

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 : Case 211
 LOCAL NO. 316, I.A.F.F. : No. 49635
 : MA-8013
 and :
 :
 CITY OF OSHKOSH :
 :

Appearances:

Mr. John C. Gee, President, and Mr. Jesse Fisher,
 Secretary/Treasurer, on behalf of Local 316.
Atty. Warren P. Kraft, City Attorney, on behalf of the City.

ARBITRATION AWARD

Local 316, International Association of Fire Fighters ("Local 316," or, "the Association") and the City of Oshkosh, ("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 meaning and application of the terms of the agreement relating to laundry duties. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Oshkosh, Wisconsin on October 11, 1993, with a stenographic transcript being prepared by October 26, 1993. The Association and the City filed written arguments on November 9, 1993 and December 7, 1993, respectively. The Association filed a reply brief on December 15, 1993, and the City waived its right to do the same.

ISSUE:

The Association frames the issue as,

"Did the City of Oshkosh violate the Collective Bargaining Agreement with Local 316 I.A.F.F. in unilaterally requiring bargaining unit employes to launder terry towels used in the cleaning of the fire trucks? If so, the City of Oshkosh will cease and desist the practice of having bargaining unit employes launder terry towels."

The City frames the issue as,

"Did the employer violate Article 2 of the 1993-94 contract when it terminated outside laundry

service for towels used by bargaining unit employees to clean fire apparatus? If so, what is the remedy?"

I frame the issue as,

"Did the employer violate the collective bargaining agreement when it directed unit personnel to launder the terry towels used to clean fire apparatus? If so, what is the remedy?"

RELEVANT CONTRACTUAL LANGUAGE:

ARTICLE II

MANAGEMENT RIGHTS

The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this agreement.

The powers, rights and/or authority herein 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 purposes of this agreement.

. . .

ARTICLE XII

RULES AND REGULATIONS

The Employer may adopt and publish rules which may be amended from time to time, provided, however, that such rules and regulations shall be first submitted to the Union for its information prior to the effective date.

This article in no way will affect the rules and regulations falling under the jurisdiction of the Police and Fire Commission as set forth in state statutes. The employer agrees that any rules or regulations pertaining to wages, hours, conditions of employment whether now in force or hereafter adopted shall be voided by this agreement.

. . .

ARTICLE XV

PRESENT BENEFITS

The parties agree to maintain the present level of benefits and policies that primarily relate to mandatory subjects of bargaining, not specifically referred to in this agreement. This provision is expressly limited to mandatory subjects of bargaining.

. . .

ARTICLE XXII

GRIEVANCE PROCEDURES

The word "grievance" is used in this agreement in any dispute which involves the interpretation, application of, or compliance with the provisions of this agreement or past practices.

Both the Union and the City recognize that a grievance should be settled promptly and at the earliest possible stage and the grievance must be initiated within five (5) days of the incident or within five (5) days of the time the aggrieved should have had knowledge of the incident.

STEP 1. The aggrieved employee shall present the grievance orally to his steward. The steward and/or the aggrieved shall attempt to resolve the grievance with the immediate supervisor, who may call other supervisors into the discussion.

STEP 2. If the grievance is not resolved at the first step, it shall be presented in writing to the department head, within seven (7) days (excluding Saturday, Sunday and Holidays) and a copy sent to the personnel office. The department head shall, within 3 days hold an informal meeting with the aggrieved and the union representatives to discuss the grievance. The department head shall then within seven (7) days, (excluding Saturdays, Sundays, and Holidays) furnish the aggrieved and

the Union a written answer to the grievance. A copy of the written answer will be also sent to the personnel office.

STEP 3. If the grievance is not resolved at the second step, it shall be presented by letter to the City Manager, within seven (7) days (excluding Saturday, Sunday, and Holidays). The City Manager, or his designee, will within 7 days (excluding Saturdays, Sundays, and Holidays) hold or have held an informal meeting with the aggrieved and Union representatives for discussion of the grievance. The City Manager shall then, within 3 days (excluding Saturdays, Sundays, and Holidays) furnish the Union and aggrieved with a written answer to the grievance.

STEP 4. If the grievance is not resolved within Step 3, it shall be submitted to arbitration, within seven (7) days, (excluding Saturday, Sunday, and Holidays). Upon receipt of notice of arbitration, the party initiating the arbitration shall present in writing to the Wisconsin Employment Relations Commission the grievance and a request for a list of 5 arbitrators to be submitted to both parties. The parties shall within 5 days of receipt of list meet for the purposes of selecting arbitrator each party in turn striking a name from the list until one name remains. The last name shall become the arbitrator. The decision of the arbitrator shall be final and binding and he shall have no right to amend, modify, ignore or add to the provisions of this agreement. Expenses for the arbitrator services and the proceedings shall be borne equally by the Employer and the Union. However, each party shall be responsible for compensating its own representatives and witnesses.

For City purposes the arbitration procedures shall follow that outlined in State Statutes. 1/

All grievances and solutions shall be made in writing and a copy presented to the personnel office.

Any employee may process his grievance as above outlined, but the Union shall have the right to be present and act in support of its position in the matter of the grievance.

If the time limits stipulated in their respective steps are not met, the grievance shall automatically progress to the next higher step.

1/ The parties stipulated to having the Commission designate a member of its staff serve as arbitrator.

BACKGROUND:

This grievance is the latest step in an on-going struggle between the parties over the number and nature of duties which the City may lawfully assign to bargaining unit personnel.

Prior to July 24, 1992, departmental personnel had been washing their vehicles with cast-off towels and rags, then drying the vehicles with chamois towels, which towels they then rinsed and hung to dry on pegs or hooks. As of that date, City Fire Chief Stan Tadych issued Policy 310.00, relating to the cleaning and maintenance of departmental vehicles. Concerned that the chamois towels were scratching vehicle surfaces, Tadych promulgated Section 310.03(4), directing the use of cotton towels instead. Section 310.05(2) provided that the towels would be "picked-up weekly for cleaning." Such cleaning was by a commercial laundry service, at an average cost of \$140 per month. Policy #310.00 provided further as follows:

POLICY #310.00

**310.00 SUBJECT: MAINTENANCE/CLEANING OF VEHICLES &
BUILDINGS**

310.01 PURPOSE AND GENERAL POLICY

The purpose of this policy is to establish a uniform procedure for the cleaning and care of fire department vehicles and stations. To ensure that department vehicles, equipment and stations receive uniform maintenance/cleaning ensuring vehicle/building longevity.

The use of cleaning supplies and materials other than those supplied by the department shall not be used on department vehicles or buildings.

310.02 ACTION

It shall be the responsibility of each officer or acting officer to ensure that vehicles/equipment/buildings are maintained in accordance with this policy and all programmed cleaning/maintenance as scheduled is completed.

Captains shall schedule all necessary maintenance/cleaning. The use of Form #310A and Form #310B shall be used to schedule building maintenance/cleaning and vehicle

cleaning. House Captains shall submit tentative maintenance/cleaning schedules to the Chief in charge of maintenance. The Chief in charge of maintenance will review and return the schedules by the end of the month to the station captain. At the end of the month Form #310A and Form #310B will be submitted to the Maintenance Chief after completion.

Chief officers shall have the responsibility to publish all necessary department scheduled activities e.i. [sic] training, hose testing, pump testing scheduled, in sufficient time to allow house captains time to review prior to establishing a maintenance/cleaning schedule.

310.03 PROCEDURES

Form #310B shall be used to schedule all nonroutine cleaning/maintenance for vehicles. Included within the schedule ground and aerial ladder shall be cleaned at least monthly. All ladders shall be extended when cleaned. Ground ladders shall be appropriately lubricated after cleaning per manufactures instructions.

1. Cleaning/Maintenance

a. Emergency Apparatus

1. Shall be thoroughly cleaned before 8:00 am if the vehicle was out of quarters the night before and also be thoroughly cleaned before 8:00 pm if the vehicle was out of quarters during the day. Cleaning shall include vehicle exterior (tires and fender wells), cab interior and windows and/or other cleaning as necessary. The underside is to be flushed as necessary. Whenever the vehicle undercarriage and exterior/interior surfaces have been exposed to mud, snow, salt, etc. the exposed surfaces shall be cleaned upon returning to quarters.
2. Spare engines shall be maintained by the company at the station where the vehicle is stored. When vehicles

are used the returning company shall have the responsibility for cleaning; and shall be cleaned, fueled and inventoried when returned.

b. Staff Vehicles

1. Exteriors shall be cleaned nightly. The interiors shall be vacuumed/cleaned and interior windows cleaned weekly or more often if needed.

c. Ambulances

1. Daily as per para 1.a. above, Interior modular shall be cleaned and sanitized after use as necessary.
2. All portable equipment shall be cleaned at least monthly or after use as necessary.
3. Spare ambulance shall be maintained by the ambulance company where the vehicle is stored. Weekly the vehicle shall be cleaned and inventoried. The modular shall be locked when in storage. When inventoried the vehicle shall be cleaned, fueled and inventoried.
2. Following the washing of vehicles, the floor in the immediate area of the vehicle shall be rinsed and squeegeed.
3. All vehicles shall have a finish protective coating applied quarterly and the inside of all compartments cleaned.
4. Vehicles shall be washed using soft brushes or mitts, water with soap concentrate, rinsed and dried using cotton towels. No sponges, stiff brushes or chamois will be used on the exterior paint surfaces.
5. Windows shall be cleaned using the provided window cleaner and COTTON towels.

310.04 HOUSE MAINTENANCE

1. Daily maintenance shall be completed as

scheduled by the house captain. Other scheduled maintenance/cleaning shall also be completed as scheduled on Form #310A or deferred if the situation warrants.

2. The Maintenance/Cleaning Schedule shall be used as a daily guide for scheduled maintenance. Other maintenance/cleaning maybe necessary as the need arises. The officer or acting officer shall certify by his signature that the assigned maintenance/cleaning was completed or deferred for what reason.

310.05 CLEANING SUPPLIES

1. All necessary cleaning supplies will be ordered quarterly with other house supplies.
2. Cotton towels will be picked-up weekly for cleaning.

On May 1, 1992, the City had published new position descriptions, and made the assignment of certain new duties relative thereto. On November 3, 1992, the Association filed with the Wisconsin Employment Relations Commission ("the Commission") a request (technically, the pleading constituted a petition), for a declaratory ruling as to whether the City's assignment of certain of these duties involved mandatory subjects of bargaining. Specifically, the Association alleged that numerous duties, previously undertaken on a volunteer basis, were now being required as mandatory duties.

Hearing in the matter of the petition was held in Oshkosh on February 10, 1993, before WERC General Counsel Peter G. Davis. After taking several hours of testimony, Davis commented as follows:

Certainly I think there are other items that the City believes it will require fire fighters to perform, and the City could anticipate that the fire fighters are not going to want to perform those duties voluntarily. I think it behooves us all to get those out on the table now so that we're not back here with another list six months from now because that's what will happen. And -- So I hope we can get as much decided as possible. ... if the City is aware of things that don't fall within A through L but are the same type, I think it would be useful to get those out on the table, get the Union's position, and we could have an answer from the Commission as to those types of duties as well.

Following Davis's comment, the parties engaged in extensive off-the-record discussions, during which Davis functioned essentially as a mediator, relating proposals and counter-proposals to and from each side. At one point, an Association spokesperson asked Davis to raise with the City the matter of including the wash-work in the settlement list. The City informed Davis it rejected including the wash-work in the agreement's list of volunteer duties. At the time of the hearing, the City was aware it would be terminating the purchase of services contract and assigning this laundry work internally.

The parties agreed to a voluntary resolution, pursuant to which they stipulated and agreed that the following job duties and work assignments would be voluntary:

- A. PAINTING - outside, walls, ceilings and floors
- B. ROOFING - large, small or fix
- C. CONCRETE/BLACKTOP - patch, put in new, repair cracks
- D. FENCES - repair or put in new ones
- E. REMODELING/CONSTRUCTION - repair structures, new construction, finishing off construction, remodeling, remove wooden floors or flooring, remove/replace/or put in new tile. install/takeout carpet, patch cracks in walls/ceilings, wall paper walls/ceilings, prepare assist/clean up after a contractor
- F. CARPENTER WORK - prepare/assist cleanup after/general carpenter work
- G. ELECTRICAL - electrical repairs of any size, install electrical equipment
- H. PLUMBING - major/minor/install plumbing
- I. RADIO/COMMUNICATION WORK - no rewiring/installing/or fixing
- J. COMPUTER WORK - none other than what is required of every man on the Department (ie, run reports)
- K. FIRE DEPARTMENT EQUIPMENT - install or repair other than basic help of mechanic when you are a E.O.
- L. YARD CARE - gardening, landscaping, sodding.

The stipulated agreement also provided that the Association and its members "will continue to do routine maintenance within and without the Station(s) including, but not limited to, grass cutting, grass and shrub trimming, weeding, snow shoveling, etc.," and that, "(i)f and when the Employer has a desire or need to add new work or to have new work projects completed or to assign new duties and responsibilities to Firefighters, it will so advise the Union." The agreement further provided that the Association "may

poll its membership" in order to secure volunteers; that "if the work is in fact done, it will be done outside of the normal duty" day; that "if the Union decides not to poll its members and/or if there are no volunteers, the work will not be done" by unit personnel; and that, "if the City still wishes said work to be done outside contractors/vendors, for example, will be retained by it at its expense."

The parties executed the Settlement Agreement on April 6, 1993. Among its terms was the following:

10. This Settlement has no effect on the instant Declaratory Ruling which is and has been indefinitely postponed.

By letter of May 5, 1993, Attorney Richard V. Graylow, on behalf of the Association, provided Davis with a conformed copy of the Agreement, and asked that he "either dismiss or relinquish jurisdiction as he sees fit." At the time of the arbitration hearing, the Commission file in this matter remained open.

On July 23, 1993, Fire Chief Stan Tadych issued to all house captains and company officers a memorandum, relating to "Laundry Services for terry drying towels/Department laundry facilities -- Station 18," as follows:

Effective the week of July 19, 1993, pickup and laundry services will no longer be provided to the department by an outside contractor.

Laundry servicing will be provided by department personnel and department owned equipment at Station 18.

ACTION

It shall be the responsibility of each house Captain to make arrangements for delivery to Station 18 for necessary laundry washing and arrange for pick up of clean laundry at station 18 on a weekly basis.

All soiled towels shall be placed in plastic bags for delivery to Station 18 for washing.

Station 18 personnel shall be responsible for washing and drying laundry. Keeping each received bag of towels separated when washing and drying, and returning to the appropriate station in plastic bags.

Clean towels received by a company shall be folded

for storage.

The company Captain of Station 18 will assign laundering responsibilities to all shifts assigned to Station 18. Laundry soap will be ordered through the quarterly house cleaning supply order.

Please direct any questions to Battalion Chief Kutscher.

For at least 20 years prior to the issuance of this directive, no unit personnel had ever been assigned to launder departmental towels, either chamois, terry, or of any other fabric, material or nature. For an uncertain number of years, ending in about 1991, there had been a washing machine at Station 18, which machine had not been the subject of specific departmental assignments, but which unit personnel had used occasionally for personal wash.

On July 26, 1993, Local 316 President John C. Gee filed a written Step II grievance letter with Tadych, in which he alleged that the memorandum of July 23 was "in gross violation of not only the Settlement Agreement in the Declaratory Ruling but against the 1993-1994 contract," and that, "in accordance with Article XII and Article XV, that implementation of this order affects the working conditions and is a bargainable item." Gee further stated that "this is something we have never done in the past and is against our present benefits clause. We also believe this order to be in direct violation of the Agreement the City proposed and signed on April 6, 1993, more specifically numbers 3, 4, 7, 8 & 9." Gee requested that the July 23 directive "be rescinded immediately."

On August 2, 1993, Tadych denied the grievance, stating that "(m)aintenance and cleaning of buildings and vehicles directly relates to the job descriptions" of the unit personnel, and that "(p)roviding clean terry towels is essential in completing those responsibilities."

On July 28, 1993, Gee filed a Step III grievance with City Manager William Frueh, citing Articles XII and XV, and alleging that "Local 316 has never done laundry in the past and doing so has a direct effect on working conditions." Gee further stated the assignment to be in violation of the Settlement Agreement, and that "this is a (sic) added responsibility that WAS and SHOULD continue to be contracted out to a private contractor (capitals in original). On August 4, 1993, Frueh denied the grievance.

Pursuant to Job Description #4108, issued March 6, 1992, among the "illustrative examples of work" for the post of firefighter/firefighter-paramedic, is the following:

* Maintains, cleans, services, inspects, and

loads fire fighting/emergency equipment, tools, etc., on company apparatus; maintains, performs repairs and cleans assigned fire station quarters and grounds.

Pursuant to Job Description #4116, issued March 2, 1992, among the "illustrative examples of work" for the post of fire equipment operator, are the following:

- * Performs general upkeep and cleaning activities as necessary to ensure the maintenance of department equipment, apparatus, furnishings, buildings and grounds.
- * Performs the duties of firefighter as required.

With variances attributable to the weather and number of vehicle runs (which factors impact on the number of vehicle-washings), the load averages out at approximately 15 loads of cotton towels per week. Testimony indicated the wash is done in the normal way: personnel load the machines, seeking to avoid an overload and maintain a balanced load; soap is placed in the soap dispenser; the machine is turned on, and it proceeds through its automatic cycles. When the load is done, personnel take it out and places it in the dryer, and starts the process anew with another load. The washer and dryer take about 30 minutes and 25 minutes, respectively. Testimony indicated further that personnel need not stand before the machine all day and watch, but they should remain in reasonably close proximity.

