

IN THE MATTER OF ARBITRATION BETWEEN

CITY OF DULUTH)	
Duluth, MN	“Employer”)
)	BMS Case No. 08-PA-0083
AND)	
)	Involuntary Transfer
DULUTH POLICE UNION)	
Duluth, MN	“Union”)

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: October 24, 2007; Duluth, MN

DATE OF RECEIPT OF POST-HEARING BRIEFS: None filed

APPEARANCES

FOR THE EMPLOYER: Lisa D. Wilson, Assistant City Attorney
City of Duluth
410 City Hall
Duluth, MN 55802
Gordon Ramsay, Police Chief
John Beyer, Deputy Chief
Mike Tusken, Deputy Chief
Steve Kirby, Labor Relations Specialist

FOR THE UNION: Timothy W. Andrew, Attorney
Andrew & Bransky
302 W. Superior Street, #300
Duluth, MN 55802
Dave Greeman, Grievant
John Haataja, Sergeant/President Police Union
Leigh Wright, Sergeant

THE ISSUE

Did the City violate Article 41.3 by assigning the Grievant to a different position against his will? If so, what remedy applies?

BACKGROUND

The Grievant, David Greeman, holds the longest seniority in the City of Duluth Police Department. He was hired on November 5, 1979. The next most senior police officer has a seniority date of June 28, 1983.

On June 4, 2007 the Grievant received official notice that, effective June 18th he was transferred from his position of Patrol Sergeant to that of Unit Sergeant in charge of the Family Crimes Unit. He promptly grieved such transfer on the grounds that his seniority rights under Article 41 of the collective bargaining agreement were violated by this forced assignment to an unwanted position.

In relevant part, Article 4.3 provides that: The Employer and Union agree with the common principle that seniority shall be a factor in making assignments. The Grievant asserts that, among other concerns, the position with the Family Crimes Unit would result in lower compensation due to loss of the shift differential currently paid as patrol Sergeant as well as certain holiday pay and overtime opportunities he would lose.

Additionally, the Grievant states that his present shift hours on a 4 on/4 off basis permits him to hold a second job as Skills Training Coordinator with Fond du Lac Community College law enforcement degree program. The Family Crimes Unit position requires a five day standard hours shift schedule that would eventually result in his being unable to meet the needs of his job with the Community College – despite police administration’s offer to be “as flexible as possible” in scheduling his daily hours in the Unit.

On July 20, 2007 City Administrator John Hall rejected the Union’s appeal of Police Chief Gordon Ramsay’s decision to deny the grievance. Administrator Hall wrote:

As you have requested, I have reviewed this grievance to include your letter of June 21, 2007, July 1, 2007, Chief Ramsay’s response of July 9, 2007 and the letter you gave me on July 16, 2007.

You feel Article 34 regarding Demotion was violated. Chief Ramsay reports Sgt. Greeman was a Sergeant prior to the transfer and remains a Sergeant. There was no demotion. Having reviewed Article 34, I must concur.

You feel Article 41 regarding Seniority was violated. Chief Ramsay informs me Sgt. Greeman’s seniority was duly considered and was a factor in this assignment. I have reviewed Article 41 and I must concur with Chief Ramsay. There was no violation.

As you have requested I have reviewed this grievance in its entirety. I am forced to concur with Chief Ramsay that there was no demotion and that seniority was considered. The transfer was made for operational reasons. I must concur with his denial of the grievance.

The Union then moved the matter to the present arbitration which was conducted in Duluth City Hall on October 24, 2007. The parties at that place and time presented their proofs and closed the hearing record with oral argument.

POSITION OF THE UNION

The language of Article 41.3 guarantees that “seniority shall be a factor in making assignments.” The City ignored the clear meaning of this requirement by forcing the Grievant to take an unwanted assignment to the Family Crimes Unit which burden him with lower compensation and eventual loss of a prized position teaching law enforcement courses and coordinating other staff at Fond du Lac Community College.

