
In the Matter of the Arbitration between

City of Ogdensburg

and

United Public Service Employees Union
(Police Benevolent Association of Ogdensburg, N.Y.)

PERB Case No.: A2020-066

AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated and having been duly sworn and having duly heard the proofs and allegations of the Parties AWARDS as follows:

For the reasons set forth in the Opinion section of this decision, the Arbitrator Awards as follows:

The City did violate the City Charter and the Collective Bargaining Contract when it passed a Resolution directing the City Manager to layoff four police officers;

The events of May 11, 2020 involving Police Officers Lummis and Kennedy provide an insufficient basis for determining whether or not the City Charter and the Collective Bargaining Contract were violated.

STATE OF NEW YORK
COUNTY OF TOMPKINS

I, *JAMES A. GROSS*, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my award.

February 3, 2021
(Dated)

James A. Gross
(Signature of Arbitrator)

 In the Matter of the Labor Arbitration Between *
 *
 City of Ogdensburg *
 *
 and *
 *
 United Public Service Employees Union *
 (Police Benevolent Association of Ogdensburg, N.Y.) *
 *
 PERB Case No.: A2020-066 *
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Pursuant to the procedures set forth in the above-named Parties’ Collective Bargaining Agreement and Part 207 of the Rules and Procedure of the New York State Public Employment Relations Board (PERB), the City of Ogdensburg (City) and the United Public Services Employees Union (Union) selected me to hear and decide the matters in dispute. The Hearing of this case was held “virtually” online on November 19, 2020. Scott Goldie, Esq., Attorney for the City of Ogdensburg, represented the City. Jose Manjarrez, Esq., Attorney and Labor Relations Representative, represented the Union. Ms. Andrea Smith, Director of Planning and Development and former Assistant City Manager; Mr. Stephen Jellie, City Manager; Mr. Jeffrey Skelly, Mayor of the City of Ogdensburg; and Robert Wescott, Chief of Police, testified for the City. Mr. Justin Polniak, Union President; Mr. Andrew Kennedy, former Chief of Police; Mr. Andrew Layng, Patrolman; Ms. Brittany Kenyon, Patrolman; Mr. Daniel Skamperle, City Councilor; and Mr. Michael Powers, City Councilor, testified for the Union.

The above-named Parties had a full and fair opportunity to make oral and written opening and closing arguments, to present and cross-examine witnesses, and to introduce pertinent documents and other relevant evidence. They City and the Union submitted post-Hearing Briefs to me on January 4, 2021 at which time the proceedings in this matter were closed.

Issue:

The City and the Union agreed to submit the following issues to arbitration:

Did the City violate the City Charter and the Contract when it passed a Resolution directing the City Manager to layoff four police officers?

Did the events of May 11, 2020 involving police officers Lummis and Kennedy and Jeffrey Kelly, who was Mayor at the time, constitute a violation of the City Charter and the Contract?

Pertinent Contractual Provisions & City Charter Provisions

Collective Bargaining Agreement:

Article I: Applicable Law:

The law governing this Agreement shall be the Public Employees' Fair Employment Act and such provisions of the Civil Service Law and the Local Laws of the City of Ogdensburg which are not inconsistent with the said Act.

Article XVIII: Grievance Procedure:

Section 2: Definitions:

2d. Grievance shall mean any claimed violation, misinterpretation or inequitable application of this Agreement or of any laws, rules, procedures, regulations, administration order or work rules of the employer, or those matters affecting employees' health or safety, physical facilities, materials or equipment furnished to the employees or supervisor of employees.

Ogdensburg City Charter

Article II: Election District:

§C-9: Limitations:

B. Appointments and removal. Neither the City Council nor any of its members, including the Mayor, shall in any manner dictate the appointment or removal of any City administrative officers or employees whom the City Manager or any of his subordinates are empowered to appoint, but the City Council may express its views and fully and freely discuss with the City Manager anything pertaining to appointment and removal of such officers and employees.

C. Interference with administration. Except for the purpose of inquiries and investigations under §C-14, the City Council and its members, including the Mayor, shall deal with City officers and employees who are subject to the direction and supervision of the City Manager solely through the City Manager, and neither the City Council nor its members, including the Mayor, shall give orders to any such officer or employee, either publicly or privately.

§C-16: Meetings; rules and minutes; voting:

A. Meetings. The City Council shall meet regularly at least once in every month at such times and places as the City Council may prescribe by rule. Special meetings may be held on the call of the Mayor or of two or more members and upon no less than 24 hours' written notice to each member. All meetings shall be public; however, the City Council may recess for the purpose of discussing any matter in a closed session, which is in compliance with New York State Public Officers Law, Articles 6 and 7, limited to its own membership, provided that final action thereon shall not be taken by the City Council while in closed session.

Background:

The City experienced serious financial issues in 2019-2020. Four new City Council members were elected to the seven member City Council. The four new members, one of whom was chosen to be Mayor, ran on a platform of cutting taxes and City personnel. On May 6, 2020 the City Council by a vote of 4-3 adopted a resolution directing the City Manager to implement several cost reductions. (Joint Exhibit No. 2). Among other cuts in City positions, the Resolution “directed” the City Manager to implement “four layoffs in the Police Department effective May 15.” (Joint Exhibit No. 2).

In that context, four City Police Officers left the Department by late May and early June of 2020. On May 14, 2020, the City Council held another videoconferencing meeting to consider a Resolution that the City Manager be “placed on administrative leave” because she “failed to implement the necessary budget adjustments” set forth by the Council. (Joint Exhibit Nos. 4 & 5.)

The City Manager had stated publicly that the City Council Resolution of May 6, 2020 had “no legal effect” because only the City Manager has the authority to appoint or remove City administrative officers or employees (Union Exhibit No. 1.) The City Council Resolution to put the City Manager on administrative leave carried by a 4-3 vote. It is undisputed that no City police officers were laid off as a result of the May 6, 2020 resolution.

On May 11, 2020 there was an incident involving Mayor Skelly and Police Officers Lummis and Kenyon. Although many of the facts are contested, it is agreed that Officer Kenyon from their police car, took a cell phone picture or pictures of the Mayor as he emerged from a business establishment owned by a fellow City Council member. The Mayor got into his truck and followed the police car a few blocks and signaled the officers to pull over. The Mayor went to the officers who were still seated in their vehicle and questioned the officers about the picture-taking. An investigation ensued but no charges were filed or disciplinary action taken against Officer Kenyon. Officers Kenyon and Lummis filed incident reports complaining about the Mayor’s behavior during the event. (Union Exhibits 4 & 5.)

On May 13, 2020 the Union filed a grievance claiming that the City Council Resolutions on May 6, 2020, directing the City Manager to layoff four Police Officers, violated Article I of the Collective Bargaining Agreement and Article II C-9(B) and C19(2) of the Charter. The Union’s grievance also charged the Mayor with violations of Article II C-9(C) of the Charter when he “confronted, questioned, and dealt with Kenyon and Lummis.” (Joint Exhibit No. 6.)

Union Position:

The Union maintains that “the City violated the Charter and the CBA [Collective Bargaining Agreement] when it resolved to direct Purdy [City Manager] to layoff four police

officers.” The Union contends that the “Council’s directive did exactly what the Charter says it cannot do, that is, dictate the removal of employees that the City Manager is empowered to appoint.” The Union also argues that because “the Charter has a direct relationship” with the Collective Bargaining Agreement, the Council “violated the Charter and in doing so, it violated” the Collective Bargaining Agreement. (Union post-Hearing Brief, p. 7.)

The Union emphasizes that the Council voted in favor of the Resolution despite the protestations of two Council members during the May 6, 2020 meeting that the Resolution was “illegal because it dictated the removal of employees in violation of the Charter” and three Council members seeking to table the Resolution until a legal opinion was obtained. The Union also cites the City Attorney’s advice to the City Manager that “the authority to suspend or remove employees rests with you as city manager.” (Union post-Hearing Brief, p. 8.)

The Union maintains, in addition, that “the Council’s actions were not excused or otherwise relieved by the fact that the City did not formally layoff four police officers.” According to the Union “implementation of an unlawful resolution is not a precondition to a Charter violation.” The Union contends that the layoffs did not occur because the City manager “refused to participate in the Council’s unlawful actions” despite being “removed from office prematurely when she failed to go along with the Council’s directive” The Union asserts, moreover, that the “uncertainty produced by and around the time of the Resolution amounted to a constructive layoff” in that it “drove at least four members of the police department to leave right after the Resolution was passed...making it unnecessary for the City to seek formal implementation of the Resolution.” Consequently, the Union maintains that “the City’s defense that it never implemented the layoffs has no merit.” (Union post-Hearing Brief, pp. 9-10.)

In regard to the incident with the Mayor on May 11, 2020, the Union contends that the encounter “amounted to ‘dealing’ and ‘ordering’ employees by the Mayor which the Charter makes unlawful. (Union post-Hearing Brief, pp. 10-14.)

City Position

The City contends that the Union may not challenge a municipal determination which is not final citing Matter of Greenberg 996 N.Y.S. 48 at 51: “For a challenge to administrative action to be ripe, the administrative action sought to be reviewed must be final, and the anticipated harm caused by the action must be direct and immediate.” The City maintains that the Union has no basis for a grievance “until such time as the City Manager acts in accordance with the Resolution” and “no such action was taken by the City on this Resolution” and “no lay-offs were made in the Police Department.” (City post-Hearing Brief, p. 4.)

The City also takes the position that “the City Council is free to express its interests and desires for staffing.” The City acknowledges that the “authority to suspend or remove employees rests with the City Manager” so that the City Council’s Resolution “has no legal effect with regards to its request to lay-off four in the police department, other than to express in clear uncertain terms its views.” The City concludes that “in the absence of the direct removal of four [police officers] from the department by the City Manager there is no basis for [the Union’s] claim.” (City post-Hearing Brief, pp. 4-5.)

In regard to the May 11, 2020 incident involving the Mayor and two police officers, the City asserts that “the limitation set forth in the Ogdensburg City Charter was never intended to deny a City Councilor’s right as a private citizen to communicate with

City employees.” The City emphasizes that the Mayor did not address the police officers “as Mayor;” “he never gave them any orders or direction; nor did he attempt to discipline or scold them.” The city asserts that the Mayor’s “actions were consistent with those of a private citizen under the circumstances.” (City post-Hearing Brief, pp. 5-6).

Opinion

For the reasons set forth in this Opinion, the City did violate the City Charter and the Collective Bargaining Contract when it passed a Resolution directing the City Manager to layoff four police officers. The events of May 11, 2020 involving Police Officers Lummis and Kennedy and Mayor Skelly, however, provide an insufficient basis for determining whether or not the City Charter was violated.

The May 6, 2020 Resolution.

Article I of the Parties' Collective Bargaining Contract provides that the Agreement shall be governed by the Public Employees Fair Employment Act, the Civil Service Law and the "Local Laws of the City of Ogdensburg which are not inconsistent" with the Public Employees Fair Employment Act. (Joint Exhibit No. 1) Article XVIII, 2(d) of the Collective Bargaining Agreement, in relevant part, defines a grievance as "any claimed violation, misinterpretation or inequitable application of this Agreement or of any laws, rules, procedures, regulations, administrative order or work rules of the employer..." (Joint Exhibit No. 1.).

The City Council's May 6, 2020 Resolution (Joint Exhibit 3) on its face constituted a shift of authority to remove City employees from the City Manager to the City Council. Such a shift of authority would affect both the terms of the City Charter and the terms of the Collective Bargaining Agreement. Consequently, the Union's grievance in this matter (Joint Exhibit 6) is arbitrable and meritorious.

The Resolution passed at the special City Council meeting on May 6, 2020 states unambiguously "that the City Manager is hereby directed to implement [among other things] four layoffs in the Police Department effective May 15." (Joint Exhibit 3) That was a directive from

the City Council, not an expression of views, not a recommendation or a request, not the expression of an opinion or even an urging that this action be taken by the City Manager.

The majority of the City Council's conscious intent to order the City Manager to layoff four police officers and to have that order carried out is evidenced by its actions during the meeting of May 6 and its subsequent removal of the City Manager from her job. During the May 6 meeting, a minority of the Council had expressed the position that the Resolution was "an unlawful order and violates the Charter." (Joint Exhibit 3, minutes of the May 6, 2020 meeting, p. 124.) A majority of the Council, however, rejected efforts by the minority to have the City Attorney participate in the meeting or to table the Resolution until the City Attorney could issue an opinion on the legality of the Resolution. There is no evidence or even a claim that any delay that might have been caused by securing the City Attorney's participation or tabling the Resolution until the City Attorney issued an opinion on its legality would have had any serious negative consequences – except a holding by the City Attorney that the Resolution did violate the Charter.

On May 9, 2020, the City Manager stated publicly that the "layoff directives" she had received from the City Council "have no legal effect." She based her conclusion on correspondence from the City Attorney informing her that the City Council had no authority to direct her to remove employees so that the May 6 Resolution had "no legal effect" except "to express in clear uncertain terms their views." (Union Exhibit No. 1.) (The City and the Union agree that the Charter gives the City Manager, not the City Council or the Mayor, the authority to appoint or remove City employees. See: City post-Hearing Brief, pp. 2 & 4-5.)

The City Council's subsequent actions also provide persuasive evidence that it intended more than to express its views; it took action to secure the City Manager's compliance with its directive to layoff four Police Officers by May 15, 2020. When the City Manager did not comply,

a majority of the City Council, on May 14, 2020, approved a Resolution to remove her from her position and place her on paid administrative leave until her impending retirement date. (Joint Exhibit 5.)

Assistant City Manager Andrea Smith testified that she “took over” when the City Manager was put on administrative leave. She testified, moreover, that the Council “told me to go forward with the layoffs” but that she declined saying that she “had no authority to do that as an Assistant City Manager.” (Quotations from the Arbitrator’s notes of the Hearing unless otherwise indicated.) The City Council, therefore, continued to seek implementation of its layoff directive even after the removal of the City Manager.

The City takes the position that the Union “does not have the basis for a grievance until such time as the City Manager acts in accordance with the Resolution.” (City post-Hearing Brief, p. 4.) The City relies on the Matter of Greenberg (996 N.Y.S 2d 48) for the principle that “For a challenge to administrative action to be ripe, the administrative action sought to be reviewed must be final, and the anticipated harm caused by the action must be direct and immediate.”

Matter of Greenberg involved what was clearly the recommendation of the Executive Director of a Tax Commission who had no authority to approve or deny tax refund applications. In the case before me, the City Council was ordering, not recommending, and took actions, that affected the livelihoods of City employees. The fact that City Managers who were directed to layoff four Police Officers refused to do so in the main because the City Council’s directives violated the City Charter and, therefore, were unlawful cannot immunize the City Council from the consequences of its actions – which were direct and immediate.

In addition to the removal of the City Manager who refused to implement the City Council’s layoff directive, four City Police Department Officers left the Department in reliance on

the Council's May 6 Resolution. As one Officer testified, "I decided to transfer to Potsdam the day after the Resolution to secure my position and my career." He also testified that he "would not have transferred if there was no Resolution." The City's financial situation even prior to the May 6 Resolution had created uncertainty in the Department concerning continued employment. As the former Chief of Police testified, "I discussed with the least senior members of the Department what would happen if the Resolution was implemented." The former Chief also testified that he assisted three of the four least senior officers (one was still in the Police Academy) in getting released from their probationary status in order to improve their chances of being able to move elsewhere. (Union Exhibit 3.)

The City Council's May 6 Resolution had serious consequences for City employees – at least for four Police Officers and the City Manager. A ruling that the Union's grievance is not "ripe" for consideration of these consequences and their unlawful causes would have the twisted and unjust effect of rewarding and protecting the City Council because it was unsuccessful in its attempts to get the City Manager to comply with its unlawful Resolution.

The May 11, 2020 Encounter

In order to decide if the Mayor's actions during his encounter with Police Officers Kenyon and Lummis on May 11, 2020 violated Section C-9(c) of the City Charter, I would have to determine the meaning of the provision's language stating that the Mayor "shall deal with" City employees "solely through the City Manager."

At the hearing and in their post-Hearing Briefs, the Union and the City agreed on the meaning of the language of section C-9(B) of the Charter. It was unnecessary, therefore, for me to

determine its meaning. The phrase “deal with” in Charter section C-9(c), however, is not clear and unambiguous on its face and the Union and the City dispute its meaning.

Given the absence of any evidence of prior application or consideration of what “deal with” means, I conclude that this is a case of first impression. It would be questionable and at least a serious undertaking under any circumstances for an arbitrator to make a first impression ruling on the meaning of a law.

It would be especially unwise to determine the meaning of “deal with” on the basis of the exceptional facts and circumstances of the May 11 encounter – considering in particular that it occurred in the context of public controversy and wide-spread hostility surrounding local politics and the May 6 Resolution. Such a determination in this case would have to be based on these exceptional facts and circumstances rather than set forth a meaning or interpretation applicable to the broader, ordinary course of interactions involving section C-9(c). Because my decision-making authority extends only to the circumstances of the May 11, 2020 encounter between the Mayor and the two Police Officers, I have no authority to issue the broader and deeper ruling on the meaning of “deal with” that is needed.

For these reasons, I find that in this case there is no adequate basis on the Record for me to determine the meaning of “deal with” in City Charter Section C-9(c).