

American Arbitration Association

BELLOWS FALLS POLICE UNION NEW ENGLAND POLICE BENEVOLENT
ASSOCIATION, LOCAL 410

-and-

BELLOWS FALLS VILLAGE CORPORATION
AAA CASE NO. 01-20-0015-0588

AWARD

1. The Union did not demonstrate the Employer violated Article 24, Section 24.1 when the Village Trustees reduced staffing of full-time officers and budgeted overtime in the 2020-21 budget.
2. The Employer did not produce sufficient evidence that it complied with Article 24, Section 24.1 of the Agreement in regard to its efforts to recruit full-time officers to fill vacancies to bring staffing to the levels approved by the Village Trustees for the 2020-21 fiscal year.

The Employer is to provide written monthly communications to the Union in which it shares specific recruiting activities beginning with a report after the full month of May 2021 and ending with a report following the full month of May 2022, or sooner if all vacant positions have been filled. The Employer may unilaterally decide whether this practice will continue beyond this period knowing the Union has the right to further grievances over Employer's compliance under Article 24, Section 24.1.



Date: April 20, 2021

Michael W. Metzler, Arbitrator

Bellows Falls Village Corporation (the “Employer”) was represented by L. Raymond Massucco, Esq. of Massucco & Stern, P.C. Testifying for the Employer were Chief of Police, David Bemis and Town Manager, Scott Pickup.

Written briefs were submitted by both Parties and received by the Arbitrator on March 26, 2021.

THE ISSUE

1. Is the Employer in violation of Article XXIV (Section 24.1) “Working Conditions” of the Parties July 1, 2017 through June 30, 2020 Collective Bargaining Agreement between the Bellows Falls Village Corporation and New England Police Benevolent Association Local 410?
2. If so, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

The Parties’ 2017-2020 Collective Bargaining Agreement (Joint Ex. 1) contains the following pertinent provisions:

XXIV. WORKING CONDITIONS

24.1 The EMPLOYER will attempt to have two or more police officers on duty at all times for the safety of the officers and the security of the Bellows Falls Village Corporation.\

XI. JOB POSTING AND BIDDING

11.1 When the EMPLOYER decides to permanently fill a vacancy within the bargaining unit, such vacancy shall be posted in a conspicuous place listing the pay, duties and qualifications. This notice of vacancy shall remain posted for five (5) calendar days. EMPLOYEES interested shall apply in writing within the five (5) calendar day period. If an EMPLOYEE applies, in

writing, within the five (5) calendar day posting period, then within thirty (30) calendar days after the expiration of the posting period, the EMPLOYER will make a decision on selection. When, in the sole judgment of the EMPLOYER, qualifications, ability and reliability of all applicants, including persons from outside the bargaining unit, are relatively equal, bargaining unit seniority shall be the determining factor. In accordance with the aforementioned standards set forth governing an applicant, any applicant must first pass a physical fitness examination, as set forth by the police academy, and oral board examination provided by the Chief of Police or his/her designee.

OVERVIEW

This case arose from a domestic incident occurring on July 26, 2020 wherein a single officer responded to the scene. A second domestic incident took place around the same time, and since no Bellows Falls Police Department officer was available, the Walpole, NH Police Department was sought for assistance and an officer from that Department responded. Subsequently the Union filed a grievance on July 29, 2020 in a letter from Corporal Michael Keefe to Acting Chief David Bemis as follows:

“Please consider this letter submitted by me as a formal grievance pertaining to the lack of at least two officer coverage on 7/26/2020. This event was caused by the Bellows Falls Village Trustees demanding a staff reduction during the current fiscal year combined with a reduced overtime allowance in this current fiscal year. Both factors directly resulted in the following events taking place:

On 07/26/2020 in the late afternoon hours several domestic related incidents occurred during which numerous arrests were ultimately made. The Walpole, New Hampshire Police Department was ultimately requested and responded to the second domestic incident, with no Bellows Falls Police Department officers available to respond due to an arrest during the first incident. Officer Zachary Tarvit was contacted to come in and was luckily available to do so.

