

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 LOCAL 414, KENOSHA FIREFIGHTERS, :
 INTERNATIONAL ASSOCIATION OF :
 FIREFIGHTERS :
 :
 and : Case 163
 : No. 46016
 : MA-6845
 CITY OF KENOSHA :
 (FIRE DEPARTMENT) :
 :

Appearances:

Mr. John B. Kiel, Executive Board Member, Local 414, IAFF, appearing on
Davis & Kuelthau, S.C., by Mr. Roger E. Walsh, and Mr. Lon D. Moeller,

behalf
 appear

ARBITRATION AWARD

The Employer and Union above are parties to a 1989-91 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance filed by the Executive Board of Local 414, concerning an order to march in a parade honoring Operation Desert Storm troops.

The undersigned was appointed and held a hearing on November 4, 1991 in Kenosha, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on February 6, 1992.

ISSUES:

The Union proposes the following:

1. Did the Fire Chief exceed his authority under law and contract in ordering bargaining unit members to participate in the May 19, 1991 Operation Desert Storm parade?

The Employer proposes the following:

1. Did the City violate the contract by assigning on-duty employes to participate in a parade on May 19, 1991 honoring the troops who were in Operation Desert Storm?

The parties agree that the companion issue is:

2. If so, what is the appropriate remedy under the contract?

RELEVANT 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.

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.

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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 10 - WORKING CONDITIONS

10.01 Major wall washing shall not be done by fire fighters. Major wall washing is defined to include all the walls in the fire stations including the ceilings, trim, lights and windows. The men/women in each fire station agree to wash the walls twice a year in the kitchen and dining areas only. Nothing contained herein shall prevent washing station windows by fire fighters on a normal scheduled basis.

10.02 Fire fighters shall not be assigned to refinish furniture.

10.03 Lawn maintenance at any fire station by any employee subject to this contract shall not be mandatory.

10.04 Fire Fighters shall not be required to maintain the Fire Chief's Office, the Assistant Fire Chief's Office, or the Fire Inspection Bureau.

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ARTICLE 16 - GRIEVANCE PROCEDURE

. . .

16.05 Step 4. If any party is dissatisfied with either the Mayor's or his/her designate's disposition or the disposition of the Board of Police and Fire Commissioners at Step 3, said party may invoke final and binding arbitration of the grievance or dispute by serving written notice of intention to do so within fifteen (15) days following receipt of the written decision of either the Mayor or his/her designate, or the Board of Police and Fire Commissioners. The arbitrator shall then be selected by a joint written request to the Chairman of the Wisconsin Employment Relations Commission to appoint a member of his staff as arbitrator. After the arbitrator is appointed, the parties shall agree on a hearing date as soon as is mutually convenient. The arbitrator shall have jurisdiction to rule on the arbitrability of the dispute, to issue subpoenas, to define the questions involved, to make rulings on procedure and evidence according to the equities of the situation, and to render a decision on the merits which will be final and binding on the parties. 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 a part of this contract and attached hereto, designated as Supplement No. 1.

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.

. . .

(From RULES and REGULATIONS, incorporated in the Agreement)

X. FIREFIGHTER

Firefighters shall perform any and all duties that the Chief or their superior officers may direct. They shall familiarize themselves with the rules and regulations of the Fire Department and shall obey all orders and commands.

. . .
XII. GENERAL RULES

All officers shall perform such other duties as may be required of them from time to time by the Chief.

. . .

FACTS:

The facts are largely undisputed. Like many other cities and towns throughout the United States, the City of Kenosha held a parade in honor of the troops who had served in Operation Desert Storm. The Mayor requested that the Fire Department take part in the parade, the Department's chief Richard Thomas agreed, and Thomas requested volunteers from among the firefighters. Thomas and John Celebre, President of Local 414, discussed the matter on two occasions about a month prior to the parade, and Celebre offered to encourage off-duty firefighters to participate. He himself also offered to participate, and subsequently sent a memo to Local 414 members suggesting their participation. It was also made known to employes generally that the Department's two newest pieces of equipment and their associated crews would be featured in the parade in an on-duty status.

On the morning of the parade, Chief Thomas discovered upon his arrival at the parade site about 10:30 a.m. that only four off-duty volunteers were available, including himself and Celebre. This, Thomas testified, was far short of the number required to staff a "honor guard", as he had been requested to do by the Mayor. Thomas testified that he then solicited more volunteers from among officers on-duty on that day, which netted two more participants. He then ordered Assistant Chief Jim Sundstrom to issue an order, to the crews of the two rigs which were scheduled to be in the parade on-duty, that all members of those crews except the driver were to march or walk in the parade rather than ride in the rig.

All the members of the crews did so, except for the drivers and

Lieutenant Richard Bosanko [whom the City subsequently disciplined, and the Union subsequently supported in a grievance separately in arbitration]. Celebre, however, on being informed of the order to walk/march, objected to any employe being ordered to walk/march, and told Thomas he himself would not march with the Department. Celebre then covered his uniform and participated in the march along with the "firefighters' auxiliary" unit elsewhere in the parade. The crews of the two units assigned to the parade marched immediately behind those units, and there is no dispute that had either unit been dispatched for firefighting duty from the parade, the firefighters' absence from the rigs would have added no more than a few seconds to the dispatch time. There is also no dispute that while the Department has frequently provided units to participate in parades before, no employes were ever ordered to march in a parade before. Employes did, however, leave their rigs to perform demonstrations of equipment during a parade.

Celebre and two other Union witnesses testified that the Union's objection to the parade, and the basis of the grievance, was that marching in a parade constitutes support of the goals of the parade organizers, and the Union felt that the purpose of the Operation Desert Storm parades was largely political. Celebre distinguished in his testimony between marching in the parade and riding on a rig in the parade on the ground that riding in the rig clearly identified the firefighter involved as being there as part of a firefighting unit, while marching, he argued, indicated individual support for the parade's purpose. The Union did not contest the Fire Department's right to send units to the parade or have employes ride on them.

Firefighter James Lovell, previously a member of the Army Reserves for a number of years, testified that he learned at about noon on parade day, an hour before the beginning of the parade, that he had to march as opposed to riding on his rig. Lovell testified that while he supported the troops in Operation Desert Storm, he was against the military action itself, and was distressed that he would be identified with that action by marching. He testified that he objected to marching to some other employes who were nearby. But Lovell did not identify any member of management as being among them, and could not name those to whom he had registered this objection. Lovell testified that he marched behind the fire equipment in a group of 9 to 11 people including the Chief, and that no banner was carried by this group.

Donald Martin, a Fire Lieutenant with a military background, testified that even though he was not working on the day of the march he considered that his interests were affected by this order, because it implied that any employe could be ordered to participate in a parade which the employe felt was political in nature and did not support.

Thomas testified that no firefighter objected to him that his presence in the parade might have political connotations, and stated that if such an objection had been made to him he would have honored it, if he felt was sincere. Thomas testified that neither the honor guard nor the equipment went to the ceremony at Kenosha City Hall which followed the parade.

The Union introduced into evidence several cartoons and a letter to the editor, which had been featured in area newspapers about the time of the parade, purporting to show that the parade had political overtones.

THE UNION'S POSITION:

The Union contends first that the exercise of political expression, or refusal to engage in such expression, are matters protected under the first and sixteenth amendments of the United States Constitution and under Article 1, Section 1 of the State of Wisconsin's Constitution. The Fire Chief of the City

of Kenosha, the Union argues, is constitutionally prohibited from telling personnel to engage in "expressive conduct" in matters of intellectual, spiritual, patriotic, political, public or related concern.

The Union further argues that Article 4.01 and 25.02 of the labor agreement prohibit the fire chief from ordering personnel to march in parades. These Articles, the Union contends, require the continuation of existing working conditions, and do not allow unilateral changes. The past practice shows that while department personnel have accompanied departmental apparatus in parades, personnel have never been ordered to march in parades, and the apparatus rather than the personnel have been the primary object of parade spectators' attention. The Union asserts that the Arbitrator has the authority to rely on constitutional mandates and Supreme Court precedents to decide this matter, because the rules and regulations of the Fire Department limit the authority of the fire chief to the issuance of "lawful orders and directives" and Article 25 of the Agreement incorporates the rules and regulations of the contract. The Union makes a detailed argument concerning the applicability of principles of free speech to public conduct that is not speech, in support of its contention that the appearance of an employe marching in a parade connotes support for the goals of that parade, asserted to be political in this case.

As to exclusively contractual arguments, the Union contends that neither before nor during the term of this contract had the Union consented to changing working conditions by including marching in parades in those conditions. The Union distinguishes marching from accompanying emergency apparatus in parades, contending that the testimony indicated only one instance in which employes demonstrated booms in a parade on four or five occasions, and that on all other occasions employes had merely ridden on their apparatus. Furthermore, the instance Chief Thomas testified to had nothing to do with marching, since it was a demonstration of the functions of a piece of emergency apparatus. The Union distinguishes the participation in prior parades of department personnel playing the role of "Sparky the Fire Dog" on the ground that such personnel were acting in a compensated but volunteer capacity. The Union argues that there is a clear past practice of not marching in parades.

Finally, the Union argues that participation in parades by marching is an activity unrelated to the work of fire department personnel, contending that the rules and regulations of the Department provide that its functions are "to provide effective fire prevention, fire suppression, emergency medical service and public information and education services . . .". The Union contends that denial of this grievance would allow the Fire Chief unilaterally to extend the limits of his authority to areas bearing no reasonable relation to the work of firefighters, fire officers and paramedics.

THE EMPLOYER'S POSITION:

The Employer contends first that Article 2 of the collective bargaining agreement vest it with broad and inherent right to direct and assign the work force. The Employer contends that under this clause it has broad rights to assign Fire Department personnel to participate and march in parades. The Employer contrasts Article 2 with Article 10 of the Agreement, which includes a specific lists of limitations of types of work which the City may not assign to employes, demonstrating that the broad authority of the City to assign work is not without contractual limitations, but those contractual limitations do not include any ban on an assignment of the type made here.

The Employer contends that rule X. of the Department's rules and regulations requires fire fighters to "perform any and all duties that the chief or their superior officers may direct" and that rule 12 provides that "all officers shall perform such other duties as may be required of them from

time to time by the chief". The City points to the job description of firefighter as including reference to "public relations" and argues that this is specific reference to marching and participating in parades. Similar job descriptions, the City argues, exist for captains and lieutenants. Thus, the City contends, both participating and marching in the Desert Storm parade were properly within the scope of the job duties of fire department personnel.

The City contends that on a number of occasions over many years firefighters have been required to participate in parades honoring a number of occasions, including July 4, Memorial Day, fire safety, and homecoming parades for Carthage College, a private college affiliated with the Lutheran church, as well as homecoming parades for Kenosha High Schools. During the course of this they have been required to get off their rigs at times.

The City argues that the Union did not object to the "political" nature of the Operation of Desert Storm parade until after the grievance was filed, and that the only objection raised prior to the parade was by Celebre, who contended that marching in the parade was not part of job duties of on-duty personnel. The City points to testimony by Thomas that he would have released an employe who raised sincere political objections to marching in the parade. The City further contends that the parade was not political in nature, citing the participation of "Miss Kenosha" and the McKinley pompon cheerleaders, as well as local clergy and charities, to buttress this point. Finally, the City asserts that no agreement was ever reached between Thomas and Celebre that would bar Thomas from assigning employes to march.

The City requests that the grievance be denied.

DISCUSSION:

Accepting, for purposes of argument, the Union's assertion that the Operation Desert Storm parade was at least in part political in nature, I still do not find that this matter rises to the level of a dispute over political expression. The evidence here is that while several firefighters object to what they see as an act of support for political goals they disagree with, no such employe made such an objection to anyone in management upon receiving the order to march in the parade. It is an ancient principle in matters of political expression that silence indicates consent. 1/ Here, no voice was heard to object to the politics of the parade until the parade was over. Furthermore, Chief Thomas indicated some level of receptiveness to such concerns by his testimony that he would have excused from such duty any firefighter who made a sincere objection to that affect. For me to delve further into the political arguments concerning the nature of the parade and the nature of employes' rights of self-expression would thus be the sort of speculative essay which arbitrators are generally enjoined from engaging in. I therefore conclude simply that the facts of this case do not justify treating it as related to the right of self-expression, or the right of employes to refrain from expressions supporting political causes they disagree with.

As to the "work assignment" or "working conditions" aspects of the case, I note first that there is no evidence that Celebre and Thomas ever discussed the possibility that enough employes might not volunteer to fill out the requested honor guard. The fact that Thomas first sought volunteers, however, does not establish that he lacked the right to assign firefighters to the function in question. Since in the present case the "politics" issue does not

1/ Sir Thomas More will do for an authority, as well as any.

fairly arise, the City's rights are exclusively determined by the collective bargaining agreement and those documents referenced within it. These, however, do not favor the Union's assertion that this was a function which could not properly be assigned to a firefighter.

First, participation in parades as such has never been in issue, so that the arguments here revolve solely around whether management could require employes to walk rather than ride. Further, the arguments concerning individual identification with a cause they might not agree with do not arise here, for reasons already expressed. And there is no assertion that any employe was physically incapable of performing the requested work, or that any hazard was involved. Rather, the Union seeks here to assert the primacy of the "Maintenance of Standards" clauses over the "Management Rights" language.

But as the work in question does not have, on this record, the political overtones the Union wishes to stress, this occasion amounts to a workaday job assignment with no special meaning. The Maintenance of Standards clauses referred to by the Union speak in terms of working conditions, rather than assignments of particular forms of work. The causes cited by the City, however, are specific to work assignments. In particular, Article 10, by identifying several forms of work which may not be required of firefighters, lends considerable weight to the City's contention that Article 6 and the associated rules of the Fire Department justify a broad reading of management's right to assign work otherwise. Furthermore, references to public relations occur in each of the job descriptions in the record, and the City can therefore fairly claim that a substantial past practice of engaging in public relations via participation in parades has here been modified only in detail. I therefore conclude that management was within its rights in requiring firefighters to walk rather than ride in the parade.

For the foregoing reasons, and based on the record as a whole, it is my decision

AWARD

1. That the City did not violate the collective bargaining agreement by assigning on-duty employes to march in the parade on May 19, 1991.
2. That the grievance is denied.

Dated at Madison, Wisconsin this 8th day of April, 1992.

By _____
Christopher Honeyman, Arbitrator