

In Re the Arbitration Between

**International Brotherhood of Electrical Workers, Local 160, Union
and
City of Janesville, Employer**

BMS Case No. 11PA0041

**Carol Berg O'Toole
Arbitrator**

April 18, 2011

Representatives:

For the Employer:

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For the Union:

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Appearances:

**Clinton Rogers, Janesville City Administrator
David Ulmen, Janesville Police Chief**

Preliminary Statement

The hearing in the above matter commenced at 10:00 A.M., January 27, 2011, at the City Council Chambers at the Janesville City Offices, 101 North Mott Street, P.O. Box

O, Janesville, Minnesota 56048. The parties involved are the International Brotherhood of Electrical Workers, Local Union No. 160, AFL-CIO (Union), representing all licensed essential Peace Officers of the City of Janesville Police Department and the City of Janesville (Employer). The parties vigorously represented their sides presenting opening statements, oral testimony, oral arguments, and exhibits. Exhibits were admitted with the caveat that they would be given the appropriate weight. Post hearing briefs and one additional exhibit were filed. The arbitrator closed the hearing upon receipt of both briefs on April 9, 2011.

Issue Presented

Because the parties were unable to agree on a statement of the issue, they requested that the arbitrator craft the issue. The issues at dispute are, first, whether the Employer has violated Article XX, Section 20.2 the collective bargaining agreement, when the Grievant was placed on lay off and part time workers were used. Second, if a violation occurred and the action was not a proper layoff, is it a discharge without just cause. If no just cause exists, what is the appropriate remedy?

Contractual and Statutory Jurisdiction

The Union is the certified bargaining representative for all licensed essential peace officers, excluding supervisory and confidential employees. The Employer and the Union are signatories to a collective bargaining agreement (Agreement) currently in effect, which provides in Article VII that if the grievance is unresolved in Step 3 and appealed in Step 4 of the grievance procedure, it shall be submitted to arbitration. The parties could not agree on a resolution through the grievance procedure; thus, the dispute is properly before the arbitrator. The parties agreed that there were no

timeliness or arbitrability issues in dispute. The Employer raised an objection to the presence of a court reporter hired by the Union, given the federal district court litigation, the potential use of reported testimony from the arbitration, and the failure to notify the Employer. The Union argued that there was no prejudice, that the Union was the party in this proceeding, not the plaintiff as in the federal district court matter, and that the Union had no intention of using the transcript in the federal district court proceedings. A discussion ensued. The arbitrator ruled that the court reporter could transcribe the hearing and stated that the federal district court could decide admissibility issues if the use of the arbitration testimony was offered in the civil matter. Additionally, the arbitrator ruled that the failure to notify was neither prejudicial nor harmful as court reporters are frequently used in discharge cases and can be typically anticipated by the other party. The parties agreed to refrain from voluntarily disclosing the transcript to third parties.

Union's Position

The Union argued that the grievance was a simple story with a rather complicated back story. The Grievant, who is an excellent officer with seven years of seniority, was terminated on April 9, 2010. The termination was characterized by the City of Janesville (City) as a layoff for budgetary reasons. Her hours were distributed to several part time workers. The less simple back story is that certain City officials, namely the former mayor, Alvin Grams, made it clear in open public forums that the Employer wanted to get rid of the Grievant and proceeded to abuse the budgetary process. The Union asked that the layoff be construed as a discharge and be held to the standards just cause. The Union asked that the Grievant be reinstated.

The City Administrator, Clinton Rogers, was called to testify via subpoena. Rogers has been the City Administrator since October, 2001, and lives in the City. He presides over

the day-to-day operations of the City, prepares for and attends the City Council meetings and generally functions as the chief operating officer for the City. In addition, Rogers represents the City in grievances and collective bargaining and is responsible for preparing the City's draft budget.

Rogers testified that there were four full time police officers and now there are two.

Rogers testified that Grams served as mayor from May 2005 to 2010 when he was defeated in the election. Rogers observed overt hostility from Grams to the Grievant as well as to "other employees". He described a City Council Meeting on December 18, 2011, at which time the budget for 2009 was discussed. Rogers testified he heard "the tape" from the City Council meeting (Union Exhibit 11) on December 18, 2008, where Grams describe the Grievant as a "pain in the ass". Rogers said he had been out of the council meeting during the time the comment was made and that, "I didn't know until the next day he made the comment." Rogers testified that he also read the comment in a news article written by R.A. Hager (Union Exhibit 14). Rogers stated that thought Grams wanted to "get [the Grievant]".

Rogers described the City's Police Department as comprised of four to five officers when he first started with the City and, then, being reduced to three. The Grievant was the junior officer. He described the 2009-2010 budgetary process and said that the funds for the City were "never enough". The budgetary process was a lot of "give and take" and normally started right after Thanksgiving. When asked if there was any reason to "put in a dramatic reduction", he replied that there wasn't. Rogers said he was surprised when Grams suggested \$80,000 cut in the Police Department. Rogers stated that the only way that could be done was to lay off a full-time employee. Rogers testified that he thought the City Council knew laying off a full-time employee meant the

Grievant would be the one. Rogers stated that he thought the Police Department was “understaffed, [with] gaps in police coverage” but that the department with the Chief and three officers was “in line” with cities of the same size. He said that they looked at data suggesting that cities generally spent about 30% of their budget on the police department and fire departments combined.

Rogers was asked about the City Golf Course. He indicated that it represents a one and one-half million dollar operational loss, \$20,000-30,000 per year, and a \$70,000-100,000 loss if you consider debt payment.

Rogers responded to questions about the earlier March, 2005, budget deliberations by testifying that the City Council took steps to layoff the Grievant then also.

Rogers testified that Union Exhibit 17 included all part time officers. There were six in 2009. Union Exhibit 18 included all the part-time police officers from July 21, 2010, to January 27, 2011. Union Exhibit 19 showed the part-time police officers pay hours and included on-call hours. On-call hours are paid \$4.00 per hour. Two part-time officers, Jacobsen and Vanderwilt, were added after Grievant was laid off and currently work more than 14 hours per week.

Police Chief David Ulmen appeared under subpoena by the Union. He testified that he worked for the City starting in July, 2000. He indicated that he observed the Grievant at work and considered her to be a “good officer” with a “good work history”. He identified Union Exhibit 10 as the Grievant’s training record and described her training and development as “comparable” to other officers. Ulmen said that she is still training in the area of investigations and was solving more difficult investigative assignments.

When asked by Employer's counsel about the Grievant's disciplinary record, Ulmen stated that no other officer had three reprimands as did the Grievant.

Ulmen agreed that he had witnessed hostility that was "reiterate[d] in the]record" and recalled the "pain in the ass" remark by Grams. He stated that the newspaper report of the mayor's quote was accurate according to what he had heard. Ulmen said that when Grams took office he didn't like the Grievant because she wasn't from the community.

Ulmen said that no other officer at the City had been laid off before the Grievant was laid off. He said that after Grams was elected he made efforts to have the Grievant laid off, even before she was the least senior officer. Ulmen said the mayor stated that he "didn't understand".

Ulmen described some of the activities related to scheduling the Grievant and the use of part-time officers including Union Exhibit 21 and 22.

Ulmen said that the department should be staffed at three full-time officers according to the International Association of Chiefs of Police, Union Exhibit 11. He stated that in 2005, Grams had agreed to three full-time officers.

Ulmen described the on-call usage of the department and also described the total number of hours in 2010 as being greater than 2009. He "guesstimated" that after the Grievant's departure part-time usage increased by 50%. He stated that Vanderwilt and Jacobsen were working more than 28 hours in a two week period.

Ulmen stated that Grams demonstrated anger to him and others and that the mayor's comments "were more specifically directed towards her, but all the police officers in general, including myself even as a department head." Transcript at 125.

Employer's Position

The Employer's counsel described the tough economic times as the impetus for the drastic step of the Grievant's layoff. She stated that the Police Department was not the only area that had a layoff. The City's utility department laid off a full-time employee, froze wages and did not fill vacated positions. The Employer stated that the City reduced the Police Department more drastically than any other City department because the cost of the police department exceeded the City's needs. Although people may disagree, the decision to cut is the council's decision. The Employer has the right to "set and amend budgets". Joint Exhibit 1.

The Employer argued that the Agreement clearly provides in Article XX, Section 20.3, that seniority shall be determined by the employee's length of continuous employment in a full time capacity with the police department. The Grievant was the least senior officer in the police department when the budget cut was made. The Grievant was recalled when a six to eight week vacancy occurred after the initial layoff. No violation of the Agreement has occurred.

Furthermore, the Employer argues, the City has always had non-union part-time employees. They are simply not under the authority of the Union. They are at-will employees and not members of the bargaining unit. The Agreement is void of language related to part-time police officers. Finally, the Employer argues that the grievance is not about claims of hostile work environment as there is no provision in the

Agreement so related and the Grievant is proceeding in another forum to address that issue.

Rogers testified that the Agreement, Joint Exhibit 1, was currently in effect and includes Article VI, Employer's Authority, including the authority to set and amend the budget, determine the number of personnel, to establish work schedules, and to perform any inherent managerial function not specifically limited by the Agreement.

Rogers testified that he was aware of cities without police departments including Mora, Pipestone, Dodge Center, and 10-15 cities in Wright County. He agreed that his job is to implement the City Council's direction and that they are, "quite a few things I do I disagree with". He further agreed that the City Council was not required to consult with the City Administrator in advance of the budget meeting.

In response to questions about the Grievant, Rogers testified that the Grievant was the least senior in the Police Department and had been laid off in 2005, until, two days later, a more senior officer resigned and the Grievant was recalled. Rogers testified that there was no provision in the Agreement to layoff part-time or temporary police officers before laying off full-time officers. Rogers also stated in response to a question that part-time police officers are not a part of the bargaining unit and the City Council sets the wages at \$12.40 per hour. Part-time police officers are not provided any benefits from the City.

Rogers described the reductions in Local Government Aid as being \$50,000 in 2008, \$50,000 in 2009 and \$100,000 in 2010. Rogers stated that the actual shortfall in 2010 totaled \$110,000. Rogers pointed to Building Permits being down because of the lack of building starts and stated that property tax receipts were also declining. Employer

Exhibit 1 and 2 Rogers testified that the City experienced an overall decline in revenue from local government aid, building permit revenue and electric utility revenue. Transcript at 97-8.

Rogers testified that historically the City Council felt that the Police Department was too large and too expensive. Transcript at 102. Rogers testified that for “[a]s long as I have been here” the City Council had been concerned about the size of the Police Department budget compared to a community of the City’s size. Transcript at 101-

Rogers testified that the City Council cut the Police Department by approximately 20% and cut the Inspections Department and the Animal Control Department by approximately the same percentage. Transcript at 54.

Rogers stated that the City Council had been concerned with the City’s reserve fund. The State Auditor recommends 35=50% of general fund be set aside as reserve. To contend with the shortfall, the City Council laid off a full-time line worker, Martin Erdman. Employer Exhibit 4 and Transcript at 109.

Rogers testified regarding the incidents related to Grievant’s layoff. The vote to reduce the police budget occurred on December 21, 201. The Grievant applied for a Family and Medical Leave Act leave for twelve weeks and was granted it. That leave expired on March 26, 2010. The Grievant was laid off, effective April 9, 2010. On May 3, 2010, Grievant was recalled to full-time status to replace a more senior office, Johnson, who took sick leave. Shortly after Johnson’s return to work, Grievant was again laid off effective July 13, 2010. Joint Exhibit 2.

When asked about hostile behavior by Grams, Rogers testified that he showed anger, yelled and shouted at other employees, including himself and the Chief of Police. Rogers stated that two other members of the City Council asked about the Grievant and why those “cops have to be at Council meetings.”

Ulmen testified that the budget had been reduced over time and that he disagreed with the budget reductions. He agreed that the cut-back included uniforms, training, over-time, equipment, and capital expenditures. He stated that he disagreed with the City Council and thought that the Grievant should be offered any hours available

Ulmen testified that there was “quite a significant savings” with the use of part-time officers as they worked for \$12.40 per hour and received no benefits. (When the Rogers was recalled, he stated that for part time officers, the regular rate was actually \$12.30 per hour and \$2.00 per hour for on-call, as opposed to \$4.00 per hour for full-time officers). Ulmen said the Police Department currently uses five part-time officers. He described the history of using full-time officers. He said that in 2006 a full-time officer, Adam Grey, left and his position was not filled. Transcript at 159. In 2007 another full-time officer, the School Resource Officer, resigned and was not replaced. Transcript at 160. In addition, there was an administrative assistant who was cut in 2007 and not replaced. Transcript at 161.

Ulmen was asked about the Grievant being recalled previously and whether he considered the City being in compliance with the Agreement. He said he did. When asked about hostility focused on the Grievant he stated that the hostility was focused on the Police Department. Ulmen was asked about being criticized for stopping people for speeding. He testified that the criticism was directed to other officers than the Grievant. Finally, when Ulmen was asked about the Grievant’s performance history, he described

the Grievant as a good officer but acknowledged that she had three reprimands in her file.

Discussion

The issues to be determined are two. First, whether the Employer has violated Article XX, Section 20.2 the collective bargaining agreement, when the t Grievant was placed on lay off and part time workers were used. Second, whether such layoff is a discharge without just cause. If no just cause exists, what is the appropriate remedy?

Whether the Employer has violated Article XX, Section 20.2 the collective bargaining agreement, when the t Grievant was placed on lay off and part time workers were used.

There is no dispute between the parties that the Grievant is the least senior police officer in the department. Transcript at 93. There is also no dispute that the layoff procedures were properly carried out. The Grievant began employment as a police officer with the City in 2003. In 2005, she was placed on layoff for a short time until a more senior officer retired. She was recalled. In 2009, after the City Council cut its budget and before the Grievant was laid off, she asked for and was granted a Family and Medical Leave. After that leave expired she was notified of layoff on March 26, 2009. Following that, another, more senior police officer took a leave so she was recalled for the leave period on May 3, 2009. Joint Exhibits 2 and 4. Finally, the Grievant was placed on layoff and has remained so to the time of this arbitration.

Elkouri and Elkouri's *How Arbitration Works* (Ruben 2003) is illuminating on the subject of seniority. Seniority benefits exist as "rights" only to the extent made so by contract. "Whatever seniority rights employees have exist only by virtue of the collective bargaining agreement that is in existence between the union and the employer. Such seniority rights depend wholly upon the contract. They arise out of the contract. Before a collective bargaining contract is in existence, there are no seniority rights. Alan Wood Steel Co., 4 LA 52, 54 (Brandschain, Zwissl, & Irwin, 1946.)

In the City, seniority is a right under the Agreement only for full-time police officers. The Agreement makes it clear that the contract provision relates expressly to full-time, non-probationary positions. "Seniority shall be determined by the employee's length of continuous employment in a full time capacity with the Police Department." Agreement, Article XX, Section 20.3. Joint Exhibit 1. If part-time police officers earned seniority and were on the list, the Employer would be obliged to layoff the least senior employee or employees, assuming job relevant qualification factors were equal. That is not the case here. I find no basis within the Agreement authorizing this arbitrator to provide seniority benefits for the Grievant which do not emanate from the express provisions of the Agreement.

An award has to draw its essence from the Agreement. An arbitrator cannot "ignore clear-cut language" and "may not legislate new language" since to do so would usurp the role of the labor organization and employer". Clean Coverall Supply Co., 47 LA 272, 277 (Witney, 1966). If the Union wants to represent part-time police officers, as well as full-time police officers, it must gain that right at the bargaining table or in a unit clarification from the Bureau of Mediation Services.

The City has an extensive record of financial limitations and budgetary compression. The City has repeatedly looked for areas to reduce expenditures undertaking 20 to 25% cuts in, not only the Police Department, but the City's Inspections Department and the City's Animal Control Department. Despite advice from its administrative staff, the City Council has maintained, since two years before the Grievant came on board, that the Police Department should be smaller. When they have had a resignation or retirement in the police ranks, they have chosen not to fill it. In 2009 facing even more drastic financial exigencies, they laid off the Grievant. This was not her first time. She had been least senior and had been laid off several years before, albeit briefly.

Even if the administrative staff disagreed, it is clear that the City Council had the right to make the decisions to cut department's budgets and layoff staff. The Employer has the right under Article VI to 'operate and manage all manpower,to establish functions and programs; to set and amend budgets;...to select, direct and determine the number of personnel; to establish work schedules; and to perform any inherent managerial function not specifically limited by this AGREEMENT " Joint Exhibit 1, The Union, the City Administrator and the Police Chief may disagree with the decision of the city council, but it is not their decision to make. I find no violation of Article XX of the Agreement.

If the violation occurred and the action was not a proper layoff, is it a discharge without just cause. If no just cause exists, what is the appropriate remedy?

Because I find no violation of the Agreement, I do not reach the second question.

Award: The grievance is denied.

Dated this 18th day of April, 2011

Carol A. Berg O'Toole