

American Arbitration Association

In the Matter of the Arbitration

AAA # 01-15-0005-4278

(Calculation of Seniority – Years of Service)

Between

Town of Carver

And

Carver Police Union

New England Police Benevolent Association L. 89

I, the UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and having been duly sworn and having heard the proofs and allegations of the parties AWARD the following:

AWARD

The Town violated Articles 11 (vacation) and/or the longevity provision of Article 13 (Base Rate of Pay) by failing to recognize certain officers' prior service with non-civil service departments.

The Town shall grant seniority to Officer Rizzuto and similarly situated officers from the date of their employment in the non-Civil Service departments from which they transferred to the Carver Police Department.

The Town must make the grievants whole for lost wages and benefits from three weeks (excluding Saturdays, Sundays, and Holidays) prior to June 10, 2015, when this grievance was filed, to the date of compliance with this Award.

The Arbitrator retains jurisdiction over this matter for ninety days from the date of this Award for the sole purpose of resolving any dispute between the parties concerning the damages Awarded herein.



Sarah Kerr Garraty,
Arbitrator
June 26, 2018

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Between

Town of Carver

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Carver Police Union
New England Police Benevolent Association L. 89

Before: Sarah Kerr Garraty, Esq.

Appearances: For the Employer:
[REDACTED], Esq.

For the Union:
Gary G. Nolan, Esq.

Hearing Date: April 9, 2018

Briefs Received: June 1, 2018

THE ISSUES:

The parties were not able to agree on a set of stipulated issues.

The Union proposed:

Did the Town violate the CBA when it, for purposes of base pay rate and vacation leave, used different methods for determining “years of service” for similarly situated officers?

If so, what shall be the remedy?

The Town proposed:

Did the Town violate Article 11 (vacation) and/or the longevity provision of Article 13 (Base Rate of Pay) by failing to recognize certain officers’ prior service with non-civil service departments?

If so, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

The July 1, 2012 to June 30, 2015 collective bargaining agreement (Agreement) between the Town of Carver (Town) and the Carver Police Union, New England Police Benevolent Association (Union) contains the following relevant provisions:¹

Article II – Management Rights

Subject to applicable law and the express provisions of this agreement, the Town and its selectmen and Police Chief shall not be deemed to be limited in any way in the exercise of the regular and customary functions of municipal management.

Article IV – Seniority

Seniority means an employee's length of continuous service with the employer since his/her earliest date of continuous full time employment, excluding until completion of the probationary period, the time spent at a training academy prior to his/her admission into the bargaining unit.

Article XI – Vacation Leave

1. For less than one (1) years of service, one (1) day per month, not to exceed ten (10) days and must be used by July 1st.
2. Completion of one (1) years service, two (2) weeks vacation
3. Completion of one (1) years service one (1) day for every two (2) years service in addition to the two (2) weeks, to maximum of four (4) weeks....

Article XIII – Base Pay Rates

UNIT A

Effective July 1, 2004 two percent (2% increase for all grades (Grade 1-5 patrolman and Grade 1-3 Sergeant) ²

Grade I patrolman service completed up to nine (9) months \$40,207.32

¹ The Agreement was subsequently modified by a Memorandum of Agreement that spanned the period between July 1, 2016 and June 30, 2019.

² The Agreement provided for a 2% increase for each year of its three-year duration).

Grade 2 patrolman service completed two (2) years	\$ 42,230.21
Grade 3 patrolman service completed three (3) years	\$ 44,251.10
Grade 4 patrolman service completed three years to five (5) years	\$ 46,271.99
Grade 5 patrolman service completed ten (10) years	\$ 47,993.03

Additional Longevity pay increases of three hundred dollars (\$300.00) per year after completion of five (5) years for the next five years. On the anniversary of the fifteen-year the employee shall receive an additional three hundred fifty dollars (\$350).

BACKGROUND

The Town of Carver Police Department employs patrol officers and sergeants whose wages, benefits and conditions of employment are contained in the Agreement. The Town's police department is covered by Civil Service Law M.G.L. c. 31. The dispute that brought about this arbitration stems from the Town's practice of crediting years of seniority for previous employment in other Massachusetts police departments that are covered by M.G.L. c. 31 but not for years of service for previous employment in other Massachusetts police departments not covered by M.G.L. c. 31. The grievance, filed on behalf of Officer Dennis Rizzuto, Jr. and "all officers similarly situated" and dated June 10, 2015, read as follows:

Pursuant to Article XI, "Vacation Leave" ongoing violation of the CBA. Officer Rizzuto and other similarly situated officers have been denied vacation benefits commensurate with their years of service as full time officers, in violation of the CBA as applied through past practice.

Pursuant to Article III, "Base Pay Rate" (longevity) ongoing violation of the CBA. Officer Rizzuto and other similarly situated officers have been denied longevity benefits commensurate with their years of service as full time police officers, in violation of the CBA as applied through past practice.

Resolution Desired: All affected officers be retroactively credited all years of service as police officers towards vacation time and longevity, and make them whole in all respects.

The grievance was preceded by an effort on the part of Officer Ruzzuto to persuade the Town to “address an inequity.” He sent letters on January 11, 2015 and February 26, 2015 to Chief Marc R. Duphily and Town Administrator Michael Milanoski (respectively) in which he explained that from May 1995 until his date of hire in Carver in 2000, he worked as a full-time police officer for the Town of Plympton, Massachusetts. He noted that when hired he received no credit for his full-time service in Plympton, yet another officer, who was hired during the same time period, was credited for years service in an other police department for purposes of calculating that officer’s benefit package.

Officer Rizzuto noted that when he inquired about this issue he was told it had to do with Civil Service. He had accepted that explanation at the time. When more officers were hired from Civil Service Departments and credited for prior service, Rizuto inquired further and learned that Chapter 31 does not contain such a mandate. He nevertheless “put the issue behind him” until yet another officer was extended this benefit – bringing the total number of Carver officers who received extra seniority for work in other police departments to eight. Rizzuto requested that the same courtesy be extended to him, with the result that he be credited with have four years nine months of added service, with accompanying increased benefits.

On May 4, 2015 Officer Rizzuto received an email response from Town Administrator Milanoski, which read,

Upon looking into this in more detail, this is a civil service issue. If you transfer from one civil service department to another, then you are able to carry your start date in the civil service system with you. Since Plympton

was not a civil service community there was no civil service time to accumulate or start from. Your first day in civil service as I understand it was when you were hired in Carver, which is what you are credited with.

The parties presented a list of Officers who have been hired as “lateral transfers” since the year 2000. In total, nine officers, eight from the New Bedford Police Department and one from the Wareham Police Department, have been permitted to carry over their seniority when they transferred to jobs as Officers in the Carver Police Department because those departments are covered by c. 31. In the same time frame, only four officers, including the Grievant Rizzuto, have transferred from non-civil service departments. They came from Plympton (Rizzuto - 2000); Mashpee (Glenn - 2012); Kelly (Mattapoisett - 2011) and Nantucket (Shaw -2017).

The Union protested this disparity once, in 2001 and on behalf of then-Officer John Mulready. It alleged that the town had bargained with Officer Englehart, (who was granted lateral transfer rights when transferring from the New Bedford Police Department to the Carver Police Department) without Union representation. The Union asserted violations of Articles XI and XIII of the Agreement and requested that Officers Brine, Mikech, Harriman, and Rizzuto be given an additional 3 days vacation and a pay raise to the rate of Officer Englehart. The Union also sought to negotiate over this issue. Then-Town Administrator Richard LaFond denied the grievance. The October 2, 2001 denial stated, in pertinent part,

... At the time of the hiring process it was well understood by the Board that it would make no sense to seek applications from potential candidates in other departments and expect them to step backwards in their compensation

and benefits. In fact, the Board has promulgated non-union regulations that allow the town to recognize prior experience in personnel practices.³

... The agreed upon issue at hand is not addressed in Article 1 (Recognition Clause) or anywhere else in the contract, and therefore becomes a management right...

There is no evidence in the record about what happened with this grievance after it was denied at Step 2 because no one present had any further information to offer. Presumably, it was settled or withdrawn in advance of arbitration, since no award was presented.

Grievant and Union Secretary Treasurer Dennis Rizzuto testified that, like other Officers who have transferred into the Carver Police Department from c. 31 communities, he attended the Police Academy and took the Civil Service examination. His job duties in Plympton, a town that abuts Carver, are precisely the same as are his job duties in Carver and precisely the same those of his colleagues who laterally transferred from Departments governed by Civil Service. Like them, he needed no special training when he started his job, other than a one-week review of Carver's policies and procedures, as well as a chance to familiarize himself Carver's police station. This is exactly the same training that officers who transferred from c. 31 received.

Rizzuto explained that this disparate treatment affects him in several ways. First, shift bids are made in seniority order and he was not granted seniority credit for his years as a Plympton Police Officer. Second, vacation picks are allocated in seniority order. Third, longevity pay is based on seniority. Finally, transferred

³ The Town also rejected the Union's "direct dealing" allegation by explaining that it had decided to seek a lateral transfer applicant before it had hired Officer Englehart; she was not even an employee of the Town at the time.

Officers from c. 31 departments are placed higher on the wage scale than are new officers or officers transferring from non-c. 31 communities. Comparing himself to Officer Englehart, the grievant points out that he began as a Plympton Officer in 1994 whereas she began as a New Bedford the same year. Yet for purposes of seniority, her year of hire in Carver is treated as being 1994, whereas his is treated as being 2000, the year in which he transferred from Plympton to Carver. While his pay is now “maxed out” on the wage scale, when he was first hired he suffered comparatively reduced pay as well as benefits, as compared to transferees from Civil Service communities.⁴

Chief Marc Duphily testified that he was hired laterally following seven years of service as a New Bedford officer. He was given credit for that prior service for purposes of vacation and longevity but was at the bottom of the Carver list for shift picks. He has hired several officers since he became Chief and has just “followed the protocol – lateral transfers for Civil Service purposes were granted credit for prior service but ‘new hires’ were not.” Duphily knew of no exceptions to that hiring pattern.

Chief Duphily was not yet working for the Town of Carver when the 2001 grievance was filed and processed. He found the written grievance and responses in a file marked, “2001 grievances,” which he ran into coincidentally while looking for something else. He acknowledged that he had no other information about this grievance; he did not discuss it with anyone who had been involved at the time.

⁴ The grievant acknowledged that he was not promised a higher rate of pay and benefits when he was hired. Neither has he previously grieved the issues as far as he could recall. He testified that the prior Union attorney told him it had to do with Civil Service law, an assertion he has since come to doubt.

Duphily testified that he seeks to hire new officers as lateral transfers because this saves the Town from spending money in order to put them through the Police Academy. The Town is also able to avoid waiting six months before these are ready to be put out on patrol. He agreed that these advantages adhere whether the transfer was from a c 31 or non-c. 31 department. He noted that despite this longstanding practice, the Union has never proposed changing it during collective bargaining.

POSITIONS OF THE PARTIES

THE UNION

The Union argues that the language of the CBA is clear and unambiguous and that, therefore, past practice evidence is not relevant. The Town basically acknowledged this in its Step 3 denial, in which it pointed out that, "base wage rates are based on continuous employment with the Town of Carver." Had it actually followed that unambiguous language, this grievance would not have been necessary. However, with no contractual (or, as it turns out) statutory support, the Town has unilaterally increased wages for one class of employees while refusing to do so for others. This has produced a harsh, absurd and nonsensical result for a minority of Officers who laterally transferred into the Carver Police Department from non-Civil Service communities.

As the Chief acknowledged, the Town reaps the same benefits from lateral transfers, regardless of the Civil Service status of the community they came from. Both types of transferees are already trained, already certified, and already experienced. The more beneficial application of the CBA to a majority of these

transferees over a minority of them is arbitrary, capricious, discriminatory and unreasonable.

The Union insists that the grievance that the current Chief dug out of an old file should have no impact on this case. It has formed the basis of an 11th hour excuse not even raised before arbitration. By definition, that grievance had no role in the Town's decision to favor lateral transfers only from Civil Service departments and no role in its decision to deny the grievance. There was no hearing witness who had any first hand information about this grievance. There is no way to know how it was resolved. Although it also involved the Town's decision to grant seniority status to officers transferring from c. 31 police departments, the Union's central allegation in submitting the grievance was that the Town had engaged in direct dealing with one of the first transferees to whom it conveyed seniority status for prior employment.

In fact, the Union raises that issue again in the context of this grievance. The CBA does not include any language that can reasonably be interpreted as permitting the Town to consider previous employment in calculating seniority in the Carver Police Department at all. And it certainly conveys no permission to pick and choose which employees to grant this unstated benefit to, while denying it to others.

For all of these reasons, the Union insists that this grievance must be sustained. It requests a make whole remedy and asks the Arbitrator to retain jurisdiction with regard to the implementation of the Award.

The Town

The Town insists that the “years of service provisions” of the CBA have been interpreted for many years as meaning a bargaining unit members’ years of service in a Civil Service police Department. That practice has been consistent ever since; officers hired from a c. 31 police department are given credit for their Civil Service employment while officers hired from a non-Civil Service police department have not. It has hired nine officers from Civil Service departments and all of them have been afforded seniority credit following lateral transfers to Carver.

Early on in this history, the Union filed a grievance protesting the disparity between how lateral transfers were handled based on whether they transferred from a Civil Service or non-Civil Service city or town. The Town denied that grievance and the Union did not pursue it further. The distinction favoring lateral transfers from other c. 31 departments is longstanding and clearly defined. Although the Union asserts that the Town violated Article XI (“years if service”) and Article XIII (service completed), the Agreement contains no term that would serve to interpret, define or clarify those terms. Thus to the extent those terms are ambiguous, the Arbitrator must examine the parties’ past practice to determine the intended meaning of the disputed provisions. That past practice, dating back over fifteen years, has been to count service in other c. 31 departments as “years of service” or “service completed,” but not to count service in other departments.

There is no assertion that the Union was unaware of this interpretation. Yet the Union and the Grievant waited fifteen years to allege that the practice is “inequitable.” It cannot now attempt to erase that history based on its newfound

disagreement with this longstanding policy. The grievance should therefore be denied.

DISCUSSION

As with any contract interpretation, the analysis must begin with the contract language. And since at its essence, this is a dispute about seniority, the analysis appropriately begins with the Seniority Article. The key language is simple, and bears repeating,

Seniority means an employee's length of *continuous service with the employer* since his/her earliest date of continuous full time employment, excluding until completion of the probationary period, the time spent at a training academy prior to his/her admission into the bargaining unit. (Emphasis supplied).

This language is specific as to both inclusion and exclusion. Seniority is based on "length of continuous service with the employer." It cannot be reasonably denied that when a CBA refers to the "employer" that means the employer specified on the front page of, and throughout, that CBA. The "employer" referred to in the seniority provision of this agreement is the Town of Carver. There is specific language about what does not count as seniority (the probationary period and the time spent in a training academy) but there is no specific language empowering the Town to add seniority above that gained through "continuous service with the Town."

It cannot be questioned that despite the Agreement's utter silence about the impact of prior service in other police departments, for fifteen years before this grievance was filed, the Town had afforded seniority to prior police service only when the City or Town from which the officer was transferred is designated as a Civil Service department. The Union asserts that this has and still does, amount to

an arbitrary and capricious distinction without a foundation in either Civil Service law or the CBA. The Employer argues that this practice was initially grieved, but that the grievance was then denied and abandoned. Between 2001 and 2015, silence had prevailed; the Union has long tolerated the disparity between lateral transfers from c. 31 departments and those from non-c. 31 departments. This has permitted it to mature as an unambiguous past practice.

The Town's past practice argument would be compelling had Agreement's definition of seniority been ambiguous. Had that been the case, the ambiguity would have to be viewed as having been rectified by an obvious, clearly enunciated and mutually understood practice that has operated to give the ambiguous language meaning over a period of many years. However, the seniority language in this Agreement is not ambiguous where the definition of seniority is concerned.⁵

Seniority under this agreement means "continuous service with the employer" (the Town of Carver). Indeed, the Town originally based its disparate treatment of previous service not on the CBA but on Civil Service law. Unfortunately, it appears that this historical reliance was misplaced. The Town has not even sought to argue that c. 31 actually does require that employees from one Massachusetts police department be credited for time served in that department when they laterally transfer to another Massachusetts police department only when both are Civil Service departments.

⁵ By definition, the practice contested in this grievance cannot be viewed as falling within the Management Rights provision because it runs contrary to the "express provisions of this Agreement."

The Town impliedly asserts that even if the practice at issue in this case has somehow not become binding by virtue of its long application, the Union has waived its right to contest it now, having tolerated it for at least 14 years and having never raised it in collective bargaining. This is indeed a vexing silence. The best explanation of it is that Grievant Rizzuto (and presumably his two cohorts who had laterally transferred from non-Civil Service police departments before this grievance was filed in 2015) had for many years relied on the explanation that they were not entitled to seniority status based on their prior service because that benefit was derived from Civil Service law. He testified that he eventually learned that this was not the case and persuaded the Union to file this class action grievance.

The Town's waiver argument would be persuasive had the disparate treatment of transferees been a single incident that the Union had grieved and abandoned, then ignored for fourteen years. But this is, in its essence, a pay violation and is therefore subject to the "continuous violation" doctrine. The rationale is that every time employees are denied pay to which they are entitled, a new violation of the Agreement occurs. If there is a violation for which monetary damages are appropriate, the damages adhere only back to the time at which the grievance was filed and not the time at which the contractual breach first originated. This preserves the ability to contest an ongoing violation at any time but avoids exposing the employer to potential damages that could have been earlier prevented.

The real twist in this case is that the Union is understandably not objecting to the Town's longstanding practice of extending seniority rights not called for in the collective bargaining agreement to its members who transferred from Civil Service

departments. That was, in retrospect, a contractual breach, but the outcome of reversing it at this point would be untenable. Thus, the Union seeks instead to have that extra-contractual benefit, which has had profound consequences on how seniority has been awarded among bargaining unit members, be applied fairly.

The Town's practice of conveying augmented seniority status to transferees from other police departments has been good for the transferred Officers and good for the Town. The Town has been able to recruit seasoned Officers who would have been much less likely to transfer to Carver had it meant giving up their seniority in the departments in which they previously worked. The Town has been able to put these transferred officers right to work with very little additional training needed. But the Town has received that same benefit in recruiting Officer Rizzuto and his similarly-situation colleagues who agreed to move to Carver from departments not covered by c. 31. With no valid statutory or contractual distinction, that has produced a harsh, absurd, or nonsensical result.

The Town is prohibited from applying the CBA in a manner that is arbitrary capricious or discriminatory, or made in bad faith.⁶ Put another way, in interpreting a collective bargaining agreement, an arbitrator should not overlook the equity aspects surrounding the grievance, which serves to guide the arbitrator in making a proper and fair interpretation of the language embodied in the contract.

The seniority benefit is fundamental to employee rights under a collective bargaining agreement. Greater years of service not only enhance benefits and

⁶ There is no reason to believe that the Town originally conveyed extra-contractual seniority unequally in bad faith. As noted above, it appears to have been based on a misunderstanding of what c. 31 required.

therefore compensation, but they also frequently allocate benefits among bargaining unit members. The Town has applied the term “continuing service with the employer” as meaning, “continuous service with the employer, enhanced by previous service in other police departments” in a manner that irrationally and discriminatorily awards extra contractual seniority to most, but not all bargaining unit members. This has resulted in loss of contractual benefits, such as longevity pay and vacation accrual. For all of these reasons, the grievance must be sustained.

The proper remedy for this violation is to make the grievant and “all officers similarly situated” whole for lost wages and benefits from “three weeks, excluding Saturdays, Sundays, and Holidays” of June 10, 2015, when this grievance was filed.⁷ The remedy sought was that “all affected officers be retroactively credited all years of service as police officers towards vacation time and longevity, and to make them whole in all respects. That is an appropriate remedy, but only as to the lost benefits that were timely grieved. The Union has asked the Arbitrator to retain jurisdiction over the remedy, and that is also appropriate.

⁷ Article XXII of the Agreement (the grievance procedure) provides that a grievance is timely filed when submitted three weeks (excluding Saturdays, Sundays and Holidays) of the “incident upon which the grievance is based...”

Award

The Town violated Articles 11 (vacation) and/or the longevity provision of Article 13 (Base Rate of Pay) by failing to recognize certain officers' prior service with non-civil service departments.

The Town shall grant seniority to Officer Rizzuto and similarly situated officers from the date of their employment in the non-Civil Service departments from which they transferred to the Carver Police Department.

The Town must make the grievants whole for lost wages and benefits from three weeks (excluding Saturdays, Sundays, and Holidays) prior to June 10, 2015, when this grievance was filed, to the date of compliance with this Award.

The Arbitrator retains jurisdiction over this matter for ninety days from the date of this Award for the sole purpose of resolving any dispute between the parties concerning the damages Awarded herein.



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