BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL UNION #583, AFL-CIO

and

CITY OF BELOIT

Case 122
No. 50626
MA-8320

Appearances:

Lawton & Cates, S.C., by Mr. Richard V. Graylow, appearing on behalf of the Union.
Mr. Bruce K. Patterson, Employer Relations Consultant, appearing on behalf of the City.

ARBITRATION AWARD

The Employer and Union above are parties to a 1992-94 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 the Union's grievance concerning out-of-classification pay for Shift Commander work.

The undersigned was appointed and held a hearing on September 27, 1994 in Beloit, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs and reply briefs, and the record was closed on February 3, 1995.

Issues:

The Union proposed the following:

1. Whether or not based on the facts presented in this case the Employer violated either Article IV, Sections 2, 3 or 4 and/or Article XIX, Section 7, and/or Article XX of the current collective bargaining agreement in full force and effect between the parties?

2. If so, what remedy, if any, is appropriate?

The Employer proposed the following:

1. When the City of Beloit restructured the table of organization of the fire department, did it violate Articles IV, XIX and XX of the collective bargaining agreement?

2. If so, what should the remedy be?

Relevant Contractual Provisions:

ARTICLE IV

APPLICATION AND INTERPRETATION OF WORK RULES

Section 1 — For purposes of this Article, work rules are defined as and limited to:

Rules promulgated by the City within its discretion which regulate the personal conduct of employees during the hours of their employment.

Section 2 — The Union recognizes the right of the City to establish reasonable work rules. Copies of newly established work rules or amendments to existing work rules will be furnished to the Union at least ten (10) days prior to the effective date of the rule.

Section 3 — The City agrees that established work rules shall not conflict with any provisions of this Agreement.

Section 4 — The Union reserves the right to grieve the reasonableness of a work rule. Anytime a work rule is grieved, said work rule shall be withheld until such grievance is resolved.

. . .

ARTICLE XIX

WAGES AND SALARY SCHEDULE

. . .

Section 7 Employees will be used out of classification when Motor Pump Operators and officer shortages occur due to vacation, sick time, furlough and compensation time.

1) Employees, when serving as Motor Pump Operators, shall receive Motor Pump Operator's wages.

2) Acting Lieutenants, when serving as Lieutenant, shall receive Lieutenant's wages.

3) Lieutenants, when serving as Captains, shall receive Captain's wages.

4) Captains, when serving as Shift Commander, shall receive the difference between Captain's wages and the Shift Commander wage on active duty or ten (10) dollars per twenty-four (24) hour shift, whichever is greater.

. . .

ARTICLE XX

MANAGEMENT RIGHTS

The Union recognizes and agrees that, except as expressly limited by the provisions of this Agreement, the supervision, management, and control of the City's business and operations are exclusively the functions of the City. 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 purpose of this Agreement.

The City and Union shall immediately enter into negotiations to replace any section of this Agreement if found to be in violation of the Wisconsin Statutes.

. . .

Discussion:

The facts are not in dispute. In early 1994, the City's fire department enacted a reorganization of its operations, as a result of which several changes were made in the complement of employes working on any given shift. The A, B and C shifts in the department work 24 hours apiece on successive days, with a 24-hour on, 48-hour off rotation. Prior to the reorganization, each shift was headed by a bargaining unit employe designated Shift Commander. Each shift also had one Captain, three Lieutenants, four Motor Pump Operators, and five Paramedics. The A shift had four Fire Fighters, while the B and C shifts had five Fire Fighters. Undisputed testimony by management witnesses indicates that it was a fairly common occurrence for the department to operate with its minimum crew of 14, since the A shift in particular could afford to lose only four employes before reaching the minimum manning level specified in department policy. Several higher-level officials, including the Fire Chief, the Assistant Chief, two Deputy Chiefs and an Inspector, worked on a different schedule and took no direct role in shift supervision.

The organizational structure proposed by the department, in a detailed proposal to the City Council and City administration, changed this pattern in several ways. After it was enacted, each shift was eventually to be headed by one of three Deputy Chiefs. The sole personnel in the department not assigned to a shift would become the Fire Chief, Assistant Chief and Inspector. The result, over a period of time, was expected to be that each shift would have 19 employes at full strength, and the minimum manning level would be increased to 15. The heading of each shift by a Deputy Chief was expected to be accomplished over time, by attrition of the existing Shift Commanders. There is no dispute that one Shift Commander retired on December 31, 1993. Captain Terrence Moran testified without contradiction that he worked as Acting Shift Commander after Shift Commander Foster retired, and was paid as Shift Commander up to April 4, 1994. Thereafter, a Deputy Chief was assigned to his shift, and he was not paid as Shift Commander unless the Deputy Chief was off work on the day in question.

