BEFORE THE ARBITRATOR

In the Matter of a Dispute Between

AFSCME LOCAL 67

and

CITY OF RACINE

Case 822
No. 72857
MA-15280

AWARD NO. 7917

Appearances:

Mark DeLorme and Joanne Townsend for AFSCME Local 67.

Scott Letteney for the City.

ARBITRATION AWARD

On October 26, 2015, at 11:00 a.m., in the Racine Wisconsin City Hall, I was present to serve as the arbitrator of a grievance filed by Joanne Townsend. Ms. Townsend was present as was City Attorney Scott Letteney. Ms. Townsend asked that the hearing be postponed so that she could be represented at a future date by AFSCME Council 32 Staff Representative Mark DeLorme. The City opposed the postponement request and asked that the grievance be dismissed for lack of prosecution. I denied the postponement request and urged Ms. Townsend to represent herself. I further advised Ms. Townsend that, if she did not proceed to represent herself, I would be granting the City's request that the grievance be dismissed. Ms. Townsend then consulted by telephone with Representative DeLorme and advised me that she was not comfortable proceeding. I then granted the City's motion to dismiss. This Award confirms the dismissal of the grievance and provides the pre-October 26, 2015 context for that action.

The following excerpt from an October 22, 2015 email sent by Letteney to then Arbitrator Houlihan provides a chronology of events and the City's perspective regarding same. The email was sent to Arbitrator Houlihan in response to an October 21, 2015 DeLorme request that Houlihan recuse himself.

May 28, 2015 – The parties, together with Arbitrator William Houlihan, the arbitrator selected by the parties, set July 14, 2015 as a date for mediation of the Grievance as required by the parties' Collective Bargaining Agreement.

July 6, 2015 – Union makes a Public Records Request from the City for:

> A list of all employees of the City of Racine, represented and non-represented, who, between 2010 and 2014, inclusive, moved to a higher classification and the effective date of the change, and list of employees who, between 2010 and 2014, inclusive, did not change classifications, but received temporary or permanent wage increases or enhanced benefits from those stated in the collective bargaining agreement, the associated position and the effective date of the increase and the effective date of the end of the increase, and a list of benefit changes for all employees.

(Such request was made approximately five weeks after the mediation date was set and only five business days prior to the mediation date.)

July 7, 2015 – The City seeks clarification of the request and advises the Union that more than 20 Public Records Requests were in queue ahead of the Union's.

July 8, 2015 – Union provides clarification and converts the request from a request under the Wisconsin Public Records Law to a request from a Union representative pursuant to *Milwaukee Teachers' Education Association*, Dec. No. 27807-A (WERC, 1/94).

July 13, 2015 – Union requests rescheduling of the mediation - one day before so – because, as the Union agrees, the information requested created an unreasonable burden on the City. The parties, together with Arbitrator Houlihan, continue the mediation to August 4, 2015.

July 22, 2015 – (12:53 PM) Union withdraws its request for the information it had sought from the City.

(1:29 PM) The City accepts this, but indicates it stands ready to work to provide the requested information.

August 4, 2015 – Arbitrator Houlihan attempts to mediate the Grievance. The parties are unsuccessful.

August 6, 2015 – Arbitrator Houlihan offers three dates for arbitration. The City responds that it is available on any of the offered dates.

August 13, 2015 – Union notifies Arbitrator Houlihan and the City of its availability. Parties agree to set October 12, 2015 for the grievance arbitration.

September 13, 2015 – Union expresses concern that Arbitrator Houlihan's pending retirement might affect his ability to complete the arbitration.

September 14, 2015 – Arbitrator Houlihan indicates that he will complete this arbitration.

October 8, 2015 – Two business days prior to the arbitration, and 56 calendar days after the arbitration date was set, Union requests witness subpoenas from Arbitrator Houlihan. Arbitrator Houlihan provides subpoenas by mail and by email. Union notes it "may have to ask for a continuance."

October 9, 2015 – (10:39 AM) One business day prior to the arbitration, union requests a continuance due to the "unavailability of witnesses." Union representative suggests for the first time that he had a "desire to attend an important medical appointment with a family member."

(11:25 AM) The City objects to the request for continuance.

(3:29 PM) Union representative states that he will be "spending Monday at the hospital with family," and so he unilaterally decided to cancel the arbitration. Union representative also claims he has "called off witnesses." Union representative also claims that the date set for the arbitration, October 12, 2015, is "a holiday, [so] no other union representatives are available."

(3:34 PM) The City objects to any continuance.

At no time did Arbitrator Houlihan agree to reschedule the arbitration.

October 12, 2015 – The City and Arbitrator Houlihan are at the appointed place at the appointed time and date for the arbitration. No representative from the Union appears. City requests award in its favor by default.

October 13, 2015 – (11:18 AM) Arbitrator Houlihan indicates the demand for default judgment shall be held in abeyance and offers October 26, 27, or 28 as a date for the continued arbitration.

(1:53 PM) The City indicates that it is available October 26, 2015.

October 14, 2015 – (1:25 PM) The Union representative states that he is available "any of those days" and that he will check witness availability.

(1:51 PM) Arbitrator Houlihan asks all parties to hold October 26, 2015 for the arbitration, with the parties to be prepared to address the merits of the grievance and the City's request for default award.

October 19, 2015 – The Union representative states that he is unavailable the entire week of October 26, 2015, "to care for an ill family member."

October 20, 2015 – (11:28 AM) Arbitrator Houlihan asks the City how it wants to proceed.

(11:37 AM) Pursuant to the arbitrator's October 14, 2015 request, the City indicates it desires to hold the arbitration on Monday, October 26, 2015.

(12:13 PM) Arbitrator Houlihan indicates the hearing will take place on October 26, 2015, at 11:00 AM, and states that, if the Union representative is unavailable, another representative be sent in his stead.

October 21, 2015 – The Union representative seeks to have Arbitrator Houlihan recuse himself from the proceedings.

It is clear from this description of the events surrounding the scheduling and holding of the mediation and arbitration in this matter that the Union fails to timely prepare for a mediation or an arbitration and, then, when the date is upon it, the Union seeks a continuance based upon a convenient excuse. Further, the excuse for a continuance often seems to change along the way. To wit:

- Only five business days prior the first-scheduled mediation date, and approximately five weeks after that mediation date was set, the Union makes a burdensome request for records. When the City reasonably indicates it cannot fulfill the request so quickly, the Union seeks to have the mediation date continued. After the mediation date is reset, the Union withdraws the request for records.

- Two business days before the first-scheduled arbitration date, and nearly two months after that arbitration date was set, the Union for the first time suggests it is having trouble obtaining witnesses and that it might need a continuance.

- The next day, the Union representative states witnesses were "unavailable" and that he desired to attend a family member's medical appointment, and so he requests a continuance.

- Later that same day, not yet having heard from the arbitrator regarding the request for continuance, the Union representative unilaterally declares the arbitration hearing cancelled. In that same communication, the Union representative's previously indicated "desire" to attend a family member's medical appointment converted to the need to spend an entire day at the hospital with a family member. The Union representative further noted that he had "called off witnesses," despite the fact that only the day before, he had stated that his witnesses had been "unavailable."

- Thereafter, the arbitrator offers three dates for the arbitration to be reset. The City indicates availability

> on one of those dates. The Union representative indicates that he is available on "any of those days" as offered by the arbitrator and that he would check witness availability. Several days later, the Union representative states that, not only is he not available "any of those days" as he had previously stated, but he must spend the entire week caring for an ill family member.

It is difficult to know what is true and what is fabrication when it comes to the excuses offered for delay after delay from the Union. Certainly, no person of character would use a family member's illness as an excuse to delay a proceeding. It is odd, however, that such an explanation comes second, or is used at all, where it is clear the Union failed to procure witnesses – if any witnesses actually ever existed – in time for the scheduled hearing date.

This is not the only inconsistency in positions taken by the Union. When making its demand for a continuance for the October 12, 2015 arbitration date, the Union argued that "no other union representatives [were] available," because it was a holiday. (We can aside that October 12, Columbus Day, is not a State of Wisconsin holiday nor a City of Racine holiday, and that the Union representative did not complain that it was a holiday when he originally agreed to October 12 as an arbitration hearing date.) The Union representative suggested that, were it not a holiday, another Union representative could be available. Now, in the recusal demand, the Union argues that it is unreasonable for a "replacement of their representative" to take place.

The Union also suggests that you, as the arbitrator, are somehow responsible for the delay in this matter, because you did not answer the Union's Eleventh Hour demand for a continuance. The Union argues that untimely demands for continuance are common, that you should have expected such, and that your lack of response caused the Union to unilaterally cancel the October 12, 2015 date. The City cannot recall continuance demands made so often and so untimely.

As to the actual standard for recusal – that of an unshakable bias toward or against a party to the dispute – the Union offers no actual evidence. Instead, it only makes the bald

> statement that you made "several comments implying prejudgment of the dispute," at the mediation, but fails to state what those comments were. The City has seen no bias toward or against either party. So the City sees no reason for you to recuse yourself or otherwise be removed from this matter.
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> The Union's suggestion that your pending retirement is any sort of an issue in your ability to handle this matter is a red herring. When asked, you have indicated that your future retirement is not an impediment to your serving as arbitrator in this Grievance. Such argument should be dismissed out of hand.
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> It is clear that this is simply another effort by the Union to delay the hearing in this matter. The truth is that Union has no problem with your handling of the case, except for the fact that you want the case to actually move forward.
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> The City requests that the motion for recusal be denied. Further, the City requests that your direction of October 20, 2015, that the Union provide certain information to you by 4:30 PM today, remain in force. Finally, the City requests that the arbitration hearing proceed on October 26, 2015, at 11:00 AM, in Room 303 of Racine City Hall.

The motion to recuse, emailed to Arbitrator Houlihan on October 21, 2015, stated the following:

> This letter shall serve as a **MOTION TO RECUSE** in the above-captioned matter. A copy of this Motion has been forwarded to the City's representative, Attorney Scott Letteney. The basis for the Union's Motion for lack of impartiality is as follows.
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> 1) On August 4, 2015, the parties participated in mediation with the Arbitrator in Racine, Wisconsin. After examining the Employer's evidence, the Arbitrator made several comments implying prejudgment of the dispute. These comments were made in front of the Grievant, Union leadership and the representative. The Union's concerns about the comments made by the Arbitrator were immediately raised with him and

as a direct result of these comments, the Union immediately ended mediation.

2) On October 4, 2015, the Union communicated to the Arbitrator the need to postpone arbitration. It did so by the customary use of email. The Motion to Postpone was made one full business day and three calendar days prior to arbitration as was dictated by circumstances. Inexplicably, the Arbitrator failed to check his work email for three-days although late postponements are not uncommon. This failure to provide any decision on the Motion or guidance to the parties directly resulted in the Grievant having to respond to a request for a Default Award by the City. If the Motion had been considered in a timely manner, this additional burden may have been avoided.

3) On October 20, 2015, the Arbitrator unilaterally ordered that the hearing be held on October 26, 2015 despite the unavailability of the representative or consideration of the circumstances for the lack of availability. This order was made based on the Arbitrator's faulty recollection of the scheduling communications. In his email, the Arbitrator wrote, "I am not prepared to postpone this hearing once again." However, the hearing was never scheduled for October 26, 2015. By email on October 13th, the Union was offered a single date, October 26th, to schedule. The representative indicated by email on October 14th that he would have to clear it with witnesses before confirming availability. Twenty-six minutes after the representative's email, the Arbitrator asked the parties to "hold" October 26th. "Hold" does not mean "schedule". No scheduling notice went out by email or postal mail. No indication was given to the Union that the Arbitrator considered October 26th the firm hearing date in any way. The Union did not request a postponement because there was no scheduled hearing to postpone. The representative indicated his unavailability by email on October 19th because of an ongoing family

> emergency, which will require him to take the entire week of October 26th off. Despite this, the Arbitrator ordered that the hearing take place on October 26th, required time-consuming duties solely upon the Union and ordered replacement of their representative with one with no knowledge of the case.

By words and actions, the Arbitrator has demonstrated a clear bias and lack of impartiality. The Arbitrator demonstrated unfairness and bias in fact when he failed to timely review the Union's Motion for Postponement, which directly led to the Grievant facing additional burdens. The Arbitrator demonstrated unfairness and bias in fact when he failed to notify the Union that he considered the hearing scheduled on October 26, 2015. This not only added an additional burden on the Grievant by requiring the compilation of witness information, but also denied the Grievant the ability to have the representative of her choice. Finally, and most egregiously, the Arbitrator demonstrated actual bias when he made comments indicating prejudgment to the Union. These words and actions have resulted in the Union having no faith that the Arbitrator will render a fair, unbiased and impartial decision.

On September 14, 2015, the representative learned that the Arbitrator was retiring. The desire to clear a caseload before retirement is understandable, but this rush should not be at the expense of the Grievant's due process rights, which require a fair and impartial decision-maker. The Arbitrator's conduct thus far demonstrates that those due process rights have fallen by the wayside and created a strong perception that closing the file quickly is more important. This has created in reasonable minds a perception that his ability to carry out his responsibilities with impartiality is impaired. In the email of September 14th, the Arbitrator noted that because of his retirement he may want a "tight briefing schedule". The contractual grievance procedure found in the parties' Agreement is designed for fairness, not speed. Neither the prehearing process, the hearing itself nor the briefing schedule should be given short shrift because of the Arbitrator's personal timeline.

The Grievant, Union leadership and representative, without exception, do not believe the process thus far has been

> fair and impartial or that an impartial decision will be rendered. Parties have the right to have their case heard and decided by impartial individuals. Arbitrators must avoid even the appearance of partiality. On these grounds, the Union requests that the Arbitrator voluntarily recuse himself from participation in this case.

By email on October 23, 2015, Arbitrator Houlihan responded as follows to the DeLorme recusal request.

> This responds to the Union's Motion for Recusal and sets forth the status of this matter.
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> I will recuse myself from this matter. My notes and recall of the events referenced in Mr. DeLorme's October 21 letter and Motion are significantly at odds with the narrative set forth in Mr. Delorme's letter. However, I believe the process will be better served if this matter is heard by someone whose impartiality is not at issue.
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> Peter Davis has agreed to take on this case. He will preside over the hearing, as scheduled, on Monday, October 26, 2015, beginning at 11:00 A.M. I have turned the file over to him. He is copied on this email.
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> I directed the Union to provide certain information as to efforts to subpoena witnesses in the October 8 – 9 time frame. The Union did provide that information prior to 4:30 on Thursday. I have turned that document over to Mr. Davis.

Having reviewed all of the foregoing, I was persuaded, as was Arbitrator Houlihan, that no further postponements of the hearing were appropriate. Therefore, after Townsend declined to proceed on October 26, 2015, dismissal of the grievance was warranted.

Dated at Madison, Wisconsin this 27th day of November 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Peter G. Davis, Arbitrator