

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
NEW BERLIN PROFESSIONAL POLICE ASSOCIATION, INC. LOCAL 219A
AND
CITY OF NEW BERLIN

Grievance No. 22-497

Case ID: 611.0002
Award No. 7989

Appearances:

Roger W. Palek, Wisconsin Professional Police Association, 660 John Nolen Dr., Suite 300, Madison, Wisconsin, appearing on behalf of the New Berlin Professional Police Association, Inc. Local 219A.

Brian J. Waterman and James M. Carroll, Buelow, Vetter, Buikema, Olson & Vliet, LLC, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin, appearing on behalf of the City of New Berlin.

ARBITRATION AWARD

The New Berlin Professional Police Association, Local 219A, hereinafter referred to as the Association, and the City of New Berlin, hereinafter referred to as the City or the Employer, were parties to a 2021-2022 collective bargaining agreement which provided for final and binding arbitration of unresolved grievances. Pursuant to that agreement, the Wisconsin Employment Relations Commission assigned the undersigned to decide a promotion grievance. A hearing on that grievance was held in New Berlin on January 24, 2023. The hearing was transcribed. Afterwards, the parties filed briefs and reply briefs, whereupon the record was closed on March 20, 2023. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUES

This grievance has two bifurcated issues, one procedural and one substantive. The Association frames the issue as follows:

1. Is the grievance filed by the Association arbitrable?

2. If yes, did the City's merit-based seniority classification of the four officers promoted in 2022 violate the collective bargaining agreement, and if so, what is the remedy?

The City frames the issues as follows:

1. Did the Union fail to timely follow the procedures for moving the grievance to arbitration under the parties' collective bargaining agreement? If so, is the grievance non-arbitrable?
2. Did the City violate the CBA when it determined order of promotion to sergeant, and thus length of service in rank, based on merit rather than on length of service with the Department?

Although the parties did not stipulate the issues to be decided, they agreed that the arbitrator could establish the issues. I find that the issues that will be decided herein are as follows:

1. Is the grievance filed by the Association arbitrable?
2. If the grievance is arbitrable, did the City violate the CBA by giving preference in the selection of fixed shift assignments to Aaron Dreyer over James Ament? If so, what is the remedy?

PERTINENT CONTRACT PROVISIONS

The collective bargaining agreement (CBA) applicable here was from January 1, 2021 to December 31, 2022. It contained the following pertinent provisions:

ARTICLE II – MANAGEMENT

Section 2.01: All the power, authority and rights of the City not specifically assigned or limited by this Agreement are retained by the City.

Section 2.02: The Agreement is the entire and the only Agreement between the parties and there are no understandings, arrangements or agreements not specifically expressed herein. This is a whole agreement and it is the intention that it be all-inclusive with no areas remaining, during its term, for further collective bargaining.

ARTICLE XIII – GRIEVANCE PROCEDURE

Section 13.01: An arbitral grievance is defined as a disagreement as to the meaning or application of the terms and conditions of the Agreement. A non-arbitrable grievance is defined as a disagreement as to the provisions of and application of the Department rules and regulations, general orders, special orders, or other administrative memoranda.

Section 13.02: Any member of the Department within the bargaining unit may make a grievance in the following manner:

...

Fifth, if the meeting with the Director of Administrative Services does not satisfactorily dispose of the grievance, and if the grievance is one defined as arbitrable, by submission to arbitration by an arbitrator appointed by the Wisconsin Employment Relations Commission, providing however, that the Association makes such submission of the grievance and request for an arbitrator in writing to the Wisconsin Employment Relations Commission within thirty (30) calendar days of the written response referred to in Fourth. A copy of such submission and request shall be sent to the Director of Human Resources and Police Chief.

ARTICLE XVI – OTHER CONDITIONS OF EMPLOYMENT

Section 16.06 - Shift Assignments: The Chief shall determine the number and identity of Officers assigned to each division and shift and the number and identity of Sergeants to each division and shift. Non-Probationary Officers shall be assigned to fixed shifts. The Chief of Police or his designee shall make available to Non-Probationary Officers and Sergeants, the fixed shift selection process between September 15 and October 15 for the coming year and post the fixed shift assignments no later than November 1. There shall be a separate shift minimum for Patrol Officers and Sergeants. The term of the fixed shift assignment shall be one (1) year in length commencing within one (1) month of February 1st of each year. Probationary officers shall be assigned on a rotating basis any of the three shifts as determined by the Chief of Police.

The selection of fixed shift assignments shall be based on rank and length of service in such rank. When length of service in rank is identical, the preference shall go to the Officer with the longest continuous length of service in the Department. When the length of service is also identical, preference shall go to the Officer whose position on the eligibility list was higher at the time of employment.

BACKGROUND

The City is a municipal employer that provides law enforcement services through its Police Department. The New Berlin Professional Police Association is a labor organization that serves as the collective bargaining representative of certain employees of the New Berlin Police Department (hereinafter NBPD) including those employees in the separate ranks and classifications of police officer, sergeant, and detective. A CBA between the parties was effective from January 1, 2021 through December 31, 2022. The action that is the subject of this grievance arbitration occurred during that contract period.

FACTS

In early summer 2022, the NBPD posted four sergeant vacancies within the bargaining unit. Since the Chief joined the NBPD in 1997, order of promotion has been based on merit. The Chief determines how and in what order promotions are granted, with input from the NBPD management team and ratification by the City's police and fire commission (herein PFC).

Here, as in other promotions, potential candidates were informed about the process and afforded an opportunity to submit application materials, including a resume and responses to essay questions selected by the Chief. The Chief and the NBPD management team then reviewed applications and selected candidates to participate in a panel interview and a leadership assessment. The Chief and his leadership team then evaluated and ranked the candidates based on a holistic evaluation of their merit, including their interviews, resumes, leadership assessments, past performance evaluations, and personnel files.

On June 9, 2022, the Chief made selections for recommendation to the PFC. He sent these selections in an email which stated that "The new sergeants were selected in the following promotional order": Aaron Dreyer, James Ament (herein Grievant), Stacey Howard, and Ryan Straus. The Chief also called the Grievant to inform the Grievant of his decision and told the Grievant that he (the Grievant) was second in the order of promotion.

It is undisputed that this promotional order did not correspond with length of continuous service with the NBPD. The Grievant was the most senior, having started working for the NBPD on September 13, 2010. Aaron Dreyer began working for the NBPD on January 16, 2013. Ryan Straus began working on March 10, 2014, and Stacey Howard began working on July 24, 2017.

On June 21, 2022, the PFC ratified the Chief's recommendations for promotion and ordered the action to take effect. The Chief instructed Deputy Chief Tony Pine to issue Personnel Order 651, which was issued on June 24, 2022. Personnel Order 651 kept the same order of promotion, though it changed the wording from "order of promotion" to "order of seniority."

On July 25, 2022, the four NBPD officers were simultaneously sworn in as sergeants.

On August 9, 2022, the Grievant timely filed Grievance No. 22-497, maintaining that Personnel Order 651 contradicted the CBA's provisions regarding seniority of ranked positions. The Grievant requested that the order of seniority be changed to align the four sergeants' promotions with their length of continuous service with the NBPD.

On October 7, 2022, Human Resources Director Melissa Beck denied the grievance at Step 4. She wrote that it was past practice to use promotional order to establish length of service in rank and that the City had a management right to determine seniority. Further, she wrote that the issue was not grievable because it was not included in Sec. 13.01 of the CBA as a grievable item.

The CBA, Sec. 13.02, states that if the Director of Administrative Services does not satisfactorily dispose of the grievance, the Association must submit the grievance to the Wisconsin

Employment Relations Commission (herein, the WERC) within 30 calendar days of the written response. Therefore, the Association had until November 6, 2022 to submit the grievance to the WERC.

On November 2, 2022, Association attorney Roger W. Palek completed Form WERC-24, "Request to Initiate Grievance Arbitration," and mailed it to the WERC with the \$400 labor organization filing fee. Form WERC-24 states that: "The initiating party(ies) may request the appointment or submission of one of the following to issue a final and binding arbitration award. Select Applicable Statement:" This is followed by three options: (1) "A WERC commissioner or staff member to serve as sole arbitrator or as arbitration board chair;" (2) "A panel of WERC commissioners/ staff members;" or (3) "A panel of ad hoc arbitrators." Palek selected the second option, a "panel of WERC commissioners/ staff members."

On November 4, 2022, the WERC replied acknowledging receipt of the submission and the filing fee. The WERC informed Palek that it was providing him with a panel of three WERC-employed arbitrators and instructed him to notify the WERC of the arbitrator selected.

On November 11, 2022, Palek's colleague, Association Attorney Andrew Schauer, spoke with City Attorney Brian Waterman on the phone. Schauer told Waterman that Palek was interested in striking arbitrators from a panel for this grievance. Waterman told Schauer that the City would not discuss striking arbitrators from a panel because the CBA did not require it to do so. Waterman declined to stipulate to an arbitrator.

On November 14, Waterman emailed Palek and Schauer to reiterate that Step 5 of Sec. 13.02 of the CBA required the Association to submit a request to the WERC to *appoint* an arbitrator.

On November 16, Palek sent an email to the WERC stating that he might have made a clerical error on the form and requested that an arbitrator be appointed. Arbitrator Scott was appointed, and a hearing date was scheduled for January 24, 2023.

DISCUSSION

Issue One: Arbitrability

The question of procedural arbitrability is a threshold issue for the arbitrator. Grievances have a "broad presumption of arbitrability," and arbitral law has a strong preference for resolving disputes on substantive rather than procedural grounds. *See City of Madison v. WERC, 261 Wis.2D 423 (2003)*. Because of this presumption, the City bears the burden of proof that a grievance is not arbitrable. Any credibility disputes must be resolved in favor of a conclusion that the grievances are arbitrable, and any ambiguous contract language must be resolved in favor of a finding of arbitrability. In *A.T.&T. Technologies v. Communication Workers*, the United States Supreme Court ruled that an arbitration clause carries with it a "presumption of arbitrability in the sense that: "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with the positive assurance that the arbitration clause is not susceptible of an interpretation that

covers the asserted dispute. Doubts should be resolved in favor of coverage.” *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). The arbitrator's jurisdiction extends only to grievances which have properly been advanced to the final step under the terms of the CBA. The arbitrator's role is limited to interpreting the parties' CBA, as well as those matters they have incorporated into that CBA.

In this case, the City alleges that there is a procedural defect in the Association's processing of this grievance: namely, that the grievance was not appealed correctly to the WERC because the CBA requires the grievant to request that the WERC appoint an arbitrator, rather than requesting the WERC provide a panel of arbitrators for the two parties to strike from. The Association alleges that “appoint” applies to all arbitrators found through the WERC, even if they are selected in a variety of ways, including striking from a panel. The Association further argues that the CBA is silent on how the arbitrator is selected.

The initial question is whether the City waived objections to procedural arbitrability by failing to raise them before the arbitration step. They clearly did not: both parties agree that Attorney Waterman, who represents the City, clearly and repeatedly stated that the CBA required the Association to request that the WERC appoint an arbitrator and refused to strike from the panel. *See* Grievant’s Closing Brief, pg. 6; City Closing Brief, pg. 8-9.

Sec. 13.02 of the CBA states: “Fifth, if the meeting with the Director of Administrative Services does not satisfactorily dispose of the grievance, and if the grievance is one defined as arbitrable, *by submission to arbitration by an arbitrator appointed by the Wisconsin Employment Relations Commission*, providing however, that the Association makes such submission of the grievance and *request for an arbitrator in writing to the Wisconsin Employment Relations Commission within thirty (30) calendar days* of the written response referred to in Fourth (emphasis added).”

When interpreting a contract, an arbitrator must decide whether the contractual language is ambiguous. *See SEIU Healthcare Wisconsin v. Oakwood Lutheran Homes Association, Inc.*, Award No. 7930 (Jones, 07/16). Language is ambiguous when it can have more than one meaning, and unambiguous when it is susceptible to only one plausible interpretation. *Id.* If contract language is ambiguous, the arbitrator must attempt to discern the parties’ intent, then consider the facts in light of their intent. *Id.*

I find the CBA’s language about “appointing an arbitrator” ambiguous, because it is susceptible to more than one plausible interpretation: the parties could request one arbitrator or multiple, ultimately to be appointed by the WERC after being chosen by the parties.

The parties agree that there is no past practice here that would help illuminate the way this ambiguous provision should be interpreted. *See* Grievant’s Closing Brief, pg. 6; City Closing Brief, pg. 8-9.

Since the contract language is ambiguous, I conclude that Attorney Palek’s action fell within the scope of the ambiguity in the grievance procedure outlined in the CBA. Palek made his

request in writing to the WERC before the 30-day deadline. He checked the wrong box on a form, with the intention of giving the City the opportunity to help select the arbitrator the WERC would appoint. When Attorney Waterman, on behalf of the City, declined to strike from the panel, Attorney Palek promptly asked the WERC to instead select an arbitrator. Therefore, I find that this grievance is arbitrable.

Issue Two: Promotional Seniority

At issue here is whether the City's actions in this matter violated the parties' CBA. The Association contends that it did, while the City disputes that assertion. Based on the rationale which follows, I find that the City's actions violated the CBA.

An arbitrator cannot disregard or modify plain or unambiguous provisions of a CBA. *See Madison Tchrs. Inc. v. Madison Metro. Sch. Dist.*, 2004 WI App 54, 271 Wis. 2d 697, 678 N.W.2d 311 at ¶15. However, an arbitrator has authority to construe an ambiguous provision. *Id.* Therefore, the initial question is whether the provision of the CBA in question – Sec. 16.06 – was ambiguous.

Sec. 16.06 governs shift assignments. It reads, in relevant part:

“The Chief shall determine the number and identity of Officers assigned to each division and shift and the number and identity of Sergeants to each division and shift. Non-Probationary Officers shall be assigned to fixed shifts. The Chief of Police or his designee shall make available to Non-Probationary Officers and Sergeants, the fixed shift selection process between September 15 and October 15 for the coming year and post the fixed shift assignments no later than November 1. There shall be a separate shift minimum for Patrol Officers and Sergeants. The term of the fixed shift assignment shall be one (1) year in length commencing within one (1) month of February 1st of each year. Probationary officers shall be assigned on a rotating basis any of the three shifts as determined by the Chief of Police.

The selection of fixed shift assignments shall be based on rank and length of service in such rank. When length of service in rank is identical, the preference shall go to the Officer with the longest continuous length of service in the Department [emphasis added]. When the length of service is also identical, preference shall go to the Officer whose position on the eligibility list was higher at the time of employment.”

In other words, this provision is intended to ensure that those who have higher rank, who have served longer in their positions, or who have served longer with the NBPD, are given preference in the selection of fixed shift assignments. The provision is thorough, providing not one but two strike-breaking options in the event that employees have the same length of service in rank. It shows that, in negotiating this CBA, the parties gave serious thought to how preference in the selection of fixed shift assignments would operate. It delineates the role that the chief plays (selecting employees for promotion) and the rights that the employees have (to receive preference

in the selection of fixed shift assignments based on their rank, length of service in rank, and length of service in the NBPD).

A provision is ambiguous when there is more than one plausible interpretation. *See Portage County*, WERC MA-14386 (Millot, 10/15/10). Here, the provision is ambiguous, because it does not explain how “length of service in rank” is determined. One interpretation would be that “length of service in rank” is determined by the date and time at which an officer is sworn in. Another interpretation would be that “length of service in rank” is determined by the order of promotion.

To construe the terms of a CBA, arbitrators may use rules, standards, and principles borrowed from the jurisprudence developed by courts, as well as the express language of the agreement, statements of the parties in negotiations, bargaining history, custom, and past practice. *See Madison Tchrs. Inc. v. Madison Metro. Sch. Dist.*, 2004 WI App 54, 271 Wis. 2d 697, 678 N.W.2d 311. Binding past practice must be (1) unequivocal, (2) clearly enunciated and acted upon, (3) readily ascertainable over a reasonable period of time, and (4) established practice accepted by both parties. *See Green Bay Area Public School District*, WERC MA-9115 (Mawhinney, 2/96).

Here, the parties offered no evidence of bargaining history or statements made in negotiations. Although the City has offered examples of custom and past practice, these are not unequivocal enough to establish that it was a custom or binding past practice for the length of service in rank to be determined by the order of promotion. The three personnel orders submitted by the City, Exhibits 9 – 11, do not show that order of promotion determines the length of service in rank; rather, they demonstrate that the order of promotion generally determines the order in which officers or sergeants are sworn in. Only one personnel order, Personnel Order 157 or Exhibit 10, states that one officer has seniority when two officers are sworn in simultaneously. One instance is not enough to constitute a binding past practice. If anything, the past practice of staggering the swearing-in of officers and sergeants by one to fifteen minutes suggests that the seniority language of Sec. 16.06 applies.

Since negotiating history and past practice are not helpful, I must turn to the express language of the agreement. The key term in interpreting the phrase “length of service in rank” is “service.” Service does not begin when the police chief selects nominees to send to the PFC, or even when the nominees are approved by the PFC. It begins when employees are sworn in as officers or sergeants.

The City is correct that, under the management rights provision, Sec. 2.01 of the CBA, the police chief has the right to choose the order in which employees are promoted and even the order in which the employees are sworn in. However, in this case, it is undisputed that the sergeants were all sworn at the same time. *See Trans. pg. 91*. Since all four sergeants were sworn in simultaneously, all four sergeants have the same length of service in rank. This triggers the tie-breaking provision of Sec. 16.06, which leads us to the question of who had the longest continuous length of service with the NBPD. It is undisputed that the Grievant had the longest continuous length of service in the NBPD among the four sergeants promoted on July 23, 2022. Therefore, the Grievant should have been given priority in the selection of fixed shift assignments over the

other three sergeants promoted that day. The City violated the CBA by giving priority in the selection of fixed shift assignments to another sergeant.

On the basis of the above and foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following:

AWARD

The grievance is arbitrable.

That the Employer's actions in this matter violated the parties' CBA. The grievance is sustained, and the Grievant shall be given priority in the selection of fixed shift assignments going forward.

Issued at the City of Madison, Wisconsin, this 16th day of June, 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Katherine B. Scott, Arbitrator