Assistant Chief James Reseburg testified that one of the reasons for the restructuring was that there had been employe complaints concerning the safety of operations, and that shift staffing on the A shift in particular was a continuing concern. Reseburg also identified a management desire to have a non-bargaining unit supervisor for each shift as a motivating factor for the restructuring. Reseburg testified that the potential savings in overtime costs and in Shift Commander costs were influential in persuading the City Council to agree to a structure which increased the number of Fire Fighters and created an additional Deputy Chief position. He also testified that the Union was well informed of all of the developments at all times, and that he explained the entire proposal at a Union meeting on September 2, 1992. Reseburg further testified that he had surveyed other Wisconsin fire departments, and of ten or eleven who had responded, all had a non-bargaining-unit officer in overall charge of each shift (though their titles varied.) 1/

1/ Tr. p. 45, Employer's Exhibit 8.

There is no dispute that the grievance claims payment for Shift Commander pay for each shift in which no employe has been designated Shift Commander since April 4, 1994, and that there have been a number of such shifts. There is also no dispute that on days when no Deputy Chief was assigned, a Shift Commander has been designated and has been paid. There is further no dispute that the pattern of assignments in the department is such that when a Captain is moved up to Acting Shift Commander and receives Acting Shift Commander pay, a Lieutenant in turn moves up to fill the Captain slot and is paid at Captain's rate, and so forth down the line.

The parties agreed to submit a copy of the job description for Shift Commander, which reads in pertinent part as follows:

City of Beloit
Shift Commander - Fire

Status: IAFF Local #583

General Summary

This position is responsible for assuming command of all fire fighter and ambulance forces on the assigned shift also for the care and maintenance of all equipment and apparatus during tour of duty.

Principal Duties and Responsibilities

1. Responsible to the chief of the department or the designee pertaining to personnel assignments, apparatus, and equipment during tour of duty.

2. Assigns personnel, keeps daily attendance and absentee records referred by subordinate officers.

3. Responds to all fires or other related emergency alarms during tour of duty.

4. Exercises full and complete control of all companies upon reaching the scene of the fire or other emergency.

5. Reports immediately to headquarters the extent of the fire or emergency, the available equipment and personnel, and such other information or directions the dispatchers require for further action.

6. Contacts the Chief on any major fire or at any time that

there is a loss of life caused by a fire.

7. Responsible for the efficient performance of the department on the assigned shift.

8. Maintains the duty roster and schedule leaves.

9. Responsible for proper use, condition and care of apparatus, equipment, and buildings.

10. Conducts training programs set up by the training officer for the assigned shift.

11. Responsible for the efficiency for all companies in carrying out all department programs.

12. Maintains all records, reports, and communications of companies.

Reporting Relationships

Reports to the Fire Chief or designee for general instruction and review.

It is undisputed that in or about 1989, as part of its proposals for the upcoming collective bargaining agreement with the Union, the City made several proposals related to deleting the rank of Shift Commander from the collective bargaining agreement. These proposals were not accepted, and the rank of Shift Commander continues to appear in each successive collective bargaining agreement with an associated pay rate.

There is also no dispute that the existence and use of the title Shift Commander is of long standing. Two retired Fire Chiefs testified, demonstrating that the term Shift Commander dated back to the 1970's, and that as of the early 1970's the practice described by the department personnel as "roll ups", i.e., the practice of each rank being filled for the day if necessary by promotion from a lower rank at an increase in pay, had continued throughout until 1994.

The Union's Position:

The Union contends that there is a clear and consistent past practice which governs the payment of out-of-class pay, and demonstrates that the practice was unilaterally changed by the present Chief on or about January 3, 1994. The Union contends that the record shows that the City had previously attempted to attain this change at the bargaining table and had failed. The Union argues that this act violated Article IV of the agreement because "the edict contained in the Chief's written material of January 3, 1994 regulated and continues to regulate the conduct of

Captain Terrence Moran during the hours of his employment." The Union argues that the grievance filed January 12, 1994, under the terms of Article IV, should have stayed execution of the new work rule until the grievance was resolved. With respect to Article XIX, the Union contends that Section 7 clearly specifies that individuals be paid extra while working out-of-class, and that Captain Moran worked out-of-class and did not get paid. As to Article XX, the Union contends that the City has functionally eliminated the position of Shift Commander, transferred the work formerly done by Shift Commanders to Deputy Chiefs on a routine basis, and has refused to pay working-out-of-class pay to Captain Moran and potentially others. The Union argues that this is bargaining unit work, and that the testimony of all witnesses was consistent that working-out-of-class pay was paid under these conditions consistently until April 4, 1994. The Union contends that the recognition clause specifically excludes officers above Shift Commander, and the City's action thus represents a transfer of work out of the bargaining unit. It thus attempts to evade the letter and spirit of the collective bargaining agreement and is therefore in violation of Article XX. In its reply brief, the Union contends that the statutory section relied on by the City in its brief in chief does not convert the Shift Commanders into "dinosaurs", contending that the City now admits that it is assigning bargaining unit work to supervisors. The Union further contends that the Management Rights clause is of no help to the City because that clause by its own terms may not be used "to undermine the Union or as an attempt to evade the provisions of this agreement". The Union contends that both of these requirements are applicable to the present case. The Union requests that the Arbitrator find the policy of the City improper under the agreement and retain jurisdiction in order to permit the parties an opportunity to discuss a remedy.