It was later learned from another officer at the second domestic incident that an individual involved in the incident had complained to him regarding the response time of the Bellows Falls Police Department.

The fact that two officers were not on duty endangered not only the officers but the "security of the Bellows Falls Village Corporation". Domestic violence incidents have been proven to be one of the most dangerous and volatile situations that police officers can respond to, that need to be responded to quickly. It is clearly the priority of the Village Trustees to ignore the officers and citizens safety versus funding is very concerning for the officers of the Bellows Falls Police Department and need to be addressed as soon as possible.

The following section of the agreement listed below were violated pertaining to 07/26/2020:

XXIV Working Conditions

24.1 - The employer will attempt to have two or more officers on duty at all time for the safety of the officers and the security of the Bellows Falls Village Corporation.” [Joint Ex. 2]

In a letter dated August 10, 2020 from Chief Bemis to Corporal O’Keefe denied the grievance at the first step as follows:

“Mike,

I have reviewed your grievances of 07-29-20 and find it without merit.

XXIV Working Conditions

The employer will attempt to have two or more officers on duty at all time for the safety of the officers and the security of the Bellows Falls Village Corporation.

While it is preferable to have 2 Officers on duty at a time it is not always feasible due to availability of Officers and the budget.

Our work force has been reduced in the current year’s budget. We are not currently at full staff and to schedule a second Officer at all times isn't practical or affordable. To force overtime is not sustainable by personnel or the budget of the village.

David Bemis

Interim Chief of Police Bellows Falls Police Dept.” (Joint Ex. 3)

Joint Exhibits 4 through 7 are the correspondence tracking the steps of the grievance process. Given the failure to resolve the grievance, Union Attorney Thomas Horgan

submitted a written request for arbitration to the American Arbitration Association. (Joint Ex. 8)

POSITIONS OF THE PARTIES

UNION POSITION

Through its sole witness, Corporal Michael Keefe, the Union traced the change in officer staffing levels through the 2019-2020 fiscal year and into the current fiscal year. Corporal O’Keefe is the Local Union President. He explained that during the 2019-2020 fiscal year the Police Department was staffed with nine patrol officers which included a Chief and Sergeant. Chief Lake retired in July 2020 and Sergeant Davis Bemis became the interim Chief. This led to a reduction of one officer in the Department.

As reflected in the Village Trustee Minutes of 3/14/2020 (Union Ex. 1), the Trustees voted as part of the fiscal year 2020-2021 budget to “...redo the Police Department budget for six full-time officers, one police chief, no K9, one dispatcher, moderate overtime, and a couple of flexible part-time officers.” In the Union’s post-Hearing Brief, it is noted that as of February 23, 2021 (the date of the arbitration hearing), the staffing level is down to four full-time patrol officers and three part-time patrol officers.

The Union does state that Article 24, Section 24.1, does not require a minimum level of staffing. However, it maintains it does require the Department to make a “good faith effort” (Post-Hearing Brief, p.4) to fill vacancies in order to consistently have two officers on duty at all times.

At the hearing, Chief Bemis testified on this recruitment efforts to fill vacancies. The Union argues that despite his testimony on specific numbers of candidate interviewed and vetted, there was a lack of any evidence of the following:

1. Actual interviews
2. Specifics on the vetting of candidates
3. Oral boards and physical examinations (PT tests) which are a requirement before hiring
4. Posting of vacancies as required by Article XI, Section 11.1 (Agreement, Joint Ex.1)

The Union points out that Chief Bemis testified he did interview a number of candidates, but produced no evidence of this, and did state during the 2020-21 fiscal year there were no oral boards or PT tests scheduled.

During the hearing the Employer submitted Village Exhibit “A” as a current posted work schedule. It was introduced through its witness, Chief Bemis. There was some confusion about the number of hours of single-officer coverage. On direct examination Chief Bemis stated there were fifteen such hours. On cross-examination, according to the Union in its Post-Hearing Brief, Chief Bemis corrected this to forty-one. [My notes record he testified forty-six and as I reviewed Exhibit A, I calculated 54 hours of single-officer scheduled coverage.] The Union argues there are a number of factors which work against the Employer’s ability to fill these hours with two officers. One is the right of part-time officers to refuse to come in and another is the small number of hours part-time officers are available to work. Also, full-time officers could be used on an overtime basis, but there is no guarantee a full-time officer might be available on his or her day off. Further, the number of hours to be filled by a second officer increase when an officer is out due to vacation or sickness.

