

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**VILLAGE OF BUTLER PROFESSIONAL POLICE ASSOCIATION  
LOCAL 312, LABOR ASSOCIATION OF WISCONSIN, INC.**

and

**VILLAGE OF BUTLER (POLICE DEPARTMENT)**

Case 24  
No. 62968  
MA-12455

*(Grievance 2003-65 – Cooper Layoff)*

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Appearances:

**Kevin Naylor**, Labor Consultant, Labor Association of Wisconsin, Inc., on behalf of the Association.

de la Mora & de la Mora, Attorneys at Law, by **Paul E. Alexy**, on behalf of the Village of Butler.

**ARBITRATION AWARD**

The Labor Association of Wisconsin, Inc., hereinafter the Association, requested that the Wisconsin Employment Relations Commission provide a panel of staff arbitrators from which the Association and Village of Butler, hereinafter Village, could select an arbitrator to hear and decide the instant dispute, in accord with the grievance and arbitration procedures contained in the parties' labor agreement. Thereafter, the parties selected the undersigned, David E. Shaw, to arbitrate in the dispute. The Village subsequently requested that the grievance be dismissed prior to hearing on the basis that it was untimely filed. The Association opposed the request. By letter of April 21, 2004, the undersigned denied the Village's request on the basis that there were factual disputes regarding when the Association should have been aware of the grievance. A hearing was held before the undersigned on September 8, 2004 in Butler, Wisconsin. There was no transcript made of the hearing. The parties completed the submission of post-hearing argument by November 3, 2004.

Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

### ISSUES

The parties were unable to stipulate to a statement of the issues and agreed the Arbitrator will frame the issues.

The Association would state the issues as follows:

Did the Village of Butler violate the collective bargaining agreement when it laid off Officer Josh Cooper? If so, what is the appropriate remedy?

The Village offers the following statement of the issues:

- 1) Is the grievance timely?
- 2) Is the grievance substantively arbitrable? 1/

The Arbitrator would adopt the Association's statement of the substantive issue, but with the Village's statement of the procedural issue of timeliness as the threshold issue.

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*1/ The Village indicated that it would leave this issue to the Arbitrator to decide.*

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### CONTRACT PROVISIONS

The following provisions of the parties' labor agreement are cited, in relevant part:

#### ARTICLE 1 - MANAGEMENT RIGHTS

**SECTION 1.01:** Except as otherwise specifically provided herein, the management of the Village of Butler and the direction of the work force, including but not limited to, the right to hire, the right to promote, suspend, discipline and discharge for just cause, the right to decide job qualifications for hiring, the right to lay off for lack of work or funds, the right to abolish and/or create positions, the right to introduce new or improved operational methods, training and evaluation techniques, equipment or facilities, the right to make reasonable rules and regulations governing day to day operations, conduct and safety, and the right to determine schedules of work, shall be vested in

management. Management, in exercising these functions, will not discriminate against any employee because of his/her representation by any Union, if so represented.

...

## **ARTICLE 5 – GRIEVANCE PROCEDURE**

**SECTION 5.01- PURPOSE:** The purpose of this grievance procedure is to provide a method for quick and binding final determination of every question of interpretation and application of the provisions of this agreement, thus preventing the protracted continuation of misunderstandings which may arise from time to time concerning such questions. The purpose of the complaint procedure is to provide a method for prompt and full discussion and consideration of matters of personal irritation and concern of any employee with some aspect of employment.

### **SECTION 5.02 – DEFINITIONS:**

- (1) A grievance is defined to be an issue concerning the interpretation or application of provisions of this agreement in compliance therewith.
- (2) No grievance shall be processed under Step No. 1 of this Article unless the employee filed a grievance within thirty (30) calendar days from the day the grievance first arose or that the employee should have had reason to know of such grievance.

...

## **BACKGROUND**

The Village maintains and operates the Village of Butler Police Department. The Association is the collective bargaining representative of all of the non-supervisory police officers in the Department. The Village is governed by an elected Board of Trustees and the Village President. For the past 9½ years, Walter Woloszyk has been the Village President, and prior to that he was a Trustee for the Village from 1982 to 1990. Larry Plaster is the Village Administrator, and as such, is responsible for preparing the Village's budget.

In the Fall of 2001, the parties began negotiations for a successor labor agreement. The Village raised the possibility of the layoff of an officer during the negotiations. Present Association President Chad Rahn testified that the Village raised the matter during

negotiations, as well as proposing having an “Officer in Charge” (OIC) from among the officers, rather than having another supervisor. Rahn testified he could not recall what reasons the Village gave in negotiations for a layoff, but that the Village never claimed it was for lack of work. Village Administrator Larry Plaster testified that the Village’s budget restraints were brought up by the Village during negotiations. The parties’ 2002-2003 agreement was signed in February of 2003.

In August of 2002, the Village began preparing its 2003 budget. At the time the Chief had retired and the Lieutenant was serving as Acting Chief and there were six patrol officers. Prior to the Chief’s retirement, there had been the Chief and Lieutenant and six officers in the bargaining unit, for a total of eight staff in the Village’s Police Department. Plaster testified that in the course of budget deliberations, he, Village President Woloszyk and the Board discussed the staffing levels in the Police Department including the possibility of eliminating one police officer position.

The Association opposed reducing the number of officers. Prior to the November 19, 2002 Village Board meeting at which citizens could comment on the 2003 budget, including the elimination of the officer position, the Association distributed a letter to Village residents opposing the reduction. The letter was signed by all of the Association’s members and included the following statements:

Dear residents and business owners of Butler:

You may or may not have read in the Sussex Sun of the ongoing contract negotiations between your Police Department and the Village of Butler. We, the officers at the Police Department feel it necessary to inform the residents and business owners of the status of the police negotiations. . . .The following are two key topics that are causing the current impasse:

. . .

#### **Another concern of the Police Department**

Since the early 1980’s this Police Department consisted of a total of 8 members, 6 patrol officers and 2 supervisors. I think that we can all agree that times have changed drastically since the early 1980’s. Reducing the number of patrol officers on the Butler Police Department is not taking a proactive stance in keeping you, the residents and businesses, safe.

In the October 23, 2002 issue of the Sussex Sun, Larry Plaster is quoted as saying, “I have permanently excluded one position on the police department”

and “We should have an additional supervisor and lay off a patrol officer.” These statements are of great concern to us in the Police Department and should be to you, the residents and business owners as well. . . .It is the Village’s belief that the best course of action is now to hire a new chief, keep the lieutenant, and lay off a patrol officer. The Village has budgeted in 2003 for one less patrol officer; therefore, there will be one less officer patrolling the streets of Butler.

The Village of Butler is willing to sacrifice a dedicated officer when there are no rational or financial reasons. The Village Administrator, Larry Plaster, stated in the October 23, 2002 issue of the Sussex Sun, “For the near future, Butler is in very good shape” and “we are in a VERY POSITIVE FINANCIAL SITUATION.” Understanding that the Village is financially secure, why eliminate a police officer? The Village has proposed a tax rate decrease of \$.18 cents per \$1000.00 of assessed value in 2003. With keeping the budgeted 2002 Police Department staffing levels, 6 patrol officers and 2 supervisors, your taxes due the Village of Butler would still be lower in 2003 than it was in 2002.

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Rahn and Officer Cooper, who was the least senior officer in the Department, attended the November 19, 2002 Board meeting, at which citizens spoke on the proposed budget and for or against reducing the number of police officer positions.

Plaster testified that the Village was under financial constraints in developing its 2003 budget due to shared revenues being stagnant or reduced, declines in other revenues, and State expenditure restraint limits, along with little or no increase in property values in the Village. Plaster testified that there was no other item that could be cut that would have resulted in that amount of a reduction. Woloszyk testified that the decision to eliminate the patrol position was based upon the economic restraints on the Village, as well as the Department having operated satisfactorily with only seven, and that there was no other place to cut that much money in the budget. The Village Board passed its 2003 budget in December of 2002, which included filling the Chief’s position and eliminating an Officer position.

In the Spring of 2003, the Village hired a new Police Chief who would be starting in May. By letter of April 8, 2003 from Plaster, the Village notified the least senior patrol officer, Joshua Cooper, that he was being laid off effective May 1, 2003. That letter stated, in relevant part:

Dear Mr. Cooper:

The Village of Butler has appropriated funds for two Police Administrative positions and five Patrol Officers in Year 2003. Until now, one Administrative position had remained vacant.

However, Michael Olson has been hired as Police Chief for the Village of Butler. Section 6.02 Application of Seniority; of the Collective Bargaining Agreement between the Village of Butler and the Butler Professional Police Association determines the procedure for layoff of personnel. Unfortunately, it is my duty to inform you that for economic reasons and in accordance with Section 1.01 and Section 6.02 of the Collective Bargaining Agreement, as the individual with the least seniority, this letter serves as a notice of lay-off. April 30, 2003 will be your last day of employment with the Village of Butler. Please arrange with Acting Chief Cosgrove to turn in all Village owned and issued police equipment.

...

Finally, on behalf of the Village of Butler, I want to express my appreciation for your service to the Community. This action is a result of economic circumstances, the consequences of which, through no fault of your own, fall upon you.

...

Officer Cooper was laid off and no grievance was filed at the time by Cooper or the Association. According to the Association's president, Chad Rahn, the Association did not grieve the layoff because the officers accepted the Village's claim that the layoff was for "economic reasons".

The Association did continue to oppose the reduction in the number of patrol positions and submitted a petition to the Village Board to hire an officer to return the staffing level to six patrol officers. The Village Board rejected the petition and the matter was the subject of an article in an area newspaper on August 26, 2003. That article included the following statements attributed to Village President Woloszyk:

He also said that the layoff was not caused by any "budget crunch," as that report had stated. "We only lost \$9,000 in shared revenue," he said.

“When the former chief [Ernie Rosenthal] retired two years ago, we just decided not to replace him and see if we could do with seven officers,” Woloszyk said. “I was skeptical at the time, but it worked out fine.”

Rahn testified that after the article was published, he and two other Association members saw Woloszyk in the Village Hall parking lot and asked him why, if the Village was so poor it had to lay off an officer, did he say that there was no budget crunch, and that Woloszyk responded, “I’ll have to watch what I say,” and “I shouldn’t have said that,” or “It was a dumb comment to make. . .” Woloszyk testified that he did not recall if he had made the statement in the article or not and that he did not recall discussing the article or statement with Rahn.

On September 12, 2003, Rahn filed a grievance regarding Cooper’s layoff on behalf of the Association. Rahn testified that the grievance was precipitated by the statements in the article attributed to Woloszyk.

The parties were unable to resolve their dispute and proceeded to arbitration of the grievance before the undersigned.

### **POSITIONS OF THE PARTIES**

#### **Association**

As to the issue of whether the grievance was timely filed, the Association notes that Article 5, Sec. 5.02(2) of the Agreement requires that a grievance be filed “within thirty (30) calendar days from the day the grievance arose or that the employee should have had reason to know of such grievance.” (Emphasis added). Thus, the parties recognized that violations of a labor agreement are not always evident at the time they occur, and have provided that a timely grievance can be filed when the violation is first discovered more than 30 days from its occurrence. The Village ignores this and if its interpretation were accepted, it would encourage deceit by an employer. In this case, the Association would be punished for taking the Village at its word when it said it was laying off Officer Cooper due to the Village being in dire financial circumstances. Had the Village stated at the time of the layoff that it was not due to a budget crunch, a grievance would have been filed. It was not until the newspaper article was published on August 26, 2003, that the Association learned the layoff was not due to a “budget crunch”. That date triggered the time for filing the grievance, not Cooper’s layoff. The grievance was filed on September 12, 2003, well within 30 days of the date the Association first learned of the violation. Thus, the grievance is timely.

As to the substantive issue, Article 1 – Management Rights, authorizes the Village to layoff employees “for lack of work or funds. . .” This is not an unfettered right to layoff, as

the Village claims, rather, there are contractual restrictions on the right. Sec. 61.34, Stats., does not preclude the Village from bargaining over layoffs and does not supersede the terms of the agreement once the Village and Association have done so, nor does the statute render the agreement invalid. The Village, having agreed to conditions on its right to layoff, those conditions must be met.

Further, the language of Article 1, is clear and unequivocal that the layoff must be “for lack of work or funds.” The Village offers no alternative interpretation of those words; rather, it ignores the wording and asserts that it is the Village’s elected official’s role to decide if there is to be a layoff, not the Association’s.

In its reply brief, the Association asserts that, contrary to the Village’s claim that the Association violated the parties’ agreement by filing this grievance, Article 5, Sec. 5.01, contains clear language that permits the Association to file a grievance regarding “matters of personal irritation and concern of any employee. . .” The grievance was filed when the membership became irritated and concerned with the conflicting statements by the Village’s representatives regarding the Village’s financial well-being.

The Association asserts that the Village’s reliance on the CITY OF BROOKFIELD decision 2/ is misplaced. This case does not involve a prohibited practice charge over a

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2/ *CITY OF BROOKFIELD v. WERC, 87 Wis. 2d 819 (1979).*

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municipal employer’s refusal to negotiate over a layoff decision or its impact; rather, it involves a grievance over a layoff that conflicted with specific language in the parties’ agreement. The Village submitted no evidence that it took the position in negotiations that the language in the agreement was permissive or that it attempted to modify that language. Further, the BROOKFIELD decision expressly stated that municipalities are not prohibited from negotiating such contractual restrictions. The Village is therefore bound by the terms of the agreement, including the restriction on its right to layoff employees. If the Village has concerns in this regard, it should address them at the bargaining table.

The Association requests that the grievance be found to have been timely filed and to have merit, and that the Village be ordered to reinstate Officer Cooper, or if Officer Cooper is unable or unwilling to return, to order the Village to replace Officer Cooper with another full-time officer.



## Village

The Village takes the position that the grievance must be rejected because it violates two separate provisions of the Agreement and seeks to intrude on authority expressly reserved to the Village Board by State statutes.

With regard to the issue of timeliness, the Village asserts that the grievance was not filed in compliance with Article 5, Sec. 5.02(2) of the agreement. The budget eliminating Cooper's position was adopted December 3, 2002. Cooper was notified of his layoff by letter of April 8, 2003 and was laid off May 1, 2003. The grievance was not signed until September 12, 2003. The Association's claim that it had no reason to know of its grievance until it saw the newspaper article quoting Woloszyk as saying there was no "budget crunch", is contradicted by the evidence. The letter the Association passed out to Village residents prior to the November 19, 2002 Board meeting, signed by all of the Association's members, establishes that the Association was aware of quotes attributed to the Village Administrator from October, 2002 concerning the Village's budget, and that the Association questioned at that time the elimination of an officer for budgetary reasons. The only additional information allegedly obtained from the newspaper article was the introduction of the term "budget crunch", which has no significance under the agreement or Wisconsin law. Thus, the grievance was untimely.

As to the substantive issue, decisions regarding the layoff of officers for lack of work or funds and to create or abolish positions is unequivocally vested in the Village Board under Article 1 - Management Rights. This is consistent with the Board's authority under Sec. 61.34, of the Wisconsin Statutes. The Association's grievance is predicated on the August 26, 2003 newspaper article which purported to quote Woloszyk as stating the Cooper layoff was not caused by any "budget crunch". Woloszyk testified he could not recall making such a statement and that he had been misquoted by that newspaper in the past. Regardless of whether he made the statement or not, the term "budget crunch" is not used in the agreement and there is no evidence that a budget crunch must exist as a prerequisite to a layoff. Further, the testimony of both Plaster and Woloszyk establishes that there was a lack of funds available in the 2003 budget to fund Cooper's position. Woloszyk also testified that there would have been a "budget crunch" if the Village had tried to retain the position. The facts of this case are remarkably similar to those in the CITY OF BROOKFIELD case, in which the Wisconsin Supreme Court held that a budgetary layoff decision is not a mandatory subject of bargaining. Thus, the Board's budgetary decision that resulted in Cooper's layoff could not have violated the Agreement.

The Village requests that it be found that the Village did not violate the Agreement, that the decision to layoff Officer Cooper was not subject to arbitration, and that the grievance was untimely filed.

## DISCUSSION

### Timeliness

The threshold issue in this case is whether the grievance regarding Officer Cooper's layoff is procedurally arbitrable, i.e., was it timely filed under Sec. 5.02(2) of the parties' Agreement. Absent circumstances that would be found to constitute a waiver of the contractual time limits for filing a grievance, if the grievance was not filed within the time limits of Sec. 5.02(2), that provision provides that the grievance cannot be processed under the parties' contractual grievance procedure. Thus, if the grievance is found to be untimely, the Arbitrator has no authority to address the substantive issue raised by the grievance. For the reasons discussed below, the Arbitrator concludes that the grievance was not timely filed.

Article 5, Grievance Procedure, of the parties' agreement provides, in relevant part:

#### SECTION 5.02 – DEFINITIONS:

...

- (2) No grievance shall be processed under Step No. 1 of this Article unless the employee filed a grievance within thirty (30) calendar days from the day the grievance first arose or that the employee should have had reason to know of such grievance.

The Association essentially argues that until the August 26, 2003 newspaper article quoting Woloszyk as saying Cooper's layoff was not because of any "budget crunch" was published, it had no reason to "know" of the grievance (that Cooper's layoff was not due to a lack of funds). According to the Association, they accepted the Village's claim at the time of the layoff that it was for a lack of funds and had no reason to think otherwise until Woloszyk's alleged statement appeared in the newspaper article. This assertion is not persuasive. As the Village notes, the Association disputed the Village's claims that it had financial problems while the Village's proposed 2003 budget was being discussed publicly in November of 2002. The letter to Village residents distributed by the Association prior to the November 19, 2002 Board meeting, at which the 2003 budget and the elimination of Cooper's position was discussed, asserted that the Village had no financial reason for eliminating the position and that the Village was "financially secure".

The evidence indicates that the Association did not believe at the time that Cooper's layoff would be due to a lack of funds. Therefore, it had "reason to know" of the grievance when the layoff occurred. It was incumbent upon Cooper to act at the time he was laid off if he or the Association did not believe the Village's claims of budget restraints. Nothing

changed between May 1, 2003, when Cooper was laid off, and August 26, 2003, when the article was published. All the newspaper article did was provide possible evidence to support the Association's position. The Association was required to act on its belief that the layoff was not for a lack of funds, i.e., was in violation of Article 1, when the layoff occurred. The time limit in Sec. 5.02(2) did not stop running until the Association could obtain better evidence to confirm its suspicions.

In sum, the layoff of Officer Cooper is the action being grieved. That occurred on May 1, 2003, and the Association believed at that time that the layoff was not for a lack of funds. Thus, the 30-calendar day time limit in Sec. 5.02(2) began to run on the date of the layoff. As the grievance was not filed until September 12, 2003, it was not timely filed under contractual time limits and cannot be processed under the parties' contractual grievance procedure. Therefore, the Arbitrator has no authority to address the contractual violation alleged in the grievance.

Based upon the foregoing, the evidence, and the arguments of the parties, the Arbitrator makes and issues the following

**AWARD**

The grievance was not timely filed under Article 5 – Grievance Procedure, Sec. 5.02(2) of the parties' Agreement, and therefore, is not procedurally arbitrable.

Dated at Madison, Wisconsin, this 13th day of January, 2005.

David E. Shaw /s/

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David E. Shaw, Arbitrator

