

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**CITY OF BRILLION**

and

**LOCAL 1362, BRILLION CITY EMPLOYEES, AFSCME, AFL-CIO**

Case 27  
No. 64401  
MA-12888

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**Appearances:**

**Ms. Helen Isferding**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Avenue, Sheboygan, WI 53083, on behalf of Local 1362.

**Mr. William G. Bracken**, Labor Relations Specialist, Davis & Kuelthau, S.C., 219 Washington Avenue, P.O. Box 1278, Oshkosh, WI 54903-1278, on behalf of the City.

**ARBITRATION AWARD**

According to the terms of the 2002-04 collective bargaining agreement between City of Brillion (City) and Brillion City Employees, Local 1362, AFSCME, AFL-CIO (Union), the parties jointly selected Arbitrator Sharon A. Gallagher through the Wisconsin Employment Relations Commission to hear and resolve a dispute between them regarding the City's decision to employ only part-time Building Supervisors at the Brillion Community Center beginning November 1, 2004. Hearing on the matter was held on May 20, 2005, at Brillion, Wisconsin. A stenographic transcript of the proceedings was made and received by the Arbitrator on June 7, 2005. By agreement, the parties submitted their initial briefs to the Arbitrator for her exchange on July 15, 2005. The parties reserved the right to file reply briefs which were received by the Arbitrator on August 26, 2005, whereupon the record herein was closed.

**ISSUES**

The parties were unable to stipulate to the issues for determination in this case. However, they agreed to allow the Arbitrator to frame the issues based upon the parties' suggested issues as

well as the relevant evidence and argument in the case. The Union suggested the following issues:

1. Did the Employer violate the contract and its own policies and procedures when it laid off Grievants McGlin and Alt in September, 2004?
2. If so, what is the appropriate remedy?

The City suggested the following for determination:

1. Did the City violate Section 3.01 of the Agreement when it changed the table of organization to provide for all part-time Building Supervisors in order to staff the Community Center in the most efficient manner?
2. If so, what is the appropriate remedy?

Based upon the relevant evidence and argument and the above suggested issues, the Arbitrator finds that the Union's issues reasonably state the controversy between the parties if the phrase "in September, 2004" is deleted and the following language is added at the end of Union Issue 1:

. . . and then recalled McGlin and Alt to part-time positions on November 1, 2004?

## **RELEVANT CONTRACT PROVISIONS**

### **ARTICLE III MANAGEMENT RIGHTS**

3.01 The Management of the work, except as hereinafter provided, and the direction of the working forces, including but not limited to the right to hire, promote, demote, suspend, discharge or otherwise discipline for just cause, layoff, transfer, subcontract provided no recognized regular full-time employee is laid off, classify or assign work and determine the table of organization, is vested exclusively in the Employer.

3.02 The Employer shall have the right to establish reasonable work rules. The Union shall have the right to grieve the reasonableness of the work rules.

**ARTICLE VIII  
PROBATION, BENEFITS AND SENIORITY**

8.01 New employees shall serve a six (6) month probationary period during which time they may be discharged without recourse to the grievance procedure. Continued service beyond the six (6) month probationary period shall be deemed as evidence of a satisfactory completion of the probationary period.

Benefit Eligibility: All new regular full-time and regular part-time employees shall become eligible for insurance fringe benefits on the dates determined by the respective insurance policies.

8.02 A regular full-time employee is hereby defined as an employee who occupies a regular full-time position. A permanent regular full-time employee is one who has completed his/her probationary period. A regular full-time position is defined as a group of duties and responsibilities requiring the full-time employment of one (1) person.

B. A regular part-time employee is hereby defined as an employee who occupies a regular part-time position. A permanent regular part-time employee is one who has completed his/her probationary period. A regular part-time position is defined as a group of duties and responsibilities requiring less than full-time employment of one (1) person.

C. Regular part-time employees who work twenty (20) or more hours per week shall receive fringe benefits on a pro-rata basis. Regular part-time employees who work less than twenty (20) hours per week shall only receive: (1) pro-rated holiday pay, subject to Article XII herein. Proration shall be computed based on [sic] number of part-time hours worked annually divided by 2080 x 72 hours (9 holidays x 8 hours) x rate of pay. (2) pro-rated sick leave as provided to Article XIV herein. Employees who terminate shall receive holiday pay to which they are entitled as part of the last paycheck.

All regular part-time employees shall be offered health insurance on a pro-rated basis.

D. An employee shall be considered a regular employee if said employee has worked ninety (90) consecutive workdays for the City. The City may extend this non-regular period one time for thirty (30) consecutive work days and agrees to notify the Union in writing when it extends said period.

E. A seasonal employee is either a full-time or part-time employee who is on the payroll only during the season in which his/her services are required.

F. Employees on a paid leave of absence shall receive all fringe benefits as provided for in this Agreement.

8.03 City seniority shall be defined as the length of continuous service with the City of Brillion from the employee's last date of hire to a position within the City service. Department seniority shall mean the continuous length of service within the department to which the employee is assigned. If an employee moves from one City department to another City department, department seniority shall prevail for vacation selection, etc., but City seniority shall prevail for the amount of vacation, sick leave, longevity, etc.

8.04 Seniority shall be broken and terminated if an employee:

- A. Quits
- B. Is discharged for just cause.
- C. Fails to report for work within two (2) weeks after completion of a leave of absence, except under extenuating circumstances by mutual written agreement between the employee and their immediate supervisor.
- D. Is laid off and not re-employed by the City within two (2) years from date of layoff.
- E. Retires.

## **ARTICLE IX VACANCIES, LAYOFFS, AND RECALL**

9.01 A notice of all new or vacant positions shall be posted on department bulletin boards for at least five (5) working days in overlapping

weeks, but not more than eight (8) working days. Interested employees shall apply by signing the posting.

9.02 The most qualified applicant shall be awarded any vacant position the Employer intends to fill. If qualifications are equal, the applicant with the longest continuous City service shall be awarded the position.

9.03 If a position is filled by promotion of a current City employee, that employee shall serve a thirty (30) day training and qualifying period at his/her former rate of pay. This training and qualifying period may be waived by mutual agreement between the City and the Union.

9.04 If a current City employee is promoted to a position and fails to qualify for that position during the thirty (30) day training and qualifying period, the employee shall be returned to his/her former position.

9.05 In laying off permanent employees, the shortest in length of service in the department shall be laid off first, provided those retained are capable of performing the available work. When recalled, the employees on the seniority list having greatest length of service in the department shall be called back first, provided they are qualified to perform the available work. Employees on lay-off shall not be entitled to fringe benefits.

9.06 The Employer shall provide the Union with department and citywide seniority lists on January 2nd and July 1st of each year upon request by the Union prior to each date.

9.07 Regular employees who are assigned to higher classifications for four (4) consecutive work hours or more shall receive the higher rate of pay.

## **ARTICLE X TERMINATIONS**

10.01 When an employee is discharged by the Employer, a written discharge report shall be prepared stating the effective date and reason(s) for the discharge. The original shall be given the employee, and the Union shall be provided one (1) copy.

10.02 When any employee voluntarily terminates his/her employment, he/she shall submit his/her resignation in writing no less than ten (10) working

days prior to the resignation's effective date, said days to be exclusive of any vacation due the employee. Failure to comply with this provision shall result in forfeiture of accrued vacation benefits.

## **ARTICLE XI HOURS OF WORK**

11.01 The normal workday for Department of Public Works employees and Community Center Custodian shall be 7:00 a.m. to 12:00 Noon and 12:30 p.m. to 3:30 p.m. and the normal workdays shall be Monday through Friday. The City reserves the right to alter this schedule to meet the needs of the City as the City determines those needs. The City may only schedule changes with a forty-eight (48) hour notice.

11.02 Work performed over eight (8) hours in one day or forty (40) hours in one seven (7) day work week shall be compensated at the rate of time and one-half (1-1/2) as compensatory time off or pay, provided (1) he/she announces his/her choice on the following work day and (2)

. . .

## **RELEVANT CITY PERSONNEL POLICIES AND PROCEDURES**

### **LAYOFFS**

Layoffs of City employees could occur because of changes in department or work unit responsibilities, work methods used, reduction in workload or revenues supporting City operations. Layoffs will normally be based on recommendations of the department head, the City Administrator, the appropriate board, commission or committee and the Personnel Committee. The Common Council must approve all layoffs.

When the Common Council has acted to authorize layoffs, each employee affected will be notified by letter. The written notification will give the reason for the layoff, its effective date and a summary of the employee's rights and benefits. The letter will be delivered to the employee at least ten working days before the date layoff takes effect.

An employee designated for layoff will be counseled by the department head and the Personnel Officer. They will be given an opportunity to ask questions

concerning the exercise of his or her rights and offered assistance in obtaining benefits the employee may be entitled to receive.

The City will pay an employee's portion of health care and life insurance premiums for the month during which a layoff takes effect, for the calendar month following layoff, and the month during which the employee is recalled.

Seasonal, limited-term, part-time and probationary employees will usually be laid off before permanent full-time employees in the same classification.

Based on seniority and a capacity to do the tasks required, an employee designated for layoff may request that he or she displace, or "bump down," an employee with less seniority. Each request to "bump down" requires approval by the Personnel Committee. An employee displacing another City employee will receive the salary or wage established for the position when filled by an individual with the same length of service in the position.

The Common Council retains the right to recall and restore employees to positions held at the time a layoff was ordered. A recalled employee will report for work on a date agreed to by the City and the employee. If an individual fails to report for work on the agreed date, his or her status as a City employee will be terminated.

#### **DISCHARGE FOR CAUSE**

A City employee may be discharged for cause.

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The discharge of other employees for cause will be at the discretion of the appointing authority based on charges, supported by evidence and following hearings.

#### **BACKGROUND**

The City has operated the Brillion Community Center (BCC) since the 1990's. The BCC has an indoor swimming pool, racquetball courts, a gym and class/meeting rooms where fitness classes are offered to residents and non-residents of the City. Participants must pay for some activities but others are free. Prior to 1994, the City employed three part-time Building

Supervisors and one part-time clerical employee at the BCC. At this time, the BCC Building Supervisors essentially opened the BCC and acted as receptionists to greet the public, collect fees, and make sure the building was clean, maintained and ready for scheduled activities. Prior to 1994, the BCC Building Supervisors were supervised by a full-time Parks and Recreation Director. At this time, the City also employed a full-time Director of Public Works. BCC employees were members of the Union, part of an overall bargaining which included one full-time custodial employee and one part-time custodial helper. The City's custodial employees were responsible to maintain the BCC, City Hall and Library buildings.

In March, 1994, the Director of Public Works resigned and Chad Hoerth (then the Director of Parks and Recreation) was hired into a revised, combined position, Public Works/Parks and Recreation/Marketing Director. At this time, the City decided to hire a part-time Aquatics Director and a full-time Recreation Supervisor (both non-union) and to combine the two part-time Building supervisors into one full-time position, to hire another full-time Building Supervisor and to retain one part-time Building supervisor to cover weekend shifts. The two full-time and one part-time Building Supervisors were Union employees.

The position description effective for the all full-time Building Supervisors (entitled Building Supervisor/Receptionist), read as follows:

. . .

**DUTIES & RESPONSIBILITIES:**

This is a supervisory, maintenance, and clerical position responsible for assisting the Park & Recreation Director/Aquatic Coordinator in the operations of the Community Center. Responsibilities include (but not limited to) all facility operations and activities (i.e. opening the building, taking facility reservations/rentals, registering participants in recreational & aquatic programs, supervising gymnasium & racquetball court activities, perpetual cleaning, and frequent tours of all areas of the building.)

This position is subject to the general direction of the Park & Recreation/Aquatic Coordinator, under the approval of the City Personnel Committee, the City Administrator, and the Common Council.

A candidate must have the knowledge and skills to perform the following duties:



1. Supervision of the Community Center Building (including all facility rentals and activities).
2. Assist with office procedures and operations.
3. Perform daily and assigned cleaning & maintenance duties.
4. Assist in the direct supervision of programs and staff (recreation and aquatic).
5. Aid and assist the public in a diplomatic, helpful, and courteous manner.
6. Collect program fees, register participants, and write our [sic] appropriate receipts.
7. Collect swimming pool admissions and receipts as needed.
8. Distribute vending coin loss envelopes when necessary.
9. Distribute recreational equipment when requested.
10. Handle the BCC facility rental/reservation system, post the next days activities on the entrance marquee nightly.
11. On the half hour, roam the facility to check the swimming pool area, youth center, gym, racquetball/balcony area, and meeting rooms for problems and safety. Also check whenever specific demand and/or incidents dictate.
12. Perform office tasks requested by the Park & Recreation Director/Aquatic Coordinator.
13. Clean all windows of the Community Center, vacuum, and complete other maintenance tasks as requested by the Director.
14. Answer the phone and record messages for staff as needed.
15. Provide assistance to patrons and insure the safety and security of the facility.

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**QUALIFICATIONS:**

1. Ability to deal and work with the public, knowledge of general office procedures, knowledge of general maintenance procedures, ability to handle a multitude of activities.
2. Knowledge of all cash handling and banking procedures.
3. Must have ability to manage all record keeping functions of the Park & Recreation/Aquatic operations in an orderly and functional manner.
4. Respond to the needs and concerns of all persons using par [sic] & recreation facilities.
5. PC knowledge and skills (i.e. Windows 95, Microsoft Word 6.0, Microsoft Publisher 2.0, etc.).

6. Be able to deal with general public in an outgoing and courteous manner as to promote public relations between the City of Brillion and all BCC facility users and program participants.
7. American Red Cross Standard or Community First Aid current certificate and CPR-PRO or Community CPR current certificate (or able/willing to get certified within 30 days of hire).
8. Valid American Red Cross Certification in Automatic External Defibrillator, Oxygen Administration, Prevention of Disease Transmission. (New Requirement, Effective Date 1/1/02)

**DESIRABLE TRAINING & EXPERIENCE:**

1. Ability to handle a multitude of duties, be responsible and dependable, favorable work history, preferably in dealing with the public.
2. High school diploma or equivalent.
3. Prior experience in similar office function, some of which shall have been in the area of direct contact with the public.

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The two Grievants, Beth Alt and Judy McGlin were hired in 1998 and 1996 respectively as full-time Building Supervisors at BCC. McGlin worked the morning hours from 5:15 a.m. to 1:15 p.m. Monday, Wednesday and Friday and 6:00 a.m. to 2:00 p.m. Tuesday and Thursday. Alt covered the afternoon/evening hours, 1:15 p.m. to 9:15p.m. Monday through Friday. Neither was regularly scheduled to work on the weekends as the part-time Building supervisors were employed to cover the BCC open hours, on Saturday (8:00 a.m. to 5:00 p.m.) and Sunday (11:00 a.m. to 4:00 p.m.). The position description for the part-time Building Supervisors was then identical to that quoted above for the Full-time Building Supervisor/Receptionist except for references to the hours worked) and reference to McGlin's payroll/voucher duties.<sup>1</sup>

On October 8, 2003, BCC director Hoerth presented the following memo to the City Personnel Committee, proposing to employ only part-time Building Supervisors:

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<sup>1</sup> The duties of both part-time and full-time Building Supervisors have traditionally been the same except for the hours of work and the payroll/voucher duties that were added to McGlin's job for the period of time prior to BCC getting a computerized time clock. After the time clock was installed in October, 2004, McGlin's job no longer included payroll/voucher duties as the time clock generated the necessary information. The Union is not complaining about the removal of these duties from McGlin in this case.

...

The Park and Recreation Commission has made a recommendation to the Personnel Committee to change the BCC's current building supervisor arrangement. Presently the BCC employees [sic] 2 full time building supervisors, 3 part time building supervisors and 1 temporary building supervisor. The 2 full time supervisors work during the week (one in the AM and one in the PM). The weekend supervisors rotate to work during the weekend shifts. The non-union temporary supervisor fills in only when the union workers can not work. The AM supervisor is a Clerk 1 so her wage is a bit higher because she fills out payroll records. The recommendation that has come from the Park and Recreation Commission is to demote the full time supervisors to part time supervisors and rotate all part time building supervisors throughout the weekdays and weekends. To make up for the supervisor who completes payroll, a new electronic time clock is budgeted for 2004. This new time clock will automatically add up payroll. All records can then be accessed from the director's computer for processing. Pros and cons are listed with Attachment A. When comparing the two situations it appears that the city could save over \$26,000 by employing the new arrangement (using 2003 figures) (see Attachment B).

