AN

ARBITRATION

BETWEEN

CITY AND COUNTY OF DENVER

(City)

AND

THE DENVER POICE PROTECTIVE ASSOCIATION

(DPPA)

ARTICLE 9 GRIEVANCE – VACATION SELECTION

BEFORE

THE

ARBITRATION BOARD

Appearances:

For the City: Robert Nespor, Assistant City Attorney

For the DPPA: Sean Olson, House Counsel

**I. INTRODUCTION**

This matter was heard on June 26, 2013, at the offices of the DPPA in Denver, Colorado. Pursuant to the provisions of the collective bargaining agreement (CBA), the matter was heard by the Arbitration Board, consisting of Harry N. MacLean, Chair, Franklin A. Nachman, City appointee, and Sgt. Bryan O’Neil, DPPA appointee. Both parties were provided the opportunity to present oral and documentary evidence, and all witnesses testified under oath as administered by the Chair. Briefs were submitted on August 16, 2013.

There was no objection to the arbitrability of the grievance, and therefor the Board finds that it is properly before it for a final and binding decision. The issue to be decided is: Did the City violate the CBA in November 2012 when it directed that the selection of vacations by police officers be by team seniority rather than by district seniority? If so, what is the appropriate remedy?

**II. FACTS**

The patrol division of the Denver Police Department is divided into six districts. The staffing levels for each district are determined according to the size of the district, the number of precincts, and anticipated calls during the various shifts.

Prior to January 1, 2013, all patrol officers selected their shift and regular days off on the basis off district-wide seniority every 28 days. In November of each year, the officers selected vacation for the upcoming year, also based on district-wide seniority.

Under the directions of Police Chief Robert White, who took office in December 2011, the Denver Police Department reorganized the districts into teams. Under this restructuring, effective January 1, 2013, each district was organized into twelve teams. Each team had a regular shift and set days off for the next twelve months. Each team consists of a sergeant, a corporal and a number of patrol officers. The officers in each district bid by seniority into the teams, so their shifts and days off were set for the next twelve months. In November 2012, the officers selected their vacations for 2013 based on seniority within the team, instead of within the district as had been done before. It is this change which is the subject of this grievance. The Union alleges that the new practice violates Article 9.11.1 of the CBA.

The Union offered the testimony of several officers to demonstrate the negative effects of this change in vacation selection. Only one person on a team is allowed for each vacation slot, and on some teams the veteran officers found themselves junior to other officers and thus with a poorer selection of vacation times. In some cases, it came down to selecting premium shift and days off teams in exchange for getting a poor selection of vacation days. A veteran officer who selected a less desirable team in terms of days off and shift would most likely be in a more senior position when it came to vacation selection. Prior to the institution of the team concept, the veteran officer would benefit from seniority in all three categories, rather than having prefer two over one or one over two. Under the new model, relief officers are not needed for vacations.

Officer Michael Graves has been with the Denver Police Department for twenty two years. He has been in District 5 since 2004. Under the old method, there were four to five slots per two-week period, and more senior officers could get their preferred vacation days, sometimes being able to get all four weeks back to back. Graves would usually select the first two weeks of January and spring break in April to be with his kids. Or he would take time in July when the kids were on vacation. Now he votes against guys on his team, and with only one person per slot, when that slot is filled that’s it. It makes it difficult to attach compensatory time off to the vacation days as well. This last year he was unable to select any vacation time in January.

On cross-examination, Graves admitted that even under the old system, when he was 5th most senior in District 5, he was not guaranteed the vacation slots he wanted. Under the current system, he could select a teams with less desirable days off and shifts and be in a better position to select the vacation dates he wanted. He also stated that under the old system, officers were moved around on shifts and days off every 28 days, and now with the team concept the same officers are with the same supervisors for twelve months. Under the new model, there are also eight vacation slots per period, as opposed to six under the old system.

Officer Dwayne Huddleston has been a patrol officer for 14 years. He is currently in District 5. In team selection, conducted by seniority, he selected Team A 1, because it is a day shift and has Thursday, Friday and Saturday off. However, he was the most junior member of the team and thus last to select vacation days. Junior officers on other teams were able to select better vacation days. Huddleston also testified that under the previous system, there was no guarantee that the seven officers ahead of him in seniority in the district would not select the preferred vacation days. Under the current system, if vacations are a priority, he could select a team that would give him more seniority in vacation selection.

Officer Ron Johnson has been with the department for twelve years and was assigned to District 4 in December 2012. When he started on the force, an officer worked his way up for a better shift, days off and vacation selection. Under the current method, an officer must pick between getting better days off/shifts and vacation days.

Officer Kevin Curtis has been with the department for 7.5 years and has been assigned to District 1 and District 5. He selected team B 1, which is a day shift and has Monday, Tuesday and Wednesday off. His wife works at night, so this allows him to look after his daughter in the evening. Because he chose a team with a day shift, he voted last for vacation days, which ended up with his vacation being clumped together in January and February. He would have liked to spread his vacation time out over the entire year. Under the prior system, while he could usually select vacation in July and August, his days off and shifts were changing every 28 days. Now, scheduling for the entire year at one time is convenient for the family.

The City offered the testimony of Paul Pazen, Commander of District 1. He identified Exhibit 11, which sets for the structure of the Denver Police Department. Beneath the Chief, are the Deputy Chief of Operations, the Conduct Review Division, the Chief of Staff, and the Deputy Chief of Administration. Beneath the Deputy Chief of Operations, are the six districts, the major crimes division, the investigative support division, special operations division, and the forensics and evidence division. Under the Deputy Chief of Administration are the internal affairs division, financial services division and the planning and research support division.

Pazen testified that prior to the adoption of the team concept, the patrol officers voted against other officers in the same district. Officers in specialized units, such as SWAT or narcotics or investigative support, voted against other officers in the same unit.

Under team staffing, there is one supervisor, the sergeant, one corporal, and groups of five to eight officers on each team. Teams are organized by days off and shifts, and are selected by officers by rank and seniority. The senior member on the team votes first for vacation. An officer is able to prioritize vacation selection over day offs and shifts, or vice versa.

Pazen testified that team staffing has markedly improved the operational efficiency of the department. The same sergeant supervises the team throughout the year, allowing for better communication, more consistent supervision and better performance evaluation. Also the same team works the same precincts seven days a week, which allows the officers and the community to get to know each other better. Under the old system, the officers worked under the same sergeant at most 50% of the time. Under team staffing, officers work with the same sergeant 90% of the time. This provides for more continuity and accountability in policing the districts. There is also no need for vacation relief officers under this system.

Pazen testified that productivity has vastly improved since the implementation of team staffing. There is substantially more accountability, because an underperforming officer is more easily identified and held accountable when the officer is supervised by the same sergeant, rather than being bounced around. Everyone knows who is responsible for what, and officers take more ownership of their work. Additionally, since officers select shifts and days off only once a year, rather than every 28 days, there is considerably less time spent by supervisors on administrative matters.

Pazen also testified that the “span of control” has increased. Previously many corporals could sign up for the day shift, leaving fewer corporals for graveyard. Now, corporals are spread out over all the shifts instead of being clumped together. In the old system, all the sergeants evaluated each patrol officer in his district. Often times, the sergeant would have supervised an officer very little, if at all. Now an officer is evaluated by the sergeant who works with him on an ongoing basis. Finally, sergeants get to know officers on their team better and this increases more direct communication. Team staffing also puts more officers on the street during the times they are needed. Previously, the more senior officers could be working Monday night, not a busy time, because they preferred to have weekends off, which were the busiest times.

David Quinones, Deputy Chief of Operations, testified that team staffing shifts the emphasis from solving crimes to preventing crimes. Team policing is a better use of resources and creates more cohesive units because the same officers are working together under the same supervisor in the same area for a year, rather than changing every 28 days. Quinones also testified that under this model vacation selection must be by seniority within the team. If district-wide seniority were used, the teams would be decimated. Additionally, property assigned to the teams is better accounted for than under the old system. Now, each team has an inventory of Tasers, pepper balls, gas and 40 mm shells. The teams takes more ownership of the items.

In Quinones’ view, voting by seniority within the team is consistent with the language of Article 9.11.1, which allows voting within individual units. The term unit is not defined in the CBA but is defined in the Operations Manual as follows: “Any number of officers or employees of the department regularly grouped together under one head to accomplish a police purpose.” A team clearly fits within this definition. The use of vacation selection within the team also fits within the second line of Article 9.11.1, which allows the chief to make exceptions to the rule in order to increase operational efficiency.

**III. ANALYSIS AND AWARD**

The issue before the Arbitration Board is: Did the City violate the CBA in November 2012 when it directed that the selection of vacations by police officers be by team seniority rather than by district seniority? If so, what is the appropriate remedy? Since this is a contract interpretation case, the Union has the burden of proving by a preponderance of evidence that the directive to select vacations by team seniority rather than by district seniority violated the contract.

The Union relies on the first sentence of Article 9.11.1 in support of its position that voting must be by district. The relevant language reads:

The Use of vacation time shall be voted by seniority as follows:

Throughout the department, voting in each Bureau/District shall be according to seniority in rank. Rank includes the following positions: Captain, Lieutenant, Sergeant, and Police Officer. The appointed positions of detective, corporal and technician are not civil service ranks. Division chiefs may permit voting within individual units subject to the approval of the Deputy Chief of the affected area of Operations or Administration. The Chief of Police may establish exceptions to this rule as he deems necessary for the efficient operations of the department.

The Union also argues that the fourth sentence allowing division chiefs to permit voting within individual units does not apply here because historically the term units has referred to specialized units, such as SCAT or SWAT. The meaning of the term is limited to the units as they existed at the time of the adoption of the last collective bargaining agreement. Past practice of twenty years limits the meaning of this term to specialized units and cannot be expanded to include teams as they have been structured under the new model.

The last sentence of the 9.11.1, according to the Union, cannot be read to allow the Chief to adopt a rule under which all vacation voting will be by teams because to do so would lead to an absurd result and essentially allow the exception to swallow the rule.

The City argues that the terms individual units in Article 9.11.1 cannot be restricted to the usage of the term in the collective bargaining agreement at the time it was adopted in 2010. The City points to the language in the Police Department Manual which defines a unit as: “Any number of officers or employees of the department regularly grouped together under one head to accomplish a police purpose.” A team as currently constructed clearly fits within this definition. Given this usage, Article 9.11.1 allows division chiefs to permit vacation selection by team. Additionally, the last sentence of Article 9.11.1 allows the chief to make exceptions to the rule of vacation voting by district as “he deems necessary for the efficient operations of the department.” The evidence was overwhelming that the implementation of the team concept has increased the operational efficiency of the department.

Regarding the Union’s argument that the parties are bound by the past usage of the term “individual unit” to apply only to specialized units, the Arbitrator would note that there was very little evidence offered on this specific point. Accepting the assertion in the Union’s brief that the term has been applied only to specialized units for the past twenty years, there was no testimony as to how it had been interpreted or applied in the specific application of Article 9.11.1. For the sake of discussion, the Board will assume that the language of Article 9.11.1 has existed in its current form in previous contracts. The Board will also assume that for the past twenty years the term unit or individual unit has referred to the specialized units such as SWAT or SCAT. Does this then constitute a past practice of the parties that binds them to this specific meaning of this term? Does it mean that no other meaning can be given to this term under any circumstances?

In order for a past practice to be binding, it must meet three requirements, as set forth by Arbitrator Justin in Celanese Corp. of America, 24 LA 168, 172 (1954):

In the absence of a written agreement, “past practice” must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties.

Stated another way, the party claiming the practice must prove three elements: (1) The practice was clear and consistent, (2) The practice was known by the both parties, and (3) The practice was established for a long period of time. The reason for these specific requirements is that a finding that a certain practice is binding upon the parties usually results in a restriction on management flexibility or prerogative.

There are several reasons why the Board declines to give the term “individual units” the limited usage argued by the Union. First is the fact that it is not clear the term was “clearly enunciated and acted upon.” That is, there does not appear to be any instances in which the term was applied in any sort of discretionary fashion. In most past practice cases, the practice involves something like the application of the term progressive discipline, where the employer historically gave two warnings before issuing a suspension, or in the application of the term “two breaks per shift,” where the employer for years allowed the employees two fifteen-minute breaks. In each case, the employer exercised a choice to issue two rather than one warnings, to allow fifteen-minute rather than ten-minute breaks. It was this choice that continued long enough and openly enough that the parties were determined to in effect have agreed that the term came to mean just that and only that. It went on long and consistently enough that the employees were entitled to rely on the practice as if they had written it into the contract itself.

In our case, accepting the Union’s assertions, the term was simply used over a period of time to refer to specialized units. There was not a decision made to use it in only that fashion. It was a practice that simply developed over time. It was not a practice that specifically excluded other meanings, as in the two examples given above.

Perhaps more importantly, the practice fails to meet the requirement that it be unequivocal. That requirement in essence means that there were no deviations from the practice, there were no contradictory interpretations or applications of it by either party. The definition in the Operations Manual defeats this requirement. It sets forth a much broader meaning of the term “unit.” It states that a unit is: “Any number of officers or employees of the department regularly grouped together under one head to accomplish a police department.” In the face of this very broad definition of the term unit adopted by the City, it cannot reasonably be held that the City has agreed unequivocally that the term unit applies only to specialized units.

In this regard, the Board would stress that the Operations Manual is relied on not to establish the true mean of the term “unit,” but merely to demonstrate that the City had not agreed to the limited definition suggested by the Union.

Additionally, any issue of past practice must always be viewed in light of other relevant contractual and, in this case, Charter provisions. The Charter by its very terms supersedes the CBA. In any conflict between the two documents, the Charter must prevail. In Section 9.8.3, which establishes the right of collective bargaining for police officers, the Charter lists subjects which are not subject to collective bargaining. The second item is “proposals that would conflict with the City Charter, including any subsequent amendments.” This makes it clear that not only may parties not bargain for proposals that conflict with the City Charter, but that any proposals which conflict with the Charter are superseded by the Charter.

The Charter is quite clear about retaining to the City the right to manage certain aspects of the Department. Section 9.8.3(C)(vii) of the Charter states that the parties may not bargain over “staffing of the Police Department, the Department of Public Safety, and the City.” Subsection (viii) states that the parties may not bargain over “The tables of organization of the Police Department, the Department of Safety, and the City.” Subsection (xi) states that the parties may not bargain over “the number of shifts and times the shifts begin and end.” Finally, subsection (xiv) says that the parties may not bargain over “Assignment of work to Police Officer. .”

Thus the City has the right as it sees fit to organize the police department, to staff the police department, and to assign work to police officers. Any provision in the CBA which seeks to limit or restrict these rights is invalid as contrary to Section 9.8.3(C)(ii) of the Charter.

The Union expressed concern that this finding in essence means that the parties cannot enter into a valid agreement which restricts or limits the City’s authority to manage the department. This is true only insofar as the limitation or restriction would affect one of the functions specifically reserved in the Charters as a prohibited subject of bargaining. The parties are, however, free to negotiate restrictions or limitations on subjects which under the Charter are permissible subjects of bargaining.

It is noteworthy that the Union does not challenge the right of the Chief to reorganize the districts into teams. The Union only challenges the right of the Chief to require that vacations be selected within the teams rather than within the district. The Union, in other words, does not object to setting up the teams; it objects only to the manner in which vacations are selected under the new structure.

The problem with this position, were it to be adopted, is that it ends up allowing the tail to wag the dog. The testimony by police officials was clear and unchallenged that if vacations were not selected by seniority within the team the entire team system would collapse. The word used by Deputy Chief was “decimated.” It’s not hard to see the truth of this assertion. Under the team model, only one officer is on vacation at a time. However, if selection by district-wide seniority were allowed, veteran officers on a team could all be off on the same time, leaving the team decimated. Additionally, many benefits of team policing would be lost if, as before, few if any of the senior sergeants ended up working weekend shifts.

Thus, if one were to accept the Union’s argument that “unit” can only mean specialized units and that therefor patrol officers must be allowed to select vacations by district seniority, the result would be that the team model would most likely have to be abandoned. A contractual provision would thus end up severely limiting or restricting the broad grant of management rights specified in the Charter as prohibited subjects of bargaining. The tail, the contractual provision, would end up wagging the dog, the Charter provision.

The Charter gives the right to the City to organize and staff the department and assign work to police officers. The CBA says vacation is selected by seniority within the unit. The meaning of unit is at best unclear, although certainly an argument can be made that it refers only to specialized units. But to allow an ambiguous phrase in the collective bargaining to essentially undo what is an otherwise valid exercise of the City’s right to organize and staff the department would be to give undue weight to the CBA provision.

The Board would also note that the testimony as to the beneficial effects of the reorganization was persuasive. The evidence was clear that the reorganization had increased the operational efficiency of the department in that there has been (1) improved supervision and evaluation of officers, (2) increased productivity and accountability, (3) the lack of a need for relief officers, (4) a reduction in time spent by supervisors managing shifts and days off. Importantly from the public’s point of view, the same officers are working their areas allowing for more familiarity and better communication. Officers have also benefited from consistency in their supervision and evaluations and in the ability to make long range plans.

The Chief was clearly acting within the authority reserved to him in the Charter to reorganize the department. The new team models are sound and unquestionably beneficial. The language in the CBA provision cannot reasonably be read in such a way that it in fact nullifies this otherwise legitimate exercise of managerial authority.

In keeping with this analysis, the Board need not consider whether the last sentence in Article 9.11.1 is sufficient to give the City the authority to establish seniority by team for vacation selection.

For the above reasons, the grievance must be denied. Board member Nachman concurs in the award. Board member O’Neill dissents from the award.

IV. AWARD

The grievance is denied.

Harry N. MacLean, Chair

October 11, 2013