The Employer's Position:

The Employer contends that Article XX must be read in light of Wisconsin State Statute 111.70(1)(o)(2), and that this statute provides that a municipal employer may have management supervisors in each fire station when they have multiple fire stations within their jurisdiction. The Employer contends that the motivation for the reorganization was not evasion of the collective bargaining agreement, but improving the staffing level of manpower on the three 24-hour duty shifts. The Employer notes that the effect of the reorganization was to provide for the first time equal staffing on all shifts and a minimum staffing complement increased from 14 to 15 personnel on all shifts. The City contends that the role of Shift Commander has not been removed from the agreement, because Reseburg's testimony clearly established that when bargaining unit personnel are assigned as Shift Commander, i.e., when a superior officer is not on duty, the City does compensate the Acting Shift Commander or in accordance with Article XIX, Section 7. The City contends that under normal circumstances it is not necessary for bargaining unit personnel to perform management functions when a Deputy Fire Chief is on duty, and therefore no Shift Commander is needed. The City argues that the collective bargaining agreement contains "no specific provision requiring the continuation of bargaining unit positions to infinity," and that customary interpretation of management rights clauses supports the City's view that it retains control over staffing levels and assignment of personnel. The City further argues that it has a public policy responsibility for efficient and effective operation, and that the

reorganization represented an implementation of that responsibility and was clearly within the rights set forth in Article XX. In its reply brief,

the City contends that it is clearly established in the record that Captain Moran has been paid out-of-classification pay whenever a superior officer is not on duty, and that the practice of the Department, properly read, is not to pay out-of-classification pay under all circumstances, but when a superior officer is not "on duty". The City contends that this past practice remains unchanged. The City contends that there is no unilateral "revised working out-of-classification policy" as argued by the Union in its brief, and that on the contrary, the City pursued an overall restructuring through an extensive process culminating in the 1994 budget's adoption by the City Council. The City contends that Section 7 of Article XIX relies on the words "when serving", and that this is the essential flaw in the Union's argument, because since April 4, 1994, Captains have not served as Shift Commanders when a Deputy Chief was present. The City requests that the grievance be denied.

Discussion:

Upon review of the record, I find that the most appropriate statement of the issues before me is as follows:

1. Did the City violate Article IV, Sections 2, 3 or 4; Article XIX, Section 7; and/or Article XX of the collective bargaining agreement by its treatment of the Shift Commander issue on and after April 4, 1994?

2. If so, what remedy is appropriate?

Several of the considerations urged by the Union might apply to any of the three specific Articles in which a violation has been alleged. It is therefore appropriate to comment on these first. To begin with, it is clear from the record that the employes' interests both gained and lost as a result of the restructuring. The addition of a position on duty in each of three shifts is clearly (based on uncontradicted testimony) a response in part to employe expressions of concern over minimum manning and safety; and the creation of an additional Deputy Chief position, potentially a promotional opportunity for employes, goes some way to offset the eventual attrition of three Shift Commander positions. This is relevant to the Union's contention that the City sought to undermine the Union by its restructuring. Meanwhile, I find that the Employer's previous proposal to delete the Shift Commander position, often a contributing factor to a finding that both parties understood a certain subject to be bargainable prior to any change, in this case is not on the same footing as the present restructuring. The restructuring clearly occurred a considerable time after the City had abandoned its proposal, while the restructuring does not, in fact, delete the Shift Commander function as such. Even with the attrition which the City expects to occur, Captains

may still serve in this capacity on a temporary basis, at an increase in pay, indefinitely if a Deputy Chief is off work. Therefore, the City's action in restructuring the department is not the precise equivalent of a unilateral imposition of deleting the Shift Commander position, as proposed in its 1989 round of proposals.

Turning to the specific clauses alleged to be violated, upon reading Article IV, Section 1, I note that that clause defines a work rule as "defined as and limited to: rules promulgated by the City within its discretion which regulate the personal conduct of employes during the hours of their employment." 2/

It is difficult to reconcile the City's action with the definition of a work rule as expressed in Section 1. While the restructuring certainly has an impact on the functions of Captain Moran, and potentially on other employes, the description of this restructuring as regulating the "personal conduct" of employes seems a stretch of logic. "Personal conduct" is a phrase which suggests something considerably more specific to the individual than a department-wide restructuring which changes opportunities for out-of-classification employment, and the phrase that work rules are "defined as and limited to" the provided definition discourages an arbitrator from giving a broad interpretation to that language. I therefore conclude that the restructuring is not a "work rule" within the meaning of Article IV. The consequence is that the Section 4 requirement to withhold a work rule until resolution of a grievance does not apply to this case.

