BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
EAU CLAIRE FIRE FIGHTERS, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL NO. 487, AFL-CIO	Case 224 No. 54020 MA-9521
and	
CITY OF EAU CLAIRE	

Appearances:

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, Attorneys at Law, by Mr. John B. Kiel, appearing for the Union.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Mr. Stephen L. Weld, appearing for the City.

ARBITRATION AWARD

Eau Claire Fire Fighters, International Association of Fire Fighters Local No. 487, AFL-CIO, herein the Union, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and to decide a dispute between the parties. The City of Eau Claire, herein the City, concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Eau Claire, Wisconsin, on August 19, 1996. A stenographic transcript of the hearing was not made. The parties completed the filing of post-hearing briefs on November 19, 1996.

ISSUES:

The parties were not able to stipulate to the issue and agreed that the arbitrator should frame the issue.

The Union stated the issue as follows:

> Was the City's reassignment of Kim Nessel from a twenty-four (24) hour day, fifty-six (56) hour week, to an eight (8) hour day, forty (40) hour week without the mutual agreement of Local 487 unreasonable and violative of the contract?

The City stated the issue as follows:

> Did the City violate the collective bargaining agreement when it temporarily assigned Fire Captain Kim Nessel to a 40-hour work week in order to train new recruits? If so, what is the appropriate remedy?

The arbitrator believes the City's statement of the issue to be an accurate statement of the dispute.

BACKGROUND:

At the time of the hearing in the instant matter, the City's Fire Department was staffed by a total of 88 employes. Employes assigned to the ranks of Captain, Lieutenant, Fire Equipment Operator, EMT/Paramedic, Firefighter or Shift Battalion Chief are shift employes. The shift employes are assigned to one of three shifts and have a standard workday of 24 consecutive hours and a standard work week of an average of 56 hours. The shift employes work on a 27 day cycle which provides for 216 hours of work in each 27 day cycle (9 scheduled days x 24 hours per day = 216 hours). Under the Fair Labor Standards Act, herein FLSA, the overtime threshold for firefighters working a 27 day cycle is 204 hours. Thus, in each 27 day cycle the shift employe is scheduled to work 12 hours of overtime. The non-shift employes have a standard work day of 8 hours and a standard work week of 40 hours.

In late 1995 or early 1996, the City scheduled a training session for new recruits to commence on February 5, 1996. The training session typically consists of four consecutive 40 hour weeks and 8 hour days. Battalion Chief David Gee coordinates the training sessions. Prior to the training session which commenced on February 5, 1996, Gee did some of the training, while other portions of the training were conducted by the on-duty shift Captains. Because the training by the Captains was conducted during their regular duty shifts, the training occasionally would be interrupted by runs in response to fire calls.

In early December of 1995, Captains Kim Nessel and Brad House met with David Patrow, the Deputy Chief of Operations in the Fire Department, to discuss their suggestions for improving the training of recruits. Nessel was concerned that the then-existing method of conducting the training was not consistent due both to the training sessions being conducted by several individuals and to the interruptions in the training caused by responses to fire calls. Nessel and House thought that the training would be more consistent if one off-shift person conducted the entire 4 weeks of the training. Patrow agreed with that approach and asked Nessel if he would go off-shift and run the next training session. Nessel, who is a state certified instructor, agreed to that request. Nessel testified that he asked Patrow if he should contact David Tobisch, the Local Union President, to

inform him that Nessel would be going off-shift and that Patrow said either he or management would contact Tobisch. Patrow testified that he did not recall any conversation about contacting or getting approval from Tobisch or the Union, but rather, he recalled saying that he would need to see if the Chief would approve of Nessel going off-shift due to the overtime cost of replacing Nessel as a Captain during that time. In either case, Tobisch first learned of Nessel's transfer to an off-shift status on January 22, 1996.

Nessel transferred from on-shift status, i.e., a 56 hour week, to an off-shift status, i.e., a 40 hour week, on January 22, 1996. Nessel remained off-shift through March 1, 1996. He did not work any overtime hours during the six weeks that he was off-shift, but his wage rate was increased by approximately $5.00 an hour during said period of time.

On January 26, 1996, Tobisch filed a grievance alleging that the City had violated the contract by transferring Nessel from a 56 hour work week to a 40 hour work week. Said grievance became the basis for the instant proceeding.

For a considerable, but unspecified, number of years, the City has temporarily transferred employes from a 56 hour per week on-shift schedule to a 40 hour per week off-shift schedule on numerous occasions either to allow employes to attend courses at the National Fire Academy, or, to accommodate employe requests for light duty assignments. On two occasions during the early 1990's, the City has used the same type of schedule changes to fill, on a temporary basis, vacancies in the position of inspector.

POSITION OF THE UNION:

The City waived its right to unilaterally change the work shifts of the Captains. In Article III of the contract, the City recognizes the Union as the exclusive bargaining representative of the bargaining unit employes and acknowledges a duty to bargain over hours of work. The product of that bargaining is Article IX, which provides that the standard schedule for all shift employes is a 24 hour day and a 56 hour week. The word "standard" does not give the City the managerial flexibility to unilaterally change the work schedules of shift personnel.

The management rights clause, Article IV, is subordinated to the rest of the contract. The hours of work provision abridges and modifies the management rights clause by defining the work day and the work week in unambiguous, specific, mandatory fashion.

Prior to the class in February of 1996, the bulk of the recruit training was performed by Battalion Chief Gee, with various Captains provided training while on-shift. Never before has a Captain been assigned training duties on an 8 hour day and a 40 hour week schedule. Even the job description for Captains clearly provides for them to perform training on-shift. By assigning Nessel to train recruits on an off-shift schedule, the City created a new work rule affecting hours of work. New rules affecting hours of work are subject to negotiations and mutual agreement

under Article XXX, Section 2 of the contract. The City did not fulfill its bargaining obligation before reassigning Nessel.

The Union has never agreed that the City has a unilateral right to reschedule shift employes. The arrangements by which employes may be assigned off-shift to attend the National Fire Academy courses or to perform light duty are both of a long-standing nature and have been approved by the Union. The Union also has agreed twice to allow the City to fill Inspection Department vacancies by reassigning shift employes to an 8 hour day and a 40 hour week. Thus, the Union has agreed to allow the City to change the work schedule of shift employes for a few well defined reasons, but it has never agreed to a blanket waiver of the hours of work provision.

If the City is allowed to unilaterally alter the work schedules of the employes, such changes could have an impact on the personal lives of the employes when they make plans based on their standard work schedule.

The City's claim to the exclusive authority to make temporary assignments and/or change work schedules cannot be supported without a revision of the contract. The City should not be allowed to achieve through arbitration a right which it has refused to seek in bargaining. The grievance should be sustained.

POSITION OF THE CITY:

The Union failed to prove that Nessel's acceptance of the temporary training assignment was contingent upon approval of the Union. Patrow did not recall Nessel raising that condition. However, Patrow did recall stating that he would need the Chief's approval of the assignment since it would likely result in increased overtime.

The contract does not require the City to obtain the Union's approval before making an assignment change, even where it results in a switch from a 56 hour work week to a 40 hour work week. Under the contractual management rights clause, the City possesses exclusive authority to make temporary assignments and/or to change work schedules. There is no contractual provision which specifically and expressly limits the City's right to temporarily change a work assignment.

Article IX merely sets forth the standard work day and work week. The inclusion of the work "standard" denotes a recognition by the parties that "non-standard" work schedules can occur, especially where the changes are only temporary in nature. After the training was completed, Nessel returned to his standard 56 hour work week on-shift schedule. Moreover, Nessel received the same bi-weekly salary during his temporary assignment as he would have

received if he had been on his 56 hour work week.

The City's temporary assignment of Nessel to training duty was not arbitrary, capricious or in bad faith. There was a specific operational objective behind Nessel's temporary assignment. The new recruits needed to be trained. Nessel was qualified to train them and he

volunteered to train them. He is a state certified fire instructor who teaches courses at Chippewa Valley Technical College. Training is an integral and essential part of Nessel's job duties as a Captain, as illustrated by the job description for a Captain.

Past practice supports the City's actions. It has not been uncommon for 56 hour employes to temporarily switch to 40 hour assignments. Employes who have attended the national fire academy for training have temporarily switched from their standard 56 hour on-shift schedules to 40 hour off-shift schedules. When firefighters have requested light duty assignments, they have been switched from 56 hour on-shift schedules to 40 hour off-shift schedules. Both of said types of schedule changes have occurred without approval, objection or input from the Union. In addition, on two separate occasions during the early 1990's, employe promotions resulted in vacancies in the position of inspector, which is a 40 hour off-shift position. In both cases, the City posted a notice to employes to advise them that the City would fill the vacancy on a temporary basis until a more formal promotion process could be completed. Both vacancies were filled temporarily by shift employes who switched to 40 hour off-shift schedules. The Union did not either object to or approve of those changes. There is no evidence to support the Union's claim that it had agreed to allow temporary assignments from on-shift to off-shift status in the three foregoing situations.

The City did not establish a new work rule in the instant matter. Accordingly, Article III does not apply. Neither did Nessel's temporary assignment violate an existing work rule. Therefore, the City had no duty to bargain with the Union over that assignment.

The City requests that the grievance be denied.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE II
DEFINITIONS

. . .

H. "Grievance" shall mean a claimed violation, misinterpretation or misapplication of the existing rules, wages, procedures, or regulations covering working conditions applicable to the employees of the department and shall include all claimed violations, misinterpretations, or misapplication of the provisions of this Agreement. The term "wages" herein shall have no relation to the establishment or changing of wage scales or rates of new or changed jobs or to any provision of the retirement system or the Employees Benefit Plan.

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ARTICLE III
UNION RECOGNITION AND ACTIVITIES

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Pursuant to and in accordance with all applicable provisions of Chapters 111.70 and 111.77 of the Wisconsin Statutes, the City hereby recognizes the Union as the exclusive representative for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and conditions of employment for all non-civilian uniformed employees of the City's Fire Department for the term of this Agreement.

. . .

ARTICLE IV
MANAGEMENT RIGHTS

Section 1. It shall be the right of the City to operate and manage its affairs in all respects in accordance with its responsibility, and the powers or authority which the City has not specifically abridged, delegated, or modified by other provisions of this Agreement are retained by the City. Such powers and authority, in general, include, but are not limited to, the following:

A. To determine the mission of the agency, set standards of service to be offered to the public, exercise control and discretion over its organization and operations, and to utilize personnel in the

most appropriate and efficient manner possible.

. . .

C. To establish or alter the number of shifts, hours of work, work schedules, vacation schedules, methods, processes, and means and ends.

. . .

F. To create new positions or divisions and to introduce new or approved operations or work practices and to permanently or temporarily terminate, consolidate, transfer, or modify existing positions, divisions, operations and work practices.

. . .

K. To hire, schedule, promote, transfer, assign, train, or retrain employees in positions within the Fire Department.

. . .

ARTICLE VII
GRIEVANCE ARBITRATION

Any unresolved grievances which relate to the interpretation, application, or enforcement of any specific article and section of this Agreement or any written supplementary agreement and which has been processed through the last step of the grievance procedure, may be submitted to arbitration in strict accordance with the following:

. . .

Section 3. The arbitrator shall limit his/her decision strictly to the interpretation, application, or enforcement of this Agreement and shall be without power and authority to make any decision contrary to, or inconsistent with, or modifying or varying in any way, the terms of this Agreement.

. . .

ARTICLE IX
HOURS OF WORK

Section 1. The standard workday for all shift employees shall consist of twenty-four (24) consecutive hours and the standard work week shall consist of an average of fifty-six (56) hours, Monday through Sunday inclusive (according to the California Plan). For purposes of complying with the Fair Labor Standards Act only, this schedule shall be based on a 27 day cycle.

Section 2. The standard workday for all non-shift employees shall consist of eight (8) hours not to include a lunch period. The standard work week shall consist of an average of forty (40) hours.

. . .

ARTICLE XXX
WORK RULES

Section 1. Existing work rules are made part of this Agreement.

Section 2. The establishment of new work rules affecting wages, hours of work, or conditions of employment shall be subject to negotiations and mutual agreement prior to their effective date.

. . .

DISCUSSION:

The parties are in agreement with the concept that an employer has the right to assign and schedule work to the extent that its authority to do so has not been restricted by other provisions of the contract. The parties disagree over the extent of such restrictions in the relevant contract. Section 1 of Article IV does state that the City has the right to establish or alter work schedules. However, said right is not unrestricted. Article IX defines the standard work day and the standard work week for both shift and non-shift employes. The Union contends the provisions of the contract, particularly Article IX, show that the City has waived its right to unilaterally change employe schedules and must obtain the Union's agreement before an employe's schedule can be changed. Conversely, the City contends that its right to alter an employe's work schedule on a temporary basis is specified in Article IV and is not restricted by other provisions of the contract.

The undersigned has reviewed numerous arbitration awards, including those cited in the briefs of both parties. The Union relied heavily on City of Warr Acres, 87 LA 127 in support of its position that the contractual definition of the standard work day and the standard work week limited the management rights clause. In said case, apparently the employer implemented a permanent change in the work schedule by occasionally reducing a sufficient number of shifts in each 28 day work cycle from 24 hours to 20 hours so as to ensure that the scheduled hours for each firefighter would not result in overtime pay. Such a permanent change is different from the temporary change at issue herein. Therefore, that decision is distinguishable from the instant case.

The Union asserts that there is a long-standing practice whereby employes are not moved from one type of work week to the other type of work week without the approval of the Union. As evidence of such a practice, the Union points to the absence of any objection by it, either as a grievance or in some other form, to temporary transfers made by the City in the following situations: (1) to allow employes to attend courses at the National Fire Academy; (2) to

accommodate employe requests for light duty assignments; and, (3) to temporarily fill vacancies in the inspector position. Tobisch testified that the practice of making temporary transfers for the foregoing three reasons was in existence when he was hired by the City, which hire was over 26 years before the instant case arose. Tobisch also testified that, because the Union approves of temporary transfers for those reasons, there is neither any need to approve each individual transfer which falls into one of those categories, nor, is there any need to state the practice in writing. While such an explanation is plausible, so is the following explanation offered by the City. The City believes the absence of any prior grievances, relating to temporary transfers, shows that the Union has recognized the City's retention of the right to make temporary transfers for legitimate reasons without prior approval or input from the Union. Tobisch did not testify to any instances, prior to the instant proceeding, in which the City attempted to make a temporary transfer, but the transfer was not made because the Union refused to give its approval to the transfer. Further, there is no evidence to show that the Union was ever asked to give its approval to temporary transfers which were made for one of the three reasons set forth above. Faced with such a background, the undersigned finds the City's explanation for the absence of any grievances over prior temporary transfers to be more persuasive. Accordingly, the past practice supports the City's position.

If one were to look at the contractual language, without considering any past practice, the undersigned finds the City's arguments to be more convincing. The Union avers that, by agreeing to the use of the word "standard" in Article IX to describe the work day and the work week, the City gave up the right to make unilateral scheduling changes. The undersigned does not believe said provision prohibits the City from making temporary transfers of employes between the two types of schedules for valid reasons. Adopting the Union's interpretation would cause the word "standard" to mean "only" or "sole." Rather, the use of the word "standard" implies that there may be abnormal or non-standard schedules which vary from the standard work day and/or work week. Such would be the case also if the language used normal or regular, instead of standard, to describe the work days and work weeks. Further, if the parties had agreed that an employe could be moved from the shift schedule to the non-shift schedule, or vice versa, only with the Union's approval, then the parties easily could have used language to reflect such an agreement.

It is clear that Patrow concurred with the suggestions of Nessel and House for revising and improving the training session. One of those suggestions was to assign one employe to be with the trainees during the entire four weeks, rather than to have a number of instructors conduct different parts of the training. Nessel was qualified to coordinate and lead the training session. When asked by Patrow, Nessel agreed to take the assignment. Thus, the City had a reasonable basis for temporarily assigning Nessel to an off-shift schedule to conduct the training session. Although the City did not need the Union's approval to temporarily transfer Nessel from an on-shift schedule to an off-shift schedule, the City should have informed the Union of the change in Nessel's shift prior to the change going into effect. It was not Nessel's responsibility to inform the Union of the change in his schedule.

The undersigned does not agree with the Union's assertion that the City created a new work rule when it required Nessel to perform training off-shift. Thus, the City's actions did not violate Article XXX.

The evidence submitted does not show that Nessel lost any earnings as a result of the temporary change in his schedule, since he received the same bi-weekly salary for the 40-hour work weeks as he received for his normal 56-hour work weeks.

After considering the evidence and the arguments of the parties, the undersigned enters the following

AWARD

That the City did not violate the collective bargaining agreement when it temporarily assigned Fire Captain Kim Nessel to a forty hour work week in order to conduct a training session for new recruits; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 31st day of January, 1997.

By Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator