BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 875	:	Case 63 No. 48693 MA-7680
and	:	
CITY OF ASHLAND	:	

Appearances:

Mr. Thomas K. Harrison, 1604 Ninth Avenue, West, Ashland, Wisconsin 54806, appearing on behalf of International Association of Fire Fighters, Local 875.

Mr. Scott Clark, Clark & Clark, 214 West Main Street, Ashland, Wisconsin 54806, appearing on behalf of the City.

ARBITRATION AWARD

International Association of Fire Fighters Local 875 ("the Association") and the City of Ashland ("the City") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Association made a request, in which the City concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance concerning the payment of overtime for training activities. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Ashland, Wisconsin, on April 29, 1993. The parties waived their right to file written briefs.

ISSUE:

The parties stipulated the issue to be:

> "Did the employer violate Section 25.03 of the collective bargaining agreement when it denied Capt. David Anderson overtime pay for training activities and meetings between October 23, 1992 and December 23, 1992?"
>
> If so, what it is the remedy?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE IV - WORK SCHEDULE

4.01 The basic work week for the following

categories of employees shall consist of

fifty-six (56) hour average work week, to be worked in twenty-four (24) hour duty tours separated by twenty-four (24) hours off-duty in a twelve (12) day cycle.

. . .

4.04 Off-duty fire personnel will be requested to call in and receive permission to leave city limits.

4.05 The work schedule shall be posted for one (1) month in advance. If changes in the posted schedule are necessary all involved personal (sic) must be notified as far in advance as possible, but in no event less then (sic) 24 hours in advance except in case of sickness or emergency. Changes in station on the same shift do not require 24 hour notification.

. . .

ARTICLE XV - DUTY INCURRED DISABILITY PAY

15.01 An employee, while performing within the scope of his employment as provided in Chapter 102 of the Wisconsin Statutes (Workmen's Compensation Act), shall receive the difference between his prevailing straight time salary and his Workmen's Compensation benefits described herein as "Injury Pay" for the period of time he may be temporarily totally or temporarily partially disabled because of said injury, not to exceed thirty (30) weeks from date of injury.

15.02 Special cases may be extended by mutual agreement between the Union and the Employer.

15.03 If after thirty (30) weeks an employee is still unable to return to work but continues to receive Workmen's Compensation payments, he may, at his option, utilize his accrued sick leave to the amount necessary to receive his full salary.

. . .

ARTICLE XXV - E.M.T. AND AMBULANCE PAY

25.01 Any member of the Union who is or becomes

an EMT-D shall receive one dollar ($1.00) per each shift worked. Any member of the Union who is or becomes an EMT-I shall receive one dollar ($1.00) per each shift worked.

25.02 The two (2) men assigned on the ambulance shall each receive two dollars and fifty cents ($2.50) per shift. Effective 1 January 1992 the two (2) men assigned to the ambulance shall each receive three dollars ($3.00) per shift.

25.03 Overtime pay shall be authorized for all off-duty training required for Certification, Re-certification, and continuing education for EMT, EMT-D, EMT-I, or any other training as authorized by the Chief.

BACKGROUND:

On July 26, 1992, Captain David Anderson, the grievant, was injured in the line of duty, causing him to remain on duty-incurred disability until January 1, 1993. 1/ Pursuant to City policy, Anderson was initially paid at his overtime rate for attendance at EMT classes and Officer's Meetings. The City changed this policy effective September 18, and thereafter denied Anderson overtime payment for attendance at sessions on October 23, 27, 29; November 4, November 30; December 7, 8 and 23. Had he not been on duty-incurred disability, Anderson would have been scheduled to work October 27, November 30 and December 7. During his period of disability, Anderson was kept whole as pertains to salary and fringe benefits, including an ability to cash-out vacation time, notwithstanding that the collective bargaining agreement provides for neither cash-out nor carry-over of vacation.

POSITIONS OF THE PARTIES:

The Association asserts and avers that collective bargaining agreement clearly requires, and the prior City practice clearly acknowledges, payment, at overtime rate, for attendance at EMT classes and officer's meetings. The City asserts and avers that the grievant has already been made whole through the contractual supplemental payment provision; that 15.5 hours of sessions which Anderson attended were on days he would have been on-duty, but for his injury; and that the other 20 hours constituted light duty as implicitly assigned by management.

1/ Unless specified otherwise, all date references hereafter are to 1992.

DISCUSSION:

There is little in dispute in this grievance. The City acknowledges that, prior to Fall, 1992, it followed a policy under which bargaining unit members who were on duty-incurred disability were paid overtime for attendance at EMT training and other authorized sessions. In September, however, the City changed its policy, and denied overtime to the grievant.

The grievant was, however, kept whole as pertains to his basic wage, by virtue of the contractual provisions for the City to pay the difference between the Worker's Compensation benefit and the prevailing straight time salary. In fact, the City made the grievant better than the contractually required whole, by allowing a cash-out of vacation benefits, notwithstanding that such payment was not authorized by the contract.

I do not find persuasive the City's argument that these training and other sessions constituted a change in the grievant's schedule such as to make them on-duty hours. The collective bargaining agreement, Article IV, provides explicit standards for the establishment and alteration of the work schedule. The City has not shown that it complied with these provisions, as pertains to the hours on dates other than October 27, November 30 and December 7.

The language of Section 25.03 states that overtime pay shall be authorized "for all off-duty training required" for certain purposes. As appears implicit from Article IV, off-duty is the time when a bargaining unit member is not on-duty; that is, there needs to be a period of being on-duty within a reasonable time frame to enable someone to be off-duty. When an employe is on disability leave for more than five months, I cannot find that entire period, for the purposes of this discussion, to constitute being "off-duty."

Further, consideration of the purpose of Section 25.03 does not provide support for the Association. The work schedule here is 24 hours on, 24 hours off, a 56-hour average work week in a 12-day cycle. Under such a schedule, there is clear purpose in paying off-duty training hours as overtime: given the hardships of the job itself, compounded by the unusual schedule, off-duty hours are precious, and deserve special compensation. That rationale, however, is absent in the case before me. Not being on-duty for more than five months, Capt. Anderson did not suffer the hardship of losing real off-duty hours that employes not on leave suffer when called to attend training and other sessions outside their work schedule.

In the period September 18 through December 31, the grievant would ordinarily have been scheduled for approximately 600 hours of duty. During that period, while on duty-incurred disability,

he

attended 20 hours of training and other sessions on days he otherwise would not have worked. He was paid the straight time rate as though he had worked his entire normal shift-load. Contrary to the provisions of the collective bargaining agreement, he was also allowed to cash-out existing vacation benefits. The express written terms of the collective bargaining agreement do not require the City to pay the grievant still more.

However, past practice does. For close to 40 years, the accepted understanding in American labor arbitration has been that, for a past practice to be binding on the parties, it must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time. Justin, Celanese Corporation of America, 24 LA 168, 172.

Further, a clear and timely renunciation of a past practice may terminate that practice. As one respected authority has written, "(i)n the face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding." Mittenthal, "Past Practice and the Administration of Collective Binding Agreements," Proceedings of the 14th Annual Meeting of NAA, 30, 56 (BNA Books, 1961).

The practice of paying overtime to unit members who were on duty-incurred disability was unequivocal, clearly enunciated and readily ascertainable over a reasonable period of time. Thus, it became a binding practice which could be unilaterally terminated by the Employer only upon the expiration of the collective bargaining agreement.

Accordingly, on the basis of the relevant contractual provisions, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is sustained. The Employer shall pay the grievant for 20 hours of overtime, for training and other authorized activities on October 23, October 29, November 4, December 8 and December 23, 1992.

Dated at Madison, Wisconsin this 30th day of July, 1993.

By Stuart Levitan /s/
Stuart Levitan, Arbitrator

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