

OPINION **Case: Bishop #2**

In the matter of voluntary arbitration:

MERC Arbitration Case No 999

Mr. Steven BLUE - Layoff

Between the

UNION

Petitioner,

-and-

CITY

Respondent.

APPEARANCES:

For the City

E. Jay Olivares Law Offices
E. Joy Olivares
711 Seventy Avenue
Michigan

For the UNION

Mouw & Celello
Gerald N. Pirkola
Attorney for the UNION
PO Box 747
Michigan

Dated: April 24, 2007

BACKGROUND

Steven BLUE was a police officer employed by the city of SOMEPLACE, Michigan

(Hereinafter referred to as the Employer). Mr. BLUE had been an employee of the Employer since November 2000. He is married, has three children, and is fully certified as a police officer. During the hearing with regard to his layoff there were no negative remarks concerning his work record and he appeared to be highly regarded by his colleagues and supervisors. He is a member of the UNION (hereinafter referred to as the Union) and was represented in this process by them.

On March 1, 2006, the Employer notified Mr. BLUE by letter that due to financial considerations he would be placed on indefinite layoff effective March 10, 2006. On March 2, 2006, Mr. BLUE protested his layoff by filing a grievance with his Union (Union Grievance number #06-216).¹ Subsequent steps in the grievance procedure provided no relief for Mr. BLUE and the matter was referred to arbitration.

The arbitration service selected by the parties was provided by the Michigan Employment Relations Commission. The Commission Chair notified Mr. Harry W. Bishop of his selection and in accordance with their rules instructed him to hold a hearing, and after the close of the hearing prepare an award, serve the award on each of the parties, and bill the parties directly for his service.

The arbitration hearing was held at 915 SOME Street in SOMEPLACE, Michigan on Tuesday, January 30, 2007. Testimony was heard and post-hearing briefs were subsequently filed by both parties.

PERTINENT CONTRACT LANGUAGE

ARTICLE 1- RECOGNITION

Pursuant to and in accordance with all applicable provisions of Act 379 of the Public Acts of 1965, as amended, the Employer does hereby recognize the Association as the exclusive representative for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment for the term of this Agreement of all employees of the Employer included in the bargaining unit described below:

All full-time and regular part-time sworn police department employees, below the rank of Sergeant.

¹ The Employer recalled Mr. BLUE to work May 18, 2006. He was again placed on layoff on September 13, 2006. This brief recall to duty was a result of a more senior police officer being placed on sick leave for the same period of time that Mr. BLUE was recalled to work.

ARTICLE 2 - MANAGEMENT RIGHTS

The right to manage the City and to direct the employees and the operations of the City, subject to the limitations of this Agreement, is exclusively vested in and retained by the City. These rights include, but are not limited to, the following:

- determine its mission, policies, and to set all service standards;
- to plan, direct, control and determine departmental operations;
- to determine the methods, means and number of personnel needed to carry out the department's mission;
- to direct the working force;
- to hire and assign or to transfer employees within the department or other police related functions;
- to make, publish and enforce rules and regulations;
- to introduce new or improved equipment, machinery or processes change or eliminate existing equipment and institute technological changes;
- to subcontract or purchase any and all materials and supplies.

ARTICLE 10 - SENIORITY

Section A: All employees hired under this Agreement shall be considered as probationary employees for the first twelve (12) months of their employment. When an employee finishes his/her probationary period, he/she shall be entered on the seniority list from the date of hire. There shall be no seniority among probationary employees nor part-time employees.

Section B: The Association shall represent probationary employees for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment as set forth in Article 1 of this Agreement, except discharged and disciplined employees for other than Association activity.

Section C: Seniority Lists: Seniority shall not be affected by race, sex, marital status, or dependents of employees. The seniority list on the date of this Agreement will show the names and job titles of all employees of the Association entitled to seniority. The Employer will keep the seniority list up to date at all times and will provide the Association membership with up-to-date copies at least every six (6) months.

Section E - Loss of Seniority: An employee shall lose his/her seniority for the following reasons only:

- (1) He/she quits.
- (2) He/she is discharged and the discharge is not reversed through the procedure set forth in this Agreement.
- (3) He/she is absent for five (5) consecutive working days without notifying the Employer. In proper cases, exceptions shall be made. After such absence, the Employer will send written notification to the employee at the last known address that he/she had lost seniority, and his/her employment has been terminated. If the disposition made of any such case is not satisfactory, the

matter may be referred to the grievance procedure.

- (4) If the employee does not return to work when recalled from layoff as set forth in the recall procedure. In proper cases, exceptions shall be made.
- (5) Return from sick leave and leaves of absence will be treated the same as (3) above.

Section F - Seniority of Association Representatives: Notwithstanding, their position on the seniority list, Association representatives shall in the event of a layoff of any type be continued at work as long as there is a job in the City which they can perform and shall be recalled to work in the event of a layoff on the first open job in the City which they can perform.

Section G - Seniority of Officers: Notwithstanding their position on the seniority list, the president, treasurer, secretary and representative of the Association shall, in the event of a layoff only, be continued at work at all times, provided they can perform any of the work available.

ARTICLE 12 - LAYOFF AND RECALL

Section A - The work "layoff" means a reduction in the working force due to a decrease of work or required by financial consideration.

Section B: If it becomes necessary for a layoff, probationary employees will be laid off first. Seniority employees will be laid off according to seniority as defined in Article 10, Section C. In proper cases, exceptions may be made. Disposition of these cases will be a proper matter for special conference, and if not resolved, it shall then be subject to the final step of the grievance procedure (arbitration).

Section C: Employees to be laid off an indefinite period of time will have at least seven (7) calendar days' notice of layoff. On the same date the notices are issued to the employees, the Association secretary shall receive a list from the Employer of the employees being laid off.

Section D - Recall: When the working force is increased after a layoff, employees will be recalled according to seniority, as defined in Article 10, Section C. Notice of recall shall be sent to the employee at his/her known address by registered or certified mail. If an employee fails to report for work within five (5) days from date of mailing of notice of recall the employee shall be considered a quit.

UNION'S POSITION

The Union has alleged that the Employer's layoff of Police Officer Steve BLUE violated the terms of the parties Collective Bargaining Agreement effective July 1, 2004, through June 30, 2007. The Union refers specifically to Article 12, which provides some restrictions on the ability of the Employer to layoff employees.

EMPLOYER'S POSITION

The Employer's position is that there was no violation of the Collective Bargaining Agreement and that they had the unfettered right to place employees on layoff status.

DISCUSSION

During this lengthy hearing the Union introduced exhibits and had five witnesses testify. The Business Agent for the Union, the Police Chief, Steven BLUE, and two police officers in the bargaining unit all testified.

The Employer introduced exhibits and had two witnesses testify. Both the City Manager and the City Auditor testified.

Several facts emerged during the hearing which will be discussed in more detail. The discussion will be based on the hearing, the transcript of the hearing, the exhibits, and the understanding of the arbitrator.

The testimony of police officer James E. CARR was quite remarkable. Officer CARR has considerable seniority and was willing to transfer out of the Police Department and take a job at reduced pay with the SOMEPLACE Department of Public Works, another Employer department, just so Officer BLUE could retain his position and avoid being laid off. It certainly establishes that there is a true fraternal order in the Employer's police department. Other police officers in the Union were aware of CARR's offer and the Employer's decision not to take advantage of this offer had an adverse impact of employee morale. Often the difference between dedicated performance of duty and pedestrian performance of duty is largely a question of employee morale.

Mr. HATT started his testimony about his personal history with the Police Union. His testimony referenced the employment history of Police Chief PLANES, who had been laid off previously by the Employer. HATT testified that PLANES was unpopular with certain SOMEPLACE City Council members and the City Manager and was laid off. After Chief PLANES grieved his layoff the arbitrator found for PLANES. Consequently, the Employer was forced to reinstate him with full back pay.

HATT also testified that when Chief PLANES was laid off there was no reference to budgetary concerns by the Employer. Further, during this same time frame a new contract was negotiated with the Union without any threat of layoffs or budgetary concerns voiced by the Employer.

It became evident during this hearing that an acrimonious relationship had existed between the Employer and the Chief PLANES. The Union relied on the arbitration decision in the lay off of Chief PLANES when presenting their defense in the lay off of Steven BLUE. Because the history of this relationship and the subsequent events that predate the present grievance concerning Steven BLUE's lay off we will discuss Chief PLANES's employment history.

Accordingly, Chief PLANES testified that he had been in law enforcement for a little over thirty four years, serving over twenty eight years in Illinois. He held different positions—detective sergeant,

patrol sergeant and lieutenant. He retired from Illinois as a lieutenant in July 2001. He was offered the position of chief of police in SOMEPLACE—a position he now holds. Before he was hired, he said the city of SOMEPLACE was looking at eliminating its police department. According to PLANES, the citizens complained that they wanted to keep their police department, and didn't want it contracted out to the county. The city council supported the citizens and said they were going to hire a police chief that would bring in guidance, direction and administrative leadership to the department. However, when PLANES was hired a group of citizens didn't like the fact that the Employer hired an outsider and blamed him for taking a job that they felt another member of the department should have had.

PLANES went on to say that there were two candidates for the position of chief. Both went through the same assessment process. A group of citizens presented petitions to the city council wanting them to reconsider hiring him. Eventually the city council continued to support its decision and hired PLANES.

During this process, PLANES sent out a questionnaire to the 'community to find out perceived concerns and problems they had with local law enforcement. The responses to the questionnaire dealt with drugs, alcohol, underage drinking, and speeding vehicles. As a result of the responses to the questionnaire, Chief PLANES informed the SOMEPLACE police officers that the force was going to be dealing with the things the community was concerned about and the goals of the police department were set.

In carrying out the goals of the police department some of the bars got cited for underage sale of liquor. The owners were brought before the liquor commission and were fined. According to PLANES, a small group of bar owners got together and put pressure on the city council to get rid of him because they were being made to be responsible for their patrons. In subsequent elections of the city council all members except one were replaced. PLANES was told that promises were made to get rid of him as police chief if they were elected.

Consequently PLANES received notice that he was placed on indefinite layoff to balance the budget and maintain good fiscal charge (Union Exhibit 10). Chief PLANES appealed his layoff through arbitration and was eventually reinstated with full back pay (Union Exhibit 12).

Throughout the arbitration hearing dealing with the layoff of Officer Steven BLUE, the Union placed considerable emphasis on the arbitration award regarding the layoff of Chief PLANES. The Union implied that PLANES' s arbitration award invalidates the Employer's budgeting process and renders the Employer's financial deficit a mere shell game. The Union claims the layoff of Officer Steven BLUE is invalid. This arbitrator disagrees with this assessment of the Union.

When Chief PLANES was reinstated with all back pay, the arbitrator stated it was because his layoff was a subterfuge for discharge. From the record and exhibits in the present case, it is clear that the city has undergone considerable downsizing in their operations for several years. Whereas in the case of Chief PLANES, unwarranted or not, it is apparent that he was very unpopular with the city council for his aggressive enforcement of certain laws. In considering his unpopularity with the

city council and its need to reduce expenditures, the Employer took a shortcut and decided to kill two birds with one stone. The Employer reduced expenditures and got rid of the police chief. The arbitrator in Chief PLANES case succinctly stated that the layoff was in reality a subterfuge for discharge and was meant to deprive the chief of his due process rights. Consequently, the Employer was forced to reinstate PLANES with full back pay. This did not reduce expenditures or get rid of the police chief. I find no correlation between Chief PLANES' s discharge and the layoff of Officer BLUE.

Scott R. FANNS testified for the Employer. He is a self-employed CPA and the City of SOMEPLACE's auditor. He testified as to the fiscal condition of the city. He stated that Gasby 34 (Governmental Account Standards Board, Statement 34) is a modified accrual system that more accurately reflects the financial condition of the City of SOMEPLACE. This system is now mandated by the State of Michigan. He testified to the accuracy of the Employer's Exhibit 19, which showed that the City of SOMEPLACE has been borrowing money to finance a deficit for the last five years.

It should be noted that the use of the Gasby 34 modified accrual system did not cause the deficits for the City of SOMEPLACE. They were always there. What changed was the required accounting method (Gasby34) that revealed the deficits for the first time. In addition, Gasby has additional written statements concerning accounting requirements that have not been released as yet. Gasby can and will impose future accounting requirements that will impact on how the public is to be informed about the financial status of both state and local governments.

AWARD

The Employer did not violate Section A, Article 12, of the Collective Bargaining Agreement. The grievance is denied.

Harry W. Bishop
Arbitrator

Dated: April 24, 2007

Employer Exhibits

1. Collective bargaining agreement between the City of SOMEPLACE and the SOMEPLACE Police Officers Association - Effective: July 01, 2004, Expiration: June 30, 2007
2. 3/2/06 Grievance faun filed by Officer BLUE (See Union exhibit #2)
3. 3/6/06 Letter to Officer BLUE from Chief PLANES (See Union exhibit #3)
4. 3/9/06 Letter to Officer BLUE from City Manager STAPLE (See Union exhibit #4)
5. 3/30/06 Memo to City Manager from B. A. HATT (See Union exhibit #5)
6. 5/18/06 Letter to Officer BLUE from City Manager STAPLE Re: recall to employment
7. 9/5/06 Memo to Officer BLUE from City Manager STAPLE Re: reduction in force
8. 5/20/05 City of SOMEPLACE Budget 7/1/02 through 6/30/10 Details of General Fund Revenue (Composite- 2 pages A and B)
9. 5/20/05 City of SOMEPLACE Budget 7/1/02 through 6/30/10 - Details of General Fund Expenditures (Composite, 2 pages A & B)
10. 5/20/05 City of SOMEPLACE Spreadsheet - 7/1/02 through 6/30/10 - Police Department Salary Spreadsheet for 2005-2006 (Multi-year Operating and Capital Improvement Budget -Compute "A" with Officer BLUE and "B" without Officer BLUE
11. Undated Spreadsheet of total salary /cost for each City of SOMEPLACE employee for year 2006.
12. Layoff language in master agreement for period 1988-2007.
13. City of SOMEPLACE 2005 budget showing expenditures for Police Department.
14. City of SOMEPLACE 2006 budget showing expenditures for Police Department.
15. City of SOMEPLACE audit 03/04 reflecting declining revenue and fund balance transfers.
16. City of SOMEPLACE audit 04/05 reflecting declining revenue and fund balance transfers.
17. City of SOMEPLACE audit 05/06 reflecting declining revenue and fund balance transfers.

18. Exchange of e-mails between City of SOMEPLACE and Emile HATT, UNION Business Agent discussing business matters and possibility of layoffs (composite).
19. Letter from Auditor with worksheet attached.

UNION EXHIBITS

1. Layoff notice to Steven BLUE dated March 1, 2006.
2. Grievance form for Officer BLUE dated March 2, 2006.
3. Letter to Officer BLUE from Chief PLANES denying violation of contract dated March 6, 2006.
4. Letter to Officer BLUE from City Manager STAPLE denying violation of contract dated March 9, 2006.
5. Letter to City Manager STAPLE from B. A. HATT that he has requested arbitration dated March 30, 2006.
6. Petition by B. A. HATT to Michigan Department of Labor for Grievance Arbitration dated March 31, 2006.
7. Cover letter by B. A. HATT to Michigan Department of Labor for Grievance Arbitration dated March 31, 2006.
8. Copy of appointment letter to H. W. Bishop as Arbitrator dated June 7, 2006.
9. Copy of Agreement between City of SOMEPLACE and SOMEPLACE Police Officers Association for period of July 1, 2004-June 30, 2007.
10. Copy of letter to Chief PLANES from City Manager STAPLE of May 20, 2004 notifying him of his layoff.
11. Copy of letter to Sgt. from City Manager STAPLE notifying him of his May 20, 2004 layoff or option of demotion if he so chose.
12. Arbitration decision concerning the lay off of Chief dated June 22, 2005.
13. A series of newspaper articles dealing with SOMEPLACE businesses selling alcohol, violating or reputed to be violating, Michigan alcohol consumption laws.

14. June 20, 2006 letter to UNION from City Manager STAPLE notifying the UNION of the possibility that SOMEPLACE police services may be contracted out to the County Sheriffs Department.
15. December 21, 2006 letter to County Controller from City Manager STAPLE asking for an update on information for contracting out service with County