

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

NORTH SHORE FIRE FIGHTERS ASSOCIATION,
LOCAL 1440, IAFF

and

NORTH SHORE FIRE DEPARTMENT

Case 1
No. 53158
MA-9262

Appearances:

Mr. Timothy E. Hawks, Shneidman, Myers, Dowling & Blumenfield, Attorneys at Law,
appearing on behalf of the Union.

Mr. Alan M. Levy, Lindner & Marsack, S.C., Attorneys at Law, appearing on behalf of
the Employer.

ARBITRATION AWARD

The Union and the Employer named above are parties to a 1995-1997 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The Union, with the concurrence of the Employer, requested that the Wisconsin Employment Relations Commission appoint an arbitrator to hear the grievance of James Nauer. The undersigned was appointed and held a hearing on May 7, 1996, in Brown Deer, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties filed briefs and replies by July 1, 1996.

ISSUE:

The parties ask:

Did the Employer violate the collective bargaining agreement by paying James W. Nauer at the rate of \$49,032 per year effective January 1, 1995? If so, what is the remedy?

CONTRACT LANGUAGE:

Transitional Agreement:

Any employee who does not receive a \$300 annual salary increase during a year of the contract due to differences between this pay scale and his existing rate of pay, will receive a bonus such that his total increase plus the bonus equals \$300.

IMPLEMENTATION AGREEMENT

...

11. With regard to the implementation of the Transitional Agreement of Appendix B of the CBA, the Board agreed that it will determine an employee's "existing rate of pay" to be the annualized rate of pay an employee would have received as of 8:00 a.m., January 1, 1995 pursuant to advancing a step on the salary schedule of the predecessor employer's collective bargaining agreement, if eligible to do so had the employee continued in the predecessor's employment.

BACKGROUND:

The North Shore Fire Department came into existence on January 1, 1995. It is a combination of several suburban fire departments north of Milwaukee -- Glendale, Whitefish Bay, Fox Point, Shorewood, Brown Deer, River Hills and Bayside.

The Grievant, James Nauer, started working as a fire fighter with the Village of Fox Point in 1979. He started working with the City of Glendale in 1987 and became a Fire Captain in the Glendale Fire Department in 1993. His position as a captain was excluded from the bargaining unit of fire fighters in the Glendale Department. When the Glendale Department ceased to exist as the North Shore Fire Department came into existence, Nauer became a lieutenant in the new North Shore Department. The position of lieutenant is in the bargaining unit in this Department.

Nauer was paid an annual salary of \$49,032 effective January 1, 1994 by the Glendale Department. If he had remained employed by the City of Glendale on January 1, 1995, he would have been paid \$51,423 by Glendale.

Nauer took family leave the end of 1994 and the beginning of 1995, until January 23, 1995. The City of Glendale granted the leave through December 31, 1994. Glendale City Administrator Richard Maslowski sent a letter to Nauer on November 30, 1994, which states:

Your request to use your accrued sick leave for paternity leave has been granted from December 17, 1994 through December 31, 1994.

Since the North Shore Fire Department will commence operations on January 1, 1995, and the Glendale Fire Department will cease operations on the same day, I have no authority to approve your

requested leave beyond December 31, 1994.

As to the status of your current accrued sick leave after the commencement of operations of the new North Shore Fire Department, I do not have an answer for you at this time. This is one of many issues currently being reviewed by the Board of Directors of the new Fire Department. Once I have the information, you will be informed.

On March 30, 1995, Maslowski sent Nauer a letter regarding accrued sick leave:

I have received your March 17, 1995 letter regarding the status of accrued sick leave. Former management employees with the Glendale Fire Department will be treated the same as former represented employees. A copy of the agreement between the City and Local 2958 is enclosed for your review file.

In summary, you were allowed to carryover up to 50 days of sick leave from Glendale to the North Shore Fire Department, which may be used during 1995 pursuant to the rules of the new department. Any of those days not used in 1995 will be banked as of December 31, 1995. Upon your retirement or termination from the North Shore Fire Department (provided you have a total of 15 years combined seniority between the City and the North Shore Fire Department), the banked sick leave will be paid out to you, based on the December 31, 1994 value.

Nauer used family leave on January 2, 5, 8, 11, 14, 17, and 20 of 1995. He works the "blue shift," starting at 8:00 a.m., working one shift on and two shifts off. But for his leave, he would have been subject to being called in to duty for emergencies on January 1, 1995.

The position of lieutenant in the North Shore Department pays less than Nauer's current salary. He received a \$300 bonus in 1995 in accordance with the parties' Transition Agreement that employees not getting at least that much in an annual salary increase would get a bonus.

The Board of Directors on the North Shore Fire Department sent a welcoming letter to its prospective employees in December of 1994. It states, in part:

. . .

Of course, there are inevitable problems and confusions in the initial stages of any project like this. However, we are

determined that the employees not bear the burden of the transition.

Therefore, to the maximum extent possible, the Directors have adopted an initial wage and benefit package which protects all fire fighters, lieutenants, and paramedics from any pay cut, which assures continuation of the health and retirement benefits most of you utilized when employed by the individual municipalities from which you came, and which preserves and allows continued reliance on the basic vacation, sick leave, and holiday benefits to which most of you are already accustomed.

Some changes are obviously necessary for some people; such is always the case when people from five different departments with five different compensation and benefit packages become employees of a single department which provides uniform terms and conditions of employment for all its people. Indeed, we fully anticipate that you may seek collective bargaining to resolve whatever differences may be perceived as we begin. Nevertheless, we have acted now to protect everyone from any reduction in pay, to protect the health care and retirement benefits on which we all depend, and to preserve other economic benefits you may have earned in your earlier employment.

We believe this initial wage and benefit package demonstrates our good faith and high expectations for the future of this department. We look forward to your cooperation in the transition we are all now entering together.

Also in December of 1994, the Board of Directors sent out a basic employment package for fire fighters, lieutenants and paramedics in the bargaining unit. It stated that the initial wages would be the December 1994 rate that employees had been receiving from the originating or former employer. The Chief of the North Shore Fire Department, David Berousek, who had been the acting chief of the Brown Deer Fire Department before North Shore opened for business, was involved with the Directors and management as to how the new department would be run. Berousek recalled that each participating community was asked to supply the December 1994 pay rates for employees. The personnel action slip for Nauer, with an effective date of January 1, 1995, shows no adjustment in his salary, and the base salary of \$49,032 was supplied by the City of Glendale. A lieutenant from the Whitefish Bay Department, Keith Anderson, was paid \$47,489.20 on January 1, 1995, which was his old rate of pay from Whitefish Bay and which was higher than the scale in the new labor contract for lieutenants. He was promoted to battalion chief and awarded a salary of \$49,000 effective January 1, 1996.

Due to the prevailing rates of pay when all the departments merged, some fire fighters may be paid more than some heavy equipment operators, and some heavy equipment operators may be paid more than some lieutenants, just as Lieutenant Nauer is paid more than Battalion Chief

Anderson.

Richard Boehlke, a lieutenant with the North Shore Fire Department, was formerly employed with the Village of Whitefish Bay. Boehlke believes that he was paid by Whitefish Bay between midnight and 8:00 a.m. on January 1, 1995. Boehlke received an increase for 1995, in accordance with what Whitefish Bay would have paid him had he still been employed there.

Boehlke is on the Union's executive board and was a member of the negotiating team that negotiated the current collective bargaining agreement. The first contract was complicated, because the parties had to consolidate people with contracts under five different former unions.

During the bargaining for a new labor contract for the new department, the spokesman for the management negotiating team, Attorney Alan Levy, stated that there would be no pay cuts at any time. Levy also proposed that anyone not getting a lift could get a \$250 signing bonus, which eventually became a \$300 amount in the Transitional Agreement. The Union had become aware of certain employees -- Lewis and Pannell -- that had step increases coming to them under their old contracts that would have taken effect on January 1, 1995. The Union wanted to see that those increases were honored, and it proposed a transitional agreement which management first rejected in the negotiations. An employee named Tucker from Shorewood was in the same situation as Lewis and Pannell, but no one can remember when Tucker's name specifically came up during negotiations, if at all. At the tenth meeting, the Union's spokesman, Attorney Timothy Hawks, was still insisting that the Lewis and Pannell situation needed to be resolved. Lewis, Pannell and Tucker eventually received the step increases guaranteed to them by their former employers through the terms of the Implementation Agreement. The Union was not aware of Nauer's situation during these negotiations.

The Village Manager of Whitefish Bay, Edmund Henschel, sat on the management negotiation team during contract talks. He was not aware of Nauer's situation until this grievance was filed. Management never discussed Nauer's situation while the Union was advocating the step increases for Lewis and Pannell, and possibly Tucker, although Henschel does not remember Tucker's name coming up either.

Other disputes have cropped up in the consolidation. There is an issue involving four fire fighters formerly employed by the Brown Deer Fire Department. Their contract called for them to work from 7:00 a.m. to 7:00 a.m. the next morning. Since the new department did not start up until 8:00 a.m., those fire fighters worked an extra hour without additional compensation. When Whitefish Bay supplied wage rates to the new department, it supplied 1995 rates rather than the 1994 rates for fire fighters.

THE PARTIES' ARGUMENTS:

The Union:

The Union submits that the construction of Item 11 of the Implementation Agreement attached to the collective bargaining agreement must reference the context of the predecessor employer's agreements with their employees and the compensation systems in place at the time it was negotiated. The phrase "pursuant to" must be measured against the circumstances of the employees affected by this agreement in a way to prevent a forfeiture and in light of the bargaining history.

The Union notes that the City of Glendale equated Nauer with represented employees, thus bringing him within the ambit of Item 11 of the Implementation Agreement. The Employer agrees that as of 8:00 a.m., January 1, 1995, Nauer would have received from Glendale an annual salary of \$51,423 and would have advanced a step on the salary schedule had he continued in the employment of the City of Glendale. The only difference between Nauer's situation and those of Lewis, Pannell and Tucker was that Nauer's increase was not the product of a collective bargaining agreement. However, on March 30, 1995, the City of Glendale made clear to Nauer that former management employees with the Glendale Fire Department would be treated the same as former represented employees. The Union argues that the reference in Item 11 to the predecessor's collective bargaining agreements incorporates the legal construction of promises exchanged between the City of Glendale and its former employees. The appropriate inquiry is on Glendale's agreements for the transition purposes, and Glendale voluntarily conferred bargaining agreement status to its promises to employees who were managerial in Glendale but not so in the new department. Glendale's promises to Nauer were collectively a "labor agreement" and enforceable as such. Nauer was in the same position as the former represented employee Lewis, also from Glendale, and the distinction between Lewis and Nauer evaporates and Glendale's promise to pay Nauer more on January 1, 1995, is pursuant to a collective bargaining agreement by virtue of Glendale's representation to Nauer and operation of law.

The Union points out that the Wisconsin Supreme Court has interpreted the preposition "pursuant to" to mean "in agreement with." The manner by which Nauer was to receive his 1995 increase was in agreement with one conferred by a collective bargaining agreement.

The Union further argues that the Employer's treatment of Nauer causes a forfeiture, particularly when contrasted with the circumstances of other similarly situated employees. Nauer, like Lewis, Pannell and Tucker, would have been entitled to an increase in his rate of pay on January 1, 1995, because he earned the increase by virtue of having completed an entire year's service with the prior employer, as did the others. Since there is no reason to distinguish between them, Nauer must be viewed as forfeiting something others in the bargaining unit who are similarly situated received.

Every predecessor employer had experience steps for various ranks and every employee

had a different anniversary date. Some employees could have been placed in the new salary schedule based upon a rate that they received for one day while others could have been receiving a rate for 364 days. If all employees received an increase in 1995 under the new contract on their anniversary date, then no anomaly would exist. However, Appendix B stipulated that any employee who did not receive a \$300 annual salary increase during a year of the contract due to the differences between this pay scale and his existing rate of pay would receive a bonus so that his total increase plus the bonus would equal \$300. An employee who by historical accident began the day before the effective day of the new agreement would be treated substantially differently than the same employee if hired the day after the effective date of the new agreement. The effective date and time of the new contract became critically important. The parties might have negotiated a different point in time to establish existing rates of pay but they did not. The Employer here wants to depart from the rule universally applied to all employees because the Grievant was not a member of a bargaining unit represented by a union.

The Employer:

The Employer argues that Nauer already receives thousands of dollars more per year than the Union and the Employer agreed was the appropriate rate for a lieutenant, and he is paid more than a newly promoted battalion chief in the new department. Now, based on a letter about what his pay as a management employee would have been if he had remained a captain in a department which no longer exists, he seeks a \$1,400 raise to attain a pay rate as lieutenant higher than that of a battalion chief who is his superior.

The Employer agreed to a red circle system by which it would pay everyone at least what they received in their former jobs in December 1994. Nauer got every penny of that amount, regardless of his demotion from captain and the changes in duties and responsibilities caused by that difference. During bargaining, the rate established for lieutenants was almost three thousand dollars less than what Nauer continued to receive under the December 1994 red circled rate.

The Employer admits that the parties agreed that employees who would have had a raise under contracts for the constituent North Shore Fire Department municipalities would be treated as qualified for the step increase. This compromise was specifically restricted to those advancing a step on the salary schedule of the predecessor employer's collective bargaining agreement. Nauer was never entitled to this benefit because he was not subject to the labor contract of his predecessor employer. He was part of management, and the only basis for any wage increase on January 1, 1995 would have been a management letter from the chief of a department which had gone out of existence on December 31, 1994.

The Employer submits that because Nauer was not in the Glendale bargaining unit, he was not entitled to the benefits of its collective bargaining agreement. Lewis and Pannell were subject to their predecessor employer's labor agreement, and the steps were for completion of on-the-job training, not a cost of living type of increment like the levels promised Nauer while he was a

captain in the Glendale Department. Lewis and Pannell were members of the predecessor's bargaining unit, were specified by name in negotiations as the people for whom paragraph 11 of the Implementation Agreement was drafted, and were proper recipients of compensation for completing the progression. Nauer was never entitled to this treatment because he was not a member of the unit at Glendale in 1994, was not entitled to the salary schedule of the collective agreement, and was not continuing in the same job or job progression he held with Glendale.

Arbitrator Hayes stated that the provisions of a collective bargaining agreement are not available to any person who is not a member. Arbitrator Goldstein found that two employees who had transferred into a unit from a different facility under a different contract were not entitled to "snap-back" benefits negotiated as a recovery of concessions original members of their new unit had given up in bargaining before they joined that unit. Arbitrator King held that a supervisor was not entitled to seniority based on service outside the unit because the union could not and did not bargain for supervisory employees whom it did not represent. Even if the Union had nominated Nauer as a desired recipient of treatment like that given Lewis and Pannell, it had no legal standing to insist on such an agreement based on his management career.

The Employer contends that the labor agreement supersedes any individual arrangement Nauer may claim. Federal labor policy has subordinated individual agreements to the common terms of the collective bargaining agreement. Arbitration decisions have reflected this priority where special arrangements have been offered to provide better conditions or side deals for individuals. Arbitrator Williams held that a side deal between an employer and an employee to pay him differently than the contract rate was void regardless of employer assurances of a red circle for the individual. Where Nauer had no such assurances from his new employer in regard to a lieutenant position, but only from his former employer in regard to a Glendale captain position, there is no legal basis for that arrangement's enforceability. Once Nauer became part of the unit, he lost the right to rely on any special arrangements he may have had with his former employer as a result of his non-unit management position.

In Reply:

The Union submits that the level of pay of battalion chiefs proves nothing, as the Department could set the salary at any amount it chose, which could be more or less than Nauer's. The Union also disputes the Employer's statement that Nauer is paid \$2,000 more than other lieutenants; the figure should be approximately \$1,500. Finally, the Union states that it is unclear what point is made by the Department when it asserts that Lewis and Pannell satisfied an on-the-job training element. Nauer demonstrated on-the-job training as a captain, and therefore, acquired skills and abilities to assume responsibilities in excess of his current rank. The Department receives the benefit of this, and Nauer is over qualified for his current position and has little to accomplish by additional training.

The Employer responds to the Union's suggestion that the Department created its own evidence by paying Battalion Chief Anderson less than Lieutenant Nauer when it set Anderson's

salary at \$49,000, which is the entry level for battalion chiefs when the Department began operations in 1995. That is why Nauer never received "step-up" pay when he replaced a battalion chief -- he was already paid more than the rate for the job which was his temporary assignment. While some lieutenants made \$47,487.20 in 1995, which was only \$1500 less than Nauer's rate, part of this was due to the red circling of wage rates in the same manner as was Nauer's. Nauer's rate of \$49,032 was more than \$2400 over the contract rate of \$45,000 for senior lieutenants in 1995, and even without the \$300 bonus, remained \$3442 over the senior lieutenant rate on January 1, 1996. The Employer also notes that the Union raised a question about the relationship between training and steps in the salary schedule. It submits that Lewis and Pannel got their 1995 increases because they had completed a 12-month increment of on-the-job training. In contrast, Nauer was a non-represented captain at Glendale, not in such a training program. His annual increases, if any, were subject to a Glendale ordinance which requires Common Council confirmation of any annual raise.

DISCUSSION:

The relevant language is found in Item 11 of the Implementation Agreement, where it states that an employee's "existing rate of pay" will be the annualized rate of pay an employee would have received as of 8:00 a.m., January 1, 1995 "pursuant to advancing a step on the salary schedule of the predecessor employer's collective bargaining agreement, if eligible to do so had the employee continued in the predecessor's employment." Nauer was not advancing a step on a salary schedule of a predecessor employer's collective bargaining agreement. He was not a member of a bargaining unit entitled to the fruits of a collective bargaining agreement. He was a member of management, and as such, he was promised an increase for 1995 by the City of Glendale outside of the context of Glendale's collective bargaining agreement with its fire fighters.

Nauer's situation is in direct contrast to that of Lewis, Pannell and Tucker, who were members of a predecessor's bargaining unit. Nauer's situation fell more properly under the language of the Transitional Agreement, which provided for a bonus in the event that an employee did not receive a \$300 annual salary increase due to the differences between the new pay scale and his existing rate of pay. The step increases that Lewis, Pannell and Tucker got were collectively bargained and placed in a predecessor's labor contract.

The promise that the City of Glendale made unilaterally to Nauer is the source of this dispute, not the collective bargaining agreement between the Union and the North Shore Fire Department. That promise did not become embedded in the new collective bargaining agreement or the former labor contract between Glendale and its former fire fighters. Glendale's promise to treat former management employees the same as represented employees does not confer collective bargaining rights on those former management employees. The promise was made in the context of a discussion regarding accrued sick leave. But whatever the context, this statement or others made by Glendale does not put Nauer in the steps of a salary schedule of a predecessor employer's collective bargaining agreement. Thus, Item 11 of the Implementation Agreement does not apply to him and there is no contract violation.

The proper interpretation of the collective bargaining agreement does not cause a forfeiture or loss. Nauer's loss of an expected increase in pay is a result of the promise made to him by Glendale, a promise it no longer had the ability to fulfill, once its own fire department was merged into the new entity of the North Shore Fire Department. Forfeiture may not be the correct term here, where Nauer did not take a pay cut, in accordance with promises made by the new department before the new collective bargaining agreement was in place. He continued to receive the same salary he received in Glendale -- the only "loss" was a loss of an anticipated pay raise.

The grievance is not being denied because Nauer makes more money than a battalion chief or other lieutenants. There will always be inequities when merging so many departments and collective bargaining agreements together. The parties will straighten those inequities out over the next several years. The grievance is being denied because Nauer is not entitled to the \$51,432 rate by anything in the collective bargaining agreement, the source of my jurisdiction, certainly.

On the record as a whole, I find no contract violation.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 8th day of July, 1996.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator