

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
ASHWAUBENON PUBLIC SAFETY OFFICERS' ASSOCIATION

and

VILLAGE OF ASHWAUBENON

Case 45
No. 69273
MA-14550

(Outside Employment Grievance)

Appearances:

Aaron Halstead, Hawks Quindel S.C., Attorneys at Law, 222 West Washington Avenue, Suite 450, P.O. Box 2155, Madison, Wisconsin 53701-2155, appearing on behalf of the Association.

James Korom, von Briesen & Roper, S.C., Attorneys at Law, P.O. Box 3262, 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53201-3262, appearing on behalf of the Employer.

ARBITRATION AWARD

The Ashwaubenon Public Safety Officers' Association, hereinafter referred to as the Association, and the Village of Ashwaubenon, hereinafter referred to as the Village or Employer, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances arising thereunder. The Association made a request, with the concurrence of the Employer, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide the above-captioned grievance. The undersigned was so designated. A hearing was held in Ashwaubenon, Wisconsin on February 9, 2010. The hearing was not transcribed. The parties filed briefs and reply briefs whereupon the record was closed on May 11, 2010. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUE

At the hearing, the parties stipulated to the following issue:

Did the Village violate the collective bargaining agreement as alleged in the grievance?

When the Association filed their initial brief though, it worded the issue differently. Their new wording was this:

Whether the Village violated the 2007-2008 collective bargaining agreement when its Director of Public Safety denied Public Safety Officer Eric Paulowski's request to maintain secondary employment with the City of Seymour Police Department?

In its reply brief, the Employer noted that the Association's wording of the issue in its initial brief was not the issue which was stipulated to at the hearing. While there is little substantive difference between the stipulated issue and the issue proposed by the Association in their initial brief, I am going to hold the Association to the issue which they agreed to at the hearing. Thus, I am going to answer the issue which the parties stipulated to at the hearing.

PERTINENT CONTRACT PROVISION

The parties' 2007-08 collective bargaining agreement contained the following pertinent provision:

ARTICLE XXXII

OUTSIDE EMPLOYMENT

Due to the nature of the duties and the services required of the Public Safety Department employees, all secondary or outside employment shall receive the prior written approval of the Director.

BACKGROUND

Unlike virtually every municipality in the state of Wisconsin, the Village of Ashwaubenon operates a Public Safety Department. This department provides law enforcement, firefighting, and paramedic/EMT service to the community. There are 36 employees in the department who are known as Public Safety Officers (PSOs). The Association represents the PSOs. Five of them work a normal five-day schedule as investigators or police school liaison officers. The remaining 31 work a "firefighter-type" work schedule, consisting of a 24 hour shift on and two 24 hour shifts off, rotating throughout the year. There are 10 employees scheduled to work on each of the three shifts (A, B, and C). The PSOs who work 24 hour shifts are scheduled for road patrol for their first eight hours, where they perform traditional police functions. They spend their remaining 16 hours waiting for fire or paramedic/EMT calls for service.

In addition to the regularly scheduled hours of work, all employees are required to attend an additional shift once per month for a variety of supplementary training. Beyond that, employees are expected to maintain proficiency with their firearms, and spend time at the

range doing so. Finally, employees are required to testify in court on their off days as well. The record indicates that happens about ten times a year.

PSOs who are off-duty are not usually called back in to work. When an absent employee's shift needs to be filled, employees are first called using a rotating system. If a PSO answers a call from the station wherein they are ordered to report for duty, they are obligated to obey that order. However, an off-duty PSO can choose to "duck" calls from the station when the employee suspects they intend to order him in to work. According to the Chief's testimony, it is becoming increasingly difficult to fill vacant shifts.

. . .

This is an outside employment case wherein the Employer denied an employee's request to work part-time for another employer. This case involves the first time where a PSO's request to engage in outside/secondary employment was denied by the Employer.

The parties' collective bargaining agreement contains a provision which requires employees to secure the "written approval of the Director" prior to obtaining any secondary or outside employment. That language has been in the collective bargaining agreement since at least 1986. Insofar as the record shows, it has never been the subject of a grievance arbitration. Additionally, since 1995, the Department has had a written policy concerning off-duty employment. That policy was updated in 2007. That policy applies to both bargaining unit employees and supervisors. That policy has not been grieved or challenged by the Association. That policy provides in pertinent part:

I. Purpose

The purpose of this policy is to establish guidelines governing the outside employment and business interests of the Ashwaubenon Department of Public Safety members.

II. Policy

It is the policy of the Ashwaubenon Department of Public Safety that employees may engage in outside employment and business interests, provided that such activity does not violate any Federal, State, or local laws or ordinances, is in conformance with departmental guidelines, does not create a conflict of interest, and does not interfere with the performance of their duties as employees of the Department.

III. Procedure

A Required Approval

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B. Limitations

1. Permission to perform outside employment or to be involved in a business interest may be denied or suspended when it is deemed that the employee's overall performance evaluation is rated less than satisfactory.
2. Approval or revocation of the requests will be contingent on the review of the following criteria.
 - a. Type of work;
 - b. Hours to be worked;
 - c. Employer; and
 - d. Department work performance.

When an employee in the Ashwaubenon Public Safety Department wants to have outside employment, they complete a request for authorization of secondary employment on a Village-prescribed form. On that form, they list what their duties will be (in the outside employment) and what their work hours will be. With regard to the latter category (i.e. their work hours), the record indicates that common responses have been "various" or "varied".

The record shows that the Village has permitted outside employment by PSOs and other department employees in the following circumstances: as paramedics, nurses, and health care providers; as firearms instructors at the local technical college; as fire, EMS and police science/public safety instructors at the local technical college; and as law enforcement officers. This last category (i.e. law enforcement officers) is the most pertinent to this case. Accordingly, it is expounded on in the following paragraphs.

The following PSOs and managerial law enforcement officers with the Ashwaubenon Public Safety Department have been granted permission to work as police officers for other agencies.

