BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between LOCAL 415, IAFF, WAUSAU FIREFIGHTERS ASSOCIATION, AFL-CIO and CITY OF WAUSAU	Case 70 No. 47913 MA-7432

Appearances:

Ms. Therese M. Freiberg, Assistant City Attorney, appearing on behalf of the City of Wausau.

Mr. John Celebre, Staff Representative, International Association of Firefighters, appearing on behalf of the Union.

ARBITRATION AWARD

On August 6, 1992, Local 415, IAFF, Wausau Firefighters Association, AFL-CIO, hereinafter the Association, with the concurrence of the City of Wausau, hereinafter City or Employer, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to act as the impartial arbitrator involving a dispute concerning the appropriate rate of pay for an acting assignment to Captain in the Fire Department. Both parties agree that the grievance is appropriately before the undersigned, thus waiving all of the contract provisions of Article 8, Grievance Procedure, respecting the selection of an arbitrator to hear the dispute. Hearing in the matter was held on December 2, 1992, at which time the parties were afforded the opportunity to adduce testimony and introduce documentary evidence. No stenographic transcript of the proceeding was taken, and the parties concluded filing post-hearing briefs by January 14, 1993.

ISSUE:

> Did the City violate Article 12, Section D, Acting Pay, and/or Article 30, Past Practices, when it did not pay the grievant, Lieutenant Rosenow, the Step D rate for Captain when he served as an "acting" Captain on April 5, 1992?

BACKGROUND:

On April 5, 1992, Lieutenant Rosenow filled in for an absent Captain, and was considered to be working as an "acting" Captain for that shift. This was a common occurrence in the Fire Department, and in fact, in 1992, Rosenow worked on February 7, March 6, April 16, May 1, May 29 and September 18 in the capacity of an "acting" Captain. The grievance was filed on April 23, after the grievant received his paycheck dated April 16, 1992, and discovered that the difference between his regular rate of pay and what he was paid when he was functioning as the "acting" Captain on April 5, 1992, was less than he had previously received. Rosenow came to this conclusion because as recently as March 6, 1992, when he functioned as an "acting" Captain, he was paid a higher differential.

However, between March 6 and April 5, it had come to the attention of the City's Personnel Director, Hackett, that Lieutenants acting in the capacity of Captain had been paid at the top Captains' pay (Step D of Pay Grade 39) in error. This came to Hackett's attention when a recently promoted Captain came to her and inquired as to why he was being paid less than a Lieutenant who acted as Captain in his absence. Hackett investigated and confirmed that the employe was correct in asserting people acting as Captain in his absence were being paid more than he was receiving. She asked her assistant Koss to check with the Payroll Specialist to determine how this could occur. Hackett's assistant, who had previously worked in the Payroll Department as a Payroll Specialist told her that represented employes functioning in an "acting" capacity in the absence of a non-represented employe were paid the next highest step above their pay rate that was at least 5 percent higher, but not necessarily the highest rate for the non-represented employe. What Koss discovered in her investigation was that the then-current Payroll Specialist, Schmidt, who had been functioning in the position since June of 1989, on the first occasion she confronted the issue of "acting" pay in the Fire Department, looked at the previous records, determined that at the time when the Captains were in the bargaining unit and the Assistant Chief was not in the unit, Captains were paid at the Step D rate of the Assistant Chief pay schedule when filling in for the Assistant Chief. Therefore, she concluded that represented employes serving in an "acting," non-represented position were to be paid at the top step of the non-represented pay grade for that position.

Prior to January, 1990, in the Fire Department the Assistant Chief was not a bargaining unit employe whereas Lieutenants and Captains were in the bargaining unit represented by the IAFF. Then there was no problem with respect to the rate of pay received by Lieutenants temporarily assigned to work as a Captain or, for that matter, Firefighters functioning as Lieutenants. Any represented (bargaining unit) employe assigned to work in a higher bargaining unit classification, e.g. Lieutenant to Captain were paid the single contractual rate for the higher classification. However, with respect to the non-represented employes, the City had an established pay system which included pay grades and step rates. There were some 55 pay grades with Steps A, B, C and D for each grade.

