

BEFORE THE ARBITRATOR

IN THE MATTER OF THE ARBITRATION OF A DISPUTE BETWEEN

THE CITY OF WAUSAU

and

**WAUSAU FIREFIGHTER ASSOCIATION LOCAL 415,
IAFF, AFL-CIO and CLC**

Case 87
No. 55704
MA-10072

APPEARANCES

Ms. Therese M. Freiberg, Assistant City Attorney, City of Wausau, City Hall, 407 Grant Street, Wausau, Wisconsin, 54403-4783.

Mr. Mike Kunesh, Representative IAFF, 4539 Kuchera Lane, Manitowoc, Wisconsin, 54220.

STIPULATED ISSUE

“Did the City of Wausau violate Article 30 of the labor agreement by scheduling normal duty day activities for the afternoon of December 31, 1996? If so, what is the appropriate remedy?”

RELEVANT CONTRACT PROVISIONS

Article 1 - Recognition

The City continues to recognize Local 415, IAFF, as the sole and exclusive bargaining agent for the purposes of engaging in conferences and negotiations establishing wages, fringe benefits, hours and conditions of employment for the following employees: Captain/Inspecting, Lieutenant/Inspecting, Lieutenant/Firefighting, Motor Pump Operator and

Firefighter. Expressly excluded from the bargaining unit of the Wausau Firefighters Association are the Chief, Assistant Chiefs, Nonrepresented Captains, and Mechanic.

Article 4 - 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 other provisions of this contract. These rights include, but are not limited to, the following:

- A. To direct all operations of City government.
- B. To hire, promote transfer, assign and retain employees in position with the City.
- C. To suspend, demote, discharge and take other disciplinary action against employees pursuant to the ordinances of the City of Wausau, subject to the Grievance Procedure.
- D. To relieve employees from their duties because of lack of work or other legitimate reasons.
- E. To maintain efficiency of City government operation entrusted to it.
- F. To take whatever action is necessary to comply with State or Federal law.
- G. To introduce new or improved methods or facilities.
- H. To change existing methods or facilities.
- I. To contract out for goods and services.
- J. To determine the methods, means and personnel by which such operations are to be conducted.
- K. To take whatever action is necessary to carry out the functions of the City in situations of emergency.

- L. To establish reasonable rules and regulations. The Union acknowledges that the establishment and modifications of the rules and regulations of the Wausau Fire Department are within the sole and exclusive power of the Chief and that he may establish, modify and repeal rules or regulations. The Chief will submit any new rule or regulation to the bargaining committee of the Union in advance of the effective date of the new rule or regulation, whenever possible, and the Union will be provided the opportunity of discussing the new rule or regulation with the Chief. However, the City agrees that such rules or regulations will be reasonable with the reasonableness of the rules subject to the grievance procedure.
- M. To determine the number, structure and location of departments and divisions and number and kind of positions and job classifications with the Wausau Fire Department.

Article 13 - Work Week

- A. Normal On-duty Week for Firefighting Employees: The on-duty week of all employees who perform firefighting duties shall be an average of not more than fifty-six (56) hours. The platooning of all employees shall be established by the Chief of the Fire Department. The normal schedule for each platoon shall be as follows: On duty one 24-hour period, have one 24-hour period off, on duty one 24-hour period, have one 24-hour period off, on duty one 24-hour period, and have four (4) 24-hour periods off. This sequence may be altered to permit changes in an individual's duty cycle.
- A. On-Duty Day for Firefighting Employees: The on-duty day for all firefighting employees shall begin at 6:45 A.M. and end on the following day at 6:45 A.M. and shall consist of twenty-four (24) hours. All references to on-duty days for firefighting employee shall be defined as above and shall not be construed as to include any normal off-duty time.

Article 16 - Holidays

Annual: Employees shall receive paid holidays for each of the following days:

New Years Day	Labor Day
Good Friday	Thanksgiving Day
Easter	December 24 th
Memorial Day	Christmas Day
Independence Day	December 31 st

1.56 Hour/Week Employees: The rate for each day shall be the employee's annual salary plus longevity divided by 242.85. Pay for said day shall be included in the payroll which follows the said holiday.

2.40 Hour/Week Employees: The rate for each day shall be computed based upon the employee's normal hourly rate. If required to work on any of the designated holidays, they shall receive additional pay at their regular hourly rate for all such time worked.

Article 30 - Past Practices

The City will not unilaterally change any benefit, practice or condition of employment which is mandatorily bargainable.

BACKGROUND

This grievance arbitration involves the City of Wausau, Wisconsin, Fire Department. The grievance is one of contract interpretation and a violation of an alleged past practice. The grievant in this matter is Local 415 as represented by David J. Sanft, President of the Local. The grievance alleges a violation by the City of Wausau for scheduling normal duty day activities in the afternoon on a contractual holiday, December 31, 1996, in violation of Article 30 of the collective bargaining agreement.

There are ten paid holidays provided for in the collective bargaining agreement between the parties. (Joint Exhibit 1). Article 16, Holidays, lists the ten holidays and covers the rate of pay received for each holiday. One of those holidays is December 31. Article 16 covers 56-hour a week firefighters who work on holidays and 40-hour a week non-firefighters who are not assigned to work on holidays. The holiday Article does not cover what work or duties are to be performed on a holiday. Article 13, Work Week, does not specify or set forth any language pertaining specifically to duties that will be performed by firefighting employees on a holiday.

On December 31, 1996, the Fire Chief informed the lieutenant in charge of the 24-hour shift, who was acting as Captain, that employees would perform their normal work duties on the December 31 holiday. The duty lieutenant assigned regular duty activities with which the firefighters complied. The Local then filed a grievance by their Union president because they had worked normal duties on a holiday when, in the Local's view, regular duty activities had never been scheduled for a holiday, including December 31.

The on-duty shift on any holiday, as with other days, starts at 6:45 a.m. Firefighters initially perform routine maintenance and cleaning in order to have the equipment and the fire house prepared for the shift. As alleged by the Union, as of 11:45 a.m. regular duty activities stop on holidays. Normal duties involve training and inspections of businesses, office buildings, etc. As alleged by the City, there is nothing in the contract or past practice that prevents the City from scheduling normal duties throughout the 24-hour shift on a holiday. On Memorial Day and July 4, 1997, regular duty work was not scheduled. On Good Friday, 1997, regular work was originally scheduled and when it was called to the attention of the Assistant Chief, after the Good Friday schedule had been posted, the Local was informed that the scheduling was unintentional and training and other regular duty activities ceased at 11:45 a.m. After 11:45 a.m., on holidays, according to the Local, firefighters are only in a stand-by status for emergency and non-emergency calls from the public.

This arbitration was the continuation of a grievance mediation meeting between the parties and the arbitrator which occurred on June 17, 1997. The grievance went unresolved and the hearing was scheduled for August 31, 1997. At the request of the City, the hearing was rescheduled for September 8, 1997. The hearing in this matter was held by the arbitrator on September 8, 1997, in the City of Wausau. The hearing was closed at 3:40 p.m. The hearing was not transcribed. The parties were given the opportunity to file summary briefs which were received by the arbitrator on September 25, 1997.

POSITION OF THE PARTIES

Union:

It is the position of the Union that the City violated Article 30 of the collective bargaining agreement by requiring firefighters on December 31, 1996, to perform normal duties after 11:45 a.m. Article 30 is a past practice article which states "the City will not unilaterally change any benefit, practice or condition of employment which is mandatorially bargainable." (Joint Exhibit 1). The Union, through its testimony, exhibits and brief, argues that for at least twelve years the employees have never performed normal duty day activities on December 31 or any other holiday.

The Union takes the position that all the holidays under Article 16 are treated the same, and that as of 11:45 a.m. on those days, firefighters cease to perform normal duties such as training and inspections. After 11:45 a.m., the employees only perform maintenance and cleaning activities to keep the firefighting equipment continually prepared. The employees also engage in wellness programs and are on call for emergencies. The firefighters also provide support at particular City events such as the fire works display on July 4. The Union argues that the evidence proves that on no other holidays under Article 16 has there been any regular work performed. Further, the Union argues no legitimate basis exists for treating December 31 differently than the other nine holidays. The Union takes the position that its evidence establishes that there has been a clear past practice that regular duty day activities have not been performed on December 31 or any other holiday. Therefore, the Union posits that the City has violated Article 30 of the collective bargaining agreement and that the grievance should be sustained and that designated holidays, including December 31, should be classified as “non-inspection work days.” (Joint Exhibit 2.)

City:

The City’s position is that the December 31 holiday has not been treated as a typical holiday by the parties, and the only past practice that can be established is that regular duty work has been scheduled on the December 31 holiday. The City takes the position that there is nothing under the collective bargaining agreement that prevents it from assigning work on December 31 and that it has done so without the Union grieving or processing any grievance to arbitration. The City argues that all it is required to do under Article 16, Holidays, is to pay the required holiday pay under that article, which it has done in this case.

The City takes the position that the burden is on the Union to prove a past practice of not assigning regular duty activities on December 31, and the Union has failed to prove such a practice. The City argues that December 31 is treated differently because the general working public do not have that day off and the majority of businesses are open, and therefore, it is possible to schedule inspection and other normal work day activities on December 31. Lastly, the City concludes by arguing that no portion of the labor agreement, nor the past practice of the parties, indicate that anything other than normal duty activity should take place on December 31, and that therefore, the grievance must be denied by the arbitrator. (City Brief.)

DISCUSSION

This dispute involves the interpretation of Article 30 and other provisions of the parties' labor agreement. The Union in its hearing presentation offered evidence to prove that for at least the past twelve years, December 31 was treated like the other contractual holidays; the City's evidence was offered to prove that the December 31 holiday was treated differently. Both parties cited past practice to prove their case. The crux of the matter is whether regular work duties are performed after 11:45 a.m. on December 31.

The City is correct that the broad management rights clause gives it the power to determine and assign the work. No where in the collective bargaining agreement is there a definition of what are normal duties to be performed by the firefighters. However, the parties through their testimony did agree that inspections and training are normal assigned work duties. The Union attempted to prove that these duties cease on holidays at 11:45 a.m. After that time, the employees are only on call for emergencies and non-emergencies or to provide coverage for special events such as the Fourth of July fireworks display.

Based on the evidence presented by both parties, the arbitrator finds that for the nine holidays provided to the employees under Article 16, other than December 31, there is no dispute that normal duties cease after 11:45 a.m. Union President Sanft creditably testified that in his twelve years of service with the Department, normal duties ceased after 11:45 a.m. Sanft testified, without contradiction, that when the City assigned normal work on the Good Friday holiday in 1997, and this was pointed out to the Assistant Chief, the work assignments were canceled and the employees were told that the assignment of normal duties had been inadvertent. The Union also introduced evidence that regular duties were not performed on Memorial Day or on the Fourth of July in 1997. This evidence was uncontroverted.

The Fire Chief essentially confirmed the practice on holidays other than December 31, by testifying that December 31 was treated differently than the other nine holidays. While the Chief would not totally concede in his testimony that no work was performed on a holiday, this becomes a definition of what is work. Under cross examination, the Chief testified that on holidays, a holiday schedule is followed that includes physical training, maintenance, and "maybe some regular training." The Chief also testified that normal inspections and training would not be scheduled for a holiday other than December 31. The City in its brief does not take the position that normal duties are scheduled for holidays other than December 31.

This is not a case where there is any dispute over pay; the Union grievance and case makes no allegation that employees were improperly paid for working on December 31. Nor is this a case about a failure to perform assigned duties; the employees

properly performed the duties to which they were assigned on December 31, 1996, and then grieved. Nor does there seem to be a dispute as to what are and are not normal workday duties, at least not to the extent that it is relevant to the decision.