In conclusion, the Union claims the Employer failed to make a “good faith effort to maintain two-man coverage on each shift, and in fact, established that they took little, if any, serious action to hire additional staffing during the 2020-20-21 fiscal year despite admittedly having the financial means to do so.” (Union Post-Hearing Brief, p. 11) The Union asks that the Arbitrator uphold the Grievance “and direct the Employer to immediately take any and all necessary steps to raise patrol line staffing levels to a point in which it becomes actually feasible to maintain two-person coverage on each shift as outlined in Article 24, Section 1 of the Parties CBA.” (Union Post-Hearing Brief, p.12)

EMPLOYER POSITION

Through its witnesses, and in its Post-Hearing Brief, the Employer made its arguments that it fulfilled the requirements of Article 24, Section 24.1 to “attempt to have two or more officers on duty at all time for the safety of the officers and the security of the Bellows Falls Village Corporation.” (Joint Ex. 1)

Chief Bemis testified how the Department uses part-time officers and full-time officers’ overtime, to add a second officer to those times where a single officer is scheduled. He stated that as of the date of the hearing, the Department exceeded its overtime budget. With regard to Exhibit A, he explained how this is scheduled coverage and one must look at actual coverage after using part-time officers and overtime. When that is reviewed, he testified there were only about twenty hours of single-officer coverage. He explained how, throughout the schedule, the hours between three and seven AM are not covered with any scheduled officers, but two officers are on call.

Chief Bemis testified that the Department was eager to fill budgeted vacancies and he has been actively recruiting. He stated that he had interviewed a number of candidates, but they resulted in only one hire. He went on to explain how it is a national problem to fill vacancies with qualified officers. There is declining interest for Millennials to seek law enforcement careers due to the risks of the job and the challenge to the reputation of police work posed by movements such as “Black lives Matter.” Specific reference was made to known difficulties in filling police officer vacancies in Vermont and New Hampshire. He mentioned that open positions have been advertised in print and social media.

Town Manager, Scott Pickup, testified about the eagerness of the Village to fill the two vacant full-time officer positions, both of which are budgeted in the current fiscal year. He stated he himself interviewed six to eight candidates and agreed with Chief Bemis on the negative trends in the country in filling police officer vacancies.

In its Post-Hearing Brief, the Employer maintains the language of Article 24, Section 24.1 in the Agreement (Joint EX. 1) does not require the Employer to have at least two officers on duty at all hours in a week. The requirement is to “attempt” to do so and Chief Bemis testified on his efforts to cover single-officer scheduled hours with an additional officer using part-time officers and overtime. With regard to filling vacancies, Chief Bemis testified on interviews he conducted and extensive recruitment advertising.

The Employer makes several other arguments in support of its compliance with Article 24, Section 24.1. It claims the Union only has standing to claim that the Employer failed to attempt to provide two-officer coverage and threatened the “safety of the officers” (from Joint Ex.1, Article 24, Section 24.1). In the Employer’s view, the Union does not have

standing to object to failure to provide two-officer coverage for the reason it threatens the “security of the Bellows Falls Village Corporation” (from Joint Ex.1, Article 24, Section 24.1) because that is the Employer’s interest and the Arbitrator should only evaluate its conduct as it applies to the officers’ safety. The Employer then goes on to argue there is no risk to officer safety when there are no officers on duty, and the only risk is the approximately twenty hours per week when the Chief is unable to secure coverage of a second officer.

The Employer states that the fact of less than two-officer coverage for some hours in a week, “does not establish that the Agreement has been violated.” (Employer Post-Hearing Brief, p.4) It claims the use of mandatory overtime for full-time officers would create risk for officer safety as well as financial consequences. Further, an unacceptable means to provide such full coverage would be to hire unqualified officers which would threaten the safety of both the officers and the community.

