BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

VILLAGE OF GRAFTON

and

THE GRAFTON POLICE OFFICER'S ASSOCIATION, LOCAL 305 OF THE LABOR ASSOCIATION OF WISCONSIN

Case 43
No. 70630
MA-15001

Appearances:

Attorney Mary L. Hubacher, Buelow Vetter Buikema Olson & Vliet, LLC, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin, 53186, on behalf of the Village of Grafton.

Messrs. Benjamin M. Barth and **Jason E. Ganiere**, Labor Association of Wisconsin, N116 W16033 Main Street, Germantown, Wisconsin, 53022, on behalf of the Grafton Police Officer's Association, Local 305 of the Labor Association of Wisconsin.

INTRODUCTION

The Village of Grafton ("Village") and the Grafton Police Officer's Association, Local 305 of the Labor Association of Wisconsin ("Association") are parties to a collective bargaining agreement that provides for final and binding arbitration of disputes arising thereunder. On February 16, 2011, the Association filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning mandatory furlough days that had been imposed for the 2011 calendar year on employees represented by the Association. The filing requested that the Wisconsin Employment Relations Commission provide a list of five Commission-employed commissioners and/or staff members from which an arbitrator could be selected, and from that list the undersigned was selected. A hearing was held on October 19, 2011, in Grafton, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. A transcript of the proceeding was made. The Village and the Association each submitted initial and reply briefs, the last of which was received on January 20, 2012. On that date, the record in this matter was closed.

BACKGROUND

The Village operates a Police Department ("Department"). With certain exceptions not relevant here, the Association represents for the purposes of collective bargaining all regular full-time and all regular part-time employees of the Department who have powers of arrest. On January 9, 2009, the Village and the Association executed a collective bargaining agreement ("Agreement") with a term of January 1, 2009, through December 31, 2011. Among other things, the Agreement provides for a 3% across-the-board pay increase to take effect on January 1, 2011, in the third year of the contract.

In February of 2010, Darrell Hofland ("Hofland"), the Village's administrator, received direction from the Village's Board of Trustees ("Board") regarding preparation for the Village's 2011 budget. Specifically, the Board indicated to Hofland that the budget was not to include a tax levy that exceeded a 2% increase over the prior year's tax levy. Several months later, around Labor Day of 2010, the Board told Hofland that a 2% increase was no longer acceptable for 2011. Instead, the Board wanted Hofland to limit the tax rate impact for 2011 to 1%. Hofland understood that the Board had changed its position with regard to the tax levy because it recently had come to light that the property valuation in the Village had decreased 3% from the prior year and the Board did not believe Village tax payers would accept anything beyond a 1% tax levy increase. During this same period of time, the Board also gave Hofland direction regarding personnel costs in the Village. The Board indicated that, because the Village valuation was down 3% and the tax levy increase would be limited to 1%, 2011 wages would also be frozen for Village employees.

The Board's direction with regard to the wage freeze obviously conflicted with the 3% wage increase that was scheduled to occur on January 1, 2011, in the Agreement between the Association and the Village.[1] That problem arose with regard to two other bargaining units representing Village employees that had signed collective bargaining agreements for 2011, as well. The situation prompted Hofland to request a meeting early in September of 2010 with representatives of the Association, as well as the two other unions. Hofland recalls that he came to the Association "hat in hand" with the objective of reopening the Agreement and somehow eliminating the net budgetary increase that was to result from the scheduled 3% wage increase. Hofland proposed various options to the Association. One obvious option was simply to substitute the 3% wage increase with a 0% increase. Alternatively, Hofland proposed that Association members could permanently increase their contributions to health insurance premiums, or the Village could permanently reduce its contribution to the Section 125 program.

At the conclusion of this meeting, Association representatives indicated they would take the Village's proposals under consideration. Hofland and representatives of the Association continued to communicate regarding the reopener request through September of 2010. During

[1] The Board had indicated that it still intended to fund the step increases provided for in the collective bargaining agreement, as well as any increase to the Village's contribution to health insurance.

that period of time, the Association requested from Hofland certain information related to Village finances. The Village provided some information, but the Association asserted to Hofland that he had not provided all of the requested information. Near the end of September, the Association membership voted to reject the Village's request to reopen the Agreement. Indeed, all of the unions representing Village employees who were asked to reopen a collective bargaining agreement rejected that request. Although Hofland wanted to continue to meet and discuss the issue, the Association declined the request to do so, given the vote of the membership, unless some new information could be provided that might affect their decision. On November 3, 2010, Hofland again requested a meeting with the Association. In response, the Association reiterated that it rejected the Village's offer to reopen the Agreement. Hofland replied, on November 4, with a message indicating that the parties should therefore meet to discuss a furlough policy that was to be unilaterally implemented by the Village.

On December 6, 2010, the Village Board formally approved a resolution directing Hofland to schedule 7.5 furlough days in 2011 for each member of the Association. Pursuant to the procedure set forth in the Agreement, the Association grieved the imposition of the furloughs on behalf of its 22 members. That grievance led to the present proceeding.

ISSUE

The parties entered into a stipulation in this matter allowing the arbitrator to frame the issue in the award. The following is the statement of the issue proposed by the Village:

> Did the Village properly exercise its management's rights when it laid off members of the bargaining unit in the form of furloughs to address a budget shortfall for 2011 and changed the normal work schedule for employees by reducing the work schedule for a limited number of 7.5 days? If not, what is the appropriate remedy under the contract?

The following is the statement of the issue proposed by the Association:

> Did the employer violate the terms and conditions of the collective bargaining agreement when it imposed seven and one-half furlough days on all members of the association for the year 2011? If so, what is the appropriate remedy?

The issue to be heard is framed as follows:

> Did the Village violate the Agreement between the Village and the Association when it required each Association member to take 7.5 furlough days in 2011? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II – MANAGEMENT RIGHTS

The Association recognizes the right of the Village and the Chief of Police to operate and manage its affairs in all respects. The Association recognizes the right of the Chief to establish departmental rules and procedures.

The term "Village" shall refer to the Village Board, Village Administrator, the Police Chief or the Police and Fire Commission, according to the context in which it is used and in further accord with the statutes of the State of Wisconsin and the Code of the Village of Grafton.

The Village shall retain all rights and authority to which, by law, they are entitled and to manage their affairs as such affairs and rights existed prior to the execution of this or any previous agreement with the Association.

The parties understand that every duty connected with the operations enumerated in job assignments or descriptions is not always specifically described, and it is intended that all duties shall be performed by the employee.

The Village has the exclusive right and authority to make assignments of jobs, to determine the size and composition of the work force, to determine work schedules and the work to be performed by the work force and each employee, to establish methods and processes by which said work is performed, to determine the competence and qualifications of the employees, to determine the location where the operations of the Village are to be conducted, to hire, promote and lay off employees and to make assignments and promotions to supervisory positions, to transfer employees within the Police Department, to suspend, demote and discharge employees, to assign and schedule overtime work, to create new positions or departments, to introduce new or improved operations or work practices, to terminate or modify existing positions, departments, operations or work practices, and to consolidate existing positions, departments or operations.

The Association pledges cooperation to the increasing of the departmental efficiency and effectiveness. Any and all rights concerning the management and direction of the Police Department and the Police Force shall be exclusively the right of the Village and the Chief of Police, unless otherwise provided by the terms of this Agreement as permitted by law.

Whenever an authorized promotional vacancy exists in a job classification covered by this Agreement or a permanent promotional vacancy occurs as the result of a new job classification being established within the

bargaining unit, such vacancies shall be filled by members of the bargaining unit who are qualified. If no bargaining unit member is qualified, the vacancy may be filled in the manner determined by the Village. A notice of such vacancy shall be posted on the Department bulletin board at least five (5) days prior to the last day on which applications are acceptable.

. . .

ARTICLE IV – WORKWEEK

The normal work shift for all full-time Association employees will consist of eight (8) hours and twenty (20) minutes worked continuously on an established shift, four shifts on duty followed by two days off followed by four shifts followed by two days off then repeating. The Officer's workday shall commence ten (10) minutes before the scheduled shift and end ten (10) minutes after the scheduled shift.

For the Juvenile Officer.

a) The workweek will consist of eighty (80) hours in a two (2) week pay period.

b) If these positions are replacing patrol employees on a long-term basis, their regular workweek will not be more than five (5) consecutive workdays, unless mutually agreed otherwise between the Chief and the officer involved.

The Chief of Police shall designate the working shifts as per individual officer with all due consideration being given to rank and seniority. Employees in November/December shall be annually allowed to choose their shifts for the following year on a seniority basis.

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ARTICLE V – PAY POLICY

Section 1. Salaries. Salaries will be paid as provided in Appendix "A" of this Agreement.

. . .

ARTICLE XV – GRIEVANCE PROCEDURE

Section 1. Scope. A grievance is defined as an alleged violation of a specific provision of this Agreement. Grievances shall be handled in accordance with the procedure set out in this Article. A grievance is required to be put in

writing; it shall state the specific provision of this Agreement alleged to have been violated. Any dispute involving discipline, suspensions, demotions and discharges shall not be subject to the grievance procedure provided for herein but shall be handled exclusively under Section 62.13(5), Wisconsin Statutes.