**If the city decides to employee [sic] all part time building supervisors at the BCC.**

**PROS**

- Cost saving to the City of \$26,000+ (using 2003 figures)
- BCC could be open more regular hours
  - Currently we open M/W/F at 5:30am and T/TH at 6:00am due to scheduling restrictions. With part time building supervisors I could open the building Monday thru Friday at 5:30am
- Full Building supervisor staff meetings/training
  - The current arrangement does not allow full building supervisor staff meetings or training. I can only meet with the 2 full time supervisors once a week. I can not have meetings on the weekends due to the union contract that states if full time supervisors work any hours on weekend hours then they are paid overtime. If we employee [sic] all part time supervisors then I can schedule staff meetings without paying overtime.
- Weekend supervisor keeping up to date
  - 
  -

- Many of the day to day operations occur during the week. Any time a policy changes or something happens the weekday staff places a note for the weekend staff to keep them up to speed.
- This not always the best situation due to the fact that many times there are questions that need to be answered. Because the weekend staff average 18 hours of work a month it becomes difficult to keep up on changes and the day to day operations. If the part time staff works throughout the week and weekends they will become more familiar with the operations thus increasing our efficiency and productivity.
- Not decreasing services
  - Many times when items are reduced or cut from a budget, services are subsequently reduced or cut. By going to this new system the city could save money and prevent any decrease of service to the community.
- Finding Replacements
  - There have been several times in the past where building supervisors have called in sick or have requested time off at the last minute. In this case I have needed to supervise the building or have had to call in a part time supervisor to fill in the shift. Fortunately this year many times a Koren Schmidt has stepped up to the plate to fill in the shift, however if Ms. Schmidt finds full time employment at [sic] leaves the BCC finding a replacement to cover shifts at the last minute may be very difficult. It's also has [sic] happened that both full time supervisors have called in sick and I have not been able to find a replacement. During this time I unfortunately had to supervise the building straight from 5:15am-9:15pm. Because of this I am many times not able to get my job duties done. With more part time supervisors to choose from it will be easier to find a replacement at short notice.

## CONS

- With more people in the mix, there is more potential for scheduling errors.
- The current weekend supervisors may not want to work during the week, they were originally hired for weekend work and they may want to only work weekends.
- The 2 full time building supervisors will be losing hours and benefits they currently depend on.

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- Will create more work for the Director to process payroll.
- Weekday supervisors are more experienced in day to day operations, as the director I did not have to worry if a special situation arose, the weekday supervisors could handle it.

Hoerth attached a costing to this memo which showed a 2003 cost for BCC Building Supervisors of \$88,641.88 and a projected cost for part-time only Building Supervisors, based on 2003 hours, of \$66,353.08, for a savings of \$26,288.80. Hoerth's memo assumed that BCC operating hours would equal 5,272 for the year, or 92 hours per week for 52 weeks, and include 288 hours for staff training.

In response to Hoerth's proposal to the Personnel Committee, the Union sent a three page memo containing its "ideas to save money" (Union Exh. 4). Neither Hoerth nor any other City official responded to the Union's memo until March 15, 2004 (City Exh. 12).

On November 4, 2003, during the term of the 2002-05 labor agreement, the City sent the following letter to the Union requesting changes in the effective labor agreement:

. . .

After the recommendations of the Park & Recreation Commission to reduce the hours of the full-time Building Supervisors to part-time in order to reduce the City's budget by approximately \$26,000, the Personnel Committee has recommended to the Board of Public Works to review the recommendation and the unions suggestions for cost savings options.

After review, the Board of Public Works agreed rather than reduce the hours of full-time to part-time, the City at this time would be like [sic] to consider a recommendation from the union to reduce benefits in health insurance.

As you are aware, all non-union City employees who take the health insurance currently pay 10% of the costs. This reduced the 2003 budget by approximately \$4,200.00 for four employees. The City Council has required the portion of health insurance paid by City employees not represented by a bargaining union be increased to 15% for 2004. This will amount to a reduction of \$3,615.00 for the two employees still covered under the plan. Two employees have chosen not to take the health insurance plan for 2004, which will save the City approximately \$18,000.00 in health insurance costs. If the AFSCME Union employees covered under the plan were to pay 15% of the costs, this would

amount to a reduction of \$8,131.14 for health insurance costs in 2004. As noted in your recommendations, if one of the union employees were [sic] opt out of the plan and take the payout, the City would see a reduction of approximately \$10,000 in health insurance costs for one employee alone.

In 2004 the City will pay over \$100,000 in health insurance costs. This amount will increase from year to year with the uncertainty of the amount of increase in health insurance premiums. I believe the City and both bargaining units should strongly consider cost effective ways to reduce this burden on the taxpayers of the City of Brillion.

At this time, the City Council will not be considering a reduction in hours for Park & Recreation employees but would like to consider a reduction in health insurance benefits. If the union does not consider this reduction in benefit, to reduce the tax burden, the City may reconsider a reduction in hours and services provided.

Please contact me at your earliest convenience to schedule a time to meet to discuss this option.

. . .

Ultimately, no changes were made in the effective labor agreement and the City took no action to reduce the hours of Alt and McGlin to part-time status in 2003.

### FACTS

Some time in 2004, the City entertained a proposal to turn the operation of the BCC over to the YMCA. Public hearings were held on the question. And a referendum was held in which voters were asked whether they would approve of the YMCA operating the BCC. The voters voted in favor of the YMCA taking over operation of the BCC but the vote was very close. In these circumstances, the YMCA decided that it did not have the solid approval of the community and it withdrew its interest in taking over the BCC. The staffing of the BCC did not change after the referendum vote.

On September 21, 2004, a BCC staff meeting was held at which Hoerth told the Grievants that on September 27, 2004, they would be laid off if the City Council voted on a Personnel Committee recommendation to reduce all full-time Building Supervisors to part-time status (Union Exh. 6). On September 27<sup>th</sup>, the City Council approved the recommendation.

At a September 28<sup>th</sup> BCC staff meeting, Hoerth and City Administrator Gosz told BCC Building Supervisor present that as of November 1, 2004 (a tentative date), the City Council had approved the “termination” of the full-time Building Supervisor positions with automatic recall rights to part-time positions (20 hours/week or less). Hoerth stated that his original statement that the full-time Building Supervisors would be laid off was incorrect; and that the BCC full-time Building Supervisors would have no bumping rights as they were not being laid off. When asked about the date of the termination of the positions, Gosz stated that the City was only required to give 10 days written notice and that the November 1, 2004 date could change depending upon how long it took the City to hire and train additional part-time Building Supervisors.

The instant grievance was filed on September 28, 2004 and alleged, *inter alia*, that the City had unjustly terminated or discharged Grievants McGlin and Alt in violation of Section 3.01, 9.05, 10.01 and the grievance quoted the portion of the City’s Policies and Procedures Handbook regarding layoffs. On September 29, 2004, Hoerth issued a memo to then- part-time Building Supervisors Amy Zutz, Koren Schmidt, Amber Gosz<sup>2</sup> and Nicole Nienhaus regarding “staff changes” which read as follows:

. . .

At the September 27<sup>th</sup> City Council meeting the council decided to change the building supervisor structure at the BCC. As of November 1<sup>st</sup>, the BCC will employ [sic] all part time supervisors and rotate them throughout weekday and weekend hours. The plan is to employ [sic] a total of 8 part time supervisors and rotate their hours. This means there is more potential for hours during the week. I realize that you were originally hired for weekend shifts and you may not be able to work weekday hours due to work/school/other commitments. If you are not able to work during the week, the plan is that the other 4 supervisors will work more during the week and you can continue working more on the weekends, however I do want you working during the week as much as possible. If all hours can not be filled by 8 supervisors than I will continue to hire more part time workers until all shifts can be filled to get the job done. Once we get going we will also have full staff meetings/training, once a month, probably on a Sunday nights [sic] to keep up to date. Other policies will also be created/changing in the future so please be prepared when you see updates. If you have any questions or concerns about this feel free to come in and see me. Thank you.

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<sup>2</sup> No evidence was presented regarding whether Amber Gosz is related to City Administrator, Gosz.

Hoerth sent a memo to City Administrator Gosz indicating the number of sick leave, vacation, comp time and floating holiday hours used by Alt and McGlin between April 4, 2004, to October 31, 2004. The total was 350.5 hours over the seven month period, for an average of 50 hours per month or 12 hours per week.<sup>3</sup> Hoerth stated herein that when Alt and McGlin were absent and could not trade hours with each other prior to November 1, 2004, he and the Aquatics Director would have to fill in for them as Building Supervisors and that this interfered with their regular duties.

The Union submitted the following seniority list of BCC employees:

Brillion Community Center \_ Building Supervisor seniority list  
November 19, 2004 up to May 20, 2005

McGlin, Judy	11/19/1996
Schmidt, Koren	11/4/1996
Alt, Elizabeth	2/9/1998
<u>Zult, Amy</u>	<u>1/12/2002 left</u>

Gosz, Amber	8/25/2004
Nienhaus, Nicole	9/8/2004

Hired after Grievance and on payroll presently

Beth Kelly	?
Hienzi, Carolyn	5/4/2005

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<sup>3</sup> McGlin took six weeks of sick leave starting in November, 2004, and ending in early January, 2005. This sick leave was not included in the above figures.



The City submitted the following list of bargaining unit employees and their employment status as of May 5, 2004:

AFSCME Union Employees	Date of Hire	Length of Service (Years)	Position	FT/PT	Hrs/week	Retired
<b><i>Brillion Community Center</i></b>						
McGlin, Judy	11/9/1996	8.5	Building Supervisor/Receptionist	PT	20	
Schmidt, Koren	11/4/1996	8.5	Building Supervisor/Receptionist	PT	4.5	
Alt, Elizabeth	2/9/1998	7.2	Building Supervisor/Receptionist	PT	20	
Zutz, Amy	<del>1/12/2002</del>	<del>3.3</del>	<del>Building Supervisor/Receptionist</del>	<del>PT</del>	<del>15</del>	Resigned 4/25/05
Bleskey, Tracy	<del>7/30/2003</del>	<del>1.0</del>	<del>Building Supervisor/Receptionist</del>	<del>PT</del>	<del>4.5</del>	Resigned 7/25/04
Gosz, Amber	8/25/2004	0.7	Building Supervisor/Receptionist	PT	12	
Nienhaus, Nicole	9/8/2004	0.7	Building Supervisor/Receptionist	PT	16	
Kelly, Beth	11/23/2004	0.4	Building Supervisor/Receptionist	PT	16	Probation
Carolyn Henzi	5/4/2005	0.0	Building Supervisor/Receptionist	PT	4.5	Probation
<del>Schultz, April</del>	<del>3/6/2004</del>	<del>1.2</del>	<del>Custodian Helper</del>	<del>PT</del>	<del>15</del>	Resigned 04/04/05
Jane Moehn	4/4/2005	0.1	Custodian Helper	PT	15	
Goldschmidt, Lorraine	1/20/2004	1.3	Custodian Helper	PT	15	
Sittmann, Diane	<del>4/7/1992</del>	<del>11.8</del>	<del>Custodian Helper</del>	<del>FT</del>	<del>40</del>	Retired 1/30/04
Schmidt, Monica	5/12/1991	14.0	Maintenance Custodian	FT	40	80% BCC/10% CH/10% Lib
<b><i>Library</i></b>						
Enneper, Dahle	5/7/1991	14.0	Library Assistant	PT	32	
Emmer, Lorraine	1/19/1995	10.3	Library Assistant	PT	15	
Schneider, Mary	12/3/2002	2.4	Library Assistant	PT	10	
Peters, Therese	9/5/2003	1.7	Library Assistant	PT	7	
Horseill, Lynn	1/15/2004	1.3	Custodian Helper	PT	8.5	
<b><i>Department of Public Works</i></b>						
Jandrey, Dennis	3/24/1986	19.1	Working Leadman/Operator	FT	40	
Diederich, Joseph	9/7/2004	0.7	Truckdriver/Laborer I	FT	40	
<b><i>City Hall</i></b>						
Buboltz, Joy	9/2/1992	12.7	Library Assistant	FT	40	
Schoen, Vonnie	1/19/2002	1.3	Custodian Helper	PT	8	

On October 22, 2004, the City sent the Grievants the following (revised) memo concerning "Part-time Building Supervisor Positions":

...

On September 27, 2004 the City Council unanimously approved the elimination of the full time Building Supervisor/Receptionist positions at the Brillion Community Center with an automatic recall of the affected employees to part

time Building Supervisor positions with the effective date of 11/1/04. The Part-time Building Supervisor/Receptionist hourly rate of pay for 2004 is \$10.38.

Any payout for unused comp time, vacation, or floating holidays is to be determined by the Personnel Committee. Please contact your immediate supervisor regarding schedule changes.

. . .

### **POSITIONS OF THE PARTIES**

#### **The Union**

The Union argued that the City's actions in this case amounted to a layoff of Grievants Alt and McGlin — Alt and McGlin suffered a partial reduction in their work hours and they were recalled to part-time positions. Yet there was no overall reduction in work hours — the total number of Building Supervisor employees actually increased as some of Alt and McGlin's hours were simply given to other part-time employees in the same classification. Also at the time of their reduction in hours, the City treated McGlin and Alt as if they had been terminated, paying out their accumulated comp time, vacation and floating holidays.

The Union therefore urged that although the City's communications with Alt and McGlin were contradictory and confusing, the City's actions violated the labor agreement when it unilaterally laid off the Grievants making them part-time without following the contractual layoff provisions. The Union contended the City's reasons for partially laying off Alt and McGlin had nothing to do with flexibility or even saving money as the proven facts in this case failed to support these avowed reasons. Rather, the Union urged that the City was attempting to circumvent the contract and the Union, in taking away full-time benefits such as overtime, comp time, vacation and sick leave. The Union noted that the City had failed to convince the Union to concede these benefits in prior negotiations. The Union pointed to the City's 2003 letter to the Union seeking a 15% unit employee premium share on health insurance in lieu of reducing the BCC full-time staff, and City Exhibit 11 regarding the amount of time off Alt and McGlin were entitled to, constituted evidence of the City's true intentions.

In addition, the City's actions violated its own Policy which is referred to in Section 3.02 of the labor agreement and which all City employees receive (and sign acknowledging their receipt thereof). The Union noted that at page 28 of the Policy, the reasons for a layoff are stated yet none of those reasons was involved in this situation; that the written notice given

Alt and McGlin was insufficient according to the Policy as Alt and McGlin were not given 10 days' notice, no reason was given for the layoff and no statement of employee rights and benefits was included; employees were not given assistance in obtaining benefits; and part-time employees were not laid off first and McGlin and Alt were not allowed to "bump down" (Policy, 1 through 5). The Union urged that the grievance be sustained and that the Grievants be reinstated and made whole.

### The City

The City argued that this case involves the interpretation and application of Section 3.01, Management Rights, which the City asserts gives it the unfettered "authority to classify and assign work and determine the table of organization" in the City. Section 3.01 clearly and unambiguously states that the City has the exclusive right to set the City's table of organization, and unless there is an express provision of the contract that nullifies or limits the City's right, the City was privileged to eliminate all full-time Building Supervisor positions and create all part-time Building Supervisors instead.

Even if the Arbitrator disagrees, the City urged that she should recognize that the City possesses certain residual management powers which allow it to decide to employ only part-time Building Supervisors. Here, the City contended that the Union must show that a particular act of management was contrary to contractual provisions or obligations imposed upon management by the labor agreement. As nothing in the labor agreement or the City's Policy nullifies the clear rights expressed in Section 3.01 or the City's reserved management rights, the City urged that it has the right to structure its workforce in the most efficient and cost effective manner to accomplish the programs and services it desires pursuant to the labor agreement. In addition, no relevant bargaining history or past practice exists to limit or reduce the City's rights.

Furthermore, the City argued that its decision to reduce McGlin and Alt's hours to part-time was reasonable as it resulted in more efficient operations and flexibility in staffing the BCC. In 2003, BCC Director Horeth and the Aquatics Director had to fill in when McGlin and Alt were off and could not cover for each other. After the City went to all part-time Building Supervisors, Horeth and the Aquatics Director continued to have to fill in open shifts but it was less often than when McGlin and Alt were full-time.

The City asserted that Section 9.05 of the contract is not applicable to this case. On this point, the question is whether a reduction in hours constitutes a "layoff" within the meaning of Section 9.05. As the term "layoff" is not defined anywhere in the parties' labor agreement, "layoff" must be given its ordinary meaning. The City cited three dictionary

definitions of the term “layoff.” All of the definitions, the City noted, listed the requirement that the employee suffer a complete separation from employment. Such a separation does not occur where, as here, only a reduction in hours or a change from full-time to part-time status has occurred with the employees continuously employed. In addition, no contract language exists here indicating that a layoff could occur without a total break from employment. Section 9.05 does not refer to a reduction in hours or to partial layoffs. Herein, McGlin and Alt continued to be employed in the same position, performing the same tasks, as prior to their reduction from full-time to part-time status. The layoff procedure in Section 9.05 is triggered only if there is a layoff, and none occurred here.

The City observed that when a full-time Custodian Helper retired, the City decided to eliminate the full-time position and establish four part-time Custodian Helper positions without objection from the Union. Also, the City noted that in the 1990s, it had previously employed only part-time Building Supervisors. Thus, past practice also supports the City’s claims herein. In any event, laying off the least senior part-time Building Supervisors would not have accomplished the increased efficiency and flexibility needed by the City. Even if Section 9.05 were to be applied, the results would have to be the same to gain the efficiency and flexibility required by the City.

Finally, the City argued that its Policies and Procedure Manual does not apply to this case and even if it is applicable, the result would be the same. First, the Handbook does not apply by its terms if it conflicts with an effective labor agreement. The Handbook conflicts with the City’s powers contained in Section 3.01 and the specific layoff language of Section 9.05. In any event, the layoff portion of the Handbook applies only if a layoff has occurred and the Handbook does not define a layoff as a reduction in hours, partial layoff or reduction from full-time to part-time status.

If the City were required to follow its Policies in this case, it would not accomplish the efficiencies and flexibility it needs leading to absurd results. In any event, the City asserted the results would again be the same if the Policy were applied: Alt and McGlin could only bump other part-time employees and this would not change their status or benefits.

In sum, the City argued that the Arbitrator should not be swayed by the economic consequences of her Award for the City or the Grievants. Rather, the Arbitrator should follow the contract which requires that the grievance be denied and dismissed.

## **REPLY BRIEFS**

### **The Union Reply**

The Union urged that past staffing patterns should not be relevant. The Union also contended that the cases cited by the City, RICHLAND COUNTY, CASE NO. 149, NO. 62365, MA-12254 (MCGILLIGAN, 2004) AND SHEBOYGAN SCHOOL DISTRICT, DEC. NO. 5722 (BURNS, 1998), contained different contract language and were also factually distinguishable from this case. The Union thus relied on the arguments made, its initial brief, and it asked the Arbitrator to sustain the grievance and make Alt and McGlin whole.

### **The City**

The City argued that the Union had failed to address its Management Rights arguments in its initial brief; and that there is nothing in the labor agreement, which expressly limits or nullifies the City's reserved rights to assign work and determine the table of organization. The City reiterated its prior arguments that its Policy and Section 9.05 of the labor agreement are not applicable here; that the reduction in Alt and McGlin's hours did not constitute a layoff (under the Policy and Section 9.05) as both employees remained employed by the City at all times; that even if the Policy and/or Section 9.05 were found to apply to Alt and McGlin's situation, the results would be the same. The City noted that the law review article quoted by the Union was taken out of context and that the quoted material referred to layoffs, which did not occur in this case. Finally, the City urged that if the Arbitrator applied the Policy this would lead to nonsensical results and it urged the Arbitrator to deny and dismiss the grievance.

## **DISCUSSION**

The Management Rights Clause of the effective Agreement, Article III Section 3.01, states that the City has the right to "layoff" City employees and that it has the right to "subcontract provided no recognized regular full-time employee is laid off." The record facts in this case do not show that the City has subcontracted the Building Supervisor work. Rather, the City has hired regular part-time workers to perform the available work while also reducing the two regular full-time Building Supervisors from full-time status to part-time status. No third party subcontractor (with its own employers) has entered the picture here, as is normally true in subcontracting cases. Therefore, the subcontracting portion of Section 3.01 does not apply to the situation before this Arbitrator.

The next question that must be answered is whether the City's actions in this case amounted to a layoff of McGlin and Alt. As a general rule, layoffs commonly involve a

separation from employment. The separation may be total or partial; it may be temporary (seasonal) or permanent. In this case, there is a good deal of evidence to show that the City treated Alt and McGlin as if they had been terminated, as the City paid out all of their accrued full-time benefits through October 31, 2004, before the City changed their status to part-time. Also, based upon the City's actions, both McGlin and Alt applied for and received Unemployment Compensation and no evidence was submitted herein to show that the City contested McGlin and Alt's application for Unemployment Compensation benefits. This Arbitrator notes that at one point Hoerth told McGlin and Alt they would be laid off and that they could re-apply for part-time employment, but that later he told them that their positions would be terminated "with automatic recall to part-time status" (Union Exhibit 5). However, it is significant that Alt and McGlin did not have to reapply for open part-time Building Supervisor positions and that they remained employed by the City, suffering no actual time off due to their partial layoffs. In these circumstances, it is clear that Alt and McGlin were partially laid off by the City Council's September 28<sup>th</sup> action.

The next question that must be answered is what provisions of the contract and/or the City's Policy were applicable to this partial layoff. Here, the language of Article IX Section 9.05 specifically provides that if "permanent employees" are laid off, employees with ". . . the shortest in length of service in the department shall be laid off first. . ." and when recalled, those with ". . . the greatest length of service in the department shall be called back first. . ." Notably the terms "lay off" and "laid off" are not further defined in Article IX or anywhere else in the labor agreement. Given this fact, and the fact that the contract contains no other limiting language, it is reasonable to conclude that all layoffs, including partial layoffs, were intended to be covered by the language of Article IX.

The City noted that in the past, when a full-time Custodian retired, the City decided not to replace that employee and it instead reorganized the department and hired four part-time Custodians thereafter. The City argued that because the Union had not complained about the City's actions in this prior, similar case, the City's actions stand as a relevant and binding past practice in this case. This Arbitrator notes that the Union submitted no evidence to dispute the City's claims and that it did not object to the City's proffer of evidence on this point. This Arbitrator finds that although the evidence of this prior case tends to support the City's arguments herein, the proffered evidence falls far short of a showing that a binding, mutually-agreed upon past practice existed between these parties on this point.