Ila Koss was the Finance Department Payroll Specialist from 1974 to 1989. She testified

that prior to 1983, Captains acting as Assistant Chief were paid Step A of the Assistant Chief pay grade. Then sometime prior to 1983, the Captain's contractual rate was higher than Step A so they paid them at the Assistant Chief Step B rate which was a small premium above their contractual rate. While this was contrary to Section 11 of the City handbook for non-represented employes that provided "employees temporarily appointed to positions of a higher classification shall be paid at Step A of the higher pay grade for the duration of the appointment," it was necessary because the Captain's contractual pay rate was higher than Step A for the Assistant Chief. The issue of the appropriate "acting" pay for Captains as Assistant Chief was raised by the Personnel Director to the City's Personnel and Labor Relations Committee in January of 1983. The Personnel Director asked:

A. Do you wish to change the current City non-Union "acting pay" practice of picking the lowest rate in the Assistant Chief grade which offers a slight addition? If so,

B. Do you wish to tie acting pay into the '105 percent' practice?

C. Do you wish to tie acting pay to the maximum rate? (Step D)

D. Do you wish to develop another alternative?"

Although it is not clear from the memo what final action was taken by the Committee because a notation on the exhibit indicates that on January 13, 1983, the PLRC tabled the question, the uncontradicted testimony of Koss is that from at least 1983 until January of 1990, represented employes, when acting in the capacity of Assistant Chief, were paid at the pay grade step (either A, B, C or D) which was closest to their contractual rate, but at least 5 percent higher. In 1988, she testified that was Step C.

In or about 1989 and 1990, the City reorganized the Fire Department, made the Captains shift commanders, gave them additional responsibilities, and as a consequence they were taken out of the bargaining unit. At the time, their salaries were increased significantly such that the difference between the Lieutenants' rate of pay and Step D of the pay grade that the Captains were placed in, which was Pay Grade 38, was about 20 percent. Notwithstanding the substantial difference in pay, the Lieutenants were paid at the Step D rate of Pay Grade 38, when acting as Captains from 1990 until April 4, 1992.

On April 2, 1992, Hackett advised the Union that she had become aware that Lieutenants functioning as an Acting Captain had been compensated at the full Captain's pay, Step D of Pay Grade 38 in 1990 and 1991, and Pay Grade 39 in 1992. Consequently, she advised the Union that effective April 4, 1992, payment for acting Captain assignments would be made as follows: Lieutenants would receive Step B in Pay Grade 39, MPOs would receive Step B in Pay Grade 39, and Firefighters would receive Step A of Pay Grade 39, whenever they were functioning as an Acting Captain. It was that change in policy which caused Rosenow to grieve.

PERTINENT CONTRACT LANGUAGE:

Article 12 - SALARIES

. . .

D. Acting Pay: When assigned to work in a higher classification for four (4) hours accumulative or more per shift, the member of the bargaining unit shall receive the compensation for that classification for each full hour so assigned. For the position of acting Lieutenant, the M.P.O.(s) at their respective station where the opening occurs will act if they are on the qualified acting roster. If the M.P.O. is not on the roster or is not present then the acting assignment will be filled by seniority from the qualified acting roster of that crew. For the position of acting M.P.O., the senior Firefighter at their respective station where the opening occurs will act. If that Firefighter is not present, the assignment will be filled by seniority from the crews (sic) roster.

To become eligible for the qualified Lieutenant acting roster, a minimum composite score of 125 must be attained. This score is determined through a written test, performance evaluations, and seniority points.

* Written test - _____% x .45 = _____

* Two (2) years average personnel report - _____ x .45 = _____

* Seniority points - assigned from 1 to 10

Should a person on the qualified Lieutenant acting roster refuse to act, that person is removed from the roster until a requalifying test is offered.

. . .

Article 30 - PAST PRACTICES

The City will not unilaterally change any benefit, practice or condition of employment which is mandatorily bargainable.

PARTIES POSITIONS:

The Union contends that ever since the Captains were taken out of the bargaining unit in January of 1990, Lieutenants who were assigned responsibilities to act as Captains were paid at the top step rate for Captains, and that this practice overrides any claim by the City that Lieutenants

were paid at the top rate for Captains in error. The Union believes that the City might have been able to make a persuasive case for error had they raised the issue shortly after the Captains were removed from the unit; however, they did not raise the issue until April of 1991, and thus there exists a longstanding practice of paying "Acting" Captains at the top step rate for Captain.

Furthermore, the Union relied upon this practice when it entered into negotiations for the 1991-92 labor agreement. Union President Sanft never expressed concern during the negotiations over the rate at which acting pay was paid to "Acting" Captains, and thus the matter was never discussed at the bargaining table. The Union had no reason to believe that acting pay was going to come into dispute during the term of the 1991-92 contract, nor did they try to conceal a practice they knew to be in error on the part of the City. They, like the City, intended to continue to treat acting pay as it had been in the past, and thus there was no proposal to modify the acting pay language in the contract by either party.

Now, the City is trying to unilaterally change the rate of acting pay without bargaining that change with the Union. The Union believes that if there was an error in the initial compensation rate for "Acting Captains," it should have been discovered in 1990 and corrected then. But, after the parties signed their current labor agreement, the payment for "Acting" Captains at the top step rate for Captain became a past practice which the Union had a right to rely upon. A change in the rate of pay for "Acting Captain violates that contract.

The Union also notes that the non-represented handbook indicates that employes temporarily assigned to positions of a higher classification shall be paid at Step A of the higher pay grade for the duration of the appointment, and that this policy is contrary to what the Employer now claims is the correct policy, i.e. employes should be paid at the step rate of the non-represented position which grants them at least a 5 percent acting pay premium. The Union believes, therefore, that the past practice controls because it is the acting pay provision of the labor agreement which dictates how bargaining unit employes are to be paid when assigned to a higher classification. The Union, however, acknowledges that this provision of the contract does not specify any specific step at which employes working in a higher classification should be paid; but, contends that the Article 30, Past Practices clause, takes care of the problem inasmuch as the City had a practice of paying at the top step of the pay grade. Thus, any unilateral change in this past practice is a violation of Article 30 of the collective bargaining agreement.

Finally, the Union would also tie the determination of the rate of pay to the extent of additional duties and responsibilities associated with the acting assignment, whereas the City's method of calculating pay only looks to how much the employe serving in an acting capacity is normally paid, and does not give any consideration to the additional responsibilities assumed in the acting assignment. The Union concludes the top step is appropriate when this consideration is factored into the decision of what rate to pay.

The City argues that the compensation and classification plan for non-represented employes provides for Salary Steps A through D at each pay grade. The underlying theory is that each step

is tied to time served in the position with Step D being the highest rate. Under the Union's theory of the case, an employe in the bargaining unit who is temporarily assigned to function in a non-represented position, even if only for a few hours, is to be paid the Step D or highest rate of pay for that non-represented position. Under that theory, it could mean that, as in this case, an employe newly promoted to the position of Captain could be paid less than an employe who is only working on a temporary basis and is permanently classified at a lower level of responsibility. Consequently, the City believes that the Union's argument is without merit because it would require the City to pay an employe temporarily serving in a higher classified position more than the person who regularly performs the duties of that position.

Further, the City does not agree that it has an established practice of paying Union employes at Step D of the non-union pay grade for hours the Union employes are assigned to work in a supervisory capacity. Article 12 D. of the collective bargaining agreement merely provides that when Union members are assigned to work in a higher classification for more than four hours within a shift they are to be paid the rate of pay for that position during the time that they serve in that capacity. Also, the Article speaks specifically of Lieutenants and MPOs, but does not explicitly address the issue of Union employes acting in non-union positions, nor does it require any particular step of the pay grade be used in paying the Union employe. Because the contract is silent on this point, the City agrees that it is appropriate to look at the conduct of the parties in similar, previous situations. The City believes that the evidence establishes that in the past while Koss was the Payroll Specialist Union employes acting in supervisory positions were paid at least 5 percent more than their Union rate of pay, and thus would be put at the appropriate step of the pay grade for the position in which they were functioning on a temporary basis that guaranteed them at least a 5 percent increase over their permanent position pay rate. Over the years, that could vary from Step A to Step D, depending upon the position in which the employe was filling in and the rate of pay of the Union position currently held.

In 1988, Captains were paid at Step C of the Assistant Chief pay rate when they functioned in an acting capacity. However, the Union's claim to payment of Step D for Lieutenants functioning in the Captain position is not warranted by the prior practice. In this case the Payroll Clerk, without checking as to why Step D had previously been used when a Union employe was serving as an Acting Assistant Chief, on her own, assumed that the Lieutenant should be paid the Step D rate for Captains when they were functioning as an acting Captain. Clearly this was not authorized by the Personnel Department nor was it consistent with the City's practice from at least 1983, of paying the employe at that pay step of the non-represented employes' pay grade that granted the Union employe at least a 5 percent increase over and above their contractual rate. The payment of the Step D rate to Union employes serving in non-represented positions on a temporary basis since Schmidt has been the Payroll Specialist cannot be said to be a binding practice, but rather a payroll mistake. The City notes that Arbitrator Mawhinney in Crown Zellerbach Gaylord, 76 LA 603 stated "a mistake by a payroll clerk does not in and of itself constitute a binding past practice."

For these reasons the City believes that the Union has not established that any provision of

the collective bargaining agreement was violated when it paid the grievant the Captain Step B rate when he was acting as a Captain. The real past practice does not substantiate such a conclusion, and the only basis for the Union's case is premised upon an error by the Payroll Specialist.

DISCUSSION:

The basic facts in this case are not in dispute. From at least 1983, through 1989, when bargaining unit employes were asked to fill in or "act" for a non-bargaining unit employe in his/her absence, the City paid the employes in an "acting" assignment at the appropriate step of the non-represented employe pay range that granted the Union employe at least a 5 percent increase in pay over his/her contractual rate.

However, from at least 1990, subsequent to the removal of Captains from the bargaining unit, the City paid Lieutenants on acting assignment for Captain the Step D (top) rate for Captains, significantly more than 5 percent above the then-contractual Lieutenant pay rate. This change was unknowingly precipitated by Payroll Specialist Schmidt when she assumed that because Captains had been paid at the Step D rate of Assistant Chiefs when acting in that capacity, the same result should follow when Lieutenants filled in for Captains. The Union believes that by so treating Lieutenants filling in for Captains the City has created a binding practice that cannot be unilaterally terminated as was done by the City in April of 1992.

Thus, the Union's case clearly is footed on the claim that a binding past practice developed. The existence or non-existence of a binding past practice is determinative of this dispute for two reasons. First, the contract is silent with respect to how bargaining unit employes are to be paid when temporarily assigned to non-bargaining unit positions. While Article 12, Step D deals with the matter of acting pay, the language expressly deals only with acting pay when a bargaining unit employe fills in for Lieutenants or MPOs, or other non-bargaining unit positions. Second, the contract contains a past practices clause which prohibits the City from unilaterally changing any practice which is mandatorily bargainable. In this case, the alleged practice pertains to "acting pay", or in other words, wages. The Wisconsin Employment Relations Commission has found wages of municipal employes to be a mandatory subject of bargaining under Sec. 111.70(3)(a)4, Wis. Stats. 1/

When does a custom or practice become binding on the parties just as any written provision of their collective bargaining agreement? Over the years, there have been hundreds of grievance arbitration awards dealing with this subject. Analysis of these cases reveals that many arbitrators have concluded that in the absence of clear contract language a past practice to, become

1/ Village of Shorewood, Dec. No. 11716 (3/73); Racine Unified School District, Dec. No. 20652-A, 20653-A (1/84).

binding on the party must be unequivocal, clearly enunciated and acted upon, readily ascertainable over a reasonable period of time, and mutually concurred in.

The undersigned's review of the facts of this case have led him to conclude that all of the aforesaid standards are not sufficiently present in this case to conclude that a binding past practice exists with respect to Lieutenants receiving acting pay at the Captains' Step D rate, when they fill in for Captains.

It is clear from the testimony and written documentation that prior to 1990, bargaining unit employes on acting assignment to non-bargaining unit positions did not always receive the Step D or top rate of the non-bargaining unit position. Rather, they were paid at the lowest step which resulted in them being paid at least 5 percent more than their contractual rate. Depending on the classification held by the bargaining unit employe and the non-bargaining unit position he was assigned to, he might be paid at Step A, B, C or D. He/she went to the lowest step that generated at least a 5 percent premium over their contract rate. Then in 1990, when Lieutenants first temporarily filled in for Captains who were then out of the bargaining unit, Schmidt, without consulting with Personnel or anyone in management started paying Lieutenants at the Step D rate. That continued until a Captain complained, the Personnel Department investigated, and prospectively reduced the "acting pay."

This shows that the appropriate rate could not be readily ascertained inasmuch as there were several different step rates paid over time. As the Union President's testimony reveals, even he was not aware of the rate being paid at that point in time.

But, the most significant factor that is not present with regard to the alleged practice existing since 1990, is mutuality. The evidence shows that neither the City Personnel Department nor any other administrators were aware or agreed that the Lieutenants should receive the top step for Captains when filling in for them. Absent the requisite mutuality, there cannot be a finding adverse to the City's interest that the practice is binding. Arbitrator Dworkin similarly found in Wooster Sportswear Co., 45 LA 1015 (1965) that where the company paid an additional 5 cents per piece rate in error,

> In the judgment of the arbitrator, where an error in good faith appears, it does not serve to characterize the resulting rate as the existing rate for such work. The foregoing observations may not apply in a situation where the company, after becoming aware of an error in the wage rate continues thereafter to continue (sic) to pay such rate. Management is charged with the responsibility of promptly correcting an error when it is disclosed. . . . However, this circumstance is not involved in this case, inasmuch as management acted promptly in correcting the error. Errors are unavoidable, and where such occur, neither side should be

permitted to claim the benefit resulting from inadvertence and perpetuate the advantage gained thereby.

In the instant case the evidence establishes that the City as soon as it became aware of the payments to Lieutenants at the Step D rate sent a memo to the Union advising that it had uncovered the error and was prospectively changing it to the correct rate. Therefore, it is clear that management acted promptly. Also, under these circumstances it cannot be said that the City acquiesced in paying the Lieutenants, at the Step D rate.

The Union also argues that it relied on the City's history since 1990 of paying at the Step D rate, and therefore did not make any proposals regarding "acting" pay provisions in contract negotiations for the 1991-92 agreement. Had it known of the City's position, it would have made proposals to change the language. Now the City has unilaterally changed the "acting pay" practice in violation of Article 12 because it did not bargain with it over the change from paying at the Step D rate. While the Union is correct in concluding that the City cannot unilaterally modify a binding past practice during the contract term as long as Article 30 remains in force, that conclusion only holds with respect to binding practices. As I discussed above, in this instance the City's practice of paying the Step D rate to Lieutenants was not binding on the City. Consequently, the City was not contractually obligated to bargain with the Union over its decision to return to its earlier policy of calculating "acting pay" for unit employes functioning in non-unit positions such that the unit employe would be paid at the non-bargaining unit position pay grade step closest to that amount that would result in a pay increase of at least 5 percent.

The Union's claim that it would tie the determination of the "acting pay" rate to the duties and responsibilities associated with the acting assignment would certainly be a legitimate consideration when and if they were to bargain over the issue. However, it is not appropriately a consideration for the Arbitrator in this proceeding to enforce the alleged binding past practice.

Based upon the foregoing and the record as a whole, the undersigned enters the following

AWARD

The City did not violate either Article 12 or 30 when it failed to pay the grievant, Lieutenant Rosenow, the Step D rate for Captain when he served as an "acting" Captain on April 5, 1992. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 6th day of May, 1993.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator