

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 SOUTH MILWAUKEE PROFESSIONAL : Case 69
 POLICE ASSOCIATION : No. 45961
 : MA-6822
 and :
 :
 CITY OF SOUTH MILWAUKEE :
 :

Appearances:

Mr. Patrick J. Coraggio, Labor Consultant, Labor Association of Wisconsin, Inc., 2825 North Mayfair Road, Wauwatosa, Wisconsin 53222, for the Association.
Mr. Joseph G. Murphy, City Attorney, City of South Milwaukee, 1334 Milwaukee Avenue, P.O. Box 308, South Milwaukee, Wisconsin 53172, for the City.

ARBITRATION AWARD

South Milwaukee Professional Police Association and City of South Milwaukee are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in South Milwaukee, Wisconsin on October 1, 1991. No transcript was taken. The parties filed briefs, the last of which was received December 4, 1991.

ISSUE

Since the parties were unable to stipulate to a statement of the issues, the Arbitrator states the issues as follows:

1. Did the City violate the collective bargaining agreement on March 29 & 30, 1991 by not appointing Grievant Kenneth Stephany Shift Commander and not paying him Shift Commander pay for those shifts?
2. If so, what is the appropriate remedy?

BACKGROUND

On March 29 and 30, 1991 there was no sergeant or lieutenant on the early shift, and Grievant Kenneth Stephany was the most senior patrol officer on the shift. Although Grievant anticipated that these circumstances would result in his being appointed Shift Commander, he was informed by the day sergeant that another officer would be the Shift Commander. Officer Stephany grieved the City's failure to appoint him and pay him as Shift Commander for those two days. That grievance remained unresolved and is the subject of this arbitration award.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

ARTICLE VIII - WAGES

Section 8.04 - Shift Commander Pay: When

members of the bargaining unit are assigned to act in a higher classification for one (1) or more hours, the employee shall be entitled to the salary applicable to the duties of the classification being performed.

. . .

ARTICLE IX - SENIORITY

Section 9.01: Seniority is defined as length of service with the Police Department and is computed as the total years, months and days of employment in the Police Department following a break in service. When two (2) or more employees are hired on the same day, seniority is based upon the employees' standing on the Police and Fire Commission hiring list.

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ARTICLE XV - EMPLOYEE RIGHTS

Section 15.05 - Department Rules, Regulations, Policies and Procedures: The Association recognizes the employers right to promulgate reasonable rules and regulations from time to time. However, any changes in the rules and regulations as presented in the Departmental General Order 88-5 entitled "General Rules of Conduct" or any changes in the policies and procedures as presented in the Department General Orders Manual pertaining to wages, hours and conditions of employment which are mandatorily bargainable shall be transmitted to the Association in writing and the impact thereof shall be subject to negotiations between the parties. When negotiations are required, this Agreement shall be amended or modified to incorporate the agreement(s) reached in said negotiations.

If said negotiations result in an impasse, the impasse shall be resolved pursuant to provisions of Section 111.77 Wisconsin Statutes.

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POSITIONS OF THE PARTIES

The Association

The Association argues Section 8.04, "Shift Commander Pay", is ambiguous and therefore requires the Arbitrator to look to past practice for its interpretation. It asserts the past practice, reinforced by former Chief William Redding's memo, is sufficiently long, consistent and mutually-accepted to provide meaning for the provision. The Association insists the subject of the dispute is addressed in the collective bargaining agreement, although ambiguously. Finally, the Association argues that the method of selecting Shift Commander is a mandatory subject of bargaining and as such must be bargained prior to change pursuant to Section 15.05.

The City

The City contends that there is no contract provision dictating who will be assigned Shift Commander. It contends the 1983 order by former Chief Redding that the most senior officer be appointed Shift Commander does not create a past practice. The only contract reference to Shift Commander is one which prescribes the pay of the Shift Commander, not the method of assignment.

As for the seniority provision of the contract, it governs only vacation selection, shift selection and layoff. The City, pursuant to Section 16.04, uses seniority in determining promotions only in the event that the evaluation of employes results in a tie score between two or more employes. This standard of resorting to seniority only if all other considerations are equal is also used by the Chief in assigning Shift Commander. If the arbitrator should determine that the selection of Shift Commander is governed by seniority, such a ruling would add a provision not contemplated by the contract and be in excess of the arbitrator's authority.