Pursuant to directives which Battalion Commander Kutscher issued on February 18 and 19, 1993, the personnel at Station 18 also use the washer/extractor to wash the turn-out work gear of department personnel. National Fire Protection Association 1500, sections 5-1.8.1 and 5-1.8.2, relating to protective clothing and protective equipment, provide as follows:

5-1.8.1 Where such cleaning is conducted in fire stations, the fire department shall provide at least one washing machine for this purpose in the designated cleaning area specified in Section 3-2 of NFPA 1581, Standard on Fire Department Infection Control Program. These washing machines shall be marked or labeled "FOR WASHING PROTECTIVE OR WORK CLOTHING ONLY."

5-1.8.2 Bed linen, dish towels, and other station linens or machine washables shall not be washed in the washing machines designated for protective or work clothing due to the

possibility of cross-contamination.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Association asserts and avers as follows:

All aspects of this case are governed by the collective bargaining agreement and/or the settlement agreement, to wit: that any unilaterally applied rule or regulation pertaining to conditions of employment is voided by Article XII; that the historical action of the City to have the cotton towels laundered by an outside agency since the inception of the use of such towels constitutes a past practice under Article XV, and that the settlement agreement signed by all parties was specifically written to cover such aspects.

Article XII voids all rules and/or regulations pertaining to a change in wages, hours and conditions of employment. The unilateral implementation of Chief Tadych's memo of July 23, 1992 was a change in the conditions of employment previously performed by bargaining unit employes.

Article XV specifically maintains the present level of benefits which relate primarily to mandatory subjects of bargaining, thus maintaining the benefits of bargaining unit employes historically not doing laundry, specifically terry towels. Testimony established that such activity had never been performed for at least the past 31 years.

In support of its position that the grievance should be denied, the City asserts and avers as follows:

As shown by its framing of the issue and remedy, the Union's grievance goes to the process which the City has chosen to clean the terry cloth towels, not to any substance. There appears no dispute that the City has the management right to require that the firefighters maintain clean apparatus, or that the City can substitute towels for chamois and rags, or that the towels do less harm to the vehicles than the chamois, or that the cleaner/extractor does a better job of

cleaning the towels than does simple hand-washing. Accordingly, the grievance is really a question of process -- what process to use to fulfill a departmental mission, namely the keeping of equipment and apparatus clean.

Although there is some factual dispute over prior and continuing firefighter use of washing machines and dryers, the evidence indicates that union members use such machines as part of their ordinary duties to clean and maintain their equipment.

The City's intent in using a washing machine and dryer was not that this would be the only way to clean the towels; if towels were cleaned by hand in an adequate manner, that method would be used. But, given the historic responsibility of firefighters, the directive to use a washing machine and dryer to ease their obligation is the type of decision reserved for management.

Further, the settlement agreement in the prohibited practice complaint concerns itself only with volunteer jobs, not duties and obligations essential to the job of firefighter. As towel cleaning is not a voluntary task, but is instead an element of an essential job duty, it naturally was not referenced. Further, even if it were within the concept of the agreement, the agreement merely requires the City to "advise the Union," which Chief Tadych has done via his memo. Finally, even if this new duty does affect wages, hours and conditions of employment, Sec. 111.77, Wis. Stats., requires the employer to bargain the impact of the new duty upon request of the Union. The Union has made no such request.

As to remedy, that which the Union seeks -- the directive to the City to resume a purchase of services contract with an outside contractor - - is clearly beyond the arbitrator's authority to impose.

Accordingly, the grievance should be denied and dismissed.

In further support of its position, the Association responds as follows:

The City errs in describing the dispute as simply

relating to process. Process and requirement are the same when a process becomes a requirement. Had the City imposed the laundry duty when it issued the initial towel-substitution memo, the Association would have grieved. The Association notes there was no testimony supporting the City's claim that the washer/extractor did a better job of cleaning the towels. The City further errs in claiming a precedent of prior use of washing machines by unit personnel, again a claim not supported by the evidence or testimony. Nor is there evidence or testimony to support the City's hearsay about the laundry practices of other regional fire departments.

The City's argument that the washer/extractor was merely a mechanism for cleaning the towels is flawed. A mechanism already existed -- hand washing and air drying. The City has now sought to impose a requirement on the unit personnel. A requirement different than what was previously practiced on a long-standing basis is a change in past practice effecting wages, hours and conditions of employment. The difference between simply rinsing out and hanging up a chamois towel and the unwieldy process of hauling laundry to Station 18 is significant, and constitutes a change in working conditions and present benefits.

The City is only partially correct when it alleges that the settlement agreement concerns itself only with volunteer jobs, not with essential firefighter duties and obligations. And the City is not correct in describing the washing and drying of towels in a washer/extractor as part of a firefighter's essential duties and obligations. The employer has arbitrarily attached the term "mission related" to a task it wanted done.

The City is correct when it states that the settlement agreement is unambiguous in setting forth what types of tasks are to be voluntary, how the Association will seek volunteers, and how new duties are to be addressed. The City is also correct when it states that towel cleaning is not a voluntary task, since the cleaning of equipment and apparatus is a firefighter's duty. But towel cleaning and equipment/apparatus cleaning are not the

dispute; the grievance concerns washing towels in the washer/extractor and the implementation of a laundry service at Station 18.

The City is not correct when it implies that Association should have requested that the employer bargain the impact of the so-called new duty; the Association did not, and has not, accepted this new duty.

The City argument as to remedy repeats a point the Association agreed with at hearing. The Association does not seek an order compelling the resumption of the outside contract for laundry service. The Association seeks a return to the status quo, and that the washing of towels in the washer/extractor cease and desist.

DISCUSSION

This case, which is already somewhat unusual for its subject matter and procedural background, is also unusual in that it is an arbitration which requires an answer usually provided by a hearing examiner or the full commission. That is, in order to assess one aspect of the Association's grievance, I must first determine whether the assignment of certain laundry duty to the personnel of Station 18 implicated a mandatory subject of bargaining.

In sketching the outlines pertaining to subjects of bargaining, the legislature, as it has so often done, has dichotomized a paradigm, leaving to others the task of resolving resultant conflicts. In its definition of "collective bargaining," the legislature required the parties to meet and confer in good faith "with respect to wages, hours and conditions of employment," but provided further that municipal employers "not be required to bargain on subjects reserved to management and direction of the governmental unit except as the manner of such functions affects the wages, hours and conditions of employment of the employes." Sec. 111.70(1)(a), Wis. Stats.

The determination of whether or not a proposal or directive affects a mandatory subject of bargaining has come before the commission and the courts on many occasions. In an almost Delphic manner, the Wisconsin Supreme Court has commented that:

(t)he question is whether a particular decision is primarily related to the wages, hours and conditions of employment of the employe, or whether it is primarily related to the formulation or management of public policy. Where the governmental or policy dimensions of

a decision predominate, the matter is properly reserved to decision by the representatives of the people. This test can only be applied on a case-by-case basis, and is not susceptible to 'broad and sweeping rules that are to apply across the board to all situations.' Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89, 102 (1977), citing Beloit Education Association v. WERC, 73 Wis. 2d 43, 55 (1976).

The Court has concluded that a subject relates to a mandatory subject of bargaining, and that collective bargaining is required, when it is "primarily," or "fundamentally," or "basically," or "essentially" related to wages, hours and conditions of employment. Beloit Education Association, id., at 54; City of Brookfield v. WERC, 87 Wis. 2d, 819, 829, 833 (1979). See also, School District No. 5, Franklin, Dec. No. 21846 (WERC, 7/84).

In assessing whether the fire chief's directive that the personnel of Station 18 engage in washer-person work, it may be instructive to review some prior commission and court cases involving other protective service employes.

In City of Wauwatosa, Dec. No. 15917 (WERC, 11/9/77), decided three weeks before Unified School District No. 1 of Racine County, the Commission addressed a number of proposals submitted by the Wauwatosa Firemen's Protective Association Local 1923, IAFF. The Commission found as primarily relating to wages, hours and conditions of employment, and thus mandatory subjects of bargaining, proposals affecting the duty day; regulating maintenance work after 5:00 P.M.; the stay of discipline under certain circumstances, and renewal of the collective bargaining agreement. The Commission found as primarily reserved to the management and direction of the employer's firefighting mission, and thus permissive subjects of bargaining, proposals regulating the time of home inspections; restrictions on hydrant inspection; restrictions on holiday work, and the assignment of new duties.

Overall, the main teaching of Wauwatosa is that:

...in determining whether the assignment of a duty is a mandatory or permissive subject of bargaining, the legislative purpose requires the commission to determine whether said duty ordinarily is regarded as fairly within the scope of responsibilities applicable to the kind of work performed by the employes involved. If a particular duty is fairly within that scope, the employer unilaterally may impose such assignment. If the particular duty is not fairly within that scope, the

decision to assign that duty is a mandatory subject of bargaining. Dec. No. 15917, at page 13.

