

**A GRIEVANCE ARBITRATION CONDUCTED UNDER THE RULES OF  
THE NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD**

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**In the Matter of the Arbitration Between the  
ROCHESTER POLICE LOCUST CLUB, INC.**

**"Union"**

**OPINION AND**

**-and the-**

**AWARD**

**CITY OF ROCHESTER, NEW YORK**

**"Employer"**

**Grievances: 08-434 & 09-436 Special Events**

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**BEFORE**

Douglas J. Bantle, Esq., Arbitrator

**APPEARANCES**

For the Union:

Lawrence J. Andolina, Esq., Attorney, Trevett, Cristo, Salzer & Andolina,  
P.C.

Mike Mazzeo, President, Rochester Police Locust Club (RPLC)

Ralph J. Gagliano, Executive Vice-President, RPLC

Theodore Coriddi, Treasurer, RPLC (9/22/09, 9/23/09)

Charles Koerner, Chief of Police, Clyde; Retired City of Rochester Police  
Lieutenant (9/22/09)

Steven R. Williams, Retired Rochester Police Department Officer (9/22/09)

John Smith, Lieutenant, Rochester Police Department (9/22/09)

John Fiorica, Secretary, RPLC (9/22/09)

For the Employer:

Yvette Chancellor Green, Esq., Municipal Attorney, City of Rochester

Sharon Burke, Manager of Labor Relations, City of Rochester

George Markert, Executive Deputy Chief, Rochester Police Department

Donald Lucas, Lieutenant, Rochester Police Department

John Girvin, Consultant (9/22/09, 9/23/09, 12/7/09)

## **PROCEDURE**

Four (4) days of hearing were held in the above matter in Rochester, New York in the Locust Club Conference Room on June 5, September 22, September 23, and December 7, 2009 before the undersigned who was selected mutually by the parties to serve as Arbitrator. At that hearing both parties were given full opportunity to present their evidence, testimony, and argument; to summon, examine, and cross-examine witnesses.

At the conclusion of the hearing, the parties agreed to submit post-hearing briefs which were to be postmarked to the Arbitrator no later than February 26, 2010, later extended by the Parties to March 5, 2010. The final "hard copy" post-hearing brief was received by the Arbitrator on March 30, 2010 and the record was closed on that day.

## **THE ISSUE**

At the arbitration hearing, the Parties were unable to agree upon an issue or issues to be submitted to the Arbitrator and did not agree to allow the Arbitrator to frame the issue. Lacking such agreement, the issue is the questions being brought to the arbitrator in the grievances themselves<sup>1</sup>: GR 08-434 Special Events Award Violation (Jt. Exh. #2):

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<sup>1</sup>The question of the proper issues was discussed at some length at the arbitration hearing (T pp. 9-18). When the Parties were unable to agree, the Arbitrator stated the following (T pp. 15-18):

If you look in the case law in New York State, private or public, both are the same on this. The issue is the questions being brought to the arbitrator.

There is no necessity of an agreement upon an issue. Essentially the union gets to determine what the issue is by this method.

The union is the one that files the grievance. The grievance is what puts the thing into play. The grievance is, unless further defined by the parties, the issue, in other words, you have got a document that you have already submitted that is included in the record.

....

So if an arbitrator is faced with a situation in which the parties cannot agree on a different issue, the arbitrator is under the law to address what's determined in the grievance.

So we have a section here nature of grievance and we have a section remedy. They are both at play because that's what was put into play. That's what the city responded to.

So this is the question or questions to be decided by the arbitrator on grievance

**Section 2:** This grievance is submitted pursuant to Article 27 of the current collective bargaining agreement between the City of Rochester and the Rochester Police Locust Club and disputes the interpretation and/or implementation of the current collective bargaining agreement including, but not limited to,

Article 15 – Section 6 and General Order 265

**Section 3: NATURE OF GRIEVANCE**

On or about August 5, 2008, the Rochester Police Department cancelled Special Events details at Frontier Field. On August 9, 2008 the Rochester Police Department, under the direction of Executive Deputy Chief George Markert, ordered on-duty personnel from the Westside Division to perform police duties at the Red Wings Baseball game located at Frontier Field, an event that would normally have been performed by a “Special Events” detail.

This location has been previously designated as a “Special Events” location since its opening during the summer of 1996 and was again subsequently determined to be a “Special Events” location upon the Opinion and Award of Contract Arbitrator Jeffrey M. Selchick – GR 06-408 dated June 4, 2007 (attached as Exhibit 1). Furthermore, the decision by Arbitrator Selchick reaffirmed that if police personnel are assigned to perform police duties at Frontier Field, that the established protocol as covered by General Order #265 and the long-standing practice of the parties would prevail.

It is the Union’s position that when police personnel are assigned to perform traffic and other normal Special Events duties, then those members shall be selected from the list of members who volunteered to work on an

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O8-434 absent any other agreement. . . .

. . . . From my perspective, I don't need any other -- we have put on the record your two independent positions.

There was no agreement to choose one of those or the other. You didn't want to let me frame it. I don't have to frame it. I have got the grievances. I have got O8-434 and I have got. . . .

. . . .

O9-436. Therefore, I have to answer the questions on these pages unless the two parties agree to have me answer something other than that. I must address every issue brought up on these pages.

And I would advise both parties to be prepared in their proof to address every issue on this because we have not come up with an alternative.

overtime basis pursuant to General Order 265.

**Section 4: REMEDY SOUGHT:**

The Union requests that the City of Rochester immediately abide by Grievance Award 06-408 by assigning members by the established custom and practice of General Order 265 in events at Frontier Field and all other so situated events that are designated as “Special Events” locations and events.

In addition, the Union requests unit members should be made whole for the loss of wages that may have occurred as a result of the City’s refusal to abide by the decision of the arbitrated grievance award.

and GR 09-436 Special Events Violations – War Memorial:

**Section 2:** This grievance is submitted pursuant to Article 27 of the current collective bargaining agreement between the City of Rochester and the Rochester Police Locust Club and disputes the interpretation and/or implementation of the current collective bargaining agreement including, but not limited to,

**GENERAL ORDER 265  
and ARBITRATOR AWARD Dated 6/4/2007**

**Section 3: NATURE OF GRIEVANCE**

On or about January 15, 2009, the Rochester Police Department assigned on-duty Tactical Unit police officers to perform Special Event detail assignments at the Rochester War Memorial. Subsequently, the Department further assigned on-duty Tactical Unit officers to events held at the Rochester War Memorial on January 19, 22, 23 and 24, 2009. The on-duty Tactical Unit officers performed duties that would normally have been performed by a “Special Events” detail.

The Rochester War Memorial is a location that has been established by the parties to be a designated “Special Events” location and has been a location where the parties have previously met and jointly agreed to reductions of staffing as set forth through established Special Events protocols and long-established practices of the parties.

Furthermore, the decision of Contract Arbitrator Jeffrey Selchick (GR 06-408 dated June 4, 2007 and attached as Exhibit 1) reaffirmed that if police personnel are assigned to perform police duties at an established Special Events location, the then established protocol as covered by General

Order #265 and the long-standing practice of the parties would prevail.

It is the Union's position that when police personnel are assigned to perform traffic and other normal Special Events duties, then those members shall be selected from the list of members who volunteered to work on an overtime basis pursuant to General Order 265.

**Section 4: REMEDY SOUGHT:**

The Union requests that the City of Rochester immediately stop the assigning of on-duty members to events at the Rochester War Memorial and that the Department assign members to events at the Rochester War Memorial and all other so situated events that are designated as "Special Events" locations and events by the established custom and practice of General Order 265.

In addition, the Union requests that unit members be made whole for the loss of wages that may have occurred as a result of the City's unilateral decision to disregard contractual language and protocol that has [sic] been established between the parties.

The Union also requests that the City abide by the established custom and protocol of the parties by meeting and discussing any planned changes in staffing reductions at any future established "Special Events" locations or events.

As remedy, the Union, on page 26 of its post-hearing brief, requests the following:

The Locust Club requests that the City be ordered to utilize off-duty officers selected pursuant to the procedures set forth in General Order 265 to staff special events at Frontier Field and the War Memorial, subject only to the recognized exceptions for specialized unit personnel, such as Mounted or K-9 officers. All members who have wrongfully been deprived of overtime should also be made whole, not only with an award of back pay but also, where appropriate, compensation for any resulting diminution in retirement benefits.

**RELEVANT CONTRACT LANGUAGE**

The following language in the Parties' July 1, 2005 to June 30, 2008<sup>2</sup> Collective

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<sup>2</sup>Despite the fact that both instant grievances are dated post-June 30, 2008, the Parties have jointly submitted the July 1, 2005 to June 30, 2008 as the applicable Collective Bargaining Agreement.

Bargaining Agreement (Jt. Exh. #1)<sup>3</sup> is arguably relevant to the Grievance:

**ARTICLE 15  
OVERTIME**

....

**Section 6: Special Events Overtime**

The procedures for the selection and payment of overtime for Special Events will be covered by General Order #265.

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**ARTICLE 27  
CONTRACT ADMINISTRATION**

**Section 1: Definitions**

- A. Grievance - the term "grievance" shall be defined as a dispute between the parties to this Agreement, involving the interpretation or application of any provisions of this Agreement.

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**Section 4: Arbitration**

- A. An arbitration proceeding shall be conducted before the Permanent Contract Arbitrator, who shall be mutually selected by the parties no later than August 1, 1995, and shall serve until replaced by mutual agreement of the parties. The Permanent Contract Arbitrator shall have full authority pursuant to the provisions contained in this Section to resolve all pending grievances and future grievances brought by either

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<sup>3</sup>The Parties agreed to the following stipulations with regard to the Collective Bargaining Agreement (T pp. 8-9):

MR. BANTLE: . . . .

....

Ms. Green has written down two stipulations that were agreed to by the parties on June 5th. And I will ask her to read them now so we can incorporate them into the record.

MS. GREEN: The first one is Article 15, Section 6 of the collective bargaining agreement incorporates General Order 265 into the contract.

And the second is that Article 27 at Section 1(a) defines grievance.

party.<sup>4</sup>

<sup>4</sup>This provision of the Collective Bargaining Agreement has been supplemented by a "Revised Memorandum of Agreement" signed by the Parties on June 15, 2009 (Jt. Exh. #10) that states, in relevant part:

Whereas, on February 12, 2009, the parties signed a memorandum of agreement, agreeing to an interim process of resolving grievances pending the resolution of current contract negotiations, and

Whereas, one of the selected arbitrators . . . is unable to serve on the interim panel . . .

Now, therefore the City and the Police Locust Club mutually agree that the arbitrators shall now be ranked as follows:

- . . . .
- 2. Douglas Bantle
- . . . .

- 1. The arbitrator shall be selected in the order they appear on the above list on a rotating basis.

. . . .

At the arbitration hearing the Parties had the following colloquy as to application of Article 27, Section 4 provisions to these interim arbitrators (T. pp. 13-15):

MR. BANTLE: We have had a variety of discussions back and forth. . . . So let me try and clarify things as I see them.

Yvette originally referred me to Section 4(e) of the arbitration section, which is part of the contract administration section, which is Article 27 in the collective bargaining agreement. I'm referring to page 44 in particular in which the parties agreed to a permanent contract arbitrator; and thus, all of the clauses which follow that, and that's the A through F clauses, all apply to the permanent contract arbitrator and don't apply to anybody else given the collective bargaining agreement.

. . . .

It was pointed out to me . . . that apparently there's an agreement, and there is, signed on 6/15/09, which is a revised memorandum of agreement with an interim process of resolving grievances pending the resolution of the current contract negotiations. So there's some limitations contained thereof.

. . . .

The agreement merely cites how the panel is going to work. It does not say anything about the contract language A through F, which the contract arbitrator was under. I am led to believe, and please correct me if I am wrong, from both counsels - one of the reasons why we had one of our side bars - that their intention was to have the other paragraphs B through F essentially apply to this group of four arbitrators.

MS. GREEN: Right.

MR. BANTLE: There was not an intention to exclude that, but it is not explicitly included in this document between them.

....

B. Decisions of the arbitrator shall be final and binding on the Club, the City and any grievant, provided that said decision is within the scope of his authority and the constraints established by this section. The arbitrator shall have no authority or power to render a decision or award inconsistent with Statutory or Appellate decisional law.

....

E. The authority of the arbitrator shall be limited to matters of interpretation or application of the express provisions of this Agreement and the arbitrator shall have no power or authority to alter, add to or subtract from or otherwise modify the terms of this Agreement as written. The arbitrator shall confine himself to the precise issue submitted for arbitration and shall have no authority or power to determine any other issues not submitted to him. He shall confine his decision and award solely to the interpretation and application of this Agreement.

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**ARTICLE 30  
GENERAL PROVISIONS**

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**Section 4: Changes in Rules, Regulations and General Orders**

All portions of any Rules, Regulations and General Orders of the Department pertaining to the terms and conditions of employment shall be changed through the process of collective negotiations. In the event the City desires to so change such a Rule, Regulation or General Order, it shall give notice thereof to the Club. The parties shall thereafter negotiate collectively over such proposed change(s). If, as a result of the collective negotiations, the parties arrive at impasse, the matter shall be resolved through arbitration, as that procedure is set forth in Article 27, Section 4, of this Agreement.

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MR. ANDOLINA: It's my understanding and having been part of the discussions concerning that I think that clearly was the intent of the parties.  
MS. GREEN: It is.

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**ROCHESTER POLICE DEPARTMENT  
GENERAL ORDER 265**

**I. DEFINITION**

Special Event - Certain events or public gatherings, such as parades, entertainment/sporting events or other activities that are usually scheduled in advance and which generally provide an opportunity for advance planning of required police services. For the purposes of this directive, a “Special Event” is one that requires the services of sworn uniform personnel (or selected non-departmental personnel, e.g. PAC-TAC, per GO 270) for coverage.

