

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

CITY OF KENOSHA

and

LOCAL NO. 414, KENOSHA FIRE FIGHTERS,  
IAFF, AFL-CIO

2-15-90 grievance  
concerning creation  
of non-unit  
Fire Prevention Bureau  
Inspector positions

Case 152  
No. 43963  
MA-6126

Appearances:

Mr. Roger E. Walsh, Davis & Kuelthau, S.C., Suite 1400, 111 East  
Kilbourn Avenue, Milwaukee, WI 53202-3101 appearing on behalf of the City.

Mr. John Celebre, President, 8845 - 41st Street, Kenosha, WI 53142, appearing on behalf  
of the Union.

ARBITRATION AWARD

The Wisconsin Employment Relations Commission designated the undersigned Arbitrator to hear and determine a dispute concerning the above-noted grievance under the parties' 1989-91 collective bargaining agreement (herein Agreement).

The parties presented their evidence and arguments to the Arbitrator at a hearing held at the Kenosha Municipal Building, Kenosha, Wisconsin on August 30, 1990. The hearing was transcribed. Briefing was completed on December 4, 1990, marking the close of the record.

ISSUES

At the hearing, the parties were unable to agree on a statement of the issues for determination herein.

Among other disputes regarding the framing of the issues, the City refused to arbitrate any issue concerning the EMS Coordinator position, asserting that it had promptly declined the Union's earlier request to amend the grievance to include a reference to that position. The Arbitrator asked whether the Union wished to postpone all proceedings in this matter pending a determination in a different forum as to whether the City is obligated to arbitrate issues concerning the EMS Coordinator position in this proceeding. The Union stated that it preferred to proceed as

to those matters that the City was not refusing to arbitrate.

The parties authorized the Arbitrator to frame the issues regarding the remaining issues. After hearing the parties' respective proposed formulations of the issues, the Arbitrator advised the parties that he was formulating the issues in dispute as follows:

1. Does the subject matter of the grievance dated 2-15-90 involve subject matter arbitrable under the Agreement?
2. Was that grievance timely filed so as to be procedurally arbitrable under the Agreement?
3. Did the City violate the Agreement by creating the Fire Prevention Bureau Inspector positions outside the bargaining unit?
4. If 3 is so, what is the appropriate remedy under the Agreement?

Following further informal discussions, the parties agreed to the following stipulation:

For purposes of this grievance arbitration and for no other purpose, the parties agree that the Fire Prevention Bureau Inspector is a supervisory position within the meaning of the Sec. 111.70(l)(o)2, Stats., definition.

The City then agreed that with that stipulation the answer to ISSUE 1 (substantive arbitrability), above, became "Yes", such that no determination of that issue by the Arbitrator would be necessary.

Finally, the parties agreed that if the City prevails on ISSUE 3 (merits), the Arbitrator need not reach ISSUE 2 (timeliness); but that if the Union prevails on ISSUE 3, then the Arbitrator must reach ISSUE 2 in order to determine whether ISSUE 4 (remedy) can be considered.

Because the Arbitrator concludes that the City does prevail on ISSUE 3 (merits), the Arbitrator sets forth below only the Agreement provisions, factual background, parties' positions and discussion relating to ISSUE 3.

## PERTINENT PORTIONS OF THE AGREEMENT

### ARTICLE 1 - RECOGNITION

1.01 The City recognizes and acknowledges that Local 414, I.A.F.F., is the authorized representative and sole bargaining agent

for the Fire Fighters of the City of Kenosha, excluding the Assistant Chiefs, the Chief of the Kenosha Fire Department, Training Coordinator and the Apparatus and Equipment Supervisor.

1.02 The City agrees to instruct the Chief of the Fire Department to explain this agreement to all new appointees.

1.03 It is mutually agreed that a fair share agreement is hereby created as per the provisions of State Statute 111.70(l)(h). The City agrees that it will deduct from the monthly earnings of all employees in the bargaining unit the amount of monthly dues certified by the Union as the current dues uniformly requested of all members, and remit said amount to the Union prior to the end of the month for which the deductions were made. Changes in the amount of the dues shall be certified by the Union thirty (30) days before the effective date of such change. New employees shall become subject to the provisions of this paragraph immediately upon employment.

1.04 The City further recognizes that the bargaining unit is comprised of all employees in the following classifications:

House Captain Fire Department Lieutenant  
Line Captain Apparatus Operator  
Fire Prevention Firefighter  
Bureau Lieutenant

## 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.
- d) To hire, promote and transfer and lay off employees and to make promotions to supervisory positions.
- e) To suspend, demote or discharge employees for just cause.
- f) To schedule overtime work as required in the manner most advantageous to the City and consistent with the requirements of the Fire Department and the public interest.

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.

2.03 The Union recognizes its responsibility to cooperate with the City to insure maximum services at minimum cost to the public consonant with its obligations to the employees it represents.

2.04 This agreement shall in all respects, wherever the same may be applicable herein, be subject and subordinate to the provisions of the charter of the City of Kenosha, the laws of the State of Wisconsin, and the Ordinances of the City of Kenosha in effect at the effective date of this agreement.

. . .

#### ARTICLE 16 - GRIEVANCE PROCEDURE

16.01 Any violation of this Agreement or any supplement thereto shall be deemed subject to the grievance procedure . . .

. . .

16.05 . . . The authority of the arbitrator shall be limited to the above and he/she shall have no authority to add to, detract from, or amend the agreement. . . .

. . .

## ARTICLE 25 - ORDINANCES AND RESOLUTIONS

25.01 The Ordinances of the City of Kenosha which apply to Fire Department Personnel are incorporated herein by reference to have the same force as if set forth in full. The Rules and Regulations of the Fire Department are incorporated herein by reference and made part of this contract and attached hereto, designated Supplement No.

1.

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### FACTUAL BACKGROUND

In the fall of 1987, Fire Chief Michael A. Massey presented the City Council with a lengthy Fire Department Study which included, among others, a recommendation for the creation of a Fire Prevention Bureau and of Fire Prevention Bureau Inspector [herein FPBI] positions by reorganization of existing personnel. The City Council took action on some of the Chief's other recommendations prior to the parties' execution of the Agreement on April 27, 1989, but it did not take any action on the two noted above until after that date. It was not until the budget-making process for calendar year 1990 that the creation of Fire Prevention Bureau Inspector positions was proposed and approved by various City committees. While the creation of those positions remained subject to final City Council approval of the budget, the City posted an announcement of the FPBI position as a supervisory position outside the Local 414 bargaining unit. The City Council then approved the budget including the creation of the FPBI positions on April 28 or 29, 1989. That budget became effective January 1, 1990. Gerald Markey and Daniel Santelli were appointed and began working as the FPBIs as of February 1, 1990. Prior to those appointments, Markey held the bargaining unit position of Fire Prevention Bureau Lieutenant, and Santelli held a bargaining unit position of Fire Fighter but was performing the duties of the bargaining unit position of Fire Prevention Bureau Lieutenant and was being compensated for this duty under the Working Out of Classification provision of the Agreement. There is no evidence that the City employed anyone in the Fire Prevention Bureau Lieutenant classification after Markey and Santelli ceased working in that job title as of February 1, 1990.

No mention was made of the FPBI position during the negotiations leading up to the Agreement which, as noted, the parties signed on April 27, 1989.

A grievance challenging the "removal of FPB Inspectors from bargaining unit" was submitted to the City, processed through the grievance procedure, and submitted to arbitration as noted above.

## POSITION OF THE UNION

Agreement 1.01 provides that the Union "is the authorized representative and sole bargaining agent for the Fire Fighters of the City of Kenosha, excluding the Assistant Chiefs, the Chief of the Kenosha Fire Department, Training Coordinator, and the Apparatus and Equipment Supervisor." The parties' specification in that list of all of the positions they intended to exclude from the bargaining unit reflects their agreement and understanding that there would be no other classifications excluded absent mutual agreement to amend the exclusions list. The clear and unambiguous meaning of Agreement 1.01 is therefore that if the City creates any positions--supervisory or nonsupervisory--which are not an Assistant Chief, Chief, Training Coordinator or Apparatus and Equipment Supervisor, then such new position is a "Fire Fighter of the City of Kenosha" and cannot be excluded from the bargaining unit during the term of the Agreement without the Union's consent. Here, the City created positions in the Fire Department that are being deemed supervisory for purposes of this proceeding. They were "Fire Prevention Bureau Inspectors," and not one of the positions in the abovequoted list of unit exclusions. Therefore, the City was required to include them in the unit. By treating them as outside the unit, the City violated Agreement 1.01 and hence failed to deduct fair share dues from the Fire Prevention Bureau Inspectors' pay and failed to pay same over to the Union.

Agreement 1.04 defines the broad and general nature of work which the unit has contracted to perform. It is not designed to govern the scope of the unit as Sec. 1.01 does, but rather defines the work to be performed by the unit and regulates the assignment of such work within the unit. As such, Agreement 1.04 cannot be relied upon to limit the scope of the bargaining unit.

Furthermore, Agreement 25.01 expressly incorporates the Rules and Regulations of the Fire Department as part of the Agreement. Those Rules include a statement of the duties of the various classifications in the Department, including those for Lieutenants. The Rules make no reference at all to a Fire Prevention Bureau Inspector. By establishing that classification and assigning it duties, the City unilaterally modified the Rules without the Union's consent in violation of Agreement 25.01.

The management rights language in Agreement 2.01 on which the City relies is expressly superceded where, as here the parties have "otherwise specifically provided" elsewhere in the Agreement, to wit in Agreement 1.01 and 25.01 and in the Rules thereby incorporated into the Agreement.

The evidence shows that the duties of the Fire Prevention Bureau Inspectors consist for the most part of work previously performed by the Fire Prevention Bureau Lieutenants and for which the parties have specifically set forth the applicable wages and benefits in Art. 11 and elsewhere in the Agreement. The City has not argued or proven that it had good reasons for transferring those historically bargaining unit duties to positions deemed for purposes of this proceeding to be

supervisory. Arbitrators do not consider general management rights provisions sufficient to authorize the transfer of bargaining unit duties to non-bargaining unit supervisors, especially where, as here, the City has offered no legitimate operational reasons for its doing so.

If the City had wanted to create an additional excluded position or to reserve the right to unilaterally do so, it should have bargained language giving it that leeway. The evidence shows that the City had the Chief's recommendation for the creation of the Fire Prevention Bureau Inspector classification before it when the 1989-91 Agreement was negotiated and signed, but that the City made no effort to bargain with the Union on that subject. In the foregoing circumstances, the City is precluded by the Agreement from creating a new supervisory position and from transferring bargaining unit work to those positions, without the consent of the Union, which it has neither sought nor obtained.

For those reasons, the answer to ISSUE 3 should be "Yes."

By way of remedy, the Arbitrator should order the City to eliminate the non-unit positions of Fire Prevention Bureau Inspector and return the work performed by those positions to the bargaining unit positions of Fire Prevention Bureau Lieutenant. In addition, the Union asks for payment of the back Union dues for the two individuals involved since February 1, 1990.

#### POSITION OF THE CITY

In Wisconsin, municipal employers are not obligated to bargain about decisions to create positions, whether they are within or outside of the bargaining unit. Rather, such decisions are a permissive subject of bargaining.

The City has not contractually bound itself to bargain about or to refrain from making such decisions during the term of the 1989-91 Agreement. On the contrary the Management's Rights clause in Art. 2 specifically expresses what would otherwise be the City's inherent right to create positions, supervisory or otherwise. Agreement 2.01 vests such rights in the City "except as otherwise specifically provided in this agreement," and the Arbitrator is limited by Article 16 to consideration only of the provisions of

Agreement 1.01 does not limit the City's statutory and contractual rights to create new supervisory positions. The exclusions listed in that provision and the inclusions listed in Agreement 1.04 represent a unit/nonunit allocation only of those positions in existence at the time the Agreement was signed. Those provisions have no effect on positions that were not in existence at the time the parties signed the Agreement. The evidence shows that the FPBI positions did not exist at the time the Agreement was signed in April of 1989, but rather that those positions were later authorized and created by the City in November of 1989.

For those reasons, and because the parties have agreed for purposes of this proceeding that



the FPBI positions are supervisory, the City was within its rights in creating the FPBI positions outside the bargaining unit. ISSUE 3 should therefore be answered "No" and the grievance should be denied.

## DISCUSSION

As noted above, the Arbitrator finds merit in the City's contentions regarding ISSUE 3 relating to the merits of the grievance.

The Arbitrator is persuaded that Agreement 2.01 reserves to the City the right to create new supervisory positions and to assign to such positions duties previously performed by bargaining unit personnel, "except as otherwise specifically provided in this Agreement." The Arbitrator finds such rights reserved by the following provisions of Agreement 2.01:

- "to determine its general business practices and policies and to utilize personnel . . . in the most appropriate and efficient manner possible" (2.01.a);

- "to determine the . . . personnel by which . . . the operations of the City are to be conducted" (2.01.c); and

- "to hire, promote and transfer and lay off employees and to make promotions to supervisory positions." (2.01.d.)

In addition, Agreement 2.02 emphasizes that "Nothing in this agreement shall be construed to limit the discretion of the City with regard to matters affect the possible health, safety, or general welfare."

Thus, this is not a case in which management relies only a general management rights clause as its basis for the personnel determinations associated with its reorganization of the work of the Department. Rather the Arbitrator is satisfied that the foregoing provisions, read together, constitute specific reservations of the rights exercised by the City herein unless it can be said that the parties have "otherwise specifically provided in this Agreement." Agreement 16.01 and 16.05 emphasize that the Arbitrator's jurisdiction is confined to determining whether the Agreement or any supplement thereto has been violated, and they specifically prohibit the Arbitrator from adding to, detracting from or amending the agreement. In the context of the specific language of Arts. 2 and 16, the Arbitrator does not find it appropriate to require the City to affirmatively justify the actions it has taken with persuasive operational rationale. The Agreement specifically reserves the rights the City has exercised unless the Agreement or any supplement thereto specifically provides otherwise. Nevertheless, it can be noted that the Chief's recommendation concerning the creation of the Fire Prevention Bureau was framed in terms of operational considerations:

2. Establish a full-time fire prevention and education bureau - These services represent the only direct, practical, and cost effective way to reduce fire related deaths and fire loss in the community. Current resources are woefully inadequate to address the needs of the community. Insurance rates could be reduced. Computerization is absolutely essential. Staffing is possible through reorganization.

Moreover, there is no evidence that the City has exercised its rights in a manner tainted with discrimination, antiunion animus or bad faith either in the development of the Chief's reorganization plan or in the City's approval and implementation thereof.

Attention is now turned, therefore, to whether the abovenoted management rights are undercut because the parties have "otherwise specifically provided" in the Agreement or any supplement thereto.

Agreement 1.01 and 1.04 are both parts of the Article entitled "Recognition" and as such they are appropriately read together to determine the composition of the bargaining unit. The Arbitrator is persuaded that those provisions describe the bargaining unit inclusions and exclusions as regards classifications that existed at the time the Agreement was signed. It cannot fairly be said that those provisions, or either of them, specifically provide(s) that the City cannot reorganize during the term of the Agreement in such a way as to create new positions outside of the bargaining unit and to assign duties historically performed by a bargaining unit position in addition to other duties to the newly-created supervisory positions. If newly-created positions are non-supervisory, the City would have a statutory obligation to bargain with the Union about the wages, hours and conditions of employment of the newly-created positions. Where, as here, it is agreed for purposes of this proceeding that the newly created positions were supervisory, the City would not have such a duty to bargain about the wages, hours and conditions of employment of the newly-created positions.

While the idea for an FPBI position was before the Council in the form of the 1987 Fire Study recommendation, that recommendation was not acted upon so as to create an FPBI position until months after the Agreement was signed. Accordingly, the Arbitrator concludes that nothing in Article 1 constitutes a specific provision creating an exception to the City's Art. 2 rights described above.

The Union has also cited the portion of the Rules describing the duties of Lieutenants. The Rules and Regulations of the City of Kenosha Fire Department are a supplement to the Agreement and are expressly made a part of it by Agreement 25.01. Those Rules begin with the following:

All sworn personnel who may be employed in the Fire Department shall be subject to such rules and regulations and shall perform such duties as may be prescribed for, or required by them by the Chief of

the Fire Department, with the approval of the Mayor or the Common Council and not inconsistent with the State Statutes.

The Rules go on to describe the duties of the Chief, House Captains, Lieutenants, Training & Education Supervisor, Fire Department Apparatus & Equipment Supervisor, Fire Department Alarm & Communication Supervisor, Apparatus Operators, Firefighter, and general Fire Duty of all Department personnel. With regard to "Lieutenants," the Rules provide the following:

They shall have command and control of the apparatus, and personnel, to which they are assigned. In the absence of the Captain, they shall assume command and fulfill all the orders, regulations and duties of the Captain.

They shall be responsible for the duties and assignments given them by the Captain.

They shall notify the Captain of the necessity for any repairs, alterations or changes of their equipment or for necessary supplies.

They shall make and sign any and all reports or forms that may be prescribed by their superior officers.

The Union has noted that the newly created new job description for Fire Prevention Bureau Inspectors provides in part as follows:

#### EXAMPLES OF WORK

1. Inspects public buildings for fire hazards, efficiency of fire protective equipment, adequacy of fire exits, and general compliance with fire prevention laws and standards; advises property owners as to methods of abating fire hazards, and if necessary, take appropriate steps to induce compliance with fire prevention regulations; reports violations of laws, ordinances and established safety hazards to the Fire Marshal; inspects the installation and maintenance of private fire alarm systems, fire extinguishing equipment and storage of explosives and flammables.

2. Investigates a fire scene to determine the cause, point of origin, and possible violation of fire codes and regulations; estimates losses; takes, develops, and prints pictures of fire hazards and damages; assists police in apprehending arsonists if arson is

suspected; appears in court in connection with fire investigations.

3. Conducts or coordinates fire prevention and safety classes for schools, churches, civic groups and the general public; conducts classes on commercial and home inspections for departmental personnel; follows upon on investigations to gain compliance; receives and investigates complaints of alleged fire hazards; does plan check of new businesses.

While the foregoing portion of the FPBI duties were previously performed by the bargaining unit Fire Prevention Bureau Lieutenants previously employed by the City, the duties specification under "Lieutenant" in the abovenoted portion of the Rules does not constitute a specific provision precluding the City's actions at issue herein.

Neither does the existence of the agreed-upon wages and benefits for Fire Prevention Bureau Lieutenant constitute a specific provision precluding creation of the FPBI and assignment of the abovequoted "Examples" of duties to those FPBI positions. The Agreement requires the City to pay the agreed upon wages and benefits for the various specified bargaining unit positions, but the wages and benefits for supervisory personnel is not a matter dealt with in the Agreement nor one about which the City would have been obligated to bargain with the Union.

For those reasons, then, the City was acting within its Art. 2 rights when it created the FPBI positions outside the bargaining unit and assigned work to that position which had previously been performed by the Fire Prevention Bureau Lieutenant classification. The City did not violate Agreement 1.01 or any other provision of the Agreement when it did so.

In light of that conclusion and the parties' agreement concerning the order in which the abovenoted ISSUES may be addressed by the Arbitrator, the Arbitrator finds it unnecessary to reach or decide the remaining issues concerning timeliness and remedy.

#### DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on those of the ISSUES noted above that were not resolved between the parties during the hearing, that:

1. The City did not violate the Agreement when it created the Fire Prevention Bureau Inspector positions outside the bargaining unit.
2. No consideration of timeliness or remedy is necessary, and the abovenoted grievance is denied.

Dated at Shorewood, Wisconsin this 4th day of March, 1991.

By Marshall L. Gratz /s/  
Marshall L. Gratz, Arbitrator