Randy Bani was a (shift) commander with the Ashwaubenon Public Safety Department. That's a full-time managerial position. Bani retired this year. While he was with Ashwaubenon, he also worked part-time for the Hobart/Lawrence Police Department. He started working for Hobart/Lawrence in 2003 while he was a commander with Ashwaubenon. He was hired by Hobart/Lawrence as a sergeant. Initially, he worked 15 hours a week. In 2004, Bani became Hobart/Lawrence's Police Chief. He now works 24 hours a week in that position, although as chief, he controls his own work schedule.

James Molloy was a (shift) commander in the Ashwaubenon Public Safety Department when he retired in 2007. As just noted, that's a full-time managerial position. While he was

with Ashwaubenon, he also worked part-time for the Town of Freedom Police Department. He started working for that Town's Police Department in 1998 while he was a sergeant with the Ashwaubenon Public Safety Department. Between 1998 and 2000, Molloy worked as a road patrol officer. In that capacity, he made arrests. From 1998 to 2008, he worked 20 hours per week. In 2000, he became that Town's Police Chief. He still holds that position today. As police chief, he continues to perform patrol duties, but with reduced frequency.

Rick Buntrock worked for the Ashwaubenon Public Safety Department for 20 years before retiring in 2008. From 1998 to about 2005, he was a PSO. For the last three years of his employment with Ashwaubenon he was a supervisor (i.e. a lieutenant). In 1998, while he was a PSO in Ashwaubenon, he worked part-time for the City of Seymour Police Department as a road patrol officer.

Tomas Baxter currently works as a PSO for the Ashwaubenon Public Safety Department. Beginning in 2005, he started working about 16 hours per month as a Coast Guard Reserve law enforcement officer.

Donald Penza currently works as a PSO for Ashwaubenon. For about one year in the early 1980s, he worked as a police officer for the Town of Brillion. During that year, he worked about eight hours per week for Brillion.

Finally, the record shows that in 1986, six PSOs in the Ashwaubenon Public Safety Department worked as private security for a local mall. The PSOs worked about 15 to 20 hours per week in those mall security positions.

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The record indicates that Eric Paulowski had previously applied for two specialized assignments within the Ashwaubenon Public Safety Department – namely, fire instructor and field training officer – but he was not selected for those assignments.

FACTS

Eric Paulowski has worked for the Village as a PSO since March, 2005. He is a line employee who works a 24 hour shift. His job performance ratings have been satisfactory or above.

In mid-2009, the City of Seymour advertised that it would be hiring a part-time police officer. The City of Seymour is located about 25 miles from the Village of Ashwaubenon. Paulowski, who lives close to Seymour, applied for that position. He subsequently took several tests for the position and was interviewed. On June 2, 2009, he was notified that he was the second candidate on the eligibility list.

On June 5, 2009, Paulowski submitted a request for authorization of secondary employment on the Village-prescribed form. In his request, Paulowski wrote that he was requesting authorization for secondary employment with the City of Seymour Police Department performing "Police Patrol" duties, and that his hours with Seymour, if hired, would be "varied".

Insofar as the record shows, Paulowski was the first Ashwaubenon PSO since 2005 to request to work as a police officer in another jurisdiction.

On June 9, 2009, Commander Randy Tews issued his written recommendations concerning Paulowski's request. Therein, he recommended against approving Paulowski's request for secondary employment for the following reasons. First, he cited potential scheduling conflicts with the Seymour Police Department. Second, he noted that Paulowski had applied for positions within the Department as a field training officer and a fire instructor, and he (Tews) expressed concern over the impact that outside employment would have on Paulowski's ability to develop his career with the (Ashwaubenon Public Safety) Department. Third, Tews expressed concern about the fact that Paulowski is relatively low on the seniority list which "puts him in a position to work or be ordered in for various overtime assignments that again would effect both departments." Finally, Tews noted that "Paulowski is a very good officer with our department and I would not want to see his career hurt by secondary employment that is a big commitment to another community. . ."

On June 11, 2009, Public Safety Department Director Eric Dunning denied Paulowski's request. His written explanation consisted of the following sentence: "The Department would incur to[o] great of a liability if this employment was allowed." Prior to denying Paulowski's request for outside employment with Seymour, Chief Dunning did not contact the Seymour Chief of Police, Rick Buntrock, to ask him anything about the position Paulowski was seeking with Seymour. Dunning did not speak to Paulowski about the position either.

On June 12, 2009, Association Vice-President Tomas Baxter wrote to Director Dunning, stating that the Association had learned of the Director's denial of Paulowski's request for outside employment. The e-mail went on to state that "Commander Bani has secondary employment with another law enforcement jurisdiction, and some of our line officers assist with training outside of the department, as secondary employment, for law enforcement purposes." The e-mail concluded by asking Dunning if he would "elaborate on [his] basis for denial." On June 15, 2009, Dunning responded as follows:

. . .This is a complicated issue and I realize that this will not likely be resolved by e-mail. I did not support some admin decisions that were made in the past, so what has happened in the past is not an automatic for the future. This is not a personal decision, this has to do with unforeseen liability and legal considerations. . .

On June 24, 2009, the Association filed a grievance over the Director's denial of Paulowski's request for secondary employment. The grievance did not cite a specific provision in the collective bargaining agreement which was allegedly violated. Rather, the grievance posed the following questions:

The APSOA would like to know why a current full time employee of Ashwaubenon Public Safety is allowed to maintain their secondary employment with another law enforcement jurisdiction, if the unforeseen liability of this secondary employment is also possible with their employment. Commander Bani of Ashwaubenon Public Safety has secondary employment with the Hobart Police Department, as the Chief of the department. The APSOA would also like to know if the basis for the denial would adversely affect secondary employment with respect to positions in the Fire or EMS service due to the high probability of death, great bodily harm, and possible liability on Ashwaubenon Public Safety due to the inherent danger associated with these positions.