**II. POLICY**

- A. This directive establishes criteria for departmental responses to all Special Events; the use of specialized unit personnel, as required; the designation of a single person and/or position as supervisor and coordinator for a given event; logistical requirements; coordination among affected agencies/persons (either governmental or non-governmental); and the final “After Action Report” of each event (Attachment A).
  
- B. The Special Events Section will report to the Commander of the Special Services Division. The Coordinator of Special Events will be the commanding Officer of Support Services. The Coordinator, in conjunction with the Commander of the Special Services Division, will determine within a reasonable advance time period the number of uniform personnel required to provide appropriate police services at each event.

**III. PROCEDURES**

- A. The Special Events Section will be responsible for the coordination of all police activities at Special Events and will liaison with the City Office of Cultural Affairs and Special Events.
  - 1. The Special Events Section will:
    - a. Distribute special event availability calendars (Attachment B) to all sections/units at the end of each month;

- b. Select members to work a special event based on the following:
  - i. Submission of the special event availability calendar
  - ii. availability of the member as indicated on the submitted calendar
  - iii seniority (in accordance with the current collective bargaining agreement)

.....

- d. Issue Special Event Assignment Notification forms (Attachment C) to the affected member. . . .

2. Selection Process. Members will be chosen for special event details by the following procedures:

- a. Two lists will be prepared of those who submitted calendars for the month, sorted by rank: the first listing the top 20% most senior ("senior list"); the second containing the remaining members. Those on the senior list shall have three (3) opportunities, per month, during the months of May through October and two (2) opportunities during the months of November through April. . . .

.....

- c. Assignment of events will continue down the senior list by seniority until (and if) all members on the list are assigned up to the appropriate number. If other events remain to be assigned after all on the senior list have had the applicable opportunities, the second list will be utilized, but on an event-by-event basis;

.....

- h. the transfer of a member or his unavailability due to his work schedule will not affect the member's

crediting of opportunities as listed above. However, members are responsible to immediately notify Special Events of such changes. . . .

- i. If a member fails to perform his duties in a satisfactory manner (burden of proof rests with the Administration), the member may be removed from the eligible list until it can be determined that the performance is improved. . . . Such performance improvement proof rests with the member. . . .
  - j. members accepting an assignment and failing to report as directed will suffer the following consequences:
    - i. 1st offense: removal from the current and the following two (2) months' lists;
    - ii. 2nd offense: removal from the current and the following 12 months' lists.
  - k. the selection of investigators and detectives to work special events in uniform shall be limited to a ratio of one investigator/detective to 8 police officers. The ratio will be applicable for each special events season.
3. Specialization. This directive applies only to general assignments and not to specialized services capable of being performed only by uniquely trained personnel (e.g., Special Events Coordinator, motorcycle duty, mounted, K-9, bicycle patrol, etc.). The department will not use a member in additional duty to provide services which they would not routinely perform (or be expected to perform) during their regular duty assignment.

Members of speciality units who receive special events overtime due to their speciality will not be allowed to request general special events duties unless their overtime opportunities related to special events fall below that given to members with the same seniority. In that case, the speciality member may request events in the following month to bring them up to the level of allotment due them based on their seniority. . . . It is that member's burden to prove such inequity.

B. Members willing to work special events will:

1. Complete and return the availability calendar to the Special Events Section no later than the 15th of the month preceding the period for which members are to be scheduled;
2. Sign and immediately return the Special Event Assignment Notification form to the Special Events Section. Failure to sign and return the Special Event Assignment Notification form may result in the member's cancellation from the event.

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C. The Special Events Coordinator will:

1. Be provided with event information on a "Request for Support Services" form (attached) from city Hall Office of special Events and the event promoter.
2. Review all logistical requirements, police needs, and required presence at a special event, making a recommendation if the event can be assigned to the Patrol section as [a] "special attention" or if it requires overtime coverage.

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5. Prepare outlines, as needed, of traffic points, crowd control points, and adjacent parking facilities for those areas regularly used for Special Events (e.g., War Memorial, etc.). . . .

.....

7. Reassign all cancellations from personnel assigned as follows:
  - a. The Special Events Coordinator will make a reasonable attempt to reassign the event utilizing the next available member on that month's availability list.
  - b. If a replacement cannot be found, the Special Events Coordinator or the event supervisor shall

consult with the commanding Officer of Support Services to arrange for a replacement. . . . Any last minute coverage or no-show(s) may be covered utilizing on-duty personnel, or a list of up to 25 members who have volunteered to be called for last minute replacement. Members who desire to be placed on the cancellation list and who establish a pattern of not being available to work events may be removed from the list for the remainder of the calendar year.

- 8. Prepare a departmental Special Order for issuance by the Chief of Police outlining the following:
  - [a]. identification of the special event, the event dates, and the event reporting location;
  - b. Specific details of the special event, including:
    - i. Assigned personnel, including all on-duty and off-duty/overtime, and Commanding Officer/supervisor of the event:

- . . . .
- . . . .
- . . . .
- F. Following each special event, the designated supervisor will be responsible for submitting an After action Report to the Special Event Coordinator no later than three (3) business days after the event.
- G. If an event is canceled and the member is contacted more than 24 hours in advance no compensation will be paid. If the member is contacted less than 24 hours in advance the member will have another opportunity. If the member reports to the event, but the event is canceled, or the member is not allowed to work, the member shall receive four hours at the overtime rate.
- H. Overtime not specifically listed in this Order will be paid per current collective bargaining agreements.
- I. Nothing in this order precludes the Chief of Police from utilizing

on-duty personnel for special events. Notwithstanding the provisions of the selection process contained in this order, selection of personnel for specific events may be at the discretion of the Special Events Coordinator with reasonable explanation.

### **RELEVANT FACTUAL BACKGROUND**

The facts in these Grievances are generally not in dispute. The Parties first agreed on contractual language regarding “Special Events Overtime,” Article 15, Section 6, in the November 19, 1997 Memorandum of Agreement completing bargaining for a successor to the 1993-1997 agreement (Attachment to Jt. Exh. #6). Despite the fact that a version of General Order 265 was attached to that Memorandum of Agreement, the Parties did not finalize the language of General Order 265 for some years, although the selection process contained therein was followed by the parties. This draft status of General Order 265 was specifically noted in a letter from then-Commander Markert to the Union President dated March 13, 2006:

Enclosed please find the most recent DRAFT of General Order 265. As you are well aware, this order has existed in draft form for many years. Nonetheless, we have been following the selection process outlined therein, which was mutually established by the parties several years ago.

I am aware that there have been attempts in the past to bring this order to closure and issuance. I suggest that we try to finalize the order content in the next few weeks. The means by which Special Events overtime is distributed is the key component of the order, and in that area, I believe the City and the Club are in agreement.<sup>5</sup>

During this process of finalizing General Order 265, the Parties signed a Memorandum of Agreement on June 16, 2004 (Emp. Exh. #8) pertaining “to the staffing

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<sup>5</sup> As quoted in Rochester Police Locust Club, Inc. & City of Rochester, Police Department, GR06-408 Special Events -Frontier Field, Opinion and Award, Jeffrey M. Selchick, Esq., Contract Arbitrator, June 4, 2007, (Jt. Exh. #2, Attachment Exhibit #1), p. 5.

changes that were initiated by the Rochester Police Department.” One of the provisions of that Memorandum of Agreement stated,

*Special Events:* The parties agree that the current process of selecting members for Special Events assignments will be maintained and additional on-duty personnel shall not be used to supplement or replace Special Events personnel.

On September 8, 2006, the Union President filed a grievance (GR06-408) claiming a violation of Article 15, Section 6 and Draft General Order #265. Following a recitation of specific alleged violations,

The grievance concluded that “the assignment of police personnel to perform normal police duties at Frontier Field without following the selection process contained in General Order 265 is a violation of Article 15, Section 6 of the current collective bargaining agreement” and that there was a “long-standing practice and custom” whereby the “parties had designated Frontier Field as a ‘special events site’ and each time the Rochester Police Department assigns unit members to that location to perform traffic and other normal special events’ duties that the members should be selected from the list of members who volunteered to work on an overtime basis pursuant to General Order 265.”<sup>6</sup>

During the course of Grievance 06-408, at least until the issuance of the Arbitrator’s Opinion and Award, the Union contended that Draft Order #265 was a contractual understanding between the parties. However, as noted by Arbitrator Selchick in his Opinion,

The City resists the Union’s argument, essentially claiming that Draft General Order 265 is only in draft form and has never been finalized.<sup>7</sup>

In his Opinion and Award on Grievance 06-408, Contract Arbitrator Selchick found that

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<sup>6</sup>Rochester Police Locust Club, Inc. & City of Rochester, Police Department, GR06-408 Special Events - Frontier Field, Opinion and Award, Jeffrey M. Selchick, Esq., Contract Arbitrator, June 4, 2007, (Jt. Exh. #2, Attachment Exhibit #1), p. 4.

<sup>7</sup>*Ibid.*, p. 10.

Draft General Order #265 was “part and parcel of the parties’ Agreement”<sup>8</sup> and further found that,

. . . the parties have negotiated understandings relative to Draft General Order 265 that extend beyond the language thereof. It is clear, therefore, that the parties . . . have also agreed that the “special events” covered by Draft General Order 265 are those that could reasonably be considered major events as defined by the need for crowd control and the like. Thus, it is evident that the parties have agreed that 30 minute neighborhood parades, for example, would not qualify as special events within the meaning of Draft General Order 265.<sup>9</sup>

Arbitrator Selchick made the following finding regarding staffing of “Special Events”:

. . . . A close reading of Draft General Order 265 discloses that the City has not relinquished its managerial rights to determine staffing at special events. If the City determines, therefore, that there is no need to provide police coverage at a special event at Frontier Field, then its decision can be seen as an exercise of its managerial rights. If, as the City contends in the instant case, the City’s decision to no longer provide police coverage is based on the nonpayment of a bill by the County’s Sport Authority, it is most evident that the City has posited a reasonable and good faith basis for the exercise of its managerial rights. . . .

If, however, the City does elect to provide any City police coverage at a special event, which would include the assignment of on-duty officers to the event, then the City is obligated to follow Draft General Order 265 and the protocol set forth therein. Accordingly, in such case, the City would be obligated to use off duty Officers on an overtime basis as set forth in draft General Order 265. To be certain that this is made perfectly clear, the Contract Arbitrator is finding herein that where the City determines to provide police coverage to a special event, including the utilization of on-duty Officers, Draft General Order 265 and the procedures set forth therein must be followed.<sup>10</sup>

He also noted, “that the parties agree that events at Frontier Field are special events.”<sup>11</sup>

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<sup>8</sup>*Ibid.*, p. 11.

<sup>9</sup>*Ibid.*

<sup>10</sup>*Ibid.*, pp. 11-12.

<sup>11</sup>*Ibid.*, p. 16.

Arbitrator Selchick found that the City's actions,

. . . to assign police personnel, without resort to Draft General Order 265, to provide services on August 17 and September 6, 2006, and thereafter, to special events at Frontier Field<sup>12</sup>

“violated Draft General Order 265 and therefore the Agreement.”<sup>13</sup> He awarded the following remedy:

As Remedy for the contract violation found herein, the Arbitrator hereby directs the City to follow Draft General Order 265 for all special events in a manner consistent with this Opinion and Award. The City shall also make whole any member of the Union for loss of wages for not working special events for the dates of August 17, 2006 and September 6, 2006 and thereafter, at the salary rate provided in Draft General Order 265. To accomplish this Remedy, the parties shall meet within 30 days of the date of this Award to discuss and attempt to reach agreement on the affected members herein and the monetary amounts to be allocated to each. The Contract Arbitrator shall retain jurisdiction of this grievance for the purpose of resolving any and all disputes regarding the implementation of the Remedy provided herein.<sup>14</sup>

The City then petitioned the State Supreme Court to vacate the Arbitrator's award:

. . . to set aside the arbitrator's determination as exceeding his authority, being totally irrational, against public policy and exceeding the scope of the judicial issues raised by the grievance.<sup>15</sup>

The Union filed a cross-motion to confirm the Award. Justice Polito's decision, issued on November 26, 2007, was that,

The petition and the cross motion are denied without prejudice as

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<sup>12</sup>*Ibid.*

<sup>13</sup>*Ibid.*

<sup>14</sup>*Ibid.*, p.17.

<sup>15</sup>City of Rochester, Rochester Police Department v. Rochester Police Locust Club, Decision, Justice William P. Polito, November 26, 2007, (Jt. Exh. #8), p. 2.

interlocutory and not yet final.<sup>16</sup>

In his decision, Justice Polito noted,

Although the City unsuccessfully contested at the arbitration hearing that General Order #265 was not a contractual part of its Collective Bargaining Agreement, it has conceded the same here (Deputy Chief Markert's affidavit #18).<sup>17</sup>

and further noted,

. . . the agreed modification of General Order 265, which has occurred since the dispute. . . .<sup>18</sup>

In its brief, the City acknowledged the facts that formed the basis for both of the instant Grievances did in fact occur:

With respect to the facts giving rise to the grievances at issue, in grievance #08-434 the Police Department, on August 5, 2008, cancelled Special Event overtime coverage for a Red Wings game that was scheduled on August 9, 2008. The cancellation of this overtime assignment was done within the time-frames set forth in the collective bargaining agreement and, therefore, no overtime payment was due to any member. (Ex. J-1 at Article 15 §1 at p.25). On-duty officers from the Westside Patrol Division performed traffic control duties outside of Frontier Field on August 9, 2008.

In grievance #09-436, on-duty officers from the Tactical Unit were assigned to provide Special Events coverage for events held at the War Memorial on January 19, 22, 23, and 24 2009.<sup>19</sup>

Union President Mazzeo filed the instant grievance 08-434 (Jt. Exh. #2) on August 13, 2008 (see the text of the Grievance in the Issue section above). Executive Deputy Chief Markert denied the Grievance in a letter dated August 18, 2008 (Jt. Exh. #3) stating in relevant part,

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<sup>16</sup>*Ibid.*

<sup>17</sup>*Ibid.*, pp. 3-4.

