

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE POLICE ASSOCIATION,
LOCAL 21, IUPA, AFL-CIO

And

CITY OF MILWAUKEE

Case ID: 251.0051
Award No. 7983

(Acting Detective Grievance)

Appearances:

Brendan Matthews, Cermele and Matthews, Attorneys at Law, 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin, appearing on behalf of the Milwaukee Police Association.

Lisa Gilmore, Assistant City Attorney, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin, appearing on behalf of the City of Milwaukee.

ARBITRATION AWARD

Milwaukee Police Association, Local 21, IUPA, AFL-CIO, hereinafter referred to as the MPA or the Association, and City of Milwaukee, hereinafter referred to as the City or the Employer, were parties to a collective bargaining agreement which provided for final and binding arbitration of unresolved grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the instant grievance. A hearing on that grievance was held via Zoom on December 8, 2021. The hearing was transcribed. Afterwards, the parties filed briefs and reply briefs, whereupon the record was closed on February 18, 2022. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties did not stipulate to the issue to be decided. The MPA frames the issue as follows:

Did the Department violate its own SOPs, and thereby the parties' collective bargaining agreement when it created the acting detective position/assignment without any selection process, and if so, what are the appropriate remedies?

The City frames the issue as follows:

Whether the City's action, temporarily transferring police officers to the Criminal Investigation Bureau (CIB) to act as Detectives, violated the collective bargaining agreement, or any rule or regulation of the Milwaukee Police Department? If so, what is the remedy?

I have not adopted either side's proposed wording of the issue. I find that the issue that will be decided herein is as follows:

Whether the Employer's actions in this matter violated the parties' collective bargaining agreement? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The collective bargaining agreement (hereinafter CBA) applicable here was from January 1, 2018 to December 31, 2019. It contained the following pertinent provisions:

PREAMBLE

1. THIS AGREEMENT, is made and entered into at Milwaukee, Wisconsin between the CITY OF MILWAUKEE, a municipal corporation, hereinafter referred to as "City", as municipal employer, and the MILWAUKEE POLICE ASSOCIATION, Local #21, I.U.P.A., AFL-CIO, hereinafter referred to as "Association", as the representative of certain non-supervisory employees of the City of Milwaukee in the Police Department.

2. The parties to this Agreement are desirous of reaching an amicable understanding with respect to the employer-employee relationship which exists between them and to enter into a complete Agreement covering rates of pay, hours of work, and conditions of employment.

3. The parties do hereby acknowledge that this Agreement is the result of the unlimited right and opportunity afforded to each of the parties to make any and all demands and proposals with respect to the subject of rates of pay, hours of work, and conditions of employment and incidental matters respecting thereto.

4. This Agreement is an implementation of the provisions of Section 111. 70, Wisconsin Statutes, consistent with the legislative authority in effect on the

execution date of this Agreement that is delegated to the City Common Council relating to: The Chief of Police and the Fire and Police Commission (as set forth in Section 62.50, Wisconsin Statutes); The Municipal Budget Law (as set forth in Chapter 65 of the Wisconsin Statutes); and any other statutes and laws applicable to the City. The Fire and Police Commission and the Chief of Police will abide by the terms of this Agreement.

**ARTICLE 2
RECOGNITION**

Except as provided in subsection 2, below, the Association is recognized as the exclusive bargaining agent for employees in active service and in the following classifications:

Detective
Police Officer

2. The Association recognizes its responsibility to cooperate with the City to assure maximum service at minimum cost to the public consistent with its obligations to the employees it represents.

**ARTICLE 5
MANAGEMENT RIGHTS**

1. The Association recognizes the right of the City, the Chief of Police and the Board of Fire and Police Commissioners to operate and manage their affairs in all respects in accordance with the laws of Wisconsin, ordinances of the City, Constitution of the United States and Section 111. 70 of the Wisconsin Statutes. The Association recognizes the exclusive right of the Board of Fire and Police Commissioners and/or the Chief of Police to establish and maintain departmental rules and procedures for the administration of the Police Department during the term of this Agreement provided that such rules and procedures do not violate any of the provisions of this Agreement.

7. The City shall have the right to transfer employees within the Police Department in a manner most advantageous to the City.

8. Except as otherwise specifically provided in this Agreement, the City, the Chief of Police and the Fire and Police Commission shall retain all rights and authority to which by law they are entitled.

12. The Association pledges cooperation to the increasing of departmental efficiency and effectiveness. Any and all rights concerning the management and direction of the Police Department and the police force shall be exclusively the right of the City unless otherwise provided by the terms of this Agreement as permitted by law.