. . .

APPENDIX "A"

. . .

A. The pay steps as herein established are binding on the Association and the Village and cannot be added to or modified in any way unless agreed to by both parties. This provision is not to be construed to prevent the Village from starting an employee at any step higher than Step 1. However, the Village agrees to notify the Association in writing prior thereto.

B. With the exception of the rank of Patrol Officer – 1, all pay steps herein established shall become automatic on an annual basis, but only on the anniversary date of hire covering each Association officer.

C. Unless otherwise agreed by the Village and the Association, any future negotiated adjustments in salary, other than the automatic anniversary step increase described in "B" above, will be mutually determined using the Patrol Officer – 5 pay step as a base of one hundred percent (100%). Within each rank, pay step adjustments will be calculated on a percentage ratio to the Patrol Officer – 5 base of one hundred percent (100%) as shown above.

DISCUSSION

The parties in this case both acknowledge that the management rights clause at Article II of the Agreement reserves to the Village the right to "lay off" employees. The parties also agree that the unpaid leave mandate being challenged here, which consistently has been referred to in the record as "furloughs", constituted a layoff. Notwithstanding these fundamental points of agreement, however, the Association challenges the Village's imposition of the 7.5 days of furlough on essentially three grounds. First, the Association argues that the furloughs are inconsistent with certain provisions in Chapter 62 of the Wisconsin statutes that it believes apply to this situation. Second, the Association contends that the furloughs violated the Agreement, because they were inconsistent with provisions contained therein that address hours and wages. Finally, the Association takes the position that the Village was not in an economic situation during the period of time relevant to this case that justified the imposition of the furloughs being challenged here.

Whether the Furloughs were Implemented in Violation of Section 62.13 of the Wisconsin Statutes

Section 62.13 of the Wisconsin statutes applies to the operation of police and fire departments in Wisconsin cities. Through Section 61.65(3g)(d)2, Wis. Stats., the requirements of Section 62.13, Wis. Stats., also apply to Wisconsin villages. The Association contends that the present grievance should be sustained because the Village's implementation of the furloughs conflicted with seniority requirements set forth in Section 62.13(5m), Wis. Stats. It further contends that the furloughs caused a reduction in wages for the affected employees in a manner that ran afoul of certain requirements set forth in Section 62.13(7), Wis. Stats.

My analysis in this case cannot be guided by these provisions. The Agreement between the parties, and specifically Section 4 of Article XV which addresses arbitration hearings, is the source of my authority here as arbitrator. That provision states that an arbitrator is to "confine [her]self to the precise issues submitted to [her] for arbitration and shall have no authority to determine any other issue not so submitted…" Here, both of the statements of the issue proposed by the parties ask me to consider whether the Agreement has been breached, not whether any statutory provision has been violated. Similarly, the issue recited in the grievance form submitted by the Association to the Village, in December of 2010, also indicates that the Association's objection to the furloughs was rooted in provisions in the Agreement.[2]

Having said that, insofar as the parties have submitted to me an issue that requires interpretation of the layoff and wages provisions of the Agreement – and I believe it is fair to say they have done so – it is appropriate to consider whether either of the statutory sections relied on by the Association are expressly or impliedly incorporated into the Agreement such that the provisions contained therein are affected. It is immediately evident that there is no express indication in the Agreement that the parties intended to bind themselves, with regard to layoffs, to the requirements of Section 62.13(5m), Wis. Stats., or, with regard to wages, to the requirements of Section 62.13(7), Wis. Stats. Those statutory provisions are simply not mentioned anywhere in the Agreement. Contrary to the cases cited by the Association, in the absence of some express intent, there are many instances in which arbitrators have declined to apply Section 62.13, Wis. Stats. *See, e.g.*, CITY OF ELKHORN, MA-14170 (Gordon, 4/09), CITY OF RHINELANDER, MA-10421 (Crowley, 4/99), CITY OF KIEL, MA-7648 (Nielsen, 11/93), CITY OF BLOOMER, MA-6367 (McLaughlin, 5/91).

