

IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN

CITY OF BLAINE, MINNESOTA)	
)	BMS CASE NOS.
“CITY”)	13-PA-0560 & 14-PA-0313
)	
And)	DECISION AND AWARD
)	
LAW ENFORCEMENT LABOR SERVICES, INC)	RICHARD R. ANDERSON
LOCAL 165)	ARBITRATOR
)	
“UNION”)	AUGUST 18, 2014
)	

JURISDICTION

The hearing in the above matter was conducted before Arbitrator Richard R. Anderson in Blaine, Minnesota on June 19, 2014 and by telephonic conference in Eagan, Minnesota on June 25, 2014. Both parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced into evidence by both parties and received into the record. The hearing closed on June 25, 2014. Timely briefs were mailed on July 31, 2014 by the parties and last received from the City on August 4, 2014, at which time the record was closed and the matter was then taken under advisement.

This matter is submitted to the undersigned Arbitrator pursuant to the terms of the parties’ January 1, 2011 through December 31, 2013 collective bargaining agreement, hereinafter the Agreement.¹ (*Joint Exhibit 1*) The relevant language in Article 7 [*EMPLOYEE RIGHTS- GRIEVANCE PROCEDURE*] provides for the procedure to resolve grievance issues. The parties stipulated that the instant grievance is properly before the undersigned Arbitrator for a final and binding decision. The parties further stipulated that this matter does not involve contract arbitrability or any other substantive or procedural issue.

¹ The Agreement remained in full force and effect during all relevant times herein.

APPEARANCES

For the City

Susan K. Hansen, Attorney
Chris Olson, Police Chief
Terry Dussault, Human Resource Director
Sheri Chesness, Human Resources Coordinator
Mark Boerboom, Police Sergeant
Ted Berg, Police Sergeant

For the Union

Isaac Kaufman, General Counsel
Mike Bozell, Grievant and Police Officer
Renee Branshaw, LELS Research Assistant

THE ISSUE

The Parties stipulated to the following issues.

1. Did the City of Blaine violate Section 9.4 of the Collective Bargaining Agreement by failing to promote Officer Mike Bozell to Sergeant in or about November 2012? If so, what is the appropriate remedy?

2. Did the City of Blaine violate Section 9.4 of the Collective Bargaining Agreement by failing to promote Officer Mike Bozell to Sergeant in or about August 2013? If so, what is the appropriate remedy?

The City of Blaine, hereinafter the City or Employer is a northern suburb of Minneapolis, Minnesota located in Anoka County. The Law Enforcement Labor Services (LELS), hereinafter the Union, is the collective bargaining representative of approximately 46 non-supervisory Police Officers, hereinafter Officers. The Union has represented the Officers for at least the past four decades. The Union also represents the Police Sergeants albeit in a different bargaining unit.

On November 29, 2012, the Grievant was informed by Police Chief Chris Olson that he was not the successful candidate in a recent Police Sergeant promotional posting. (*Joint Exhibit 11*) On November 30, 2012, Union Business Agent Dennis Kiesow filed a Step 1 grievance on behalf of the Grievant alleging that: (*Joint Exhibit 12*)

On or about November 19, 2012, the City announced a promotion to Sergeant. Based on test scores and seniority, the promotion should have been granted to Officer Bozell. It was given to a much junior officer based solely on the decision of the Chief without consideration of seniority as provided in the labor agreement. The City violated the labor agreement to include, but not limited to Article 9, Seniority which states: Senior employees will be given preference with regard to transfer, job classification assignments, and promotions when the job relevant qualifications of employees are equal.

Chief Olson denied the grievance in writing on December 10, 2012 stating that, “*Job qualifications were not equal. No contract violation occurred.*” (Joint Exhibit 13) After Chief Olson waived the Union’s Step 2 requirement (Joint Exhibit 14) by email on December 14, 2012, Kiesow appealed the grievance to Step 3 in writing that same day. (Joint Exhibit 15) The City through City Manager Clark Arneson in a letter to Business Agent Kiesow dated January 15, 2013 denied the grievance wherein he stated, “*I met with you and Officer Bozell on Friday, January 11th. I listened to and understand arguments made by Officer Bozell and yourself concerning the grievance. However, I do not believe there is a violation of the Labor Agreement.*”

The Grievant was involved in another Police Sergeant promotional process in early August 2013 (Joint Exhibit 17) and again was an unsuccessful candidate. (Joint Exhibit 18) Business Agent Kiesow filed a Step 1 grievance on September 3, 2013 on behalf of the Grievant alleging the same argument that he stated in the November 30, 2012 grievance. (Joint Exhibit 19)

Chief Olson denied the grievance in writing on September 11, 2013 for the same reasons that he stated in his previous December 10, 2012 denial letter. (Joint Exhibit 20) Business Agent Kiesow appealed the grievance to Step 2 in writing that same day (Joint Exhibit 21), which Chief Olson denied in writing on September 20, 2013 for the same reasons as stated in the earlier grievance. (Joint Exhibit 22) Business Agent Kiesow then appealed the grievance in writing on September 24, 2013 to Step 3. (Joint Exhibit 23) City Manager Arneson in a letter dated September 27, 2013 to Business Agent Kiesow denied the grievance wherein he stated, “*Again the promotion was awarded to a junior officer based solely on the decision of the Chief without consideration of seniority as provided in the labor agreement. Job relevant qualifications were not equal. No contract violation occurred.*” (Joint Exhibit 24)

The Union then filed for arbitration with BMS on October 1, 2013. (*Joint Exhibit 25*) The undersigned Arbitrator was notified in writing on October 25, 2013 by City Counsel Susan K. Hansen that I had been selected as the neutral arbitrator for both grievances. (*Joint Exhibit 26*)

RELEVANT CONTRACT PROVISIONS

ARTICLE 5—EMPLOYER AUTHORITY

5.1. *The EMPLOYER retains the full and unrestricted right to operate and manage all manpower, facilities, and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; 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 function not specifically limited by this AGREEMENT.*

5.2. *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

7.1. Definition of Grievance. A grievance is defined as a dispute or disagreement as to the interpretation or application of a specific provision of this Agreement.

7.4. Procedure

Step 1. *An employee claiming a violation concerning the interpretation or application of this Agreement shall, within twenty-one (21) calendar days after such alleged violation has occurred, present such grievance to the employee's supervisor as designated by the EMPLOYER. If the designated representative does not resolve the grievance, the grievance will be presented to the Chief of Police, the designated Step 2 representative.*

7.5. 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 law, rules or regulations that have the force and effect of law. The Arbitrator's decision shall be submitted in writing within thirty (30) days following close of the hearing or the submission of briefs by the parties, whichever be later, unless the parties agree to an extension. The decision shall be binding on both the Employer and the UNION and shall be based solely 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

9.4. *Senior employees will be given preference with regard to transfer, job classification assignments, and promotions when the job-relevant qualifications of employees are equal.*

ARTICLE 21—WAIVER

21.1 *Any and all prior agreements, resolutions, practices, policies, rules and regulations regarding terms and conditions of employment to the extent inconsistent with the provisions of this Agreement are hereby superseded.*

21.2 *The parties mutually acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any term or condition of employment not removed by law from bargaining. All agreements and understandings arrived at by the parties are set forth in writing in this Agreement for the stipulated duration of this Agreement. The Employer and Association each voluntarily and unqualifiedly waive the right to meet and negotiate regarding any and all terms and conditions of employment referred to or covered in this Agreement or with respect to any term or condition of employment not specifically referred to or covered by this Agreement, even though such terms or conditions may not have been within the knowledge or contemplation of either or both of the parties at the time this contract was negotiated or executed.*

FACTS

The Grievant, who has a 2-year law enforcement degree from North Hennepin Technical College, has worked for the City's Police Department as an Officer since 1993. He also served as a Community Service Officer (CSO) for two years prior to his appointment as an Officer. He was working the day shift (6 a.m.-6 p.m.) when the issues arose herein.² During his entire tenure, the Grievant has received highly successful/outstanding evaluations by his superiors. (*Union Exhibits 1 and 2 and City Exhibits 1 and 2*) Chief Olson acknowledged in his testimony that the Grievant was a solid Officer with good evaluations and no history of discipline.

The Grievant is highly trained and experienced in all aspects of policing. In addition, he has performed a number of additional duties during his tenure with the Department. He was a Field Training Officer (FTO) from 1996 until May 2013 when he resigned from that position due to what he calls a family conflict. It appears that the FTO's were recently being rotated into the night shift and this would conflict with his wife's work schedule and child day-care arrangements. He stated that he did not want to continue as a FTO because he would be periodically bouncing back and forth between days and nights and felt that he would not be able to adjust to this schedule because of family issues, e.g. day care and wife's work schedule.

It is the responsibility of the FTO to train new hires in all aspects of police work. The Grievant testified that with the exception of the Chief, the current Captain and a Lieutenant, he has trained most of the Officers in the Department.

² The Department utilizes two shifts—6 a.m. to 6 p.m. and 6 p.m. to 6 a.m. Officers bid on shifts by seniority.

The Grievant served from 1998-2000 as a Provisional Detective, a rotating position whose duties were to assist Detectives in their investigations. He has also been a Use of Force Instructor and Fire Arms Instructor since 1995, and currently has “armorer” duties which consist of maintaining all types of Department weaponry.³

The Grievant also has served as a Senior Officer (SO) numerous times since 1996. The SO is not appointed through a selection process, but rather is the most senior officer on a shift. The SO receives no specialized training for the position or extra compensation. They do not directly supervise the other Officers on the shift. Their limited role is to perform some of the Police Sergeant’s job duties when one is absent on a shift. This includes taking complaints against Officers⁴, responding to calls from dispatch, and forwarding custodial affidavits to the Anoka County Attorney of an arrest of an individual who is being sent to the Anoka County Jail for holding.

In early September 2012 the Grievant became aware that a Police Sergeant position was opening up. The Grievant applied for this position in a memo with accompanying resume directed to Human Resource Coordinator Sheri Chesness dated September 6, 2012. (*Joint Exhibit 3*) The resume listed the following specialized training that the Grievant had received since becoming an Officer—Field Training Officer (1995-Present), Firearms Instructor (1993-Present), Provisional Detective (1998-2000), D.A.R.E. Instructor (1997-2000), Glock Law Enforcement Armorer (1997-Present), First Responder (1992-Present), Pursuit Intervention Tactics (1995-Present), Traffic Lidar (September 2000), Intoxilyzer Operator, Defensive Driving Course, Windows User Course, MP5 Users Course (June 1997), MP5 Instructor Course (August 1997), MP5 Instructor (1997-Present), Defib Certified, Community Policing (January 1998), Remington 870 Armorer (March 1998), Computerized Criminal History Certificate (1999-Present), NC1C Training (1991-Present), Death Investigation (May 2000), Power Line and Gas Safety (2000), MP5 Armorer (April 2000), Soulis Survival Shooting (November 2001), Tazer User Course (March 2002), Water Rescue Training (February 2006-Present), M16 User Course (2000-Present), UTV Instructor (2007-Present), Tire Deflation (2008-Present), Hazmat Trained, Mobile Security Training (September 2007), Search Warrant/Entry Training (April 2008), Frisbouy (2008-Present), Active Shooter Training (2008-

³ Other Officers also have these duties.

⁴ The SO does not have the Sergeant’s authority to investigate a complaint.

Present), Bloodborn Pathogen (1998-Present), Milo Shoot Trained (2008), Speed/Radar Training (2007), Annandale Shoot House Training, Instructor Development Training (May 2006), Armory Supervisor (2008-2011), Fingerprinting/Evidence Collection Training (2005), Firearms Recertification (May 2006), Remington 870/1187 Shotgun Armorers Course (September 2006) and Less Lethal Training.⁵

The promotional process consists of two parts—a preliminary promotional test followed by an interview with Chief Olson. On September 12, 2012, HR Coordinator Chesness notified the 10 candidates who had expressed interest in the position by memorandum that a representative from Personnel Decisions Inc. (PDI) would be conducting an orientation session on September 27, 2012 to go over the promotional test for the vacant position. This test consisted of four components—(1) Written In-Basket Examination (2) Police Career Index Examination (3) Role Play Examination and (4) Oral Interview Examination with an outside panel with 25 points assigned to each component. (*Joint Exhibit 4*) She followed this up with another memo to the candidates dated September 27, 2012 of the various examination dates beginning on October 3, 2012 and ending on October 18, 2012. (*Joint Exhibit 5*)

After the conclusion of the initial promotional testing, HR Coordinator Chesness notified the Grievant by memorandum on October 24, 2012 that he was one of the top five candidates and would be personally interviewed by Chief Olson on a date to be determined later. The memorandum also informed the Grievant that his testing score would be withheld from both the Chief and him and disclosed at a later time. (*Joint Exhibit 6*)

HR Coordinator Chesness subsequently notified the Grievant in a memorandum dated October 30, 2012 that his interview to be conducted by Chief Olson with her in attendance was scheduled for November 8, 2012. (*Joint Exhibit 7*) During all scheduled interviews of the top five candidates, each candidate was asked the same 19 questions and whether they had additional information to offer. (*City Exhibits 3, 8, 9, 11, 16 and 17*) The 19 questions evaluated the finalist's job relevant qualifications including their supervisory skills and leadership abilities.

Chief Olson notified the Grievant in a memorandum dated November 19, 2012 that Officer Mark Boerboom, who had 12 years of law enforcement experience with the last 6 years being

⁵ The resume did not specifically list any specialized supervisory training or special programs initiated or attended.

with the City, was the successful Sergeant candidate.⁶ (*Joint Exhibit 7*) According to the testimony of Chief Olson, Officer Boerboom had been selected for the Sergeant's position based on his demonstrated supervisory skills, supervisory training and experience, his leadership abilities and because he was the most qualified applicant. In addition Chief Olson testified that Officer Boerboom answered the 19 questions like a supervisor should during his interview.

Officer Boerboom's experience and qualifications are contained in the resume that he submitted during the selection process to which he testified at the hearing. (*City Exhibit 10*) Officer Boerboom testified that he has a 2-year law enforcement degree, attended a law enforcement recruit academy and a skills program for law enforcement officers. He is currently pursuing a 4-year degree in specialized administration. He was employed as a police officer in the Menasha, Wisconsin Police Department from 2000-2007 with the last four years as an Officer in Charge (OIC). The Menasha Police Department consisted of 32 sworn officers, which included a chief, 6 lieutenants and 3 OICs who supervised 4 patrol officers per shift when the shift lieutenant was absent.⁷ In addition to his regular patrol officer duties at Menasha, Officer Boerboom served as an FTO and evidence technician and was also a member of the Critical Response Team (CRT) and police honor guard.

Officer Boerboom further testified that the Menasha OIC's were selected competitively and paid a monthly differential above the rate of regular patrol officers. The OIC had duties similar to the City's Sergeants in that they had no patrol responsibilities and directly supervised patrol officers. This consisted of handling roll call, reviewing patrol officer reports and returning them for correction if errors were made, ensuring the shift was adequately staffed with authority to call in additional patrol officers. The OIC also had authority to call in the (CRT) or an investigator if the situation warranted.

Officer Boerboom was employed as an Officer in the City's Police Department beginning in 2007. During the 2012 Sergeant's selection process, Officer Boerboom testified that he presented a portfolio of information (resume) to the Chief in order to highlight his supervisory abilities and leadership accomplishments both at Menasha and at the City. (*City Exhibit 10*)

⁶ City Manager Arneson made the final selection decision based on the recommendation of Chief Olson.

⁷ The Menasha Police Department did not employ a sergeant's classification.

In this resume and through his testimony Officer Boerboom highlighted his success leading various programs at the Menasha Police Department. He led his department's Police Auxiliary Program, which is comparable to the City's Police Explorer Program, where he supervised 20 program participants. In addition to interviewing candidates and conducting background investigations, Officer Boerboom oversaw the Program's budget, organized weekly meetings and supervised participant training. In addition, he drafted and implemented a successful new officer hiring program for the Menasha Police Department.

While at Menasha, Officer Boerboom was involved in other community activities through his service on the law enforcement committee for the Fox Valley Special Olympics where he was responsible for fund-raising events that raised over \$300,000 annually. His work earned him the Law Enforcement Volunteer of the Year for Special Olympics in 2004. Officer Boerboom also implemented and facilitated teaching a community child safety program and a bicycle safety awareness program.

Officer Boerboom performed other duties in addition to his regular patrol duties while an Officer with the City. These included being a FTO and conducting background checks on potential candidates, serving as an advisor to the Employer Program and acting as the assistant coordinator for the Safety Services Citizen Academy. Officer Boerboom also was the School Resource Officer (SRO) at Centennial High School beginning in 2009 where he was responsible for a safe student environment as well as investigating criminal offenses that occurred on the school property. He also performed Provisional Detective duties that included being on the Drug Task Force and investigating burglary, theft and financial transaction crimes.

In addition as the City's SRO, Officer Boerboom developed and facilitated a student DWI education program at Centennial High School where he identified a need for the education, proposed a budget to administration, met with school administration and orchestrated a large scale education event with more than 15 agencies and businesses and 100 volunteers.⁸ In his resume, he also highlighted his work with the City in developing a landlord training/certificate program and his work where he proposed and assisted with implementing a police mental health awareness program.

Officer Boerboom completed various specialized training programs throughout his law enforcement career. These included a 10-hour BCA Death Investigation Conference in May

⁸ He had previously formulated and implemented a similar program while at Menasha.

2011, a 3-day Juvenile Officer's Conference in January 2011, a 7-hour BCA Time Management course in May 2010, a 14-hour BCA Police Personnel Management class in October 2008, a 21-hour Police Management Principals & Practices class in September 2008, an 8-hour Anoka County Attorney Office Juvenile class in September 2008, a 14-hour BCA Managerial Relations class in May 2008, a 14-hour BCA Motivational Leadership class in March 2008, a one-day Spring Lake Fire Department Ice Rescue class in February 2008, a 14 hour BCA Police/Media class in January 2008, a 320-hour Fox Valley Technical College Criminal Justice class sponsored by the Executive Development Institute from March 2006–February 2007⁹, a one-day Waukesha (WI) County Technical college Armored Vehicle Rescue Tactics class in June 2006, a 2-day Fox Valley Technical College Interview & Interrogation FBI Training in March 2004, a 14-hour insurance company seminar on Understanding Human Differences in December 2014, a Safety Kids, Inc. program for Personal Child Safety in August 2003 and a 3-day Wisconsin SWAT Association SWAT Training conference in February 2003.

Boerboom's portfolio of information presented to the Chief also highlighted Boerboom's proposed projects for the Blaine Police Department in the event he was selected as a Sergeant. The proposed projects included a Regional Information Sharing System (RISS) Deconfliction Program for officer safety purposes and a Robbery In-Service Training Program.

The Grievant met with Chief Olson and HR Coordinator Chesness on November 26, 2012 and made notes of the meeting that he testified to at the hearing. (*Union Exhibit 3*) According to the Grievant, Chief Olson made various statements on his decision to promote Officer Boerboom. He acknowledged that had looked through the Officer's resumes and their personnel files and was looking for someone long-term and someone who could jump right into the position. He felt Officer Boerboom answered the questions posed during the interview like a Sergeant. According to the Grievant, Chief Olson also expressed surprise that he had put in for the night shift position since it appeared that he was set on day shift and carved himself a niche there.¹⁰ Chief Olson also asked him if he had put in for supervisor classes, which he had

⁹ This training is similar to the BCA Staff and Command School that City Sergeants attend.

¹⁰ The Grievant as one of the most senior Officers worked the day shift (6 a.m.-6 p.m.) exclusively. As the least senior Sergeant, the Grievant would be working the night shift (6 p.m.-6 a.m.) exclusively.

not.¹¹ He then informed the Grievant that Officer Boerboom had taken such classes, and that this had been among the reasons why he had been selected for the promotion. During this meeting Chief Olson also told him he wasn't quite there yet and suggested that he take some supervisor classes.

The Grievant took Chief Olson's advice and enrolled in two supervision classes conducted by the Minnesota Bureau of Criminal Apprehension (BCA). One was a class on Supervisor Survival and the other on Ethics and Integrity. The Grievant took these classes during his regularly scheduled hours and did not accrue any overtime. The Grievant also took an advanced armorer's class to master the operation and maintenance of the City's new M4 rifles. He also applied for a week-long Supervision and Management course sponsored by the Wisconsin State Patrol at Ft. McCoy, Wisconsin, but that request was denied by the Training Coordinator, Lt. Stephen Johnson. (*Union Ex. 6*) In this Exhibit Lt. Johnson cited a number of reasons for denying this request—the training was only available for current supervisors due to the expense, staffing was at a minimum due to a Department shoot where the Grievant was scheduled to instruct, the Grievant was scheduled for three days of vacation during that time period and outstate travel required City Manager approval.

After the November 12, 2012 Chief's meeting, the Grievant learned from HR Coordinator Chesness that he had the highest ranking going into the interview with Chief Olson. He decided to grieve the selection process because he felt that he was the most qualified applicant, had the most seniority and was ranked number one in the four-part examination process with a score of 81.39 while Officer Boerboom was ranked 3rd with a score of 80.18.

On August 7, 2013, the unsuccessful top four candidates from the 2012 testing process were notified by HR Coordinator Chesness that the City would be using the same list to promote another Sergeant. (*Joint Ex. 17*)¹² Thereafter, the Grievant attended another follow-up interview with Chief Olson and Ms. Chesness on August 20, 2013. Each candidate was asked two questions—(1) Please update us on any education, training, or experience you may have gained since our last interview, and (2) Is there anything we did not discuss in our last

¹¹ The Grievant testified that he did not know that he could take supervisory or leadership training classes; however, as a part of the Grievant's 2009-2010 performance evaluation, supervisors listed management training as a goal he was to accomplish before his next evaluation.

¹² A fifth candidate from the original promotional list was also included in the notification, but would be asked the original 19 questions the four unsuccessful Officers were asked during the earlier promotional process.

interview, or that you want me to consider when making my promotional decision? (*City Exhibits 13, 14, 19 and 20*)

During this interview the Grievant shared with Chief Olson his taking two BCA supervisory/management courses and his attempts to take the third at Ft. McCoy. The Grievant also informed Chief Olson that he resigned from his FTO position because he felt he could not do a proper job on the night shift, but did not expand on this comment nor did Chief Olson explore it further.

The Grievant testified that in spite of his resignation as an FTO he applied for the Sergeant position knowing that he would be the least senior of the Sergeants and would be working the night shift exclusively. He testified that rather than a split shift FTO schedule, he would only be working at night. Further, his previous family concerns had improved and they would no longer inhibit him from working nights. He also testified that he never informed Chief Olson of this changed stance on working the night shift.

The Grievant was notified by email from Chief Olson on November 28, 2013 that Officer Ted Berg, who had 16 years of law enforcement experience with the last 7 years being with the City, was the successful Sergeant candidate.¹³ (*City Exhibit 19*) Officer Berg ranked 2nd on the four-part examination process with a score of 80.85 while the Grievant ranked 1st with a score of 81.39.

Chief Olson testified that he promoted Officer Berg because of his prior supervisory and administrative experience, his leadership skills and because he was the most qualified applicant. Also, during the initial Sergeant selection process Chief Olson informed Officer Berg that he needed to improve his communication skills. As a result, Officer Berg took the SRO position to improve his communication skills when Officer Boerboom was promoted.¹⁴

Chief Olson further testified that he also had concerns that the Grievant resigned his FTO position because he did not want to work nights and because of what Chief Olson described as a lack of leadership when the Grievant “threw the administration under the bus” in a public

¹³ Again, City Manager Arneson made the final selection decision based on the recommendation of Chief Olson.

¹⁴ Because of their constant interaction with students, school staff and the community at large, SRO’s need appropriate communication skills.

fashion after his first rejection for the Sergeant position by circulating an email to the Department on January 1, 2013.¹⁵

Officer Berg, who has a four-year degree in police science, was hired as an Officer in August 2006. He applied for the Police Sergeant position on September 6, 2012 and included his resume. (*City Exhibit 7*) According to his resume and testimony at the hearing, he was employed as a police officer and sergeant from 1996 to 2006 for the City of Northfield, Minnesota. In addition to his regular policing duties as a patrol officer, he was the department's Neighborhood Intervention Program officer. He also implemented and supervised the department's Police Explorer Program from 1998 to 2006 where he was responsible for all aspects of the program. Officer Berg was also a police instructor in weaponry and served as a FTO. He also served as an advisor to the Northfield police chief in the area of computers and technology wherein he created computerized report-writing and case-management systems including for the in-car computers, all at no cost to the city.

Officer Berg was a police sergeant during his last four years with the Northfield police department where he directly supervised the daily work of a patrol shift consisting of 4-6 officers. As a sergeant, he directly supervised officer performance, conducted written officer evaluations, conducted roll-call, ensured that there was adequate staff available for duty, assigned overtime, handled officer civilian complaints, reviewed officer work product and ensured that any deficiencies reported were corrected.

Officer Berg also served on the police department's policy committee where he assisted with the development of department policies and procedures and served on the accreditation team to ensure that the department was in compliance with accreditation standards established by CELA.¹⁶ He was assigned as the Training Coordinator where he was responsible for its budget, made recommendations to the police chief, prepared annual reports to the State of Minnesota on training costs and hours of training. Officer Berg was responsible to ensure that all officers were in compliance with the State P.O.S.T. Board continuing education requirements. In addition, he conducted most use of force and firearms training and

¹⁵ The email stated "*Even though it wasn't expressed by anyone in administration, everyone should be proud of how they performed in 2012. The great job we do is what makes this an excellent police department.*(*City Exhibit 4*)

¹⁶ This is a private police accreditation group which is akin to education accreditation that some cities in Minnesota use.

implemented the use of the TASER program into the department including the policy for its use and training of officers.

Officer Berg was the Northfield police department's Traffic Safety Coordinator where he was responsible for the Safe and Sober and Night Cap programs, coordinated traffic mitigation control efforts during road construction and conducted traffic surveys including enforcement and data collection activities. He assisted in the formulation of the county-wide safety effort in Dakota County including establishing a record keeping model, established input on grant applications and identification of traffic obstacles and the solutions to address them.

While at Northfield, Officer Berg was assigned as the department's Police Reserve Program Manager where he supervised all aspects of the police reserve unit including hiring, discipline, policy development and budget. He integrated the unit into the Emergency Management function with an emphasis on severe weather spotting and disaster recovery assistance.

Officer Berg testified that most of the sergeant's duties he performed at Northfield are similar to the duties he is currently performing at the City although he is now responsible for more Officers. Additionally, while in Northfield he performed some of the duties being performed by City Lieutenants since the command structure at Northfield did not have a Lieutenant rank or classification.

Officer Berg had specialized training in supervision and leadership while with the Northfield police department. He attended the Southern Police Institute's Management of the Small Law Enforcement Agency week-long training program in 2003. He also attended the International Association Chiefs of Police sanctioned week-long training program in managing criminal investigations of an agency.

After he was hired by the City in August 2006, Officer Berg performed all of the duties of a patrol officer and Neighborhood Intervention Program officer. He was also a use of force instructor and FTO instructor. He was the department's advisor for the Explorer program where he was responsible for its hiring, background investigations, training, discipline and program planning. As a part of the Explorer program he was responsible for the inner security and parking volunteers for the 3M Golf Tournament where he supervised a team of 12-15 Explorers engaged in security and other needs during this tournament.

Officer Berg handled additional administrative tasks with the City while he was an Officer. He created electronic forms for multiple police functions and served on an advisory group for the development of a current electronic field and reporting system. He served on an advisory committee and conducted staff analysis for patrol schedule changes being implemented in 2013.

While employed at the City, Officer Berg had more specialized supervisory and leadership training through the BCA's supervision and management program. He completed this two-year program that consisted of 12 different 1 and 2-hour sessions in May 2010.

Prior to Officer Boerboom's and Officer Berg's promotions, there were four Sergeant promotional examinations using the four-part evaluation process formulated by PDI in 2001, 2004, 2006 and 2008. In each situation the Officer who attained the highest score was eventually promoted. There were also three subsequent residual Sergeant promotional events shortly after the initial promotions in 2002, 2006 and 2008 wherein the procedure was similar to the one used when Officer Berg was the successful candidate. The scores from the preceding promotional event were used to determine the top five applicants who would be interviewed by the Chief. In those situations the Officer who scored 6th in the earlier 2001 examination, the Officer who scored 3rd in the earlier 2006 examination and the Officer who scored 4th in the earlier 2008 examination were promoted.

After the Grievant had filed his grievance regarding Officer Berg's selection as the new Sergeant, the Grievant filed an internal age discrimination complaint (exact date unknown) over his non-selection that was investigated by Attorney Joseph B. Nierenberg who issued his Report of Investigation of Internal Complaint on January 14, 2014 finding no evidence of age discrimination. (*Union Exhibit 7*) In the Report Attorney Nierenberg referenced that one of the points Chief Olson considered in making his decision was the Grievant's withdrawing from his FTO assignment because the night work conflicted with family functioning.

There was is a reference in the Report that City representatives did not consider or give any weight to "longevity" or "tenure" in the selection process in both 2012 and 2013.¹⁷ The Report also expands on Chief Olson's comment during his post-selection interview with the Grievant that, "he was looking for someone long-term". The Report states, (*Id. p. 4*)

¹⁷ Presumably, Chief Olson and HR Coordinator Chesness.

Concerning the Chief's "long term" comment, Complainant noted that he had "been telling people that he wanted to retire in five years. He wanted the supervisor's spot in order to increase his "high five" pre-retirement salary years. He said, "I had put that out there to people I talk to on a daily basis. Maybe it got back to the Chief that I was planning on leaving in five years." It stunned Complainant, he said, that the Chief said he was looking for someone long term, but Complainant conceded that he [Chief] might not want to have gone through the process again in five years.

The Grievant also filed an age discrimination charge with the U. S. Equal Employment Opportunity Commission (EEOC) (exact date unknown), which is currently under investigation. The parties stipulated during the hearing that the issue of age discrimination is not before the undersigned Arbitrator.

Finally, the Union alleges that HR Director Terry Dussault made a statement in the January 11, 2013 grievance meeting that Officer Boerboom and the Grievant were "neck and neck" in their qualifications for the promotion. Presumably this information was provided to HR Director Dussault by Chief Olson. Chief Olson denied this statement and HR Director Dussault, who was in attendance during the hearing, was not called as a witness.¹⁸

UNION POSITION

The Union's position is that the City violated Article 9.4 of the Agreement by not promoting the Grievant in 2012 or 2013. In support of this the Union argues:

- Section 9.4 gives particular weight to seniority in the selection process. The Grievant had the most seniority and experience (a margin of 14 years) of the Officers vying for promotion. Yet according to Attorney Nierenberg, tenure or longevity were not criteria used in the selection process. Seniority should have been the deciding factor in the selection process in view of HR Director Dussault's comment during the January 2013 grievance meeting that the Grievant and Officer Boerboom were "neck and neck" in their qualifications for promotion.
- To pass on the Grievant twice despite his superior performance on the examination was contrary to past practice and demonstrates the unreasonableness and arbitrariness of the process. Past practice in 2002, 2004, 2006 and 2008 demonstrates a history that the Officer with the highest score in the four-part promotional examination was promoted. The

¹⁸ This allegation was not discussed in Attorney Nierenberg's Report.

Grievant had the highest score in the examination for both the 2012 and 2013 promotional events.

- Chief Olson's decision regarding other qualifications for the 2012 and 2013 promotional events were unreasonable, arbitrary and capricious. It had an effect of rendering the seniority provision in Section 9.4 meaningless. A more reasonable and consistent standard for job-relevant determinations would make the Grievant's qualifications at least equal if not superior to the other candidates ensuring his selection for promotion under Section 9.4.
- There was no reason for Chief Olson to consider the Grievant's resignation from his FTO assignment as a factor in his promotional decision. The Grievant was available and willing to work nights, otherwise he would not have applied for the promotions. The fact that he resigned from his FTO assignment is a red herring. Chief Olson knew that night field training assignments are sporadic, unpredictable and disruptive to an Officer's and family schedule. Whereas an Officer working a regular night shift has a predictable schedule and can make the necessary family adjustments.
- Supervision classes as a job-relevant qualification as a determining criterion was also arbitrary and unreasonable. Chief Olson, during his post-promotion interview with the Grievant, cited his lack of taking supervisory classes as a factor in his not being promoted. The Grievant took his advice and enrolled in classes, but was still denied a subsequent promotion.
- Chief Olson also gave weight to Officer Berg having a 4-year degree as a basis for promoting Berg over the Grievant in 2013, yet he promoted Officer Boerboom who had a 2-year degree over Officer Berg in 2012. Chief Olson has also promoted other supervisors to higher positions with lesser degrees than the individuals ultimately selected.
- If the City contends that the Grievant's alleged criticism or disrespect toward the heads of the department contained in the January 1, 2013 email played any role in the decision to pass him over for promotion in 2013, that contention is not supported by the record. This shows, yet again, that the promotional process was unreasonable and arbitrary.

CITY POSITION

It is the City's position that it did not violate the Agreement when it failed to promote the Grievant to Sergeant in 2012 or 2013. In support of this position, the City argues that:

- The Union has failed in its burden to establish that the City violated Section 9.4.

- The only restriction on the City’s selection and promotion policy is contained in Section 9.4 which gives limited preference to seniority. According to Section 9.4, seniority only becomes a factor when the City determines that the job-relevant qualifications of the candidates are equal.
- Section 9.4 does not prescribe what the City must consider in making a determination as to whether job-relevant qualifications are equal. It also does not state the job-relevant qualifications are the “minimum requirements” from the job description nor does it state that the candidate with the most points after the preliminary testing process automatically gets the open position. If this were the case, there would be no need for interviews with Chief Olson.
- Since the Agreement is silent as to the method to be used or the factors to be considered in determining qualifications, the City is free to use any method to determine ability so long as the method is fair. In this regard, Chief Olson determined that since the Sergeant is responsible for supervision and leadership, the job-relevant qualifications for the Sergeant position would include supervisory skills and leadership ability.
- Chief Olson determined that Officer Boerboom’s supervisory and leadership skills were “head and shoulders” above that of the Grievant. Further, he answered the 19 questions posed to him during his final interview like a supervisor should.
- Officer Boerboom’s supervisory and leadership experience included serving as OIC in the Menasha Police Department, which has many of the duties of a City Sergeant, for four years. The Grievant did not have prior supervisory experience since SRO’s are not supervisors. Officer Boerboom’s supervisory and leadership experience also included leading the Menasha Police Auxiliary Program, which is similar to the City’s Police Reserve Program led by a Sergeant, for approximately seven years. In addition, he successfully revamped the Menasha Police Department’s hiring process.
- Officer Boerboom also has pursued specialized training in supervision and leadership which he highlighted in his resume that he submitted during the promotional process. The Grievant had no specialized supervision or management training. Officer Boerboom’s resume highlighted his success in leading various programs at the Menasha Police Department including leading a DWI student program which he carried over as the SRO at Centennial High School. He instituted an Officer Mental Health Awareness Program based

on the program that was in effect in the Menasha Police Department. Officer Boerboom also established a Landlord Training Program in the City Police Department. Finally, Officer Boerboom proposed two new projects for the City Police Department—a RISS Deconfliction Program and a Robbery In-Service Program in the event that he was selected as the Sergeant. He is also pursuing a four-year degree in specialized administration.

- In selecting Officer Berg for promotion, Chief Olson determined that his supervisory and leadership qualifications were superior to the Grievant.
- Officer Berg presented a portfolio of information to Chief Olson during the selection process that highlighted his supervisory, leadership and administrative accomplishments. This demonstrated Officer Berg's ability to lead and supervise.
- Officer Berg was a supervisor (sergeant) in the Northfield Police Department for four years where he directly supervised other patrol officers. The Grievant had no supervisory experience. Since the Northfield Police Department did not have a lieutenant in its command structure, the sergeants handled many of the administrative duties that the City's Lieutenants perform.
- Officer Berg was the Training Coordinator responsible for overseeing the training budget and ensuring that the department's officers were in compliance with P.O.S.T. requirements. He was also the Traffic Safety Advisor responsible for analyzing traffic problems in the area and working with other jurisdictions on traffic problems as well as administering traffic safety grants. He was on the Northfield Police Department's policy committee where he assisted with the development of department policies and procedures and served on the accreditation team to ensure that the department was in compliance with accreditation standards established by CELA.
- Officer Berg has a four-year degree in police science. In addition, he pursued additional specialized training in supervision and leadership including a week-long course in the management of a criminal investigation division and 12 courses in supervision and management conducted by the BCA.
- In making his selection choice in 2012 and 2013, Chief Olson determined that the Grievant did not have the supervision, leadership or administrative skills that Officer Boerboom or Officer Berg had demonstrated nor did he have the advanced specialized training that those Officers had. Chief Olson also took into consideration that the Grievant

had resigned from his FTO responsibilities when faced with night shift assignments and did not explain the reason for this during his interviews. In addition, Chief Olson took into consideration the January 1, 2013 email that the Grievant circulated which he considered to be undermining his administration.

- The Union's claim that there is a past practice of selecting the candidate with the highest score on the four-part examination process is not accurate. Clearly, this practice has not been followed since Officers selected after the initial selection process in 2002, 2206 and 2008 did not have the highest scores. If the Union's claim is accurate then officers with the highest scores should have been selected also. Further, if the Union's claim was accurate, there would be no need for the Chief to conduct interviews before a candidate was selected.
- The Minnesota Supreme Court has defined past practice as "a prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances. Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency, (2) longevity and repetition, (3) acceptability, (4) a consideration of the underlying circumstances and (5) mutuality."¹⁹
- There is no "prior course of conduct", "consistently made" or "reoccurring situation" regarding the selection of the candidate based solely on points from the preliminary testing process.

OPINION

The Union bears the burden of proof in this contract interpretation dispute. The issues are whether the City violated Section 9.4 of the Agreement by failing to promote the Grievant to Sergeant in November 2012 and August 2013. In making this claim, the Union is alleging that the Grievant's qualifications were at least equal if not superior to the two successful candidates; therefore, under Section 9.4 he should have been promoted because he was the most senior Officer who had applied.

It is clear from the evidence presented that the Grievant is a highly valued member of the City Police Department and skilled in all aspects of the Officer duties. During past evaluations, the Grievant has received highly successful or outstanding ratings in various job performance

¹⁹ Citing *Ramsey County v. American Federation of State, County and Municipal Employees, Council 91, Local 8*, 309 N.W.2d 785, 788 n.3 (Minn. 1981)

categories. In addition, he has a performance record free of any discipline. He was also the most senior Officer who applied for promotion to Sergeant in both 2012 and 2013.

While it could be argued that the Grievant had more specialized training and responsibilities as a non-supervisory police officer than the two successful candidates, this is not in and of itself a predictor that he would make a good supervisor. In addition, there is no evidence that either successful candidate was other than competent in their previous role as a non-supervisory police officer or supervisor, nor is there a record of any prior disciplinary actions involving either candidate.

Chief Olson determined that he wanted to promote a candidate who had supervisory experience and leadership qualifications. In doing so, he was exercising the City's inherent managerial right to establish the promotional criteria used during the selection process since there is no language in the Agreement restricting this inherent managerial right nor has the City waived its right to do so.

The Union argues that the criteria that Chief Olson used in the selection process were unreasonable, arbitrary and capricious. I reject this argument since there is no evidence to support this allegation. Rather, past supervisory and leadership skills coupled with advanced specialized training in those areas are all valid criteria for the Sergeant's position since the primary role of a Sergeant is supervision and leadership. Moreover, it is axiomatic that a valid predictor for future performance is past successful performance and additional specialized training in a similar position, something both successful candidates clearly demonstrated.

The evidence disclosed that the entire examination process in addition to the selection criteria was thorough, fair and unbiased and failed to support any inference of arbitrariness, unreasonableness and capriciousness. This included the interviews of the candidates by Chief Olson and Human Services Coordinator Chesness as well as the composition of the 19 questions and the recorded responses of each candidate.²⁰

The preponderance of evidence discloses that the Grievant's qualifications were not equal to the qualifications of the two successful candidates.²¹ Although the Grievant obtained the

²⁰ I have reviewed the questions and recorded responses of the Grievant and the two successful candidates and find that they were not arbitrary, unreasonable or capricious, but rather well-thought out, fair, unbiased and relevant to the selection process.

²¹ Outside of a hearsay statement, there is no evidence to support the "neck and neck" statement allegedly made by Human Resource Director Dussault during the 2012 Sergeant's selection process.

highest score in the preliminary four-part examination and had some leadership experience, he did not have any direct supervisory or managerial experience or the substantial leadership experience and specialized training that either successful candidate demonstrated.

The Union argues that in the past, the Officer who scored the highest on the four-part preliminary examination was the Officer who was first promoted; and since the Grievant scored highest, he should have been promoted ahead of the two successful candidates. The evidence presented clearly demonstrates that this was not always the case. While four of the prior successful candidates scored highest during the preliminary examination, three who were subsequently promoted did not. Also, there is no evidence that the four successful candidates in past selection processes did not score the highest during the Chief's interview based upon the criteria established for those promotional events. Moreover, if this allegation was true, there would be no need for the Chief to conduct lengthy post-examination interviews or go through the tedious process of preparing and evaluating interview questions.

The Union's past practice argument also fails the statutory past practice four-part test set out by the City in its position herein. There was no evidence of mutuality, consistency or acceptance on the part of the City.

Section 9.4 is the only contractual restriction covering the selection process. The language is clear and unambiguous in that only when the qualifications of the candidates are equal, seniority prevails. There is no mention in Section 9.4 or in the entire Agreement that the highest test score in the preliminary examination is the determinative factor in the selection process under any circumstance.

In conclusion, I have determined that the Union's past practice argument has no merit. I have also determined that since the job-relevant qualifications of the Grievant and the two successful candidates were not equal, there was no violation of Section 9.4.

In view of the foregoing, I conclude that the Union has failed to sustain its burden of proof that the City violated Section 9.4 the Agreement when it failed to promote the Grievant in 2012 or 2013; and I will, therefore, dismiss the grievance in its entirety.

AWARD

It is Hereby Ordered that the grievance be and hereby is dismissed in its entirety.

Dated: August 18, 2014

Richard R. Anderson, Arbitrator