ARTICLE 7
GRIEVANCE AND ARBITRATION PROCEDURE

II. GRIEVANCE ARBITRATION

F. In reviewing any difference over application of a departmental rule or regulation under this grievance and arbitration procedure, the arbitrator shall take into account the special statutory responsibilities granted to the Chief of Police under Section 62.50, Wisconsin Statutes, 1977. The arbitrator shall not impair the ability of the Chief of Police to operate the Department in accordance with the Statutory responsibilities under Section 62.50, Wisconsin Statutes, 1977, nor shall he/she impair the authority of the Chief of Police to maintain, establish and modify rules and regulations for the operation of the Police Department, provided such rules and regulations are not in violation of the specific provisions of this Agreement. In addition, the arbitrator shall not prohibit the Chief of Police from executing Departmental rules and regulations in a fair and equitable manner.

BACKGROUND

The City is a municipal employer that provides law enforcement services through its Police Department. MPA is a labor organization that serves as the collective bargaining representative of certain employees of the Milwaukee Police Department (hereinafter MPD) including those employees in the separate ranks and classifications of police officer and detective. A CBA between the parties was effective January 1, 2018 through December 31, 2019. The incident that is the subject of this grievance arbitration occurred during that contract period.

The following overview is germane to this matter. The position of “police officer” and “detective” are separate classifications of sworn personnel titles within the MPD and within the MPA’s bargaining unit. Detective is a higher classification than that of police officer. In keeping with the principles of a hierarchical organizational structure, department members operate within their established chain of command unless exigent circumstances dictate otherwise. Pursuant to Wis. Stat. § 62.50 (3)(b), the Board of Fire and Police Commissioners (FPC) has exclusive statutory authority to establish rules governing the selection and appointment of employees of the MPD.

The statutory provision just cited (Wis. Stat. § 62.50) and FPC rules control the promotion process in the MPD. The FPC selection process rules for the promotion of employees in the MPD can be summarized as follows. First, the FPC administers a competitive examination to those who qualify to sit for the exam by meeting continuous service requirements. Second, after the exam, the individuals are ranked based on their exam performance and placed on an eligible list. Third, the list just referenced is then adopted and approved by the FPC. Finally, after FPC adoption and approval, the eligible list is provided to the MPD to use for promotional opportunities.

The MPD's Human Resource Administrator distinguishes transfers under the authority of the Chief of Police from the promotion process governed and administered by the FPC. She testified thus:

“Transfer” is based on assignment within the Department, meaning that you stay within your title classification and you're just being reassigned based on the needs of the Department. “Promotion” is actually going through a [formal] selection process, being vetted for promotion to a higher classification, a different title, and -- which would often provide a higher pay in salary”. (Tr. pp. 49 – 50).

FACTS

It was in that context that the following occurred. In October of 2019, the MPD experienced high attrition levels for detectives and police officers. At the time, there were 47 detective vacancies and 44 police officer vacancies. The detective vacancy rate was 24% and the police officer vacancy rate was 3%. When this happened there was no active eligibility list for the detective classification; the detective eligibility list adopted by the FPC on December 17, 2015 and extended to March 15, 2018 had been exhausted.

After considering the 24% detective vacancy rate, the high crime rate which had caused an investigation backlog for serious crimes, and the absence of a valid detective eligibility list, the Department's management team decided to address those concerns with the following solution: it would temporarily assign some police officers to work in the Criminal Investigation Bureau (CIB) to perform detective work.

After that decision was made, Sgt. Jonathan Mejia was tasked with seeking patrol officers who were willing to work nights in the CIB performing detective work. To accomplish that task, he went to every police district in the city seeking officers who, as just noted, were willing to do detective work on nights in the CIB. He particularly sought out women and Spanish speaking officers. Ultimately, a dozen employees told Mejia they were interested in performing that work. Mejia then checked whether any were sick leave abusers and whether they had open investigations pending (meaning were they facing disciplinary action). Mejia then forwarded his list of a dozen officers who were willing to do detective work in the CIB on nights to the Department's inspector. That was the end of Mejia's involvement in this matter.

Management subsequently determined that 16 patrol officers would “temporarily” be assigned to the CIB to do detective work as acting detectives. Just two of the 16 officers which

management selected for that assignment were on Mejia's list (Joseph Newell and Elizabeth Rubio); the other 14 were not on his list. The Employer did not show how or why it selected those 14 employees to be acting detectives.

On October 15, 2019, Police Chief Alfonso Morales issued Personnel Order 2019-135. That order specified in pertinent part that 16 police officers were "temporarily" transferred to work nights in the CIB.

None of the 16 police officers who were transferred to CIB pursuant to that personnel order had previously been participants in the Department's promotional testing process that had previously been conducted for officers that want to be promoted from the rank of police officer to the rank of detective.

The 16 police officers who were transferred to CIB pursuant to that personnel order then underwent detective training. After a week of training, they were deemed acting detectives and thereafter performed the duties of the rank of detective. They did so until February 2021. During that year and a half time period, none of the officers were permanently promoted to the position of detective. After a new detective eligibility list was created and adopted by the FPC, all 16 officers were returned to non-detective assignments.

MPA subsequently filed two grievances concerning the issuance of the personnel order just referenced. The first challenged the Chief's decision to transfer 16 police officers to work as acting detectives without posting it and not using a formal selection process to determine who was selected for the transfer assignment. The second grievance sought detective pay for the police officers who were transferred to CIB pursuant to that personnel order and were performing detective work. The parties subsequently settled the second grievance, and the City paid the transferees for performing work of a higher classification. The MOU for that grievance settlement stated in pertinent part:

1. A Police Officer who is assigned to the Criminal Investigation Bureau (CIB) to perform the duties of the rank of Detective shall receive Acting Detective Pay ("acting pay") after he/she has received the necessary training to perform Detective duties. A Police Officer so assigned shall receive acting pay for the duration of the assignment.
2. Acting pay shall be at the first step of Pay Range 808
3. The following Police Officers shall receive acting pay retroactively to the date that they were transferred to the CIB and completed detective training. The officers shall continue to receive acting pay until such time as they are no longer performing detective duties : . . .
4. Once a Detective eligible list is available for promotional appointments, individuals who have been assigned to the CIB to perform the duties of the rank of Detective

shall be transferred to a different assignment as individuals are promoted off of the eligible list.

The first grievance referenced above did not settle and was subsequently appealed to arbitration. It is the matter involved here.

In November of 2019, the City's FPC made a formal announcement of the next detective promotion examination. After the examination was conducted, the FPC adopted an eligibility list for promotion to detective on September 24, 2020. That list was subsequently rescinded. On February 4, 2021, the FPC adopted a new detective eligibility list. After that happened, police officers were promoted to detective off that list. As already noted, the 16 acting detectives then returned to other assignments in the department.

Some additional facts are referenced in the Discussion.

DISCUSSION

At issue here is whether the Employer's actions in this matter violated the parties' CBA. (Note: I'll explain later why I worded the issue this way). The Association contends that it did while the City disputes that assertion. Based on the rationale which follows, I answer that question in the affirmative and find that the Employer's actions violated the CBA.

Before I delve into my rationale though, here's the pertinent backstory. In the fall of 2019, the MPD had a high detective vacancy rate. As a result, the department needed detectives. To an outsider, the way to fix the problem seems simple: promote police officers to the rank of detective. It wasn't that simple though because the MPD couldn't do that on its own volition. That's because another entity - namely the Milwaukee FPC - is responsible for conducting the detective exam and then creating the detective eligibility list. Permanent detective promotions in the MPD are based off that list. However, in 2018, the detective eligibility list which had been created in 2015 was "exhausted" (meaning there were no names left on the list to promote because everyone on the list had already been promoted to detective). Thus, the situation that existed in the fall of 2019 was that the MPD could not permanently promote any police officers to detective until it got a new detective eligibility list from the FPC. While that ultimately happened, it took a long time (namely till February 2021) because of the pandemic and other unspecified reasons. After a new detective eligibility list was created and adopted by the FPC, employees were then promoted to detective off that list. This case involves what happened in the interim period.

What happened in the interim period was that the Department's management team decided to assign some police officers to be acting detectives to deal with the backlog of cases in the CIB. To effectuate that, the Chief issued a personnel order in October 2019 which "temporarily"

transferred 16 police officers to the CIB on nights. After those 16 police officers were transferred there, they underwent detective training and afterwards were deemed to be acting detectives. Then, those officers performed detective work until February 2021. At that point, a new detective eligibility list had been created and adopted by the FPC and the employees on that list were permanently promoted to detective. After that happened, the 16 acting detectives then returned to other assignments in the department.

Having given that factual context, I'm now going to pivot to my rationale.

