

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :  
of a Dispute Between :  
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LOCAL NO. 316, INTERNATIONAL :  
ASSOCIATION OF FIRE FIGHTERS :  
 :  
and : Case 137  
 : No. 43638  
 : MA-6029  
CITY OF OSHKOSH (FIRE DEPARTMENT) :  
 :  
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Appearances:  
Mr. Stuart Schrottky, Vice President, Local 316, International Association of  
Fire Fighters, on behalf of Local No. 316, I.A.F.F.  
Mr. John W. Pence, City Attorney, and Mr. Warren P. Kraft, Assistant City  
Attorney, on behalf of the City of Oshkosh.

ARBITRATION AWARD

Local No. 316, I.A.F.F., hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Oshkosh, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned was designated to arbitrate in the dispute. A hearing was held before the undersigned on April 26, 1990 in Oshkosh, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by June 18, 1990. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties agree on the following statement of the substantive issue:

Did the City of Oshkosh violate the collective bargaining agreement with Local 316 I.A.F.F. in requiring Fire Fighter Luck to pay for a missing fire helmet under policy no. 0.05?

The City has also raised the following procedural issues:

- 1) Is the grievance timely?
- 2) Has the grievance been resolved rendering the matter moot?

CONTRACT PROVISIONS

The parties cite the following provisions of their 1988-1990 Agreement:

ARTICLE II

MANAGEMENT RIGHTS

The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this agreement.

The powers, rights and/or authority herein claimed by the City are not to be exercised in a manner that will undermine the union or as an attempt to evade the provisions of this agreement or to violate the spirit, intent or purposes of this agreement.

## ARTICLE X

### RULES AND REGULATIONS

The employer may adopt and publish rules which may be amended from time to time, provided, however, that such rules and regulations shall be first submitted to the Union for its information prior to the effective date.

This article in no way will affect the rules and regulations falling under the jurisdiction of the Police and Fire Commission as set forth in state statutes. The employer agrees that any rules or regulations pertaining to wages, hours, conditions of employment whether now in force or hereafter adopted shall be voided by this agreement.

. . .

## ARTICLE XIII

### PRESENT BENEFITS

The parties agree to maintain the present level of benefits and policies that primarily relate to mandatory subjects of bargaining, not specifically referred to in this agreement. This provision is expressly limited to mandatory subjects of bargaining.

. . .

## ARTICLE XX

### GRIEVANCE PROCEDURES

The word "grievance" as used in this agreement is any dispute which involves the interpretation, application of, or compliance with the provisions of this agreement or past practices.

Both the Union and the City recognize that a grievance should be settled promptly and at the earliest possible stage and the grievance must be initiated within five (5) days of the incident or within five (5) days of the time the aggrieved should have had knowledge of the incident.

. . .

## ARTICLE XXIV

### UNIFORM ALLOWANCE

Effective in 1989 a One Hundred Seventy-five Dollars (\$175.00) initial uniform allowance will be paid to new employees upon entry to the Fire Department and completion of fifteen (15) work days service. Annual uniform allowance shall be \$175.00 per year to be paid in January of each year. In the event an employee has worked less than 12 months in the preceding calendar year the amount shall be prorated. A new dress uniform shall be purchased by each new employee within thirty (30) days after completion of his probationary period. In addition, the City shall provide all turnout gear.

The union agrees that it is the right of the Chief to determine the type and style of uniform to be worn by the men. The City, however, agrees that no major changes will be implemented during the life of this contract.

### BACKGROUND

Per the parties' Agreement the City provides its Fire Department employees with "turnout gear," which includes helmets. The Grievant, Fred Luck, is a fire fighter in the City's Fire Department. On October 19, 1989 Luck was on a run to fill in at the Airport Station. The fire fighters took their gear on the run and put the gear on the Airport truck when they got there. Luck usually rode in the jump seat behind the cab of the truck and stowed his helmet behind the seat. On the return trip to the station Luck stowed his gear behind the jump seat, but rode in the cab due to cold weather. When they arrived back at the station Luck discovered his helmet was missing and told his officer. They took the truck and retraced their route to the airport and back, but did

not find the missing helmet. The officer informed the Duty Chief. Assistant Chief Kaufman was advised of the loss the next day and told acting Chief Flegler of the matter. Chief Flegler told Kaufman that Luck would have to pay for the cost of replacing the helmet. Luck was then informed he would have to pay for the helmet and on October 23, 1989 Luck called Kaufman to tell him he would not pay and was told to tell it to the Chief. Luck discussed the matter with Chief Flegler and told him he (Luck) should not have to pay for the helmet.

On or about December 12, 1989 Luck received an invoice from the City directing him to pay the sum of \$98.50 for the loss of the helmet. On that day Tom Roblee filed an oral grievance on Luck's behalf over the bill for the helmet. Luck subsequently had the grievance withdrawn on December 20th and sent the City the following letter dated December 21, 1989:

City of Oshkosh  
P.O. Box 1130  
Oshkosh, Wisconsin 54902

To Whom It May Concern:

I received a bill from the City of Oshkosh for a fire fighter helmet. I do not believe I am responsible for this bill.

Under Article X and Article XXIII (sic) of the Collective Bargaining Agreement between the City of Oshkosh and the International Association of Fire Fighters Local 316, the City is responsible for supplying turnout clothing.

Sincerely,  
Fred Luck

Luck subsequently received the following letter from the new Chief dated January 3, 1990:

Dear Fred,

Re: Loss of Fire Helmet

I am in receipt of a City of Oshkosh invoice which was previously mailed to you.

Per Oshkosh Fire Department Policy No. 0.05 dated April 14, 1984, and the City of Oshkosh Police and Fire Commission Rules; Section IX, General Duties of Officers and Men, rule 5, item 9, it is my determination that you were negligent in the loss of City of Oshkosh property, a fire helmet, on October 19, 1989.

I note that the oral grievance submitted on this subject by Local 316, on your behalf, has been withdrawn by IAFF, Local 316.

City of Oshkosh Invoice No. 6032 dated 12/11/89 is returned to you for your attention. If remittance is not made to the City of Oshkosh within fifteen (15) days from date of this letter, other appropriate action will be taken.

Sincerely,  
Stan Tadych  
Fire Chief  
Oshkosh Fire Department

An oral grievance was filed on Luck's behalf on January 8, 1990 and a written grievance was submitted at Step 2 by a letter dated January 15, 1990 from the Union's Vice President, Stuart Schrottky. The Grievant and Roblee, who became the Union's President on January 1st, met with Chief Tadych to discuss the grievance on January 18, 1990. There were subsequent telephone discussions between the Chief and Roblee and Roblee and the Grievant to try to resolve the matter and at one point there was an agreement that Luck would pay half the cost of replacing the helmet, but there was a misunderstanding as to the conditions of the agreement.

The Chief sent the following letter to Roblee dated January 29, 1990 to confirm what he felt was the agreement:

Dear Tom,

Re: Grievance Step II

Firefighter Fred Luck - Loss of Fire  
Helmet

Through mutual agreement we consider the grievance of Fred Luck resolved.

With your oral agreement with me on January 26, 1990, we agree to the following:

1. Fred Luck will pay for 50% of the replacement cost of the helmet.
2. Local 316, IAFF will draft and distribute a letter to it's (sic) membership concerning lost protective equipment items.
3. I will draft and distribute a letter to the personnel of this department concerning lost protective equipment items.

We understand that this was an item that should have been resolved by this departments (sic) previous management. It will be my policy in the future that any person found negligent in the loss of city owned protective equipment will be responsible for 100% of the replacement cost.

Sincerely  
Stan Tadych  
Fire Chief  
Oshkosh Fire Department

Upon receipt of that letter, Roblee telephoned the Chief to advise him that the Union still intended to proceed on the grievance. The Chief in turn advised Roblee there was no longer an agreement. There is some dispute as to whether the Chief threatened to take disciplinary action against Luck if he did not pay for the cost of a new helmet.

On February 1, 1990, Luck sent Chief Tadych a personal check for the full cost of the helmet along with the following letter:

Dear Chief Tadych,

Enclosed is a check for payment for the full cost of replacing my missing fire helmet.

I am making this payment under Policy 0.05. I maintain that I was not negligent in the loss of my helmet.

Sincerely,  
Fredrick R. Luck

Also on February 1st, the grievance was processed to Step 3. The grievance was denied at that level on the basis that it was untimely and that Luck's payment of the full cost of the helmet resolved the matter.

Policy 0.05 cited by the Chief was first promulgated on April 14, 1982 by then Chief Phillipps:

#### POLICY - FIRE DEPARTMENT

POLICY NO. 0.05                      DATE: April 14, 1982  
EFFECTIVE DATE: April 14, 1982

TO: ALL PERSONNEL  
FROM: FIRE CHIEF  
SUBJECT: LOSS OF EQUIPMENT

The losing of city owned equipment, i.e., gloves, boots, helmets, spanners etc., as a result of negligence is reaching a ridiculous level. There is absolutely no reason why protective equipment should be falling off apparatus while engaged in making a response, inspecting or drilling.

In the future any lost or damaged equipment reported will be investigated, and if negligence is involved, the city will seek reimbursement from the individual(s) responsible for the repair or replacement of the equipment.

The policy was repromulgated on February 27, 1984 in the following manner:

February 27, 1984

TO: ALL PERSONNEL  
FROM: FIRE CHIEF CALVIN PHILLIPS  
SUBJECT: LOSING AND DAMAGING EQUIPMENT  
REFERENCE: OFD POLICY No. 0.05

It presently costs the city approximately \$400.00 to provide individual protective clothing for each firefighter on the department. The city also spends thousands of dollars to provide and maintain additional equipment to ensure for the safety of its employees. Once again equipment is falling off and out of the vehicles and are lost or damaged.

Therefore, effective this date, any city owned equipment that is damaged or lost due to negligence will be replaced or repaired and be billed to the responsible person or persons. This includes badges, name tags, fire fighting protective equipment and all other equipment. It is everyone's responsibility to hold down the needless repairs or replacements.

Personnel will be held accountable for personal protective equipment as noted during the last inspection.

Replacement costs (subject to change) are:

..... Helmets .....	\$68.00
..... Face Shields .....	10.00
..... Coat .....	160.00
..... Boots .....	60.00
..... Gloves .....	17.50 pr.
..... Choppers .....	17.00 pr.
..... Spanners .....	44.50
..... Badges .....	27.50
..... Collar insignia .....	12.00 set
..... Name tags .....	2.00/8.00 officer

On March 1, 1984 Roblee, who was President of the Union at that time, and Chief Phillipps signed the following statement on the bottom of Policy No. 0.05:

Policy #0.05 will be adhered to. This is a letter only, to reinforce the policy. March 1, 1984

Thomas Roblee  
Chief Phillipps

The language of Articles X and XXIV was the same in 1984 as it is in the parties' present Agreement.

POSITIONS OF THE PARTIES

Union:

The Union contends that the matter of providing turnout gear to fire fighters is a mandatory subject of bargaining that is covered by Article XXIV of the parties' Agreement. The present language of that article was negotiated into the Agreement in 1979 and included a reduction in the amount of cash reimbursement the City paid out to bargaining unit members. Any unilaterally adopted policy that pertains to wages, hours or conditions of employment and attempts to limit a mandatory subject of bargaining, such as Policy No. 0.05 attempts to limit Article XXIV, is voided by Article X. The Union cites a prior arbitration award in support of this contention. The Union also asserts that the testimony establishes that for years the clear practice has been to not charge for replacing lost equipment. Article XIII specifically maintains the present level of benefits that primarily relate to mandatory subjects of bargaining, in this case the manner in which Article XXIV has been enforced. Therefore, the practice of replacing lost turnout gear at no charge must be maintained.

With regard to the City's contention that the grievance is not timely, the Union asserts that Luck did not know who sent him the initial bill, and that when he received it the second time along with the Chief's letter, he filed the grievance. The grievance procedure was then followed to find out if Luck had to pay for the helmet under Policy No. 0.05. It is further asserted that the grievance was never resolved. Luck offered to pay half the cost of the helmet in order to avoid further action by the Chief, but never agreed to drop the grievance. When Luck paid the full cost of the helmet that did not resolve the grievance, since the validity of requiring payment for lost equipment under Policy No. 0.05 was still in question.

The Union contends that Roblee's signature on the "letter" pertaining to Policy No. 0.05 did not, and does not, make the policy valid and enforceable. The intent of the letter was only to increase awareness of not losing or damaging equipment. Neither is that policy contained in the Police and Fire Commission's rules, as there is no mention in those rules of requiring fire fighters to pay for lost equipment.

City:

The City first asserts the grievance is untimely because it was not filed within five days of the incident that gave rise to the grievance. Luck lost his helmet on October 19, 1989 and was informed on or about October 23rd that he would have to pay for the replacement. That was the "incident" giving rise to the grievance, but no grievance was ever filed until December 12, 1989. The City cites Wisconsin case law and Elkouri and Elkouri, How Arbitration Works, (3rd ed.) for the proposition that time limits are not just procedural, they are jurisdictional and must be complied with unless they are waived. There is no evidence the City has waived the time limits.

Next, the City asserts that issuing the invoice for payment of the helmet did not constitute a separate incident subject to the grievance procedure since it related back to the original decision in October to hold the employee responsible for his negligence. Even if it is held to constitute a separate "incident" that was timely grieved, the dispute was rendered moot by the Union's unconditional withdrawal of the grievance without any assurance from the City it would halt collection efforts against Luck.

Lastly, the City asserts that the grievance should be dismissed due to Luck's failure to comply with an established policy - No. 0.05 That policy was directed at this same type of negligent activity and was promulgated in 1984 with the Union's consent and signed by the Union's President and the Chief. It is asserted that Luck was negligent in this case. There is no indication that anyone other than Luck had anything to do with the loss of his helmet, rather, it appears he left his helmet unsecured and unattended on the rear jump seat for the return trip to the station. Luck did not exercise reasonable care and his conduct therefore meets the definition of negligence. The matter should therefore be considered to have been fully and finally resolved by Luck's payment for the helmet on February 1, 1990.

## DISCUSSION

### Timeliness and Mootness

The evidence indicates that there were discussions between Luck and his superiors in October of 1989 after the helmet was lost, but that no action was taken for some time at Kaufman's direction in hopes that the helmet would be returned. (City Ex. No. 5) When the helmet had not been returned by December Luck was sent an invoice (bill) for the cost of the helmet. The invoice did not indicate who sent it beyond coming from the City. A grievance was filed at that point, but was withdrawn on December 20th. On December 21st Luck sent the City a letter returning the invoice and indicating he did not feel he was responsible for paying it, that under certain provisions of the labor agreement the City was instead responsible. It was not until the new Chief sent Luck his letter of January 3rd stating that Luck was to pay the bill or appropriate action would be taken, that it was clear to Luck that he was in fact going to be required to pay for the helmet. The "incident" being grieved is the Chief's requiring Luck to pay for the helmet, and that did not occur until he received the Chief's letter of January 3rd. A grievance was timely filed after the letter was received. The earlier grievance appears to have been withdrawn because Luck had felt the bill was a mistake and he had not been ordered to pay the bill at that point. Luck's letter cannot be read to constitute either acceptance of responsibility for paying for the helmet or that he was dropping the matter.

For those reasons it is concluded that withdrawal of the earlier grievance did not render the matter moot, that the incident being grieved is the order that Luck pay for the lost helmet and that a grievance was timely filed on that incident, i.e. within five days of the Chief's letter of January 3, 1990.

### Merits

The Union asserts that Article XXIV, Uniform Allowance, provides that the City shall provide all turnout gear and that Article X voids all rules, such as Policy No. 0.05, which attempt to limit a mandatory subject of bargaining. The City conversely argues that Policy No. 0.05 provides for an exception to the City's providing the turnout gear, i.e., when it is damaged or lost due to the employee's negligence, and that the Union had previously agreed to the enforcement of that policy. There is no dispute that the practice followed since the relevant portion of Article XXIV was first included in the parties' agreement in 1979 has been for the City to replace turnout gear that has been lost or damaged by accident without cost to the employee, both Roblee and Assistant Chief Kaufman having testified that this has been the case.

The City asserts that by placing his helmet on the jump seat Luck was negligent and was thereby responsible under Policy No. 0.05 for the cost of replacing the helmet when it was lost. Both parties address the validity of Policy No. 0.05; however, it is not necessary to decide that issue in order to decide this case. Assuming arguendo that Policy No. 0.05 is valid, that policy requires that the loss be due to negligence on the part of the employee in order for the employee to be held responsible for the cost of replacing or repairing the equipment. Contrary to the City's assertion, the evidence presented does not support a finding of negligence in this case. Luck's un rebutted testimony was that he placed the helmet in a compartment behind the jump seat on the truck, as opposed to on the jump seat as the City asserts in its brief. This is also indicated in Lt. Chapin's October 22, 1989 memorandum. (City Ex. No. 6) Luck also testified that neither the Chief, nor the officers, have told the personnel where to store their turnout gear on the trucks and that behind the jump seat is the usual place to store the gear. Assistant Chief Kaufman testified that there is no written policy on where to place the gear on the trucks, since the trucks differ, and that the personnel put their gear wherever they can.

As the party claiming negligence on the part of Luck, the City has the burden of proving that his actions were negligent. What is discernible from the evidence is that Luck set his helmet in the place gear was usually stored on the truck, i.e., behind the jump seat, and that the Department does not require its personnel to wear their turnout gear or to secure it in a particular place or manner while riding the trucks on a non-emergency run. Without more, the undersigned is unable to conclude that Luck's placing his

helmet behind the jump seat constituted negligence. 1/ Further, in testifying with regard to Department practice since the inclusion of the relevant portion of Article XXIV in 1979, Assistant Chief Kaufman noted the practice of replacing gear that had been lost or damaged by accident without cost to the employee. Kaufman cited as an example the instance where a helmet was run over after it fell off the apparatus being moved. The undersigned is unable to see how Luck's loss is different from that earlier instance considered to be an accident. It is also noted that Luck's paying for the new helmet did not resolve the matter or constitute acknowledgement of negligence on his part. Rather, Luck's paying the bill is a matter of following the principle of "work now, grieve later." He paid the bill as ordered and continued to process his grievance.

Thus, it is concluded that the loss of Luck's helmet should be treated as an accident and consistent with the parties' practice under Article XXIV, the helmet should have been replaced by the City at no cost to Luck. Therefore, the City violated Article XXIV when it required Luck to pay for the cost of replacing the helmet.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is sustained. The City is directed to immediately reimburse the Grievant the \$98.50 it required him to pay for the lost helmet.

Dated at Madison, Wisconsin this 16th day of August, 1990.

By \_\_\_\_\_  
David E. Shaw, Arbitrator

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1/ It is noted that the physical layout of the truck was not made known to the undersigned beyond an explanation that the jump seat is behind the cab.