered by the WERC. After the complaint was filed with the WERC, Raleigh Jones was appointed as examiner in this matter. Hearing on the complaint was scheduled for January 14, 2014. At the hearing, the parties agreed to convert the case from a complaint case alleging a violation of MERA to a grievance arbitration alleging a violation of a collective bargaining agreement. As a result of that

agreement, my status changed from an examiner enforcing MERA to a grievance arbitrator enforcing a collective bargaining agreement. That's why this decision is captioned as an arbitration award instead of an examiner decision. The hearing was transcribed. Following the hearing, the parties filed briefs and reply briefs, whereupon the record was closed on March 18, 2014. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The MPSO framed the issue as follows:

> Whether the placement of persons in a rank lower than Captain to a day shift assignment without achieving day shift seniority is a violation of Article 44 of the MPSO's collective bargaining agreement with the City of Milwaukee, and if so, what is the remedy?

The City framed the issue as follows:

> Whether certain of the hours worked in 2012 by the three lieutenants identified in the MPSO's complaint violated Article 44 of the parties' labor agreement. If so, what is the remedy?

I have essentially adopted the City's proposed wording of the issue, but I have modified it slightly to the following:

> Were some of the hours worked by Lieutenants Obregon, Jackson and Henschel in 2012 violative of Article 44 of the collective bargaining agreement? If so, did the Employer violate that section of the agreement by its actions herein? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2010-2012 collective bargaining agreement contained the following pertinent provisions:

> ARTICLE 11
>
> HOURS OF WORK

1. The normal hours of work for employees covered by this Agreement shall consist of work shifts of eight (8) consecutive hours which in the aggregate results in an average work week of forty (40) hours.

2. The regularly scheduled 8-hour shift shall be established by the Chief of Police in accordance with the requirements set forth above.

* * *

ARTICLE 44

DUTY ASSIGNMENT

An employee holding a rank lower than that of Captain of Police shall, upon appointment and after taking and subscribing his or her oath of office, be assigned to night duty at a work location designated by the Chief of Police. Employees holding ranks lower than that of Captain of Police shall be assigned to day duty according to seniority in their respective ranks and positions. Temporary exceptions to such shift assignments may be made in accordance with existing Departmental practices.

With respect to an employee holding the rank of Deputy Inspector of Police or Captain of Police, the Chief of Police will consider an employee's seniority in rank or position for purposes of assigning such employee to a day duty assignment. The Chief of Police, however, has the final authority to assign employees in these ranks to day duty, or to night duty if the Chief of Police determines it is necessary to serve some special need of the Department. The Chief of Police's discretion in this regard shall be final and not subject to the grievance procedure set forth in the Contract Enforcement Procedure Article of this Agreement.

BACKGROUND

The MPSO represents about 300 supervisors in the Milwaukee Police Department including sergeants, lieutenants and captains, among others. The MPSO and the City have been parties to collective bargaining agreements since 1979.

For many years, there has been a provision in the parties' collective bargaining agreement that is entitled "Duty Assignment." That provision is found in the first paragraph of Article 44. While that provision will be addressed in detail in the DISCUSSION section, it suffices to say

here that that provision says that employees holding a rank lower than captain shall be assigned to night duty; after they obtain the requisite seniority, they can be assigned to day duty. (Note: Day duty is any shift that starts before 11:00 a.m. and night duty is any shift that starts after 11:00 a.m.). The last sentence in the first paragraph of Article 44 provides thus: "Temporary exceptions to such shift assignments may be made in accordance with existing Departmental practices."

The last sentence in the first paragraph of Article 44 was addressed by Arbitrator Byron Yaffe in an arbitration award in 1992. Dec. A/P M-92-219 (Yaffe, 9/2/92). His decision is addressed in more detail in the DISCUSSION section.

Captains are usually assigned to work the day shift. Lieutenants are assigned to work all shifts.

When employees move to a different position, such as moving from a sergeant to a lieutenant, they start on the night shift. They have to stay working the night shift until their seniority allows them to work days. Not surprisingly, day shift work is greatly valued by employees.

Insofar as lieutenants are concerned, the amount of time that it takes them (i.e. lieutenants) to become eligible to work the day shift varies anywhere from six months to six years. As a result, it is normal for lieutenants to work on the night shift several years before they become day-shift eligible. Consequently day shift lieutenants are usually more senior than night shift lieutenants.