<sup>18</sup>*Ibid.*, p. 6.

<sup>19</sup>Post-Hearing Brief on Behalf of City of Rochester, Police Department, pp. 10-11.

The version of General Order 265 which is currently in effect and binding on the parties is the one agreed to in the Memorandum of Agreement dated November 19, 1997, and signed by then Manager of Labor Relations Daniel C. Wissman and then Locust Club President Ronald G. Evangelista (copy attached).

III.C.8.1 of that order states: "Nothing in this order precludes the Chief of Police from utilizing on-duty personnel for special events activities." As you can see, the use of on-duty personnel is allowable pursuant to the governing policy as agreed to by the parties.

Additionally, in your grievance you reference the designation of a "Special Events" location'. There is no formal process by which a location receives such designation; nor is any such process identified in General Order 265. This special designation you reference does not formally exist, and the Union's creation of such a term does not give it credence.

By letter of September 22, 2008 (Jt. Exh. #4), Manager of Labor Relations Sharon A. Burke denied the Grievance at Step C. By letter of September 15, 2009 (Jt. Exh. #2), President Mazzeo advised the Employer that the Union would pursue Grievance 08-434 through arbitration pursuant to Article 27 of the Collective Bargaining Agreement.

Union President Mazzeo filed the instant grievance 09-436 (Jt. Exh. #5) on January 27, 2009 (see the text of the Grievance in the Issue section above). By letter of February 12, 2009 (Jt. Exh. #6), Executive Deputy Chief Markert denied Grievance 09-436 for the same reasons as he had denied Grievance 08-434 and added the following:

Article 27, Section 1.A defines a grievance as "a dispute between the parties to this Agreement, involving the interpretation or application of any provisions of this Agreement." Filing a grievance alleging a violation of a previously issued arbitrator award is not supported by the agreement between the parties.

By letter of February 19, 2009 (Jt. Exh. #7), Manager of Labor Relations Sharon A. Burke denied the Grievance at Step C. By letter of March 2, 2009 (Jt. Exh. #5), President Mazzeo advised the Employer that the Union would pursue Grievance 09-436 through

arbitration pursuant to Article 27 of the Collective Bargaining Agreement.

Pursuant to the Revised Memorandum of Agreement signed June 15, 2009 and its predecessor Memorandum of Agreement signed on February 12, 2009, I was designated as the Arbitrator for both Grievance 08-434 and Grievance 09-436, resulting in the hearing held on June 5, September 22, September 23, and December 7, 2009 and ultimately in this Opinion and Award.

### **CONTENTIONS OF THE UNION**

I will now set forth the arguments regarding the issue as presented in the Parties' post-hearing briefs *in summary form*. The Union presented four (4) major lines of argument in support of its position:

Point I - The testimony of Sergeant Gagliano establishes that during the negotiation of General Order #265 there was specific discussion and agreement that events at the War Memorial and Frontier Field would be manned by off-duty personnel (T p. 33). The testimony of Chief Koerner, in charge of Special Events from 1998 to 2001, Lieutenant Smith, currently the Special Events coordinator, and Officer Williams, who was assigned to the Special Events unit for 18 years, establishes that events at the Blue Cross Arena and Frontier Field were considered Special Events. In the prior arbitration on this matter, the Arbitrator specifically noted "the parties agree that events at Frontier Field are special events."<sup>20</sup>

The testimony of Sergeant Gagliano, Officer Williams, Lieutenant Smith, President Mazzeo, and Chief Koerner establishes that prior to the Special Events grievances, Special Events were staffed primarily by off-duty personnel following General Order # 265, except for very small events or when specialized units were required. Consistent with this testimony, Deputy Chief Markert testified that all of the

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<sup>20</sup>Rochester Police Locust Club, Inc. & City of Rochester, Police Department, GR06-408 Special Events -Frontier Field, Opinion and Award, Jeffrey M. Selchick, Esq., Contract Arbitrator, June 4, 2007, (Jt. Exh. #2, Attachment Exhibit #1), p. 16.

individuals who were listed in Union Exhibits #3- #9 as working at Special Events at the War Memorial and Frontier Field from 2003-2009 were all working at the overtime rate (T 253).

The evidence in the Record clearly establishes the past practice of the Parties was to staff Special Events at the War Memorial and Frontier Field utilizing off-duty officers selected according to General Order #265, as required in Article 15, Overtime, Section 6, Special Events Overtime.

Point 2 - The two Grievances do not challenge the staffing levels at events at the War Memorial and Frontier Field, but only the manner in which officers are selected to fill a detail when the Employer determines a detail will be assigned to those events. The collective bargaining agreement and its attendant past practice establish the manner of assigning officers to such events and a change in the method of assignment must be addressed in negotiations and cannot be unilaterally changed by the Employer.

Cost considerations cannot justify a breach of the Collective Bargaining Agreement. The testimony indicates that the City has the ability to negotiate full reimbursement of costs from event promoters and has, when it has chosen to do so, refused to provide officers without full reimbursement.

Point 3 - General Order #265 requires the Special Events Coordinator to determine whether an event can be assigned to the Patrol Sections as a “special attention” event or if it requires sufficient resources to be classified as a Special Event. For Special Events, General Order #265 provides a detailed procedure for the selection of officers to work special events. All of the complex procedures for selection, acceptance, rejection or cancellation of the Special Events “are clearly only relevant and applicable to the use of off-duty personnel.”<sup>21</sup>

The City’s reliance on Section III(I) of the General Order is misplaced. The Employer’s reading of the Section gives the Employer *carte blanche* to utilize on-duty officers for Special Events without any limitation, effectively negating all of the preceding carefully negotiated provisions of the General Order.

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<sup>21</sup>Post-Hearing Brief on Behalf of the Rochester Police Locust Club, Inc. in Support of the Grievances, p. 14.

“It is a well-settled cannon [sic] of contract interpretation ‘that an interpretation that tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect.’ Elkouri and Elkouri, How Arbitration Works, (6th ed. 2003) at p. 464 (quoting John Deere Tractor Co., 5 LA 631, 632 (Updegraff, 1946)). Thus, ‘[i]f an arbitrator finds that alternative interpretations of a clause are possible, one of which would give meaning and effect to another provision of the contract, while the other would render the other provision meaningless or ineffective, the inclination is to choose the interpretation that would give effect to all provisions.’ Id. at p. 463.”<sup>22</sup> “Given that General Order 265 was negotiated, agreed upon by the parties and incorporated into Article 15 of the CBA, which deals with the issue of overtime, it is simply unreasonable to believe that the parties mutually intended a single sentence to nullify the rest of the General Order.”<sup>23</sup>

Instead the consistent and mutual past practice established through testimony at the arbitration hearing illuminates and resolves the possible ambiguity of General Order #265 and in particular Section III(I):

Section III(J) [sic] of the General Order is properly interpreted as confirming the permissible continued use of on-duty officers from the specialized units, to provide special attention to certain neighborhood events not warranting full treatment as a special event and, perhaps, the use of an on-duty officer to fill in for a scheduled off-duty officer who does not show and where an off-duty replacement cannot be obtained in time.<sup>24</sup>

Point 4 - The June 4, 2007 arbitration award by Arbitrator Jeffrey Selchick dealt with the same language and matters at issue in the instant Grievances. The Selchick award should be given precedential effect and found to conclusively resolve the

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<sup>22</sup>*Ibid.*, pp. 15-16.

<sup>23</sup>*Ibid.*, p. 16.

<sup>24</sup>*Ibid.*, p. 18.

instant matter as “the long-serving contract arbitrator with intimate familiarity with the contract, agreements and practices between the parties, squarely addressed the precise issue raised by the current grievances and resolved the matter in favor of the Locust Club.”<sup>25</sup> In the alternative, the Selchick opinion and award should be given careful consideration as a well-reasoned and persuasive determination by an arbitrator who was “the long standing contract arbitrator and therefore had a greater familiarity with the contract and the practices in place between the parties than another arbitrator could possibly be expected to have.”<sup>26</sup>

Arbitrator Selchick specifically found that while the City retains its managerial rights to determine staffing levels at Special Events. “If, however, the City does elect to provide any City police coverage at a special event, which would include the assignment of on-duty officers to the event, then the City is obligated to follow Draft General Order 265 and the protocol set forth therein.”<sup>27</sup>

Arbitrator Selchick stated, “‘the Arbitrator notes initially that the parties agree that events at Frontier Field are special events.’ Opinion and Award at p. 16. Thus, any attempt by the City, in the current proceeding, to claim that events at Frontier Field are not special events is disingenuous and most likely barred by estoppel principles.”<sup>28</sup>

The Employer’s argument that Supreme Court Justice Polito’s decision that “to some extent found that the award was not final, and thus denied both the City’s petition to vacate the award and the Locust Club’s request to confirm the award”<sup>29</sup> means that the Selchick award is without any effect is simply not correct. Justice Polito found “that ‘The first part of the

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<sup>25</sup>*Ibid.*, p. 23.

<sup>26</sup>*Ibid.*, p. 25.

<sup>27</sup>*Ibid.*, p. 22 quoting Rochester Police Locust Club, Inc. & City of Rochester, Police Department, GR06-408 Special Events -Frontier Field, Opinion and Award, Jeffrey M. Selchick, Esq., Contract Arbitrator, June 4, 2007, (Jt. Exh. #2, Attachment Exhibit #1), p. 12.

<sup>28</sup>Post-Hearing Brief on Behalf of the Rochester Police Locust Club, Inc. in Support of the Grievances, pp. 22-23.

<sup>29</sup>*Ibid.*, p. 23.

grievance is resolved'. . . . Thus, the issue of whether or not the City was required to follow the selection procedures established by General Order 265 was resolved by the Arbitrator, in favor of the Locust Club.”<sup>30</sup> When the contract provides that the “[d]ecisions of the arbitrator are final and binding,” a prior arbitration award on the same contract language and addressing substantially the same fact pattern “may have a force that can be fairly characterized as authoritative.”<sup>31</sup> This precedential effect is based on the contractual language that the decisions are “final and binding,” not on a judicial confirmation of the decision.

For these reasons, the Grievances should be upheld and the requested remedy awarded.

### **CONTENTIONS OF THE EMPLOYER**

The Employer presented five (5) major lines of argument in support of its position in its post-hearing brief. They are, in summary,

Point 1 - “[T]he Police Chief has sole discretion to determine when on-duty officers can be utilized, pursuant to the negotiated language of General Order 265, which is incorporated into the contract at Article 15 §6. Specifically, the relevant language unequivocally states that ‘Nothing in this order precludes the Chief of Police from utilizing on-duty personnel for special events activities.’ This is clear contract language and must be applied as written.”<sup>32</sup>

Subsequent bargaining history demonstrates “that the parties’ [sic] understood that the Chief had broad discretion to assign on-duty officers to Special Events. In a 2004 Memorandum of Agreement regarding department-wide reorganization, which expired in 2007, the parties agreed that no additional on-duty officers would be used to supplement or replace Special Events personnel. If the parties did not intend the Chief to

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<sup>30</sup> *Ibid.*, p. 24 quoting City of Rochester, Rochester Police Department v. Rochester Police Locust Club, Decision, Justice William P. Polito, November 26, 2007, (Jt. Exh. #8), p. 6.

<sup>31</sup> Post-Hearing Brief on Behalf of the Rochester Police Locust Club, Inc. in Support of the Grievances, p. 24 quoting Elkouri & Elkouri, *How Arbitration Works*, Sixth Ed. [American Bar Association, The Bureau of National Affairs, Inc., Washington, D.C. 2003], p. 576.

<sup>32</sup> Post-Hearing Brief on Behalf of City of Rochester, Police Department, p. 1.

have unfettered discretion to use on-duty personnel in GO 265, there would have been no need to negotiate this language to limit the Chief's discretion."<sup>33</sup>

"If GO 265 were to be read as the Union has suggested, they would nullify the provision relating to the Chief's discretion, rather than giving meaning to all of the provisions of the GO that relate to on-duty officers. It is a basic principle of contract construction and interpretation that all clauses in a contract are intended to have meaning and a clause should not be considered surplusage and rendered meaningless when it can be given a reasonable meaning consistent with the rest of the agreement. Elkouri & Elkouri, How Arbitration Works, 6<sup>th</sup> Edition p. 464."<sup>34</sup>

Point 2 - When the contract language is clear, consideration of any past practice is inappropriate. Furthermore, if past practice were contrary to clear contractual language, the Employer retains the right to revert to the clear contractual language. "There is no duty to negotiate concerning a past practice that is a non-mandatory subject of bargaining."<sup>35</sup>

In any event, the Union has not met its burden of proof to demonstrate a binding past practice. The 1997 Memorandum of Agreement (Jt. Exh. #6) demonstrates "during the period of November 1997 to June 1999, by agreement of the parties Frontier Field and High Falls were not being staffed as a Special Event. (Ex. J-6 last 2 pages)."<sup>36</sup> "On-duty officers from specialized assignments were utilized for Special Event coverage; on-duty officers were utilized for 'special attention' Special Event coverage; and on-duty officers were utilized at many other major events, such as the St. Patrick's parade, the Lilac Festival, the Labor Day parade, the Park Avenue Festival, the Memorial Day parade, the Bar Detail, and the Proposition 8 Protest march. (Ex. C-7)."<sup>37</sup>

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<sup>33</sup>*Ibid.*, p. 2.

<sup>34</sup>*Ibid.*, p. 12.

<sup>35</sup>*Ibid.*, p. 13.

<sup>36</sup>*Ibid.*, p. 19.

<sup>37</sup>*Ibid.*, pp. 19-20.