In City of Manitowoc (Fire Department), Dec. No. 18333 (12/80), the Commission held as permissive a proposal by the Manitowoc Professional Firefighters Association, Local 368, that "The Chief shall endeavor to maintain a fourteen (14) man work crew on each shift." Finding there to be "no evidence adduced in the instant proceeding to establish that any reduction in the fourteen man work crew on each shift would in any way affect the safety of any firefighter employed by the City on any shift," the Commission concluded that any obligation by the Fire Chief to maintain, or endeavor to maintain, a certain size of firefighter crew to relate primarily to the formulation, implementation and management of public policy, rather than to wages, hours and conditions of employment.

In Manitowoc County, Dec. No. 18995 (WERC, 9/81), the Commission found to be primarily related to the employer's right to manage and to determine the quality of service, and thus a permissive subject of bargaining, a proposal by the Manitowoc County Sheriff's Department Employees Local 986B, which required two law enforcement officers per squad car during evening hours. The Commission said that if the record had established that the proposal related to the safety of the officers working the night shift, it would have been satisfied that the proposal primarily related to a condition of employment, but that the record did not so convince the Commission.

In City of Brookfield, Dec. No. 19944 (WERC, 9/82), the Commission found to be permissive a proposal by the Brookfield Professional Firefighters Association which provided, in part, as follows:

If an equipment operator is to be assigned to any apparatus, such assignment to the specific piece of equipment shall be made within one hour of the commencement of the normal duty day. No first line engine, pumper, or truck shall be operated by any unit employe for that shift unless such assignment has been so made. A truck to be operated by unit employes shall require the assignment of an additional equipment operator daily to serve as a tillerman.

The Commission found that these three requirements primarily related to the formulation or management of public policy; that "to deprive the City of the flexibility to make last minute assignments potentially interferes with its ability to make assignments of manpower which are adequate to meet the level of

service needed;" and, citing Milwaukee Board of School Directors, Dec. No. 17504 (WERC, 12/79) and City of Wauwatosa, Dec. No. 15917 (11/77), that "such interference with the ability to provide service is akin to other proposals determined by the Commission to relate to permissive subjects of bargaining because they effectively prevented the Employer from providing services."

In City of Madison, Dec. No. 17300-C (WERC, 7/83), the Commission found that the Madison Professional Police Association did not have a right to bargain over the City's decision to require Cardiopulmonary Resuscitation (CPR) training and certification for its police officers. The Commission found that the "duties and training in question," namely "the delivery of life support services," did "fall fairly within the scope of a police officer's regular job duties," and that "the public policy dimensions of the instant requirement ... predominate over the wages, hours and conditions of employment aspects of the decision." The Commission endorsed "the principle that management has the right to unilaterally assign duties which fall fairly within the scope of an employe's regular job duties." Id., at p. 5

In City of Fond du Lac (Fire Department), Dec. No. 22373 (WERC, 2/85), the Commission found to be primarily related to the management and direction of the City, and thus a permissive subject of bargaining, a proposal by the International Association of Fire Fighters, Local 400, that the first responding companies would respond with at least a set minimum on each engine and aerial company. Noting that it had "previously concluded that proposals which provide a contractual forum for adjudication of disputes over compliance with statutes which are related to employe wages, hours and conditions of employment are mandatory subjects of bargaining," the Commission further found to be primarily related to wages, hours and conditions of employment, and thus a mandatory subject of bargaining, an IAFF proposal requiring ambulances to be "manned in accordance with State Statutes."

In City of Kaukauna, Dec. No. 27027-A (Nielsen, 8/92), the examiner found that the employer's imposition of a new daily work schedule was primarily related to wages, hours and conditions of employment, but that the labor organization had been given clean and unequivocal prior notice of the change and had waived its right to bargain the matter by its failure to make a timely demand to do so. The Commission also found to be a mandatory subject of bargaining an Association proposal relating to the creation of eligibility lists for promotions.

In City of Wisconsin Rapids, Dec. No. 27466-A (Shaw, 5/93), the examiner found that the employer had no duty to bargain collectively with the Wisconsin Rapids Fire Fighters, IAFF, with respect to its imposition of training duties, or with respect to

the impact thereof. Citing Wauwatosa, the examiner found the training duties assigned to be fairly within the scope of employment.

Here, the Association does not challenge the employer's right to ensure proper maintenance of its equipment and apparatuses. Such proper maintenance includes the use of proper tools to wash and dry vehicles. Ultimately, the Association's challenge is not to the use of the terry towels rather than the chamois, but rather to the way in which the new tool -- the terry towels -- were maintained. In the private sector, arbitrators have repeatedly found that an employer may provide new and/or improved equipment which affects job descriptions or even results in the elimination of jobs. Interstate Brands Corp., 81 LA 1255 (Glendon, 1984); Union Carbide, 84 LA 788 (Seinsheimer, 1985); Grinnell College, 83 LA 39 (Nathan, 1984). An employer has the right to continually upgrade all aspects of production and equipment to remain competitive. Doboy Packaging Manchineer, 88 LA 670 (Reynolds, 1987).

The combined teaching of Wauwatosa, City of Madison, and City of Wisconsin Rapids, appears to me to be that duties which fall fairly within the scope of an employe's regular job are not mandatorily bargainable. As noted above, the assignment of washing equipment and apparatus is clearly within the employe's regular job duties. Washing the equipment and apparatus requires towels; these towels themselves have to be washed and dried. The City made a reasonable determination that terry towels were more appropriate than chamois. It made further determinations that the use of machines for washing and drying was preferable to hand-washing and air-drying, and that in-house laundry was more efficient and economical than the outside contracting. In a labor/management construct where the employer can force workers to learn and apply Cardiopulmonary Resuscitation (the City of Madison case), and where firefighters have no enforceable right to bargain over the imposition of training duties (the City of Wisconsin Rapids case), I am hard pressed to find that doing laundry is such an egregious and unexpected imposition that it is outside the firefighters' regular scope of employment.

By its explicit terms, the Present Benefits provision of Article XV is "expressly limited to mandatory subjects of bargaining." On the basis of commission case law, I conclude that the directive of July 23, 1993, relating to the assignment of terry-towel laundry duty was fairly within the regular scope of a firefighter's employment, and thus did not primarily relate to a mandatory subject of bargaining. I thus find no violation of Article XV.

The Association contends that the fact that firefighters had not previously washed towels constituted a binding past practice. It is well-settled that, in order to be binding on both parties,

a practice must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. Celanese Corp. of Am., 24 LA 168, 172 (Justin, 1954). The fact that firefighters had not previously performed this duty does not, in and of itself, transform this non-assignment into a binding past practice especially when the contracting-out of the terry towel laundering lasted only one year.

The Association has raised the matter of whether washing these towels or other items in the same machine used for washing turn-out gear violates National Fire Protection Association guidelines. A cursory review of NFPA sections 5-1.8.1 and 5-1.8.2 appear to substantiate the Association's contention. However, there is nothing in the collective bargaining agreement which gives me the jurisdiction to review departmental compliance with NFPA guidelines.

The Association argues further that this assignment violates the agreement settling the declaratory ruling proceeding. The City counters by arguing that that agreement dealt only with volunteer jobs not directly related to the regular scope of duties. Based on my review of that agreement, as well as the entire file in that proceeding, I concur with the City. The agreement deal with tasks such as roofing, electrical repair, plumbing and computer work; the issue of this grievance is the laundering of towels used to wash department equipment and apparatus. As the parties acknowledged in their agreement in the declaratory ruling proceeding, tasks such as roofing and plumbing are in no way part of the regular scope of employment of a firefighter. There is a quantum difference between these categories. By agreeing to make plumbing and electrical repair purely voluntary (or have it contracted out), the City did not also agree to regard as voluntary those duties which are fairly within the employe's regular scope of employment.

This is not to say that I completely endorse the City's actions in this regard, particularly its posture during the mediations leading up to the settlement agreement. The Association suspected, and the City full-well knew, that the City would be cancelling the outside contract and assigning the laundry work to unit personnel; the City, however, merely declined the opportunity to reference the wash-work in the agreement, without explicitly acknowledging that it would shortly be assigning those duties. Had the City been more forthcoming, it would have saved itself from violating the notice provisions of Article XII. That Article requires the City to submit rules and regulations to the Association "for its information prior to the effective date." The City has not denied that the memorandum of July 23, 1993 relates to rules and regulations. That memo was "effective the week of July 19, 1993." I do not believe that issuing a memorandum on July 23, effective the week of July 19, constitutes

the providing of "information prior to the effective date."

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

1. That the grievance is sustained in part and denied in part.

2. That the employer did not violate Article II or Article XV when it assigned unit personnel to launder the terry towels used to clean fire apparatus.

3. That the employer did violate the notice provision of Article XII, by issuing on July 23, 1993 the assignment of laundry duties "effective the week of July 19, 1993."

4. That the employer shall cease and desist from adopting and publishing Article XII rules which have an effective date prior to the date of publication.

Dated at Madison, Wisconsin this 15th day of March, 1994.

By Stuart Levitan /s/

Stuart Levitan, Arbitrator