FACTS

Here's a factual overview of this case. This case involves the hours worked by Lieutenants Aimee Obregon, Phillip Henschel and Jutiki Jackson in 2012. Specifically, it involves their start time. That year, all three were officially assigned to work an 8 hour shift that ran from 11:00 a.m. to 7:00 p.m. However, for a variety of reasons, they sometimes started work before 11:00 a.m. At issue is whether that early start time was contractually permissible.

* * *

The following facts provide additional context.

In the fall of 2012, Deputy Inspector Mary Hoerig asked Lt. Al Johnson if he was interested in filling an acting captain assignment in the Technical Communications Division on the day shift. Being an acting captain is an assignment and not a permanent rank or position. At the time, Johnson – who was a very senior employee – was working elsewhere on the day shift. Johnson answered that he preferred his current assignment. Notwithstanding Johnson's personal preference, if the Employer wanted to, it could have nonetheless moved Johnson from his then assignment to the acting captain assignment in the Technical Communications Division. Since

Johnson preferred his current assignment, Hoerig asked Johnson for recommendations. Johnson responded that there were already three lieutenants at that location – one of whom worked the day shift – and asked her why management did not take one of those lieutenants and give them the acting captain assignment. Hoerig responded that she did not want any of them to fill the acting captain assignment in the Technical Communications Division. Hoerig then floated Lt. Obregon's name and asked Johnson for his opinion of her. Johnson offered a favorable opinion of Obregon, but then said that Obregon was night-shift eligible only and therefore could not work days. The conversation ended with Johnson telling Hoerig that if management intended to place Obregon in an acting captain assignment on the day shift, management should discuss the matter with the MPSO in order to get a temporary waiver from the labor agreement.

Sometime in the fall of 2012 – the record does not indicate when – Obregon was assigned to be acting captain in the Technical Communications Division. There was no ending date for the acting captain assignment. When Obregon was given this acting captain assignment, her work hours were officially designated as 11:00 a.m. to 7:00 p.m. That particular shift is considered a night shift (as opposed to a day shift). While her work hours as an acting captain were officially 11:00 a.m. to 7:00 p.m., she often started work before 11:00 a.m. (just as she had been doing throughout that year). The number of times that she started work before 11:00 a.m. in 2012 will be identified later in this section.

On December 19, 2012, MPSO Labor Relations Manager Thomas Klusman wrote Chief of Police Edward Flynn about Obregon's assignment as acting captain for the Technical Communications Division. In that letter, Klusman averred that as a night shift supervisor, Obregon could not commence work any earlier than 11:00 a.m. each day without violating Article 44 of the parties' collective bargaining agreement. Klusman further averred that, other than attending in-service training at the Police Academy, there were "no current / open temporary exceptions to Article 44," nor had the parties discussed or agreed to any temporary exceptions which would allow a less senior night shift supervisor to work day shift hours.

On January 17, 2013, Klusman wrote to Chief Flynn again about Obregon serving as acting captain for the Technical Communications Division. That letter provided in pertinent part:

> Up to this particular assignment and dating back to your predecessor's administration, there has been a relatively consistent process in the department that when there is a determined need for an Acting Captain for a period of greater than thirty (30) days, the most senior lieutenant in that work location has been so assigned.

The letter then went on to assert that the Department "depart[ed] from that practice" by giving Obregon the acting captain assignment for the Technical Communications Division.

About the same time, the MPSO received complaints from its members that in addition to Obregon getting the acting captain assignment for the Technical Communications Division and working the day shift, there were two other lieutenants – namely Lt. Jackson and Lt. Henschel – who had also been given acting captain assignments and were working the day shift. The record

indicates that Jackson was assigned to be acting captain with the Neighborhood Task Force and Henschel was assigned to be acting captain with the Tactical Enforcement Unit. The record does not indicate when Jackson and Henschel were given their acting captain assignments, but it can be inferred from the record that, like Obregon's acting captain assignment, it was sometime in the fall of 2012. There was no ending date for their acting captain assignments. When Jackson and Henschel were given their acting captain assignments, their work hours were officially designated as 11:00 a.m. to 7:00 p.m. (just like Obregon). While their work hours as acting captains were officially 11:00 a.m. to 7:00 p.m., they often started work before 11:00 a.m. (just as they had been doing throughout that year). The number of times that they started work before 11:00 a.m. in 2012 will be identified later in this section.

After receiving the complaints referenced above, the MPSO requested certain documentation from the Department concerning the 2012 work hours for Obregon, Henschel and Jackson. The Department did not respond to the request. The MPSO was frustrated by the City's (lack of) response to their request for information, and by the Department's current method of tracking work hours.

In May 2013, Obregon, Henschel and Jackson created documents which purportedly identified their 2012 work hours. These documents were apparently based on the employees' own records and calendars (as opposed to any official Department records). In any event, these documents indicate that in 2012, each reported to work prior to 11:00 a.m. on numerous occasions. Obregon's documents indicated that she reported to work prior to 11:00 a.m. 3 times in January, 6 times in February, 4 times in March, 2 times in April, 4 times in May, 2 times in June, 5 times in July, 2 times in August, 11 times in September, 8 times in October, 14 times in November and 7 times in December (for a total of 68 shifts in 2012). Henschel's document indicated that he reported to work prior to 11:00 a.m. 4 times in January, 5 times in February, 5 times in March, 4 times in April, 5 times in May, 3 times in June, 2 times in July, 4 times in August, 5 times in September, 6 times in October, 4 times in November and 0 times in December (for a total of 47 shifts in 2012). Jackson's document indicated that he reported to work prior to 11:00 a.m. 0 times in January, 7 times in February, 7 times in March, 3 times in April, 3 times in May, 9 times in June, 3 times in July, 9 times in August, 9 times in September, 7 times in October, 4 times in November and 1 time in December (for a total of 62 shifts in 2012).

On all the dates when Obregon, Henschel and Jackson started work before 11:00 a.m., they essentially worked the day shift that day.

* * *

In June of 2013, Lt. Obregon and Lt. Jackson were promoted to captain.

* * *

On July 11, 2013, the Police Department's Chief of Staff, Joel Plant, sent a letter to Klusman which confirmed that Lt. Mark Stanmeyer was going to work the day shift for a couple of weeks.

POSITIONS OF THE PARTIES

MPSO

The MPSO contends that the City has violated Article 44 by assigning "night shift-eligible only" employees to the day shift. While the City essentially dismisses the assignments in question as no big deal, the MPSO disputes that characterization, and contends it was a contract violation. It asks the arbitrator to remedy same. It elaborates as follows.

First, the MPSO reviews the contract language involved here. It notes that the first two sentences in Article 44 provide that anyone below the rank of captain has to have the requisite seniority to work day shift. The last sentence then provides: "Temporary exemptions to such shift arrangements must be made in accordance with existing Departmental practices". The MPSO avers that one "temporary exception" when night shift-eligible employees are allowed to work day shift is when an employee attends training at the Police Academy. With regard to the phrase "existing Departmental practices", the MPSO asserts that that phrase refers to getting a waiver from the MPSO. Specifically, when the Department wants a night shift employee to work day shift, that can happen if the Department gets a written waiver from the MPSO. According to the MPSO, that waiver request needs to include a specific ending date (for the assignment) and an identified special need for the request.

Second, the MPSO notes that in 2012, Lts. Obregon, Jackson and Henschel were given acting captain assignments. It avers that as part of their assignments, they worked the day shift. To support that premise, the MPSO relies on the memorandums which those officers submitted in May 2013. According to the MPSO, a review of those memorandums show that all three of them worked the day shift (i.e. starting work before 11:00 a.m.) sporadically in 2012. It further avers that the three of them had no specific ending date for their day shift assignments. The MPSO submits that the problem with that was that none of the three had the seniority to work day shift; they were all "night shift-eligible only". The MPSO argues that since the City never obtained a waiver from the MPSO for Lts. Obregon, Jackson and Henschel to work day shift (when they did not have the seniority to do so), the City violated Article 44.

Third, the MPSO notes that the contract language involved herein has been addressed in a previous arbitration award, namely City of Milwaukee and Milwaukee Police Supervisors' Organization, A/P M-92-219 (Yaffe, 9/2/92). The MPSO summarizes that award thus. That case involved two sergeants who were assigned to the day shift without first obtaining the necessary seniority to do so. Yaffe determined that indefinite and lengthy duration of an assignment without a specific ending date or an anticipated duration of the assignment is not temporary. He further found that even if those lengthy assignments had a duration and met the temporary definition, the assignments would still have been in violation of Article 44 because "the Department failed to make any systematic effort to identify and skills and qualifications of more senior sergeants who might have been interested in the assignments in question" (sic, page 6). Applying Yaffe's reasoning here, the MPSO avers that there were many day shift eligible

lieutenants who might have been interested in the assignments given to Obregon, Jackson and Henschel, but the Department failed to make any systematic effort to find those people.

Finally, the MPSO responds to the City's contention that by seeking to have the arbitrator order the Department to track the actual hours worked for all persons below the rank of captain, the MPSO is attempting to amend its labor agreement. The MPSO disputes that contention. In its view, it is merely seeking to have the existing contract language enforced.

As a remedy for the City's contractual violation, the MPSO initially notes that in the Yaffe case, Yaffe ordered the two sergeants reassigned from the day shift to the night shift and replaced (on the day shift) with the most senior sergeants. The MPSO submits that that remedy is inapplicable here because Lts. Obregon and Jackson have since been made captains. The MPSO therefore requests that the arbitrator direct the Chief to issue an order which: 1) confirms that no member of the department below the rank of captain can be assigned day shift without the department first seeking a temporary waiver from the MPSO for assignments that are temporary in nature with a definite duration ending date; and 2) provides an explanation of why the assignment could not be filled with an existing day shift employee of that rank during the temporary period.

CITY

The City's position is that its actions herein did not violate Article 44. The City acknowledges at the outset that Lts. Obregon, Jackson and Henschel worked some day shift hours in 2012 even though they were assigned to night shift. However, as the City sees it, their working some day-duty hours did not violate Article 44 because the day time hours they worked in 2012 were "limited, scattered and irregular". It elaborates as follows.

First, the City addresses the language in the last sentence of the first paragraph of Article 44. According to the City, MPSO President Klusman testified at the hearing that there was just a single exception to Article 44's general proviso regarding day shift assignments (namely, training). Building on that premise (i.e. that there is just one exception), the City disputes that assertion. The City avers that claim (i.e. that there is just one exception) is erroneous. It submits that if there was just going to be a single exception to the contract's general provision that employees will only be assigned to day duty if they have sufficient seniority, then it would have been a logical and simple matter for the parties to have referenced "except for training exercises," or words to that effect, at the time they formulated this provision. The City notes that the parties did not include such language in Article 44. The City also calls attention to the fact that the last sentence in the paragraph has been in the collective bargaining agreement since 1985. The City submits that given its longevity, no MPSO witness was in a position to offer testimony from their first-hand knowledge as to the range of permissible exceptions under Article 44 of the contract.

Next, the City contends that the 1992 Yaffe Arbitration Award between the parties sheds some light on the meaning of the last sentence in the first paragraph of Article 44. Here's why. First, the City notes that in that award, Yaffe summarized the MPSO position in the matter as

being that a "temporary exception" dealt with assignments of "relatively short duration". The City further notes that in that case, two junior sergeants were permanently and indefinitely assigned to the day shift. Yaffe found that their lengthy and indefinite assignment to the day shift – without any specified ending date – ran afoul of Article 44. The City contends that the facts here are different. In this case, it asserts that none of the three lieutenants involved were permanently assigned to the day shift or anything approaching a permanent day shift in 2012. As the City sees it, that's of critical importance. Second, the City notes that in the Yaffe award, in the portion of his decision that summarized the MPSO's position, he listed a number of assignments where night shift employees could temporarily be assigned to the day shift. He listed those assignments as being "the vice squad, tactical squad, gang detail, background investigations and internal investigations" (Yaffe Award, page 4). According to the City, that listing (in the Yaffe Award) establishes that contrary to Klusman's testimony, there is more than just a single circumstance when a night shift employee may be temporarily assigned to a day shift assignment. Additionally, the City characterizes the listing (in the Yaffe award just noted) as "practices" that continue to this day. Building on that, it cites an arbitration award for the proposition that when a party wants to end a past practice which clarifies ambiguous contract language, the accepted way of doing it is to change the contract language. The City submits that here, though, "the MPSO has obtained no change in contract language such as to end these practices."

Next, the City addresses the hours that Lts. Obregon, Jackson and Henschel worked in 2012 on the day shift. According to the City, a number of those hours fit into either the training exception (that the MPSO acknowledged), or some of the categories referenced in the Yaffe Award (such as the tactical squad). As for the remaining hours that Lts. Obregon, Jackson and Henschel worked in 2012 on the day shift, "the City acknowledges that not each and every one of those work activities are directly described as within the description of 'existing department practices' outlined in the Yaffe award." Nonetheless, the City maintains that these particular activities do not run afoul of the provisions of Article 44. That's because, as noted earlier, the MPSO takes a "nearly absolutist position" that, with but a single exception, Article 44 precludes assigning MPSO members on any work day to day duty (i.e. a work schedule that commences before 11:00 a.m.), if the member does not have sufficient seniority for such an assignment. The City maintains that there are, in fact, a number of exceptions to Article 44. According to the City, two of the exceptions are "Compstat" (a management meeting) and "acting captain" duties. The City submits that "these two types of intermittent activity were not of the type that ran afoul of the contract provision that specifies MPSO members should be assigned to day duty in accordance with their seniority." Aside from that, the City maintains that in most of the instances where the three lieutenants started work before 11:00 a.m., it happened "on a relatively few number of days scattered throughout the month. Only on some occasions were these activities conducted over a series of days in the same week…" The City sees that as significant. Building on all of the foregoing, it's the City's position that the three lieutenant assignments to day shift in 2012 did not violate Article 44.

Finally, the City addresses the fact that the MPSO was frustrated in its efforts to obtain certain documentation from the Department in connection with this grievance. According to the City, those records were ultimately furnished to the MPSO via Joint Exhibits 15-17. With regard

to the MPSO's contention in its opening statement that it believes "there's a need for the City to require a tracking of actual hours worked for persons below the rank of captain", the City understands that to be a demand that the arbitrator order such a system. Addressing same, the City submits that the Union's frustration in this respect may not lawfully be addressed through grievance arbitration for these reasons. First, the Union failed to cite any provision of the contract that explicitly requires such records. Second, in the course of the hearing, it was indirectly suggested that the Department is currently reviewing its manner of tracking hours worked. Third, the City cites the portion of the collective bargaining agreement that says that the arbitrator may not add to or modify the language of the contract in the issuance of an award. As the City sees it, the parties should be left to their own circumstances to deal with the issue, rather than the arbitrator being drawn into the matter.

The City therefore asks the arbitrator to find no contract violation and dismiss the grievance. If the arbitrator decides otherwise and finds a contract violation, the City submits that the sole remedy is simply to have the City abide by the terms of the provisions of Article 44 of the collective bargaining agreement. The City asks the arbitrator to not adopt the MPSO's proposed remedy because that proposed remedy is at variance with the language of the contract.

DISCUSSION

I'm going to start by addressing the scope of this decision.

First, when this case was being processed, the MPSO sought certain information from the Department. Specifically, it sought documentation from the Department for the 2012 work hours for Lts. Obregon, Jackson and Henschel. The Department did not respond to the request. The MPSO was frustrated by the Department's (lack of) response to their request for information, and by the Department's current method of tracking work hours. To address those concerns, the MPSO asked me – as part of any remedy in this case – to order that the Department create such a system for tracking hours. No matter what I do concerning the merits of this case, I'm not going to order the Department to create such a tracking system. In my view, that's beyond the scope of this decision.

Second, the MPSO also expressed concern over how it was that Lts. Obregon, Jackson and Henschel were given the acting captain assignments. As the MPSO put it in their brief, their being given those assignments "appeared to be acts of favoritism". Also, in his January 17, 2013 letter to Chief Flynn, MPSO Labor Relations Manager Klusman averred that there was an applicable past practice dealing with who was to be selected to fill acting captain assignments that were expected to last more than 30 days. According to Klusman, the past practice was this: the most senior lieutenant in that work location was given the acting captain assignment. In this case, I'm not going to decide whether there is, or is not, such a practice dealing with who is to be selected to fill acting captain assignments. I leave it to the parties to sort out how future acting captain assignments are filled and whether there is, or is not, a binding past practice dealing with that matter. While I certainly will be addressing the three lieutenants who were given acting captain assignments in the discussion which follows, it will not be in the context of how they

were selected for that assignment. Rather, it is after they were selected for that assignment, were some of their work hours violative of Article 44.

Third, the MPSO also expressed concern over how it was that Lts. Obregon and Jackson were selected in July, 2013 to be captains. Again, in their brief, the MPSO averred that their selection (as captains) "appeared to be acts of favoritism". I'm not going to address that topic either. That topic is also beyond the scope of this decision.

* * *

Having made those preliminary comments about what I'm not going to be addressing in my decision, the focus now turns to what I will be addressing. As I see it, the questions to be answered here are as follows: first, were some of the hours worked by Lts. Obregon, Jackson and Henschel in 2012 violative of Article 44 of the collective bargaining agreement? Second, if so, did the Employer violate that section of the agreement by its actions here? The MPSO essentially answers those questions in the affirmative while the City answers them in the negative. Based on the rationale which follows, I agree with the MPSO and answer those questions in the affirmative.

I begin by looking at the contract provision at issue herein. It's Article 44. That article contains two paragraphs. The parties agree that the second paragraph is inapplicable here, and just the first paragraph applies. Here's what that paragraph provides:

> DUTY ASSIGNMENT
>
> An employee holding a rank lower than that of Captain of Police shall, upon appointment and after taking and subscribing his or her oath of office, be assigned to night duty at a work location designated by the Chief of Police. Employees holding ranks lower than that of Captain of Police shall be assigned to day duty according to seniority in their respective ranks and positions. Temporary exemptions to such shift assignments may be made in accordance with existing Departmental practices.

The first sentence in this paragraph says that employees holding a rank lower than captain shall (initially) be assigned to night duty. Thus, a new sergeant or lieutenant starts on night duty. The second sentence then goes on to say that after that employee obtains the requisite seniority, then they can be assigned to day duty. When these two sentences are read together, they establish the following general proposition: Employees holding a rank lower than captain are initially assigned to night duty. They have to stay working night duty until their seniority allows them to work day duty. While the terms "night duty" and "day duty" (which are used in these two sentences) are not defined in this paragraph, the record indicates that the parties agree on what those terms mean.

Before I identify what those terms mean, the following background is important for the purpose of context. There are numerous eight hour shifts that run throughout a 24-hour period. I'm not going to attempt to identify herein all of those shift starting and ending times. Instead,

what's important here is that 11:00 a.m. is an important cut-off point. I'll elaborate more on that later.

I now return to the terms day duty and night duty. The parties agree that "day duty" refers to any shift that starts before 11:00 a.m. Thus, a shift starting at 10:00 a.m. and running eight hours till 6:00 p.m. qualifies as day duty. Further, the parties agree that "night duty" refers to any shift that starts after 11:00 a.m. Thus, a shift starting at 11:00 a.m. and running eight hours until 7:00 p.m. qualifies as night duty. While it seems to me that an 11:00 a.m. to 7:00 p.m. shift should qualify as day duty, that's not how the parties see it. Obviously, on that point, their view controls; not mine. The reason I decided to make reference to an 11:00 a.m. to 7:00 p.m. shift is because, as the parties know, that's the specific shift involved here.

Returning now to the contract language in the first paragraph of Article 44, the third and final sentence in that paragraph provides thus: "Temporary exceptions to such shift assignments may be made in accordance with existing Departmental practices." This sentence says that there can be exception(s) to the general seniority rule which is established in the first two sentences of this paragraph (and were already reviewed above). Once again, the general rule is that employees holding a rank lower than captain are assigned to night duty until they obtain the requisite seniority; after they obtain the requisite seniority, then they can be assigned to day duty. The third sentence then goes on to allow an exception to the general seniority rule set out in the first two sentences (so that a junior employee can work days) so long as it's done "in accordance with existing Departmental practices". Under this language, the City does not get to give itself an exception whenever it wants one. Rather, to get one (i.e. an exception) the City has to show that the exception was granted per "existing Departmental practices".

In this case, there is no question that when the Employer had Lts. Obregon, Jackson and Henschel start work before 11:00 a.m. in 2012 (in effect, letting them work the day shift) rather than giving that day shift assignment to more senior lieutenants, the Employer was taking the view that the "exception" referenced in the third sentence of the first paragraph of Article 44 applied. That being so, the basic question to be answered here is whether the "exception" applied to all the times that the three lieutenants started work before 11:00 a.m. in 2012. In making that call, I'm putting the burden on the City to prove that the "exception" applies because it's the City – and not the MPSO – that wants an exception to the general seniority rule established in the first two sentences of the first paragraph of Article 44.

Before I apply the third sentence in the first paragraph of Article 44 to the facts herein, it's relevant to consider that this sentence was addressed in a prior arbitration award between these parties. I'm referring, of course, to Dec. A/P M-92-219 issued by Arbitrator Yaffe in 1992. In that case, the Department created a new department known as OMAP and assigned two sergeants from the night shift to the day shift in that department. This assignment was open-ended with no termination date. A group of sergeants who had more seniority than the two sergeants selected for this day shift assignment grieved. After setting forth the issue as being whether these assignments were "temporary" assignments made in accordance with "existing departmental practices", Yaffe's decision dealing with the merits was just two paragraphs long. The first paragraph provided thus:

> Because of the indefinite and lengthy duration of said assignments, and because the City, even at the time of the hearing in this matter, could not give any definition to their anticipated duration, the undersigned cannot conclude that said assignments fall within the "temporary" exception set forth in Article 44. The record evidence in this matter clearly distinguishes the nature and duration of these assignments from those that have been made by the Chief in the past. Though other out of seniority assignments that lasted for significant periods of time appear to have been made in the past, in this case the assignments are both lengthy and of an indefinite duration, and the combination of those factors not only distinguishes these assignments from others, but must result in a finding that they are not "temporary" within the meaning of Article 44.

After elaborating for just one more paragraph, Yaffe found as follows: "Based upon the foregoing considerations, in undersigned's opinion the City violated Article 44 when it made the assignments in question".

While one would think that this award would be helpful in deciding the outcome of this case, I find that it is not particularly helpful for the following reasons.

To begin with, the facts in the Yaffe case are different from the facts present here. The following shows this. First, in the Yaffe case, the Department officially moved the two sergeants from the night shift to the day shift. That did not happen in the instant case. In this case, the three lieutenants were all officially on night duty throughout all of 2012 (specifically, the 11:00 a.m. to 7:00 p.m. shift noted earlier), as opposed to being on day duty as was the situation in the Yaffe case. That distinction is important because in the Yaffe case, the Employer did not dispute the contention that the two sergeants were working a day shift. Here, though, the Employer disputes the assertion that the three lieutenants worked a day shift. Second, in the Yaffe case, the two sergeants worked what he characterized as "permanent day shift". My interpretation of that is day in and day out. That did not happen in this case. Here, the three lieutenants did not work before 11:00 a.m. every day. Instead, they only did so about four or five days a month, on average. In other words, they started work before 11:00 a.m. a day here and a day there (with some exceptions that will be noted later).

Aside from that, as previously noted, a big part of this case is deciding whether the "temporary exception" that the Employer made here (when it had these three lieutenants work before 11:00 a.m. thereby having them work the day shift) was done "in accordance with existing Departmental practices". In his decision, Yaffe made no express finding concerning the "existing Departmental practices" that existed there, except to say the following: "The record evidence in this matter clearly distinguishes the nature and duration of these assignments from those that have been made by the Chief in the past." In my view, that statement doesn't give me much to work with here because I don't know what "record evidence" Yaffe was referencing when he made that statement. Once again, all he referenced was "the record evidence in this matter".

Having made those comments about the Yaffe Award and its application here, the focus now turns back to determining what constitutes an "exception" that is in accordance with "existing Departmental practices".

The record shows that one "exception" that qualifies as an "existing Departmental practice" is attending training conducted during the day shift hours. The reason that we know that is an "exception" is because both sides acknowledge that it is. Their agreement on that point means that a night shift employee can attend in-service training on the day shift without the Employer running afoul of Article 44.

While there are no other exceptions that the parties agree on, the City contends there are nonetheless other "exceptions" that qualify per "existing Departmental practices". To support that contention, the City points to the "Position of the Parties" section of Yaffe's award on page 4 where Yaffe wrote: "Said language related to assignments to the vice squad, tactical squad, gang detail, background investigations and internal investigations." According to the City, I should use that statement as a basis to find that all of the foregoing still qualify as "existing Departmental practices". I'm not going to do that. Simply put, I'm not going to take a single line from the "Positions of the Parties" section of a 20 year old arbitration award and use it as a basis to find what currently qualifies as an "existing Departmental practice". More proof than that is needed. It would be one thing if there was record evidence that conclusively demonstrated that assignments to the vice squad, the tactical squad, the gang detail, background investigations and internal investigations all qualified as "existing Departmental practices". However, such evidence is not in the record.

Even if there was evidence in the record that those five assignments still qualified as "existing Departmental practices", they still don't cover all the categories of work that Lieutenants Obregon, Jackson and Henschel did in 2012 when they started work before 11:00 a.m. What I mean by that is that not all of the work that these three lieutenants did when they worked the day shift can be shoe-horned into the five assignments that Yaffe referenced in the "Positions of the Parties" section of his award. Take, for example, attending Compstat meetings and acting captain duties. Both are assignments that the three lieutenants handled in 2012. However, neither is referenced anywhere in Yaffe's award. Additionally, there is no evidence whatsoever in this record that either somehow qualifies as an "existing Departmental practice" within the meaning of Article 44.

A review of Joint Exhibits 15, 16 and 17 conclusively establishes that while their official work schedules in 2012 were 11:00 a.m. to 7:00 p.m., all three lieutenants started working before 11:00 a.m. numerous times throughout that calendar year. The City tries to get around this inconvenient fact by characterizing the day time hours that the three lieutenants worked in 2012 as "limited, scattered and irregular". For the most part, that characterization is accurate as it applies to the period of January through August, 2012. However, when the three lieutenants were given the assignment of acting captain in the fall of 2012, they worked more day shifts than they previously had that year. That was particularly the case with Obregon who worked days 11 times in September and 14 times in November. To put those numbers in perspective, in those two

months she only worked a night shift about six times each month. Thus, in those two months, her day shifts were anything but "limited, scattered and irregular".

Normally, starting work earlier than one is scheduled is not a problem and usually does not violate a collective bargaining agreement. This point is illustrated with the following example. Take, say, an employee whose normal work schedule is an eight hour shift that runs from 10:00 a.m. to 6:00 p.m. If that employee comes in to work at 8:00 a.m. and works till 6:00 p.m. (i.e. a 10 hour day), the Employer is on the hook, so to speak, for two hours of overtime, but it certainly is not usually a contract violation for an employee to work two hours of overtime. What happened here, though, is different from the hypothetical I just gave. When Lts. Obregon, Jackson and Henschel came in before 11:00 a.m. and started their shift early, that was problematic because 11:00 a.m. is the cutoff point for a day shift. The Employer was well aware that by having an employee who is on an 11:00 a.m. to 7:00 p.m. schedule start work before 11:00 a.m. – even if it was just one hour – that changed the categorization of their work shift from a night shift to a day shift. In other words, that change in their work schedule had the practical effect of transforming their work shift from nights to days. The third sentence in the first paragraph of Article 44 essentially says that the only way a junior employee can work days is if an "exception" applies per "existing Departmental practices". In this case, the only "practice" that was shown to exist is training. While some of the three lieutenants came in to work early for that express reason, they also came in for reasons other than training, such as Compstat meetings and to be acting captain. While there may indeed be more "existing Departmental practices" than just training, they were not shown here. Since the City was trying to make an exception to the general seniority principle set forth in the first two sentences of the first paragraph of Article 44 when it allowed junior employees to work days, it had the burden of proving that an "exception" applied per "existing Departmental practices". It did not prove that.

Finally, the Employer implicitly asks me to overlook the dozens and dozens of instances where the three lieutenants worked the day shift and essentially let the City off the proverbial hook. While the MPSO is certainly capable of granting the Employer leniency, I am not. My task herein is to apply the contract language as written. Based on the rationale expressed above, I find that some of the hours worked by Lieutenants Obregon, Jackson and Henschel in 2012 were violative of Article 44. That's because they worked the day shift on those occasions. The problem with that was that they did not have sufficient seniority to work days. While the last sentence in the first paragraph of Article 44 allows the Employer to put a junior employee on the day shift, this "exception" has to be done per "existing Departmental practices". That was not done in 2012, so a contract violation occurred.

Having found a contract violation, the focus now turns to the remedy. At the hearing, the MPSO indicated it was not asking for any back pay. Instead, it essentially asked for a cease and desist order. I'm essentially granting that, although I'm not going to use the magic words "cease and desist" in my order. Instead, I'm simply ordering that henceforth, the Employer is to comply with the last sentence in the first paragraph of Article 44. In the future, if the Employer wants to have an employee on the night shift start work before 11:00 a.m. and work days, then that "exception" needs to be effectuated per the last sentence in the first paragraph of Article 44. I

leave it up to the parties to determine what practices qualify for inclusion in the phrase "existing Departmental practices". I have not granted any of the other remedies sought by MPSO.

In light of the above, it is my

AWARD

That some of the hours worked by Lieutenants Obregon, Jackson and Henschel in 2012 were violative of Article 44 of the collective bargaining agreement. As a result, the Employer violated that section of the agreement by its actions herein. In order to remedy this contractual violation, the City shall take the following action: Henceforth, the Employer is to comply with the last sentence in the first paragraph of Article 44. In the future, if the Employer wants to have an employee on the night shift start work before 11:00 a.m. and work days, then that "exception" needs to be effectuated per the last sentence in the first paragraph of Article 44.

Dated at Madison, Wisconsin this 5th day of June 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Raleigh Jones, Arbitrator