Another argument made by the Employer is that the Union did not put into evidence any situation where the lack of two-officer coverage put officers at risk. It claims the incidents of July 26, 2020 did not put officers at risk in that the Walpole, NH Department responded, and another officer was available to respond when called. The grievance statement referred to a complaint on response time, but the Employer claims this was an issue of community safety which is only the interest of the community and outside the interest of the Union.

The Employer maintains the “attempt’ to have two-officer coverage “at all times” required in Article 24, Section 24.1, “must be read in the context of the larger focus of the Agreement and in the context of the economic circumstances at hand and the absence of sufficient,

qualified personnel.”(Employer Post-Hearing Brief, p.5). The Employer concludes it has taken sufficient steps, considering the conditions of the present, to minimize one-officer coverage and, therefore, the grievance should be denied.

DISCUSSION

There are two types of Employer staffing raised by the Parties. The first is whether the Chief has attempted to regularly augment a scheduled single -officer with a second officer. Chief Bemis testified how he would use overtime and part-time officers to fill these gaps so that single-officer coverage was reduced to about twenty hours per week. The Union did not take issue with this, but argued that this type of coverage is not dependable. Officers not scheduled may not be available to be called in. The second activity regarding staffing, and the Union’s principal focus, is the Employer’s recruitment efforts to fill full-time vacancies which were two in number at the time of the hearing. This second activity will be discussed in detail below.

Scott Pickup, Town Manager, testified that he had interviewed six to eight candidates and was unsure how many he vetted. Chief Bemis named the places he advertised the open positions and explained how there is a local and national problem recruiting officers because, for several reasons, there is a declining interest in police officer careers.

In its Post-Hearing Brief, the Union acknowledges the Chief’s testimony on his efforts, but argues there was no evidence entered by the Employer other than the Chief’s testimony. The Union pointed to the failure of the Employer to post open positions for five days as required by

Article 11, Section 11.1 of the Agreement, the lack of any oral interviews with candidates, and the absence of any scheduled PT tests for candidates.

The Employer's arguments fall into several areas:

1. The word "attempt" in Article 24, Section 24.1 does not require two-officer coverage at all times. Chief Bemis' testimony on his efforts shows fulfillment of the Employer's obligation to attempt to reach that goal.
2. There was no evidence presented by the Union of incidents where Officer safety was at risk, and the safety of the Village is not the interest of the Union, but the interest of the Village only.
3. As the Employer seeks to "attempt" to fulfill the goal of two-officer coverage at all times, there are other considerations to be weighed, namely the safety of officers being mandated to work overtime, the risk to the Village of hiring unqualified officers, and financial impact.

I find number one above to be central in this case. With respect to number two above, the language of Article 24, Section 24.1 embodies the agreement of the Parties to attempt to reach the goal of two-officer coverage at all times. The reasons stated in the second sentence are for the "safety of officers" and the "security of the Bellows Falls Village." I do not accept these reasons in the language to be interpreted to allow for the Employer to lessen its attempt to reach, or abandon, the goal if in its judgment officer safety or Village security is not comprised by doing so.

With regard to the third argument above, there was no contention made by the Union for the Employer to use mandatory overtime. It did say that weekly measures to fill gaps were not

dependable and focused rather on the need to fill vacancies. Also, there was no suggestion by the Union that the Employer hire unqualified individuals.

An important argument in number three is the Employer claim for “financial impact” to be a consideration for less than two- officer coverage. The Village trustees approved six full-time position for the current fiscal year budget, down from nine in the prior fiscal year. In the grievance submission (Joint Ex.3) it is stated that the lack of two-officer coverage on 7/26/2020 “was caused by the Bellows Falls Village Trustees demanding a staff reduction during the current fiscal year combined with a reduced overtime allowance in this current fiscal year.”(Joint Ex. 2) However, the Union, at both the hearing and in its Post-Hearing Brief, did not argue to restore the three lost positions, but focused mainly on the Employer’s efforts to fill the two vacant positions. In fact, its Post-Hearing Brief, the Union states : “Had the Employer made any serious effort to hire new officers for the 2020-2021 fiscal year, or even increase staffing levels to six full-time officers, which was the number of full-time positions previously approved and budgeted for by the Trustees in March of 2020 (Union Exhibit #1), it would have at least been more feasible to consistently maintain two-man coverage on each shift during the 202-2021 fiscal year.”(Union Post-Hearing Brief, pp. 4-5) This statement implies Union acceptance that, in spite of the budget reductions, two-officer coverage may be attainable at all times with a combination of six full-time officers and fill-ins through the use of part-time officers and overtime.

So, the overriding Union issue is that the Employer is required to “attempt” to fill the budgeted full-time vacancies yet provided no evidence to prove it was doing so. The Union uses the term “good faith effort” and “serious effort” (Union Post-Hearing Brief, p. 4). It argues that Article

24, Section 24.1 requires “the employer to make a good faith effort” to maintain two-man staffing when it is feasible to do so (Union Post-Hearing Brief, p.5) The only evidence presented by the Union on its attempt to fill vacancies was the testimony of Chief Bemis and Town Manager, Scott Pickup, with no corroborating exhibits.

Chief Bemis and Town Manager Scott Pickup appeared to be credible, but I find that their testimony was insufficient without other evidence of interviews conducted, candidates vetted, and measures taken to recruit successfully. Evidence perhaps could have included the Chief’s and the Town Manager’s schedules, correspondence of different varieties, copies of ads, etc. Names could have been redacted. No reasons were given for not posting positions. The Union questioned recruiting efforts as it observed the absence of oral interviews and PT tests. Chief Bemis could very well have been conscientious in his attempts to fill the full-time vacancies. However, I cannot rely on his testimony alone. There was insufficient evidence to verify his work.

The Union claims the Employer did not show “good faith” attempts to fill vacancies. Although those specific words are not in Article 24, Section 24.1, there is an implied principle in contract law of good faith and fair dealing. Without sufficient evidence in this cause, there is doubt whether the principle of good faith was followed by the Employer.

Let me address the Union’s second point of contention. In its first statement of the grievance, the Union claimed the Employer violated Article 24, Section 24.1 by reducing staffing of full-time officers as well as reducing budgeted overtime in the 2020-21 budget. The Union had the burden of demonstrating this. However, it did not show these budget changes would necessarily impact

at least two- officer coverage at all times. I find, therefore, that the Union did not satisfy this burden.

In summary, I find that the Union was unable to demonstrate the Employer violated the Agreement by reducing the staffing level to six full-time officers and reducing budgeted overtime in its 20-21 budget. However, I also find I that the Employer did not produce sufficient evidence that it complied with Article 24, Section 24.1 of the Agreement in regard to its efforts to recruit full-time officers to fill vacancies to bring staffing to the levels approved by the Village Trustees.

I felt from the hearing that there is a strong working relationship between the Employer and the Union which no arbitrator ever wants to disrupt. The recruitment issue may be one of communication. I feel it would be of value to require that for a period of time that the Employer regularly keep the Union informed on its efforts to recruit for the vacant full-time positions. This would give the Employer the opportunity to demonstrate its good faith attempts to fill vacant budgeted positions.

Given the specific finding made above, I issue this Award:

AWARD

1. The Union did not demonstrate the Employer violated Article 24, Section 24.1 when the Village Trustees reduced staffing of full-time officers and budgeted overtime in the 2020-21 budget.
2. The Employer did not produce sufficient evidence that it complied with Article 24, Section 24.1 of the Agreement in regard to its efforts to recruit full-time officers to fill vacancies to

bring staffing to the levels approved by the Village Trustees for the 2020-21 fiscal year.

The Employer is to provide written monthly communications to the Union in which it shares specific recruiting activities beginning with a report after the full month of May 2021 and ending with a report following the full month of May 2022, or sooner if all vacant positions have been filled. The Employer may unilaterally decide whether this practice will continue beyond this period knowing the Union has the right to further grievances over Employer's compliance under Article 24, Section 24.1