It is important that there is no language in the labor agreement which gives employees bumping rights. Rather, bumping is referred to only in the City's Personnel Policies and Procedures Manual (Policy) which has existed along with the Union's labor contract for many years. In this case, the City argued that its Policy does not apply given that a collective bargaining agreement covers McGlin and Alt. In the circumstances of this case, this Arbitrator disagrees.

Initially, this Arbitrator notes that Article III, Section 3.02 grants the City the right to establish “reasonable work rules,” the reasonableness of which the Union reserved the right to grieve. The City’s Policy constitutes the type of “rules” referred to in Section 3.02. This Arbitrator notes that unit employees were issued copies of the Policy and that they signed an acknowledgment of their receipt thereof. In addition, this Arbitrator notes that the provisions of the Policy do not conflict with the express terms of the parties’ labor agreement. Rather, the Policy appears to fill in some of the blanks in the labor agreement. For example, the Policy defines some circumstances under which layoffs “could occur,” but it does not attempt to definitively describe when layoffs will occur. In short, the Policy does not prohibit the City’s actions in laying off McGlin and Alt. Therefore, the express language of Article III reserved to the City the rights to “assign work and determine the table of organization,” “except as hereinafter provided.” Notably, there is nothing in the labor agreement which specifically limits or diminishes the City’s (quoted) Article III management rights.

Notwithstanding the above, the City’s Policy provides unit employees with certain rights:<sup>4</sup> written notice of layoff, counseling, the offer of assistance, the right to ask questions and to request to bump down any other City employee “with less seniority.”<sup>5</sup> Although the City’s Policy was not negotiated with the Union, I find it does not conflict with the effective labor agreement and therefore the City is bound to follow its Policy in this case. As the City failed to follow the Policy provisions detailing employee rights (listed above), the City violated the Policy and thereby violated Section 3.02 of the labor agreement. The City must remedy its failure to properly notify, to counsel, to allow questioning, and to offer assistance to Alt and McGlin regarding their layoffs.

In addition, Alt and McGlin were denied any right to bump. On this point, this Arbitrator notes that McGlin requested to bump and that City Administrator Gosz and Director Hoerth denied Alt and McGlin’s rights to be considered for bumping under the Policy.<sup>6</sup> The City’s refusal to allow Alt and McGlin to request to “bump down” under the Policy must also be remedied by this Award.

The City has argued that even if Section 9.05 should have been applied to Alt and McGlin’s situation it need not have been as the results would have been the same. This

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4. In regard to which employees must be laid off (and recalled) and how that is to be done, Article IX of the labor agreement is more specific and it controls those areas.
  5. The bumping right described in the Policy does not limit bumping to unit employees.
  6. The Policies and Procedures Manual states that the City will consider the employee’s “seniority and capacity to do the tasks required” in considering an employee’s request to displace or bump an employee with less seniority and that bumping is subject to the approval of the Personnel Committee.

Arbitrator disagrees. In the view of this Arbitrator, given the seriousness of the City's actions here, the City was required to follow the exact letter of the clear and unambiguous contractual requirements after it decided to reorganize the BCC and employ only part-time Building Supervisors. Thus, in order to layoff Alt and McGlin, the City should have laid off *all* less senior employees in the BCC in order to reduce Alt and McGlin to part-time employees, and then the City should have offered the laid off employees the opportunity to "bump down" "based on seniority and a capacity to do the tasks required"<sup>7</sup> pursuant to the City's Policy. After the bumping ceased, the City should have posted any remaining part-time openings<sup>8</sup> pursuant to Article IX, Sections 9.01 and 9.02.<sup>9</sup>

A great deal of evidence was submitted in this case regarding the City's reasons/motivations for partially laying off Alt and McGlin.<sup>10</sup> This evidence essentially goes to the merits of the City's decision to employ only part-time Building Supervisors and it is not relevant. In short, there is no language in this labor agreement which would prevent the City from making the business decision to employ only part-time Building Supervisors<sup>11</sup> even if that decision appears to be ill-considered, not based upon full consideration of all options or a proper assessment of the substantial and compelling evidence.

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7. The Personnel Committee's consideration of the employee's requests to bump would be subject to an arbitrary or capricious type of standard.
  8. No evidence was submitted herein to show that the City ever posted any part-time BCC openings.
  9. The Union has requested that Alt and McGlin be made whole. Based upon the above analysis, it is unlikely that any backpay will be due/owing after the City has complied with this Award.
  10. This evidence included the fact that the City did not save any substantial amount of money by laying off Alt and McGlin; that the City had attempted in 2003 to force the Union to agree to insurance concessions by threatening to lay off full-time Building Supervisors if agreement was not reached; the City's 2002 contract proposal (later withdrawn) to use part-time Building Supervisors on the weekends to avoid overtime liability; and the City's failure to address the Union's October 16, 2003 cost savings memorandum for five months.
  11. It is significant in this case that there is no contractual provision guaranteeing BCC employees' work hours and that the contract covers full and part-time employees, granting prorated benefits to part-time employees.



Based upon the record evidence and argument and the above analysis, this Arbitrator issues the following

**AWARD**<sup>12</sup>

The City violated the labor agreement and its Personnel Policies and Procedures Manual by the manner in which it laid off Grievants McGlin and Alt and then recalled McGlin and Alt to part-time positions effective November 1, 2004.

To remedy the violations found in this case, the City shall reverse its prior actions and follow the applicable provisions of Section 9.05 and its Policies and Procedures Manual to lay off BCC employees and then consider their bumping requests, if any.

Dated at Oshkosh, this 1<sup>st</sup> day of November, 2005.

Sharon A. Gallagher /s/

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Sharon A. Gallagher, Arbitrator

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12. This Arbitrator shall retain jurisdiction of the remedy only in this case should the parties have difficulty agreeing upon the details of the remedy herein.