With respect to Article XIX, Section 7, I agree with the City that the phrase "when serving as" which appears in each paragraph of that section must be given meaning in the disposition of this case. The City's argument that a Captain is not "serving" as a Shift Commander, when the Captain is not in command of the shift, is unassailable. The assignment of Deputy Chiefs to shifts might or might not constitute an impermissible removal of bargaining unit work, but that is a separate question. If a Deputy Chief is serving as a supervisor of a shift, it is clear that a Captain has a superior officer on duty, and the Captain clearly is therefore not in command of the shift. Among the principal duties and responsibilities of a Shift Commander listed on that position's job description, it is clear that several critical ones are not being performed by a Captain when a superior officer is on duty, for example items 4, 7, 9, and 11. (In addition, it appears from the testimony that following the change in organization, a number of the other duties previously assigned to Shift Commanders were assumed by Deputy Chiefs, but this point is neither extensively testified to nor extensively argued). The fundamental point is simply that one cannot be an acting Shift Commander without being in command of a shift, and if a superior officer is present, that condition is not met.

The crux of the case therefore is whether Article XX permits the City's action, or whether the past practice of the parties should be read as providing for the continuation of a Shift Commander on each shift. In this respect, I am guided by the accumulated wisdom of many arbitrators who have held that functions traditionally assigned to management should not be read out of existence lightly. It is not irrelevant that the role of a Shift Commander in this department is one which in other departments, as testified to by Reseburg without contradiction, is customarily assigned to a non-bargaining unit rank; and it is also not irrelevant that the statute defining

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2/ Emphasis added.

bargaining unit placement in fire departments in Wisconsin specifies that the term

supervisor "shall include all officers above the rank of the highest ranking officer at each single station". Both of these points support the Employer's contention that there is nothing unusual or particularly hostile to a union for a fire department to insist upon overall control of multiple fire stations on each shift by non-bargaining unit personnel.

Yet the management rights clause here is expressed in general language, and permits more than one interpretation. Arguably, as the Union contends, the clause must be read in conjunction with the longstanding existence of Shift Commanders in this bargaining unit, and harmonizing those factors would suggest that "past practice" be defined on the Union's terms here.

I do not, however, end with this interpretation, because to give past practice the breadth of meaning urged by the Union would vitiate the management rights clause in its reference to "management and control of the City's business and operations". In this instance, it is possible to read the past practice more narrowly than the Union does without denying its existence as a past practice: the fact that a Shift Commander position exists in the collective bargaining agreement, under many arbitral precedents including the Crowley award cited by the City, does not guarantee that such a position must be filled at any particular time. And the restructuring which the City engaged in is, as noted above, not simply to be read as an attack upon the contract, even though some of its aspects limited opportunities for employes; other aspects actually increased them. To read the past practice of employment of Shift Commanders as <u>requiring</u> the continued presence of a minimum of three Shift Commanders at all times, and their replacement only by promotion from below, appears to tread too heavily upon the "management and control of the City's business and operations" of which Article XX speaks.

The record demonstrates that the pattern of staffing of supervisory work in this City does not reflect common practice. That pattern is not explicitly guaranteed by any clause in the agreement. Many arbitrators, as previously noted, are reluctant to read into a collective bargaining a restriction on a restructuring of management operations, absent a clear reason to do so. And I conclude that the ambiguity here must be decided in the City's favor. The restructuring is clearly not something engaged in lightly or solely for the purpose of reducing the costs of supervision here. If anything, the record demonstrates that the restructuring has resulted in a somewhat increased cost for the department as a whole, while providing for greater minimum manning and a higher staffing level for each shift. These are changes, particularly in view of their breadth, their extensive public discussion, and the fact that the primary adverse effect on employe opportunities occurred at a level of supervision which in most departments is outside the bargaining unit, which appear to me predominantly to involve the management and control of the City's business and operations. The Union's Article XX claim that this is an attempt to "evade the provisions" of the Agreement is unpersuasive, in turn, because the effect on employe opportunities for out-of-classification pay is an incidental and secondary element in the restructuring. For these reasons, I conclude that Article XX is not violated by the City's restructuring or its effects, even as I have above found that the other clauses at issue were not violated.

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

AWARD

1. That the City did not violate the collective bargaining agreement by engaging in the 1994 restructuring which resulted in reduced opportunities for out-of-classification pay.

2. That the grievance is denied.

Dated at Madison, Wisconsin this 1st day of May, 1995.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator