

IN THE MATTER OF ARBITRATION BETWEEN

LAW ENFORCEMENT LABOR
SERVICES, INC.
and its affiliated Local 197
St. Paul, Minnesota
Union

and

CITY OF OAKDALE, MINNESOTA
Oakdale, Minnesota
City/Employer

OPINION AND AWARD

Contract Interpretation
Shift Bidding Grievance
BMS Case No. 14-PA-0436

Award Dated: August 29, 2014

Date and Place of Hearing:

Offices of the City
Oakdale, Minnesota

Date of Receipt of Post Hearing Briefs:

August 15, 2014

APPEARANCES

For the Union: Isaac Kaufman, Esq.
General Counsel
Law Enforcement Labor Services
327 York Avenue
St. Paul, Minnesota 55130

For the City: Mary D. Tietjen, Esq.
Kennedy & Graven Law Offices
470 U.S. Bank Plaza
200 South Sixth Street
Minneapolis, Minnesota 55402

ISSUE

Did the Employer violate the Section 9.5 of the Collective Bargaining Agreement by assigning certain patrol shifts prior to the shift bidding process for 2014? If so, what is the proper remedy?

WITNESSES TESTIFYING

Called by the Union

Michael R. Kroger, Patrol Officer
Oakdale Police Department

Roy G. Gilman, Retired Patrol Officer
Oakdale Police Department

Robert J. Hankanson, Patrol Officer
Oakdale Police Department

Kimberly M. Coffey, Patrol Officer
Oakdale Police Department

Molly L. Callinan, Patrol Officer
Oakdale Police Department

Sean Coffey, Patrol Officer
Oakdale Police Department

Called by the Employer

William S. Sullivan, Chief of Police
Oakdale Police Department

OTHERS PRESENT

On Behalf of the Union

No others were present

On Behalf of the Employer

David Schaps,
Assistant City Administrator
City of Oakdale, Minnesota

JURISDICTION

The issue in grievance was submitted to the Arbitrator for a final and binding resolution under the terms set forth in Article 7 of the Collective Bargaining Agreement (Union Exhibit 1) between the parties and under the rules of the Bureau of Mediation Services of the State of Minnesota. The Arbitrator was mutually selected by the parties from a list of names of arbitrators submitted to them by the Bureau of Mediation Services. The parties stipulated that the Arbitrator had been properly called and that the issue was properly

before him for a decision. The Arbitrator inquired at the hearing if the parties had any objection to the decision in this case being offered for publication through the Bureau of Mediation Services or recognized agencies that publish arbitration awards. No objection was raised and a release form was signed by counsel for both parties. The Arbitrator tape-recorded the hearing as an extension of his notes for his personal use.

At the hearing the parties were given full and complete opportunity to examine and cross-examine witnesses and present their proofs. Final argument was provided through post hearing briefs submitted by each party, which were received on the agreed deadline. The parties served their briefs to opposing counsel. With the receipt of the post hearing briefs by the Arbitrator, the record in this matter was closed. The issue is now ready for determination.

STATEMENT OF THE ISSUE

At the hearing the parties stipulated to the following framing of the issue:

Did the Employer violate the Section 9.5 of the Collective Bargaining Agreement by assigning certain patrol shifts prior to the shift bidding process for 2014? If so, what is the proper remedy?

The grievance documents behind the issue are contained in Union Exhibits 18-24. The Step 1 Grievance Report was signed by nine (9) patrol officers and reads in relevant part as follows:

NATURE OF GRIEVANCE

On 09-25-2013 the 2014 Oakdale Police Department patrol schedule was posted. On the posted 2014 schedule three (3) shifts were blocked out for two (2) "New Hires" and recently hired Officer Courtney Brown. Some of the reserved shifts are highly sought after ones.

The blocked out shifts were never made available to “Senior qualified Employees” and is a violation of our current LELS contract.

On 10-02-2013 a “Pre-filing” meeting was held with Chief Sullivan, Capt. Kettler, Officer Gilman and Officer Kroeger present. The meeting failed to resolve the issue.

CONTRACT VIOLATION

9.5 Senior qualified Employees shall be given shift assignment preferences after eighteen (18) months of continuous full-time employment.

SETTLEMENT DESIRED

A shift bid shall be completed by seniority as stipulated by the current LELS contract.

The grievance proceeded through the required steps of the grievance procedure without resolution. On October 22, 2013 the City denied the grievance citing Article 5.1 and 5.2 of the Collective Bargaining Agreement. The Union moved the grievance to step three of the grievance procedure on October 28, 2013, and it was denied by the City on October 31, 2013 reiterating its authority under Article 5. The grievance was then moved to arbitration where it was heard on July 24, 2014.

The sections of the Collective Bargaining Agreement which bear on this issue are as follows:

ARTICLE 3 – DEFINITIONS

* * * *

3.10 SCHEDULED SHIFT: A consecutive work period including rest breaks and a lunch break.

* * * *

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 organization 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.

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 9 – SENIORITY

* * * *

9.5 Senior qualified Employees shall be given shift assignment preferences after eighteen (18) months of continuous full-time employment.

In addition to the above cited contract language the City has promulgated certain policies that bear on this case which reads in relevant part as follows:

**OAKDALE POLICE DEPARTMENT
STANDARD OPERATING PROCEDURES**

Number: PE-007
Subject Title: Work Scheduling and Overtime Distribution
Pages: 18
Date Issued: 10/21/2011
Date Effective: 10/21/2011

Section A: General Work Scheduling

1.0 Introduction

Work scheduling practices and policies in this department will conform to all lawful obligations created under labor contracts, city ordinances, and / or state and federal regulations.

With consideration for these factors as well as the overall mission of the agency, every reasonable effort will be made to implement scheduling principles that meet the needs of both the department and the employee.

* * * *

4.0 Shift Bidding-Patrol Officers and Patrol Sergeants

4.1 Shift bidding shall be done one time per calendar year, beginning in approximately October of the year preceding the “bid” period. The Field Operations Captain shall post the available shifts and the bidding schedule in a prominent place in the squad room. In accordance with the terms of existing labor agreements, bidding shall be done on a seniority basis, with due consideration for the rank classification. Any officer failing to properly submit his / her bid in accordance with the posted bid schedule will be considered to have forfeited his / her bid. The entire bidding process for a particular “bid year” shall be completed no later than December 1st of the preceding year.

* * * *

FACTUAL BACKGROUND

This case involves the application and interpretation of Article 9.5 of the Collective Bargaining Agreement. The dispute arose when the City reserved certain shifts with associated hours of work and days off for a newly hired officer and for two prospective new hires. The Employer is a municipal corporation chartered under the laws of the State of Minnesota. As such it is a public employer and provides a variety of services to the City of Oakdale community, including that of law enforcement. The Union represents police personnel in the job classifications of Patrol Officer, School Resource Officer, and Investigator/Detective. The City and Law Enforcement Labor Services have maintained a collective bargaining relationship since 1995. Prior to that time the patrol officers employed by the City were represented by Teamsters Local 320.

Exhibits entered into the record of this proceeding shows that the shift bidding language found in Article 9.5 of the current Collective Bargaining Agreement has been in previous contracts with LELS and Teamsters 320 without change since at least 1993. Chief Sullivan testified without challenge that the language has been in collective bargaining agreements covering the Patrol Officers since 1978 without change.

The Oakdale Police Department operates with four categories of shifts for Patrol Officers as follows:

1A-1E	07:00-17:00 Hours
2A-2D	17:00-03:00 Hours
3A-3F	21:00-07:00 Hours
P1-P2	11:00-21:00 Hours

Each of these shifts may have different days off. Individual Officers may have a preference for a particular shift based on how the hours worked and days off relate to their personal and family needs.

Additional shifts are scheduled for the Patrol Sergeants in the Department. Currently there are no Sergeants working between 03:00 and 07:00 hours.

As provided for in Standard Operating Procedure PE-007 Patrol Officers bid by December 1st for their shift preference for the coming year. It is not disputed that Officers on special assignments such as School Resource Officers and Detectives are exempt from the shift bidding process for Patrol Officers. It is also not disputed that certain shifts for the 2014 “bid” year were “pre-assigned” by the Department. Specifically, a newly hired

Officer, Courtney Brown, was pre-assigned to the afternoon 2A shift. Additionally, a power shift (P2) and a morning shift (1B) were pre-assigned to “new hires” who the City planned employ during the year. By pre-assigning these shifts the existing Patrol Officers who had attained 18 months of seniority with the Department were denied the opportunity to bid on them.

Upon learning of the pre-assigned shifts the Union filed the instant grievance. It was processed through the required steps of the grievance procedure without resolution and was heard in arbitration on July 24, 2014.

POSITION OF THE PARTIES

Position of the Union

It is the position of the Union that the grievance be sustained in its entirety, and an order be entered enjoining the Employer from “manipulating” the bid process in the manner used in 2014. In support of this position the Union offers the following arguments:

The intent of the parties in agreeing to Section 9.5 of the labor agreement must be determined based on the express language of the Agreement and past practice.

The specific language of Section 9.5 trumps the general language of management rights expressed in Article 5.

The assertion by the City that senior officers be given shift assignment preferences only for those shifts that the City decides should be included in the bid process goes well beyond the plain language of the Agreement.

To have the City exercise its authority in the way that it did has a domino effect on all the other Patrol Officers. They are significantly restricted in their exercise of seniority rights, and the language of Section 9.5 is made essentially meaningless.

Police Department policy provides that “in accordance with the terms of existing labor agreement, bidding shall be done on a seniority basis”. The policy makes no reference to limiting these seniority rights by pre-assigning or setting aside patrol shifts prior to the bid process.

For the Chief to decide unilaterally which patrol shifts to include as “available shifts” expands his authority well beyond the terms of the labor agreement.

Many new officers have been included in the shift bidding process despite having less than 18 months of service. The City has presented little or no evidence to explain why it deemed it necessary to change this practice by excluding Officer Brown from the 2014 bid process, and assigning him a patrol shift.

The City’s argument that there are no Sergeants on duty from 03:00 to 07:00 hours thereby limiting the supervision of new officers who would be assigned to work during those hours could be remedied by the Department putting a Sergeant’s midnight shift back on the schedule. Moreover, officers with less than 18 months of seniority have worked the midnight shift without Sergeant’s supervision in the past.

Shift preference based on seniority is an especially valuable benefit because it enables senior officers to choose shifts with holidays as scheduled off days. The record shows that at the Oakdale Police Department, the benefits of seniority have been incrementally taken away. Continuing this trend is contrary to the intent of the parties as reflected by the seniority language in the agreement.

Position of the Employer

It is the position of the City that the grievance should be denied. In support of this position they offer the following arguments:

The City did not violate the provision in the Agreement providing that “Senior qualified employees shall be given shift assignment preference after eighteen (18) months of continuous full-time employment.” Shift assignment preference is triggered only after an officer has been employed for 18 months. The arbitrator can deny the grievance on this basis alone and need not go any further in his analysis.

The phrase “18 months of continuous full-time employment” was inserted into the Agreement for a reason and must be given meaning. If the shift

preferences were intended to be based solely on seniority for all officers – regardless of experience level – then there would have been no reason to add the “18 months” requirement.

The plain language of the agreement gives management the right to assign new officers and articulates that officers have no claim to bidding rights in the first 18 months of employment.

The Department’s pre-bid assignment practice is also consistent with Section 4.1 of Standard Operating Procedure PE 007. The SOP necessarily means that some shift may not be available for bidding, which is consistent with the practice of pre-bid assignments and the plain language and intention of the Agreement.

Even if the Arbitrator finds that the Agreement is ambiguous. There is no ambiguity that the Department has exercised its management right to make pre-bid assignments numerous times since 1988, with no objection, grievance or requests for contract clarification from the Union. The grievants’ testimony that such assignments had never occurred before is not credible and is directly contrary to the evidence.

If the Arbitrator is not persuaded that the plain language of Section 9.5 gives the Department assignment rights for officers with less than 18 months, then the Department retains the right under Article 5.1 and 5.2 of the Agreement. The broad discretion and authority granted under this language covers a management prerogative to set work schedules for junior officers who have not year acquired bidding rights.

The *Sauk Rapids* case involved a similar issue, but is distinguishable from the instant case and does not govern the outcome here. The contract language in *Sauk Rapids* is different, and did not include the phrase “after 18 months of continuous full-time employment”. To reach the same result as in the *Sauk Rapids* case would require completely disregarding the “18 month” phrase in the Oakdale Agreement.

Chief Sullivan testified at length about the considerations involved in assigning newer officers and keeping them off the midnight shift. The City presented concrete statistics regarding the number and types of calls generated during a midnight shift, and discussed the importance of higher activity levels for newer officers. The Department has provided sufficient evidence supporting the practice of assigning officers and the grievance should be denied.

The Arbitrator in the *Sauk Rapids* case declined to rely on the “Management Rights” Article in that contract because he found that the

Employer's discretion was limited by the clear language of the provision that provided senior employees with shift assignment preferences with regard to the length of employment. Here the Agreement gives shift preference rights to officers only after they have completed 18 months of employment.

ANALYSIS OF THE EVIDENCE

This dispute centers on the application and interpretation of Article 9.5 of the Collective Bargaining Agreement. It presents the classic challenge to management rights by specific contract language agreed to by the parties. In undertaking an analysis of the evidence in this case this Arbitrator is mindful of the restrictions on his authority imposed by Article 7.4 of the labor agreement. That Article directs that the Arbitrator not "amend, modify, nullify, ignore, add to or subtract from the terms and conditions" of the contract. Such a restriction appears in most labor agreements, and appropriately limits an arbitrator from imposing his or her own sense of "industrial justice". The foundation of such a restriction is the reasonable expectation that the parties have carefully crafted each word and phrase in the contract and have given full consideration of the implications of the terms they have agreed to. It is not reasonable to believe the parties placed terms into their binding agreement that they would later simply ignore or give a meaning that is other than what the words would compel.

This dispute involves how an officer's seniority enters into the assignment of shift hours and associated days off. The Union points to the language of Article 9.5 as providing officers with over 18 months of seniority an unrestricted right to shift preference based on their seniority. The City points to the language of that Article as reserving to

management the right to schedule officers with less than 18 months of seniority to a shift that would provide them the greatest opportunity for development and afford the Department the opportunity to have Sergeants on the same shift to provide supervision.

Both parties referred to an award by this Arbitrator in *LELS v. City of Sauk Rapids*, [BMS Case No. 13-PA-0748]. The Union argues that case provides clear guidance as to how the instant case should be decided. The City argues that the contract language in the *Sauk Rapids* case is different than the language in the instant case, compelling a different finding here. In *Sauk Rapids* the relevant contract language reads in its entirety as follows:

Article 7.4: Senior employees shall be given shift assignment preference.

The contract language in the instant case, however reads as follows:

9.5 Senior qualified Employees shall be given shift assignment preferences after eighteen (18) months of continuous full-time employment.

Clearly, the language in the two contracts is different. The *Sauk Rapids* contract makes no reference to preferences only after eighteen (18) months of continuous full-time employment. It provides in categorical terms that senior employees shall have shift assignment preference.

What must be determined here is the intent of the parties when they agreed to the language in the City of Oakdale agreement. There is no doubt that the phrase “after eighteen (18) months of continuous full time employment” must be given some meaning.

The parties would not have placed that language in their Agreement if they did not intend it to have some meaning.

The Union argues here that the City does not have authority to reserve certain shifts for officers with less than 18 months of continuous full-time employment. It contends that all shifts should be available to those officers with more than 18 months of such employment. Clearly, such an interpretation would result in the junior officers, those with less than 18 months of continuous full time employment, having available to them only those shifts that remain after the senior officers have made their selection. Such an interpretation would effectively place the junior officers in the bidding process for shift preferences behind the senior officers as would occur if the controlling contract language did not contain the “18 month” provision. It is not reasonable to believe that the parties in drafting the language of Article 9.5 included language that would have no meaning. Accordingly, the Union’s interpretation of that language is found to be misplaced.

It is also instructive to review the practices of the parties in applying the language of Article 9.5 in the past. While it is not necessary to review past practice when contract language is clear, there is sufficient ambiguity in the language of Article 9.5 to require such review. The ambiguity in the language arises over the rights of management to reserve certain shifts for junior officers. Article 9.5 simply does not say how the junior officers are to be placed into the shift bidding process. It only states that officers with over 18 months of continuous full time employment are to be given shift preference based

on their seniority. What is not stated is how those officers with less than 18 months of continuous full time employment are to be assigned a shift.

The record shows that the Department has a long standing procedure [PE 007, Section 4.0] which provides that “The Field Operations Captain shall post the available shifts ...”.

The critical words in that phrase are “available shifts”. The record shows that for many years the Department has followed a practice of reserving certain shifts for officers with less than 18 months of continuous full time employment. There is nothing the record of this proceeding to show that practice was grieved prior to the instant grievance. Accordingly, the facts and circumstances of this case compel a finding that “available shifts” means those shifts that remain after the Department has reserved certain shifts for those officers with less than 18 months of continuous full time employment.

There was considerable testimony and evidence introduced related to the need for the Department to place officers with less than 18 months of continuous full time employment on the shifts at issue here. While not entirely controlling in this case that evidence did demonstrate a reasonable need for doing so. Not reserving the shifts selected by the Department would have resulted in those junior officers being placed on shifts that had relatively low call volume which would have limited the development of the officer to field a variety of law enforcement calls.

The Union challenged the argument of the Department that it was also necessary to have the officers with less than 18 months of continuous full time employment on those shifts

where Sergeants were available to assist them, guide their development and evaluate their performance. The Union opined that Sergeants could have been assigned to the night shifts where the junior officers would be assigned. While there is no evidence that could not be done, there is nothing in the record to compel the Department to do so. To the contrary, Article 5 of the Agreement provides the Department with management rights to, under the facts and circumstances of this case, assign junior officers to shifts that provide opportunity for supervision of their activities and development opportunity.

The Union pointed to several instances in the past where officers with less than 18 months of continuous full time employment were placed in shifts with relatively low opportunity for development and supervisory oversight. The Department responded without significant challenge that those assignments were made so as not to disturb the shift selections of other officers after shift selections had been made. The record credits the position of the Department.

To sustain the position of the Union in this case would require the Arbitrator to ignore the “18 month” provision of Article 9.5. He is barred from doing so by the limitation on his authority imposed by Article 7.4 of the Agreement. It is recognized that shift preference and other benefits of seniority create incentive for an officer to remain employed by the City. It is also recognized that reserving shifts as was done by the Department here diminishes that benefit. It is also recognized that reserving shifts by the Department could become excessive, and may not be related to legitimate interests of the City as was demonstrated here. That said, the current contract language and practice of the parties

compels a finding that there was no contract violation. Accordingly, the Arbitrator is without authority to sustain the grievance. Should the parties wish to place some limitation on the authority of the Department to pre-assign shifts for officers with less than 18 months of continuous full time employment, they must bargain over that.

IN THE MATTER OF ARBITRATION BETWEEN

LAW ENFORCEMENT LABOR
SERVICES, INC.
and its affiliated Local 197
St. Paul, Minnesota
Union

and

CITY OF OAKDALE, MINNESOTA
Oakdale, Minnesota
City/Employer

OPINION AND AWARD

Contract Interpretation
Shift Bidding Grievance
BMS Case No. 14-PA-0436

Award Dated: August 29, 2014

Based on the evidence and testimony taken into the record in this case, the grievance is denied.

August 29, 2014
Dated: _____

James L. Reynolds

James L Reynolds
Arbitrator

Awd6.14