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

SUPPLEMENTAL AWARD

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.

On June 1, 2012 the undersigned issued a Decision wherein I Awarded:

1. Yes, the City violated 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.

2. The parties are to meet and confer in an effort to agree to 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 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.

On July 20, 2012 the parties notified the undersigned that they were unable to reach agreement on a remedy and a briefing schedule was established. The parties submitted briefs and responsive reply briefs, the last of which was received on October 9, 2012. Thereafter the Union sought to re-open the record to address what it characterized as "inaccuracies and issues associated with" the City's reply brief and submitted a supplemental reply brief on October 15, 2012. The City objected. On October 16, 2012 I declined to re-open the record, informed the parties that I would not receive the Union's October 15 supplemental reply brief, but invited the parties to jointly submit financial calculations by the end of the week if they so choose. Having not received any financial calculations by October 19, 2012, the record was closed.

RELEVANT CONTRACT LANGUAGE

ARTILE VII – GRIEVANCE PROCEDURE

Section 1 A grievance is defined as an alleged violation of a specific provision of this Agreement.

Only one subject matter shall be covered in any one grievance. A written grievance shall contain a clear and concise statement of the grievance and indicate the issue involved, the relief sought, the date the incident or violation took place, and the specific section or sections of the Agreement involved. An employee may choose to have his/her appropriate Union representative represent him/her at any step of the grievance procedure. If any employee brings any grievance to management's attention without first having notified the Union, the management representative to whom such grievance is brought shall immediately notify the Union and no further discussion shall be had on the matter until the Union has been given notice and an opportunity to be present.

All grievances may be presented promptly and no later than twenty (20) calendar days from the date the grievant first became aware of, or should have become aware of with the exercise of reasonable diligence, the cause of such grievance.

...

Section 3 Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within thirty (30) calendar days of the date of the City decision in Step Two, or the grievance will be considered ineligible for appeal to arbitration. If an unresolved grievance is not appealed to arbitration it shall be considered terminated on the basis of the second step answers of the parties without prejudice or precedent in the resolution of future grievances. The dispute as stated by the parties in Step Two shall constitute the sole and entire subject matter to be heard by the arbitrator unless the parties agree to modify the scope of the hearing.

For purposes of selecting an impartial arbitrator the parties will meet within ten (10) calendar days from the date of the written appeal of the grievance to arbitration. If the parties are unable to agree on an impartial arbitrator within the ten (10) calendar days period, the parties or party, acting jointly or separately, shall request the WERC to appoint an employee of the WERC to act as an impartial arbitrator or to submit a panel or (sic) arbitrators for selection of an arbitrator, by the parties in accordance with the procedures established by the Commission.

Where two or more grievances are appealed to arbitration, an effort will be made by the parties to agree upon the grievance to be heard by any one arbitrator. The cost of the arbitrator and the expense of the hearing, if requested by either party, will be shared equally by the parties. The party requesting (sic) court reporter shall pay the costs unless otherwise agreed to. On grievances where the subject matter raises a question of arbitrability, the arbitrator shall first hear and decide the question of arbitrability unless mutually agreed otherwise. The arbitrator shall not have jurisdiction or authority to add to, amend, modify, nullify, or ignore in any way the provisions of this Agreement and shall not make any award which in effort would grant the Union or the City any matters which were not obtained in the negotiation process. The decision of the arbitrator shall be final and binding for both parties of this Agreement.

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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.

...

DISCUSSION

The City breached the collective bargaining agreement when it delayed and then intentionally ignored its contractual obligation to hire replacement officers for Gustafson and Armstrong thereby falling below a cadre of 57 firefighters. In lieu of ordering a remedy, the undersigned remanded this case to the parties to develop a mutually agreeable resolution. The parties were unable to do so which prompts this Award consistent with the parties' stipulated issue, "[w]hat is the appropriate remedy?"

Wide latitude is afforded arbitrators when formulating remedies, provided the award arises out of the labor agreement:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is *especially true when it comes to formulating remedies*. There the need is for flexibility in meeting a wide variety of situations. The draftsman may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.
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> Bornstein, Gosline & Greenbaum, Labor and Employment Arbitration, 2nd. Ed. p.39-4 (2002) citing Steelworkers v. Enterprise Wheel & Car Corp. 363 U.S. 593, 46 LRRM 2423, (1960). Italic in original.

When fashioning a remedy for breach of a collective bargaining agreement, the objective is to place the employees in the position they would have been in but for the violation:

> When a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong has (sic) not been committed.
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> Hill and Sinicropi, Remedies in Arbitration, 2nd. Ed. p. 180 (1991) citing Wicker v. Hoppock 73 U.S. 94, 99 (1867).

In this case, the Union agreed to re-open the 2008-2010 collective bargaining agreement at the City's request. The Union then gave up an already agreed upon 2.50% wage increase in 2010 in exchange for the terms contained in the Side Letter of Agreement. While the 2010 wage increase wasn't the only item of value in the Side Letter - there was value to maintaining the status quo on health insurance - the linchpin of the agreement was the City's willingness to maintain staffing at 57. Thus, when the City violated the terms of the Side Letter, first unintentionally and later deliberately, it wronged the Union and for that wrong, the Union is entitled to the 2010 2.50% wage increase it relinquished. The question then is, from what date forward is the Union due the 2010 2.50% wage increase?

The grievance was filed July 11, 2011. In cases of continuing violations, the general rule is that arbitrators limit back pay awards to either the date of the filing of the grievance or to a specified earlier date, calculated from the date of the grievance filing less the number of days provided for by the labor agreement to file a grievance. City of Buffalo, 93 LA 5, 8-9 (Pohl, 8/89). See also Elkouri & Elkouri, How Arbitration Works, 6th Ed., p. 218 (2006). Article VIII-Grievance Procedure requires that grievances will be filed within 20 calendar days from when the grievant knew or should have known of the event giving rise to the grievance. I conclude that the remedy will be calculated from June 22, 2011.

The Union argues that the remedy should be calculated from September 8, 2010, the date of Gustafson's retirement. While it is true that that is the date when staffing fell below 57, the parties' Side Letter acknowledged that when a vacancy occurred it would be "filled through the normal recruitment and appointment process," thus the parties knew that there would be some delay between a vacancy and the hiring of a sworn fire fighter. It is also true that the City engaged in what I have previously found to be a hiring process that resulted in an arbitrary cumulative delay in hiring, but the Union did not challenge the City's actions. Rather, the evidence establishes that the Union agreed to the creation of a new 2011 eligibility list and up until the filing of the grievance, the Union believed that the City was going to hire Gustafson's replacement.

The City argues that the 2.50% wage increase included in paragraph 1 of the Side Letter does not represent a "new" wage increase, but rather was delayed to December 15, 2011. Paragraphs 1 and 2 of the Side Letter provide:

> 1. The Union agrees the 2.5% wage increase scheduled for January 1 has been replaced by 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.

Paragraph 1 of the Side Letter addresses the year 2010 and states that the Union's wage increase was "replaced" by a wage freeze. Paragraph 2 speaks to 2011 and the wage increase is delayed to 2011. This language is clear and unambiguous. The only delayed wage increase was the 2011 2.50% across the board increase. The 2010 wage increase was a separate and distinct across the board wage increase.

The City next argues that the overtime earned by various members of the bargaining unit should "offset" the back pay awarded. I disagree. The City's failure to hire bargaining unit members 56 and 57 created the vacancies which resulted in overtime shifts. Those shifts were legitimately worked by bargaining unit members in overtime status and they were entitled to overtime compensation for that work.

Finally, the Union argues that it is entitled to punitive damages. Arbitrators are generally unwilling to award punitive damages unless "there is evidence of such bad faith as to shock the conscience of the arbiter." Id. at 1216 citing Lake Local Board of Education 114 LA 839, 843 (Murphy, 5/2000). There is no question that the City decided in October 2011 that it would violate the Side Letter, knowing that it was contractually obligated to maintain a staffing level of 57, but I believe the remedy awarded will sufficiently deter future violations.

The remedy awarded is a 2.50% wage increase effective June 22, 2011. This increase will result in back pay from June 22, 2011 through the current date and will lift the hourly wage of the bargaining unit membership thereafter. Such an award is appropriate given these facts and compensates the membership for the wrongdoing of the City.

AWARD

1. Yes, the City violated 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.

2. The appropriate remedy is to grant all bargaining unit members the 2010 2.50% wage increase effective June 22, 2011.

3. The undersigned shall retain jurisdiction for a period of 60 days from the date of this Award for the purpose of resolving any issues that arise regarding implementation of this Award.

Dated this 7th day of January, 2013 in Rhinelander, Wisconsin.

Laurie A. Millot /s/
Laurie A. Millot, Arbitrator

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