DISCUSSION AND ADDITIONAL FACTS

The Association argues that when a shift lacks a Sergeant or Lieutenant, the City is obligated to appoint the most senior patrol officer, (in this case, the grievant), to Shift Commander. This argument is based upon an asserted eight years of practice which dates back at least as far as an order issued by former Police Chief William Redding on August 19, 1983. That memo read as follows:

DATE: August 19, 1983
MEMO TO: ALL PATROL PERSONNEL
FROM: Chief William Redding
SUBJECT: Officer-in-Charge

Effective immediately, whenever a Rank officer is not on duty during any of the 3 shifts, the senior officer on duty will be in charge and responsible for all decision making during the shift he is in charge of.

Public Safety Officers have no decision making responsibilities.

Per contractual rights, the officer in charge will get pay equivalent to that of a Sergeant for these responsibilities.

If a officer works another shift by virtue of a exchange day, and he is senior to all officers on duty, said officer will be in charge if a Rank officer is not on duty.

Although the record does not indicate the frequency of the need to appoint a Shift Commander under such circumstances, it does show, without dispute that the only aberrations from this order occurred in the year preceding this grievance when a senior patrol officer who had received discipline was not appointed Shift Commander. With the exception of incidents involving that one officer, the procedure in the August, 1983 order had been followed until the events generating the instant grievance.

The Association makes three arguments from the City's arguable adherence to this procedure. It argues the City has created a past practice that: one, clarifies an ambiguity in the contract; two, becomes an implied term of the

contract; and, three, imposes compliance upon the City until bargaining has occurred pursuant to Section 15.05.

The undersigned does not find that the contract is ambiguous as to the selection of Shift Commander. It is not possible to find that Section 8.04 could be interpreted in two or more ways as to the method of selecting a Shift Commander in the absence of a ranking officer. Rather, this section entirely ignores the question of the method of selecting a Shift Commander; it merely indicates how that officer will be compensated when the assignment has been made.

Likewise, Section 9.01 cannot be said to be ambiguous on this point, for it is silent as to selection criteria for assigning Shift Commander. Section 9.01 merely defines seniority, and the succeeding subsections describe the application of seniority for vacation selection, shift selection and lay off.

Having determined that the contract does not contain an ambiguous provision that would support resort to the procedure described in former Chief Redding's memo by means of clarification, the undersigned must determine whether that procedure has become an implied term of the contract in its own right. Under some contracts and under some conditions, mutually accepted practices can become implied terms of the contract if adherence to them is sufficiently long, consistent and generally accepted.

Generally speaking, however, practices that become implied contract terms relate to a major condition of employment, or to a benefit to the employees. In this case, however, the procedure of appointing the most senior patrol officer as Shift Commander in the absence of a ranking officer was not a benefit to the employee but a method of operation. This method of operation was followed by the department to facilitate the management of its need to provide a Shift Commander for all shifts. The procedure did not exist to provide a benefit to employees. The fact that Section 8.04 provides premium pay for the officer so chosen is consequential to the assignment of the duty, and not the primary reason for the existence of the procedure. Consequently the assignment procedure in dispute cannot be found to have become an implied provision of the contract. 1/

Finally, the Association argues that the City is obligated to continue to appoint the most senior patrol officer until it was bargained with the Association pursuant to Section 15.05. That provision, set forth above, at page 2, requires bargaining before modification of rules and regulations implicating mandatory subjects of bargaining if such rules and regulations are part of Departmental General Order 88-5 or Departmental General Orders Manual.

Review of the record does not indicate that the August 19, 1983 Memo became part of either General Order 88-5 or the General Orders Manual. Indeed, the relative obscurity of the memo is indicated by Chief Slamka's testimony that he did not recall ever seeing it. Since the memo was not encompassed in

1/ Given the above conclusion, it is unnecessary to discuss the fact that the disputed procedure was not followed under circumstances similar to those at issue in this grievance: a patrol officer was not assigned to Shift Commander duty after he had been disciplined.

either of the two source of rules and regulations covered by this section, the City was not obligated to comply with it pursuant to Section 15.05.

In summary, since there is no contractual ambiguity to be clarified by the practice asserted by the Association, and since the asserted practice did not become an implied term of the contract, and since Chief Redding's memo is not encompassed in the rules and regulations that must be bargained pursuant to Section 15.04, the City is not obligated to assign the duties of Shift Commander to the most senior patrol officer when there is no ranking officer on a shift. Therefore the collective bargaining agreement was not violated when the City failed to assign grievant as Shift Commander.

In the light of the record and the above discussion, it is the arbitrator's

AWARD

1. The City did not violate the collective bargaining agreement on March 29 & 30, 1991 when it did not appoint Grievant Kenneth Stephany Shift Commander and did not pay him Shift Commander pay for those shifts.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 18th day of March, 1992.

By Jane B. Buffett /s/
Jane B. Buffett, Arbitrator