BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CITY OF KENOSHA	Case 150 No. 43588 MA-6009
and	
LOCAL 414, KENOSHA FIRE FIGHTERS INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS	

Appearances:
Lawton & Cates, S.C., by Mr. Richard V. Graylow, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, for the Union.
Davis & Kuelthau, S.C., by Mr. Roger E. Walsh, 111 East Kilbourn, Suite 1400, M

ARBITRATION AWARD

Pursuant to the terms of their 1989-1991 contract, the City and the Union asked the Wisconsin Employment Relations Commission to designate a member of its staff to act as a grievance arbitrator. The undersigned was so designated. Hearing was held in Kenosha, Wisconsin on March 15, 1990. A transcript of the hearing was prepared and the parties filed post-hearing briefs, the last of which was received on August 6, 1990.

THE ISSUE

The parties were unable to stipulate to the issue but did agree that the Arbitrator should frame same after considering the parties' positions.

The Union contends the issue should be stated as follows:

> Did the City's implementation of, or attempt to implement, the Program violate Article 4 and/or Article 25 of the Agreement; and if so, what remedy is appropriate.

The City proposes that the issue be stated as follows:

> Did the City refuse to bargain with the Union over the impact of its decision to operate its Fire Department on a First Responder/Rapid Zap System? If so, does the refusal violate the Collective Bargaining Agreement?

Having considered the parties' positions, I conclude that the issue before me is as follows:

> What are the parties' rights and obligations under the bargaining agreement regarding the implementation of the First Responder/Rapid Zap Program and what remedy, if any, is appropriate?

PERTINENT CONTRACTUAL PROVISIONS

. . .

ARTICLE 2 - MANAGEMENT RIGHTS

2.01 The management of the City of Kenosha Fire Department and the direction of the employees in the bargaining unit, except as otherwise specifically provided in this agreement, shall be vested exclusively in the City, and shall include, but not be limited to the following:

a) To determine its general business practices and policies and to utilize personnel, methods and means in the most appropriate and efficient manner possible.

b) To manage and direct the employees in the bargaining unit.

c) To determine the methods, means and personnel by which and the location where the operations of the City are to be conducted.

. . .

2.02 Nothing in this agreement shall be construed to

limit the discretion of the City with regard to matters affecting the public health, safety, or general welfare.

. . .

ARTICLE 4 - MAINTENANCE OF STANDARDS

4.01 The City agrees that all conditions of employment in the unit of bargaining covered by this agreement relating to wages, hours of work, overtime, and general working conditions shall be maintained at not less than the highest standards in effect at the time of the signing of this agreement. As to any item not covered by this agreement, reference may be made by either party to past procedure, departmental policy, City Ordinances or Resolutions, and State Statutes as guidelines in attempting to settle a particular dispute.

. . .

ARTICLE 25 - ORDINANCES AND RESOLUTIONS

. . .

25.02 Neither party shall terminated (sic) or modify any terms of this Agreement or conditions of employment of the employees subject to this Agreement during its term, unless mutually agreed to.

. . .

MEMORANDUM OF UNDERSTANDING

The Paramedic Program has been negotiated with the following mutual understanding of the parties:

- Paramedic rescue units will be staffed by a minimum of three (3) personnel. Of these three, two (2) will be certified Paramedics.

- The Department does not intent (sic) to use, on a normal basis, Engine or Ladder companies to respond to calls for emergency medical services.

- Paramedics will be cross-trained, dual-roll personnel who will be represented by Local No. 414, IAFF.

The City agrees that any changes in these conditions will impact on the working conditions of personnel represented by Local 414, and, therefore, be subjects for collective bargaining.

This memorandum shall expire at 4:30 P.M. on December 31, 1990.

POSITIONS OF THE PARTIES

The Union

The Union contends Articles 4.01 and 25.02 of the parties' 1989-1991 contract generally prohibit the City from changing employe conditions of employment during the term of said contract, unless the Union agrees to reopen the contract and a change is bargained. It argues the City's First Responder/Rapid Zap Program changes employe conditions of employment and thus violates Articles 4.01 and 25.02 because the Union has not agreed to reopen the contract.

In support of its view as to the meaning of Articles 4.01 and 25.02, the Union cites the City's unsuccessful attempt to eliminate existing Article 25.02 and replace it with language giving the City freedom to revise and/or create work rules.

The Union further argues that the parties' September 1988 Memorandum of Understanding regarding use of Engine and Ladder companies explicitly establishes an employe condition of employment which is preserved and protected by Articles 4.01 and 25.02 and which the First Responder portion of the City's Program would unilaterally change.

