

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**CITY OF WATERTOWN**

and

**LABOR ASSOCIATION OF WISCONSIN, INC.**

Case 87  
No. 71194  
MA-15103

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**Appearances:**

**Nancy L. Pirkey**, Buelow, Vetter, Buikema, Olson & Vliet, LLC., Attorneys at Law, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin, appeared on behalf of the Employer.

**Benjamin A. Barth**, Labor Consultant, N116 W16033 Main Street, Germantown, Wisconsin, appeared on behalf of the Association.

**ARBITRATION AWARD**

City of Watertown, hereinafter “Employer,” and Labor Association of Wisconsin, hereinafter “Association,” jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Watertown, Wisconsin, on January 11, 2012. Each party filed a post-hearing brief, the last of which was received February 13, 2012, and the record was closed as of that date.

**ISSUES**

The parties agreed to the following statement of the issues:

1. Was General Order 22.3.3 – Off-Duty Employment reasonably applied to the “business operation” of grievant?<sup>1</sup>

### FACTS

The facts in this matter are not in dispute. The Employer is a Wisconsin city located in Dodge and Jefferson Counties. It operates a police department. The Association is the collective bargaining representative of the sworn police officers of the Employer. Grievant Dayne Zastrow is a sworn police officer employed by the Employer and is a member of the bargaining unit represented by the Association. Officer Zastrow has been employed in that position by the Employer for 24 years.

For the two years prior to the hearing, Officer Zastrow performed process serving outside of his duties a police officer and without knowledge of the Employer. He has served process about 18-20 times. Most of this work has been for his father in connection with his father’s business as a landlord. That work has been done without charge. He has also served some papers for a local attorney in civil actions. He has charged the attorney \$25 for each paper served. Officer Zastrow serves process in civilian clothes and does not identify himself as a police officer when he does so.

The issue came to light on August 4, 2011, when the attorney came to the police department and asked that Officer Zastrow serve some process. The Employer duly investigated the matter and concluded that the “business” of serving process violates policy 22.3.3 specified below. The Employer issued a written warning to Officer Zastrow on that basis. Officer Zastrow filed the grievance in dispute and the same was properly processed to arbitration.

Some background information is helpful to understanding this dispute. The Sheriff of each county is required by law to provide a process serving service. That department does provide process serving for a fee. The City of Watertown through the police department did perform process serving for a fee. In that regard, the work used to be performed by police officers. In Wisconsin, serving process is not an exclusive function of the state and its subdivisions. Essentially, any person in Wisconsin is allowed by law to serve process.

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<sup>1</sup> The parties stipulated that the appropriate remedy is to order the Employer to withdraw the warning in dispute if the answer be “no.” The issue is modified by adding the quotation marks to reflect the actual issue the parties litigated. The Association argued that the rule was not “reasonable” as it was applied in this circumstance. The Employer’s argument is implicit in its argument at page 8 of its brief. The Employer’s argument is that performing the duties of the position of process server is a conflict of interest irrespective of whether the person is actually employed as a process server.

**RELEVANT AGREEMENT PROVISIONS**

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**ARTICLE II - MANAGEMENT RIGHTS**

**2.01** The Association recognizes the prerogatives of the Employer to operate and manage its affairs in all respects in accordance with its responsibility and in the manner provided by law, and the powers or authority which the Employer has not specifically abridged, delegated, or modified by other provisions of this Agreement are retained as the exclusive prerogatives of the Employer. Such powers and authority, in general, include, but are not limited to the following:

- A. To determine its general business practices and policies and to utilize personnel, methods, and means efficiently and flexibly.
- B. To manage and direct the employees of the Employer, to make assignments of jobs, to determine the size and composition of the work force, to determine the work to be performed by the work force and each employee and to determine the competence and qualifications of the employees.
- C. To determine the methods, means, and personnel by which and the location where the operations of the Employer are to be conducted.
- D. To take whatever action may be necessary in situations of emergency.
- E. To utilize temporary, provisional, part-time, or seasonal employees when deemed necessary.
- F. To hire, promote, transfer and lay off employees and to make promotions to supervisory positions.
- G. To suspend, demote, or discharge employees.
- H. To establish or alter the numbers of shifts, hours of work, work schedules, methods, or processes.
- I. To schedule overtime work when required.

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## ARTICLE XVII – GRIEVANCE PROCEDURE

**17.01** The Grievance Procedure provided for in this Article shall apply only to grievances involving the interpretation or application of a specific provision of this Agreement.

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**17.05** Upon completion of this review and hearing, the arbitrator shall render a written decision as soon as possible to both the Employer and the Association which shall be final and binding upon both parties. In making his decision, the arbitrator shall neither add to, detract from nor modify the language of this Agreement. The arbitrator shall have no authority to grant wage increases or wage decreases. The arbitrator shall expressly confine himself to the precise issue(s) submitted for arbitration and shall have no authority to determine any other issue not so submitted to him or submit observations or declarations of opinion which are not directly essential in reaching the determination. In any arbitration award, no right of management shall in any manner be taken away from the Employer, nor shall such right be limited or modified in any respect excepting only to the extent that this Agreement clearly and explicitly expresses an intent and agreement to divest the Employer of such right.