On July 7, 2009, the Director denied the grievance. In his denial, he listed the following reasons for denying Paulowski's request for outside employment "as a front line officer with the Seymour Police Department or any law enforcement department":

1. Ashwaubenon Public Safety Training Liability – If Officer Paulowski were to be involved in an incident where Use of Force, Emergency Vehicle Operations, Firearms, or any other trained technique is used while working for the Seymour Police Department it would be assumed that a majority of the officer's training, if not all of his training, during his law enforcement career has been provided by Ashwaubenon Public Safety.
2. Off Duty Arrest Powers – As a law enforcement officer in the State of Wisconsin you are authorized to make arrests off duty. Under what jurisdiction would Officer Paulowski be assuming if he were to make an off duty arrest and who would be liable if the off duty officer or the suspect is injured during the arrest procedure?
3. Court Appearances – What happens when the officer is summoned to appear in court and he is scheduled to work for the other municipality?
4. State of Emergency/Natural Disaster – As we all know in public protection we cannot predict what is going to happen and how long the duration of the event may last. Who is responsible when one department's emergency staffing needs effect the other department's scheduling requirements?

The response went on to address Commander Bani's situation:

The issue of Commander Bani from the Ashwaubenon Public Safety Department being employed by Hobart/Lawrence Police Department as Commander Bani's secondary employment occurred while Chief Gary Wieczorek was Chief of Ashwaubenon Public Safety. Commander Bani's secondary employment was approved by the Village Board. Commander Bani's job description for the Hobart/Lawrence Police Department was that of a Lieutenant. Commander Bani's primary responsibility was for investigations and office administration paperwork. Commander Bani was not hired as a front line patrol officer and did not work as a patrol officer. Since that time Commander Bani has been promoted to the position of Chief for the Hobart/Lawrence Police Department. In being the Chief, Randy Bani has no patrol responsibilities and his duties are strictly administrative.

The grievance was subsequently processed through the other steps of the contractual grievance procedure and was ultimately appealed to arbitration.

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Several days before the arbitration hearing, Director Dunning called the Seymour Police Chief, Chief Buntrock, and inquired about the nature of the (Seymour) part-time position.

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Seymour Police Chief Buntrock testified at the hearing. He testified that the candidate who was ranked number one did not accept the part-time position, so as a result, he would have offered the position to Paulowski had Ashwaubenon permitted him to accept it. The record indicates that Chief Buntrock was familiar with the Ashwaubenon Public Safety Department because, as previously noted, he worked for that department for 20 years before retiring in 2008. After he retired from Ashwaubenon, he became Seymour's police chief. Buntrock also testified that if Ashwaubenon would have permitted Paulowski to accept the part-time Seymour position, he (Buntrock) would have understood that Paulowski's Ashwaubenon employment took precedence over the Seymour employment. He further testified that he would have accommodated Paulowski's work schedule with Ashwaubenon, and would have been flexible with respect to the hours he assigned to Paulowski. Buntrock also testified that some months, the part-time officer works no hours at all and, at other times, works several hours per week.

POSITIONS OF THE PARTIES

Association

The Association contends that the Employer violated the parties' collective bargaining agreement when it denied PSO Paulowski's request to maintain secondary employment with the City of Seymour Police Department. It elaborates as follows.

The Association argues at the outset that the contract provision involved here – namely Article XXXII – does not say what the Employer reads it to say, namely that there is a “presumption” that all “secondary or outside employment is automatically denied unless it receives ‘prior written approval’ of the Director.” The Association sees the logic underlying that interpretation as problematic. It asks rhetorically how can a request possibly be denied before it is made. The Association argues instead that the contract language “provides no assistance in understanding what factors may permissibly inform the Director’s decision making when a PSO presents a request for authorization to engage in outside employment.” Building on that premise, the Association maintains it will be necessary for the arbitrator to consider things other than just the contract language in resolving this dispute.

The Association also contends that the numerous appellate court decisions which the Employer cited in their initial brief are not helpful in resolving this dispute. The Association maintains that none of those cases involved disputes arising under a collective bargaining agreement, and contract language dealing with outside employment. The Association sees that as significant because that’s what this case involves. The Association therefore asks the arbitrator to ignore those decisions.

The Association submits that in this case, the arbitrator can get the guidance needed to resolve this dispute from the following two sources: the Employer’s outside employment policy and the Employer’s past responses to requests for secondary employment.

First, as just noted, the Association relies on the Employer’s off-duty employment policy. While the Association reads the Employer’s initial brief to “barely mention the policy”, it’s the Association’s view that that policy provides great guidance in resolving this contract dispute. Here’s why. The Association notes at the outset that that policy has been in place since 1995. It further notes that it was revised by Director Dunning in 2007. It further calls attention to the fact that it (i.e. the policy) is referenced in the Village-promulgated Secondary Employment Authorization form which an employee has to complete when requesting approval. Next, the Association addresses the language in the policy itself. The Association calls particular attention to the second paragraph in the policy. According to the Association, that paragraph rebuts the Employer’s claim that the “presumption” is that outside employment is prohibited. As the Association reads it, that paragraph “makes clear that employees are presumed to be permitted to engage in such employment, and that denials of requests for such employment are the exception.” Said another way, the “default” position is that outside employment is permitted unless contraindicated by the exceptions stated in the policy. Next, the Association asserts that that same paragraph then goes on to specify four specific exceptions (to the “default” position). The Association asserts that an activity is permitted as long as it: (1) does not violate any Federal, State or local laws or ordinances; (2) is in conformance with departmental guidelines; (3) does not create a conflict of interest; and (4) does not interfere with the performance of [the PSO’s] duties as employees of the Department. The Association characterizes these as the four disqualifiers. The Association contends that the Employer did not establish that the part-time employment Paulowski proposed would have fallen within any of the four disqualifiers. Building on that premise (i.e.

that the Employer did not demonstrate that Paulowski's proposed Seymour employment ran afoul of one of those four disqualifiers), the Association maintains that the Village was obligated by the policy to permit Paulowski to accept that employment.

While the Association believes that the Village has to base its denial of Paulowski's request on the four disqualifiers in the policy just referenced, it notes that the Employer nonetheless proffered different reasons for the denial than those referenced in the policy. The Association argues that since those reasons "do not root themselves in one or more of the four prongs of that policy, such reasons cannot be taken as proper basis for that denial." However, if the arbitrator addresses those grounds, it's the Association's view that they lack merit. Here's why.

The Association first addresses the "liability" statement which the Director made when he denied Paulowski's request (namely, that Paulowski's part-time employment with Seymour would have caused the Village to "incur to[o] great a liability if this employment was allowed." The Association contends that at the hearing, "the Village produced no evidence that it - or any other Wisconsin law enforcement agency - has ever been subjected to claims or suits as the result of a police officer's employment with another law enforcement agency." Additionally, it noted that the Employer "offered no evidence that its insurer had counseled it against allowing Paulowski to work for Seymour." Finally, the Association points out that the Village regularly provides training in police functions (such as defensive and arrest tactics, emergency vehicle operation, and use of tasers) to officers employed by other Brown County municipalities. As the Association sees it, "if the Director truly harbored the liability concerns he expressed in denying the grievance, he would not permit PSOs to provide police training to officers of other jurisdictions since to do so would create the potential for a citizen to sue the Village for the acts in which those other officers engage on behalf of their municipal employer." Putting all the foregoing together, the Association maintains that the record facts fail to substantiate the Director's assertion that the Seymour employment created any potential for Village liability.

Next, the Association addresses the other four reasons which the Director added when he responded to the grievance. With regard to the first reason (i.e. the potential for liability), the Association avers that "there is no evidence to support the notion that a Wisconsin police officer's performance of part-time law enforcement duties, as an employee of one jurisdiction, can give rise to liability of another jurisdiction, in which case he is employed on a full-time basis." With regard to the second reason (i.e. that if Paulowski were to make an off-duty arrest, it cannot be known whether an aggrieved arrestee would sue the Village or sue Seymour), the Association maintains that reason has no basis in fact in the record. According to the Association, "employment with Seymour would actually have the impact of diluting the Village's liability for off-duty conduct; i.e., the would-be arrestee would now have two potential targets for his suit, rather than just the Village." With regard to the third reason (i.e. the concern regarding court appearances), the Association contends that "any such speculative concerns evaporate under the light" when one considers Chief Buntrock's statement that Paulowski's position would take precedence over his Seymour employment, and as a result, he

would have to be flexible in setting Paulowski's schedule. The Association points out that the reason the Director did not know this was because he did not contact Chief Buntrock before he denied Paulowski's request. The Association maintains that the Director's rejection of Paulowski's request "prevented him from appreciating that the requested outside employment would not have conflicted with Paulowski's Village responsibilities." With regard to the fourth reason (i.e. the concern regarding emergencies and natural disasters), the Association asserts that concern has no support in the record evidence. According to the Association, "there is no reason to believe that PSO Paulowski would have been less available to the Village in the event of an emergency or that the MABAS system would not have provided the Village with all of the assistance necessary in such an event."

Next, the Association responds to the reasons which were raised in the Employer's initial brief for denying Paulowski's request. First, it addresses the Employer's contention that allowing Paulowski to accept the part-time Seymour position would have caused the Village difficulty in filling vacant road shifts. The Association disputes that contention and avers that PSOs have "no contractual obligation to accept an order-in on his or her days off." Building on that premise, the Association maintains that "allowing Paulowski to accept the part-time Seymour position would not have resulted in his shirking any obligations he has to the Village." Second, the Association addresses the Employer's contention that the Director's refusal to allow Paulowski to engage in outside employment was proper, in part, because of Paulowski's interest in the assignments of fire instructor and field training officer. The Association disputes that contention and notes that neither the Director's denial of Paulowski's request, nor his later denial of the grievance, made any reference to Paulowski's expression of interest in those assignments.

Finally, the Association disputes the Employer's contention that past practice is inapplicable here. The Association asks rhetorically: "by what standard does the Village suggest the Arbitrator decide this case. . .?" As the Association sees it, the parties' practice under the agreement and the Village-promulgated policy is very relevant because it provides a "prism" through which Paulowski's request is to be viewed and, as a result, "must inform the Arbitrator's analysis here."

The Association contends that when the arbitrator reviews the types of outside employment which the Employer has allowed in the past, it weighs strongly against a conclusion that the part-time Seymour position would have violated the Employer's outside employment policy. Here's why. First, the Association emphasizes that prior to this matter, the Employer had never denied a PSO's request to engage in secondary employment. Second, it points out that the Employer has previously allowed employees to engage in what it calls a "plethora" of different types of secondary employment. Third, it emphasizes that one of the types of secondary employment which the Employer has allowed is law enforcement work. It notes that both managerial and bargaining unit employees have been allowed to do this work. With regard to the former (i.e. managerial employees), the Association notes that Commanders Bani and Molloy were granted permission to do police work in other jurisdictions (Bani as police chief with the Hobart/Lawrence Police Department and Molloy as the police chief with

the Town of Freedom). With regard to the latter (i.e. PSOs), the Association notes that PSOs Penza and Buntrock were granted permission to do part-time police work in other jurisdictions (Penza for the Town of Brillion and Buntrock for the City of Seymour). As the Association sees it, this history casts further doubt on the Employer's claim that outside employment is presumed to be impermissible.

In sum, it's the Association's view that after the arbitrator considers the language in the collective bargaining agreement, the pertinent policy, and the Employer's historical conduct in granting previous requests for secondary employment, the arbitrator should grant the grievance and issue what it calls the "appropriate" make whole remedy.

Employer

The Employer's position is that the Director's decision to deny Paulowski's request to work part-time for the Seymour Police Department was appropriate, that no provision of the collective bargaining agreement prohibits such an exercise of discretion, and that no contract violation occurred. It elaborates as follows.

