

In the Matter of the Arbitration Between )  
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The City of Wellston )  
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and )  
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The Fraternal Order of Police/ )  
Ohio Labor Council )

OPINION

Re: FMCS No. 030411-08835-6

The Hearing took place on Tuesday June 15, 2010 at the Wellston City Building. The Hearing convened at 10:00 A.M. and adjourned at approximately 3:00 P.M. Both sides were afforded the opportunity to present evidence and defend/explain their respective positions on the issue.

**ISSUE:** Did the City violate the parties' Collective Bargaining Agreement when it laid-off the Grievants? If so, what is the proper remedy?

**Appearances for the City of Wellston:**

David Riepenhoff, Attorney for the City of Wellston  
Thomas Baker, Auditor City of Wellston  
John Hall, City of Wellston Police Chief  
Mark Jacobs, Service Director City of Wellston

**Appearances for The FOP/OLC:**

Douglas Behringer, General Counsel FOP/OLC  
Mark Drum, FOP/OLC Staff Representative  
Dennis Edmiston, Wellston Police Department (Grievant)  
Richard Kisor, Wellston Police Department (Grievant)  
Roy Roberts, Wellston Police Department/FOP Bargaining Representative

**Arbitrator:**

Dennis M. Byrne

**Introduction:**

The instant arbitration is the result of a grievance filed by the Fraternal Order of Police/Ohio Labor Council (FOP/Union) on behalf of the membership of the Wellston Police Department against the City of Wellston (Employer). The parties' Collective Bargaining Agreement contains language [Article 12 (3)] that is intended to insure that all other non-essential employees of the City are laid-off before any members of the Police Department are laid off. In response to the City's current fiscal emergency, the City laid off three members of the Police Department. The Union claims that these layoffs violate the parties' contract. Therefore, the Union filed a grievance protesting the layoffs, and this arbitration is the result of that grievance.

**Background:**

The City of Wellston is a small city of 6,170 persons in South-central Ohio. The City has faced serious financial problems over the years and finally was declared to be in Fiscal Emergency by the State Auditor's Office on October 1, 2009. The Auditor found that the City was in fiscal emergency according to ORC Section 118.03(A)(6) and 118.03(B) because the City's "treasury balance less the positive cash fund balances exceed one-sixth of the treasury receipts as of December 31, 2008, and June 30, 2009, by \$588,915.00 and \$623,915.00, respectively" (Employer Exhibit 10). Once the Fiscal Emergency was declared, the City was required to develop a Financial Recovery Plan. That plan was developed and implemented by City Council in City Ordinance No. 4069 passed on March 4, 2010 (Employer Exhibit 3).

The City's Recovery Plan antedated the recommendations of a Performance Audit performed by the State Auditor's Office that was published on May 20, 2010 (City Exhibit 4)<sup>1</sup>. The State Auditor found a number of problems with the way that the City managed its finances, and the report made a number of recommendations that were intended to bring the City's financial records into conformity with both the ORC and generally accepted accounting standards.

The Auditor's Report also made a number of recommendations on ways that the City could improve its financial health. Because labor costs are such a large part of the City's budget, the report discussed staffing in each of the City's service departments and made a series of recommendations about ways that the City could increase efficiency in the provision of services to the citizenry. Some of those recommendations involved layoffs and/or the redeployment of resources. One of the report's recommendations was that the City lay off three police officers; and consequently, three officers were laid off.

The Union contends that the clear language of Article 12 (3) requires that the City lay off all probationary, temporary, intermittent, part-time, and seasonal employees before any full-time police officers are laid off. The Union argues that this language was not followed during the layoffs. Specifically, the Union argues that the City's Janitor's job was abolished, but that the same person, Carl Patrick, was rehired as a contract worker and paid with a IRS 1099 form as opposed to a W-2 form. The Union believes that this is a subterfuge that the City used to get around the layoff language of Article 12 (3). In addition, the Union contends that most members of the Fire Department are part-

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<sup>1</sup> It must be noted that the City's Recovery Plan mirrored the Auditor's recommendations for the most part.

time employees because they are paid as W-2 employees even though they do not work a full time schedule. The Union argues that these employees should have been laid off before any police department personnel were laid off. The Employer disagrees with the Union's contentions and claims that it has followed the contract. Moreover, the City argues that the Union does not understand the actions that it has been forced to take because of the financial emergency.

One of the main reasons for the difference in the way that the parties view the situation is the way that the City keeps its books. The City uses a fund accounting system. That is, most City departments are funded out of a specialized account that can only be used to pay for a specific activity. For example, the Cemetery Fund finances the Cemetery, the Fire Department's expenditures are funded by the Fire Department Fund that is financed by the City's fire levy. The Streets Department, the Water Department, the Parks Department, etc. are all funded by individual accounts. Consequently in Wellston the General Fund, which is usually the main funding vehicle for most governmental activity, only funds expenditures for the City Administration and the Police Department. Therefore, if City Council wishes (needs) to implement personnel actions because of the Fiscal Emergency, it is limited to taking actions with regard to the City Administration and the Police Department.

This system of fund accounting has caused some misunderstanding between the parties. The Union believes that the City has unfairly targeted the Police Department for layoffs and believes that the City has violated the contract. The City argues that the Union does not fully appreciate the steps that have been taken to try to meet the emergency. The City argues that it has taken numerous personnel actions and laid off

many of its employees in an attempt to reduce expenditures while providing the necessary services to the citizens of Wellston.

Patrick Davidson, Local Government Services Director for the State Auditor's Office, testified about the City's financial condition and the accounting practices in Wellston. Davidson used the Cemetery Fund as an example to illustrate some of the City's financial problems. According to his testimony, the ORC mandates that the money in the Cemetery Fund can only be used for the operation of the cemetery. Therefore, cemetery maintenance, etc., was paid for out of the Cemetery Fund. Over time the costs of running the cemetery had been greater than the amount of money in the fund, and a deficit resulted. The City made up the shortfall and continued to pay the employees in the Cemetery Department out of its general revenues.

Once the fiscal crisis was recognized, the Cemetery Department was abolished. However, this has only a minor impact on the City's finances, i.e., the General Fund is no longer used to subvent the Cemetery Fund. But, even though the Cemetery Fund is no longer running a deficit, the City's overall finances don't change significantly because earmarked revenues in special funds cannot be used to finance everyday City operations. The result is that the Cemetery Fund will slowly be replenished, but the City's overall financial situation will only change marginally.

Davidson testified that the Parks Department operated in much the same way. It was running a deficit; and as a result, the City abolished the Department. However, the impact on the City's overall finances is relatively minor. In this context, the City's Service Director testified that the City decided not to open the City swimming pool this summer to save money, but a private donor gave the City money to run the pool. That

money is earmarked for the swimming pool and cannot be used for anything else. Consequently, the residents of Wellston and their children can use the City pool because of the generosity of an unnamed benefactor. The Arbitrator is unaware of another situation where a private citizen has taken it upon him/herself to pay for a public good. This is a tangible sign of the magnitude of the financial crisis in Wellston.

Davidson's overall testimony reinforced the notion that the City was in severe financial distress and that because of the fund accounting used in Wellston, the City's overall ability to deal with the crisis was limited. This is the same result outlined in the Auditor's Performance Audit. Parenthetically, one of the Auditor's main suggestions was that the City makes sure that all expenditures are credited to the proper fund. Therefore, the Auditor's testimony reinforced the City's argument that it was doing all that it could to straighten out its finances and deal with its fiscal problems.

**Discussion:**

The language in question reads:

**Article 12**

- (3) All probationary, temporary, intermittent, part-time and seasonal employees of the City will be laid off before members of the Bargaining units. Furthermore, the City recognizes that safety force personnel are a priority need for the community and shall attempt to lay off all non-essential employees before safety force personnel and will not sub-contract out the services of these personnel. However, the FOP recognizes that if the City and County jointly agree to implement a county wide dispatching center that the City will make a good faith effort to have the existing dispatchers consolidated to the new 911 center. The City agrees to discuss the impact of this change on the bargaining unit members.

The Union argues that this language means that most non-safety force personnel should be laid off before safety personnel are laid off. The Union recognizes that all (most) City

departments must be staffed at some level. However, the Union argues that safety force personnel are among the most vital members of any municipal workforce and that they should be among the last employees laid off.

The City made a number of answers to the Union's concerns. The first is based on the contested language. The City stated that the language in question says that the City will *attempt* to lay off all *non-essential* employees... The City argues that the language in question does not require that the City lay off any particular full-time employee, only that it makes an attempt to lay off all non-safety forces first. The City believes that it lived up to its responsibility under the contract and that it did lay off non-safety forces first. The City presented a list of laid-off employees and argued that it cut many departments to the bone before it laid off police officers (City Exhibit 1).

The Arbitrator agrees with this position. A contract means what it says. The Union was able to negotiate language into the agreement that gave its members maximum job security in the event that there were layoffs in Wellston. However, the language only requires the City to lay off certain classifications of employees prior to laying off safety forces. The City has promised to attempt to lay off non-safety forces first, but the language in question does not require the City to lay off all other City employees before it lays off safety forces. This language gives the City some latitude when it decides which employees to lay off.

The City's second contention is that there is no definition of the term *non-essential* in the contract. The City claims that under the Management Rights clause of the agreement that the City determines which positions are essential and which positions are non-essential.

This point is also germane. The definition of non-essential is important in this context. The City presented evidence that it had laid off numerous employees throughout the City. However, it testified that the water treatment facility was crucial to the City's well being. This relates not only to the safety of the City's drinking water, but also to the fact that the City's largest employer, Pillsbury Baking Co., requires an assured source of clean water or it might leave the area. If the plant closed down, the City would be devastated. Therefore, the City argues that it must have the ability to decide which employees are crucial to its continued operations.

In the same vein, the City stated that the water quality engineer was going to retire in the near future and that it would have to fill that position before it recalled any laid off employees. Again, this is reasonable given the circumstances. The fact that the City Administration is making hard choices and chose to lay off some police personnel is reasonable given the facts in the record.

The above paragraphs do not mean that the Arbitrator finds that the language of Article 12 (3) is inoperative. The words mean what they say. For example, if the City kept the Parks Department open while it laid off police officers, the Arbitrator would view that as a violation of Article 12 (3). However, the facts of the matter in dispute do not show that the City simply ignored the wording of Article 12 (3). Rather, the facts show that the City has laid off a number of individuals and is attempting to deal with its financial problems in a reasonable manner.

The Arbitrator recognizes that different individuals might see the same facts in a different light, and based on their viewpoint follow a different course of action.



However, the facts in the record do not show that the City laid off any of its safety forces 1) before it laid off other City employees, and 2) without good reason.

With that as an introduction, the Arbitrator will turn to the specific charges leveled by the Union against the City. The first charge was that the City abolished the janitorial position, but then hired the same person back as an independent contractor to do the same job. The Union argues that this is an example of bad faith. That is, the janitor is not as important to the well being of the City's residents as a police officer, but police officers are in lay off status while the janitor continues to work.

The City agrees that it hired the same person back to do the same job as an independent contractor. However, the City stated that there is a need for janitorial services to clean City Hall. The City stated that the citizens deserve a clean, sanitary City Building. This meant that once the janitor's position was eliminated, the City would have to hire a janitorial service to clean the City Building. The laid off janitor was willing to take the work at a reduced wage as an independent contractor. In addition, he would not receive any fringe benefits (roll up costs). The City stated that this arrangement was cheaper than contracting the service out to a cleaning service and that in this situation the City Administration was attempting to find an economical way to have a necessary function performed. The City argued that this does not violate the language and the spirit of Article 12 (3). There is nothing in the record to show that the City violated Article 12 (3) when it rehired the janitor as an independent contractor at a much lower cost to the City (Testimony of the City Auditor).

The Union's second argument is that the City is using part-time employees in the Fire Department and the language of Article 12 (3) specifically states that all part-time

employees must be laid off before full time safety force personnel are laid off. The Wellston Fire Department is unusual in that there are only three (3) full-time members of the Department. The full-time members are the Chief and two Assistant Chiefs. The Department tries to schedule its personnel so that one full-time member of the Department is present at all times. In addition, the Department has twenty-five (25) paid on-call employees and eight unpaid (8) volunteer members. The Department's responsibilities include the full range of fire suppression, fire prevention, and Emergency Medical Services.

A problem arises whenever there is any incident (emergency) that requires the Fire Department to respond to a call for service; i.e., there are not enough full-time members of the Department to man the emergency vehicles. The National Fire Protection Association's recommends minimum staffing level per fire suppression vehicle four (4) firefighters (Employer Exhibit 4, p. 4-16). However, there is only one (1) full-time member on a shift and only three (3) full-time members in the Department. Therefore, the City must rely on either volunteers or paid on-call personnel to respond to calls.

The system in place is that if there is an alarm, any trained personnel can respond to the call. If a person does respond, he/she is paid \$6.00 per hour. At the end of the year the City issues a W-2 form for the amount that it paid the individual. If no volunteer responds, then the full-time person on staff is the only responder. In this case, the full-time firefighter usually requests mutual aid from surrounding communities. Moreover, because there are only three (3) full-time members of the Department, there are times when no full-time member is present for duty because of illness, vacations, etc. In that

case, the City has a paid on-call employee work the full-time employee's shift. In this instance, the part-time employee is paid the full-time rate for the twenty-four hour shift.

There was no testimony about response times, etc., put into the record. However, Wellston's Fire Department is understaffed according to any measure. The personnel situation in the Fire Department was noted in the Performance Audit (City Exhibit 4). The Auditor mentioned that the City was spending less on its Fire Department than any other comparable city. The Auditor also recommended that the Fire Department's roster of full-time members be increased. This was the only recommendation for increased personnel in the entire report. The information in the Performance Audit shows that Wellston's Fire Department does a lot with very little.

The Union argued that since the part-time members of the Fire Department are paid W-2 income that they are employees of the City. Therefore, the Union argues that these individuals should be laid off before any police personnel are laid off.<sup>2</sup> The Arbitrator notes that the testimony in the record proves that there is no set schedule for any on-call firefighter except in the instances when a full-time member misses a shift and an on-call member fills in. However, in the event of an emergency situation, the on-call (part-time) employees may or may not respond to the alarm at their own discretion.

The City of Wellston must provide safety services to its citizens. Safety services include both fire and police services. In this instance, the City's Fire Department has limited full-time personnel. In an attempt to provide services to the taxpayers, the City uses an amalgam of full-time, paid on-call (part-time), volunteer, and mutual aid firefighters. This system seems to work. However, if the Union's position is accepted on

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<sup>2</sup> At the current time some laid-off members of the Police Department work as part-time (on-call) members of the Fire Department.

this issue, then the Wellston Fire Department will consist of three (3) full-time firefighters and eight (8) volunteers. This is an unacceptably low number of individuals to staff a crucial department in any City. Consequently, accepting the Union's position on this issue is tantamount to forcing the City to hire more full-time firefighters at a time when the City is in fiscal emergency and/or to decrease already sparse budgets in other City Departments in order to fund increased Fire Department expenditures. Either of these alternatives is unacceptable given the state of the City's finances.

The City also presented evidence that total employment in Wellston had fallen over the past year (City Exhibit 1). According to the information in the exhibit, at least fourteen (14) individuals had either been laid off, terminated, or retired and had not been replaced. In addition, a number of individuals had bumped into other jobs within the City leading to downstream layoffs. The testimony at the hearing indicated that the Administration has cut staffing to the bone in most City departments.

For example, the City's Safety/Service Director testified that burnt out bulbs in traffic lights often are not replaced for days because of a lack of manpower. The City's representatives also testified that the City was unable to work on a street cave-in for over a week because of a lack of both equipment and manpower. Finally, the City presented evidence that the staff of the Wastewater Distribution Department was reduced to a single person from a compliment of five (5) in 2009.

In its presentation the Union contended that the City had not cut employment; however, the evidence is overwhelming that the City has cut a significant number of employees. One reason for the different views may be caused by confusion over the City's fund method of accounting. There has been attrition in all the City Departments;

however, if employment funded by the General Fund is examined the picture is murkier. Because only the Police Department and the City Administration are fully funded by the General Fund, it appears that only police officers have been laid off. This is not true; but in order to get a full view of the employment picture in Wellston, the entire staffing situation must be examined. The City put a document entitled Full Time Workforce Changes since 1/1/09 into the record (City Exhibit 1). The document shows that the City has cut its overall workforce by at least fourteen (14) individuals. The Union put the City Wide Seniority List for 2009 (Union Exhibit 3) and the City Wide Seniority List for 2010 (Union Exhibit 4) into the record. If the part-time firefighters and the individuals affected by the latest round of layoffs are deleted from the City's employment list, then the Union's data shows the same bleak picture of employment within the City as City Exhibit 1.

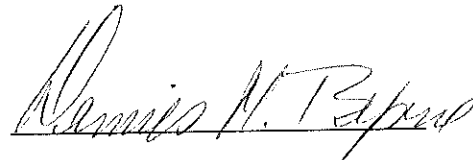
**Conclusion:**

The language of Article 12 (3) requires the City to try to avoid laying off any public safety workers. It is clear from the data presented by the City that the City has laid off all temporary, seasonal, and part-time workers with the exception of individuals in the Fire Department. Given the fact that the City has only three (3) full-time members in the Fire Department and that the City must have some personnel to provide fire suppression, fire prevention, and emergency services to the citizens of Wellston, the Arbitrator does not find that the City has violated its contract with the Police Union by staffing the Fire Department with paid on call employees. Rather, the data in the record shows that the City has abolished a number of departments and made staffing cuts in the remaining

departments. In order to provide even rudimentary services to the City's residents, the City Administration must have some staff in the remaining departments and a source of manpower for the Fire Department. The use of unscheduled personnel to respond to emergencies and the use of an occasional fill in for the three (3) full time firefighters does not constitute a breach of the City's contract with the Police Department.

Award: The grievance is denied.

Signed this 9<sup>th</sup> day of August 2010, at Munroe Falls, Ohio

A handwritten signature in cursive script, reading "Dennis M. Byrne". The signature is written in black ink and is positioned above the printed name.

Dennis M. Byrne, Arbitrator

## LIST OF WITNESSES

**For the Union:**

1. Mark Drum, Staff Representative FOP/OLC and Legislative Chair for Ohio.
2. Richard Kisor, Grievant and Part-time Wellston Firefighter.
3. Roy Roberts, Wellston Police Department and FOP/OLC Bargaining Representative

**For The City of Wellston:**

1. Patrick Davidson, Ohio State Auditor's Office/Local Government Services
2. Mark Jacobs, City of Wellston Director of Public Safety and Service Director
3. Thomas Baker, City of Wellston Auditor
4. John Hall, City of Wellston Police Department



## LIST OF EXHIBITS

### Joint:

1. Collective Bargaining Agreement between the City of Wellston and the FOP/OLC dated December 1, 2006 – November 30, 2009.
2. Filing of Collective Bargaining Agreement (Addendum) extending the Labor Agreement for one year dated January 12, 2010.
3. Grievance Trail: a packet of documents pertaining to the grievances. First Grievance Report Form submitted by Richard Kisor dated February 24, 2010.

### Union Exhibits:

1. Layoff Language from the parties' 2003 Labor Agreement.
2. City of Wellston Seniority List dated February 7, 2003.
3. City of Wellston Seniority List undated.
4. List of current (2010) active Wellston employees undated.
5. City of Wellston Vendor List dated June 8, 2010.
6. City of Wellston Seniority List (same as City Exhibit 2: Withdrawn)

### City Exhibits:

1. City of Wellston Organization Chart dated June 10, 2010.
2. City Wide Seniority List 2009 dated January 28, 2010.
3. City Ordinance 4069 approving the City's Financial Recovery Plan dated March 4, 2010.
4. City of Wellston Performance Audit dated May 20, 2010.
5. Chapter 32: Police Department page 11 – 32.01 Composition
6. Current Labor Agreement between the City of Wellston and OCSEA Local 11 dated 2008 – 2010
7. Packet of Letters to and from Mark Jacobs (Safety-Service Director) relating to layoffs of City employees.
8. Description of Job Duties of the Deputy Auditor and Assistant Deputy Auditor undated.
9. Financial Status Report submitted by the Wellston Police Department to the U.S. Department of Justice re: COPS Grant for period January 1, 2001 to December 31, 2003

Both Parties made Closing Statements in lieu of Post-Hearing Briefs.