These burdens are particularly troublesome as the Grievant nears retirement, within a few years, as this lower compensation would affect his “high five” period retirement pay entitlement. While acknowledging his primary responsibility to his job with the Duluth Police Department, the Grievant points out that his position with the Community College produces significant benefits to the City – benefits which could be negatively affected by his transfer from the 4 on/4 off schedule as Patrol Sergeant.

These benefits include his ongoing relationship with a student body of potential law enforcement recruits to service in the Duluth Police Department. The involvement of the Grievant and that of other Duluth police officers in the prestigious law enforcement program at the Community College further provides the opportunity and challenge to these officers to hone their skills and keep abreast of professional literature to the benefit of the citizens of Duluth.

For all of these reasons, the Grievant justifies his wish to remain in the Patrol Officer position from which he has been transferred. Beyond his obviously reasonable request, furthermore, the Grievant stands on firm contractual grounds in challenging his forced transfer to an undesired position in the Family Crimes Unit. That purpose of providing in Article 14.3 that “seniority shall be a factor in making assignments” is two-fold.

The first purpose of this language is as a tie-breaker when more than one officer bids on a desirable assignment. The Union, of course, recognizes that ability to perform the position stands as the primary consideration for selection to fill the opening. Article 14.3 means in situations where qualifications among bidders are substantially equal the most senior of officer’s length of service will be the deciding ‘factor in making the [assignment.]’

The second purpose of Article 14.3 arises when there are no bidders for an assignment. By definition, a position has no bidders because nobody wants it. Normally in such situations, police administrators seek some interest among qualified officers but when finding none, as in the present case, the position must be filled by involuntary transfer.

By providing that “seniority shall be a factor in making assignments” the collective bargaining agreement means that where more than one officer is available and qualified to fill the unwanted assignment, the most senior of these has the contractual right to decline the

transfer. In these circumstances, the most senior may decline while the least qualified senior officer in turn must accept the open position.

The City relies on the management rights clause of the labor contract to argue that police administration retains the authority “to assign and transfer employees” in accordance with inherent management rights guaranteed under state law. PELRA conditions inherent management rights pursuant to collective bargaining agreements and the instant labor contract specifically limits the enumerated management rights to those not “expressly modified in this Agreement.” Obviously, the language of Article 41.3 expressly modifies the transfer and assignment rights of the Employer in a manner as to factor seniority into such actions.

Finally, the City argues that the Grievant has the best qualifications for the position overseeing the Family Crime Unit of any of the other available officers for that assignment. This assertion ignores the fact that while superior investigative skills are called for in the Unit, the Grievant has not needed to use such skills for most of the long years of his service.

The contractual controlling purpose, moreover, does not authorize the City to use the standard of “most qualified” in filling open positions. Instead, where more than a single candidate is qualified for an open position, Article 41.3 requires that seniority shall be a factor. In sum, neither seniority alone, nor qualifications solely can determine the selection to fill the open position. Instead, both must be considered and the City has not shown where the Grievant’s seniority was a genuine factor in the disputed assignment decision.

Finally, the City’s reliance on the Berquist award ignores the distinguishable facts.

POSITION OF THE CITY

Arbitrators commonly recognize that the management rights of police administrators must be afforded wide discretionary latitude in the interest of efficient and effective law enforcement. In the present case, the Union seeks to give seniority a determining weight in staffing decisions that the realities of police work do not justify and which the collective bargaining agreement nowhere provides.

The record facts establish that police administration followed a common and reasonable procedure in deciding to fill the important position of overseeing the Family Crimes Unit with the eminently qualified Grievant. Some potentially qualified police officers were approached to determine their interest in bidding for the open position but none indicated any intent to apply and no officers came forward to sign for the posted vacancy.

The departmental command staff then discussed the special qualifications required to meet the difficult demands of heading up the Family Crimes unit. High on the list of priorities identified were sensitivity and communication skills required to effectively represent the City in often hostile community meetings. Particular notice was taken by the command staff of the high degree of community anger generated by the City’s legal requirement to notify the public of sexual predators residing in various neighborhoods.

Police Chief Gordon Ramsay testified that a common misunderstanding which fuels such community anger places blame on the police department for somehow deciding where such predators will reside. The command staff placed great emphasis in assigning the Grievant to the Family Crimes Unit position on his proven communication skills in dealing with hostility in such settings.