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## RELEVANT WORK RULES

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### 22.3.3 OFF-DUTY EMPLOYMENT

#### **PURPOSE:**

The purpose of this policy is to describe and regulate the types of off-duty employment in which both sworn and non-sworn employees of the Watertown Police Department may engage.

#### **POLICY:**

It is the policy of the Watertown Police Department to authorize off-duty employment and other business interests, provided that such activity does not violate any federal or state laws, or local ordinances, or conflict with departmental interests, employee performance, or policy guidelines.

**DISCUSSION:**

Certain types of outside employment can present difficulties for both the employee and the department, especially where the sworn authority held by officers is concerned. Conflicts of interest can arise, or certain types of employment may be inconsistent with or detrimental to the image and professionalism of the police department.

A community and department that allow police officers to be employed in certain occupations, where their mere police presence contributes to the perception of a threat to the citizens, promotes an atmosphere of unfair advantage to the secondary employer as well as a perception of a community operated on the basis of fear and police intimidation.

**DEFINITION:**

- A. Off-duty (secondary) employment: Outside employment wherein the use of law enforcement powers is not anticipated.

**PROCEDURE:**

- A. Employees may not engage in off-duty (secondary) employment if the following criteria apply:
1. The employment is of a non-police nature in which police powers are a condition of employment; the work provides real or implied law enforcement service to the employer, or is performed during assigned hours of duty.
  2. The employment presents a potential conflict of interest between duties as a law enforcement officer and duties for the secondary employer.
    - a. Examples of employment representing a conflict of interest include, but are not limited to, the following:
      - (1) Officers who work as a reposessor or bill collector; towing of vehicles; or any other employment in which police authority might be used to collect money or merchandise for private purposes.
      - (2) Work involving personal investigations for the private sector or any employment that might

require the police officer to have access to police information, files, records, or services as a condition of employment.

- (3) Employment using the police uniform in the performance of tasks other than those of a police nature.
  - (4) Employment that assists (in any manner) the case preparation for the defense in any criminal action or for either side in any civil action or proceeding.
  - (5) Employment by or for a business or labor group that is on strike.
3. The employment constitutes a threat to the status or dignity of law enforcement as a professional occupation. Examples of such employment include the following:
- a. Establishments that sell pornographic books or magazines, sexual devices or videos, or otherwise provide entertainment or services of a sexual nature.
  - b. Any employment located in the city limits of the City of Watertown involving the representation, sale, distribution, manufacture, transport, or dispensing of alcoholic beverages.
  - c. Any gambling establishment not exempted by law.

B. Additional limitations on off-duty (secondary) employment.

1. Permission to perform off-duty employment or to be involved in a business interest may be denied where it is deemed that the employee's performance is less than satisfactory.
2. Employees who have not yet completed their entry-level probationary period shall not be allowed to engage in off-duty employment until their probation is satisfactorily completed.
3. Employees who are on medical or other leave due to sickness, temporary disability, or an on-duty injury, or who are absent from work pursuant to a Family Medical Leave request shall not

be permitted to work off-duty employment without expressed, written permission from the Chief of Police.

4. Work hours for all off-duty employment must be scheduled in a manner that does not conflict or interfere with the employee's performance of duty.
5. An employee engaged in any off-duty employment is subject to call-out in case of emergency, and may be expected to leave his off-duty employment in such situations.
6. Employees may not use any department or duty related equipment for off-duty employment. This includes, but is not limited to, duty weapon, OC spray, baton, handcuffs, or uniform apparel.

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### POSITIONS OF THE PARTIES

#### Employer

The Employer has the exclusive right: "To make and alter rules and regulations for the conduct of its business and of its employees." The reasonableness of the Policy 22.3.3 is not in dispute because it was not challenged when it was adopted. Policy 22.3.3 provides a general explanation of the reason for its specific terms and prohibits in Section (4) employment that:

. . . assists (in any manner) the case preparation for the defense of any criminal action or for either side in any civil action or proceeding.

Serving process is generally considered in the police profession as a conflict with the duties of a police officer. The Employer has a right to adopt the rule in question. It has shown a nexus between the off-duty conduct and his on-duty conduct. The Chief explained this nexus in his response to the grievance. He stated that the off-duty business confers a special advantage to a private interest at the expense of the public interest. It also creates a perception of an unfair advantage in the minds of the public. Officer Zastrow served papers in a case in which he responded to the underlying dispute in his official capacity. When he served papers for his family, he created a conflict of interest because the public could perceive that his family had a special advantage by virtue of his position as a police officer.

Officer Zastrow admitted in the investigation that he was aware of the policy in dispute. He acknowledged that it was his purpose to force a change in the policy. He testified at the hearing that he did not intend to violate the policy, but believed that his actions did not violate the policy. This is inconsistent with what he said in the investigations. The Employer

discontinued providing the process-serving function as part of its services. It has the right to prohibit officers from doing so privately.

