

IN RE ARBITRATION BETWEEN:

METROPOLITAN COUNCIL TRANSIT OPERATIONS

and

TEAMSTERS LOCAL 320

DECISION AND AWARD OF ARBITRATOR

BMS # 13-PA-0933

JEFFREY W. JACOBS

ARBITRATOR

August 11, 2014

IN RE ARBITRATION BETWEEN:

Met Council Transit Operations,

and

DECISION AND AWARD OF ARBITRATOR
BMS CASE # 13-PA-0933
Richard Gizzi Grievance

IBT #320.

APPEARANCES:

FOR THE EMPLOYER:

Frank Madden, Attorney for the Employer
Tony Brown, Labor Relations Representative
Marcia Padden, HR Representative
A.J. Olson, Deputy Chief of Police
John Harrington, Chief of Police & Security

FOR THE UNION:

Joseph Kelly, Attorney for the Union
Richard Gizzi, grievant
Bruce Larson, former Met. Council police officer
and union steward
Terry Neuberger, Business Agent

PRELIMINARY STATEMENT

The hearing in the above matter was held on June 26, 2014 at the Bureau of Mediation Services in St. Paul, Minneapolis, MN. The parties presented oral and documentary evidence at that time. The parties submitted post-hearing briefs dated July 29, 2014.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement Article 13 of which provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Minnesota Bureau of Mediation Services. At the hearing the parties stipulated that there were no procedural arbitrability issues and the matter was properly before the arbitrator.

ISSUES PRESENTED

Is the matter substantively arbitrable? If the matter is found to be substantively arbitrable, did the Employer violate Section 9.04, Transfers and Promotions, when the Grievant was not selected as a canine handler? If so what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 1 - PURPOSE OF AGREEMENT

This Agreement is entered into between the Metropolitan Council, hereinafter called the EMPLOYER, and Teamsters Local 320, hereinafter called the UNION. It is the intent and purpose of this Agreement to:

- Establish procedures for the resolution of disputes concerning this Agreement's interpretation and/or application; and
- Place in written form the parties' agreement upon terms and conditions of employment for the duration of this Agreement.

ARTICLE 2 - RECOGNITION

Section 2.01 – Recognition

The Employer recognizes the Union as the exclusive representative, under Minnesota Statutes, Section 179A.03, Subdivision 8, for all police personnel in the following job classification:
FULL TIME POLICE OFFICER

ARTICLE 5 - EMPLOYER AUTHORITY

Section 5.01 - Retained Rights

The Employer retains the full and unrestricted right to operate and manage all workers, facilities, and equipment; to establish functions and programs; to establish and modify the organizational structure; to select, direct, and determine the number of personnel; to establish work schedules, and to perform any inherent managerial functions not specifically limited by this Agreement. Any term and condition of employment not specifically established or modified by this Agreement shall remain solely within the discretion of the Employer to modify, establish or eliminate.

ARTICLE 7 EMPLOYEE RIGHTS – GRIEVANCE PROCEDURE

Section 7.01 – Definition of a Grievance

A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this Agreement.

Section 7.05 – Arbitrator's Authority

- A. The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this Agreement. The Arbitrator shall consider and decide only the specific issue(s) submitted in writing by the Employer and the Union, and shall have no authority to make a decision on any other issue not so submitted.
- B. The arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law. The arbitrator's decision shall be submitted in writing within thirty (30) days following the hearing or the submission of briefs by the parties, whichever is later, unless the parties agree to an extension. The decision shall be binding on both the Employer and the Union and shall be based on the arbitrator's interpretation or application of the express terms of this Agreement and to the facts of the grievance presented.

ARTICLE 9 - SENIORITY AND PROBATION

Section 9.04 – Transfers and Promotion

Senior employees shall be given preference with regard to transfer, job classifications, and promotions within the bargaining unit when the job-relevant qualifications of employees are deemed to be equal.

Section 9.05 – Shift Bidding

The Employer agrees to implement a shift bidding process by seniority on or before October 1, 2007. Bidding does not include investigation, light duty, canine or any task force position.

