

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 KENOSHA PROFESSIONAL FIRE FIGHTERS :
 UNION, LOCAL 414, IAFF, AFL-CIO : Case 146
 : No. 43077
 and : MA-5891
 :
 CITY OF KENOSHA (FIRE DEPARTMENT) :
 :

Appearances:

Mr. John Celebre, President, Kenosha Professional Fire Fighters Union, Local 414, appearing on behalf of the Union.
 Davis & Kuelthau, S.C., by Mr. Roger Walsh, Attorney at Law, appearing on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and City respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was transcribed, was held on March 7, 1990 in Kenosha, Wisconsin. The parties filed post-hearing briefs which were exchanged on June 7, 1990 whereupon the record was closed. Based on the entire record, I issue the following Award.

ISSUE

The parties stipulated to the following issue:

Are Kenosha Fire Department Firefighters/Paramedics entitled to the additional compensation in Section 11.05 of the labor contract?

PERTINENT CONTRACT PROVISIONS

ARTICLE 11 - CLASSIFICATION AND COMPENSATION PLAN

. . . .

11.02 Effective 1/1/89

COMPENSATION PLAN

. . . .

NOTE: A Upon successful completion of paramedic training, paramedic certification and participation in the department's Paramedic Program, Paramedics shall receive an additional monthly payment equal to five percent (5%) of the current rate for the top step of the Firefighter classification indicated in Article 11. In the event a Paramedic ceases to participate in the Paramedic Program at any time during the month, this premium pay shall be prorated for the time the employee spent in the program in accordance with the following formula. Example: If an employee's name appears on the Paramedic List for only a portion of a month, that employee shall be paid for only the full or part days that he/she was on duty while his/her name appeared on the Paramedic List. The rate for each day on duty while his/her name appears on the Paramedic List shall be (using 1988 rates):

\$2,394 x 5: + \$119.70
\$119.70 divided by 243.3 = \$.49/hr.
Therefore, hourly rate for less than 24 hours = \$.49
Rate for full 24 hour tour of duty = \$11.76

. . .

11.05 Any employee assigned to and actually working on rescue squad duty for more than twelve (12) hours during a duty day shall receive an additional \$5.00 for such day. In the case of two employees assigned to and actually working twelve (12) hours each on rescue squad duty in the same duty day, then each employee shall receive an additional \$2.50 for the day.

FACTS

Prior to 1989, the City did not employ paramedics. The City's emergency medical service (EMS) was primarily provided by Emergency Medical Technicians (EMTs) in rescue squads. Employees assigned to the rescue squads received the premium set forth in Section 11.05 of the parties' agreement (i.e., \$5.00 per day to "any employee assigned to and actually working on rescue squad duty for more than twelve (12) hours during a duty day . . .").

In 1988, the City decided to create a paramedic program. On August 8, 1988, the Union and the City commenced impact negotiations on the paramedic program including the pay for paramedics. The parties reached a tentative agreement on September 21, 1988 which was ratified by both parties on or before October 3, 1988. That agreement provided for a premium payment to all employees certified as a paramedic of 5% of the top step firefighter rate. Thereafter, the City began to train employees as paramedics and the paramedic system became operational in July, 1989. After implementation of the paramedic program, the City paid paramedics a premium of 5% of the top firefighter rate as set forth in the parties' tentative agreement and Section 11.02 of the agreement.

During the period from July 15-31, 1989, the City paid both the paramedic premium and rescue squad premium to paramedics. Thereafter, the City paid paramedics only the paramedic premium and not the rescue squad premium which resulted in the instant grievance.

UNION'S POSITION

The Union contends that the language on paramedic premium pay set forth in Section 11.02 is specific, clear and very detailed, yet it contains nothing to indicate that it is in lieu of any other payments. It submits that Section 11.05 is also specific in that payment applies to anyone working on rescue squad duty for more than twelve (12) hours during a duty day. The Union points out that the tentative agreement reached on the paramedic program specifically excludes paramedics from certain provisions of the parties' agreement and the present agreement further excludes paramedics from the provisions of Section 7.01, but in neither the tentative agreement nor the collective bargaining agreement is there an express exclusion from the provisions of Section 11.05. The Union also argues that the exclusion of paramedics from Section 11.05 violates Section 4.01 of the agreement, the maintenance of standards provision.

The Union maintains that the City authored the paramedic language and the City must suffer the consequences of its failure to properly draft language to reflect the understanding of the parties if there had been any understanding (the Union claims there was none) related to exclusion of the paramedics from Section 11.05. The Union asserts that firefighters entered the paramedic program with the understanding they would get both premiums under Section 11.02 as a paramedic and Section 11.05 as before.

The Union asserts that the City's evidence on bargaining history in support of its contention that there was agreement that paramedics were ineligible for Section 11.05 premiums must be given no weight. It insists that the City's claim is based on a conversation that never took place. The Union notes that six members of the Union negotiating team could not recall the conversation or find any notation of it in their notes. It further notes the questionable reference by the City to the one member who is in Arizona and unavailable to testify. The Union takes exception to the use of comparables as evidence of the interpretation of language in the parties' agreement, and, furthermore, it claims such comparables do not support the City's position.

The Union concludes that the clear contract language controls even if it is contrary to one party's intent, and nothing in the contract excludes paramedics from Section 11.05 as that section clearly provides that everyone gets rescue squad pay if they are so assigned. It asks that the grievance be sustained and appropriate remedial orders issued.

CITY'S POSITION

The City contends that bargaining history establishes that the parties' agreement provides that paramedics receive only the 5% paramedic premium and

not the \$5.00 per day rescue squad pay. The City points to its initial proposal for paramedic pay of \$10 per 24-hour period and its explanation that the proposal was \$5.00 more than the people who worked rescue squad got. The City claims that it never intended that paramedics would also receive rescue squad pay. The City notes that the Union's response to the City's flat-dollar proposal was to propose a percentage amount for paramedic pay. The City also refers to the Union's proposal that the \$5.00 per day rescue squad pay would apply to rigs other than rescue squads when these rigs were used in the first responder system, and the extra pay for becoming EMT certified rather than having to be performing rescue squad duty. It claims that the discussion on these items was separate from the proposal on paramedic pay indicating separate and complete payments under each, respectively.

The City alleges that it agreed in principle with the Union's proposal for 5% paramedic pay and on September 14, 1988, in a negotiation session, made a written proposal agreeing to the 5% premium for paramedics. The City claims that at this meeting, one of the Union's executive board members asked if the 5% was over and above the \$5.00 per day rescue squad pay and the City responded that it was not and added the comment "nice try", whereupon that member then responded that he couldn't be blamed for trying.

The City maintains that its position in bargaining was consistent with the paramedic premium payments in comparable cities. The City claims it contacted the 14 largest cities in Wisconsin (excluding Milwaukee) and found that eight had paramedic programs of which two paid a flat-dollar amount and the rest paid a percentage. The City further claims that only five of the eight had a separate rescue squad and in none of these is the paramedic also eligible for rescue squad pay.

The City submits that the Union in negotiations for the 1989-91 contract proposed 3% premium pay for EMTs and if the Union's position were correct, this would mean 8% premium for paramedics. The City points out that this proposal was not agreed to and the 1988 contract provision remained the same in the 1989-1991 contract as in the prior contract.

The City argues that it was clear to both parties that what was negotiated on the paramedic program was a complete and total premium for being a paramedic. It submits that EMTs will still be paid while on rescue squad duty and it emphasizes that this duty is different from paramedic duty. The City insists that pyramiding premium payments for the same type of service was never intended by the parties nor is it policy or practice in any comparable city. It asks the arbitrator to deny the grievance.

DISCUSSION

The sole issue for determination in this matter is whether the parties' agreement on paramedic pay excludes paramedics from also receiving rescue squad pay. Section 11.05 of the parties' collective bargaining agreement provides that "any employee assigned to and actually working rescue squad duty" is eligible for rescue squad pay after meeting the minimum-hours requirement. On its face, this language is general enough to include paramedics. Thus, at first glance it would certainly appear that the Union is correct that paramedics are entitled to receive the rescue squad pay authorized by Section 11.05 in addition to their paramedic premium pay.

By its express terms, the parties' tentative agreement on the paramedic program 1/ modified and supplemented their labor agreement. That being so, it is necessary to examine the tentative agreement to determine the intent of the parties with respect to whether paramedic pay was in lieu of rescue squad pay.

The express language of the tentative agreement does not specifically exclude paramedics from the provisions of Section 11.05 nor does the language specifically include paramedics within the provisions of Section 11.05. 2/ Paragraph 9 of the tentative agreement simply states that paramedics shall receive an additional monthly payment equal to five percent (5%) of the current rate for the top step of the firefighter classification. 3/ It is unclear whether this is all inclusive or a separate premium from the other premiums provided by the parties' labor agreement.

A review of the paramedic program negotiating history indicates that the City initially proposed that the paramedics would receive \$10.00 per 24-hour day, 4/ explaining that this was \$5.00 more than the EMTs. 5/ The Union's

1/ Er. Ex-9.

2/ Id.

3/ Id.

4/ Er. Ex-1.

5/ Er. Ex-2.

response was for a premium of 5% for the paramedics. 6/ Additionally, the Union proposed that if the City decided to use rigs other than the rescue squad to be first responders to EMS calls, that personnel assigned to such rigs would also get rescue squad pay. 7/ The Union has also sought pay based on EMT certification rather than assignment to rescue squad duties. 8/ This history of negotiations indicates that the parties made a distinction between the paramedic pay and the rescue squad pay. Additionally, after the paramedic negotiations resulted in the tentative agreement, the Union's proposals for a successor contract included the demand of a 3% premium to all EMTs. 9/ This establishes that the parties had separated the paramedics and EMTs completely and pay would be based more on the respective training as opposed to assignment, although both had to be assigned to their respective duties to get the premium. By making proposals related to EMT pay during the negotiations on the paramedic program, the Union implicitly acknowledged that the paramedic premium was exclusive of the rescue squad pay. Had the Union not made any proposals in the paramedic negotiations concerning rescue squad pay, certainly their position herein would be greatly strengthened because the inference would be that paramedics were to receive both paramedic pay under the tentative agreement and rescue squad pay under the contract. However, the Union did make proposals concerning rescue squad pay during the paramedic program negotiations which, as noted above, were not accepted by the Employer. That being the case, it is inferred that paramedics were to get paramedic pay only. It is therefore concluded that the bargaining history of the tentative agreement supports the City's position that the paramedic program was complete in itself and modified the parties' labor agreement such that this program and Section 11.05 did not pyramid premiums.

The Employer's representatives also testified that at the negotiation session held on September 14, 1988, in response to a statement by a member of the Union's bargaining team that the 5% paramedic premium was over and above the \$5.00 per-day rescue squad pay, the City stated that the 5% paramedic premium was in lieu of the \$5.00 per-day squad pay. 10/ The Union's witnesses testified though that they could not recall this conversation and a review of their notes indicated nothing about this statement. 11/ Although the City's witnesses' testimony supports the conclusion reached by the undersigned, it is expressly noted that the undersigned has not reached this conclusion based on a credibility determination that the Union's witnesses' testimony is not credible. Instead, the undersigned has decided the issue presented without making any credibility determination of the respective testimony concerning the September 14, 1988 negotiation session.

6/ Er. Ex-4.

7/ Id.

8/ Er. Exs-2 and 3.

9/ Er. Ex-10.

10/ Er. Ex-12, Tr-24, 25 and 48.

11/ Tr-52, 55, 57 and 62.

Although the City did pay both the premium for paramedics and the rescue squad premium to employes during the first pay period they became eligible for paramedic pay, i.e., for the period ending July 31, 1989, the undersigned credits the City's explanation that this was due to the late notification to payroll of those certified as paramedics, 12/ and the City's determination that it would cost more to take back the rescue squad pay than let it go and not make a change in the amounts already paid. The undersigned finds that the later change to only paramedic premium rather than both payments did not constitute a past practice, nor did it constitute a violation of Section 4.01 of the parties' agreement.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

That Kenosha Fire Department Firefighters/Paramedics are not entitled to the additional compensation in Section 11.05 of the labor contract and, therefore, the grievance is denied.

Dated at Madison, Wisconsin this 22nd day of August, 1990.

By _____
Raleigh Jones, Arbitrator

12/ U. Ex-1., Er. Ex-11.