Police officers are normally held to a higher standard of conduct with respect to the public. The Employer has discretion to impose the written reprimand in dispute. If it is reviewable at all, it is only to determine if it is arbitrary or capricious. It is a mild form a punishment which was clearly appropriate for this situation. The Employer accorded Officer Zastrow all of the elements of due process, including hearing his side of the story, before it imposed discipline. The Employer asks that the grievance be dismissed.

### Association

Officer Zastrow did not violate General Order 22.3.3. The testimony of Sgt. Randy Johnson supports the Association's position. He said that serving process was not specifically prohibited by the policy. There was no impact on Officer Zastrow's work for the Employer from Officer Zastrow's process service. He also said he never considered less discipline than a written warning. Chief Roets testified that he saw a conflict of interest in this work. However, he acknowledged that on one had ever complained about any aspect of Officer Zastrow's process serving. He acknowledged that until a few years ago, the Department itself served process.

The evidence indicates that Officer Zastrow did not violate the rule in dispute. Officer Zastrow testified as follows. He did not believe serving process constituted a violation of this policy and, therefore, he did not intentionally violate the policy. He served papers for no charge for his own family and for some local attorneys for \$25.00 per service. He has never had a conflict of interest issue arise. He had never been called to testify about any of his affidavits of service, nor has he ever been called to be a witness in any case in which he served papers. When he did process service he wore plain clothes and did not identify himself a police officer.

The Chief failed to meet the standard of "just cause" in Sec. 62.13(5)(em), Stats. This standard is appropriate because it is a well-established "due process" model. It has been used by the Employer and the Association in the past to determine if discipline is appropriate. If the alleged rule violation is upheld, this violation could form the basis for more serious progressive discipline. It asks that the grievance be sustained and the warning rescinded.

### DISCUSSION

The parties agreed that the issue for determination is limited to a determination of whether Officer Zastrow's conduct violated the rule in question. For example, I do not address the right of the Employer to make a rule involving process serving or the right of the Chief to direct Officer Zastrow as to his off duty behavior. I conclude that Officer Zastrow did not violate the rule in dispute.



Officer Zastrow's "business" consisted of service process for his family at no charge other than reimbursement for out of pocket expenses and serving process for a fee plus expenses for a local attorney.

I first address the service of process for his father in his father's rental real-estate business. General Order 22.3.3 relates to "employment" only. Service of process without being compensated does not meet the definition of "employment" within the meaning of General Order 22.3.3. While the word "employ" may be used in the sense of "used in connection with," the rule in question applies to work for compensation. This is the ordinary meaning in the labor relations context. The context of the rule refers to an "employer" and can only reasonably be read as "work for hire." Being compensated for one's actual expenses by a family member does not convert the service of process to "employment." Officer Zastrow did not violate General Order 22.3.3 by serving process for his father.

I next address the Chief's argument that because Officer Zastrow is a well-known local police officer, those upon whom he is serving papers might view his law-enforcement status as an unfair advantage. I note that Officer Zastrow does not serve process in uniform and does not use his police position in this work at all. The "unfair advantage" argument can be made in almost any aspect of the day-to-day affairs of any police officer. In the world of process serving, being recognized at all is a clear disadvantage. The rule specifically prohibits occupations such as bill collecting or repossessing property. Process serving does not carry the same risk of causing breaches of the peace as bill collecting or repossession of property because the process server does not seek to obtain any money or property from the person served. This argument is without merit.

I next address the reason advanced by the Chief that the work is "case preparation." I conclude that it is not. There are services which attorneys use in civil and criminal legal proceedings which are necessary to the litigation process, but are not part of the case preparation process. These include, for example, court reporting services, services that prepare exhibits, printing and others. The service of process is a service which does not involve being part of the advocacy for one side or the other. The words "case preparation" reasonably relate to services supporting advocacy or that involve the right of a client to confidentiality.

The Chief also contended that performing work for the attorney in question as a process server effectively would lead to the perception of an economic conflict of interest. The Chief testified that he did not view other work for an attorney as an economic conflict of interest. For example, he did not view being paid to landscape an attorney's house or to regularly mow the attorney's lawn for pay as a conflict. The economic aspects of process serving provide no greater economic conflict of interest than would otherwise be allowed.

The Chief's also believed that it would be awkward for Officer Zastrow to be called to testify about process he had served and also be called to testify on the merits of a situation involving the same individual. The testimony in this case indicates that Officer Zastrow has

never been called to testify about his affidavits of service. I conclude that those affidavits are rarely challenged. Even if an affidavit is challenged, it is not likely that the testimony would affect testimony on the merits of any police situation. The process issues are ordinarily handled separately from testimony on the merits of any proceeding. I, therefore, conclude that Officer Zastrow did not violate General Order 22.3.3.

**AWARD**

Officer Zastrow did not violate General Order 22.3.3. The Employer shall withdraw the written reprimand in dispute and remove it from Officer Zastrow's personnel file.

Dated at Madison, Wisconsin, this 16th day of May, 2012.

Stanley H. Michelstetter II /s/

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Stanley H. Michelstetter II, Arbitrator