Point 3 - Under the contractual definition of a grievance (Article 27, §1(A)):

as a dispute between the parties to this Agreement, involving the interpretation or application of any provisions of this Agreement and under Article 27, §4(E)'s limitations on the arbitrator's authority:

The authority of the arbitrator shall be limited to matters of interpretation or application of the express provisions of this Agreement and the arbitrator shall have no power or authority to alter, add to or subtract from or otherwise modify the terms of this Agreement as written. . . . He shall confine his decision and award solely to the interpretation and application of this Agreement.

only contractual provisions can be a basis for a grievance. Grievances cannot be based upon past practice nor arbitration decisions.

The June 4, 2007 Opinion and Award of Arbitrator Selchick "has been determined by the Court not to be a final award; therefore, it should not be considered in any context as an authoritative source."<sup>38</sup>

Point 4 - "[T]he parties have never negotiated or designated any Special Events locations."<sup>39</sup> General Order #265's definition of Special Events neither designates any particular locations as Special Event locations, nor mandates the use of overtime officers. "In these grievances, the Union is attempting to make an artificial distinction by carving out Frontier Field and the War Memorial for separate treatment that is not set forth in any agreement of the parties."<sup>40</sup>

"On-duty officers have been used at Frontier Field and the War Memorial, including the traffic unit and the mounted unit. For weekday events, such as in the case with the week-long Jehovah Witnesses convention, on-duty officers are utilized."<sup>41</sup>

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<sup>38</sup> *Ibid.*, p. 2.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, p. 9.

<sup>41</sup> *Ibid.*

Point 5 - The City has not waived its rights to determine staffing levels “which would include whether to increase deployment levels by calling in officers on an overtime basis to work Special Events.”<sup>42</sup> General Order #265 specifically requires the Special Events Coordinator to assess whether “the event can be assigned to the Patrol section as ‘special attention’ or if it requires overtime coverage.” From 2006 to 2009, the number of filled officer positions has increased from 695 to 784 (Emp. Exh. #4). “[I]nherent in the scheduling of overtime officers for Special Events is an increase in the number of officers who are deployed – staffing levels and the use of additional officers on overtime are inextricably intertwined.”<sup>43</sup> The evidence in the Record indicates that on-duty officers have been utilized at many Special Events.

For these reasons, the Grievance should be denied in its entirety.

### **DISCUSSION, OPINION AND AWARD**

This is a contract interpretation issue. Normally, the “moving party” in such a case has the “burden of proof.” It must prove by a "preponderance of evidence" standard that its views in this matter ought to be sustained.

*Black's Law Dictionary* defines the term "preponderance of evidence" as,

As standard of proof in civil cases, is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. Braud v. Kinchen, La.App., 310 So.2d 657, 659. With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more credible and convincing to the mind. That which best accords with reason and probability. The word "preponderance" means something more than "weight"; it denotes a superiority of weight, or outweighing. . . .<sup>44</sup>

The proof required by the definition above is perhaps made easier if one pictures a set of

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<sup>42</sup>*Ibid.*, p. 2.

<sup>43</sup>*Ibid.*, p. 14.

<sup>44</sup>*Black's Law Dictionary*, Sixth Edition, (1990), p. 1182.

balance scales. The task of the parties is to attempt to present sufficient competent evidence that will result in the balance tipping in its favor.

There are a number of items that arbitrators examine to determine the meaning of contract language. These items are basically the same ones used by judges in the civil courts for deciding contract interpretation cases for contracts other than collective bargaining agreements. I will address these in the order of importance that they are generally given by both arbitrators and the judiciary. The first and foremost "test," if one may use that term, is an examination of the words themselves. If the words are clear and unambiguous, in the view of the arbitrator or judge, he or she should go no further before rendering his or her decision. Therefore, clear language is viewed as the best evidence of the parties' intent when the language was negotiated. However, if there is ambiguity or a lack of language on a particular topic, a judge or arbitrator may examine the negotiations history or even the "practice" of the parties.<sup>45</sup>

The most relevant language of the Collective Bargaining Agreement: Article 15, Overtime, Section 6 - Special Events Overtime, has been part of the Agreement since the November 19, 1997 Memorandum of Agreement for a successor to the 1993-1997 agreement (See attachment to Jt. Exh. #6). It states,

The procedures for the selection and payment of overtime for Special Events will be covered by General Order #265.

The text of General Order #265 as attached to the November 19, 1997 Memorandum of Agreement (Jt. Exh. #6, Attachment) is the text that the Parties in these

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<sup>45</sup>If there is ambiguous language in a collective bargaining agreement, the preferred proof, prior to the use of "practice," involves the use of the negotiations history of the language.

Grievances have stipulated is incorporated by Article 15, Section 6 into the Collective Bargaining Agreement.<sup>46</sup> While the current text of General Order #265 is identical to the 1997 text, the Parties have only much more recently agreed that it is the authoritative text, not a Draft General Order subject to further negotiation. The Opinion of Contract Arbitrator Jeffrey M. Selchick on Grievance 06-408 makes it clear that as of the arbitration hearing in that case on January 31, 2007, the Employer conceded neither that General Order #265 was a final, rather than a draft order, nor that it was incorporated into the Collective Bargaining Agreement. Throughout his June 4, 2007 Opinion, Arbitrator Selchick refers to the Order as "Draft General Order #265" and specifically notes,

The City resists the Union's argument, essentially claiming that Draft General Order 265 is only in draft form and has never been finalized.<sup>47</sup>

In his Opinion and Award on Grievance 06-408, Contract Arbitrator Selchick found that Draft General Order #265 was "part and parcel of the parties' Agreement."<sup>48</sup> The Employer moved in Supreme Court to vacate the Selchick Opinion and Award and the Union cross-motivated to confirm it. Supreme Court Justice Polito's decision, issued on November 26, 2007, was that,

The petition and the cross motion are denied without prejudice as interlocutory and not yet final.<sup>49</sup>

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<sup>46</sup>See footnote 3, *supra*.

<sup>47</sup>Rochester Police Locust Club, Inc. & City of Rochester, Police Department, GR06-408 Special Events -Frontier Field, Opinion and Award, Jeffrey M. Selchick, Esq., Contract Arbitrator, June 4, 2007, (Jt. Exh. #2, Attachment Exhibit #1), p. 10.

<sup>48</sup>*Ibid.*, p. 11.

<sup>49</sup>City of Rochester, Rochester Police Department v. Rochester Police Locust Club, Decision, Justice William P. Polito, November 26, 2007, (Jt. Exh. #8), p. 2.

In his decision, Justice Polito noted,

Although the City unsuccessfully contested at the arbitration hearing that General Order #265 was not a contractual part of its Collective Bargaining Agreement, it has conceded the same here (Deputy Chief Markert's affidavit #18).<sup>50</sup>

Thus the Record indicates that the City only accepted General Order #265 as a final and binding part of the Collective Bargaining Agreement sometime between June 4, 2007 and November 26, 2007.

The Record does not indicate that the Parties have taken action since November 26, 2007 to move Grievance 06-408 to a non-interlocutory final remedy resolution. An examination of Grievance 06-408 (Jt. Exh. #9) makes it clear that Grievance is based upon a virtually identical set of facts regarding assignments to Frontier Field as is the instant Grievance #08-434. Furthermore the issue submitted to the Contract Arbitrator in GR06-408 was broader than just dealing with special events at Frontier Field but dealt with the selection protocol for special events in general:

Did the City violate Article 15 of the Collective Bargaining Agreement when it changed the selection protocol for special events?<sup>51</sup>

That issue certainly is broad enough to encompass all the situations at both Frontier Field and the War Memorial as well as "any future established 'Special Events' locations or events" referenced in the instant Grievances. Thus Grievance 06-408 is a previous decision by the Permanent Contract Arbitrator, specially established by Article 27, Section 4(A), on the identical contractual language and on essentially indistinguishable facts from

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<sup>50</sup>*Ibid.*, pp. 3-4.

<sup>51</sup>Rochester Police Locust Club, Inc. & City of Rochester, Police Department, GR06-408 Special Events -Frontier Field, Opinion and Award, Jeffrey M. Selchick, Esq., Contract Arbitrator, June 4, 2007, (Jt. Exh. #2, Attachment Exhibit #1), p. 2.

the instant Grievances.

The Parties differ strongly as to what effect, if any, Grievance 06-408 should have on the instant proceeding. The Union posits three alternatives as to the force of the Opinion and Award in Grievance 06-408:

1. Justice Polito concluded that “[t]he first part of the grievance is resolved”<sup>52</sup>:

. . . the issue of whether or not the City was required to follow the selection procedures established by General Order 265 was resolved by the Arbitrator, in favor of the Locust Club.<sup>53</sup>

therefore that portion of the Opinion has been effectively judicially confirmed.

2. “Additionally, it is not necessary . . . that an arbitration award be judicially confirmed in order to be given precedential effect. A prior arbitration award involving the same parties, interpreting the same contract provision and addressing a substantially similar factual pattern ‘may have a force that can be fairly characterized as authoritative.’ Elkouri and Elkouri, How Arbitration Works, at p. 576 (6th ed. 2003). This precedential effect is conveyed not by judicial confirmation of an award, but by a contract provision declaring that ‘[d]ecisions of the arbitrator shall be final and binding . . . ’ Joint Exhibit 1 (CBA) at Article 27, Section 4(B).”<sup>54</sup>
3. “Furthermore, even if the award were not given precedential effect and found to conclusively resolve the matter, there is absolutely nothing which would prevent the current Arbitrator from considering the reasoning and findings contained in that decision for persuasive value. Arbitrator Selchick is not only a respected arbitrator, but was also the long standing contract arbitrator and therefore had a greater familiarity with the contract and the practices in place between the parties than another arbitrator could possibly be expected to have. In such circumstances it certainly makes sense, and is entirely appropriate, to give his findings and conclusions

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<sup>52</sup>Post-Hearing Brief on Behalf of the Rochester Police Locust Club, Inc. in Support of the Grievances, p. 24, quoting City of Rochester, Rochester Police Department v. Rochester Police Locust Club, Decision, Justice William P. Polito, November 26, 2007, (Jt. Exh. #8), p. 6.

<sup>53</sup>Post-Hearing Brief on Behalf of the Rochester Police Locust Club, Inc. in Support of the Grievances, p. 24.

<sup>54</sup>*Ibid.*

careful consideration.”<sup>55</sup>

In contrast, the Employer states two independent reasons why the Selchick Opinion and Award should have no bearing on the instant Grievances:

1. By contractual definition in Article 27, Section 1(A) a grievance is,  

a dispute between the parties to this Agreement, involving the interpretation or application of any provisions of this Agreement.

Therefore, a party cannot, as did the Union in the instant grievance 09-436, cite an arbitration award as the basis for a grievance. The limitations on the arbitrator’s authority contained in Article 27, Section 4(E):

The authority of the arbitrator shall be limited to matters of interpretation or application of the express provisions of this Agreement and the arbitrator shall have no power or authority to alter, add to or subtract from or otherwise modify the terms of this Agreement as written.

require the Arbitrator to apply the express language as negotiated by the Parties, not changes in the Agreement that might have been “written” by a previous arbitrator. “An arbitration award . . . , however cannot supplant the express negotiated language of the parties.”<sup>56</sup>

2. “In this case . . . the Selchick decision is not even a final award, which is the determination made by Supreme Court Justice Polito, in his decision of November 26, 2007. (Ex. J-8). As such, the award should not be considered in any context. While final and binding awards can be looked at as an authoritative resource, they do not have preclusive effect, as is the case of a judicial determination. Here, however, the Selchick award was deemed by the court not to be final; therefore, it is not appropriate to even consider it as an authoritative resource.”<sup>57</sup>

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<sup>55</sup>*Ibid.*, p. 25.

<sup>56</sup>Post-Hearing Brief on Behalf of City of Rochester, Police Department, p. 18.

<sup>57</sup>*Ibid.*

I agree with the Employer that my authority as the Arbitrator under Article 27 is limited to “the interpretation or application of any provisions of this Agreement.” However, part of the Agreement itself is Article 27, Section 4's provisions that provide for a Permanent Contract Arbitrator “to resolve all pending grievances and future grievances.” Article 27, Section 4(B) provides that “[d]ecisions of the arbitrator shall be final and binding on the Club, the City, and any grievant.” Under this language, the decisions of the permanent contract arbitrator are definitive interpretations of the Agreement and are final and binding on the Parties. Given this language and the dispute resolution structure set up by the language, it is contrary to the good faith obligations of either Party to the Agreement to contend that decisions of the permanent contract arbitrator should not be considered an authoritative resolution of a dispute over the interpretation or application of the Agreement. To make such a contention would render the contractual language that “decisions of the arbitrator shall be final and binding” nugatory.

With regard to the status of a binding arbitration opinion that has neither been vacated nor confirmed by a court of appropriate jurisdiction, the Agreement's own statement that “Decisions of the arbitrator shall be final and binding” makes such decisions authoritative until some adjudication by a court of appropriate jurisdiction determines that they are not. The Employer has failed to provide any contrary holding regarding the effect of such decisions.

Thus a prior decision of the Contract Arbitrator, while not absolutely *res judicata* is very persuasive in a subsequent arbitration on the same language and similar facts. In the instant situation, a longtime Permanent Contract Arbitrator with intimate knowledge of the Agreement, the Parties, and their practices, and who, in addition, has been the Panel Chair

in, at least, the last three Interest Arbitrations between these Parties,<sup>58</sup> has rendered an Opinion and Award. While this previous ruling is not absolutely binding on this arbitrator, it is a part of the “common law” of this workplace that is essentially woven into the Collective Bargaining Agreement by the procedures established in Article 27. One objective of arbitrations is to establish “a consistent body of arbitral interpretation of the same provisions of the contract under similar facts.”<sup>59</sup>

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<sup>58</sup> See Opinion and Award in PERB Case No. IA2006-009 (Emp. Exh. #11), Jeffrey M. Selchick, Esq, Public Panel Member and Chairman, April 9, 2008, p. 3:

Thereafter, the parties were subject to an Interest Arbitration Award for the period commencing July 1, 1999 and ending June 30, 2001 [*Matter of City of Rochester and Rochester Police Locust Club*, PERB Case No. IA99-021, Selchick, Panel Chair]. A second Interest Arbitration Award covers the period commencing July 1, 2001 and ending June 30, 2005 [*Matter of City of Rochester and Rochester Police Locust Club*, PERB Case No. IA201-028, Selchick, Panel Chair].

<sup>59</sup> Peabody Coal Co., 89 LA 885, 887 (Volz, 1987) quoted in Elkouri & Elkouri, *How Arbitration Works*, Sixth Ed., American Bar Association, The Bureau of National Affairs, Inc., Washington, D.C. 2003, p. 576.

See *How Arbitration Works*, pp. 567-603 for a complete discussion of the “Precedential Value of Arbitral Awards.” Particularly relevant in the instant case are these excerpts:

. . . . In interpreting . . . a provision, which read “[t]he arbitrator’s decision shall be final and shall govern only the dispute before him,” an arbitrator explained that:

The primary purpose of such a provision is to recognize the binding effect of an arbitrator’s award in resolving the dispute immediately before him, but it also has a larger implication. It must be assumed that the parties are interested in achieving the same result in similar cases and establishing a consistent body of arbitral interpretation of the same provisions of the contract under similar facts. [Peabody Coal Co., 89 LA 885, 887 (Volz, 1987)]

This view is referred to as the “contractual approach.”

Although some arbitrators take the position that they are retained to exercise independent judgement and need not necessarily follow a prior award, others hold that prior decisions are deemed incorporated into the labor agreement, particularly when the provision previously so interpreted has been carried forward intact into a successor agreement [p. 576, Footnotes omitted].

. . . .

Any well-reasoned and well-written prior arbitration opinion has persuasive qualities where it is “on point” with the subject matter of a current grievance; however, to be given preclusive effect it must be between the same parties, must invoke the same fact situation,

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must pertain to the same contractual provisions, must be supported by the same evidence, and must concern an interpretation of the specific agreement before the arbitrator. Consequently, where a new incident gives rise to the same issue that is covered by a prior award, the new incident may be taken to arbitration, but in the absence of materially changed circumstances, it may be controlled by the prior award.

The policy behind giving binding effect to a prior arbitration award and its limitations has been expressed in these terms:

. . . .

But an arbitration award is not conclusive only with respect to the outcome of a particular grievance. Rather, it is also dispositive of the underlying issue presented by the grievance. The consequence is that a decision on the validity of a particular interpretation or application of a Contract term has continuing effect.

Were the parties free to repeatedly submit the same issue to arbitral resolution, "shopping" for a different result, the "common rule" of the work place would be destroyed. Contract terms are expected to be applied uniformly to all similarly situated employees. A provision cannot be allowed to mean one thing for one employee and something else for another employee. . . .

Accordingly, regardless of the decision an arbitrator might be inclined to render, were a dispute brought to him as a matter of first impression, he is bound to defer to the opinion of a prior arbitrator upon the same issue.

This principle of arbitral "*res judicata*," however, is not without its limitations.

Preclusive effect may be given to a prior award only where the issues are identical and the subsequent dispute cannot be distinguished from the earlier one ruled upon.

Thus, the second arbitrator must first be satisfied that the issue he is required to decide is identical to that presented in the previous case. Next, assuming he had made that determination, the arbitrator must ascertain whether there have been any changes in the circumstances or conditions material to the original holding which would make inappropriate continued adherence to the earlier ruling.

If there are none, he must then define the nature and extent of the ruling made in the earlier arbitration and properly apply it to the facts of grievance before him.

Finally, the Arbitrator is obliged to inquire whether or not any extraordinary and compelling reasons exist why the initial decision should not be followed, as, for example, where it is shown that perpetuation of the ruling would produce more harm than its abandonment [ Burnham Corp., 88 LA 931, 934-935 (Ruben, 1987)].

[pp. 577-578, Footnotes omitted].

. . . .

A number of arbitrators have identified the circumstances under which, and the reasons why, a prior award need not be followed. One arbitrator observed that while "it is only fair and reasonable to expect an arbitrator's decision to apply to subsequent cases of

It is additionally significant that the Parties have provided for a Permanent Contract Arbitrator in the Collective Bargaining Agreement. That very fact demonstrates that the Parties were trying to avail themselves of the advantages of a permanent arbitrator, advantages described in the well-known arbitration reference Elkouri and Elkouri, *How Arbitration Works* (cited by both Parties in their respective briefs)(footnotes omitted):

. . . . “As a support for industrial relations stability, a permanent arbitrator is a prime requisite. Out of the continuing relationship, consistent policy and mutually acceptable procedures can gradually be evolved.”

. . . .

A permanent arbitrator becomes familiar with the provisions of the parties’ agreement and come to know the parties’ day-to-day relationships and their circumstances, personalities, and customary practices. The importance of this knowledge was emphasized by Umpire Harry Shulman:

An opportunity should be provided, if possible, for the arbitrator by continuous association with the parties, or at least by repeated association with the parties, to get to know them better. A good many disputes that come to arbitration are deceptive. . . . Some are deceptive even because they don’t really portray what the parties are concerned about. They seem to be fighting about one thing, and actually it is something else which is bothering them. That kind of thing happens, at least in my experience, quite frequently. A grievance is filed partly as a sort of pressure technique. It is filed partly in order to lay a foundation for a claim subsequently to be made. An arbitrator who doesn’t know and doesn’t sense what he is getting into, what a decision one way or the other will lead to in the developing strategy, might find himself regretting subsequently, when

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the same nature,” and that “the refusal to apply the arbitrator’s decision to similar cases leaves unsolved and unsettled the general problem covered by the decision,” nevertheless, the refusal to apply an award to cases of the same nature is justified where it is shown that any one of the following conditions obtains: (1) the previous decision clearly was an instance of bad judgment, (2) the decision was made without the benefit of some important and relevant facts or considerations, or (3) new conditions have arisen questioning the reasonableness of the continued application of the decision [p. 586 quoting Inland Steel Co., 1 ALAA ¶67, 121, at 67, 248 (Blumer, 1944)].

he finds out what the parties were really after—regretting he made that kind of determination. And so an arbitrator who is in continuous association with the parties may be in a better position to realize what the parties are really fighting for rather than what they appear to be fighting for.

. . . .

Permanent arbitrators make their awards available for the guidance of the parties. Cases that do not involve new issues or new situations are likely to be settled at early stages of the grievance procedure, because the parties know how the arbitrator has decided similar disputes. Thus, one effect of a decision covering a disputed point may be its application by the parties themselves to other disputes involving the same issue. The awards of a permanent arbitrator generally will be consistent with one another, thus avoiding the confusion that sometimes results from having two or more temporary arbitrators rule on similar issues.

Permanent arbitrators have special reason for concern regarding the ultimate effect of each decision. They expect to continue to serve the parties after each decision is rendered and expect to be confronted time and again by their own decisions. The situation is somewhat different with temporary arbitrators, who, while in good conscience are eager to render sound awards, serve with the realization that they may never again have contact with the parties.<sup>60</sup>

Therefore, when the parties establish a Permanent Contract Arbitrator they evince a desire for the development of a consistent “common law” of the workplace.

When there is a prior arbitration decision between the same parties, the party in a subsequent arbitration on the same language bears the burden of arguing why the reasoning of the prior arbitration should not be followed. This requires arguments distinguishing the instant case from the previous cases based on differences in the factual situations or citing new conditions which have arisen that bring into question the reasonableness of continuing the previous interpretation of the language. The latter argument may include contentions that the previous arbitrator or arbitrator did not consider

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<sup>60</sup>Elkouri & Elkouri, *op. cit.*, pp. 148-149.

some relevant factors.

Therefore, it is my responsibility to carefully review the previous arbitration weighing any arguments made in the instant arbitration that distinguish the facts of the instant grievances from the facts of the previous arbitration, point out new or changed conditions or contend that relevant factors were not considered by the previous arbitrator. Having made that analysis, I will attempt to continue to build a “common law for this workplace” by applying results of that analysis to the facts in the instant case. In that framework, I will now review the disputed language of Article 15, Section 6 and General Order #265, while attempting to address the various points made by the Parties in their respective briefs.

The Parties disagree as to whether events at Frontier Field and the War Memorial have been designated as Special Events and thereby are covered by the provisions of Article 15, Section 6 and General Order #265. Section I of General Order #265, Definition, states two criteria for “Special Events”:

1. events scheduled in advance, providing an opportunity for advance planning, and
2. an event that “requires the services of sworn uniform personnel.”

Section I does not refer to any specific locations. However, Section III(C)(5) anticipates “areas regularly used for Special Events (e.g. War Memorial, etc.).” Read as a whole on its face, General Order #265, while recognizing that certain facilities are likely to be regularly used for Special Events, defines Special Events, not by their location, but by a requirement for the services of sworn uniform personnel that is known in advance. Thus the language of General Order #265 is ambiguous whether events at Frontier Field and the War Memorial are “Special Events” except to the extent that events at those venues are

- scheduled in advance allowing for advance planning, and

- require the services of uniform personnel.

Both Parties agree that in cases of ambiguous language, evidence of parties' past practices is evidence of the parties' intent when drafting the language.<sup>61</sup> Evidence of the intent of the parties as expressed during the negotiations of the language can also be useful in interpreting ambiguous language.<sup>62</sup>

The City essentially agrees with the facial reading of General Order #265: Special Events are not defined primarily by location, but by the need for resources. Executive Deputy Police Chief Markert testified, in particular with regard to the War Memorial, that depending upon the nature of the event, the time of day, and the resources available, events sometimes utilized on-duty resources and at other times were handled as a Special

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<sup>61</sup> See Post-Hearing Brief on Behalf of the Rochester Police Locust Club, Inc. in Support of the Grievances, p. 18:

The most common use of past practice, which even the City acknowledges is appropriate, is to assist in the interpretation of ambiguous contract language. In fact, "use of past practice to give meaning to ambiguous contract language is so common that no citation of arbitral authority is necessary." [Elkouri & Elkouri, *op. cit.*] at p. 623.

and Post-Hearing Brief on Behalf of City of Rochester, Police Department, p. 3:

Thus, the negotiated language of the parties limits a grievance to disputes regarding CBA provisions. Any claimed past practices are not contractual provisions and, therefore, cannot be grieved. The utility and applicability of any claimed past practice is limited to interpreting ambiguous contract language.

<sup>62</sup> See Elkouri & Elkouri, *op. cit.*, pp. 453-454, (Interpreting Contract Language, Rules to Aid Interpretation, Precontract Negotiations and Bargaining History)(footnotes omitted):

Precontract negotiations frequently offer a valuable aid in the interpretation of ambiguous provisions. Where the meaning of a term is in dispute, it will be deemed, if there is no evidence to the contrary, that the parties intended it to have the same meaning as that given it during the negotiations leading up to the agreement. Indeed, even evidence of subsequent negotiations may establish the prior understanding of the parties.

Event generally only using off-duty overtime officers.<sup>63</sup> However, contrary to the

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<sup>63</sup>See Transcript pp. 163-170:

THE WITNESS: I think my view of it would be different in that when we speak to -- I will speak to the War Memorial specifically.

MR. BANTLE: Okay.

THE WITNESS: We have events there, at times in the day, at times at night. So when an event occurs, for me -- and I -- for me it is a decision of resource allocation. And I have to look at what resources I have available and what the demand will be.

. . . .

THE WITNESS: I can speak to how people were assigned. So prior to '06, although this grievance occurs in '08, staffing at the War Memorial is a resource decision.

And so the application of resources is what is available versus the demand. And the demand that the -- the determination for demand is citywide, the provisioned police services across the city.

So during certain times of the day I will have more resources that are flexible, available to me versus other types of the day. Specifically to the War Memorial, if you speak to an event that may occur during the daytime, such as a Jehovah's witness conference which occurs every year, we utilize on-duty resources there in the form of the traffic unit because we have those resources available and I am able to use them for that purpose.

What they provide is no specialized service. It's traffic direction, which any police officer can perform. But because they are -- their obligations are different as far as answering calls for service, I make a decision that I am able to use their police officer capabilities there rather than somewhere else.

. . . .

MR. BANTLE: Okay. Well, we are looking for -- the assertion is that prior to the Selchick -- the events resulting in the Selchick grievance the city for the War Memorial events and Frontier Field events had not used other than overtime people done on SOs, and you're saying there were some times that on-duty were used and you're going to the daytime event of a group.

. . . .

MR. BANTLE: . . . So your guys just include it as part of their calendar.

THE WITNESS: Because we are aware that it occurs because we have discussions with the War Memorial staff because the duties of the special events office is to coordinate -- they do proactively look for events that will impact the police department.

MR. BANTLE: Okay. Well, then let me ask you what I think is a relatively simple question. Was this a page eight, paragraph two situation?

THE WITNESS: Yes and no.

MR. BANTLE: Okay. That's fair. Tell me why not.

THE WITNESS: Because it covers -- the hours that the event covers or the days that it covers is an individual thought process for each. For example, to the Jehovah's witness specifically --

MR. BANTLE: Uh-huh.

THE WITNESS: -- it's a week-long event that also goes across the weekend. Monday to Friday I have sufficient resources available on duty --

MR. BANTLE: Uh-huh.

Employer's contention in its brief, unsupported by any evidence, that "the parties have never negotiated or designated any Special Events locations,"<sup>64</sup> Arbitrator Selchick in his Opinion and Award in Grievance 06-408 specifically stated,

Turning to the facts surrounding the instant dispute, the Arbitrator notes initially that the parties agree that events at Frontier Field are special events.<sup>65</sup>

Thus, with regard to Frontier Field, the City appears, at least for the purposes of Grievance 06-408, to have designated events at Frontier Field as Special Events.