The Union disputes the City's contention that the Program is not a change

in "working conditions" but rather is a change in the method of departmental operations which can be unilaterally implemented under Article II of the contract. It also denies that it has conceded the permissive nature of the Program or that it has waived its right to bargain over the Program and its implementation. The Union argues that it has no obligation to reopen the contract to bargain with City over the Program or its implementation. Absent Union consent to reopen and Union agreement to modify the existing conditions of employment, the Union asserts that the contract bars the City from implementing the Program.

The City

The City commences its argument by noting that it has offered to bargain the impact of its decision to implement the Program but that the Union has refused to enter into such negotiations. The City thus contends that the Union has waived its right to demand that the City bargain over the impact of the Program.

The City next argues that neither Articles 4.02 nor 25.02 are applicable to this dispute because implementation of the Program is a change in a method of operation and not a change in working conditions. Citing arbitral authority, the City contends that the contractual Management Rights clause gives it the unilateral right to change methods of operation. The City also emphasizes that under Article 2.02, it has retained complete discretion with regard to matters affecting the "public health, safety or general welfare." The City argues that there can be no dispute that implementation of the Program is such a matter.

The City cites the Paramedic Program Memorandum of Understanding as evidence that: (1) the City never agreed that it would not change its method of operation as to delivery of emergency medical services; but that (2) the City would bargain the impact of any change with the Union. The City argues that the Union, by its conduct, has waived its right to insist on such impact bargaining.

The City denies that its proposal to modify Article 25 is supportive of the Union's position herein. It argues that the Program is a change in the method of operation of the Department and not a change in a rule or regulation. Thus, the City contends that its unsuccessful effort to obtain contractual language allowing for unilateral revision of rules and regulations is irrelevant to resolution of this grievance.

In summary, the City contends that there is nothing in the law or the contract which prohibits the City from implementing a policy decision regarding the services to be delivered to its citizens unless agreement is reached with the Union regarding implementation of such a decision. The City thus asks that the grievance be dismissed.

DISCUSSION

The City wants to implement a First Responder/Rapid Zap Program which would change the manner in which employes respond to emergency medical service calls and require employes to acquire additional training. The Union believes that City implementation of the Program would modify existing "working conditions" or "conditions of employment" and that the contract therefore allows the Union to refuse to reopen the contract to bargain over any such modifications.

The Union cites several portions of the parties' bargaining agreement as support for its position. Article 25.02 prohibits the City from modifying "conditions of employment of the employees subject to this Agreement during its term, unless mutually agreed to." A portion of the Program would require employes to obtain additional training as a condition of continued employment. Thus, the additional training requirements can reasonably be interpreted as falling squarely within the scope of the Article 25.02 prohibition. Article 4.01 requires the City to maintain "all conditions of employment . . . relating to wages, hours of work, overtime, and general working conditions . . . ." Again, the Program's training requirements could be viewed as falling under this provision. However, as the phrase "conditions of employment" in Article 4.01 is modified by the phrase "general working conditions," it can be persuasively argued that the application of Article 4.01 to new training requirements is less clear than is application of Article 25.02 to said requirements.

As to the First Responder portion of the Program which would change current use of Engine and Ladder companies, Articles 25.02 and 4.01 could also be interpreted as barring such a change. However, as argued by the City, there is substantial arbitral precedent for the proposition that such a change can most reasonably be viewed as a change in a "method of operation" rather than a change in "conditions of employment" or "working conditions."

Lastly, there is the September 1988 Memorandum of Understanding as to the Paramedic Program which states, in part:

- The Department does not intent (sic) to use, on a normal basis, Engine or Ladder companies to respond to calls for emergency medical services.

Contrary to this provision of the Memorandum, under the First Responder portion of the Program, Engine and Ladder Companies would respond on a "normal" basis to emergency medical service calls. However, the Memorandum expires on December 31, 1990 and further provides:

> The City agrees that any changes in these conditions will impact on the working conditions of personnel represented by Local 414, and, therefore, be subjects for collective bargaining.

The City cites the portion of the Memorandum quoted immediately above as support for its position that it has retained the right to make changes in the manner in which it provides emergency medical services so long as it bargains the impact of the changes on the employes with the Union. However, the Memorandum clearly allows for change in the use of Engine or Ladder companies to occur during the term of the Memorandum only if bargaining were to produce such a result. Contrary to the City's argument, the agreement in the Memorandum to bargain "any changes in these conditions," obligates the City to bargain with the Union during the term of the Memorandum as to the fundamental question of whether there should be a change in use of Engine or Ladder companies. As of the hearing in this matter, the City had not been willing to bargain over the issue of whether a change should occur, and instead sought bargaining only as to the impact of such a change.

Given the foregoing, the contract provides substantial support for the Union's position. Articles 4.01 and 25.02 can reasonably be interpreted to allow the Union to protect the employes from Rapid Zap training requirement which, if not met, would produce loss of employment. To a lesser extent, Articles 4.01 and 25.02 can be interpreted as also barring changes in use of Engine and Ladder companies. The Memorandum clearly prohibits the First Responder use of Engine or Ladder companies until December 31, 1990 unless the change in use occurs as a result of the collective bargaining process.

Obviously, however, an evaluation of the parties' contractual rights must consider the portions of the contract upon which the City relies. The City correctly notes that under Article 2.01, it has the right to:

> a) To determine its general business practices and policies and to utilize personnel, methods and means in the most appropriate and efficient manner possible.
>
> b) To manage and direct the employees in the bargaining unit.
>
> c) To determine the methods, means and personnel by which and the location where the operations of the City are to be conducted.

The foregoing management rights, if unfettered by the remainder of the contract, would likely allow the City to unilaterally determine the parameters of the First Responder/Rapid Zap Program. However, Article 2.01 explicitly specifies that the rights set forth are "vested exclusively in the City" "except as otherwise specifically provided in this agreement . . . ." Given the previously discussed content of Articles 4.01 and 25.02 and of the Memorandum of Understanding, I conclude that Article 2.01 does not provide significant support for the City's position because the management rights described therein have been limited by other portions of the contract. The same cannot fairly be said about Article 2.02 which provides:

> 2.02 Nothing in this agreement shall be construed to limit the discretion of the City with regard to matters affecting the public health, safety, or general welfare.

It is clear from the record that the First Responder/Rapid Zap Program itself is aimed at improving the manner in which the City provides for the "public health, safety, or general welfare." Thus, Article 2.02 requires that nothing in the bargaining agreement be interpreted in a manner which limits the City's discretion to establish a First Responder/ Rapid Zap Program. However, Article 2.02 cannot reasonably be interpreted as voiding any clear and specific agreements reached by the parties which so limit the "discretion of the City." Only those portions of the contract which are reasonably subject to being "construed" or interpreted to have different meanings are potentially impacted by the command of Article 2.02. The question now becomes determining how my view of Article 2.02 impacts on the previously discussed meaning of Articles 4.01 and 25.02 and the Memorandum of Understanding.

As I concluded earlier, I believe Article 25.02 and to a lesser extent Article 4.01 can most reasonably be interpreted as preventing the City from imposing new training requirements on employes. However, as argued by the

City, said contractual language can also plausibly be interpreted as having no application to training requirements. The scope of Articles 25.02 and 4.01 can also be interpreted as extending to the First Responder portion of the Program although the City's counter-arguments as to this portion of the Program are more persuasive than those it advanced as to the training requirement. However, Article 2.02 does not allow or require me to determine which parties' interpretation of Articles 25.02 and 4.01 is most persuasive. Where there is any ambiguity is the contract, Article 2.02 does not allow me to interpret Articles 25.02 and 4.01 in a manner which will "limit the discretion of the City with regard to matters affecting the public health, safety, or general welfare." Thus, I must generally conclude that Articles 25.02 and 4.01 do not prevent the City from implementing the First Responder/Rapid Zap Program.

However, the Memorandum of Understanding is a clear agreement which is not capable of differing interpretations and in which the City has specifically bound itself as to certain matters "affecting the public health, safety or general welfare." Thus, Article 2.02 does not alter the previously discussed application of the Memorandum of Understanding to this dispute. Therefore, the Memorandum bars use of the Engine and Ladder companies as proposed under the First Responder/Rapid Zap Program through December 31, 1990 unless the contractual collective bargaining process allows same to occur during the term of the Memorandum. However, upon expiration of the Memorandum, Article 2.02 again controls the interpretation I must give the contract. Thus, after 4:30 p.m. on December 31, 1990, I concluded that Articles 25.02 and 4.01 do not bar implementation of the First Responder portion of the Program.

I retain jurisdiction over this matter for the purposes of determining what remedy, if any, is appropriate and of resolving any disputes which arise as to the application of this Award.

Dated at Madison, Wisconsin this 21st day of December, 1990.

By _____
Peter G. Davis, Arbitrator