The question remains whether there is some implied indication that the parties intended to be so bound. To suggest that there is such an indication, the Association points to the grievance procedure set forth at Article XV of the Agreement. That provision, at Section 1, expressly recognizes the applicability of Section 62.13(5), Wis. Stats., which governs

[2] In fact, the first time the Association raised the assertion that Section 62.13(5m), Wis. Stats., applies to this case apparently was at hearing in this matter; and the first time it asserted that Section 62.13(7), Wis. Stats., applies was in its post-hearing reply brief.

disciplinary actions against subordinates, to grievances challenging discipline. The Association also points out that the Village has established a board of police and fire commissioners, which is required under Section 62.13(1), Wis. Stats. I do not, however, read the reference in the grievance procedure to Section 62.13(5), Wis. Stats., or the existence of a board of police and fire commissioners in the Village to be an indication that the parties intended to authorize an arbitrator to interpret and apply other parts of Section 62.13, Wis. Stats., to other provisions in the Agreement. The reference to Chapter 62 in the Agreement appears to have limited applicability to the provision relating to disciplinary grievances, and the board of police and fire commissioners appears to have been established for the purpose of handling disciplinary proceedings. Contrary to the Association's contention, the specific reference to Chapter 62 in the grievance procedure suggests to me that the parties were aware of that particular statute when bargaining and knew that they could make specific reference to it where desired in the Agreement. I take the fact that the parties did not link any such reference to the layoff or wage provisions of the Agreement as an affirmative indication that they did not intend to have the statute apply.

Certainly reference to external law has been considered useful to define ambiguous terms in a contract. The Association relies on a case where an arbitrator has looked toward Section 62.13 for such interpretive assistance. *See,* CITY OF GREEN BAY, MA-13075 (Michelstetter, 8/07) (looking to Section 62.13(5m), Wis. Stats., for assistance with interpretation of the word "dismissed"). Here, the Association suggests that the absence of any direction in the Agreement as to how layoffs are to be implemented creates ambiguity. At least when applied to this situation, however, I disagree. I read the absence of direction as a rather clear indication that, when the parties bargained the Agreement, they did not agree to limit the layoff right expressly reserved to the Village. To use Section 62.13, Wis. Stats., or any other statutory provision to impose such a limitation on the Village's layoff prerogative would be to modify or add to the Agreement in a way that exceeds my jurisdiction.

Whether the Furloughs Violated Provisions in the Agreement Pertaining to Hours and Wages

The Association also contends that the mandatory furloughs violated hours and wages provisions in the Agreement. The Association's position with regard to wages is based on its reading of Appendix A of the Agreement. Under Article V, Section 1 of the Agreement, employees represented by the Association are to be paid wages as provided for in Appendix A. For each of the three years of the Agreement, Appendix A sets out not only annual rates of pay for employees represented by the Association, but also biweekly rates of pay. The Association points out that, even though Department officers work fluctuating schedules of approximately 83 hours some workweeks and approximately 66 hours other workweeks, the biweekly pay schedule requires officers to receive the same pay every workweek. This fact, the Association contends, is evidence that the parties intended to have officers receive a guaranteed wage rather than some amount linked with hours actually worked. To support its argument, the Association also relies on the following language in Appendix A:

> *The pay steps as herein established are binding on the Association and the Village and cannot be added to or modified in any way unless agreed to by both parties.* This provision is not to be construed to prevent the Village from starting an employee at any step higher than Step 1. However, the Village agrees to notify the Association in writing prior thereto. [Emphasis added.]

The Association argues that these components of Appendix A – the schedule setting out rates of pay in conjunction with the provision that states that the pay steps are "binding" and cannot be added to or modified in any way unless agreed to by both parties – creates a guarantee that Association members will earn the wages set forth in Appendix A. Under that theory, the mandatory furloughs, which of course accomplished the intended effect of reducing the pay received by Department employees, would constitute a violation of Appendix A.

The fact is, however, that whether the Village would lay-off all employees for an equal number of furlough days or, as the Association asserts it should have done, only some employees on a more long-term or permanent basis, the pay of the affected employees would be reduced. Indeed, the essential purpose of a layoff clause is to allow an employer to save money. Thus, a finding here that the temporary layoffs imposed by the Village violated Appendix A because they had the effect of reducing employee wages, would nullify the core purpose of the layoff clause and render it useless to the Village. Such an interpretation runs directly contrary to the principle that all words and concepts in a contract are to be given effect. Under that principle I am compelled to interpret the Agreement in such a way that gives effect to both Appendix A and the layoff provision in the management rights clause. Because the Village still cannot unilaterally change the pay steps in the Agreement, the "binding" nature of Appendix A has effect; and the conclusion that the furloughs were permissible obviously gives effect to the layoff provision, as well.

The Association argues that other principles of contract interpretation should be applied and the grievance sustained. Specifically, the Association refers to the principle of avoidance of forfeiture (identifying the wages lost to the furloughs as a forfeiture) and to the principle of giving precedence to specific over general language in an Agreement (arguing that the Appendix A is more specific and should be given precedence over the more general management rights clause). As applied to the facts of this case, neither of these principles trumps the principle discussed above that requires some effect to be given to the layoff language (and all the other language) in the Agreement.

To the extent that the Association similarly relies on the hours provision at Article IV of the Agreement to assert that it guarantees Association members a certain number of paid hours in a pay period or year, that argument also fails. The hours provision identifies the "normal work shift" for employees. As several prior awards have reasoned, *see, e.g.,* CITY OF FITCHBURG, MA-14512 (Jones, 2/11), TAYLOR COUNTY, MA-14797 (Levitan, 1/11), JACKSON COUNTY, MA-12338 (Houlihan, 3/05), the use of the word "normal" implies the potential for some deviation. Here, furloughs created the deviation.

Whether the Village's Financial Condition Justified the Imposition of Furloughs

Finally, the Association also asserts that its grievance should be granted because the Village has failed to provide sufficiently concrete evidence to show that it was in a financial situation that justified furloughs. The Agreement here permits layoffs, but does not identify specific circumstances under which they may occur. The Association's arguments suggest that an "ability to pay" standard should be applied. The Agreement does not contain any such restriction. In the absence of a standard, the question is whether the Village's decision to mandate furloughs was arbitrary and capricious under the circumstances.

The Village introduced evidence into the record indicating that, starting in the first half of 2010, the Village began to face economic circumstances that could not have been anticipated over a year before when the Agreement was executed in January of 2009. Hofland testified that the Board's decision in mid-2010 to reduce the 2011 tax levy from 2% to 1% was prompted, at least in part, by a 3% percent drop in Village's valuation. The evidence shows that this drop equated to a $37 million decrease in the tax base compared to 2009. Hofland explained that, given the 4.3% or $46 million increase in the tax base the Village had experienced in 2009, the 2010 3% decrease represented an $80 million difference in the Village's valuation over a two-year period. Hofland further testified that this decline represented only the second time in the Village's history that it had experienced a tax base decrease. He also testified that, with the decline in the economy, there was an expectation that construction-related projects and, therefore, building permits would drop. According to the evidence on the record, building permits are a significant source of revenue for the Village. Hofland testified that the Village was facing a projected budget deficit in 2011 of approximately $600,000. This deficit would have been increased by an additional $130,000 had the Village implemented, without furloughs or some other concession, the wage increases called for in the collective bargaining agreements with represented employees. To balance the 2011 budget, the Village Board approved use of an amount from its fund balance that equaled approximately 7% of the reserve fund. This expenditure went against the Village's fiscal policy of limiting the use of reserve fund to 5% or less in a given year.

The evidence shows that, in light of these fiscal concerns, the Village approached not only the Association, but also other unions to seek contract concessions. In addition to the employees represented by the Association, others were subjected to furloughs. Hofland testified that the number of furlough days was specifically calibrated to offset the impact of the contractual wage increase and corresponding increased payroll tax and pension costs that were to become effective in January of 2011. Also, in 2011 non-represented Village employees received a 0% increase for the second year in a row.

The Association takes the position that these claims are exaggerated. To support this position, the Association submitted into evidence the 2011 and 2012 executive budget

summaries. Those documents indicate that the Village had fund balances in 2011 and 2012 that actually exceeded the recommended 25%. The summaries also make

claims of excellent bond ratings and financial strength in the Village during the relevant period of time. In response, Hofland testified that the Village was able to rebuild its fund balance in 2011, maintain it in 2012, and protect its bond ratings during this period specifically because of cost saving and revenue generating measures that were implemented by the Village in the second half of 2010 and in 2011, including the furloughs.

Even taking into account the evidence that the Village maintained a relatively healthy financial condition during the relevant period of time, there is nothing in the record that leads me to discredit the evidence presented by the Village such that I deem its decision to implement furloughs to have been arbitrary and capricious. Even if there was some political motivation, as the Association contends, the evidence also suggests that the Board's choices were motivated by fiscal concerns. To the extent that the Association disagrees with the fiscal choices that were being made by the Village at this time, including the choice not to reduce the furlough mandate after an officer unexpectedly left employment with the Village in April of 2011, it is necessary to clarify that these were policy decisions made in the course of the Board's management of the Village's affairs. Such decisions frequently have been recognized to come within the purview of publicly elected officials such as the Village's Board members. *See, e.g.*, VILLAGE OF GERMANTOWN, MA-14653 (Emery, 4/11), TAYLOR COUNTY, MA-14797 (Levitan, 1/11), LANGLADE COUNTY, MA-12597 (Bielarczyk, 3/05).

Now, having considered the record as a whole, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 9th day of April, 2012.

Danielle L. Carne /s/
Danielle L. Carne, Arbitrator

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