The Union presented uncontroverted testimony from Sergeant Gagliano that during the negotiations for General Order #265 prior to its incorporation into the 1997 Memorandum of Agreement, the Parties agreed that events at the War Memorial and Frontier Field were Special Events to be staffed by off-duty personnel according to the

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THE WITNESS: -- to provide - normally on duty - to provide coverage for that.

MR. BANTLE: So it is an 8-2 for that part.

THE WITNESS: It at times will be that unless for some reason - and I think there is an example or two of this - say there is a vacation period and there is, you know -- all my traffic guys are on vacation. I may decide to pay up --

MR. BANTLE: Right.

THE WITNESS: -- overtime to cover that during the day.

On Saturday or Sunday --

MR. BANTLE: Uh-huh.

THE WITNESS: -- I don't have those same resources available, and so I have to look at all my available resources and make a decision from that.

In the best interest for the city I pay overtime for that, un-reimbursed overtime to cover that detail, because my traffic guys or other flexible resources aren't there.

MR. BANTLE: But that's done as an SO then.

THE WITNESS: That would be done as an SO.

MR. BANTLE: And when you do that you are not using on-duty and overtime, you are using only overtime? You are not doing both on those weekends?

THE WITNESS: Generally.

<sup>64</sup>Post-Hearing Brief on Behalf of City of Rochester, Police Department, p. 2.

<sup>65</sup>Rochester Police Locust Club, Inc. & City of Rochester, Police Department, GR06-408 Special Events -Frontier Field, Opinion and Award, Jeffrey M. Selchick, Esq., Contract Arbitrator, June 4, 2007, (Jt. Exh. #2, Attachment Exhibit #1), p. 16.

protocol in the General Order.<sup>66</sup> In this proceeding, the Parties have stipulated that the 1997 version of General Order #265 is incorporated into the Collective Bargaining Agreement through Article 15, Section 6.<sup>67</sup>

However, the Parties have only recently come to that agreement on the status of General Order #265.<sup>68</sup> In particular, the ongoing negotiations regarding a final version of Draft General Order #265 were specifically noted in a letter from then-Commander Markert to the Union President dated March 13, 2006:

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<sup>66</sup>See Transcript pp. 32-33:

Q. Did there come a time when the Locust Club and the city entered into discussions concerning the staffing at special events?

A. Yes.

Q. And when were these discussions?

A. Originally started with the formation of the downtown section back in the early 1980s.

Q. Okay. And why was -- what were the discussions? Did it pertain to on-duty people and the necessity for staffing these events?

A. Yes, that is correct.

Q. And did there come a time when special events was established?

A. Yes.

Q. And based upon your experience with the Locust Club, how were these special events first defined in any kind of agreement?

A. They were defined generally in a general order, which spelled out what a special event was and what protocol was to be made to man these types of events.

Q. And was there specific discussion with regard to either the War Memorial or the Frontier Field?

A. Yes, there were.

Q. And what was the decision or the agreement with regard to events at those two venues?

A. That they would be manned by off-duty personnel, people that submitted a calendar to the special events office indicating they wanted an opportunity to work at these events.

<sup>67</sup>See footnote 3, *supra*, and the denial of Grievance 08-434 by Executive Deputy Chief Markert (Jt. Exh. #3):

The version of General Order 265 which is currently in effect and binding on the parties is the one agreed to in the Memorandum of Agreement dated November 19, 1997, and signed by then Manager of Labor Relations Daniel C. Wissman and then Locust Club President Ronald G. Evangelista (copy attached).

<sup>68</sup>See pp. 14-18 in the Relevant Facts section, *supra*, for the 2006-2007 history of the finalization of General Order #265.

Enclosed please find the most recent DRAFT of General Order 265. As you are well aware, this order has existed in draft form for many years. Nonetheless, we have been following the selection process outlined therein, which was mutually established by the parties several years ago.

I am aware that there have been attempts in the past to bring this order to closure and issuance. I suggest that we try to finalize the order content in the next few weeks.

This state of ongoing negotiations as late as 2006 undermines the counter-argument the Employer makes that the negotiating history of the contractual language demonstrates its version of the Parties' intent:

The subsequent negotiating history of the parties also evinces that the parties' [sic] understood that the Chief had broad discretion to assign on-duty officers to Special Events. In a 2004 Memorandum of Agreement regarding department-wide reorganization, which expired in 2007, the parties agreed that no additional on-duty officers would be used to supplement or replace Special Events personnel. If the parties did not intend the Chief to have unfettered discretion to use on-duty personnel in GO 265, there would have been no need to negotiate this language to limit the Chief's discretion.<sup>69</sup>

If General Order #265 had been recognized by both Parties as final and binding in 2004 when the referenced Memorandum of Agreement was signed, the language in the 2004 Memorandum on Special Events (Emp. Exh. #8):

*Special Events:* The parties agree that the current process of selecting members for Special Events assignments will be maintained and additional on-duty personnel shall not be used to supplement or replace Special Events personnel.

might very well have provided some support for the Employer's contentions regarding the Parties' understanding concerning the unfettered discretion afforded the Chief under

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<sup>69</sup>Post-Hearing Brief on Behalf of City of Rochester, Police Department, p. 2.

General Order #265.<sup>70</sup> However, if, as then-Commander Markert's 2006 letter makes clear is the case, the Parties were still negotiating General Order #265 in 2004, the 2004 agreement cannot reflect the Parties' joint understanding of a finalized General Order #265.

In the light of those ongoing negotiations, the 2004 language instead only serves as a placeholder maintaining the Parties' current process. That current process, presumably embodying the original 1997 intent of the Parties, was an understanding that the process that was being maintained included only a limited use of on-duty officers. The use of additional on-duty officers to supplement or replace the normally selected Special Events personnel was *not* contemplated. The concept of the limited use of on-duty officers comports more closely with the Union's contentions that on-duty officers were used in only limited, defined situations than with the Employer's contentions that the Chief had unfettered discretion in employing on-duty officers for Special Events. Therefore if the 2004-2007 language, when considered in the negotiations history, supports either party's position, it supports the meaning of the language argued by the Union, not the version argued by the Employer.

The Union's understanding of General Order #265 was supported by the testimony of several witnesses. Former Lieutenant Charles Koerner testified that, during his tenure in charge of Special Events from 1998-2001, off-duty officers staffed events at the Blue Cross Arena and Frontier Field; on-duty officers were only used for small neighborhood

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<sup>70</sup> However, it is unclear, if the Chief had unfettered discretion to use on-duty officers, what the standard would be for *additional* on-duty officers. Clearly limiting additional on-duty officers implies that the current process has some limitations on on-duty officers.

events, major parades, New Year's Eve and when specialized units were required (T. pp. 58-60). Officer Stephen Williams testified that during his 18 years assigned to the Special Events unit (before his retirement in 2009), off-duty officers on overtime were assigned to "sporting events at the area arenas" including Frontier Field and the War Memorial<sup>71</sup> "based on some guidelines that were set up per the Union and the city over the years" (T. p. 66). He testified that on-duty traffic and mounted units would be assigned to some events if the events were within their normal working hours, and that some very small neighborhood events during the day were staffed by on-duty units (T. pp. 67-69). Lieutenant John Smith, the Special Events unit coordinator since 2005, testified that up until August 2008, events at Frontier Field and the War Memorial would be staffed by off-duty, overtime officers and at times the on-duty Mounted Patrol or the traffic patrol (T. pp. 72-76). Union President Mazzeo similarly testified that prior to August 2008 at Frontier Field and January 2009 at the War Memorial, events at those venues had been staffed through the Special Events unit with off-duty officers using the negotiated protocol (T pp. 92-96).

In summary, the evidence in the Record indicates that prior to the incidents that prompted the instant Grievances and Grievance 06-408, all events at Frontier Field and, at a minimum, sporting events at the War Memorial had been staffed through the Special

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<sup>71</sup>See Transcript p. 65:

Q. Briefly can you tell us what the special events unit did, what its function was?

A. Primarily it's a unit that would assign and plan logistics for events within the City of Rochester and assign policemen on an overtime basis to provide traffic control, pedestrian safety at those events.

Q. What type of events were included in special events?

A. They would be sporting events at the area arenas, concerts, parades, neighborhood festivals, street festivals, dignitary visits.

Q. Now, when you say sporting events, would that include the Frontier Field and the War Memorial?

A.. Yes, it would.

Events unit using off-duty, overtime officers selected through the protocol established in General Order #265. The sole exceptions noted in the Record are occasions when on-duty mounted or traffic (motorcycle) details were utilized at these events. This consistent pattern over the first years in which the language of Article 15, Section 6 and General Order #265 were in place is evidence from the practice of the parties of the intent of the Parties in drafting this language. I therefore find that the preponderance of the evidence shows that the Parties intended General Order #265's protocols regarding the staffing of Special Events to apply to all events at Frontier Field and to apply at least to sporting events held at the Blue Cross Arena/War Memorial.<sup>72</sup>

That finding does not resolve the basic question of resource allocation and what restraints, if any, do Article 15, Section 6 and General Order #265 put on the assignment of officers to Special Events at Frontier Field and the War Memorial. The City strongly argues that the allocation of resources is a managerial prerogative and that prerogative includes both the level of staffing of an event and the assignment of particular staff. The Union, on the other hand, does not, at least for the purposes of these Grievances, dispute the City's managerial prerogative to set the level of staffing, but insists that the assignment of officers once that staffing decision has been made is controlled by the negotiated

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<sup>72</sup>Uncontroverted testimony by Executive Deputy Chief Markert indicates by a preponderance of the evidence that portions of at least one event at the War Memorial (the week-long Jehovah Witness Convention) were not staffed as a Special Event using the protocol established in General Order #265. On the other hand the uncontroverted testimony given by Officer Stephen Williams indicates by a preponderance of the evidence that sporting events at the War Memorial were staffed as Special Events using the protocol established in General Order #265. As the evidence indicates that at least portions of some events at the War Memorial were not staffed as Special Events under General Order #265, my finding with regard to the War Memorial is limited to the finding that sporting events at the War Memorial were intended by the Parties to be staffed under the protocol negotiated in General Order #265. I make no finding as to non-sporting events at the War Memorial as there is no specific evidence to determine what events or kinds of events other than portions of the Jehovah Witness Convention might have been intended by the Parties not to be included in the staffing protocol negotiated in General Order #265.

language of Article 15, Section 6 and General Order #265.

In its brief, the Employer cites a number of PERB cases that make it clear that the level of staffing is a non-mandatory subject of bargaining. None of these cases arises in the context of a contract interpretation arbitration; they all deal with improper practice charges dealing with a failure to bargain (Wayne Cty Sheriff's Police Officer Assoc., and Cty of Wayne (Sheriff), 38 PERB 4507 (2005) – failure to bargain a change in level of service is not improper as it is a non-mandatory subject and the unilateral change conforms to contractual language) or to negotiate in good faith (Buffalo PBA and City of Buffalo, 13 PERB 3084 (1980) – improper insistence in an interest arbitration on submission of a demand concerning work shift schedules; City of Cortland and Cortland Paid Firefighters Assoc., 29 PERB 3037 (1996) – improper demand on job posting in interest arbitration sufficient to interfere with staffing determinations; City of White Plains and PBA of the City of White Plains, 33 PERB 3051 (2000) – improper demand in interest arbitration for overtime without regard to staffing needs; Int'l Assoc. of Firefighters v. Helsby, 59 A.D.2d 342 (3d Dept. 1977) *leave denied* 43 N.Y.2d 649<sup>73</sup> – upheld PERB determination of improper demand in negotiation for minimum number of men on duty). The instant case can be distinguished from all these cases in that unlike the cited cases, in the instant Grievances the Union is explicitly **not** challenging the City's managerial right to determine the level of staffing, but only once that decision is made, whether it must follow the negotiated protocol to meet the determined level of staffing:

The grievances also do not attempt to challenge the staffing levels at any

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<sup>73</sup>Note that the standard of review in this case was not whether the decision was correct, but whether it was "arbitrary or capricious" and had a "rational basis with substantial evidentiary support."

particular event. The grievances challenge the manner in which officers were selected to fill the detail, not the number of officers assigned. Finally, the Locust Club is not challenging the City's authority to elect not to provide police services at a particular event or at events put on by a specific promoter.<sup>74</sup>

As importantly, the Employer has provided no cases that indicate that once an Employer has negotiated on a non-mandatory subject of bargaining and the agreed-upon language is in the collective bargaining agreement that the language cannot be enforced.<sup>75</sup> Therefore, even if, *arguendo*, the selection of personnel to meet an identified need were a non-mandatory subject, once the contractual language has been negotiated, the parties are bound by their negotiated agreement. Deputy Executive Chief Markert seems to acknowledge that principle by implying that the Employer could waive its rights in this area in his testimony (T. pp. 178-179):

During each of those months, President Evangelista attempted to bring up levels of staffing at special events in a manner in which those events were staffed.

BY MS. GREEN:

Q. When you say the manner in which they were staffed what are you referring to?

A. Whether we staff with on-duty or off-duty personnel.

During each of those conversations, and specifically in March, we informed him that staffing, as he was aware, was a non-mandatory subject and we were unwilling to discuss it and waive the city's rights in any way.

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<sup>74</sup>Post-Hearing Brief on Behalf of the Rochester Police Locust Club, Inc. in Support of the Grievances, p. 10.

<sup>75</sup>The difference between the duty to negotiate context of an improper practice charge and the interpretation of already negotiated language on the same subject is illustrated by the decisions on the same fact pattern in the Wayne Cty Sheriff's Police Officer Assoc., and Cty of Wayne (Sheriff), 38 PERB 4507 (2005) case noted in the Employer's brief. In the decision in the improper practice case, the Administrative Law Judge noted the County had no obligation to negotiate changes in a non-contractual past practice on a non-mandatory subject. In contrast, the Administrative Law Judge noted, concurred and adopted the prior Arbitration award on the same fact pattern that determined that the Collective Bargaining Agreement addressed the subject in question and that the County's unilateral actions were consistent with the provisions of the Agreement and therefore need not have been negotiated. Already existing contract language on a non-mandatory subject is enforceable and binding on the Parties.

and in his December 11, 2006 letter “Re: Special Events Reductions” (Emp. Exh. #6) that stated in relevant part:

As you are well aware, staffing is a non-mandatory topic of negotiation. The City will not waive its right’s [sic] in this area.

The Union has submitted its own series of improper practice charge PERB cases supporting its argument that the resource allocation question can be bifurcated into two separate questions:

1. the level of staffing required to provide the services the employer chooses to provide, which is a non-mandatory subject of bargaining, and
2. the means by which employees are assigned to meet the established level of staffing which is a mandatory subject of bargaining.

In Matter of Port Washington Police Dist. (Port Washington PBA, Inc.), 42 PERB ¶4506 (ALJ Blassman, 2009), PERB Administrative Law Judge Blassman found one of the union’s proposals in an interest arbitration was improper because it included (p. 8),

... provisions that are not mandatorily negotiable because they interfere with the District’s managerial right to determine staffing levels.

She further found (p. 9),

Nor is proposal 16 negotiable pursuant to the Board’s conversion theory of negotiability. That theory “converts nonmandatory subjects contained in collective bargaining agreements into mandatory subjects of negotiations between the parties to that agreement.” [City of New York, 40 PERB ¶ 3017 (2007), confd sub nom. City of New York v New York State Pub Empl Rel Bd, 41 PERB ¶ 7001 (Sup Ct Albany County 2008), affd, 54AD3d 480, 41 PERB ¶ 7004 (AD3d 2008) at p. 3065.] That theory does not apply to this matter because the twelve-hour tour agreement sunsets; that is, it specifically provides that its terms do not continue in effect after the agreement’s term expires.

However, Judge Blassman did make a distinction between determining staffing levels and

negotiating tours of duty and the means by which employees are assigned to meet the determined staffing levels (p. 8):

The Board has found that, although tours of duty are generally mandatorily negotiable, determining staffing levels is a managerial prerogative. In City of White Plains, [5 PERB ¶ 3008, confd sub nom. New York State Pub Empl Rel Bd v. City of White Plains, 5 PERB ¶ 7019 (Sup Ct Albany County 1972)] the Board explained:

It is the City alone which must determine the number of firemen it must have on duty at any given time. It cannot be compelled to negotiate with respect to this matter. However, there are many ways in which the schedules of individuals and groups of firemen may be manipulated in order to satisfy the City's requirement for fire protection. . . . Within the framework which the City may impose unilaterally that a specified number of Fire Fighters must be on duty at specified times, the City is obligated to negotiate over the tours of duty of the Fire Fighters within its employ. [*Id.* at 3015.]

Similarly, in Town of Blooming Grove, [21 PERB ¶ 3032 (1988)] the Board, citing City of White Plains, *supra*, with approval, stated:

[i]n essence, it is the employer's prerogative to determine the hours during which it will operate, and the number of employees in each job category which it needs to operate, but the means by which employees are assigned to meet the employer's manpower needs is a mandatory subject of bargaining. [*Id.* at 3070.]

Given the fact that the Union in the instant cases has conceded that the Employer may set staffing levels for any given Special Event, the cases cited by the Parties indicated that the method of assignment of officers to fill the staffing level determined by the Employer is negotiable and in this case has been negotiated between the Parties resulting in Article 15, Section 6 and General Order #265. The protocol as negotiated in General Order #265 is binding on the Parties and may be enforced through grievances, as long as the Employer is conceded the ability to set the numbers of officers needed for any Special Event.

As General Order #265 has been negotiated by the Parties as “[t]he procedures for the selection and payment of overtime for Special Events,” I must examine General Order #265 carefully and, when it is ambiguous or its provisions are potentially conflicting, must attempt to determine the intent of the Parties. As noted above, evidence on the negotiating history of the provision and the Parties’ practice under the provision may be helpful in resolving any such ambiguity or conflict.

In addition, in arbitration there have been developed rules of interpretation that are useful in construing ambiguous contractual language. Elkouri & Elkouri’s *How Arbitration Works* explains this development (footnotes omitted):

While the “overarching principle of contract interpretation” requires ascertainment of meaning in light of “all the relevant circumstances surrounding the transaction,”

[c]ourts start with the assumption that the parties have used the language in the way that reasonable persons ordinarily do. . . . The process of interpretation therefore turns in good part on what the court regards as normal habits in the use of language, habits that would be expected of reasonable persons in the circumstances of the parties. . . . Some of the assumptions that courts make as to normal habits in the use of language are so widely shared and so frequently articulated that they have come to be regarded as rules of contract interpretation. . . .

The rules so formulated are used both in determining what meanings are reasonably possible and in choosing among possible meaning[s].<sup>76</sup>

One of the most commonly employed rules of construction is interpretation of “The Contract as a Whole.” Interestingly, both Parties have cited portions of the Elkouri & Elkouri section so entitled (footnotes omitted):

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<sup>76</sup> Elkouri & Elkouri, *op. cit.*, pp. 447-448, (Interpreting Contract Language, Rules to Aid Interpretation).

The *Restatement (Second) of Contracts* comments:

Meaning is inevitably dependent on context. A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph. A longer writing similarly affects the paragraph. . . . Where the whole can be read to give significance to each part, that reading is preferred. . . .

In the arbitral domain, numerous decisions have invoked this interpretive principle. One of the earliest stated:

The primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions.

In the years that followed, the concept that the disputed portions “must be read in light of the entire agreement” has received widespread acceptance.

Typical of arbitral thinking is the following:

Sections or portions cannot be isolated from the rest of the agreement and given construction independently of the purpose and agreement of the parties as evidenced by the entire document. . . . The meaning of each paragraph and each sentence must be determined in relation to the contract as a whole.

. . . .

a. *Giving Effect to All Clauses and Words*

If an arbitrator finds that alternative interpretations of a clause are possible, one of which would give meaning and effect to another provision of the contract, while the other would render the other provision meaningless or ineffective, the inclination is to choose the interpretation that would give effect to all provisions. In the words of one arbitrator:

It is axiomatic in contract construction that an interpretation that tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a

solemnly negotiated agreement words intended to have no effect.<sup>77</sup>

Even more interestingly, the Parties have reached contrary conclusions when applying portions of this language. Each party has used this Rule to justify its conclusion as to the meaning the Arbitrator should place on one section of the 11-page negotiated General Order, Section III(I):

Nothing in this order precludes the Chief of Police from utilizing on-duty personnel for special events. Notwithstanding the provisions of the selection process contained in this order, selection of personnel for specific events may be at the discretion of the Special Events Coordinator with reasonable explanation.

The Employer bases its interpretation of General Order #265 solely on the first sentence of Section III(I) which it reads as giving the Chief unlimited discretion on the assignment of on-duty officers:

If GO 265 were to be read as the Union has suggested, they would nullify the provision relating to the Chief's discretion, rather than giving meaning to all of the provisions of the GO that relate to on-duty officers. It is a basic principle of contract construction and interpretation that all clauses in a contract are intended to have meaning and a clause should not be considered surplusage and rendered meaningless when it can be given a reasonable meaning consistent with the rest of the agreement. Elkouri & Elkouri, How Arbitration Works, 6<sup>th</sup> Edition p. 464.<sup>78</sup>

However, crucially, the Employer does not address the issue that its interpretation makes virtually the entirety of the rest of the 11-page General Order #265 "surplusage and rendered meaningless." The Employer gives no alternative interpretations of the rest of General Order #265 that would give meaning and effect to those provisions, if Section III(I)

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<sup>77</sup>Elkouri & Elkouri, *op. cit.*, pp. 462-464, (Interpreting Contract Language, Rules to Aid Interpretation, The Contract as a Whole).

<sup>78</sup>Post-Hearing Brief on Behalf of City of Rochester, Police Department, p. 12.

would allow the Chief unfettered discretion to use on-duty officers, thereby ignoring the rest of the 11-page document that in large part describes the process of selecting off-duty officers for service at Special Events.

The Union contends,

This City's proposed interpretation of this provision is essentially that it entirely nullifies all of the preceding provisions which provide, in carefully crafted detail, procedures for the selection of off-duty officers to staff special events and provides the City with *carte blanche* to utilize on-duty officers whenever, wherever and in whatever manner it wishes. Given that General Order 265 was negotiated, agreed upon by the parties and incorporated into Article 15 of the CBA, which deals with the issue of overtime, it is simply unreasonable to believe that the parties mutually intended a single sentence to nullify the rest of the General Order.<sup>79</sup>

The Union argues for an alternative interpretation of Section III(I) that gives "meaning and effect" to what it argues is an ambiguous section in light of the entire General Order #265. It further argues that its alternative interpretation of this ambiguous language is supported by the past practice of the Parties:

Especially given the absurd result which would occur if the language relied upon by the City were in fact interpreted to allow the unfettered use of on-duty officers, as opposed to confirming the continued use of on-duty officers in the limited manner consistent with the past practice, there is an ambiguity which is properly resolved by the use of past practice. Thus, Section III(J) [sic] of the General Order is properly interpreted as confirming the permissible continued use of on-duty officers from the specialized units, to provide special attention to certain neighborhood events not warranting full treatment as a special event and, perhaps, the use of an on-duty officer to fill in for a scheduled off-duty officer who does not show and where an off-duty replacement cannot be obtained in time.<sup>80</sup>

I find that upon examination of Special Order #265 as a whole and in light of the

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<sup>79</sup>Post-Hearing Brief on Behalf of the Rochester Police Locust Club, Inc. in Support of the Grievances, p. 16.

<sup>80</sup>*Ibid.*, p. 18.

documented nearly ten years of negotiations before both Parties would agree that the original 1997 version was final and binding, the Employer's reading that Section III(I)'s first sentence was intended to give the Chief unfettered discretion to ignore the rest of the 11-page document is insupportable. The evidence in the Record indicates that it was the Employer who was reluctant to accept the 1997 version of General Order #265 as final and binding and only did so sometime in 2007. It is beyond credulity that the Employer would have prolonged negotiations so long, if the recognized intent of the Parties were that under Section III(I) the Chief was given unfettered discretion to ignore the rest of the 11-page negotiated agreement. Even the following sentence in Section III(I):

Notwithstanding the provisions of the selection process contained in this order, selection of personnel for specific events may be at the discretion of the Special Events Coordinator with reasonable explanation.

makes it clear that the selection process for staffing Special Events is determined by the Order as a whole and deviation from that process for a specific event requires explanation.

I also find that the past practice of the Parties as demonstrated by the evidence in the Record confirms the Union's reading of Section III(I) that with regard to events at Frontier Field and sporting events at the War Memorial, Section III(I) merely condones the use of on-duty personnel in certain specified situations involving specialized requirements or in occasional extraordinary circumstances. The Union has met its burden of proof by the preponderance of the evidence with regard to its view of the meaning of Section III(I) with regard to events at Frontier Field and sporting events at the War Memorial.

General Order #265 "establishes criteria for departmental responses to all Special Events" (p. 1). As I have determined above, with regard to the scope of the instant Grievances, "Special Events" include all events at Frontier Field and all sporting events at

the War Memorial.<sup>81</sup>

General Order #265 specifies (p. 2),

The Coordinator of Special Events will be the commanding Officer of Support Services. The Coordinator, in conjunction with the Commander of the Special Services Division, will determine within a reasonable advance time period the number of uniform personnel required to provide appropriate police services at each event.

Arbitrator Selchick in Arbitration GR06-408 spent a considerable portion of his Opinion and Award (Attachment to Jt. Exh. #5) on the subject of “how much staff might be needed to properly cover” a Special Event (see pp. 12-16 of the Opinion and Award). The Union in the instant Grievances has narrowed the scope of the Grievances from the scope of GR06-408. It specifically limits the instant Grievances to “the selection of officers to staff Special Events at Frontier Field and the War Memorial”<sup>82</sup>:

At the outset, it is important to consider the nature of the two grievances at issue and, specifically, to recognize what is not being challenged. . . .

. . . .

The grievances also do not attempt to challenge the staffing levels at any particular event. The grievances challenge the manner in which officers were selected to fill the detail, not the number of officers assigned. Finally, the Locust Club is not challenging the City’s authority to elect not to provide police services at a particular event or at events put on by a specific promoter.<sup>83</sup>

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<sup>81</sup>Given the text of the Grievances before me and the evidence submitted by the Parties at the arbitration hearing, I am making no determinations, as to whether they are “Special Events,” about any other events at any other locales. To be clear, this Opinion and Award, neither excludes nor includes any other events from being covered by the protocol of General Order #265.

<sup>82</sup>Post-Hearing Brief on Behalf of the Rochester Police Locust Club, Inc. in Support of the Grievances, p. 9.

<sup>83</sup>*Ibid.*, pp. 9-10.

Therefore, I will not consider the portions of General Order #265 that deal with determining the “number of uniform personnel required.”<sup>84</sup>

Section III, PROCEDURES, (A)(1.) (p. 2) states:

The Special Events Section will:

- a. Distribute special event availability calendars (Attachment B) to all sections/units at the end of each month;
- b. Select members to work a special event based on the following:
  - i. Submission of the special event availability calendar
  - ii. availability of the member as indicated on the submitted calendar
  - iii. seniority (in accordance with the current collective bargaining agreement)

Section III, PROCEDURES, (A)(2.) (p. 3) states

Selection Process. Members will be chosen for special event details by the following procedures:

and then provides 2 1/2 pages of detailed instructions on the selection process all of which are based upon the “special event availability calendars.” Section III, PROCEDURES, (B) (p. 6) states:

Members willing to work special events will:

1. Complete and return the availability calendar to the Special Events Section no later than the 15th of the month preceding

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<sup>84</sup>I note that in Grievance 09-436 the Union listed as part of its requested remedy the following:

The Union also requests that the City abide by the established custom and protocol of the parties by meeting and discussing any planned changes in staffing reductions at any future established “Special Events” locations or events.