PARTIES' POSITIONS

UNION'S POSITION

The union took the position that the employer violated Article 9.04 when it failed to grant the grievant the position of canine handler. In support of this the union made the following contentions:

1. The union asserted that the grievant is not only *one of* the best officers on the Met Council's force but was named the *very best* officer in the force in 2006. The union noted that his evaluations have all been excellent and that he exceeds standards routinely. There is no question that he is an extremely dedicated and competent officer who has achieved high marks over his entire career. The union contended further that there is no reason he should not have been named a canine officer given his long and outstanding work record. The union pointed out that even on the department's scoring sheet, the grievant is listed as "highly qualified," one of only three candidates who were listed both as highly qualified and who exceeded expectations on their annual reviews. The grievant is the only candidate who has won the top honor of being named officer of the year.

2. **ARBITRABILITY** - The union asserted that the matter is substantively arbitrable and pointed to the provisions of the grievance procedure set forth above, which state clearly that a grievance "as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this Agreement." Given that broad language it is clear that the parties have a disagreement over the interpretation of Article 9.04, i.e. whether this was a transfer or an assignment and whether the provisions of 9.04 apply to require that the grievant be given the canine position.

3. Further, the union pointed to the recognition clause and noted that there is but one job classification listed: full time police officer. There is no other job classification. Thus, for Article 9.04 to have any meaning at all it must apply to the movement from one position to another.

4. The union asserted that if the employer's position were adopted regarding arbitrability, Article 9.04 would be rendered meaningless. The union also cited Elkouri's definition of the terms "transfer" and "promotion and asserted that the movement of an officer from a regular police officer role to that of canine officer is not a mere assignment, as the employer contends, but is in fact a transfer to a different duty, with different requirements and a far different set of expectations. If it is not a transfer, then, rhetorically, what is it?

5. The union also noted that the department's own witnesses use the terms "assignment" and "transfer" interchangeably." The Chief acknowledged as much during the hearing and when another officer failed to complete the canine training she was "transferred" back to her former position within the department. The union asserted thus that the employer is playing a semantics game but that at the end of the day, when an officer is given the canine officer position that amounts to a transfer from their regular duties to a new duty point. Thus, the union argued, the provisions of Article 9.04 apply and the grievance procedure clearly contemplates that this is a matter for arbitration.

6. The union also argued that the promotional language of Article 9.04 applies as well since there is additional pay associated with the canine officer position. Further, the union put on testimony that the other officers regard it is such as there is competition for it. Further, the very fact that there is a bid for it with the interviews that were required shows that this is not a simple assignment, as in the case where an officer might be assigned to a different location or to perform a slightly different set of duties from their "normal" routine, but is in fact a very different job altogether.

7. The union countered the assertion by the employer based on the Mille Lacs County and LELS case and noted that there were four separate job classifications in the CBA before that arbitrator. This is a major and significant factual difference since here, there is but one. Thus under these facts, granting the canine officer position to an officer amounts to a transfer and is covered by Article 9.04.

8. MERITS OF CLAIMED VIOLATION OF ARTICLE 9.04. The union asserted that the employer violated the clear provisions of Article 9.04 when it refused to grant the canine position to the grievant. He is the most senior of the all of the applicants and met the requirements set forth in the announcement.

9. Further, the union noted that while Article 9.05 provides that “bidding does not include investigation, light duty, canine or any task force position” that article is about shift bidding, not a transfer into the position – as Article 9.04 does. Thus, Article 9.05 does not apply to exempt the canine position from the provisions of Article 9.04.

10. The union also asserted that the scoring was done by a panel of experts all of whom rated the grievant one of the top three candidates, yet the Chief decided, contrary to the Administrative Announcement, to interview all the candidates. His scoring was both arbitrary and capricious, bears no rational relationship to the scoring of the panel and shows a clear deviation from the announced process to be used.

11. Moreover, the administrative announcement nowhere indicated that the Chief would do further interviews yet he interviewed all the applicants. In fact nowhere does it state that there will be any further interviews after the panel interviews. The union argued that the process used violated the employer’s own announcement and shows an arbitrary process since the panel’s scorings were changed by the Chief with little if any rational explanation or basis for those changes.

12. The union further pointed out that the actual math of the scoring sheet was wrong and that by simple math, several of the scores simply did not add up. The union asserted that this lax approach to even adding up a list of a few numbers shows the innate flaw in the process and that the department was simply trying to keep the grievant from this coveted position.

13. The union also countered the claim by the employer that the grievant does not live within 50 miles of the department. The union showed that he lives just inside that radius and that when he asked about whether the distance from his home to the department would be a problem he was encouraged to apply and told on more than one occasion that the distance factor was not a “deal breaker.” The union pointed out that it must have been even though he lives inside of 50 miles, because there was no explanation for why his score was suddenly changed by the Chief after the initial set of interviews. The union pointed out that after the first set of interviews the grievant was ranked in the top three – and that there were three canine positions to be awarded – and thus he should have been awarded one of those positions. Yet the Chief ranked him 5th after his interview without any rational basis for that.

14. The union assailed the Chief's assessment of the grievant's answers to some of the questions and the arbitrary nature of the scoring he used to rate the applicants. The Chief focused on the “ethical dilemma” question yet provided no explanation for why he rated the grievant at a 0 for that question. The apparent focus of this question was that the grievant and Lt. Greenwaldt had had a prior dispute, the nature of which was never fully explained, yet Lt. Greenwaldt was on the original panel that rated the grievant in the top three candidates. The employer asserted that the answer gave the Chief concerns about the grievant's ability to work as a team – yet the Chief had never met the grievant and his reviews all applaud the grievant's ability to work as a member of a team and be an effective leader in that context. See Union Exhibit 9.

15. The union noted that Article 9.04 requires that “senior employees shall be given preference with regard to transfer, job classifications, and promotions within the bargaining unit when the job-relevant qualifications of employees are deemed to be equal.” The union argued that the grievant’s qualifications are far better than those of those chosen for these positions.

16. The essence of the union’s claim is that the grievant was the most senior applicant, was the most qualified, met all of the requirements and was originally named in the top three candidates as scored by the panel of experts. Thus, he should have been awarded the canine position.

The union seeks an award placing the grievant in the canine handler position and be made whole with the pay he would have earned had he been awarded the position originally.

EMPLOYER’S POSITION

The employer took the position that the matter is not arbitrable since this was an assignment, subject to management’s rights and that even if the arbitrator finds that the matter is arbitrable there was no contractual violation. In support of this position, the employer made the following contentions:

1. **ARBITRABILITY** – the employer asserted that the matter is not substantively arbitrable and that the canine position is an assignment – not a transfer or promotion – and thus not covered by Article 9.04. Article 9.04 does not apply to assignments and thus this matter falls outside of the purview of that article and, significantly, outside of the scope of the grievance procedure.

2. The employer maintained that the assignment to the canine position is a matter of management rights covered by the management rights provision of the CBA and is not therefor subject to the grievance procedure at all. The employer cited both arbitral and case law authority for the proposition that an arbitrator may not add to or amend the parties’ contracts and that that if the courts finds that the arbitrators has, that is grounds to vacate any award that violates that principle. See, *Brooklyn Park v. Brooklyn Park Police Federation*, No. C9-01-1145, 2002 WL, 15635 (Minn. Ct. App. Jan. 8, 2002). There the Court vacated an award that had added a requirement to post certain positions that was not in the CBA.

3. The employer asserted most ardently that the canine officer position is not a separate job classification but is rather merely an assignment within that classification. There is but one “job classification, i.e., that of full time police officer, contained in the recognition clause. Thus, one cannot “transfer” within a job classification. The canine officer position is an assignment like any other assignment within that classification and is not covered by the clear terms of Article 9.04.

4. The employer cited the arbitration decision in *County of Mille Lacs and Law Enforcement Labor Services, Inc.*, BMS # 90-PP-148-B (Bognanno, 1990) for the proposition that a transfer requires the use of seniority and that where a position is not separately listed as a job classification, any movement from one position to another with a job classification is a mere assignment. Assignments there, as here, are subject only to management discretion and not subject to the provisions of Article 9.04.

5. The employer further maintained that a true transfer is one that takes an employee from one job classification to another and that the canine position is not a separate job classification. It is simply another assignment with the classification of full time police officer and is thus no different from any other assignment an officer might receive

6. Further the canine position is not a promotion. It carries no different rank and the extra pay is simply for the extra time, at straight time rates, for caring for the dog. It is thus not a promotion and is not covered by the specific provisions of Article 9.04.

7. The employer countered the union’s claim that the language of Article 9.04 must “mean something” since it is in the contract and asserted that if the union's position regarding the placement of sergeants in the bargaining unit (which was a position the union took at a different time) had been granted and allowed, that would be a way for the article to have applied. The employer also asserted that if there were to be in the future a corporal or other position created, the language would perhaps apply for a transfer or promotion from one such classification to another but that that remains to be determined in the future

8. The employer also noted that Article 9.05 exempts the canine position from bidding requirements and further argued that this supports the claim that the canine position is an assignment, not a transfer. Bidding would imply that the positions are in separate job classifications but the parties specifically agreed that the canine position is not subject to that requirement,

9. NO VIOLATION OF ARTICLE 9.04 EVEN IF IT APPLIES – The employer argued that even if the arbitrator were to find that the provisions of Article 9.04 applied there was no violation of any portion of the CBA.

10. The employer first argued that the announcement specifically stated that the Chief was to make the final decision. Thus, the union's claim that there was a violation of that announcement is without merit – it specifically reserved to the Chief that very right. Further there was no limitation whatsoever on doing a second set of interviews by the Chief. He was new in that job and wanted to meet and get to know his officers. The fact that he interviewed all of the officers who applied for the canine position is of no contractual or factual consequence. It was his absolute right to do so and there was nothing in either the contract or the announcement that placed any limit on that.

11. Moreover, the requirements of the canine position were clearly stated and one of the requirements was that the officer must live within 50 miles of the department. The grievant does not live within 50 miles of the department – period. That alone disqualified him from the job irrespective of any other qualifications. His own application showed that he lived outside of that radius and he never submitted anything during the application process to the contrary even though he was told to submit a Google map or other map that showed he lived within the 50 miles. Indeed, in the grievant's letter of interest, he reported the mileage from his residence in Becker to the Metro Transit Police Department was 51.4 miles. See, Union Exhibit 2. The grievant's claim that he lives only a few minutes from the Northstar commuter rail line is also of no consequence – the requirement is that he live within 50 miles of the department located in Minneapolis.

12. The employer also took issue with the union's claim that there was an arbitrary process used and flatly denied that allegation. The Chief had only been in the position for a few weeks and did not even know the grievant. To suggest that he had some sort of vendetta or animus towards the grievant or that he was playing favorites with the other applicants is absurd. The Chief was entitled to interview all the applicants and his scoring was both rational and reasonable.

13. The employer further asserted that even though there were mathematical errors in the original scoring sheet, those minor discrepancies did not change the ultimate result. With the corrected figure, the grievant was still not in the top three applicants. The grievant's actual score was a 73.8, still 5th among the applicants even with all the corrections in the addition of everyone's points. Further even if he had been given the 4 additional points to question #4, as the union asserted that he should have been given, that too made no difference in the ultimate rankings of these applicants. The grievant would still have been ranked 5th among the applicants. Thus even if one completely ignores the 50 mile radius issue (which the employer contended should end this entire discussion) he still would not have finished in the top three applicants and would not have been awarded the position.

14. The employer and the Chief acknowledged that the grievant is a fine officer whose dedication and service is well recognized and appreciated. The issue here however is whether he was qualified both on the merits and by the residency requirements to be awarded the canine position and the process determined that he was not one of the top three applicants.

15. The employer emphasized that seniority applies only when the "job-relevant qualifications of employees are deemed to be equal." Here the job relevant qualifications were *not* determined to be equal – the other applicants were simply determined to be more qualified for this particular position.

16. The Chief wanted the officers to be able to work well as a team, and be proactively looking for suspicious items on public transit vehicles to ensure the safety of the public. He wanted them to have had investigative experience. The employer asserted most strenuously that the Chief's scoring was neither arbitrary nor capricious but rather reflected the need to be able to work in this position effectively. His scores simply reflected that and the mere fact that he scored the applicants somewhat differently did not undermine the fairness of the process. In fact the Chief scored the grievant a 10 out of 10 possible points on some of the categories. This clearly showed that he treated the grievant fairly and that he scored him based on merit.

17. The employer also noted that the grievant brought up the prior issue with Lt. Greenwaldt; the Chief never even knew of it. There can be no serious allegation that the Chief had anything against the grievant based on this record. He simply picked the best applicants for the job – which is his absolute right and his responsibility to protect the public.

18. In addition, to overturn this decision now would create considerable problems for the department. The dogs and their handlers bond with each other and the dogs that have been assigned to the officers who were awarded the canine position in this round have done so. To undo that at this point would require considerable re-training of both dogs and handlers that is both unwarranted and unnecessary.

19. The essence of the employer's case is that the matter should not even be considered through the grievance procedure since this is an assignment, not a transfer, and thus not subject to the language of Article 9.04. Even if the arbitrator reaches the merits, the claim must be denied due to the residency issue as well as the clear evidence that the Chief determined that the grievant was not in the top three applicants using a reasonable and fair process. Finally there was no evidence whatsoever of any arbitrary or capricious actions taken by the Chief in this matter.

The employer seeks an award denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

FACTUAL BACKGROUND

The grievant is a long time police officer with the Metropolitan Council. The evidence showed that he is by all accounts an excellent officer and was even named Office of the Year in 2006. His evaluations have been consistently very good, ranking him at least in the “meets expectations” category but many times in the “exceeding expectations” for years. See Employer exhibit 1 and Union exhibits 8 and 9. It was also clear that the grievant has greater seniority than the applicants who were selected for the canine position

The grievant has had some investigatory experience in a prior employment and his supervisors have consistently applauded the grievants work ethic and his ability to work well as a member of a team and to work well with the public the Met Council serves. The grievant’s job performance was shown to be exemplary and was thus not a factor in this decision. This decision was based on the unique facts in this case and the contractual language at play here.

The employer has had canine positions for several years and in September 2012 determined to add three such positions and to fill them through a competitive bidding process. The employer posted the requirements to become a canine officer in an Administrative Announcement. That document contained the essential requirements to be hired as a canine officer and further set forth a selection process by which the hiring would be conducted. Officers were to submit a letter of interest demonstrating how the applicant met the essential requirements and were informed there would be a selection committee that would review the letters, conduct interviews, and make recommendations to Chief Harrington.

One of the requirements was that the successful applicants must live within 50 miles of the department, located at 2425 Minnehaha Ave. South, in Minneapolis. Prior to this time, the department had a residency requirement that the officers live within the 7 county metropolitan area. That was changed to require that they live within a 50-mile radius of the department's address listed above. For the purposes of this discussion and decision, there was clear evidence that the requirement was 50 miles and that the grievant knew that when he applied.

The announcement also clearly indicated that the Chief would make the final decision. As discussed more below, the announcement did not specifically say that there would be interviews conducted by the Chief nor did it limit the Chief's ability to do so prior his making the final decision as to which of the applicants would be awarded one of the three open canine positions.

The grievant spoke to his superiors and inquired about the position and indicated his strong interest in becoming a canine officer. He specifically inquired about the 50-mile requirement and noted his concern that he might not live within that radius. The evidence showed that he spoke to deputy Chief Olson and was told that he should still apply and that if he gave the department a map showing that he lived within that 50 mile area it "would not be a problem," or words to that effect. The evidence showed that these statements were in no way intended to be an offer of employment nor were they intended as a waiver of the requirements of the position.

The grievant did apply for the position and submitted a document showing that he lived slightly outside of the 50-mile radius. See union exhibit 2 showing the grievant's application as well as a statement that he lived 51.4 miles from the department.¹ Despite this he was allowed to continue with the interview process and was told that the mileage issue was not a "deal breaker."

¹ At the hearing the union submitted a document that showed a route from the grievant's home in Big Lake, Minnesota to the department's address that was exactly 50 miles. This document was never shown to the employer until the hearing however so the decision about which officers to hire was made without this knowledge.

The grievant was interviewed for the position by a panel of selected officers and supervisors to determine the various applicants' qualifications for the position and who might be the best fit for the job. The panel interviewed the grievant as well as a number of other applicants for the canine position. The grievant was ranked third after the selection committee interview. See union Exhibit 4. The grievant was identified by the selection committee as one of four "Highly Qualified" officers and was the only officer who had even been named "Officer of the Year" that applied. The evidence also showed that his application was flagged, along with one other officer, for review due to the 50-mile radius residency requirement.

After the panel process, Chief Harrington decided to interview all of the applicants. He testified credibly that this was due to his desire to meet as many officers as he could since he was new in the position of Chief and wanted to get to know the officers under his command. The Chief rated the grievant 5th among the applicants – still below the top three applicants.

There were some additional errors in the scoring and these were discussed at the hearing. The evidence showed that Officer Tinucci's score should have been 80.6 instead of 82.8 and Officer Johannes' score should have been 78.6 instead of 82.6. The correction of these two errors does not change the identity of the top four candidates; it simply results in the reordering of the top four. In addition, the Chief scored the Officers in the following order: Officer Tinucci was scored 82.8; Officer Johannes was scored 82.6; Officer Dietz was scored 81.4 and Officer Scharber was scored 81. Officers Tinucci, Johannes and Dietz were initially selected as canine handlers. See, Joint Exhibit 3. With the correction of the mathematical errors, the Officers would be ranked in the following order: Officer Erin Dietz 81.4, Officer Scharber 81, Officer Tinucci 80.8 and Officer Johannes 78.6.

The evidence showed that with the correct addition the grievant would still not have been in the top three applicants. Irrespective of the mathematical errors or the correction of the errors, the evidence showed that the grievant received a score of 73.8 and would still have been ranked 5th.

There was evidence that the Chief gave the grievant a 0 on teamwork in response to a question about ethical dilemmas. The union asserted that this showed an evident bias against the grievant and suggested that this was perhaps due to the grievant's answer to the ethical dilemma question and his discussion of some difficulty he had with Lt. Greenwaldt.² This will be discussed more below but on this record there was no showing of any bias against the grievant or in favor of other applicants. Indeed, as noted herein, the Chief had only been with the department for a short while and there was no evidence of any arbitrary or capricious action on the Chief's part in any of this.

The grievant was not selected for a canine position and this grievance was timely filed and processed through the appropriate steps of the grievance procedure. It is against that factual backdrop that the analysis of this case proceeds.

SUBSTANTIVE ARBITRABILITY

The employer asserted that this matter should not even be considered on the merits by the arbitrator and further argued that the canine position is in fact an assignment not subject to the provisions of article 9.04. Assignments, it argued are subject to managerial discretion and management rights and not subject to review by an arbitrator acting within the purview of the grievance procedure. This argument rests on several points. First there must be a determination as to whether the canine position is an assignment within a job classification or whether it is a true transfer under Article 9.04. Second, there must be a determination as to whether the union's arguments about the meaning of Article 9.04 have merit. Third, there must be a determination of whether the grievance procedure contemplates that this dispute is subject to arbitral review as a "dispute or disagreement as to the interpretation or application of the specific terms and conditions of th[e] Agreement."

² Lt. Greewaldt did not testify here and the nature of what the issue was with the grievant was never fully explored.

The basis of the employer's argument is a factual one – i.e. whether the canine position is a transfer or an assignment. Here the facts showed that due to the differing nature of the position from the other “regular” police officer duties, the canine position is a transfer and thus subject to the provisions of Article 9.04. A true assignment would be more akin to an assignment to a different location or “beat.” The canine position has different requirements; slightly more pay (even though the employer's position that it was not a true promotion had merit) with differing duties.³ Further, not to overlook the obvious, the manner in which it has been awarded is far more like a bid for a transfer than a mere assignment – typically an assignment is done by a simple order from higher authority requiring the officer to perform differing duties. The canine position on these facts is a vastly different sort of position and requires a different set of requirements and duties than those of a “regular” police officer.

There was also some merit to the union's claim that the language of Article 9.04 must “mean” something. The general rule is that parties know what their contract says and that each word and clause in it has meaning. Arbitrators generally interpret language so that each clause – even those that appear to be inconsistent with each other - has some meaning. See also, Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. at p. 428.

The union noted that there is only one job classification in the CBA. Thus, it follows logically that there simply cannot be a true transfer from one classification to another within the CBA because there is only one. Thus, for the language to have meaning it must apply to a movement from one position to another in this context. It is critical to note that the ruling on arbitrability is limited to these unique facts. Not every order to do a different set of duties within the job classification of police officer is to be construed as a transfer or promotion within the meaning of Article 9.04.

³ The evidence here showed that the canine position is not a promotion even though there is additional pay. There is no difference in rank and the pay is due to the additional time for caring for the dog. The pay is also at regular police officer straight time pay. Thus even though the canine position has been determined to be a transfer, subject to the provisions of Article 9.04, it was not found to be a promotion as well.

The ruling here is based on the evidence that the canine position was not a mere assignment but was in fact something more akin to a transfer and thus subject to the grievance procedure. Thus the language must be viewed in the context of the facts as they are – which of course means that there is but one job classification. It all must be viewed in the context of the reality that the canine position was filled using more than the mere order to do it – as a true assignment might be. It was placed on a competitive bidding sort of process with considerable process surrounding it.

The panel of interviewers and the rest of the competitive process undercut the argument that this was nothing more than an assignment. However, as noted below, that very process provided considerable support of the employer’s claim that there was no violation of the language of Article 9.04 in the actual manner in which this position was filled.

Further, even though the language of Article 9.04 references the term “job classification” a close reading of the language fails to reveal what that means. As noted above, there is only one job classification. Moreover, the language uses the term in a list that is frankly vague at best and does not adequately explain the circumstances under which the term job classification is used in that article.⁴ Thus on these unique facts, the union’s claim has merit.

The employer argued that the language of Article 9.04 would have meant something if sergeants were to be placed in the unit. The simple fact remains that they were not; having been determined by the BMS that they were supervisors and thus not allowed in the unit by operation of PELRA.

⁴ The language reads as follows: “Senior employees shall be given preference with regard to transfer, job classifications, and promotions within the bargaining unit when the job-relevant qualifications of employees are deemed to be equal.” How senior employees are to be given “preference with regard to job classifications,” as the language says literally, is not at all clear. Thus, the most rational reading of the language is that the transfer to the position of canine officer, for which there was a very elaborate process and set of requirements in order to be awarded, applies to this position on these facts. The canine position was a very different proposition from a mere assignment, which is usually done by a simple order to perform a different set of duties.

The employer also theorized that at some indeterminate time in the future the department could create another classification, for example of corporal, which does not currently exist and that this too might give some life to the language of Article 9.04. The theoretical possibility that the sergeants might have been placed there was not a persuasive argument. The fact is that the sergeants were *not* placed in the unit yet the language remains in the CBA.⁵ Neither is the hypothetical creation in the future of another classification of corporal. The language of a contract must be construed based on the facts as they exist not on some theoretical or hypothetical set of facts as yet unknown.

Moreover, the grievance procedure calls for arbitration of any dispute or disagreement. Here there was such a dispute about whether the canine position was a transfer or an assignment. That is a factual determination to be made based on the facts of any particular case. Here as determined above, the evidence showed that this was a transfer not an assignment. Thus the broad purview of the grievance procedure covers this dispute and the matter is arbitrable.

Finally, the employer claimed that Article 9.05 provided that the canine position was an assignment since it exempted the canine position from shift bidding. It is important to note that Article 9.05 covers shift bidding and is thus to be limited to that context. It is not read as exempting canine positions from all of the requirements of article 9.04, which calls for the application of seniority.

The employer relied heavily on Arbitrator Bognanno's decision in *County of Mille Lacs and Law Enforcement Labor Services, Inc.*, BMS # 90-PP-148-B (Bognanno, 1990). That decision was reviewed in some detail and showed one crucial distinction. The CBA in that case had four separate job classification and the arbitrator's interpretation of the language on the facts in that case was correct. There could well have been a transfer from one job classification to another under that CBA. Here there cannot since there is only one such classification.

⁵There was little if any evidence of the circumstances surrounding the union's claim to have sergeants placed in the bargaining unit and thus very little evidentiary record upon which to rely. What remains clear is that there is only one job classification in the unit and that on these facts the language applies to the transfer of an officer to the canine position from other positions.

Here, to adopt the employer's interrelation of the language would effectively render it meaningless since it appears that the employer would apply it only to a transfer from one job classification to another. Accordingly, for the reasons set forth herein the matter is determined to be substantively arbitrable and subject to the provisions of the grievance procedure. The question now is whether there was a violation of the provisions of article 9.04. On these facts there was not.

MERITS - VIOLATION OF ARTICLE 9.04

The union raised a number of allegations regarding the process the department used to award of the canine position. The union first asserted that the employer violated its own announced process by allowing the Chief to conduct a second set of interviews with all of the candidates for the position. The argument was that the announcement set forth that there would be an initial round with a panel of experts and that there was no announcement or notice that the Chief would conduct a second set of private interviews.

The announcement clearly stated that the Chief would make the final determination. Further, there was no limitation on the Chief's right to conduct a second interview either in the CBA or in the announcement of the position.

Moreover, there was no evidence of any bias or favoritism by the Chief in conducting the interviews. He interviewed all of the candidates, mostly to get to know them but also to be fair to all and give each of them a chance to explain why they should be chosen for the position. The questions were all the same and there was no evidence that he deviated from them or that he gave "easy" questions to some and harder questions to others.

The union also raised the scepter of arbitrariness in the Chief's scoring. There was no evidence of that. Certainly some of the questions used by the Chief and by the panel called for subjective determination of qualifications. That does not render the process invalid however.

In any oral interview there is almost by definition some measure of subjectivity. As examples of the sorts of factors that are frequently considered one might imagine the following: Who will be a better fit? Who will work better as a team player? Who is the “best candidate” for the job among candidates who were all presumably good and dedicated officers? Simply stated, unless there is a test of some sort with an objective measurement of abilities, such as a written test of knowledge or some sort of physical test where candidates are judged by time or some other objective measure, there will always be an element of subjectivity in oral interviews.

That was not the deciding factor here. The evidence showed that the Chief scored each fairly and as objectively as he could. Further, as discussed above, the mathematical errors in addition did not change the ultimate ranking of these candidates. Thus, even if the Chief would have granted the grievant the extra 4 points, rather than 0, for teamwork the ranking would not have changed.

Turning next to the language of Article 9.04 it is quite apparent that this is a so-called modified seniority clause. Seniority comes onto play only when the relative skills and abilities of competing candidates are equal. Otherwise seniority is not the determinative factor. Here the evidence showed that for this particular and unique position, the Chief determined, as was his right, that the qualifications of the candidates were not equal. There was no showing that this determination was manifestly wrong or that there were any arbitrary or capricious actions underlying that decision.

Finally, and most importantly on this record, the one truly objective measurement, i.e. the 50 mile limit, was not met by the grievant on this evidence. His application set forth that he lived 51.4 miles away from the department. The fact that the department continued to consider the grievant rather than disqualify him immediately did not undermine the employer’s case.⁶

⁶ The evidence showed that the grievant himself brought the residency issue up at the outset and was told that if he could show a mapping distance that was within 50 miles he could perhaps still qualify. He did not do so during the hiring process. The one map showing that he barely met the 50 miles was not submitted until the hearing. See union exhibit 1. It would be manifestly unfair to the employer and to the officers who have now been working with the dogs for an extended period of time – to use evidence not submitted during the entire hiring process to overturn the decision now.

Accordingly, while the grievant's overall work performance was not an issue in this matter, as discussed above, the fact that he did not submit anything showing that he lived within the required distance to the department was a crucial factor. There was no dispute that the 50 miles was communicated to all the candidates. There was no allegation that the 50-mile limit was somehow invalid or that it violated the CBA or other rule. Moreover, it was clear that as of the time the hiring decision was made, the grievant did not demonstrate that he lived within that limit.

Finally, the evidence showed that per the Chief's right to conduct interviews and make the final determination, the grievant's qualifications for this particular position were not equal to those chosen for the canine position. Thus, seniority under the terms of the language of Article 9.04 did not come into play and there was no violation of the contract shown. The grievance must therefore be denied.

AWARD

The grievance is DENIED.

Dated: August 11, 2014

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Jeffrey W. Jacobs, arbitrator