BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WISCONSIN RAPIDS FIREFIGHTERS, LOCAL 1054, I.A.F.F.	
and	Case 106 No. 47179
CITY OF WISCONSIN RAPIDS (FIRE DEPARTMENT)	MA-7192

Appearances:
Lawton & Cates, S.C., Attorneys at Law, by Mr. Richard V. Graylow, appearing on
Ruder, Ware & Michler, S.C., Attorneys at Law, by Mr. Dean R. Dietrich, appear

ARBITRATION AWARD

The City and Union above are parties to a 1991-92 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 involving the Mayor's directive regarding the use of City equipment and City facilities by employees.

The undersigned was appointed and held a hearing on June 3, 1992 in Wisconsin Rapids, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, and the parties completed their briefing schedule on July 31, 1992.

After considering the entire record, I issue the following decision and award.

STIPULATED ISSUES:

1. Whether the City violated the labor agreement when it issued a directive prohibiting employees from using City facilities and equipment for employee personal use and personal activities?

2. If so, what is the appropriate remedy?

FACTUAL BACKGROUND:

In January 1992, Mayor Carl G. Greenway learned that a Public Works employee was utilizing City property for personal use. Specifically, the employee was utilizing City dynamite and blasting caps to perform "blasting" for private businesses. Upon investigation, Mayor Greenway discovered that a number of other City employees were also utilizing City property for personal use, and performing personal activities on City time. These activities included employees cleaning, repairing and performing maintenance work (e.g. changing oil, spark plugs, etc.) on their personal vehicles on City time while using City tools and facilities.

After learning of the personal activities some employees were performing on City time, Mayor Greenway became concerned about the increased risks inherent in such activities in terms of additional worker's compensation and general liability claims. He also wanted a uniform City policy on the matter.

Consequently, on or about January 10, 1992, Mayor Greenway notified all aldermen of the possibility of legislative action:

> Enclosed is a list of policies that I have referred to the Legislative Committee for discussion. I feel there is a need to correct some past practices supposedly that have taken place in the past.
>
> I have been put on notice that the firefighters are prepared to lobby long and hard against item #3. I have a strong feeling that City policies should pertain to all departments and all individuals.
>
> If you have any questions about these policies, please call me or come in for discussion.
>
> . . .
>
> 3. No City buildings or facilities will be used by any City employees for cleaning or maintenance of their personal property, such as cars, trucks, etc.

On or about February 7, 1992, the City Personnel Director, James R. Jansky, advised Local 1075, AFSCME, AFL-CIO, and all Park Department, Street Department and Wastewater Treatment Plant employees of the following:

> Effective Monday, February 17, 1992, the City will enforce Article 20, Subsection N, of the Labor Agreement which reads:
>
> > "No employee shall be allowed to use the facilities of the City Garage, nor tools owned by the City, for personal business at any time."
>
> This includes all City buildings and all City equipment. It also prohibits employees from parking their own vehicles in City-owned buildings.

The above notice was also posted on all City Bulletin Boards.

On or about February 10, 1992, the Fire Chief was ordered by the Mayor to post the following notice at all City fire stations:

> DRAFT OF POLICIES
>
> 1. No equipment or supplies owned by the City of Wisconsin Rapids will leave the premises of City property unless used for City purposes.
>
> 2. Private contractors that are not City employees, in the case of emergency, may make a purchase cleared through the appropriate department head. The purchased merchandise should be replaced by the private contractor at their earliest convenience.
>
> 3. No City buildings or facilities will be used by any City employees for cleaning or maintenance of their personal property, such as cars, trucks, etc.

4. Hard hats, gloves, uniforms, safety glasses, etc., will be signed for. If these items are worn out or broken by accident, they will be replaced at the City's cost. If lost or damaged by neglect, the cost of replacement will be the employee's responsibility.

5. Materials, supplies or equipment drawn from the storeroom will be signed for.

The above five policies were unilateral decrees by the Mayor. The Fire Chief added the following comments at the bottom of the posting:

> This policy is not intended to curtail all activities. Common sense should prevail.
>
> Projects where injury is probable should not be allowed.
>
> Cars, trucks, boats, RV's may not be washed or worked on city property.
>
> Example -- Toy project, Wheelchairs, Walkers, crutches, paper work, fishing gear would be allowed. Also, if a employee's vehicle doesn't start, they may use a extension cord and battery charger to start it.
>
> If individuals have doubts, check with shift Officer and Assistant Chief, if doubt remains, ask Chief, if doubt still remains, we will check with city hall.

On or about February 17, 1992, the Union field a contractual grievance. The City denied it throughout the grievance process. At Step 2, the Fire Chief made the following comment:

> No action taken. Has not been a problem, however, not in my power to change.

On March 5, 1992, Personnel Director Jansky replied to the grievance stating:

> The City feels it has statutory rights to control activities which take place within its facilities. The City believes its directive to regulate the servicing/ repair of personal vehicles to include automobiles, trucks, recreational vehicles, boats and motors, etc., are within its rights. The same applies to use of City owned machinery, equipment, tools, etc.
>
> As discussed in the meeting of March 3, 1992, the policy statement issued does not apply to the recreational, hobby, and community service type projects and other personal activities carried on by firefighters during certain portions of their tour of duty.
>
> I am returning your grievance form without any action being taken.

> You may proceed to the next step of the grievance procedure if you do not agree with this reply.

The Union eventually appealed the grievance to arbitration.

Since at least March of 1968, the City's firefighters were able to do personal-type activities after the duty day ended. They routinely and habitually:

1. changed oil in their personal vehicles,

2. repaired chain saws,

3. washed storm windows and screens, and

4. washed cars, boats and recreational vehicles (RVs).

The aforesaid directive forbade these activities.

The applicable Fire Department work rules and regulations do not contain any reference to the aforesaid policy forbidding the City firefighters from performing personal type activities after the duty day. Said rules and regulations also provide:

> RULES AND REGULATIONS
> FOR THE
> FIRE DEPARTMENT
> OF THE
> CITY OF WISCONSIN RAPIDS, WISCONSIN
>
> . . .
>
> 3. When necessary, special instructions and general orders will be issued applying as required for the proper operation of this department.
>
> . . .

Prior Bargaining History

On October 19, 1987, Personnel Director Jansky forwarded to the Union the City's proposals for a successor 1988 collective bargaining agreement. In his letter forwarding those proposals, Jansky advised:

> The City wishes to have any and all oral, verbal or written agreements which the Union believes to exist and which they wish continued, incorporated into the new labor agreement.

This statement was in response to the Union's proposals which had already been received by the City. Included within those proposals was a new provision, entitled "Maintenance of Standards", which provided:

> ARTICLE XXXI - Maintenance of Standards
>
> Except where specifically provided for in this agreement or where subsequently modified as the result of negotiation, all conditions of employment relating

> to wages, hours of work and general working conditions, which have been continuous and are known and sanctioned by the Chief of the Fire Department, shall be maintained at not less than the highest minimum standards in effect at the time of the signing of this agreement.

The City opposed the Union's "Maintenance of Standards" proposal which the Union later dropped on December 16, 1987.

The Union also proposed unsuccessfully during these negotiations to limit the City's authority to issue rules, and policies.

The Union submitted during the negotiations for a 1988 agreement a separate proposal relating to work hours of firefighters. The Union felt that due to the physical and strenuous nature of the firefighters' job, firefighters required rest so that, following their normal workday, they could properly respond to an emergency. In accord with this rationale, the Union proposed that the duty day end at 4:30 for all regular, routine duties. The Union also proposed that maintenance and servicing of Department vehicles, equipment, and other property after 5:00 p.m. be limited to only those items necessary for emergency calls. After vigorous debate, the City agreed to the Union's proposal which was later incorporated into what is now Article 5, paragraph 6 of the collective bargaining agreement.

In negotiations for a successor to the 1988 agreement, the Union proposed another, but differently worded, "Maintenance of Standards" clause. That proposal provided:

> Prevailing Rights - All rights, privileges, and working conditions enjoyed by the employees at the present time which are not included in this Agreement shall remain in full force, unchanged and unaffected in any manner, during the term of this Agreement, unless changed by mutual consent.

In the 1989 negotiations, the Union also proposed a provision entitled "Stay Clause" which, if accepted by the City, would have granted the Union the right to grieve the reasonableness of a work rule.

As in the 1988 negotiations, the City opposed the Union's above 1989 proposals. Ultimately, the Union also dropped these proposals.

During negotiations for a 1992-1994 collective bargaining agreement, the City and Local 1075, AFSCME, AFL-CIO negotiated over the issue of City employees conducting personal business on City time. The parties reached the following agreement:

> N. No employees shall be allowed to use the facilities of the City Garage, nor tools owned by the City, for personal business at any time.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 1
PURPOSE OF AGREEMENT

> This AGREEMENT, made and entered into at Wisconsin Rapids, Wisconsin, effective January 1, 1991, according to the provisions of Section 111.70,

Wisconsin Statutes, by and between the City of Wisconsin Rapids, as municipal employer with the Fire Chief as its agent, hereinafter referred to as the "City", and Local 1054 of the International Association of Firefighters, AFL-CIO, hereinafter referred to as the "Union". This Agreement is designed to promote and maintain the harmonious relationship between the City and the Union, in order that more efficient and progressive public service may be rendered.

Now, therefore, the City and the Union have reached this Agreement.

. . .

ARTICLE 3
RESERVATION OF RIGHTS

The Union recognizes the right of the City and the Chief of the Fire Department to operate and manage its affairs in all respects. The Union recognizes the exclusive right of the Chief of the Fire Department to establish reasonable departmental rules and procedures.

The City and the Chief of the Fire Department have the exclusive right and authority to schedule overtime work, as required, in the manner most advantageous to the City, commensurate with the applicable ordinances or resolutions providing for overtime compensation, as outlined in this Agreement to Firefighters (covered by this Agreement).

It is understood by the parties that every duty connected within the Fire Department operations, enumerated in job descriptions, is not always specifically described; and it is intended that all such duties shall be performed by the employees.

The Chief of the Fire Department and the Police and Fire Commission reserve the right to discipline or discharge for cause. The City reserves the right to lay off personnel of the Department. The City and the Chief of the Fire Department shall determine work schedules consistent with this Agreement and establish methods and processes by which such work is performed. The City and the Chief of the Fire Department shall have the right to transfer employees within the Fire Department in a manner most advantageous to the City under the conditions outlined in Article 5.

The City, the Chief of the Fire Department, and the Police and Fire Commission shall retain all rights and authority to which, by law, they are entitled.

The City shall have exclusive authority to transfer any governmental operation now conducted by it to another unit of government, and such transfer shall not require any prior negotiations or the consent of any association, group organization, or labor organization whatsoever; furthermore, upon transfer,

all Agreements

are terminated, including this Agreement, as pertaining to personnel of the Department affected by the transfer.

The City shall have the authority to consolidate the operations of two or more departments within the Fire Department and to reorganize the operations with the Fire Department.

The Union recognizes that the City has statutory and charter rights and obligations in contracting matters relating to municipal operations. The right of contracting or subcontracting is vested in the City.

The Union pledges cooperation in the increasing of departmental efficiency and effectiveness. Any and all rights concerning management and direction of the Fire Department and the Firefighters shall be exclusively the right of the City and the Chief of the Fire Department, unless otherwise provided by the terms of this Agreement as permitted by law.

The powers, rights, and/or authority 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 purpose of this Agreement.

. . .

ARTICLE 5
HOURS (WORKDAYS)

. . .

The duty day for the purpose of training procedures and other regular routine duties shall terminate at or before 4:30 p.m. Maintenance and servicing of vehicles, equipment, and other Fire Department property after 5:00 p.m. shall be limited to items necessary for efficient response to alarms. Apparatus room floors shall be made reasonably safe and dry in all areas utilized by personnel in response to alarms. The balance of the tour duty shall be to provide service in matters of responding to emergency and non-emergency calls.

. . .

ARTICLE 21
RULES AND REGULATIONS

The Rules and Regulations of the Wisconsin Rapids Fire Department are hereby made a part of this Agreement.

ARTICLE 22
AMENDMENT PROVISION

This Agreement is subject to amendment, alteration, or addition only by subsequent written agreement between, and executed by, the City and the Union where mutually agreeable. The waiver of any breach, term, or condition of this Agreement by either party shall not constitute a precedent in the future enforcement of all its terms and conditions.

. . .

ARTICLE 24
NO OTHER AGREEMENT

The City agrees not to enter into any other Agreement, written or verbal, with Firefighters, individually or collectively, which in any way conflicts with the provisions of this Agreement.

. . .

RELEVANT STATUTORY PROVISION:

Section 62.09(8), Stats. Mayor.

(a) The mayor shall be the chief executive officer. He shall take care that city ordinances and state laws are observed and enforced and that all city officers and employes discharge their duties.

. . .

(d) Except in cities that have adopted s. 62.13 (6), the mayor shall be the head of the fire and police departments, and where there is no board of police and fire commissioners shall appoint all police officers, and the mayor may, in any city, appoint security personnel to serve without pay, and in case of riot or other emergency, appoint as many special police officers as may be necessary.

UNION'S POSITION:

The Union basically argues that the Mayor's directive decreeing an end to the firefighters' practice of cleaning, washing, changing oil etc. on personal vehicles, boats and RVs is unlawful.

In support thereof, the Union maintains the City violated Article 1 by its unilateral action. The Union argues said Article requires the City to meet with the Union prior to implementation of any decision affecting wages, hours and conditions of employment. (emphasis supplied) It also requires "mutuality" before implementation. The Union feels mutuality serves to foster the stated purpose of the Article: ". . . to promote and maintain the harmonious relationship between the City and the Union." The Union adds that the Mayor's unilateral decree destroyed the harmonious working relationship between the parties and rendered the word "mutuality" useless. The Union concludes that if the City was serious about maintaining a good working relationship it would have negotiated the change as it did with AFSCME Local Union No. 1075.

The Union argues that the City violated Article 3 because the Mayor, not the Fire Chief, issued the prohibition. In this regard, the Union points out that according to Article 3, first (1st) unnumbered paragraph, it is within the office of the Chief of the Fire Department, not the Mayor, where one finds the "exclusive" right to establish ". . . reasonable departmental rules and procedures." The Union also points out that the applicable work rules do not contain any reference, direct or indirect, to the subject at bar.

The Union maintains that Article 5 was violated. Article 5, Hours (Workday) sets forth the duty day. It indicates the duty day terminates at or before 4:30 p.m. It also provides that maintenance and servicing of vehicles, equipment and Fire Department property "after 5:00 p.m. shall be limited to items necessary for efficient response to alarms." The Union contends that the purpose behind placement of specific time limitations in said Article was to "lock-in" the concept of "free-time." It was during this "free-time" that firefighters were able to do personal-type activities like those in question. The Union maintains Article 5 preserved this practice by setting forth the duty day, and protecting firefighters' "free-time," after the duty day ended.

The Union adds that the City violated Article 22 by unilaterally changing the past practice. In particular, the Union feels the Mayor's directive caused a de facto addition to the Agreement in violation of the following contractual language:

> This Agreement is subject to amendment, alteration, or addition only by subsequent written agreement between, and executed by, the City and the Union where mutually agreeable . . . . (emphasis supplied)

The Union further feels the City's action violated the following language in Article 24:

> The City agrees not to enter into any other Agreement, written or verbal, with Firefighters, individually or collectively, which in any way conflicts with the provisions of this Agreement. (emphasis supplied)

In conclusion, the Union notes that, according to the City, the directive was issued for three (3) reasons: to reduce the risk of injury and to reduce the City's potential for liability; to provide uniform protection to all City employees; and to correct existing problems in other City departments such as

the possession of dynamite by a DPW employee. However, the Union feels none of these reasons apply to the Fire Department. There have been no firefighter injuries. There have been no other problems for which the City claims the firefighters are responsible. Uniform application to all City employees simply doesn't hold up either, because firefighters are unique.

In response to the City's arguments, the Union first contends that the City's reliance on Article 3 is misplaced. The Union acknowledges said Article allows the Fire Chief to establish ". . . reasonable department rules and procedures." However, as noted previously, the Union maintains the action at bar was taken by the Mayor, not the Chief. "It is the Chief not the City, who has the power to act."

Likewise, the Union rejects the City's argument that its action in restricting the tasks and activities of firefighters during their free time was reasonable. As noted above, the Union feels the City was unable to attribute any of its rationale to the Fire Department.

Finally, the Union maintains contrary to the City that the past practice in question is relevant, and protected by the Agreement as well as case law. The Union rejects the City's contention that the waiver language of Article 22 negates the past practice.

Based on all of the above, the Union requests that the grievance be sustained, and appropriate remedial orders be issued.

CITY'S POSITION:

In support of its contention that the Arbitrator should deny the grievance and dismiss the matter, the City emphasizes the following principal arguments:

1. The City's action was within its contractual rights and reasonable.

   a) Clear and unambiguous contract language is to be given effect. Past practice cannot be used to modify such language.

   b) The language of Article 3 is clear and unambiguous and, consequently, it should be given effect.

      (1) In accord with that language, the City and the Fire Chief are vested with the exclusive right to operate, direct, and manage the affairs of the Department, and to issue reasonable departmental rules and procedures. (emphasis supplied)

      (2) The only limitation in regard to this authority is if a matter is addressed otherwise "by the terms of this Agreement." The Agreement is, however, devoid of any provision which addresses, in any manner whatsoever, a firefighter's right to perform personal activities on City time and property. (emphasis

supplied)

(3) Pursuant to Article 22, only a subsequent written agreement, executed by the parties, can "amend" or "add to" the Agreement. (emphasis supplied) Consequently, the alleged past practice has no relevance whatsoever in regard to the City's contractual rights as set forth in Article 3.

(4) The City's action was also specifically in accord with the second provision of Article 3. That provision provides that the City is to retain "all rights and authority to which, by law, it is entitled. (emphasis supplied) The Mayor's authority in prohibiting personal activities on City work time and on City property, was in accord with his authority as "the head of the fire department" as set forth in Section 62.09(8), Stats.

c) The prohibition in regard to conducting personal activities on City time and property was reasonable.

(1) The prohibition did not extend to all activities. The only activities barred were the use of City buildings or facilities for cleaning, repairing or performing maintenance of personal vehicles. Other more minor activities, where personal injury was less likely, such as completing paperwork, cleaning fishing gear, etc., was not prohibited.

(2) In adopting the new rule, the City's primary concern was that the performance of the personal activities in question, could expose the City to additional worker's compensation claims and general liability claims. Besides these costs, the City could also suffer the loss of a trained and experienced firefighter due to the injury the firefighter incurred.

(3) The reasonableness of the rule is even more evident when one considers its minimal impact upon the firefighter i.e., taking into consideration meal periods and sleep time, time remaining for servicing

of personal vehicles is 3 to 4 hours. In this time period, firefighters are now precluded from servicing their personal vehicles, but are not precluded from conducting less injury prone personal activities as noted above. (emphasis supplied)

2. The Union's contentions are without merit and unsupported by the record.

a) The City's action did not constitute a violation of Article 5.

(1) Said provision provides, in essence, that with the exception of work necessary to permit efficient responses to emergencies, normal work duties are suspended after 5:00 p.m.

(2) The City did not assign firefighters to perform, after 5:00 p.m., maintenance or servicing of vehicles, or other Fire Department property.

(3) Said provision does not specify that following the end of the regular active duty day a firefighter is free to service or clean his personal vehicle.

(4) Further, City representatives were advised in negotiations that the purpose of the "normal work day hours" provision was to prohibit the assignment of normal work duties after 5:00 p.m. to ensure that firefighters were fully rested and, thus, were able to respond with greater efficiency to emergency calls. This has not changed.

b) No binding past practice exists which requires the City to permit firefighters to service their personal vehicles on City time, City property and with City equipment.

(1) To constitute a binding past practice, the practice must meet certain criteria; namely, it must be 1. unequivocal; 2. clearly enunciated and acted upon and 3. readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. (emphasis

supplied)

(2) Of the above elements, the most essential is "mutuality".

(3) The evidence demonstrates that the parties did not mutually agree to the practice in question, and that any such benefit was simply the result of mere happenstance.

c) The Agreement's "Zipper Clause" has nullified the alleged past practice.

(1) Under arbitral law, it is well recognized that zipper clauses are enforceable and, when agreed to, nullify any practices existing outside the Agreement.

(2) The Agreement herein does contain a zipper clause which expressly provides that the Agreement is subject to amendment or "addition" only by subsequent written agreement executed by the parties. (emphasis supplied)

(a) By agreeing to the provisions of Article 22, the parties meant to nullify any practice existing outside the Agreement.

(b) By making contract proposals to ensure that any past practices unmentioned in the Agreement would continue, the Union recognized that pursuant to the terms of Article 22 existing past practices were nullified.

(d) The Agreement in this dispute does not contain a "Maintenance of Standards" provision. In fact, the City specifically rejected the Union's proposals in this regard in the 1988 and 1989 contract negotiations.

3. In its reply brief, the City makes the following points.

a) Article 1, the preamble to the Agreement, does not contain any language with respect to "bargaining" or "mutuality"; and, therefore, the Union's arguments are without merit.

b) The Union's charge sounds more like a prohibited practice complaint than a

grievance arbitration proceeding. The Union is in the wrong forum for such a charge.

c) Contrary to the Union's allegations, the Fire Chief did issue the work rule in question, albeit pursuant to the Mayor's directive.

d) The Mayor is, by statute, the head of the Fire Department and, consequently, is vested with the authority to direct the Fire Chief to take actions.

e) The Union's contention that by issuing the disputed work rule the City has "caused a de facto addition" to the Agreement, in violation of Article 22 is without merit. To the contrary, the purpose of that provision is to bar the application of something existing outside of the Agreement, such as a past practice, to the terms of the Agreement. (emphasis supplied) The City's action, however, was in accord with its contractual rights as within the Agreement.

f) Article 24 is totally inapplicable to this dispute. The City has not entered into any type of "Agreement" with the firefighters in regard to the work rule.

DISCUSSION:

The parties stipulated that there are no procedural issues, and that the instant dispute is properly before the Arbitrator for a decision on its merits.

At issue is whether the City violated the labor agreement when it issued a directive prohibiting employees from using City facilities and equipment for employee personal use and personal activities.

Assuming arguendo that there is a past practice of firefighters cleaning, washing, changing oil etc. on personal vehicles, boats and RVs after the duty day terminates, the Union's case still must fail. In this regard, the Arbitrator notes that it is often held that clear and unambiguous contract language may not be modified by a practice. There is no dispute that Article 3 clearly provides "the Union recognizes the exclusive right of the Chief of the Fire Department to establish reasonable departmental rules and procedures." And contrary to the Union's assertion, the record supports a finding that the Fire Chief did issue the work rule in question, albeit pursuant to the Mayor's directive. In particular, the record indicates that the Fire Chief posted the rule as directed by the Mayor, and added his own comments to the bottom of the directive. As pointed out by the City, the Mayor's authority in prohibiting personal activities on City work time and on City property and in ordering the Fire Chief to post the notice regarding same is in accord with his authority as "the head of the fire department" as set forth in Section 62.09(8), Stats.

A question remains as to whether the directive is reasonable.

The Union argues that none of the reasons given for the rule apply to the

Fire Department. The Union claims that there have been no problems associated with firefighters performing these personal tasks, and that uniform application of the rule is not necessary due to the unique status of firefighters.

The Arbitrator agrees with the Union that firefighters perform a unique and important role for the City in the area of public safety. However, the public policy considerations listed by the City for promulgation of the new rule apply to firefighters as well. The City could suffer additional worker's compensation claims and general liability claims if firefighters were injured while engaged in the type of personal activities in question. Besides these costs, the City could also suffer the loss of a trained and experienced firefighter due to the injury the firefighter incurred. In a time of tight municipal budgets with a corresponding need for fiscal responsibility these are not minor concerns. Likewise, the Arbitrator finds no fault with the City's desire to have a uniform rule applying to all City employees.

The Arbitrator also notes that the prohibition in regard to conducting personal activities on City property does not extend to all activities. It is narrowly drawn to bar only the use of City buildings or facilities for cleaning, repairing or performing maintenance of personal vehicles. Such a prohibition is consistent with the stated purpose of the rule; namely, to limit liability claims against the City and possible loss of (experienced) firefighter services. Other more minor activities, where personal injury is less likely, such as completing paperwork or cleaning fishing gear etc., are not prohibited. Based on the above, the Arbitrator finds the prohibition is reasonably drawn to accomplish the public policy goals intended.

It is true, as the Union points out, that the previously published work rules do not contain any reference, direct or indirect, to the subject at bar. However, said rules do provide "when necessary, special instructions and general orders will be issued applying as required for the proper operation of this department." The City's directive falls in the category of such special instruction or general order.

The Union argues that the City violated Article 1 by its unilateral action. However, Article 1 is simply the preamble to the parties' Agreement. It does not contain any language requiring the City to meet with the Union prior to implementation of any decision affecting wages, hours and working conditions. It also does not contain any language imposing a duty to bargain. While there is no requirement in Article 1 of "mutuality" before implementation of a change in working conditions, the Arbitrator does agree with the Union's contention that "mutuality" serves to foster the stated purpose of the Article: " . . . to promote and maintain the harmonious relationship between the City and the Union." The Arbitrator also finds no basis in the record to disagree with the Union's position that the Mayor's unilateral action hurt the harmonious relationship between the parties or that the relationship might have been strengthened if the City had negotiated the change with the Union as it did with AFSCME Local Union No. 1075. However, nothing in Article 1 requires this.

Nor is there any persuasive evidence that the City violated Article 5. The Union is correct when it states that Article 5 preserves the concept of "free-time" for firefighters. In this regard, Article 5 specifically provides that the "duty day for the purpose of training procedures and other regular, routine duties shall terminate at or before 4:30 p.m." It also provides that maintenance and servicing of vehicles etc. after 5:00 p.m. "shall be limited to items necessary for efficient response to alarms." Said Article further provides that "The balance of the tour of duty shall be to provide service in matters of responding to emergency and non-emergency calls." However, contrary to the Union's assertion, nowhere in Article 5 does it specifically protect the

practice in question. The record indicates the purpose behind inserting language into Article 5 was to prohibit the assignment of normal work duties after 5:00 p.m. to insure that firefighters were fully rested and, thus, better able to respond to emergency calls. The City made no additional assignment of work during the time in question. Based on the foregoing, the Arbitrator rejects this claim of the Union.

Likewise, the Arbitrator rejects the Union's contention that the City's action caused a de facto addition to the collective bargaining agreement in violation of Article 22. There is nothing in the Agreement which preserves the disputed practice. Prohibiting it then does not add to, subtract from or in any way change the Agreement.

The Arbitrator points out that in the past the Union has made several contract proposals to insure that any past practices unmentioned in the Agreement would continue. The City has never agreed to any of these proposals.

The Arbitrator also notes that many arbitrators hold that "zipper clauses" are enforceable and, when agreed to, nullify any practice existing outside the Agreement. The Agreement herein does contain a strong zipper clause (Article 22) which expressly provides that the Agreement is subject to amendment, alteration or addition only by subsequent written agreement executed by the parties where mutually agreeable. (emphasis supplied) Based on this strong contract language alone, the Union's reliance on past practice must fail.

Finally, the Union believes the City's directive violated Article 24. However, the City has not entered into any other Agreement, written or verbal, with firefighters which conflicts with the provisions of the parties' labor agreement. According to the Union's own evidence, the City unilaterally issued the prohibition in dispute. Therefore, the Arbitrator also rejects this claim of the Union.

The Union cites a number of court cases, and arbitration awards in support of its position. However, they are distinguishable from the instant case. In Madison v. AFSCME AFL-CIO, Local 60, 124 Wis.2d 298 (1985), Local 60 appealed an order vacating an arbitration award. The circuit court vacated the award because it violated public policy and infringed statutorily and contractually reserved management rights.

The Court reversed the circuit court. Citing Oshkosh v. Union Local 796-A, 99 Wis.2d 95,106 n. 8, 299 N.W. 2d 210, 216 (1980) for the principle that where a contract term can rationally be viewed as ambiguous, an arbitrator does not alter or modify that contract by using the common law of the plant rather than the ambiguous term to resolve the labor dispute, the Court first found that the arbitrator had found the contract silent regarding revision of schedules to avoid the expense of holiday pay. The Court then concluded that the arbitrator did not alter or modify the contract by drawing on past practice.

The contract herein is not silent or ambiguous. The City clearly has the exclusive right to establish reasonable departmental rules and procedures pursuant to Article 3. It also has the exclusive right to operate, manage and direct the affairs of the Fire Department. The only limitation in regard to this authority is if a matter is addressed otherwise "by the terms of this Agreement." The Union is unable to point to any other provision of the Agreement which protects and preserves the disputed practice. To the contrary, the Union tried several times unsuccessfully to bargain a "maintenance of standards" provision.

Similarly, the Arbitrator rejects the Union's reliance on several other cases. In City of Pasco (Fire Department), 88-2 ARB at 8474 (1988), past practice was used to prohibit a fire chief from changing the number of off-duty firefighters at any given time. However, the contract in City of Pasco (Fire Department, unlike the instant case, had a strong prevailing rights provision. That provision preserved certain unwritten rights which formed the basis for the arbitrator's ruling. In Dearborn Country Club, 1989-90 CCH NLRB paragraph 16, 133 (1990) the Board affirmed, inter alia, the administrative law judge's finding that the Respondent violated Section 8 (a)(1) and (5) of the Act by unilaterally discontinuing its established extra contractual past practice of first offering to its full-time food and beverage servers the opportunity to work overtime, and only upon their refusal offering or assigning to other employees any such available work. This is a refusal to bargain case before the National Labor Relations Board and has no applicable arbitral precedent in the instant case. In R.L. Polk & Company, 90-2 ARB paragraph 8359 (1990), past practice was used to compel the maintenance of employer health contributions to employees who were on approved leaves of absence. The arbitrator upheld the past practice despite clear contract language which provided for a different result. However, there is no "zipper clause" referenced in the Polk decision nor any evidence of bargaining history wherein the Union unsuccessfully attempted to preserve unwritten practices. Finally, in City of Marshfield (Fire Department), Case 102, No. 45690, MA-6705 (Schiavoni, 1991) the arbitrator relied on past practice to preserve the minimum number of employees available for vacation picks. However, said arbitrator looked to past practice and bargaining history to interpret unclear contract language. (emphasis added). Here, the contract language is clear and supports the City's position.

Based on all of the above, and foregoing, the record as a whole and the arguments of the parties, and absent any persuasive evidence to the contrary, the Arbitrator finds that the answer to the stipulated issue is NO, the City did not violate the labor agreement when it issued a directive prohibiting employees from using City facilities and equipment for employees personal use and personal activities. Therefore, it is my

AWARD

That the grievance is hereby denied and the matter is dismissed.

Dated at Madison, Wisconsin this 23rd day of September, 1992.

By _____
Dennis P. McGilligan, Arbitrator