BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL UNION #583

and

CITY OF BELOIT

Case 161
No. 70883
MA-15074

(Side Letter Grievance)

Appearances:

Mr. John B. Kiel, Attorney, Law Offices of John B. Kiel, L.L.C., 3300 252nd Avenue, Salem, Wisconsin, appearing on behalf of International Association of Firefighters Local Union #583.

Ms. Nancy Pirkey, Attorney, Buelow, Vetter, Buikema, Olson & Vliet, LLC, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin, appearing on behalf of the City of Beloit.

ARBITRATION AWARD

International Association of Firefighters Local Union #583, hereinafter "Union" and the City of Beloit, hereinafter "City," requested that the Wisconsin Employment Relations Commission provide a panel of arbitrators from which to select a sole arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot of the Commission's staff was selected. The hearing was held before the undersigned on December 8, 2011 in Beloit, Wisconsin. The hearing was transcribed. The parties submitted briefs and reply briefs, the last of which was received on March 4, 2012, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute, but were unable to agree as to the substantive issues.

The Association frames the substantive issues as:

> Did the City violate the November 30, 2009, Wage Freeze Side Letter of Agreement by failing to fulfill its guarantee of retaining 57 bargaining unit sworn personnel through 2010 and 2011? If so, what is the appropriate remedy?

The City frames the substantive issues as:

> Did the City arbitrarily delay in filling a vacancy in the position of entry level firefighter resulting in a violation of the Side Letter of Agreement reached by the parties? If yes, what is the appropriate remedy?

Having considered the evidence and arguments of the parties, I frame the substantive issues as:

> Did the City violate the terms of the November, 2009, Side Letter of Agreement when it failed to fill the vacancy created by the retirement of Lt. Mark Gustafson? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

. . .

ARTICLE XXI – MANAGEMENT RIGHTS

The Union recognizes and agrees that, except as expressly limited by the provisions of this Agreement, the supervision, management, and control of the City's business and operations are exclusively the functions of the City. The powers, rights, and/or authority herein claimed by the City are not be exercised in a manner that will undermine the Union or as an attempt to evade the provisions of this Agreement or to violate the spirit, intent or purpose of this Agreement.

The City and Union shall immediately enter into negotiations to replace any section of this Agreement if found to be in violation of the Wisconsin Statutes.

. . .

XXVI – AMENDMENT PROVISION

This Agreement is subject to amendment, alteration, or addition only by a subsequent written agreement between, and executed by, the City and the Union where mutually agreeable. The waiver of any breach, term, or condition of this

Agreement by either party shall not constitute a precedent in the future enforcement of all its terms and conditions.

. . .

BACKGROUND AND FACTS

The City provides fire prevention and emergency services to the public of the city of Beloit. The Fire Department is administered by a Police and Fire Commission and the management staff including a chief, one assistant chief and two deputy chiefs. Each shift is staffed by a captain, three lieutenants, four motor pump operators and fire fighters. Fire Department personnel work 24 hour schedules. At all times relevant herein, the Fire Chief was Bradley Liggett.

The Union and City are parties to a series of collective bargaining agreements including one which covered the time period 2008 through 2010. That agreement included, among other items, salary increases in the amount of 3% in 2008, 2.5% in 2009 and 2.5% in 2010. The 2008-2010 agreement did not contain any provision which identified the minimum number of bargaining unit employees which the City would employ.

In 2009, the Department was staffed by 61 total employees. Of those, 57 were bargaining unit members.

In late summer, early fall of 2009, the City approached the Union and asked to re-open the collective bargaining agreement due to the City's poor fiscal outlook for 2010. The Union agreed to re-open the 2008-2010 labor agreement. Following negotiations, the City Manager Larry Arf directed the following October 5, 2009, memorandum to Union President Steve Warn:

SUBJECT: CITY REQUEST FOR 2010 WAGE FREEZE – OCTOBER 5 DISCUSSIONS

Although you indicated that you would prepare something to share with your membership for their meeting scheduled for tomorrow, Tuesday, October 6, 2009, I felt it important to quickly summarize the results of our discussion to avoid any possibility of further misinterpretation.

Per our discussions on this date, the existing Collective Bargaining Agreement would be amended to provide for the following changes:

1. Union employees would forego the scheduled 2.5% scheduled salary increase for 2010, continuing to use the 2009 salary schedule.

2. The City would add one additional year (2011) to the Collective Bargaining Agreement. The Agreement would continue to use the 2009 salary schedule, including all scheduled step increases until December 15, 2011, at which time employees would be granted a 2.5% across the board salary adjustment.

3. The City would guarantee no changes in the group health insurance plan for both 2010 and 2011.

4. Further, the City would guarantee that 57 bargaining unit sworn personnel would be retained through 2010 and 2011. Any vacancies among the sworn personnel would be filled through the normal recruitment and appointment process currently in place and overseen by the City's Police and Fire Commission. There would be no hiring freeze or arbitrary delay in filling vacancies.

5. The City would also agree to amend Article V of the Collective Bargaining Agreement entitled, "Residency." All references to the current 25-mile radius in this article would be changed to read: "A 50-mile radius."

6. Article XVI entitled "Sick Leave" would also be amended for (sic) the language supplied by the union. The changes in the Article would allow the employees who use no more than one sick day to receive three compensation days; while employees who use no more than two sick days would receive two compensation days; and employees who use no more than three sick days would receive one compensation day. The balance of the paragraph would remain unchanged.

7. The City agrees to settle grievances 08-03 and 08-04 as proposed by the Local during our initial meeting on Friday, September 18, 2009. (Added to memo on 10-6-09.)

Once again, let me take this opportunity to express my appreciation for your consideration of these important requests, which we believe will respond in a realistic and financially significant way to help the City move through the current economic climate while preserving and protecting the City's important workforce and the quality services they provide to the Beloit community.

As always, if you have any questions or would like additional information, do not hesitate to contact my office.

. . .

The Union agreed to the terms and the City drafted a Side Letter which both sides executed on November 30, 2009:

SIDE LETTER OF AGREEMENT

The City of Beloit (hereinafter referred to as "City") and the International Association of Firefighters (hereinafter referred to as "Union") agree as follows:

1. The Union agrees the 2.5% wage increase scheduled for January 1, 2010 has been replaced with a wage freeze for 2010. The wage freeze would result in no across the board wage increase for 2010 (the 2009 Salary schedule will continue in use for contract year 2010).

2. The City and the Union agree to enter into a one year contract beginning January 1, 2011 and ending December 31, 2011. The 2011 Collective Bargaining Agreement would continue to use the 2009 salary schedule, including all scheduled step increases until December 15, 2011 at which time employees would be granted a 2.5% across the board increase.

3. The City would guarantee no changes in the group health insurance plan for both 2010 and 2011.

4. Further, the City would guarantee that 57 bargaining unit sworn personnel would be retained through 2010 and 2011. Any vacancies among the sworn personnel would be filled through the normal recruitment and appointment process currently in place and overseen by the City's Police and Fire Commission. There would be no hiring freeze or arbitrary delay in filling vacancies.

5. At the signing of this agreement additional changes to the contract language will be amended as follows:

. . .

This Agreement is made this 30th day of November, 2009.

. . .

In May of 2010, Assistant Fire Chief Timothy Curtis distributed a memorandum indicating that the Department intended to develop a new firefighter eligibility list in January 2011. Curtis sent the memorandum to other fire department officers, as well as to: Florence Haley, City Director of Human Resources; Gary Schenck, Blackhawk Technical College; and Joe Simpson, City Human Resources Analyst. Curtis identified various recruiting activities including attendance at local job and career fairs in October and November, and asked the recipients to serve on a committee to assist with recruitment.

To effectuate the creation the January 2011 eligibility list, a Recruitment Schedule was prepared. The record is silent as to when the Schedule was created, but it likely occurred after May 18, 2010 and prior to September 3, 2010:

2010-11 City of Beloit Fire Department Recruitment Schedule

WGEZ Radio Interview with Recruitment Committee – September 3, 2010
(Discuss firefighter position, application requirements, and application dates).

City of Beloit Website Recruitment page posted August 22, 2010

City of Beloit Fire Department Job Fairs at Fire Department Headquarters – September 18, October 16, November 6, and December 11, 2010

Recruitment presentations to Blackhawk Technical College Fire Science classes – September 17, 2010.

Recruitment presentations to Rock Valley College Fire Science classes – September 20, 2010.

October 2010 – Recruitment posters and brochures displayed at local community organizations and public locations.

Written Exam ordered December 2010.

Written testing location (Blackhawk Technical College) reserved for March 26, 2011.

Newspaper and JobNet advertisements November/December 2010

Application period opens at 8 am January 17 2011

Application period ends 5 pm March 7 2011

Firefighter candidate written test March 25, 2011

Candidate eligibility list created – April 2011

CPAT candidate list established – April 2011

PFC and Fire Chief Candidate Interviews – May 2011 (tentative)

The City Police and Fire Commission reviewed the Recruitment Schedule at its September 27, 2010 meeting, but the minutes do not indicate that the Schedule was approved.

On September 8, 2010, bargaining unit sworn officer Lieutenant Mark Gustafson retired from the City. Gustafson's retirement created a vacancy in the Department and reduced the number of bargaining unit personnel from 57 to 56 members.

As a result of Gustafson's retirement, the City began the internal promotion process. The process started with the promotion of the temporary lieutenant to Gustafson's lieutenant position and continued down through the ranks until there was a vacancy in a firefighter position. The promotional process for Gustafson's position was completed in November or December of 2010.

The City made the decision to start using an electronic application process over a written application process. By February 4, 2011, the City had received 82 online applications for the Firefighter eligibility list.

The Fire Department relies on a Recruitment Committee, composed of labor and management, to process the recruitment, application and hiring process. The City has used this Committee for over nine years. The minutes from the Committee's February 4 meeting indicate that the "bugs" in the electronic application process had been worked out, that the written test would be offered on March 26, 2011 and that "Lt Gustafson's vacancy will be filled immediately from the new hiring list…"

City Administrator Larry Arf announced a hiring moratorium on March 4, 2011. The moratorium specifically excluded the recruitment underway to create an eligibility list for the Fire Department.

On April 12, 2011, the Recruitment Committee met with the intent to review the application materials of the applicants that passed the written test. This was the process that the Committee had followed in the past. The Committee would review each applicant's application and accompanying background packet which contained copies of the applicant's various licensures, certificates and other credentials to verify that the applicant met the minimum qualifications as set by the Police and Fire Commission Rules and Regulations. Because the electronic application did not request these items, the Committee was unable to verify applicant qualifications. The Committee did not review any applications on April 12.

On May 26, 2011, the Recruitment Committee met again with the intent to evaluate the qualifications of the applicants. The Committee was presented with a new matrix created by Analyst Simpson and Simpson recommended that the Committee review only the top 50 applicants. Lt. Paul Martin, Chair of the Recruitment Committee, expressed Chief Liggett's expectation that the Committee review all 109 applicant materials. This resulted in disagreement among and between the Committee members, interrupted the evaluation process, and Liggett asked for an informal legal opinion from the City Attorney.

The Recruitment Committee completed its review of applicant application materials on July 16, 2011. On that date, an email was sent to nine candidates informing them that they "failed to meet the PFC's minimum requirements for employment with the City of Beloit Fire Department." A second email was sent to 78 additional candidates informing them that the next step in the employment process was taking the Candidate Physical Ability Test (CPAT) in West Allis. The email further explained that the City would communicate at a later date with those applicants invited to take the CPAT.

The Committee selected 20 candidates for further consideration. Of those 20, six had not completed the CPAT. On July 28, 2011, Martin sent an email to Peter Rhode, Assistant Chief - Bureau of Training and Safety, West Allis Fire Department with six candidate names that the City was sponsoring for the CPAT test. The CPAT test is administered over an eight week time period and included two orientation dates in August, two trial dates in September, and one test date for the final examination. The final examination was scheduled for September 30, 2011.

On July 31, 2011, Lt. Martin sent the following email to Chief Liggett:

Subject: Recruitment next step?

Chief,

> What is your wish for the next step of the process, once the results of the CPAT have returned? Do you wish to keep a complete list of the top 20, by filling the empty spots or just keeping the list without filling the empty spots? Once this is determined, do you want me to then notify the top 20 or remaining out of the top 20, that they have been selected to be interviewed and they will be emailed with an interview date?

Lt. Martin

During the latter part of July 2011, Lt. Martin collated applicant files and began developing interview questions. Martin identified tentative interview dates in October, 2011.

Captain Ed Armstrong retired on or about August 22, 2011. Armstrong's retirement created a vacancy in the Department and reduced the number of bargaining unit personnel from 56 to 55 members. [1]

During the summer months and concluding in October of 2011, Chief Liggett was involved in the preparing the 2012 Fire Department budget. Liggett learned that his Department would lose five positions. Because the two vacant entry level firefighter positions would be eliminated with the new budget, Liggett decided to cancel the interviews and not fill either of the positions.

The Union filed a grievance on July 11, 2011 asserting a "continuing and ongoing" violation of the November 30, 2009 Side Letter of Agreement. The Union maintained that the City "failed to fulfill the guarantee set forth under paragraph 4 of the Side Letter of Agreement." The Union described the appropriate remedy "for the City's bad faith failure to comply with the terms of paragraph 4 of the Side Letter of Agreement is the restoration of the January 1, 2010 wage increase waived by Local #583 in exchange for the City guarantee to maintain a staffing level of 57 bargaining unit sworn personnel." The Union also sought back pay for all bargaining unit members. The City denied the grievance at all steps and the matter proceeded to arbitration.

The Police and Fire Commission met on September 26, 2011. The minutes from this meeting indicate that, "[p]er the City Manager, Chief Liggett passed on that no interviews will take place." At that same meeting, the Commission reviewed the proposed Rules and Regulations which included significant changes in the recruitment process. The Commission "voted unanimously to lay over until the next meeting."

Additional facts, as relevant, are contained in the **DISCUSSION** section below.

ARGUMENTS OF PARTIES

Union

The language of the Side Letter of Agreement was plain and clear and it conveys a "distinct idea." In exchange for a two and one half percent (2.5%) wage concession, the City gave the Union a guarantee that it would retain 57 bargaining unit sworn personnel for the years 2010 and 2011. The City failed to uphold its end of the bargain – guaranteeing the

[1] The City included the following in its Initial Brief:

> The City questions whether the vacancy created by the retirement of Captain Armstrong is a proper subject for this grievance because this vacancy was not created until August 2011, more than a month *after* the grievance was filed. However, the City understands that if the Arbitrator sustains the grievance and finds an arbitrary delay in filling the vacancy created by Lt. Gustafson's retirement, then by extension, the City should have filled Armstrong's position more quickly.

retention of 57 bargaining unit sworn personnel – and therefore violated the terms of the Side Letter.

Guaranty is defined by Black's Law Dictionary as "a contract that some particular thing shall be done exactly as it is agreed to be done." *Black's Law Dictionary*, 634 (5th Ed, 1979). Just like the words "shall" and "will," guarantee is not ambiguous and does not leave room for deviation. See WINNEBAGO COUNTY, Case 373, No. 64229, MA-12846 (McLaughlin, 10/05). The City chose this word to express its assurance and commitment to maintain 57 bargaining unit positions, but it did not fulfill its responsibility under the agreement.

The City had the opportunity to fill the Gustafson vacancy because there was an eligibility list in place at the time Gustafson retired. Instead, it developed of a completely new and different recruitment and appointment process. The City was obligated to hire consistent with the hiring process agreed to in the Side Letter and in doing so, the City implemented a de facto 2010-2011 hiring freeze.

Even after the City finalized its new hiring process and adopted a new eligibility list, it refused to hire as required by the Side Letter. The City reasoned that since it planned on cutting the size of the department in 2012, its actions were justified. The City's contention that the new hires would have simply been laid off in 2012 is an excuse to avoid hiring firefighters.

The City failed to fulfill its duty of good faith and fair dealing which extends to labor contracts:

> The implied covenant of "good faith and fair dealing" is similar to the principle of reason and equity' and is deemed to be an inherent part of every collective bargaining agreement. Indeed, this implied covenant is sometimes referred to as the doctrine of reasonableness. The obligation prevents any party to a collective bargaining agreement from doing anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Elkouri & Elkouri, *How Arbitration Works*, (BNA, 6th Ed. 2003), p. 478. Also see CITY OF OAK CREEK, Case 133, No. 64025, MA-12780 (McGilligan, 11/05).

As to remedy, the Union's willingness to forgo the two and one-half percent (2.5%) wage increase was conditioned upon the City's agreement to maintain 2010 and 2011 staffing at 57 sworn bargaining unit employees. Since there would not have been an agreement by the Union but for the staffing guarantee, it follows that the appropriate remedy is to award the Union monetary damages to place the Union in the position it would have been in had there been no breach of the Side Letter. This is a retroactive award of the 2010 wage increase effective January 1, 2010.

City

The language of the Memorandum of Understanding must be afforded its plain and ordinary meaning. Should interpretation be necessary, it is appropriate to apply regular dictionary definitions to better understand the parties' intent. Arbitrator John C. Carlson used *Webster's Third International Dictionary* (unbar. 1993) and defined "arbitrary" as "based on random or convenient selection or choice rather than on reason..." SCHOOL DISTRICT OF SUPERIOR, Case 132, No. 69508, MA-14632 (Carlson, 9/10).

Other arbitrators have accepted the Black's Law Dictionary definition:

> ...fixed or done capriciously or at pleasure; without determining adequate principles; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic; ... without fair, solid, and substantial cause; that is, without cause based upon law ... not governed by any fixed rule or standards.
>
> WEST ALLIS-WEST MILWAUKEE SCHOOL DISTRICT, Case 64, No. 42958, MA-5859 Engmann, 90), VERNON COUNTY (COURTHOUSE), Case 87, No. 47248, MA-7210 (Schiavoni, 9/92)

Arbitrators have also relied on the definition offered by the Wisconsin Supreme Court:

> To find an action as being arbitrary is a justifiably high standard to meet. Essentially for the Association to prevail in this matter, I must find that the actions of the District were groundless, without reason, or as the Wisconsin Supreme Court has described it, action by the District that is "... either so unreasonable as to be without a rational basis..."
>
> EAU CLAIRE SCHOOL DISTRICT, WERC DEC. NO. MA-1660 (Hahn, 7/99) citing PLEASANT PRAIRIE V. JOHNSON, 34 Wis. 2D 8, 12 (1967); BRODHEAD SCHOOL DISTRICT, WERC. DEC. NO. MA-9343 (Engmann, 7/89). See also DEERFIELD COMMUNITY SCHOOL DISTRICT, WERC DEC. NO. MA-9017 (Crowley, 10/95).

Regardless of which definition of arbitrary is used, the City did not arbitrarily delay the filling of vacancies in the Fire Department.

The City acknowledges that there were delays in the hiring process, but none were irrational, unnecessary or unconsidered choices. It normally takes six months to create an eligibility list and that is exactly how long it took in 2011. By July 16, 2011 there were 78 qualified candidates. The City realizes that at the time of the hearing, the City had not hired an entry level firefighter to fill either Gustafson or Armstrong, but there were plenty of legitimate non-arbitrary reasons for the delay.

The City's decision to create a new eligibility list was not arbitrary. When Gustafson retired, the City had only a 2007 eligibility list. Eligibility lists are generally used for just two years. The 2007 list therefore was twice as old as one that is generally used. The City decision to not use the 2007 list in lieu of a creating a more timely and relevant list was a reasonable decision made in good faith.

Similarly, the City's decision to update its application process and use an electronic application was not arbitrary. As with most technology, the first usage did not go as the City planned. There were applicants that had problems completing the application and submitting it to the City. After the due date for applications, the City realized that the electronic application did not solicit the information that was needed to determine minimum qualifications. The generic electronic application caused unanticipated and unexpected delays in the recruiting process. The "glitches" were not willful or irrational and do not rise to the high standard of arbitrariness.

The Human Resources Department and Fire Department disagreed as to the number of candidates that would be offered the opportunity to submit supplemental application materials. This dispute arose in May and was resolved by July. The Chief was concerned the City was opening itself up to legal liability and he contacted the City attorney seeking an informal legal opinion. The issue in this case is not whether the recruiting process could have been completed faster or more efficiently, but whether the delay was arbitrary – and it wasn't.

In addition to the time dedicated to the recruitment process, the Fire Department administration was involved in other job duties including promoting staff to fill the vacant captain and lieutenant positions. During the recruiting process, management staff and members of the Recruiting Committee were scheduled for and took their vacation which negatively impacted the hiring timeline. Another barrier the City encountered was the minimum of eight week completion period for the CPAT. Finally, given the loss of shared revenue and reduced state aid for the 2012, Chief Liggett was forced to spend an excessive amount of time preparing the 2012 budget, time which could not be dedicated to the recruitment and appointment process.

The City Council eliminated five positions for the Fire Department effective January 1, 2012. The Chief avoided layoffs through attrition and choosing to not fill the two entry level firefighter vacancies created by Gustafson and Armstrong. In doing so, he not only saved unemployment compensation payments, but avoided having to lay off staff that he would have just hired. This was a reasonable decision.

Assuming arguendo that a violation of the MOU is found, the Union's remedy is excessive and irrational. The Union is asking for $156,000.00. A remedy in this amount would result in further financial difficulty within the Department and possibly require additional staffing cuts. The typical remedy in grievance arbitration is make-whole. The Union is asking the Arbitrator to reward Union members who have not been harmed by any contractual violation. If a contract violation is found, the appropriate remedy is to order the

City to hire a new firefighter and provide whatever back pay and benefits that the firefighter would have received had the City hired at the "appropriate" time.

Union in Reply

This is a contract interpretation case and various principles of contract interpretation apply to assist in ascertaining meaning. First, the language of the Side Letter must be viewed in its totality rather than based on single words or phrases. The City attempt to focus on just the last five words of paragraph four of the Side Letter, "arbitrarily delay in filling vacancies." In looking at solely these words, the City glosses over all the words and meaning that precedes them. Arbitral standards require the arbitrator to give effect to all clauses and words of the agreement.

Another contract interpretation principle that applies is *noscitur a sociis,* which requires that the arbitrator look to the words associated with clauses to determine meaning. When the five words are read in the context of the last sentence of paragraph four, it is clear that the parties intended to design and give substance to the City's guarantee of staffing. The last sentence is not an escape clause as the City suggests.

The City's interpretation renders the entirety of paragraph 4 to be meaningless. When alternate interpretations of a clause are possible and the result of one is to render the other provision meaningless or ineffective, the inclination will be to interpret to give effect to all provisions. Elkouri at p. 463. The City agreed to not just maintain 57 sworn bargaining unit members, but it also promised to fill those positions promptly. The only way to give meaning to these phrases is to sustain the grievance.

The City drafted the Side Letter and the rule of *conta proferenems* applies. This means that any ambiguity should be construed against the City since the City drafted the language.

The City did not follow the "normal recruitment and appointment process in place" as the Side Letter requires. The City had an eligibility list in November 2009. The City had a process for hiring that did not include electronic application or a review of applicant credentials after the written test. These are new procedures that have since been codified. These new procedures caused delays and the ultimate failure by the City to hire firefighters to replace Gustafson and Armstrong. The City's numerous arguments that attempt to justify the delay and non-compliance with the Side Letter support a finding in favor of the Union.

Even if the standard of "arbitrariness" is applied to this case, the City's arguments must fail. When the City decided it would convert from a paper application to electronic application, it knew that there could be delays. The same holds true for the City's decision to introduce a new qualification scoring matrix. The City changed its hiring and recruitment process so much so that it required the issuance of a formal legal opinion from a City attorney before it would proceed. The City was obligated to maintain the normal recruitment and

appointment process to avoid the very recruitment and hiring delays that occurred in this situation.

City in Reply

The City maintains that it did not violate the Side Letter of Agreement when it implemented minor changes to its recruitment policies and procedures for 2011.

The City challenges the Union's assertion that the City could have immediately hired from the 2007 eligibility list. The Fire Chief testified that the list contained applicants *eligible* to be hired, but was not a list of applicants that were *qualified* to be hired. This is a significant distinction in that the candidates on the 2007 eligibility list still needed to complete the CPAT, an interview process, a background check and a medical and psychological examination. Even if the Chief had chosen to use the 2007 list, it still would have taken four to five months to make a job offer. Moreover, had the Union believed that a candidate should have been hired from that list, then it should have grieved the City's decision at that time and they did not.

The Union's claim that the City used a "new and different" recruitment process for 2011 is incorrect. The decision was made city-wide to upgrade to an electronic application process and was planned for several months, well before Gustafson retired. The remainder of the hiring process remained the same – written examination, CPAT, oral interview, background investigation and medical and psychological test. These steps are determined by the Police and Fire Commission and the Department lacked the legal authority to change them.

The City's decision to modernize its employment application process was neither arbitrary nor capricious and did not violate the Side Letter. The City acted in a practical, reasonable and logical manner. While hindsight affords the opportunity to anticipate "glitches," those minor problems do not rise to the level of arbitrary or capricious actions.

The Union is attempting to abrogate management rights by forcing the City to use an expired, out-of-date eligibility list. The City has the right to decide the process by which it hires firefighters. The Union's attempt to dictate to the City that it must utilize the 2007 eligibility list interferes with the City's management right to determine the steps in its recruitment and appointment process.

The issue in this case is not whether the City could have hired from the 2007 eligibility list, but rather whether the City acted arbitrarily when it elected to begin a new recruitment process and create a new eligibility list for 2011. The Police and Fire Commission approved the 2011 Firefighter Recruitment Schedule at its September 27, 2010 meeting. This evidences the City's intent to fill Gustafson's position.

The City agrees that the plain language of the Side Letter should be applied. The parties disagree as to what the plain language means. The Union's focus on "guarantee that 57

bargaining personnel would be retained" is wrong. The focus of this case is on the application of the language, "[t]here would be no hiring freeze or arbitrary delay in filling vacancies."

The City requests that the Arbitrator dismiss the grievance because the City did not violate the terms of the Side Letter. Should the Arbitrator sustain the grievance, the City points out that the Association is seeking a penalty, not a remedy and that the proper remedy is to order the City to fill the vacant positions and provide make-whole relief to the two candidates who would have been hired by the end of 2011.

DISCUSSION

The City and Union do not agree on the issue in the case. The City focuses on the last sentence of paragraph four of the Side Letter while the Union focuses on the word "guarantee" in the first sentence of that same paragraph. Both of the parties' submitted issues are too limiting and fail to recognize that paragraph four contains three sentences and is part of a Side Letter that contains five paragraphs.

This is a contract interpretation case. The interpretative process involves ascertaining the parties' intended meaning of the terms and provisions of a collective bargaining agreement. A contract term is ambiguous if it is susceptible to more than one meaning. Elkouri & Elkouri, *How Arbitration Works*, 6th ed., p. 434 (2002) If the words are plain and clear and convey one distinct idea, then it is unnecessary to resort to interpretation or extrinsic evidence. Id. Alternately, if the language is ambiguous, then extrinsic evidence and the principles of contract and statutory interpretation are utilized serve as guides to determining the parties' intent.

Both the City and the Union conclude that the plain language of the Side Letter supports their position, yet they reach differing conclusions. The fact that the parties assign a different meaning to the same contract language does not necessarily mean that the contract language is ambiguous. I therefore start with the language in dispute.

Paragraph four of the Side Letter of Understanding, which was negotiated at the behest of the City and drafted by the City, reads as follows:

> 4. Further, the City would guarantee that 57 bargaining unit sworn personnel would be retained through 2010 and 2011. Any vacancies among the sworn personnel would be filled through the normal recruitment and appointment process currently in place and overseen by the City's Police and Fire Commission. There would be no hiring freeze or arbitrary delay in filling vacancies.

The first sentence provides that the City will "guarantee" that it will "retain 57 bargaining unit sworn personnel" for the years 2010 and 2011. This language is strong, clear and directive. "Guarantee" is not ambiguous nor does it grant the City discretion. Instead, it assures the

Union that the City would retain 57 bargaining unit sworn officers for two consecutive years. This sentence supports the Union's position, but it cannot be read in isolation.

Moving to the second sentence of the paragraph, it is clear that the parties recognized that there was the possibility that vacancies might occur during 2010 and 2011. Rather than drafting language that would have given the City the option to fill or not fill these vacancies, i.e. by including the language "may be" filled, the parties elected to dictate that any vacancies "would be" filled. This is directive rather than optional and is illustrative of the parties' intent.

The remainder of the second sentence explains the procedure. It provides that vacancies "would be filled through the normal recruitment and appointment process currently in place and overseen by the City's Police and Fire Commission." This portion of the sentence has two components: first, it refers to the "normal recruitment and appointment process currently in place;" and second, it refers to oversight from the Police and Fire Commission. The inclusion of the terms "normal" and "currently in place" are specific and are straightforward references to time and the existing state of affairs in November 2009 when the Side Letter was reduced to writing.

Looking to the last sentence of paragraph four, it provides that "[t] here would be no hiring freeze or arbitrary delay in filling vacancies." The parties do not address the prohibition against a hiring freeze, but there is disagreement as to the import of the phrase, "arbitrary delay in filling vacancies." This sentence could have been drafted without the word "arbitrary" included. Had that occurred, then any delay, reasonable or otherwise, would have been a violation of the Side Letter. The parties did not draft the paragraph in this manner. Rather, they modified "delay in filling vacancies" with the term, "arbitrary" therefore conceding that some delay was expected and acceptable.

Each of the three sentences of paragraph four have independent meaning, but must be read together to learn the parties' intent. The first sentence set forth the guarantee of 57 bargaining unit sworn officers, but that guarantee is diminished by the next two sentences, each of which direct the City as to how it will fill vacancies that arise. Those directives ensure the timely filling of vacancies and prevent obstruction. I therefore do not find that the falling below 57 bargaining unit sworn personnel in the Fire Department constituted a per se violation of the guarantee contained in the Side Letter, but move next to examine the manner in which the City addressed filling the Gustafson, and subsequent Armstrong, vacancies.

Did the City follow the Recruitment and Appointment Process "Currently in Place" after Gustafson Announced his Retirement?

Having concluded that the City was obligated to maintain the status quo for recruitment and hiring, I move to the Union's challenge that the City failed to follow the "normal recruitment and appointment process currently in place." The Union argues that the City

followed a "new" recruitment and appointment process while the city maintains that although there were glitches, the process did not change.

In order to determine whether the recruitment and appointment process used in 2011 was new or different, it is appropriate to review the process that was followed prior to 2011. Prior to 2011, when a vacancy arose, the first question to be answered was whether a valid eligibility list existed. If such a list existed, then the Fire Chief, Union President and Assistant Chief would review the applications and select candidates to interview. In addition to the interview, candidates would complete the Candidate Physical Ability Test (CPAT), a medical and psychological examination and a background check. Ultimately, one candidate would be recommended to the Police and Fire Commission for hire. This process, if an eligibility list existed, took approximately two and one-half months to complete. If an eligibility list did not exist, then one would need to be created. In order to be included on an eligibility list, an applicant would have had to have completed a one page paper application, passed a written examination and submitted a background packet that provided verification of the applicant's education, licenses, and certificates. Once an applicant passed the test and the Recruitment Committee verified the applicant's qualifications, they were placed on the eligibility list.

When Gustafson retired on September 8, 2010, there was a valid eligibility list in place. That list had been created in 2007 and was initially valid for two years, but Chief Liggett extended it from 2009 to 2010, and in May of 2010, Liggett again extended the list an additional year through May of 2011. The City did not follow the recruitment and appointment process "currently in place" when Gustafson retired. The City's decision in September of 2010 to not utilize the 2007 extended eligibility list violated paragraph four of the Side Letter of Agreement.

This record indicates that the Union did not take issue with the City's decision to create a 2011 eligibility list rather than hire from the 2007 list. Had they done so, the grievance would have been filed in September 2010. Chief Liggett testified that he spoke to the bargaining unit and told them that he "felt it was better for the City to hire off a fresh list than a four-year-old list" and the Union went along with the City's decision to create a new list. Tr. 88. As Union President Steve Warn testified:

> We –we took – we – we took this as a – as it was written. Once we figured out that the city wasn't going to go any farther and once we figure out the wasn't going to hire anybody, even though they started a new procedure for hiring somebody, new hireback – or not a new hireback, a new eligibility list procedure, we knew that they weren't – that their intentions were not going to go any farther,; that we weren't going to get anybody. That's when we filed a grievance because, you know, they had said that they were going to start a new list, and we took them at their word that they would follow through with their word about the guarantee of 57. And once we figured it out through talking with Paul and stuff that the recruitment process wasn't going, that that's when we filed the grievance. Tr. 101-102

In addition, the Recruitment Committee, which has both Union and management representatives, was integrally involved in the creation of the 2011 eligibility list. While the Union argues in its brief that the City should have hired from the 2007 list, the evidence establishes that the Union not only acquiesced, but that it assisted in the creation of a new 2011 eligibility list.

Having concluded that the decision to forgo use of the 2007 eligibility list was mutual, the next issue to address is whether the City followed the "recruitment and appointment process currently in place" when it created the 2011 eligibility list. Applying the 2009 process to the 2011 dates, applicants applied in January and February 2011, took the written test on March 26, 2011, and on April 12, 2011 the Recruitment Committee was scheduled to review the applications of those applicants that had passed the written test. The Recruitment Committee did not review applications on April 12. This was the point at which the recruitment and appointment process broke down. This record suggests that the genesis of the collapse occurred much earlier, when the City decided to utilize a city-wide electronic application in lieu of a paper application created by the Fire Department.

In 2011, a decision was made by the City to replace paper application with a more extensive, albeit generic, electronic application. The electronic application was a full employment application which asked for experience, education, and licensure, but it did not ask job or department specific questions. Although applicants experienced "difficulty in getting documents attached to the application" and problems "if an application was started and someone got out, then to try and get back in it there were some issues," these were worked out prior to the due date for applications. Tr. 45. All individuals that completed the electronic application were invited to take the written test on March 26, 2011.

As a result of using a city-wide electronic application, Analyst Simpson was infused into the Fire Department recruitment and hiring process, and that involvement resulted in conflicts. The first difference of opinion arose after the Simpson screened and ranked applications. The scoring matrix that the Simpson used was not how Liggett wanted the applications scored. Ultimately, Liggett decided to move forward using the matrix created by Human Resources with the understanding that the Recruitment Committee would verify the applicant credentials and qualifications.

The next disagreement was also between the Human Resources Department and Chief Liggett. Simpson took the position that the Recruitment Committee only needed to look at the top 50 applicants (per his scoring matrix) and Liggett believed that all 109 applications needed to be reviewed. The Recruitment Committee met on May 12, 2011, and only reviewed 50 applications based on solely the information that was contained in the electronic application. Liggett remained dissatisfied believing that the City would subject itself to legal liability if they did not review the applications of all of the applicants that passed the written test. On May 18, 2011 the Recruiting Committee sent an email to the City Attorney asking for an informal legal opinion. Some time later, a meeting occurred between the City Attorney, the City Manager and the Chief where it was decided that all 109 applications would be reviewed. Although the

initial 50 applications had already been reviewed, the Recruitment Committee did not process their applications further pending a resolution on the legal liability question.

The final conflict arose as a result of the Recruitment Committee's inability to verify applicant qualifications and credentials. Chief Liggett was concerned that applicants who lacked the minimum qualifications may be allowed to move forward in the hiring process since the applicant credentials could not be substantiated with solely the electronic application. Lt. Martin suggested to the Recruitment Committee on April 23 that the Committee contact the applicants and request proper qualifications and valid CPAT certification, but his suggestion was not acted upon. Instead, this issue was put on hold until a resolution was reached as to how many applications would be reviewed. After the decision was made to evaluate all 109 applications, the Recruitment Committee initiated contact with all 109 applications and asked that they submit verification of their qualifications and certifications by July 13, 2011.

The City's introduction of an electronic application, the addition of Analyst Simpson to the Recruitment Committee, the use of a new scoring matrix, and the internal conflict over how many applications would be reviewed wreaked havoc to the recruitment and appointment process. While I do not believe the City intended to deviate from the "recruitment and appointment process currently in place," that is what occurred and what delayed the filling of the Gustafson vacancy. Unlike the joint decision reached between the Union and the City to create a 2011 eligibility list, all of the subsequent disputes were internal to the City and therefore totally within the City's control and responsibility to rectify.

Did the City Exercise "Arbitrary Delay in Filling Vacancies?"

The third sentence of paragraph four of the Side Letter directs that there "would be no hiring freeze or arbitrary delay in filling vacancies." The City acknowledges that delays occurred in the recruitment and appointment process and admits that the process went more slowly than it desired, but defends its actions as reasonable, practical, and not arbitrary.

The City offered numerous definitions for the term arbitrary. Arbitrary has been defined by the Wisconsin Supreme Court in PLEASANT PRAIRIE V. JOHNSON, 34 Wis. 2D 8, 12, 148 N.W. 2D 27 (1967) as, "an arbitrary or capricious decision is one which is either so unreasonable as to be without a rational basis or the result of an unconsidered, willful and irrational choice of conduct," and in OLSON V. ROTHWELL, 28 Wis. 2D 233, 239 (1965) as "arbitrary action is the result of an unconditional, willful and irrational choice of conduct and not the result of the "winnowing" and "sifting" process."

The City's analysis of the circumstances giving rise to each of the glitches focuses on the reasonableness of each the City's actions in the context of creating an eligibility list. The language of paragraph four addresses the 57 bargaining unit sworn personnel guarantee and the need to fill vacancies. There is no question that the City's decision-making process was focused on and driven by its desire to create a 2011 eligibility list with the highest caliber of candidates for future hire. The issue is not whether it was arbitrary for the City to implement

an electronic application, reconfigure the scoring matrix, include a human resource representative on the Recruitment Committee or seek a legal interpretation. Viewed individually, these were all rational actions taken by the City, but when considered cumulatively, it is an unusual sequence of events that arbitrarily delayed the filling of vacancies. Moreover, there is no evidence to indicate that the City, at any time, engaged in a "winnowing" or "sifting" process whereby it analyzed whether its decisions to modify the recruitment and appointment process would cause delays in filling a vacancies. In the end, it's not a question of whether each step in the process was arbitrary, but whether the overall delay was arbitrary.

The City knew on September 8, 2010 that Gustafson was retiring. Ten months later, the City still had not evaluated the applications and credentials of the applicants. Armstrong retired on August 22, 2011. Two months after that, the City still had not filled either vacancy and had not scheduled interviews. By December of 2011, the recruitment and appointment process had been abandoned and the Department was staffed at 55 bargaining unit sworn personnel. The evidence establishes that City failed to follow the "recruitment and appointment process currently in place" when it implemented the electronic application process and it was forced to address and devise alternate means to evaluate and review applications resulting in an "arbitrary delay in filling vacancies." The City violated the terms of the Side Letter of Understanding.

Finally, the Chief's decision to cancel the interviews because the 2012 budget called for the elimination of five positions was a deliberate violation of the Side Letter. It is true that by not filling the positions the City saved money and avoided the need to layoff the two new hires, but parties to a labor agreement are expected to fulfill all the terms and conditions, not just the ones that they like or agree with.

Remedy

There is a genuine loss in this case, not only in terms of the absence of two bargaining unit members in the workforce during the 2010 and 2011 contract years, but also a loss of trust and credibility. The Union, in good faith, agreed to a wage freeze believing that the City would honor the terms of the Side Agreement. The City breached the Side Agreement and that prompts the question, what is the appropriate remedy.

The Union argues that the membership suffered a monetary loss and therefore a punitive monetary award is appropriate. I do not find that the membership suffered a monetary loss due to the City's failure to hire two entry level firefighters. In fact, I suspect the membership earned additional compensation, in the form of overtime, as a result of the failure to hire.

For its part, the City argues that any remedy should be limited to the two candidates who might have been selected for the vacancies had the selection process been conducted as it normally would have been. Thus these two hypothetical firefighters would receive back pay

and seniority for some period of time through the expiration of the contract. This would be the appropriate remedy if the contract violation went solely to those individuals, or if the grievances were filed solely on their behalf. The nature of the violation here is not so limited. The full staffing pledge was not simply another contract provision among many. It was part of a specific set of tradeoffs made on behalf of the entire bargaining unit, in return for agreeing to delay an agreed upon wage increase for two years, creating a two year wage freeze. This deal was made on behalf of the entire Union, and it is the entire bargaining unit that was denied, in some measure, the benefit of its bargain.[2]

The promise to maintain staffing levels at 57 was a linchpin of the Side Agreement, but it was not the only benefit the bargaining unit realized. The City provided additional consideration in the areas of health insurance, residency, sick leave, and the settlement of two grievances on terms favorable to the Union's position. Moreover, the staffing levels did remain at 57 for at least a portion of the extended agreement. Even if the old system and the existing list had been used, there would not have been any new hire in 2010 and, given the mutual agreement to generate a fresh eligibility list, probably not until mid-2011 at the earliest.

With that general guidance, I conclude that the appropriate remedy is to remand this matter to the parties to discuss and agree on the remedy and the implementation of the remedy. I will retain jurisdiction for a period of time necessary to resolve disputes over the remedy if the parties cannot agree. The parties will have 60 days to either invoke that retained jurisdiction or request an extension of the period of retained jurisdiction.

On the basis of the foregoing, and the record as a whole,

AWARD

1. Yes, the City violated the terms of the November, 2009, Side Letter of Agreement when it failed to fill the vacancy created the retirement of Lt. Mark Gustafson.

2. The parties are to meet and confer in an effort to agree on the appropriate remedy.

3. The arbitrator will retain jurisdiction over this dispute for a period of time necessary to resolve any disputes over remedy, should the parties be unable to reach

[2] See the testimony of Scott Smith at page 20 of the transcript: "[t]hat's what pretty much pushed us in the direction to open the – open the contract for negotiations. We wanted to make sure that we maintained our current level of staffing and that we did not lose any positions due to the economic conditions."

agreement. If neither party invokes the retained jurisdiction of the arbitrator or requests an extension of jurisdiction within 60 days of the date of this Award, the arbitrator will relinquish jurisdiction.

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Dated at Rhinelander, Wisconsin, this 1st day of June, 2012.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

LAM/gjc
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