BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

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

and

CITY OF BELOIT

Case 131
No. 52425
MA-8965

Appearances:

Lawton & Cates, S.C., Attorneys at Law, by Mr. John C. Talis, appearing on behalf of the Union.

Mr. Richard V. Holm, Beloit City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

International Association of Fire Fighters, Local 583, AFL-CIO ("the Union") and the City of Beloit ("the City") are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission, on April 5, 1995, appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of said agreement. Hearing was held in Beloit, Wisconsin on October 24, 1995. The hearing was transcribed and the parties filed briefs and reply briefs, the last of which was received on January 10, 1996.

ISSUE

The parties stipulated to the following statement of the issue:

> Did the City violate the collective bargaining agreement when it assigned Lt. Ted Peck duties as an MPO on June 18, 1994?
>
> If so, what should the remedy be?

BACKGROUND

The facts underlying this grievance are not in dispute. On June 18, 1994, Lt. Peck was reassigned from Station 1 to Station 4 and assumed the duties of a Motor Pump Operator, i.e., a driver. Lt. Peck did not respond to any emergencies that day. A grievance was filed alleging the City violated the contract by using Lt. Peck out of classification. The grievance was denied and

appealed to the instant arbitration.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE IV

APPLICATION AND INTERPRETATION OF WORK RULES

. . .

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.
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> . . .
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> **ARTICLE XX**
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> **MANAGEMENT RIGHTS**
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> The Union recognizes and agrees that, except as expressly listed 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.

POSITIONS OF THE PARTIES

Union's Position

The Union makes four arguments with respect to its position. First, the Union argues that the City violated the plain meaning of the parties' agreement. It refers to Article XIX, Section 7, which provides, in pertinent part, as follows:

> . . .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.

The Union contends that the agreement should be read to mean what it says. It submits that employes (meaning fire fighters) will be used out of classification as MPO's and here they were

not, thus the remedy is to pay MPO wages to the fire fighters.

Second, the Union claims past grievance settlements, applicable work rules and past practice support its position. The Union asserts that a grievance settlement is evidence of the intent of the meaning of the contract. It notes that the parties understand the concept of "hire back," which occurs when an employe is called in to work on overtime to fill in for an absent employe. It points out that in 1993 the City used a Captain to fill in for a pipeman (fire fighter) and the Union objected and the City agreed not to use an officer to perform lower-ranking duties with the Chief stating in writing, "We will hire officer for officer, driver for driver and pipeman for pipeman." It submits that in the instant case an officer was required to work in a driver's position and this contravened the 1993 settlement. The Union maintains that the work rules, General Order 42, relates to hire back, and provides that Lieutenants will be hired back as a Company officer and only Acting Lieutenants may be hired back as an MPO and the City's own work rules make it improper for a Lieutenant to work as an MPO. The Union relies on past practice which demonstrates that no Lieutenant has been hired back as a driver and this past practice supports its argument.

Third, the Union takes the position that the City's action disrupts the chain of command and threatens public safety. It argues that the paramilitary nature of fire service makes essential an *esprit de corps* and a clear chain of command essential. It alleges that the City's assignment of Lt. Peck to driver was a demotion destructive of *esprit de corps* and created doubts about the chain of command which could create a safety risk for the public.

Fourth, the Union insists that there is a clear dollar loss for the misassigned work. It claims that a clear remedy is necessary to vindicate the Union's institutional interest. It requests roll-up pay for the temporary "demotion" of an officer for this occasion and each instance since the grievance was filed. It asks that the grievance be sustained.

City's Position

The City contends that Article XIX, Section 7 deals only with shortages of manpower and not with a situation where there is sufficient manpower, but too many officers. It claims that Section 7 merely provides for pay according to the service performed where the job is above the employe's current classification. It submits that nothing in the contract prohibits using an employe to perform below his/her classification. Relying on Article XX, the City observes that it is free to manage and supervise the work force as it sees fit. The City maintains that the Union has not shown any provision in the labor contract which prohibits the use of employes outside their classifications. It asserts that the language of the contract is clear and unambiguous and must be given effect and there is no need to examine past practice or other information external to the contract. According to the City, resort to past practice indicates that the parties have interpreted the contract to permit the assignment of employes to lower classifications. The City observes that arbitrators have consistently upheld the employer's right to assign duties and tasks outside the

classification, especially in temporary or emergency situations. In support of its position, the City cites Elkouri and Elkouri, How Arbitration Works, (4th Ed., 1985-89 cum. supp.)

The City insists that the Union's reliance on Article IV, Sections 3 and 4 and Article XV is misplaced as they do not deal with the right to use an employe outside his/her classification.

Union's Reply

The Union contends that the City's feeble attempt to evade the plain meaning of Article XIX, Section 7 clearly fails. It asserts that Section 7 refers to shortages in particular classifications rather than in overall manpower as triggering roll-up pay. It insists that the language does not limit itself to manpower shortages but that there was an MPO shortage and in this case the agreement provides that a firefighter shall serve as MPO and shall receive MPO wages. It alleges that the City is seeking to duck the bargain it made with the Union. It states that the City's action is a direct violation of Article XIX, Section 7 and the City's reliance on general management rights is disposed of because Article XIX expressly limits the management rights provision.

The Union claims that the grievance must be sustained because the City effectively conceded that the Union's position is supported by a written grievance settlement, applicable work rules and past practice. It notes that while the City acknowledged the grievance settlement, it claimed there were extra officers and they could be reassigned. The Union terms this argument spurious. It submits that a mutual grievance settlement was violated by the assignment of Lt. Peck, an officer, as a driver. The Union notes that the City made no response to work rules except to state the Union's reliance on Article IV, Sections 3 and 4 is misplaced. It insists that the work rules show that the parties contemplate that a Lieutenant work only as an officer and not as a driver. The Union objects to the City's effort to twist past practice by reference to Acting Lieutenants being hired back as an MPO which is permitted by the rules, whereas Lt. Peck is not an Acting Lieutenant and there is no example of a Lieutenant serving as a driver.

The Union observes that the City failed to address the issue of disrupting the chain of command and endangering public safety and insists this is a telling silence. The Union also points out that the City made no argument on the issue of remedy and it concludes that for the above reasons, the grievance must be sustained.

City's Reply

The City contends that the assertion that Lt. Peck was demoted for the day is totally false as he was paid Lieutenant wages and wore his Lieutenant uniform.

In response to the Union's argument that the agreement is unambiguous, the City agrees but asserts that the Union failed to point out any contract provision that prohibits the assignment of

a Lieutenant to MPO duties. It states that the Union only refers to language that deals with manpower shortages and there were none on the day in question.

As to the Union's second argument, the City observes that the Union, while contending that the contract language is clear and unambiguous, presents extraneous matters to interpret the agreement, all of which deal with manpower shortages. As to the third argument made by the Union, the City responds that Lt. Peck was never demoted. It labels the Union's public safety argument as a "red herring" and argues that the evidence fails to explain why Lt. Peck is not competent to operate a fire truck when his job description requires such competency. It suggests that Lt. Peck should be demoted if he is as incompetent as alleged. It states that a refresher course may be appropriate for Lt. Peck but the "public safety" argument has no basis in the collective bargaining agreement.

DISCUSSION

Both parties have argued that Article XIX, Section 7 is clear and unambiguous but give it different interpretations. The Union asserts the provision prohibits the City from assigning an employe to work at a lower classification whereas the City asserts it does not make such a prohibition nor is there any other provision of the contract which limits the City's rights to make such assignments.

Examination of Section 7 indicates that the opening sentence gives the City the general right to use employes out of classification when there are shortages of Motor Pump Operators and officers. This sentence is followed by the four numbered sentences. Each follow the same format: "(Employee position) when serving as (Employee position) shall receive (Employe position) wages." Clearly these numbered sentences serve to indicate the agreed-upon pay for employes when they are assigned out of classification. These sentences do not relate at all to whether employes can be used out of classification. Consequently, the undersigned rejects the argument that Article XIX, Section 7 prohibits the City from reassigning a Lieutenant to a MPO for a given shift.

The Union has argued the City's action violated a grievance settlement, past practice and applicable work rules. The underlying premise on which the Union is relying is misplaced. The facts giving rise to the grievance involve a reassignment of Lt. Peck from one station to another to perform MPO duties. No overtime was involved and there was a sufficient complement of personnel such that minimum staffing was met. The Union makes arguments based on an October 6, 1993 grievance settlement of an overtime, or a "hire back," situation. In that settlement, the City agreed not to hire back an officer to replace a pipeman (fire fighter). 1/ Additionally, the City stated its intention, when "hiring back," to hire an officer for officer, driver for driver and

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1/ Ex. 1

pipeman for pipeman. The instant dispute does not involve overtime since Lt. Peck was working a previously-assigned shift. The essential difference between hiring back an employe and reassigning an employe already at work, is the difference that makes the earlier settlement agreement inapplicable in this grievance.

The Union also argues that its position is supported by the work rules, as expressed by General Order 42, issued March 22, 1992, and the past practice, as demonstrated by duty rosters showing that employes were not hired back at a rank lower than their own. Both these arguments are marred for the same reason that the grievance settlement is inapplicable: General Order 42 2/ and the evidence adduced by the duty rosters relate to overtime situations, not a situation in which minimum staffing levels were met and no one was called in for overtime. Therefore, the arguments based on the work rule and past practice must fail.

The Union has argued that the reassignment disrupted the chain of command and threatened public safety. This argument is not persuasive. Lt. Peck remained a Lieutenant and was paid as a Lieutenant and the mere fact that he might perform MPO duties does not change his status as a Lieutenant. He is still a Lieutenant, has the insignia, authority and the pay of a Lieutenant. The Union's reference to a number of cited cases do not require a different result. 3/

2/ Jt. Ex. 6.

3/ Kelly v. Johnson, 425 U.S. 238 (1976) held that a county regulation on the length of policemen's hair did not violate the 14th Amendment. The reference to *esprit de corps* was that having the same hairstyles may promote it.

Nash v. City of Jacksonville, Fla., 895 F. Supp. 1536 (M.D.Fla., 1995) was a race discrimination case which held that the denial of an African-American's promotion from Lieutenant to Captain did not violate Title VII, Sec. 1981. The reference to rank structure

It is true that firefighters have a rank structure and citizens depend on them for their lives and safety. As general statements, these are true, but they do not control the outcome of this case. The evidence failed to prove that the reassignment had any effect on the ability of the Fire Department to perform its function. In short, I conclude that there is no contract violation and thus no remedy is required.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

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was merely a general statement of the facts.

In City of Boca Raton, Florida, 77 LA 759 (Hoffman, 1981), there was discipline for refusing to perform extra duty without pay. The reference to citizens depending on firefighters was a general statement.

AWARD

1. The City did not violate the collective bargaining agreement when it assigned Lt. Ted Peck duties as an MPO on June 18, 1994.

2. The grievance is denied and dismissed in all respects.

Dated at Madison, Wisconsin, this 3rd day of October, 1996.

By Jane B. Buffett /s/
Jane B. Buffett, Arbitrator