

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 ASHWAUBENON PUBLIC SAFETY :  
 OFFICERS ASSOCIATION :  
 :  
 : Case 24  
 : No. 45482  
 and : MA-6620  
 :  
 VILLAGE OF ASHWAUBENON :  
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Appearances:

Lawton & Cates, S.C., by Mr. Richard V. Graylow, appearing on behalf of  
 Davis & Kuelthau, S.C., by Mr. Mark F. Vetter, appearing on behalf of the  
 Village.

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ARBITRATION AWARD

The Employer and Union above are parties to a 1990 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the grievance of Randall Bani and Don Penza concerning assignments to the position of Acting Shift Commander.

The undersigned was appointed and held a hearing on August 27, 1991 in Ashwaubenon, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs and reply briefs, and the record was closed on November 13, 1991.

ISSUES:

The Union proposes the following:

1. Whether or not the Employer violated Article XXV of the collective bargaining agreement?
2. If so, what remedy if any, is appropriate?

The Employer proposes the following:

1. Did the Village of violate Article XXV - Acting Shift Commander of the collective bargaining agreement when Officer Bani was assigned the position of Acting Shift Commander during the Sergeant's absence of February 10, 1991?
2. If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS:

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ARTICLE XXV

ACTING SHIFT COMMANDER

Whenever a Public Safety Officer functions as

the Shift Commander for more than a 12-hour period in the absence of the Director, he shall receive the pay of the higher classification. All assignments to the position of second-in-command shall be made by seniority among all members of the Association until such time as a new "Sergeant's List" is established. Thereafter, assignments to the position of second-in-command shall be made by seniority from the "Sergeant's List" and in the event that no one from the "Sergeant's List" is available, assignment shall be made by seniority thereafter from among other Association members.

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#### ARTICLE XXXIV

#### GRIEVANCE PROCEDURE

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Step 4. If the complaint is not satisfactorily resolved at Step 3, either party may request arbitration within ten (10) days after receipt of the decision at Step 3. Said party shall file a request to arbitrate with the Wisconsin Employment Relations Commission (WERC). The WERC shall appoint an arbitrator from its staff to hear the differences of the parties and make an ultimate and binding decision regarding the interpretation or application of a specific provision of the Agreement. The party so petitioning shall send a copy of the request to arbitrate to the other party at the time said request is sent to the WERC.

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#### FACTS:

On November 28, 1989 the Employer and Union engaged in a mediation session, during the course of which they settled a prior prohibited practice case and several grievances, some of which related to the assignment process of Acting Shift Commanders. In the memorandum of agreement of that date, it states inter alia:

The parties further agree to make assignments commencing forthwith to the position of second-in-command by seniority until such time as a new sergeant's list is established and thereafter, assignments shall be made by seniority from the sergeant's list and in the event that no one from the sergeant's list is available by seniority thereafter from among other association members.

The parties' 1990 collective bargaining agreement substantively reproduced these terms in its Article XXV. A new sergeant's exam was completed in August, 1990. In or about January, 1991, the Department's Chief John Konopacki let it be known that he intended to rotate assignments to Acting Shift Commander [synonymous with second-in-command] among employes on the sergeant's list for each shift, beginning with the highest seniority of such employes. Union

President Donald Penza objected to this procedure as allegedly violating the contract, and Konopacki asked Penza to make clear the Union's position. Penza did so in a letter dated January 30, 1991:

As requested I am clarifying the Association's position involving the second-in-command. As stated in Article XXV of the contract, assignments to the position of second-in-command shall be made by seniority from the sergeant's list and in the event no one from the sergeant's list is available, assignments shall be made by seniority thereafter from among other Association members. This clearly states the senior man will be in charge.

Konopacki proceeded, however, to draw up a rotation list of assignments to the second-in-command post. In essence, his plan was to have vacancies in the sergeant's position filled month by month on those shifts where there was more than one person on the sergeant's list, beginning with the senior such employe and proceeding in rotation until it came back to the senior employe. Thus, on the B-shift [the Department has three 24 hour on, 48 hour-off shifts] the assignment would be shared during the year between Officers Gruen, McKeever, Manthe and Skorzewski. On the A-shift, again four officers would be involved, and Don Penza, the senior of them, received the January assignments. In February, Officer Randall Bani was to replace the sergeant, and the first occasion when the sergeant was absent was February 10. Bani was assigned, and both he and Penza filed a grievance claiming that Penza, as being senior to Bani, should have received the assignment.

Thus far the evidence is undisputed. As to the practice of the Department both before the December, 1989 settlement agreement and between that date and the grievance, the parties disputed a number of issues. In view of the conclusions reached below as to the meaning of the contract language, I find much of this evidence irrelevant, and it will be described here only briefly.

In general, the Union sought to prove that there was a consistent practice of assignment of the senior available employe on the sergeant's list, or off the sergeant's list before such list was updated, throughout the relevant period. The Employer sought to prove that there was a practice of rotation in effect, and additionally introduced testimony concerning its intent in the negotiations with lead up to the settlement agreement. Chief Konopacki and Employer negotiator Bruce Patterson both testified that the Employer's intent throughout was to ensure the broadest possible choice of experienced employes for subsequent promotion to sergeant, and that the experience gained in the Acting Shift Commander assignments was an integral part of ensuring fairness in the periodic examinations, which attempts to evaluate decision-making abilities in such a way that the outcome is affected by experience gained in temporary assignments. The record contains one clear example, in which Officer Gruen received Acting Shift Commander pay on days when Officer McKeever, who was senior to him, was also working. Patterson also testified that the Employer's negotiating team "communicated" during the mediation meeting of December 1989 that its intent was rotation. Patterson did not, however, identify this communication as having been directly to the Union's negotiators. Prior to December 1989, the parties' collective bargaining agreement had contained language specifying that Acting Shift Commanders be paid at the higher salary of the sergeant. Up till that date, however, the contract language provided no guidance as to who was to receive the assignment.

THE ASSOCIATION'S POSITION:

The Association argues first that the contract language is clear in specifying that assignments to the position of second-in-command shall be made by seniority from the sergeant's list. The Union notes the use of the word "shall", contending that this implies the mandatory nature of the language, and also notes that the City's labor negotiator testified that seniority generally meant length of service. The Union argues that the Village is attempting to insert the word "rotation" into the collective bargaining agreement by interpretation where it was unable to do so at the bargaining table.

The Union further contends that the past practice supports the position that the senior available employe receives the assignments, because past practice is generally found to be a guide to contract interpretation and because two witnesses testified that there was no rotation prior to January of 1991. The Union, in its reply brief, notes that the chief had issued a memorandum concerning call-ins in which he clearly identified straight seniority, rotation and inverse seniority as applying to different aspects of these assignments, and had thereby demonstrated a knowledge of the meaning of these terms consistent with their common usage. The Union argues it consistently protested the out-of-seniority assignment of second-in-command work from 1989 onwards, and that Penza's grievance concerning the February 10 assignment to Bani was timely.

#### THE EMPLOYER'S POSITION:

The Employer argues initially that Article XXV of the Agreement is ambiguous, because it does not expressly state that the "most senior" employe will be assigned to the Acting Shift Commander position for the entire year and because seniority is not defined in the collective bargaining agreement. The Employer further argues, in this respect, that this language could mean as the Village contends that these assignments be rotated on each work shift on the basis of seniority. Further, the Employer argues, the second sentence of that Article provides for the Acting Shift Commander assignments be made by seniority "among all members" of the Association, implying that the distribution of acting assignments is intended. Also, the Employer argues, Article XXV makes specific reference to the sergeant's list, and seniority is not the sole basis of which Shift Sergeant promotions are made. It would therefore, the Employer argues, be absurd to read this clause as requiring the experience generated by acting assignments to be given only to the most senior employe on that list.

The Employer further contends that the past practice of the parties demonstrates that the assignments were rotated among different officers, contending that Chief Konopacki's testimony was more detailed and accurate than the contrary testimony of two officers. The Employer further argues that the bargaining history demonstrates that the acting assignments were intended to provide supervisory experience for all of the public safety officers on the sergeant's list, because the contract provides that seniority is considered in promotional decisions only as a tie-breaker. In its reply brief, the Employer contends that the Union ignores the significance of the bargaining history surrounding Article XXV and has not shown that that language is clear and unambiguous, and that the record evidence does not support the Union's version of the parties' past practice. The Employer requests that the grievance be denied.

#### DISCUSSION:

I note initially that on February 9, 1990, Chief Konopacki issued a memorandum to all department employes which provided as follows:

When a situation arises where there is no Sergeant or

second-in-command available to work, the call-in procedure will be as follows:

- (1) Call an off-duty Sgt. in to work, by seniority.  
Cox  
Molloy  
Zvara  
Van Rooy
- (2) Order in a Sergeant, in reverse seniority.
- (3) If no Sergeant is available, call in a qualified second-in-command (list will be by seniority -- call in will be by rotation).  
McKeever  
Kiel  
Gruen  
Manson  
Manthe  
Lanon  
Ness  
Penza  
Bani  
Skorczewski  
Jakups
- (4) Order qualified second-in-command officers, in reverse seniority.

This document is significant to the present stage of the parties' arguments over second-in-command assignments only because it implies recognition by the Department of the meanings of the terms "seniority", "reverse seniority", and "rotation". The document implies that as of that date the chief was prepared to give the available work first to the senior sergeant; then to order in a sergeant in reverse seniority order, if no willing sergeant was available; and then call-in by rotation, or order in reverse seniority, other qualified officers who were not sergeants. The order of these preferences logically follows the arguments made by the City as to its underlying motivation throughout, particularly the fact that if no sergeant was available, the work would be offered by rotation to qualified officers.

But when an agreement was reached with the Union in November, 1989, and more importantly for purposes of this dispute, when substantively the same language was carried over into the 1990 collective bargaining agreement under which this case is brought, these concepts were not reflected in the language.

Instead, the language clearly provides that assignments would be by seniority. The distinctions previously made by Chief Konopacki in his February, 1990 memo underscore the fact that few contractual terms used in labor relations are as much discussed or as widely understood as the word "seniority". I find no ambiguity in the contract language as written. On its face, this language requires that on any given day, the available sergeant work be offered first to the senior officer on the sergeant's list. 1/ It is impossible to introduce

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1/ The Union does not appear to be challenging the Village's practice of offering such work on a shift by shift basis. I note that this results in several officers receiving second-in-command assignments; the consequence goes some way toward answering the Village's concern that

the Village's preferred concept of rotation without writing something else into the language; and this I am not permitted to do. While there is, as the Village argues, some evidence to support its argument that the past practice was other than the Union would have it, the past practice and bargaining history of the parties are relevant only in so far as the contract itself can be read in more than one way. Here, the most that these conflicting sources of interpretation will support is that there may have been a mistake made in agreeing to the original grievance settlement; but Patterson's testimony that the Employer "communicated" the substance of its intent did not go so far as to say to whom that intent was communicated, or in what manner; and in arbitration it is axiomatic that the intent of the parties should first be inferred from what they signed.

To the extent that the Union may have tolerated a practice during 1990 which was not consistent with the contract language, this would justify an argument by the Employer that the Union not be permitted to demand a retroactive remedy. But there are many cases supporting the principle that a party, with due notice, is entitled to insist upon strict construction of clear contract language even where, for its own reasons or through oversight, it has lived with a contrary practice in the past. Here, the exchange of correspondence in January and early February 1991 between Penza and Konopacki clearly shows that the Village was on notice of the Union's protest concerning any future rotation of these assignments, prior to the first instance that was grieved in this matter. No retroactive remedy is sought by the Union; and therefore the Union's position is safely within the general rule.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the Village violated Article XXV, Acting Shift Commander, of the collective bargaining agreement when Officer Randall Bani was assigned the position of Acting Shift Commander during the sergeant's absence on February 10, 1991.

2. That as remedy, the Employer shall forthwith upon receipt of a copy of this Award, make whole Donald Penza for losses sustained due to the assignment of Randall Bani in his place on February 10, 1991; shall cease and desist from assignments in rotation of the Acting Shift Commander work; and shall make whole all other employees similarly situated to Donald Penza for incidents of like nature subsequent to February 10, 1991.

Dated at Madison, Wisconsin this 21st day of January, 1992.

By \_\_\_\_\_  
Christopher Honeyman, Arbitrator

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future promotions not be excessively influenced by only one person having the experience gained in this assignment.