The Employer begins its argument by initially addressing the scope of the arbitrator's jurisdiction to review the Director's decision. It notes in this regard that while the parties' contractual grievance procedure identifies three different types of matters which can be grieved, just one of the three matters can be appealed to arbitration, namely matters involving the "interpretation, application or alleged violation of a specific provision of this Agreement." It addresses the specific provision involved here later in its argument.

Next, the Employer maintains that the burden of proof in this case is on the Association. It maintains that should the Association argue the existence of some implied "reasonableness" standard in the application of Article XXXII, or attempt to bootstrap the grievance procedure language about "unfairness", or "misapplication" of a policy or practice, the Association bears the burden to overcome a presumption that the Village acted appropriately in this matter. According to the Employer, arbitrators will give the benefit of the doubt to the employer, and require the Association to show that the employer had no reasonable basis to take the action it did, unless the contract language specifically sets some sort of standard to be applied. The Employer contends that the contract language involved here does not set such a standard, nor does it modify or limit management's prerogatives. Building on that premise, and on what it characterizes as "the generally accepted 'residual rights' theory", it asserts that it is unfettered in its decision-making except to the extent restricted by the agreement.

As part of its argument on this point, the Employer cites numerous court cases which have upheld the reasonableness of secondary employment limitations in the law enforcement setting against a wide variety of challenges. The Employer argues that based on these cases upholding the appropriateness and legality of off-duty employment regulations in the face of a variety of constitutional and other legal challenges, "this Arbitrator should begin with the

presumption that such regulation is reasonable, appropriate, and supported by legitimate grounds.” Building on the foregoing, the Employer maintains that the Association then bears the burden to show some specific provision of the collective bargaining agreement “wherein both Union and Management mutually agreed that such limitations cannot be imposed without violating the collective bargaining agreement.” According to the Employer, the Association cannot do that.

Turning now to the contract language of Article XXXII, the Employer begins by opining that this language “is not a limitation on the rights of the Village, but rather a limitation on the rights of employees.” It notes that the sentence starts with the parties recognizing that the “nature of the duties and the services required of the Public Safety Department employees” are unique. Then, in light of those duties and services, the parties agreed that “all secondary or outside employment” can be regulated by the Director. As the Employer sees it, this language establishes a “presumption” that “secondary or outside employment is automatically denied unless it receives ‘prior written approval’ of the Director.”

The Employer sees this contract language as significant in two respects. First, unlike other provisions of the collective bargaining agreement which indicate certain decisions will be exercised by the “Department” or by the “Village”, this clause only refers to the “Director”. According to the Employer, the implication of the difference is clear. When the parties used the word “Village” or “Department”, they implied the continuation of certain policies or practices “irrespective of the identity of the person holding the Office of Director.” In this clause though, the parties acknowledged that the individual “Director” has authority. Building on the foregoing, the Employer asserts that Director Dunning’s suggestion in the grievance process that he is not necessarily bound by the decisions of prior Directors has a legitimate foundation in the contract language. The second point “is the lack of any contractual standard to be applied to the Director’s decisions in granting or denying approval under Article XXXII.” According to the Employer, elsewhere in the collective bargaining agreement, the parties are very good at imposing such standards. Here though, the parties did not agree to the insertion of any sort of contractual standard against which the Director’s discretion might be measured, such as a “reasonableness” standard, an “arbitrary and capricious” standard, or any type of measuring stick this Arbitrator might apply. As the Employer sees it, this means that the parties recognized that “the Director is to be given broad latitude and discretion in making judgments about the best interests of the organization in deciding whether to grant or deny a request for secondary or outside employment.” The Employer maintains that “there is no reason to suspect hidden agendas or bad faith on the part of the Director in this case.” As the Employer sees it, he is responsible for making good faith decisions about what is in the best interests of the Village and its citizens. The Employer submits that in this case, the Director did not deny Paulowski’s request for secondary employment because of any personal animosity or ill will toward Paulowski. Simply put, the Director’s denial was not personal. Instead, the Director decided, for reasons that will be addressed later, that it was not in the best interests of the Village for Paulowski to work part-time in the Seymour Police Department. The Employer points out that under Article XXXII, that was his call to make. The Employer asks the arbitrator to not overrule that decision.

As part of its argument on the above, the Employer reviews the various reasons why the Director denied Paulowski's request to work part-time for the Seymour Police Department. First, the Employer contends that one of the Director's "main concerns" about allowing secondary employment as a law enforcement officer "related to the need for the Village to be able to order employees to work for the Village at times when they are needed." According to the Employer, Director Dunning does not want to leave the citizens of that other jurisdiction unprotected, but he does not want to be limited in his efforts to protect the Village of Ashwaubenon, either. The Employer notes that in response to that argument, the Association "shockingly" claims that the grievant is "not subject to any mandatory call-in" and that the grievant "is under no mandatory call-in obligation." The Employer disputes that assertion. It notes that any employee who is ordered to report to work by their supervisor is obligated to obey that order. The Employer acknowledges in this regard that an employee can "duck" calls from the Department when he thinks they intend to order him in to work, but the Employer submits that personal choice does not equate to "a contractual right to refuse to be called in when ordered to do so." Second, the Employer further acknowledges that although "no specific examples" were given at the hearing about the "Director's concerns about the increase in liability" if Paulowski put himself in "harm's way" in Seymour, it implies none were needed because the previously-referenced caselaw "suggests Director Dunning's concerns are legitimate."

The Employer argues that after the arbitrator reviews the contract language just referenced, "the arbitral inquiry must end there." As the Employer sees it, the arbitrator should not base his decision on the Employer's outside employment policy. Here's why. The Employer notes at the outset that that policy, which was unilaterally adopted by the Department in 1995, is not part of the collective bargaining agreement. Building on that point, the Employer maintains that the arbitrator has not been given authority to interpret Departmental policies – just the parties' collective bargaining agreement. Next, the Employer cites the contract provision which provides that the collective bargaining agreement can only be amended by written agreement. As the Employer sees it, this language precludes the Association from picking and choosing "the things they like", and trying to enforce them via the collective bargaining agreement. Third, the Employer points out that the introductory paragraph of that policy says that "the purpose of this policy is to establish guidelines governing" outside employment. The Employer contends that the Association ignores "that careful reservation of flexibility" and instead argues in its initial brief that the considerations mentioned in the policy "are to govern" the Director's decisions. The Employer disputes that assertion and asserts that the policy "merely contains information which 'guides' him."

Next, the Employer contends that the arbitrator should reject the Association's past practice argument. In support thereof, the Employer asserts that past practice arguments are only used legitimately when the collective bargaining agreement contains an ambiguous word or phrase which requires the reference to secondary aids to interpretation. Here, though, Article XXXII contains no such ambiguities. That being so, the Employer believes there is no need to resort to past practice to interpret any ambiguities in the contract language. While the Employer acknowledges that there are ambiguities in the Employer's outside employment

policy, it emphasizes once again that that policy is not part of the collective bargaining agreement.

The Employer argues that even if the arbitrator does address the Association's past practice argument, the Employer still did not violate any applicable past practice by its actions here. It elaborates thus. First, it maintains that those facts pertaining to Commanders Bani and Molloy working part-time for other law enforcement agencies cannot be used as a basis to establish a past practice because they were both managerial employees. According to the Employer, matters involving non-bargaining unit employees cannot form the basis for a past practice applicable to bargaining unit employees. Second, the Employer asserts "that not a single bargaining unit employee has ever asked to work, been approved to work, or actually worked as a part-time law enforcement officer in another jurisdiction." Building on that premise, it's the Employer's view that the Association simply cannot show that the Director has allowed other bargaining unit employees to work as sworn law enforcement officers in other jurisdictions on a part-time basis, while denying the same right or privilege to Paulowski. Third, the Employer distinguishes the factual situations where the Employer has approved secondary employment for PSOs from Paulowski's request for secondary employment. With regard to those employees who conduct training for the local technical college, the Employer maintains that "when working there, those individuals are free to immediately leave such a position and respond to call ins to the Village of Ashwaubenon on a moment's notice." Additionally, they "are not exposed to a high likelihood of injury, or being subpoenaed for court testimony, by virtue of doing this training." With regard to those employees who work as nurses or paramedics, the Employer opines that "the demands of those jobs do not expose employees to the same liability issues associated with the application of the use of force or other forceful arrest policies nor a high likelihood of being subpoenaed for court at times when they otherwise are scheduled to work for the Village of Ashwaubenon." With regard to those employees who work a large number of hours in their outside employment, the Employer claims that "those positions also do not expose those employees to the same types of liability issues, subpoena issues, and other concerns present when dealing with the secondary employment as a part-time law enforcement officer."

The Employer argues that the Association's grievance should fail because in no other instance "in the history of the Department" has there been "the same combination or degree of concerns" presented about an employee's outside employment. The "combination of concerns" the Employer references are as follows: 1) scheduling problems, 2) a variety of liability concerns (both worker's comp liability and general municipal liability), 3) adverse impact on the career of the Employee involved, and 4) unavailability because of judicial subpoenas. As for those situations where employees were allowed to work outside employment, those concerns simply do not exist for those other positions. In the event any of those individual reasons do not survive scrutiny by the arbitrator, it's the Employer's view that they should be viewed collectively (i.e. as a combination of reasons).

Additionally, the Employer believes that the Association's case is "fundamentally flawed" by its reliance on the Employer's outside employment policy rather than the terms of

the collective bargaining agreement. The Employer therefore asks the arbitrator to dismiss the grievance.

DISCUSSION

At issue here is whether the Employer violated the collective bargaining agreement as alleged in the grievance. The grievance essentially alleged that the Employer violated the contract when it denied Paulowski's request to maintain secondary employment at the Seymour Police Department. Based on the rationale which follows, I find that the denial of Paulowski's secondary employment request constituted a contract violation.

Attention is focused first on the contract language. The parties agree that the contract provision applicable to this case is Article XXXII. That article is just one sentence long and provides thus:

Due to the nature of the duties and the services required of the Public Safety Department employees, all secondary or outside employment shall receive the prior written approval of the Director.

The first part of this sentence is basically an introductory phrase wherein the parties acknowledged that the "nature of the duties and the services required of the Public Safety Department employees" (i.e. the PSOs), are unique. The second part of the sentence then builds on that premise and says that "all secondary or outside employment shall receive the prior written approval of the Director." This part of the sentence says that anyone who seeks "secondary or outside employment" (meaning employment outside the Ashwaubenon Public Safety Department) has to get the Director's prior written approval. This part of the sentence gives the Director the right to regulate "all secondary or outside employment" by PSOs. While the Employer reads this sentence to say that there is a "presumption" that secondary or outside employment is automatically denied unless it receives "prior written approval" of the Director, I think that interpretation lacks a contractual basis. In my view, the sentence is neutral and does not create a presumption that a request for outside employment will be granted or denied. In other words, the sentence does not create a presumption one way or the other. Moving past the presumption matter, the next question is how the Director goes about making a decision when a PSO presents a request to engage in outside employment. Simply put, how does the Director make that call? Said another way, what factors can the Director consider in making his decision? On this matter, the parties agree that the language simply does not say. It is silent on the point. Some contracts specify a particular standard which the Director's discretion is to be measured against. This contract provision does not specify what the standard is to be. Since the contract language does not specify a particular standard which is to be applied, it's my view that the call has been left to the arbitrator. I'm going to apply an arbitrary and capricious standard. In doing so, I'm going to review the Employer's decision to deny Paulowski's request to have secondary employment with the Seymour Police Department and decide, based on the record evidence, whether it was arbitrary and capricious.

Sometimes when an arbitrator reviews an employer's decision denying something to an employee, the record evidence shows that the employer's decision was personal in nature. In this case though, there's no evidence whatsoever of any animosity or ill will between the people involved. That being so, I accept the Employer's assertion that there was no reason to suspect hidden agendas or bad faith on the part of the Director in this case. Thus, to paraphrase Godfather Don Corleone, the Director's denial was not personal – it was just business.