In the first paragraph of my discussion, I identified the issue herein as "whether the Employer's actions in this matter violated the parties' CBA." The reason I decided to use such truncated and conclusory wording is because there are four separate parts to this case (which I'll identify next). While I could have mentioned all four parts in the introductory paragraph, I thought doing so looked clumsy. Consequently, I decided to instead use conclusory wording for the issue which makes no reference to the four (as yet unnamed) parts and cuts to the chase, so to speak.

I see this case as involving these four questions. First, since a transfer is involved, that raises this rhetorical question: can the Employer transfer employees as it sees fit? Second, assuming that the answer to that question is yes, does the Employer have to post transfer opportunities for employees to bid on? Third, when the Employer has a transfer opportunity to fill, does the Employer have to identify the selection criteria it uses to determine who it selects for the transfer? Fourth, when the Employer makes what it deems to be a "temporary" transfer, is there any time limitation involved?

Since all four questions involve an interpretation of the CBA, I begin my interpretive process by looking at the relevant contract language. Rhetorically speaking, is there contract language which addresses and dispositively answers these four questions? There is contract language which addresses and dispositively answers the first question dealing with transfers. I'm referring to Section 7 of the Management Rights clause. It says that "the Employer shall have the right to transfer employees within the Police Department in a manner most advantageous to the City." That language obviously gives the Employer the right to transfer employees as it sees fit.

The focus now shifts to the other three questions I noted were involved here. I begin by asking the same rhetorical question I asked about the first matter, to wit: is there contract language which addresses those questions? This time, the answer is no there is not. By that I mean there is no contract language which addresses whether the Employer has to post transfer opportunities for employees to bid on before the Employer implements same. That being so, there is no contract language which **requires** the Employer to post transfer opportunities. Additionally, there is no contract language which addresses whether the Employer has to identify the selection criteria it uses to determine who it selects for a transfer. That being so, there is no contract language which **requires** the Employer to specify what selection criteria it will use when it selects officers for a transfer opportunity. Finally, there is no contract language which addresses how long a

“temporary” transfer can last. Said another way, there is no contract language which sets a timetable for an assignment which the Employer deems to be “temporary”.

When a CBA is found to be silent on a given topic, arbitrators routinely look beyond the CBA itself for guidance in resolving disputes over its meaning. Past practice is a form of evidence commonly used to fill gaps in a CBA. The rationale underlying its usage is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given to the CBA. Said another way, the manner in which the parties have carried out the terms of their agreement in the past provides reliable evidence concerning how it is to be interpreted.

The record shows that in seven other instances where a transfer opportunity existed, the Department posted it. [Note: although I did not reference them in the BACKGROUND or FACTS, I will do so here: I’m referring to the Specialized Patrol Division - Traffic Safety Unit; the Police Academy - Administration Bureau; the Criminal Investigation Bureau - Fusion Division; the Open Records Section - Administration Bureau; the Technical Communications Division - Administration Bureau; the Specialized Patrol Division - Crisis Assessment Response Team (CART); and the Office of Management, Analysis and Planning - License Investigation Unit (LIU)]. Collectively, the parties refer to these seven postings as specialized assignments. Each of these postings identified: a) who was eligible for consideration; b) the duties of the assignment; and c) the selection criteria that would be used by management to determine who was selected for the assignment.

While the Employer was not contractually obligated to post these seven specialized assignments, what is noteworthy is that the Department nonetheless did so. Thus, it did something that it was not contractually obligated to do. The fact that it did so is not surprising when one considers that employers often take actions they are not legally or contractually obligated to take in the hope that doing so will lessen workplace conflict that would otherwise arise/occur. By posting the seven specialized assignments just noted, everyone became aware of the transfer opportunity and had the opportunity to bid on it if they chose to do so.

Since the record shows that the Employer posted these seven specialized assignments, the ball was in the Employer’s proverbial court to show that there were other specialized assignments that were not posted. No such evidence was offered.

The next question is whether the evidence just referenced established the existence of a binding past practice. I find that it did. The definition of past practice which I’ve been citing in my arbitration awards for years is this: in order for a past practice to be considered binding, the conduct must be clear and consistent, of long duration, and accepted by both sides. Said another way, the practice must be the accepted way of doing something over time. I find that what happened with those seven specialized assignments qualifies as a past practice under the definition just noted. Building on that premise, that past practice is enforceable through arbitration.

My finding that an enforceable practice exists is significant because the Employer did not follow it here. First, the Employer did not post the acting detective transfer opportunity. Second,

because there was no posting, the Employer never identified to the employees what selection process it intended to use to determine who was selected for the acting detective assignment. Because of the practice, the Employer should have done both those things (i.e., post it and identify the selection process to be used in determining who was selected). It would have been one thing if the Employer had offered bona fide reasons why it could not do those two things as it related to the acting detective assignment. However, it did not do so. Nor did the Employer even try to distinguish the acting detective assignment from the other seven specialized assignments that were posted.

