ARBITRATION

CITY OF TOLEDO

-and- Outside Employment Grievance

TOLEDO POLICE PATROLMAN'S ASSOCIATION, LOCAL 10, IUPA

SUBJECT

Unilateral ban on outside employment "projecting" at establishments where dispensing alcoholic beverages is the primary business.

ISSUE

Did the City violate Section 2129.01 and/or Section 2129.91 of the parties' agreement when it unilaterally prohibited officers to accept outside employment at any establishment in the primary business of dispensing alcoholic beverages on March 26, 2014?

CHRONOLOGY

Class action grievance submitted: April 9, 2014
Arbitration hearing: August 20, 2014
Briefs received: September 8, 2014
Award issued: September 30, 2014

APPEARANCES

For the City: Sarah Stephens and Michael A. Kyser, Human Resources Department
For the Union: Donato Iorio, Attorney

SUMMARY OF FINDINGS

The City violated Sections 2129.01 and 2129.91 by unilaterally terminating a binding past practice and condition of employment under which officers were not prohibited to engage in outside employment at but not inside establishments in the primary business of dispensing alcoholic, provided the establishment in question is not a subject of specific law enforcement concern related to criminal or liquor license investigations or prosecutions, so the grievance must be sustained.

EVIDENCE AND ARGUMENT

On March 26, 2014, Toledo Police Chief William Moton issued Notice & Bulletin No. 14-112, which read as follows:

> Effective immediately, officers shall not engage in outside employment in, around, for, outside of, or in the parking lot(s) of, establishments where the dispensing of alcoholic beverages is the primary business.
>
> This prohibition shall include working for individuals and/or private owners of bars, nightclubs, or taverns. Officers are reminded that the Chief of Police shall have the authority for final approval or disapproval of all OUTSIDE EMPLOYMENT REQUESTS (TPD FORM 2.2).
>
> The Chief of Police, may grant permissions, for officers to work special events, in which a liquor license is required, on an individual basis.
>
> Officers shall consider the contents and dissemination of this Notice and Bulletin as a standard operating procedure until Department Manual DIRECTIVE 203.4 - OUTSIDE EMPLOYMENT, can be formally revised and distributed in the next official dissemination of the Department Manual.

As it then existed, after most recent revision on December 1, 2012, Directive 203.4 (the Standard Operating Guideline concerning Outside Employment) said this about outside employment at such establishments (long referred to in the parties' vernacular as "projecting"):

> 1.2 **COMPATIBLE EMPLOYMENT - ESTABLISHMENTS DISPENSING ALCOHOLIC BEVERAGES**
> Officers may engage in outside employment at establishments which dispense alcoholic beverages, subject to the following conditions:
> 1.2.1 Officers may perform police-related functions while working outside establishments where the dispensing of alcoholic beverages is the primary business provided the officers' employment is restricted to the area outside and adjacent to the business (e.g., parking lots, streets).
> 1.2.2 Officers may perform police-related functions while working for establishments that possess a liquor permit which authorizes alcoholic beverages upon the premises of the permit holder, but only when the primary business of the permit holder is not the dispensing of alcoholic beverages. Officers shall be permitted to work in establishments such as auditoriums, large restaurants or hotels when the officer is performing such duties as crowd control, traffic control, or general security, provided the officer does not work in the area where the alcoholic beverages are actually dispenses (e.g., bar, concession stand, patio).

Directive 203.4 also says that while an officer is engaged in outside employment his "primary duty, obligation and responsibility . . . is to the City of Toledo and the Toledo Police Department" and he "shall take appropriate police action during any incident coming to [his] attention while engaged in outside employment" and "be responsible for conduct expected and required of him as an officer of the Toledo Police Department even

though engaged in outside employment," and that an officer must submit an Outside Employment Request Form and have it approved before engaging in such employment, and that "the department shall comply with contractual agreements" between the parties as related to outside employment. It also included requirements about uniforms to be worn by "officers who wear a uniform as a condition of outside employment," as projecting officers did, and stated that with written authorization officers could use department vehicles while projecting, subject to a "fee of $10.00 per hour for the use of each city vehicle . . . unless the Office of the Chief of Police waives the fee."

The parties' "contractual agreement" about outside employment is stated with notable brevity in Section 2129.91, as follows:

> **2129.91 Outside Employment**
> No employee of the City shall accept outside employment that is adverse to or in conflict with his municipal employment. In the event said employee shall be injured while engaged in outside employment, he shall be entitled to any sick benefits which have been accumulated by virtue of his employment by the City.

The same language has been part of every agreement between the parties since 1976, with the sole exception that the 1976 agreement said officers injured during outside employment would *not* be entitled to accumulated sick benefits. It is undisputed that for all of those thirty-eight years before March 26, 2014, in-uniform projecting at establishments whose primary business was dispensing alcoholic beverages was permitted, a substantial number of officers had such outside employment, and no officer suffered a compensable injury while projecting in all that time.

The City notes that a similar no-projecting notice was issued in April 1998, rescinding "approval for outside employment at bars and nightclubs" including "all establishments at which the dispensing of alcoholic beverages is the primary business." It also is undisputed, however, that the earlier prohibition never actually was implemented although it never officially was withdrawn. The Department issued three subsequent notices extending existing projecting approvals until September 1, 1998, as well as a "reminder" that such approvals would expire on September 1, but in fact they did not. Chief Moton and Deputy Chief George Kral acknowledged that projecting continued without interruption, with the Department's knowledge and approval, and a September 2008 notice/bulletin

recognized exactly that as it "reminded" officers "working approved projects at bars . . . that the authorization is for the parking lot only." The Department also issued a "Special Order" in February 1991 restricting outside employment to sixteen hours per week, but the Union filed a grievance challenging that edict as "a very serious abridgment to integrity and fundamental good faith bargaining," and it never was effectuated either.

It also is undisputed that from time to time the Department refused to approve or rescinded approval for projecting at particular bars, nightclubs or taverns when such establishments were subjects of ongoing criminal or liquor license investigations or enforcement actions. The Union placed in evidence an email exchange about such situations that Deputy Chief Kral initiated on February 3, 2014 with an inquiry about sixteen establishments for which officers had submitted projecting requests. He asked Lt. Jones in the Vice/Metro Section to let him "know if we have any ongoing investigations at, or have any concerns about, our officers projecting there." Jones referred that inquiry to Vice Detective Brian Bortel, who identified "concerns" about four of the sixteen establishments but said the other twelve did "not raise concerns at this time to the Vice Section."

The Union did not protest disapprovals of specific projecting requests in such cases and concedes they were appropriate because it agreed that projecting in such circumstances *would be* "adverse to or in conflict with" employment as a police officer. But it argues the parties' consistent and undisputed thirty-eight-year practice clearly established that except for such instances projecting at (but outside of) bars, nightclubs and taverns is not "adverse to or in conflict with" but *compatible* with employment as a police officer and a condition of employment that the City could not terminate during the contract term without its agreement. It made that assertion in a class action grievance submitted on April 9, 2014, which demanded that Notice and Bulletin No. 14-112 be rescinded and that "all affected TPPA members be reimbursed for lost wages."

The City recognizes that the only contractually prohibited outside employment is that which is "adverse to or in conflict with" Toledo Police employment, but contends the determination of whether any or all projecting involves such conflict is a management right that Chief Moton thoughtfully and appropriately exercised. He said he never engaged in

projecting himself and personally did not think it was a good idea but his decision to prohibit all projecting was based on concerns for officer safety, costs the City might incur for sick pay or potential overtime if projecting officers were injured while projecting, and the Department's public image. However, he said his safety concern was based not specific injury or danger to any projecting officer, because he knew of none, but a recent general increase in homicides and particularly drive-by shootings. He also conceded he had seen or heard no reports of public concern about or dissatisfaction with uniformed officers in bar parking lots. He said his research into the history of projecting included special attention to the 1998 order, which he relied on even though it never was effectuated.

Nevertheless, the City insists the Chief had the management right under both Section 2129.97 of the contract and state statutes to make a blanket determination that *any* projecting at drinking establishments, despite its long history, is adverse to and conflicts with police employment, especially given that in this type of outside employment officers worked in uniform, armed and *under color of law.* It also notes that the Union previously acceded to such determinations in cases of disapproval for specific bars and nightclubs as well as blanket bans on projecting at strip clubs and bingo halls, and contends there is no significant difference between those cases and this one. It also argues this ban should be beyond challenge because it is identical to the one issued in 1998 and previous management's failure to enforce the 1998 ban neither nullified nor detracted from Chief Moton's authority to re-establish it. Finally, the City asserts that even if it is found to have abused that authority, there is no basis for a monetary remedy absent proof of actual monetary loss by any specific officer.

DISCUSSION AND FINDINGS

As a general proposition, it is a commonly accepted labor relations principle that an employer may restrict employees' off-duty activities only insofar as those activities directly relate to their employment. The parties incorporated that principle into Section 2129.91 of the current agreement and its predecessors dating back to 1976, recognizing only this restriction on officers' off-duty employment: that it not be "adverse to or in con-

flict with his municipal [specifically, *police*] employment." The City is correct that determining whether any particular outside employment is adverse to or conflicts with police employment is a management prerogative retained in Section 2129.97 among "all rights and duties pursuant to the Charter of the City to operate and direct the Department of Police." Exercise of that prerogative is not immune to Union challenge or arbitral review, however, being constrained contractually by the "adverse to or in conflict with" standard in Section 2129.91 and the obligation recognized in Section 2129.01 to bargain with the Union about "conditions of employment."

The Union is correct, in turn, that one condition of employment for Toledo police officers under the current agreement and all its predecessors was opportunity for outside employment, in uniform, at but not inside of establishments with a primary business of dispensing alcoholic beverages, except for such establishments as were identified from time to time as subject to prosecution or investigation for criminal or liquor license violations. Previous edicts purportedly banning or further restricting such opportunities did not dilute the significance of that history. To the contrary, their lack of enforcement in response to Union protests was an important signifier that such "projecting" met the usual criteria of duration, consistency and *mutuality* to be a binding past practice clarifying the meaning and governing application of the "adverse to or in conflict with" standard.

This does not mean the practice never could be terminated. The City could give notice at the end of the contract term that it no longer would recognize it under a successor agreement, thereby making it a subject for bargaining. To justify unilateral termination of the practice *during* the contract term, however, the City had the burden of proving that circumstances under which it was established and perpetuated no longer existed and that current circumstances are such that it is reasonable to believe *any and all* projecting would be adverse to or conflict with police employment. Absent clear, convincing evidence to that effect, the City's unilateral mid-term prohibition of all projecting would be an arbitrary, unjustified exercise of its "administrative responsibility" recognized in Section 2129.97 and a violation of Sections 2129.01 and 2129.91.

The City presented no such evidence. The only changed circumstance Chief Moton identified was an increase in homicides and particularly drive-by shootings over the past few years. He gave no cogent explanation for how or why that affected off-duty projecting in bar parking lots, however, and the Union made a plausible counter-argument that having uniformed officers in such locations at no cost to the City is both compatible with and actually *beneficial to*, not adverse to or in conflict with, public safety and effective law enforcement. The Chief's stated concern for officers' health and safety is admirable, of course, but he cited no case of projecting causing an injury to an officer or saddling the City with extra costs for overtime or sick pay because of any such injury. Similarly, he conceded he knew of no complaints or citizen concerns about projecting that would substantiate his professed worry that it adversely affected the image of the City or the Police Department.

Chief Moton's real reason to ban all projecting seemed to be that he personally did not approve of it and never participated in it. (The Union suggested the new ban on projecting actually originated with the City's new mayor, a former Toledo Police officer who as Union president protested the 1991 notice nominally capping outside employment at sixteen hours per week. That irony aside, Chief Moton took responsibility and stated the rationale for this new blanket prohibition of projecting, so the mayor's influence, if any, is of no importance to resolution of this dispute.) Although Chief Moton never projected, many other officers did, and as the Union noted, income they earned from projecting became increasingly important to offset additional health care cost-sharing responsibilities and wage concessions in recent years.

More important, over thirty-eight years opportunity for extra income through projecting became a well established, significant condition of employment. Eliminating that condition of employment by unilaterally terminating the past practice of permitting projecting at bars that were not subject to *specific* law enforcement risks or concerns was an arbitrary, unjustified abuse of management's prerogatives under Section 2129.97 and officers' rights under Section 2129.91, so the grievance must be sustained.

The primary remedy for these contract violations is to nullify Notice and Bulletin No. 14-112 and reinstate the practice of permitting projecting at bars that are not subjects of specific law enforcement concern related to criminal or liquor license investigations or prosecutions. It is not clear whether the Union also still seeks reimbursement for outside employment income officers lost from March 26 until the practice is reinstated due to improper withholding of such permission, as requested in the grievance. Its post-hearing brief posits two issues: whether the City violated the contract by unilaterally banning all projecting, and "if so, what is the appropriate remedy?" But it proposed no answer to the second question and presented no proof of projecting income actually lost by any officer, so there is no evidentiary basis for specific monetary make-whole relief.

Rather than deny such relief outright, however, the more sensible course is to remand this issue to the parties for negotiation, with a requirement that officers present and document individual claims (presumably verifiable in department records of approved projecting requests on file before March 26, 2014) and reservation of jurisdiction for the arbitrator to resolve it if they are unable to do so within a reasonable period, as stated in the following award.

AWARD

The April 9, 2014 grievance protesting Departmental Notice and Bulletin No. 14-112 is sustained; that notice is set aside and declared null and void *ab initio*; and the City forthwith shall reinstate the long-standing condition of employment permitting officers to engage in outside employment, in uniform, at but not inside of establishments in the primary business of dispensing alcoholic beverages, except for those about which there are specific law enforcement concerns related to criminal or liquor license investigations and/or prosecutions, as well as approvals for such outside employment by individual officers that were in effect immediately before March 26, 2014. The request in the grievance for "all affected TPPA members [to] be reimbursed" for projecting income lost due to improper prohibition of such outside employment is neither granted nor denied but remanded to the parties for negotiation. Officers shall present and document individual reim-

bursement claims no later than October 31, 2014, and the arbitrator retains jurisdiction until December 1, 2014 for the limited purpose of resolving any such claims that the parties fail to resolve through negotiation.

Paul E. Glendon, Arbitrator
September 30, 2014