Having so found, I'm next going to identify how I'm going to go about reviewing the Director's decision to deny Paulowski's request for secondary employment. As already noted, the contract language doesn't provide much guidance, so that means I need to look elsewhere. When faced with similar situations where the contract doesn't provide much guidance, arbitrators routinely use secondary aids, such as bargaining history and past practice, as guides to help them interpret the contract. In this case, there's no bargaining history evidence which is helpful in determining the meaning and application of Article XXXII. With regard to the broad topic of past practice, there is plenty of relevant evidence which will be reviewed later. Before it's reviewed though, I'm first going to address the Employer's contention that I should not address that evidence. The Employer's argument against addressing any evidence relating to past practice is based on the premise that there's no word or phrase in Article XXXII that's ambiguous (and thus in need of interpretation). That's true; there isn't. However, while there's no ambiguous word or phrase in Article XXXII, there's a gap in the contract language nonetheless. As previously noted, the gap is that the language doesn't say how denials of secondary employment requests are to be reviewed. Given that gap in the contract language, it's necessary for me to consider things other than just the contract language in order to resolve this dispute.

In the discussion which follows, I'm going to address the following: the Employer's outside employment policy and the Employer's past responses to requests for secondary employment. They will be addressed in that order.

The Employer urges me to not use the Employer's outside employment policy as a basis for my decision because it's not part of the collective bargaining agreement. That's true; it's not. Be that as it may, that department policy has great relevance to this case for the following reasons. First, it's an official department policy which deals with the very subject involved here (i.e. outside employment). Second, it has existed since 1995 and was reviewed by the current Director in 2007. Third, when an employee requests approval for secondary employment, they have to complete an Employer-promulgated Secondary Employment Authorization form. That form references the Employer's off-duty employment policy. In my view, the foregoing reasons establish a sufficient basis for me to review the Employer's off-duty employment policy to see if it provides any guidance to help resolve this dispute.

The second paragraph in that policy (i.e. the section entitled "Policy") provides substantial guidance. Here's why. That paragraph begins with the following phrase: "It is the policy of the Ashwaubenon Department of Public Safety that employees may engage in

outside employment and business interests. . .” (Note: While the rest of the sentence goes on to identify four exceptions, I’ll address the exceptions later). The portion of the paragraph just quoted states in plain terms that it’s the department policy that employees “may engage in outside employment.” What’s particularly noteworthy about that statement is that earlier in this discussion, I addressed the Employer’s claim that the presumption was that outside employment was prohibited (unless it receives the Director’s approval). This sentence says just the opposite, namely that outside employment is permitted unless one of the exceptions exists. This sentence in the policy therefore establishes the presumption that employees can engage in outside employment so long as none of the four exceptions listed in the paragraph exist.

The focus now turns to a review of what I’m going to call the four disqualifiers. The remaining portion of the “Policy” paragraph states thus:

provided that such activity does not violate any Federal, State, or local laws or ordinances, is in conformance with departmental guidelines, does not create a conflict of interest, and does not interfere with the performance of their duties as employees of the Department.

In this case, the Employer did not establish that Paulowski’s proposed part-time employment with the Seymour Police Department would have fallen within any of the four disqualifiers. The following shows why. First, there is no suggestion that Paulowski’s acceptance of the part-time Seymour police position would have violated any law, whether federal, state or other. Second, the Village presented no evidence of any “departmental guideline” with which Paulowski’s proposed Seymour employment would have been inconsistent. Third, the Village offered no evidence that the Seymour employment would have created a conflict of interest for Paulowski. Fourth, the Village pointed to no aspect of the Seymour position that would have interfered with Paulowski’s Village employment. The Employer’s claim that the part-time Seymour employment would have interfered with Paulowski’s existing employment is compromised by the fact that Director Dunning did not speak to either Paulowski or Chief Buntrock about the specifics of the proposed Seymour employment before he denied Paulowski’s request. Chief Buntrock testified that he would have accommodated Paulowski’s primary employment, and that the Seymour position would only entail several hours per week (and sometimes none). Based on the foregoing, the Employer did not demonstrate that Paulowski’s proposed Seymour employment ran afoul of any of the four disqualifiers mentioned in the second paragraph of the policy.

Aside from those four disqualifiers, the last section in the policy (i.e. Section III, B which is entitled “Limitations”) lists some additional “criteria” which the Director is to consider when deciding whether to approve or deny a request for secondary employment. One criteria is “when it is deemed that an employee’s overall performance evaluation is rated less than satisfactory.” Paulowski passed that criteria because the record indicates that his job performance ratings have been satisfactory or above. The final portion of that section (i.e. Section III, B, 2) lists four additional criteria to be considered: a) Type of work; b) Hours to

be worked; c) Employer; and d) Department work performance. Insofar as the record shows, the Director did not consider these four criteria either.

The foregoing shows that when the Director made his decision herein, he essentially ignored the four disqualifiers referenced in the second paragraph of the outside employment policy, as well as the other criteria listed in Section III, B, 1 and 2 of the policy. Instead, he cited other reasons for denying Paulowski's request for secondary employment with the Seymour Police Department. While those reasons were not mentioned in the policy, they will still be reviewed in order to complete the record.

I'm first going to address the Employer's "liability" concern which the Director referenced when he first denied Paulowski's request (namely, that Paulowski's part-time employment with Seymour would (allegedly) have caused the Village to "incur to[o] great a liability if this employment was allowed." At the hearing, the Employer gave no specific examples and produced no evidence that it – or any other Wisconsin law enforcement agency – has ever been subjected to claims or suits as the result of a police officer's employment with another law enforcement agency. Additionally, it offered no evidence that its insurer had counseled it against allowing Paulowski to work for Seymour. Instead, the Employer implied that it didn't need to show via specific examples that the Director's concerns about increased liability were legitimate because the caselaw which it cited in its briefs suggest that the Director's concerns are legitimate. I'm not going to use those decisions as a basis for substantiating the Director's liability concerns. Many of those cases dealt with constitutional challenges to secondary employment limitations in the law enforcement setting. That's significant because this case does not involve a constitutional challenge; instead, it arose under a collective bargaining agreement and involves specific language dealing with outside employment. Insofar as I could determine, none of those court cases involved claims arising under a collective bargaining agreement, as is the situation herein. Accordingly, I find that the court cases referenced in the Employer's briefs, in and of themselves, do not substantiate the Director's liability concern.