Deputy Mike Tusken testified that he had personally observed the Grievant effectively handle this exact kind of problem and strongly recommended him as the only police officer available who could “hit the ground running” in filing this highly demanding requirement of the Unit.

Both Tusken and Ramsay asserted that they had considered the Grievant’s seniority in reaching their assignment decision and determined that his “fit” to the requirements of the job and the importance of a well run Family Crimes Unit to the citizens of Duluth trumped any alternative weight to his length of service. Further, both police administrators stated their willingness to be flexible in scheduling his time in order to accommodate the Grievant’s other position with Fond du Lac Community College. The City strongly asserts in this regard, however, that the Grievant’s primary obligations must be to his position in the Duluth police department.

Finally, the City contends that the very issue in this case has already been adjudicated by Arbitrator William Berquist in which the right of the Police Department to transfer an officer against his wishes superseded that Grievant’s seniority. Despite what the Union claims to be distinguishable facts in the Berquist award, the essential contractual conclusions be reached should certainly control the instant matter.

While no principle of stare decisis is operative in arbitration, custom and practice strongly favor arbitral deference to earlier awards on a common subject matter in the interest of judicial economy and consistency.

DISCUSSION AND OPINION

This case arises from the perennial conflict between the two most fervently guarded rights in the field of industrial relation – on the one hand the right of the employer to manage the workforce at optimum efficiency versus the right of employees to preferential treatment based on length of service. While these competing rights are usually accommodated through reciprocally beneficial contractual arrangements, they sometimes collide in the course of making decisions over the staffing of positions.

Management often seeks in staffing jobs to achieve not only short term efficiencies by placing employees considered most qualified into open positions but also to affect long term development by rotation of personnel among different assignments. These goals may run counter to the job claims of senior workers who feel their years of service entitles them to

reasonable degrees of priority to preferred jobs and also to preference over less senior employees in avoiding unwanted assignments.

In regard to the importance in which employees hold these length of service rights, it has been said that while wages and benefits may be the heart of the labor contract its soul is seniority rights. As for the employer, the ability to pursue efficiencies through effective direction of its workforce constitutes the core purpose of management.

With this acknowledgement of the equities involved in the instant dispute, this review turns first to the accommodations made by the parties in their labor contract. The City's primary reliance in it is found in Article 5, MANAGEMENT RIGHTS which provides:

5.1 The Employer and the Union recognize and agree that except as expressly modified in this Agreement, the Employer has and retains all rights and authority necessary for it to direct and administer the affairs of the Police Department and to meet its obligations under federal, state and local law, such rights to include, but not be limited to, the right to direct the working forces; to plan, direct and control all the operations of the Police Department; to determine the methods, means, organization and number of personnel by which such operation and services are to be conducted; to assign and transfer employees; to schedule working hours and to assign overtime; to make and enforce reasonable rules and regulations; and to change or eliminate existing methods of operation, equipment or facilities.

At the hearing of this matter, the Union dropped that part of the grievance referring to the disputed transfer as a demotion and herein bases its contractual claim on Article 41, SENIORITY...AND ASSIGNMENTS which states, in relevant part:

41.3 The Employer and Union agree with the principle that seniority shall be a factor in making assignments.

Before commencing the contractual analysis, I must cite that part of the negotiated grievance procedures that expressly limits the jurisdiction of the arbitrator. Article 40, GRIEVANCE PROCEDURE:

40.4 The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this agreement. He or she shall consider and decide only the specific issue(s) submitted to him or her in writing by the parties, and shall have no authority to make a decision on any other issue not so submitted...Either party may, if it desires, submit a brief to the arbitrator setting forth its position with respect to the issue(s) involved in a grievance. 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 and rules and regulations having the force and effect of law. The arbitrator shall submit his or her decision in writing to the parties and shall file a copy of such decision with the Bureau of Mediation Services of the State of Minnesota. The decision shall be based solely upon his or her interpretation of the meaning or application of the express terms of this agreement to the facts of the grievance presented.

Section 40.4 has special significance in this case because of the interface between the management rights clause and the seniority and assignments provision of the parties' collective bargaining agreement. These two provisions capture and express the balance the parties have freely negotiated between the competing rights of employees and administration in making position assignments.

Section 40.4 mandates that the arbitrator make no decision which would "amend, modify, nullify, add to, or subtract from the provisions of this agreement." Exactly how this contractual limitation on the arbitrator's authority operates under the facts of this case requires that I determine whether or not the police administration fully complied with the Article 41.3 requirement that seniority shall be a factor in making [the assignment of the Grievant to the unwanted position of overseeing the Family Crime Unit]. In order to do so, I must base my conclusions on the testimony of Police Chief Ramsay and of Deputy Chief Tusken, the key decision makers on the Grievant's disputed assignment.

Both testified that they had in fact considered the Grievant's seniority, stating in words to the effect that "everyone knew that Sergeant Greeman had the longest seniority in the department" and that "we certainly took note of his seniority when we looked for someone who could hit the ground running." Neither of these testimonies nor anything further offered by the key decision makers to the disputed transfer can be understood as meeting the obligation to treat seniority as a factor in making assignments.

Indeed, the recording made of the June 4, 2007 Notification of Forced Transfer Meeting (Union Exhibit 7) is particularly revealing of the lack of any meaningful consideration of the Grievant's seniority in moving him to the Family Crimes Unit. At that meeting Deputy Chief Tusken for the first time, according to the Grievant, set forth the position of police administration on the issue of factoring his long seniority into the transfer. Deputy Chief Tusken simply dismisses this contractual right as a non-issue. His candid denial of the Grievant's concerns in this regard at that meeting was presented as follows:

David you said that your concern is that you are the most senior guy in Patrol and that it wasn't a seniority issue, it's not a performance based issue, it's an issue with you've got uh...you've had success and you have an investigative background previously. We wanted to move you into Family Crimes, we know that you have a good working relationship with Bob Shene, certainly Bob Shene will appreciate working with you...um...there was a number of things that fit as far as this move. Um, not to mention the opportunity for us to also take other Sergeants and then get experience that you have, as far as on the street. So, there is a number of different components, it wasn't...it wasn't a performance based issue and I don't want you to think that it was performance based. Um...it's just...it's a fit that the administration looked and we said 'where well can we move people to... Bob Shene is getting, you've probably talked to him daily, he's got more than enough work for two or three people and so, he's expressed that its getting to the point where it's...I mean...it's getting very difficult, he wants to have somebody else to, to share the burden. So, if you have questions or concerns...

The reasons Tusken gave for virtually ignoring the Grievant's seniority claim to decline the transfer all fall short of showing any staffing needs which could reasonably justify tipping the contractual balance between his Article 41.3 seniority rights and the article's efficiency needs of the department.

It must be emphasized in this regard that the wording of Article 41.3 makes clear that in any contest between seniority as a factor in making assignments and the need for efficient staffing decisions, management rights must trump seniority rights. The case must be made, however, that the particular assignment decision is of sufficient importance that it cannot be reasonably given to a less senior officer without significantly adverse effect on the performance of the work assigned.

That case simply has not been made in this matter.

Specifically, Tusken's reasons for assigning the Grievant to the unwanted position include the following:

- "You have an investigative background previously." (In point of fact, the Grievant had only limited investigative experience in the detective bureau some 15 years earlier).
- "You have a good working relationship with Bob Shene." (Tusken agreed on cross examination that Sgt. Shene is a much admired officer who enjoys a good relationship with everyone he has worked with in the department).
- "Not to mention the opportunity for other Sergeants [to] get experience...on the street." (There was no identification of any particular sergeant who would miss getting street experience if a less senior officer were to be assigned the Family Crimes Unit post. Furthermore, the use of the words 'not to mention' suggests the latter reason was a mere afterthought rather than a significant goal of the Grievant's transfer).
- "Bob Shene's...got more than enough work for two or three people...he wants to have somebody else to share the burden." (Nowhere has police administrators shown that any of the less senior officers who were available for the disputed assignment were less capable of effectively sharing Sergeant Shene's excessive workload).

