STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL UNION NO. 695, Complainant,

vs.

TOWN OF BROOKFIELD (FIRE DEPARTMENT), Respondent.

Case 7
No. 59215
MP-3682

Decision No. 30033-B

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Jill M. Hartley,** 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters Local Union No. 695.

Cramer, Multhauf & Hammes, LLP, by **Attorney James C. Hammes,** 1601 East Racine Avenue, Waukesha, Wisconsin 53186, appearing on behalf of the Town of Brookfield (Fire Department).

ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT, AFFIRMING EXAMINER'S CONCLUSIONS OF LAW AND AFFIRMING AND MODIFYING EXAMINER'S ORDER

On June 1, 2001, Examiner Stuart D. Levitan issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondent Town of Brookfield had committed two prohibited practices within the meaning of Secs. 111.70(3)(a)5, Stats., but had not committed additional alleged prohibited practices within the meaning of Secs. 111.70(3)(a)3, 5 or 7, Stats. He ordered Respondent to take certain affirmative action to remedy the violations found and dismissed the complaint as to the alleged violations not found.

On June 19, 2001, Respondent Town of Brookfield filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats.

The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received August 13, 2001.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. Examiner Findings of Fact are affirmed as modified to add Article 4.01 of the collective bargaining agreement to Finding of Fact 5 as follows:

ARTICLE 4. MANAGEMENT RIGHTS

4.01 Management retains all rights or possession, care, control and management that it has by law and retains the right to exercise these functions under the terms of the Collective Bargaining Agreement except to the extent such functions and rights are restricted by the terms of this Agreement. The Employer's management rights include, but are not limited to the following:

1. To direct all operations of the Town of Brookfield and the Town of Brookfield Fire Department.

2. To establish work rules and schedules of work;

3. To create, combine, modify, and eliminate positions within the Town of Brookfield and its Fire Department;

4. To hire, evaluate, promote, train, transfer, assign, and schedule employees in positions with the Department;

5. To direct the employees, assign work and overtime;

6. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;

7. To relieve employees from their duties;

8. To determine the methods, means, and personnel needed to provide efficient and effective service;

9. To introduce new or improved methods, techniques, personnel, operations, or facilities or to change existing methods, means, personnel, operations, or facilities;

10. To determine the kinds and amounts of services to be performed and the number and kind of classifications needed to perform such services;

11. To take whatever action may be necessary to carry out the functions of the Town of Brookfield Fire Department in situations of emergency or to comply with State or Federal law.

B. Examiner Conclusions of Law are affirmed.

C. Examiner Order is affirmed as modified to delete Paragraph 6 1/ and add a signature and date of signing to the Notice.

---

*1/ **Paragraph 6 stated:***

6. I shall retain jurisdiction in this matter to resolve any disputes that may arise over the application of the remedies contained in this order, such jurisdiction to lapse on August 1, 20001 (sic), unless prior to that time either party requests in writing that I continue to retain jurisdiction.

Given under our hands and seal at the City of Madison, Wisconsin this 27th day of November, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employees that:

1. WE WILL NOT violate the terms of the collective bargaining agreement currently in force between the Town and Teamsters Local Union 695.

2. WE WILL NOT enforce those terms in the Union Contract Implementation document which set a 40-hour per workweek maximum as the limit for which employees of the Fire Department may bid and receive shifts.

3. WE WILL pay employees time and one-half for hours actually worked while on call-back status and for training activities undertaken when an employee would not otherwise be on duty. Payments for time already worked are retroactive to January 1, 1998, plus interest at twelve percent (12%) annually.

By _____ _____
Town of Brookfield Date

Town of Brookfield

MEMORANDUM ACCOMPANYING ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT, AFFIRMING EXAMINER'S CONCLUSIONS OF LAW AND AFFIRMING AND MODIFYING EXAMINER'S ORDER

The Pleadings

The complaint filed by Teamsters Local Union No. 695, as amended at hearing, alleges that Respondent Town of Brookfield committed prohibited practices within the meaning of Secs. 111.70(3)(a)3, 5 and 7, Stats., by the manner in which the Town implemented an interest arbitration award. In its answer, the Town denies that it committed the alleged prohibited practices.

The Examiner's Decision

As to the alleged violation of Sec. 111.70(3)(a)3, Stats., the Examiner concluded that the Town's conduct was not motivated by hostility toward Teamsters' concerted activity. Therefore, he determined that the Town did not commit a violation of Sec. 111.70(3)(a)3, Stats., and dismissed this portion of the complaint.

As to the alleged violations of Sec. 111.70(3)(a)5, Stats., the Examiner determined that the Town had committed violations by: (1) prohibiting employees from bidding on a shift which would cause an employee's total hours for a workweek to exceed 40; (2) not paying time and one-half for training activities undertaken by employees who were not otherwise scheduled to work; and (3) not paying time and one-half for hours actually worked while in call-back status. He further concluded that the Town had not violated Sec. 111.70(3)(a)5, Stats., by paying pager pay at straight time.

As to the alleged violation of Sec. 111.70(3)(a)7, Stats., the Examiner concluded that because the Town had not refused to implement the interest arbitration award but had only implemented the award improperly, no violation of Sec. 111.70(3)(a)7, Stats., had been committed.

POSITIONS OF THE PARTIES ON REVIEW

The Town

The Town asserts the Examiner erred by finding that certain aspects of the Town's implementation of the interest arbitrator's award violated Sec. 111.70(3)(a)5, Stats. As to the Examiner's conclusion that Article 16.11 of the contract is violated by the Town's limitation on the number of shifts that can be bid, the Town argues that the Examiner's interpretation of

the contract fails to correctly consider the relationship between Article 16.11 and Articles 4.01, 16.04 and 16.05. The Town asserts that the Examiner's interpretation renders portions of Article 4.01 and 16.05 meaningless and thus cannot be sustained.

Regarding the Examiner's determination that Article 16.14 requires time and one-half payments for training hours and hours worked when in call-back status, the Town asserts the Examiner's decision has the effect of rewriting the contract to substitute the word "outside" for the words "in excess of" and thus should be overturned.

Given all of the foregoing, the Town asks that the Examiner be reversed to the extent he found the Town violated the collective bargaining agreement and thus Sec. 111.70(3)(a)5, Stats.

Teamsters

Teamsters argue that the Examiner correctly concluded that the Town violated Sec. 111.70(3)(a)5, Stats., when it implemented the interest arbitrator's award in a manner contrary to the parties' collective bargaining agreement.

As to the violation found based on the Town's limitation on the number of shifts that can be bid, Teamsters asserts the Examiner properly found the management rights language of Article 4.01 to be subordinate by its own explicit terms to specific provisions found elsewhere in the contract. When those specific provisions are considered, Teamsters contend the Examiner correctly concluded that Article 16.11 gives employees the right to bid on as many shifts as they wish. Teamsters allege that the Examiner's interpretation of the contract does not render any portion thereof meaningless.

Regarding the violation of contract found as to the Town's failure to pay time and one-half for training and call-back hours, Teamsters argue the Examiner correctly gave the phrase "in excess of" its ordinary meaning. Contrary to the Town, Teamsters asserts the Examiner thereby interpreted the contract but did not rewrite it.

Given all of the foregoing, Teamsters ask that the Examiner be affirmed.

DISCUSSION

As to the alleged violation of Article 16.11 related to the number of shifts that can be bid, the Examiner reasoned:

> By adopting section 3-4.1 of the Union Contract Implementation (UCI), the Town has ordained that employees "may not bid for a shift if their total hours for the workweek will exceed 40 hours during the shift." The union

contends this violates section 16.11 of the collective bargaining agreement, which states that bargaining unit personnel "may bid as few or as many shifts as desired," provided the shift requests are for full shifts.

The Town's primary defense is that it has the right, pursuant to the management rights clause of Article 4, to control the overtime work of employees. It also argues that the Schedule Manager has the discretion to fill (or reject) bid requests, subject only to the commitment to honor seniority "where that clause is applicable." The town's attorney made clear at hearing why the town adopted 3-4.1 and the related clauses – "to establish a policy which essentially controls overtime that the fire fighters can work."

The employer is correct that it has the residual right, pursuant to sec. 4.01(5) to "direct the employees, assign work and overtime." However, as the employer acknowledges, that right is limited "to the extent such functions and rights are restricted by the terms of this Agreement."

One of the terms of the agreement is Section 16.11. That clause empowers employees to bid "as few or as many shifts as desired. . . ." I find no way that the phrase "as many shifts as desired" can coexist with the employer's unilateral imposition of the 40-hour cap. When a residual management right directly conflicts with an explicit term in the agreement, the explicit term prevails.

I also reject the employer's contention that the schedule manager has the authority to decline to assign a shift where such an assignment would generate overtime. Pursuant to Sec. 16.05, the schedule manager "will assign shifts *from the bids submitted."* (emphasis added).

The employer has described the bidding process as the means by which an employee "may submit a request for shifts," and maintains that "there is no contractual language which obligates the Town to accept those bids."

The employer exposes the flaw in its own analysis, however, by acknowledging that the Town *does* have a contractual requirement to follow seniority "when two or more employees have requested, or submitted bids, for the same shift."

The provisions for assigning shifts are neither complex nor difficult to discern, and give a far different understanding of what it means to "bid" on a shift than that which the employer asserts.

Everything about Section 16.04, Selection of Personnel, speaks to the bidding process as being far more than just a process by which an employee, as the employer puts it, "may submit a request for shifts." The paragraph begins by stating unambiguously that "selection of personnel for 'in-house staffing' *shall be by bid* on a monthly basis" (emphasis added). It states that "the monthly bid shall proceed in order of seniority," and provides that any vacant position "*not selected by bid at the close of the bidding process"* shall be filled/offered in seniority order. (emphasis added). It even defines "bid" as meaning "select," in the provision that personnel "can only select (bid)" positions they are otherwise qualified to hold.

Section 16.05 describes the duties and powers of the schedule manager, who "will assign shifts *from the bids submitted."* (emphasis added). It is hard to see how this thought – bids are the basis of shift assignments – could be expressed with any greater clarity. There is nothing in the text of this section which authorizes the shift manager to reject a bid for any reason other than it is for a shift on which a more senior employee has bid.

The clear and unambiguous meaning of Section 16.04, then, is that to "bid" on a shift is to lay claim on that shift, subject only to the conditions that bids must be for full shifts, that split shifts are not allowed, and that, in the case of multiple requests for a particular shift, the employee with greater seniority prevails.

To summarize – staffing "shall be by bid," a monthly process which proceeds by seniority. The schedule manager assigns shifts "from the bids submitted." To "bid" has the same meaning as to "select."

The employer may well feel it is unworkable, even absurd, to have a system where an employee has the right to what is essentially self-generated overtime. Certainly, from the perspective of efficient and economical scheduling, one can sympathize with the town's position. But that is not the issue before me. The issue before me is not which system would be more efficient and economical. The issue before me is whether the terms of the Union Contract Implementation document, section 3-4.1, violates the terms of the collective bargaining agreement by its unilateral imposition of a rule that prevents employees from bidding on a shift if their total hours for the workweek would exceed 40 hours during that shift. It does.

The union further complains that the town committed a prohibited practice by promulgating sections 3-3.2.2 and 3-3.2.2.1 of the UCI, which

> purport to include in the 40 hours of weekly work for which an employee may bid those hours which are for scheduled training and pager pay. The union argues that if the 40-hour limit itself is a violation of the collective bargaining agreement, then any other element of the UCI further defining and interpreting that 40-hour limit also violates the agreement.
>
> The union is correct in this analysis. Since the 40-hour limit itself violates the collective bargaining agreement, those provisions of the UCI which further define and interpret that limit also do so contrary to the terms of the agreement. As such, their implementation constitutes another prohibited practice.

We find the Examiner's above-quoted rationale to be a thorough and persuasive consideration of the Town's position. Contrary to the Town, we conclude that the Examiner's interpretation does not render any portion of the contract surplusage and does correctly set forth the interplay between the various relevant provisions of the contract. Therefore, we affirm the Examiner.

Turning to the dispute over payment of time and one-half for call-back hours and training activity, the Examiner reasoned:

> The union further alleges that the town has committed a prohibited practice by failing to pay time and one-half for time employees spend at training, when they are on the on-call crew (pager pay), and when they are called to respond outside their regular schedule. The union contends these policies violate the terms of Section 16.14 of the collective bargaining agreement, which provides:
>
> > All work in excess of schedule bid shift hours and all work in excess of forty (40) hours per week shall be paid at the rate of time and one-half (1-1/2) of the employee's applicable hourly rate of pay.
>
> The parties agree that hours spent on-duty which are an extension of a shift gets time and one-half for those additional hours. That is, when an employee whose shift ends at 6:00 a.m. works till 9:00 a.m. because of a fire call, those additional three hours are at time and one-half. Where the parties disagree is the treatment of pager pay, training hours outside of bid shift hours

and call-backs. The union says these hours are also at the overtime rate; the employer asserts that they are at straight time (except that all hours worked at more than 40 hours per week are at the overtime rate of time and one-half).

The collective bargaining agreement contains explicit provisions on two of these aspects. Section 16.11 provides that employees "shall hold themselves available" for work as per past practice "provided however that each employee shall receive two (2) hours pay (pager pay) *at the employees (sic) applicable hourly rate of pay per day served in addition to all hours worked* and, when applicable, pay received" under Section 16.15 of the agreement. (emphasis added). Section 16.15 provides that "any employee who responds to calls outside of their regular schedule will be paid a minimum of two (2) hours pay." There are no terms in the agreement specifically addressing the issue of training.

At hearing and in its brief, the town put great emphasis on the fact that the union on occasion referred to hours as being "outside" the scheduled bid shift hours, when in fact the collective bargaining agreement (sec. 16.14) provides for overtime for all work "in excess" of scheduled bid shift hours. Frankly, this seems a difference without a distinction, and for the purposes of this analysis, I find that "outside" the scheduled bid shift hours is the functional equivalent of "in excess" of the scheduled bid shift hours.

The town frequently provides training on Monday evenings, requiring personnel who would not otherwise be on duty to be present and participate. For those employees who are not otherwise on duty at that time, such training activities constitute "work in excess of scheduled bid shift hours." Pursuant to Section 16.14, these hours are to be compensated at time and one-half.

At times of exigent or emergency situations, personnel working "in-house" may be supplemented by two other sets of employees – those who are assigned to a duty crew (on crew call) may be mandated to report to assist, while those who are not on-call may be asked to report if they are available. For either group, section 16.15 provides a minimum of two hours pay, regardless of how much time is actually worked. Because any time actually worked while in call-back status constitutes "work in excess of scheduled bid shift hours," the terms of Section 16.14 require that all time actually worked while in call-back status be compensated at time and one-half.

As noted, the text of Section 16.14 shows that the parties were able to specify the pay rate under certain circumstances as time and one-half. That makes it very telling that the text of Section 16.11 pegs pager pay at the employee's "applicable hourly rate of pay," meaning straight time. The fact that

> the collective bargaining agreement includes the specific detail of the rate of pay for such work, but pointedly does not set it at time and one-half, leads me to conclude that the parties intended this activity to be compensated at straight time. Given that the drafters have been shown to be familiar with the concept and phrase "time and one-half" for certain situations, their explicit use of the phrase "applicable hourly rate of pay" must mean that they did not mean for the activity of being on the duty crew, in and of itself, as triggering the overtime provisions.

We again find the Examiner's above-quoted rationale to be a thorough and persuasive consideration of the Town's position. As argued by Teamsters, we conclude the Examiner's analysis constituted an interpretation but not a rewriting of the parties' contract and we affirm same.

We have modified the Examiner's Findings of Fact to add Article 4.01 and modified the Examiner's Order to add provision for a signature and a date of signing on the Notice and to remove the reference to retention of jurisdiction to resolve any remedial disputes, and to correctly spell "contract" in the Notice.

Dated at Madison, Wisconsin this 27th day of November, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

rb
30033-B