That said, the Employer did try to defend the selection process it used to determine who was selected for the acting detective assignment. It notes in this regard that Sgt. Mejia was tasked with seeking out those officers in the department who were willing to work nights in the CIB doing detective work. A dozen employees told Sgt. Mejia they were willing to do that. Mejia subsequently compiled a list which included their names and forwarded it up the proverbial ladder.

The Employer implies that after it got Mejia's list of volunteers, those were the employees that were assigned to be acting detectives via the Chief's October 2019 personnel order. It would be one thing if management had simply rubberstamped Mejia's list of volunteers and assigned them to the CIB as acting detectives. However, that's not what happened. The following shows this.

When one compares the 12 names on Mejia's list with the 16 officers that were ultimately chosen to be acting detectives, one sees that just two of the officers on Mejia's list were selected to be acting detectives. (I'm referring to Newell and Rubio). That means that the other 10 officers on Mejia's list were not chosen to be acting detectives. The Employer made no attempt to explain why the other 10 officers on Mejia's list were dropped from consideration by management. Additionally, the Employer made no attempt to explain why the other 14 officers were added to the Chief's October 15, 2019 personnel order. In fact, the Employer was silent on both those critical points. That silence was deafening.

Given that silence, it's a mystery to me why management selected 14 of the 16 officers it selected to be acting detectives. That's obviously problematic and buttresses the Association's claim that most of those who were selected to be acting detectives were either chosen at random, or that favoritism may have been involved in their selection.

One more point about the past practice needs to be made. It's this. Prior to this matter, no one in the department had ever been deemed an acting detective before; employees were either a police officer or a detective, and there was nothing in between these two official classifications. What the Employer did here though was unilaterally create a new classification of acting detective without negotiating over that matter with the Association. It suffices to say that it could not do that.

The final matter being reviewed here concerns the length of time that the acting detective assignment lasted. When the Employer made that assignment in October 2019, it characterized it as a "temporary" assignment. It can fairly be surmised from the record that there have been other

“temporary” assignments in the department. At the hearing, Inspector Formolo was asked how long such “temporary” assignments usually last. His answer was six months. Given that answer, one would expect that the “temporary” acting detective assignment would have lasted about that long. However, it didn’t. Instead, the “temporary” acting detective assignment lasted a year and a half. In other words, it went three times longer than other “temporary” assignments. By doing that, the assignment had crossed the proverbial line and was no longer “temporary” in nature.

Based on the foregoing, I find that the Chief’s October 15, 2019 personnel order which “temporarily” assigned 16 police officers to be acting detectives violated the CBA. Here’s a short summary why. First, the assignment was not posted. It should have been posted pursuant to an existing past practice. Second, the Department did not identify what selection criteria it used to determine who was selected to fill the assignment. Again, that was part of the existing practice. Third, although the Chief deemed the transfer to be “temporary”, it lasted three times longer than other “temporary” transfers in the Department. Because of that, the transfer ceased to be “temporary”.

Having found a contractual violation, the final matter to address is the remedy.

The remedy I am ordering maintains the practice. As noted above, the Employer should have followed the existing practice but did not do so here. Going forward, the next time the Employer has a specialized assignment transfer opportunity to fill, the Employer shall post it. This posting shall also identify the selection criteria the Employer plans to use to determine who is selected for the transfer assignment.

Oftentimes when an arbitrator finds a contract violation occurred, a monetary award is included as part of the remedy. This is not such a case. Here’s why. First, no employees are still in the acting detective assignment. That assignment ended a year ago (along with the Employer’s violation of the CBA). Second, the record shows that the parties settled a second grievance related to this matter. That settlement paid all the police officers who worked as acting detectives at a specified detective pay rate for the duration of their assignment. Since the affected employees have already been made whole for the Employer’s contractual violation via that grievance settlement, I find that no additional money is owed by the Employer to any employees.

In light of the above, it is my

AWARD

That the Employer's actions in this matter violated the parties' CBA. To remedy that violation, the next time the Employer has a specialized assignment transfer opportunity to fill, it shall post it. This posting shall also identify the selection criteria the Employer plans to use to determine who is selected for the transfer assignment.

Issued at Madison, Wisconsin this 8th day of March 2022.

By: _____
Raleigh Jones
Arbitrator