As the Union has not mentioned this issue in its post-hearing brief, I determine that it chose not to pursue this portion of Grievance 09-436 and therefore I will not discuss or make any determination upon this “request.”

the period for which members are to be scheduled;

Of the 11 pages of General Order #265, portions of pages 2, 6, 7, 8, and 11 and all of pages 3, 4, and 5 are the procedures for the assignment of members to special events detail, based upon the “special event availability calendars” (for example, Un. Exh. #2) distributed to members in the month prior to the month for which assignments are to be made. An examination of the forms and the uncontroverted testimony on the Record make it clear that these forms are designed for officers to indicate their off-duty days on which they would be available for “Special Events” assignment. Therefore it is clear that the protocol set forward in General Order #265 and negotiated by and agreed to by the Parties was based on staffing Special Events with off-duty officers on an overtime basis.

General Order #265 includes specific exceptions to this protocol of staffing of “Special Events” with off-duty officers on an overtime basis:

- The first is if the “Special Event” requires “Specialization.” Section III(A)(3.) (p. 6) of the General Order states:

This directive applies only to general assignments and not to specialized services capable of being performed only by uniquely trained personnel (e.g., Special Events Coordinator, motorcycle duty, mounted, K-9, bicycle patrol, etc.).

- Secondly, Section III(C)(2.) of General Order #265 gives the Special Events Coordinator the responsibility to make,

a recommendation if the event can be assigned to the Patrol section as [a] “special attention” or if it requires overtime coverage.

Earlier in this Opinion, I found based on the evidence in the Record that the Parties intended General Order #265's usual protocols regarding the staffing of Special Events to apply to all events at Frontier Field and to apply at least to sporting events

held at the Blue Cross Arena/War Memorial, with the sole exception of the specialized services just noted. Using the same reasoning, I find the inverse to be true, that the Parties did not intend that events at Frontier Field and at least sporting events at the War Memorial to be events that merely require “special attention.” The evidence in the Record indicates that these “special attention” events, unlike events at Frontier Field and sporting events at the War Memorial, require minimal staffing and minimal amounts of officer time.<sup>85</sup> Therefore this exception provided in General Order #265 is inapplicable to the “Special Events” in question in these Grievances: all events at Frontier Field and at least all sporting events at the War Memorial.

- The third exception occurs only when the protocol for selecting off-duty officers on an overtime basis has been followed to staff the Special Event detail. General Order #265, Section III(C)(7)(b) provides, if needed, that,

Any last minute coverage or no-show(s) may be covered utilizing on-duty personnel, or a list of up to 25 members who have volunteered to be called for last minute replacement.

In summary after a close examination of General Order #265, I find that the preponderance of the evidence supports the conclusion that the Parties, with regard to the

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<sup>85</sup>Permanent Contract Arbitrator Selchick came to a similar finding regarding the Parties’ intentions and agreement [Rochester Police Locust Club, Inc. & City of Rochester, Police Department, GR06-408 Special Events -Frontier Field, Opinion and Award, Jeffrey M. Selchick, Esq., Contract Arbitrator, June 4, 2007, (Jt. Exh. #2, Attachment Exhibit #1), p. 11]:

. . . the parties have negotiated understandings relative to Draft General Order 265 that extend beyond the language thereof. It is clear, therefore, that the parties . . . have also agreed that the “special events” covered by Draft General Order 265 are those that could reasonably be considered major events as defined by the need for crowd control and the like. Thus, it is evident that the parties have agreed that 30 minute neighborhood parades, for example, would not qualify as special events within the meaning of Draft General Order 265.

events specified in the instant Grievances, intended when negotiating Article 15, Section 6, that all events at Frontier Field and, at a minimum, all sporting events at the Blue Cross Arena/War Memorial be staffed, if staffed at all, with off-duty officers on an overtime basis chosen by the selection protocol detailed in the Order. The sole exceptions to staffing details at Frontier Field and sporting events at the War Memorial with off-duty officers on an overtime basis are the following two exceptions:

- When events at those two locales require “specialized services capable of being performed only by uniquely trained personnel (e.g., Special Events Coordinator, motorcycle duty, mounted, K-9, bicycle patrol, etc.).”
- When the Special Events Coordinator, having followed the selection protocol detailed in the Order for the event as planned, determines the need for “last minute coverage” or to replace “no-show(s)” and in addition determines to utilize on-duty officers rather than the “list of up to 25 members who have volunteered to be called for last minute replacement” provided for in Section III(C)(7)(b).

This is the same conclusion reached by Permanent Contract Arbitrator Selchick in his Opinion and Award in GR06-408 which alleged a similar violation of the same language at Frontier Field in 2006:

If, however, the City does elect to provide any City police coverage at a special event, which would include the assignment of on-duty officers to the event, then the City is obligated to follow Draft General Order 265 and the protocol set forth therein. Accordingly, in such case, the City would be obligated to use off duty Officers on an overtime basis as set forth in draft General Order 265. To be certain that this is made perfectly clear, the Contract Arbitrator is finding herein that where the City determines to provide police coverage to a special event, including the utilization of on-duty Officers, Draft General Order 265 and the procedures set forth therein must

be followed.<sup>86</sup>

Thus, my finding as to the meaning of Article 15, Section 6 and its incorporation of General Order #265 is consistent with Arbitrator Selchick's finding on the meaning of that language to the extent of the subject matter of the instant Grievances.

Having determined the application of Article 15, Section 6 and General Order #265 to events at Frontier Field, I find that the City **did** violate the Collective Bargaining Agreement when on August 9, 2008 uniformed police "Special Event" duties at the Red Wing Baseball game were performed by on-duty officers who had not been selected according to General Order #265, the protocol negotiated by the Parties, as alleged in Grievance 08-434. Similarly, having determined the application of Article 15, Section 6 and General Order #265 to, at a minimum, sporting events at the War Memorial, I find that the City **did** violate the Collective Bargaining Agreement when on January 15, 19, 22, 23, and 24, 2009 uniformed police "Special Event" duties at the Rochester War Memorial were performed by on-duty officers who had not been selected according to General Order #265, the protocol negotiated by the Parties,<sup>87</sup> as alleged in Grievance 09-436.<sup>87</sup>

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<sup>86</sup>Rochester Police Locust Club, Inc. & City of Rochester, Police Department, GR06-408 Special Events -Frontier Field, Opinion and Award, Jeffrey M. Selchick, Esq., Contract Arbitrator, June 4, 2007, (Jt. Exh. #2, Attachment Exhibit #1), p. 12.

<sup>87</sup>Although the Record does not specifically state that the January 2009 events were sporting events, the Employer concedes that staffing at those events was "Special Events Coverage" (Post-Hearing Brief on Behalf of City of Rochester, Police Department, p. 11):

In grievance #09-436, on-duty officers from the Tactical Unit were assigned to provide Special Events coverage for events held at the War Memorial on January 19, 22, 23, and 24 2009. The events giving rise to these grievance[s] both occurred after the sunset of the Reorganization MOA which placed limitation's on the Chief's use of additional on-duty personnel for Special Events coverage.

My findings of the Employer's violations are consistent with Permanent Contract Arbitrator Selchick's in Grievance 06-408. He specifically found in that case that,

. . . the City began to assign police personnel, without resort to Draft General Order 265, to provide services on August 17 and September 6, 2006, and thereafter, to special events at Frontier Field. To this extent, the City violated Draft General Order 265 and therefore the Agreement by not following the protocol set forth therein.<sup>88</sup>

In his Opinion and Award, Arbitrator Selchick made the following order:

As Remedy for the contract violation found herein, the Arbitrator hereby directs the City to follow Draft General Order 265 for all special events in a manner consistent with this Opinion and Award.<sup>89</sup>

Arbitrator Selchick's findings were referenced in both Grievance 08-434:

This location . . . was again subsequently determined to be a "Special Events" location upon the Opinion and Award of Contract Arbitrator Jeffrey M. Selchick – GR 06-408 dated June 4, 2007 (attached as Exhibit 1). Furthermore, the decision by Arbitrator Selchick reaffirmed that if police personnel are assigned to perform police duties at Frontier Field, that the established protocol as covered by General Order #265 and the long-standing practice of the parties would prevail.

and in Grievance 09-436:

Furthermore, the decision of Contract Arbitrator Jeffrey Selchick (GR 06-408 dated June 4, 2007 and attached as Exhibit 1) reaffirmed that if police personnel are assigned to perform police duties at an established Special Events location, the then established protocol as covered by General Order #265 and the long-standing practice of the parties would prevail.

In addition, Grievance 09-436 stated that it

disputes the interpretation and/or implementation of the current collective bargaining agreement including, but not limited to,

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<sup>88</sup> Rochester Police Locust Club, Inc. & City of Rochester, Police Department, GR06-408 Special Events -Frontier Field, Opinion and Award, Jeffrey M. Selchick, Esq., Contract Arbitrator, June 4, 2007, (Jt. Exh. #2, Attachment Exhibit #1), p. 16.

<sup>89</sup> *Ibid.*, p. 17.

**GENERAL ORDER 265  
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thereby specifically alleging that the Employer's conduct had violated the Arbitrator's Award.

As I have found that the Employer's conduct did violate General Order #265, I must also find that the repeat by the Employer of essentially the same conduct alleged and found to be a violation of Draft General Order #265 in the previous Arbitrator's Opinion and Award did also violate the awarded remedy:

. . . the Arbitrator hereby directs the City to follow Draft General Order 265 for all special events in a manner consistent with this Opinion and Award.<sup>90</sup>

As I noted earlier, although arbitrators' decisions are obviously not a written part of the Collective Bargaining Agreement, these Parties have negotiated the procedure to resolve "dispute[s] between the parties to this Agreement, involving the interpretation or application of any provisions of this Agreement." The Agreement itself provides for a Permanent Contract Arbitrator "to resolve all pending grievances and future grievances" and provides that "[d]ecisions of the arbitrator shall be final and binding on the Club, the City, and any grievant." Under this language, the decisions of the Permanent Contract Arbitrator are definitive interpretations of the Agreement, and are final and binding on the Parties. This negotiated contractual dispute resolution scheme essentially makes the decisions of the Permanent Contract Arbitrator regarding the meaning of the Agreement part of the Collective Bargaining Agreement. As such, either party may cite violations of the remedies for past violations of contractual language in a grievance as violations of the Collective

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<sup>90</sup>*Ibid.*

Bargaining Agreement. I so find that the violations of the Collective Bargaining Agreement cited in these Grievances also violate the definitive contractual interpretation and remedy provided by the Permanent Contract Arbitrator in his Opinion and Award in Grievance 06-408. Having said that, in the instant Grievances, such a finding adds little to my own findings that the Employer's actions have violated the Collective Bargaining Agreement, except to the extent that the finding demonstrates that the Employer has not met its good faith obligations under the Agreement's provisions that "decisions of the arbitrator shall be final and binding."

I have found by the preponderance of the evidence that the Employer has violated the Collective Bargaining Agreement when it assigned unit members to events at Frontier Field and to sporting events at the War Memorial without following the negotiated protocol for such assignments found in Article 15, Section 6 and its incorporated General Order #265. As remedy, I direct the Employer to follow the negotiated protocol in General Order #265 for assignment of uniformed officers to events at Frontier Field and sporting events at the War Memorial. For the purposes of the remedy of these Grievances,<sup>91</sup> I have found that protocol includes the following:

- The City determines the staffing level for uniformed officers, if any, for events at Frontier Field and sporting events at the War Memorial.
- If the City elects to provide **any** City police coverage at these events, the City is obligated to follow General Order #265's negotiated agreement to use off-duty

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<sup>91</sup>This reflects the fact that the Parties have excluded from these Grievances any challenge to the City's determination of staffing levels, if any exists under the contractual language, at the events in question. Any rights under General Order #265 that the Union might have with regard to staffing level, if any, are not determined in this Opinion and Award and the Remedy provided should not be read as making any determination on the existence or nonexistence of any such rights.

officers on an overtime basis assigned by the procedures provided for in General Order #265.

- The exceptions to the use of off-duty officers on an overtime basis assigned by the procedures provided for in General Order #265, are the use of on-duty officers when:
  1. the specified events require “specialized services capable of being performed only by uniquely trained personnel (e.g., Special Events Coordinator, motorcycle duty, mounted, K-9, bicycle patrol, etc.)” or
  2. needed to cover “last minute coverage or no-show(s)” and the Special Events Coordinator or the event supervisor after consultation with the commanding Officer of Support Services chooses to use on-duty officers rather than, or in combination with, the off-duty officers on the list of up to 25 members who have volunteered to be called for last minute replacement.

The Union has also requested as part of the Remedy for these Grievances that unit members should be made whole for the loss of wages, including back pay and, where appropriate compensation for any resulting diminution in retirement benefits, that may have occurred as a result of the City’s unilateral decision to disregard both the contractual language and protocol that have been established between the parties and the City’s refusal to abide by the decision of the arbitrated grievance award. However, neither Party provided any basis for my determining the actual losses suffered by individual members because of the City’s violations.

Therefore, I order the Parties to immediately negotiate the appropriate “make whole” award for all members who have wrongfully been deprived of overtime because of the

City's violations. If after 60 days from the date of this Opinion and Award, the Parties have *not* been able to reach agreement on the appropriate "make whole" award, the Parties are ordered to submit within 90 days from the date of this Opinion and Award, complete specific proposals as to the appropriate "make whole" award for each affected member, together with the Party's rationale and documentation supporting its specific proposal. I retain jurisdiction to adjudicate the appropriate "make whole" award based upon these specific proposals, should the Parties fail to reach agreement with 60 days from the date of this Opinion and Award.

The Grievances are sustained to the extent outlined above. That is my Award.

May 4, 2010  
Mendon, New York

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DOUGLAS J. BANTLE, ESQ.  
Arbitrator