Up to this point in the analysis, several mentions have been made of "qualified and available" less senior officers. This aspect of the case warrants further elaboration. The Grievant pointedly asked Tusken at the June 4th meeting "who else has been approached to take this job?" Tusken then answered "No one" – though he later clarified this response by testifying that he had casually asked both Sergeants Leigh Wright and Adam Miskus on separate occasions whether they had any interest in the open position. When both stated they had no interest in the assignment, Tusken chose not to pursue the matter further with them.

Sergeant Wright testified that she had responded to Tusken's inquiry that she was "burned out" from her previous assignment to the position. The Grievant stated that both she and Miskus had experience in the work of the Family Crimes Unit. This was never denied by

anyone in management. Additionally, the name of Sergeant Michael Ceynowa was put forth by the Union as a qualified less senior officer available for the assignment. It was never challenged by police administrators that Ceynowa was both qualified and available for the assignment in question.

Certainly, I have no authority to direct the City to select for the disputed assignment any of these three or any other officer on the department seniority list. Specific officers are named because the Union, rather than offering mere speculation, mentioned these three officers as examples of qualified less senior persons.

At this point, this contractual analysis notes that Article 40.4 states in clear and unambiguous language that the arbitrator “shall have no right to...nullify, ignore...or subtract from the provisions of this agreement.” This means that no arbitrator has the authority to virtually read out of this labor agreement, i.e., to declare Article 41.3 a nullity. On the contrary arbitrators are required – even in the absence of the injunction expressed in Article 40.4 – to give force and effect to all the provisions the parties have negotiated and incorporated into their collective bargaining agreement.

Despite the testimony of the police administrators that they “considered” the Grievant’s seniority in assigning him to the unwanted post, there is not a spec of evidence that either witness gave Article 41.3 its obvious meaning which is that his seniority earns for him the right to decline the assignment in the absence of any persuasive reason why no less senior officer was qualified and available to successfully perform the work – or to state the case in the positive that any special organizational needs of the department justified overriding his Article 41.3 seniority rights.

Finally, the City’s position that Arbitrator William Berquist’s earlier award on the same issue should be paid great deference in the instant matter. I have carefully studied Arbitrator Berquist’s well reasoned conclusions in that case and agree with him in every particular. My understanding of the main thrust of the Berquist decision is that where the City presents a persuasive, substantial reason for disregarding an officer’s greater seniority in making an assignment, such need for effective staffing trumps seniority as a factor in deciding the assignment. Nothing in this present decision should be read as in any sense disagreeing with that proposition.

The distinguishing facts in the Berquist decision concern the department’s need to move an officer who is described as displaying a difficult temperament and poor relationships with fellow officers, into an assignment where his personality problems were less disruptive to working relationships. In a contractual arrangement where seniority is but one factor in deciding the assignment, Berquist correctly read the labor contract as favoring management rights over the incidental seniority factor.

The contrast of the above facts with those of the case at hand are clear and certain. In sum, in the instant matter, police administrators offer no persuasive, substantial facts that would justify ignoring the Grievant’s long and distinguished service to the City. Certainly, Trusken’s statement that the Grievant was chosen to fill the assignment because he was able “to hit the

ground running” was not applied in selecting either of the two previous position holders – both of whom were described as excellent in performing this job.

This review ought not close without observing that the circumstances of the Grievant’s position with Fond du Lac Community College played no part in this Decision and Award. It has been well and truly stated by the City that its department heads cannot make personnel determinations on any basis other than the commitment of their employees to the primary employment with the City.

DECISION AND AWARD

1. On the basis of the foregoing discussion and opinion, the grievance is, hereby, sustained.
2. The City shall promptly reinstate the Grievant to his former position as Patrol Sergeant.
3. The City shall make the Grievant whole for any and all loss of compensation due his improper transfer.
4. The record does not contain sufficient information to permit me to fashion an appropriate make-whole remedy, therefore,
5. The issue of remedy is remanded to the parties for negotiating a resolution.
6. I retain jurisdiction in this case for 90 calendar days from date of issue, solely to resolve any issue over remedy.

November 5, 2007
Date

John J. Flagler, Arbitrator