Next, the focus turns to the four reasons which the Director added when he responded to the grievance. The first reason (i.e. the potential for liability) has already been addressed, so no additional comments are made concerning same. With regard to the second reason (i.e. that if Paulowski were to make an off-duty arrest, it cannot be known whether an aggrieved arrestee would sue Ashwaubenon or sue Seymour), I find that reason has no support in the record evidence. With regard to the third reason (i.e. the concern regarding court appearances), that concern is unpersuasive when one considers Chief Buntrock's statement that Paulowski's (full-time) position with Ashwaubenon would take precedence over his (part-time) Seymour employment, and as a result, he (Buntrock) would have to be flexible in setting Paulowski's schedule. The Director did not know this, of course, because he did not contact Chief Buntrock before he denied Paulowski's request. With regard to the fourth reason (i.e. the concern regarding emergencies and natural disasters), I find that concern has no support in the record evidence.

Finally, in its brief, the Employer raised several additional reasons for denying Paulowski's request. First, it contended that allowing Paulowski to accept the part-time Seymour position would have caused the Village difficulty in filling road shifts. While the parties dispute whether PSOs do or do not have a contractual obligation to accept an order-in on their days off, it's my view that I need not address that question in this case. Instead, it suffices to say that allowing Paulowski to have the Seymour position would not result in his shirking any obligations he has to the Village. Second, the Employer contended that the Director's refusal to allow Paulowski to engage in outside employment was proper, in part, because of Paulowski's interest in the assignments of fire instructor and field training officer. In response, I find it sufficient to simply note that neither the Director's denial of Paulowski's request, nor his later denial of the grievance, made any reference to Paulowski's expression of interest in those assignments.

Based on the above, it is held that the various reasons proffered by the Employer for denying Paulowski's request for secondary employment with the Seymour Police Department have not been substantiated.

...

Next, as another aid in resolving this dispute, I'm going to review the factual circumstances in the past where the Employer allowed employees to have outside employment. First, the record shows that prior to denying Paulowski's request for secondary employment, the Employer had never denied a PSO's request to engage in secondary employment. That is obviously noteworthy. Second, the record shows that the Village has permitted outside employment by PSOs and other department employees in the following circumstances: as paramedics, nurses, and health care providers; as firearms instructors at the local technical college; as fire, EMS and police science/public safety instructors at the local technical college; and as law enforcement officers. The last category (i.e. law enforcement officers) is most pertinent here, so it will be addressed in more detail.

The record shows that both managerial and bargaining unit employees have been allowed to do part-time police work for other law enforcement agencies. For the purpose of discussion, I'm going to address them separately.

Commanders Bani and Molloy were granted permission to do police work in other jurisdictions (Bani as police chief with the Hobart/Lawrence Police Department and Molloy as police chief with the Town of Freedom). The Employer asks me to not consider their part-time work (i.e. Commanders' Bani and Molloy's work) for other law enforcement agencies because they were managerial employees. The Employer contends in this regard that matters involving non-bargaining unit employees (i.e. supervisors) cannot form the basis for a past practice applicable to bargaining unit employees. That's true; that's an accepted principle in labor relations. However, I'm not looking at the factual situations of Commanders Bani and Molloy to create a past practice as that term is usually used in labor relations. Instead, I'm

simply looking at their experience as part of the Employer's history concerning their own outside employment policy. This distinction is important because while the factual situations of Bani and Molloy cannot be used to create a formal past practice, their outside employment experience can certainly be reviewed as part of the Department's history relative to its outside employment policy. When the Employer granted Commanders Bani and Molloy permission to have part-time employment with other police departments, it did so under the very same outside employment policy that applied to PSO Paulowski.

Next, while their experiences are more dated, the record nonetheless shows that PSOs Buntrock, Baxter and Penza were granted permission to do police work in other jurisdictions on a part-time basis (Buntrock with the City of Seymour, Baxter with the Coast Guard Reserve and Penza with the Town of Brillion). Even if Penza's part-time employment with Brillion is discarded on the grounds that it occurred too long ago to be considered relevant herein, that still leaves the other two situations as relevant, with Baxter's approval being granted in 2005. Given that approval to do part-time police work in other law enforcement agencies, the Employer's assertion "that not a single bargaining unit employee has ever asked to work, been approved to work, or actually worked as a part-time law enforcement officer in another jurisdiction" is not factually accurate.

After considering all the outside employment which the Employer has allowed in the past, particularly the part-time police work of Commanders Bani and Molloy and PSOs Buntrock and Baxter, that history weighs strongly against a conclusion that the part-time Seymour position would have violated the Employer's outside employment policy.

...

Based on all the foregoing (specifically the contract language, the Employer's outside employment policy and the Employer's past responses to requests for secondary employment wherein it allowed employees to do police work in other jurisdictions on a part-time basis), it is concluded that the Employer acted in an arbitrary and capricious manner towards Paulowski when it denied his request for secondary employment with the Seymour Police Department. His request should have been granted. Since it was not, the denial violated the collective bargaining agreement.

In order to remedy this contract violation, the arbitrator orders the following remedy: If the part-time Seymour position is still open and offered to Paulowski, the Village shall grant Paulowski permission to work in that position.

In light of the above, it is my

AWARD

1. That the Village violated the collective bargaining agreement as alleged in the grievance; and

2. That to remedy this contractual violation, if the part-time Seymour position is still open and offered to Paulowski, the Village shall grant Paulowski permission to work in that position.

Dated at Madison, Wisconsin, this 16th day of July, 2010.

Raleigh Jones /s/

Raleigh Jones, Arbitrator