The City is correct that the Union has the burden to prove there was in effect a past practice that normal duties were not assigned on the December 31 holiday, the assignment of which would violate the past practice article. The Union's testimony offered to prove that for the last 12 years normal duties were not assigned on the December 31 holiday. Although the Union witness admitted that he had not worked every December 31 holiday, his testimony is creditable that in his capacity as Union president he would have been told if normal work had been assigned. The City countered this evidence by its witness, the Fire Chief, who testified that he knew of no problem in scheduling work on December 31, and that he thought it normally was scheduled. The Chief admitted that he usually takes December 31 as a personal or vacation day so he did not know personally if a normal work schedule for December 31 was established.

Both parties tried to use a previous grievance to support their positions. 1/ The Union testified that its witness had spoken to the then Union president (no longer employed by the City) and had been told that the City at that time backed off their scheduling of work on December 31, 1984. The Union filed the grievance just to make a point and be on record. The Chief, on behalf of the City, remembers this incident differently and so testified. According to the Chief, the employees did work on that December 31, and that the Union never pursued their grievance. The City takes the position that this was a waiver by the Union to grieve the current issue because the Chief gave the Union the same reasons in 1984 for denying the grievance as he did in 1996. 2/ Any waiver of a contractual right, by either party, must be intentional or voluntary; such is not the case here. 3/ Therefore, the Union has not waived its right to file the instant grievance. 4/ Further, the 1985 grievance, and the conflicting evidence regarding it, do not offer conclusive proof that can aid the arbitrator in this case.

The Union has not proved an overwhelming case of a past practice, but the City has not shown why the December 31 holiday should be treated differently than the other holidays under Article 16. The article lists ten holidays and does not differentiate between them in any manner; the language of the article only covers the appropriate pay the holiday. The City through the Chief's testimony argues that December 31 is different because most businesses are open and inspections could be done on that day as different from the other holidays. While true that on the other nine holidays, most businesses would not be open, thus making December 31 "different," it does not prove that normal duties were assigned and worked. The Chief also testified that he "perceives" December 31 to be different because it is not recognized as a National holiday. Whether the Chief's perception is correct, the arbitrator is restricted to the terms of the labor agreement and

whether the Nation accepts December 31 as a holiday is not important; it is a holiday under the parties' labor agreement. The City tries to substantiate through its testimony and argues in its brief that past practice proves its position that normal duties were assigned and worked on December 31. The arbitrator finds that there is little evidence to support this position because the Chief admitted that he could only assume that work was assigned and performed on the December 31 holiday as he took the holiday as a personal vacation day.

The arbitrator finds that while the City has broad management rights, there is nothing in the contract that would permit it to treat nine holidays one way and December 31 another way. What evidence there is of past practice tends to support the position of the Union that normal duties were not assigned on the December 31 holiday. The essence of a holiday is that work is not performed. A fire department does not have that luxury, but it can, as here, lighten the work for the employees who by necessity must be on duty. The City has done that with nine of the contractual holidays; it would remove a significant benefit from the employees to allow regular work to be assigned on December 31. No strong evidence has been presented by the City to show that work has been scheduled on December 31 other than in 1996. 5/ Further, no evidence has been offered to show contractually why December 31 should be treated differently or could be treated differently. Therefore, the arbitrator finds that the grievance of the Union must be sustained.

AWARD

The grievance is sustained.

REMEDY

The City in the assignment of duties shall treat the December 31 holiday no differently than the other holidays under Article 16 of the labor agreement.

Dated at Madison, Wisconsin, this 30th day of October 1997.

Paul A. Hahn /s/ _____

Paul A. Hahn, Arbitrator

ENDNOTES

1/ Joint Exhibit 2(f) and 2(g).

2/ Joint Exhibit 2(g).

3/ WAUKESHA SCHOOL DISTRICT, CASE 59, NO. 42622, MA-5751 (MCLAUGHLIN, 1990).

4/ CONTINENTAL FOREST INDUSTRIES, 75LA53, 55 (ANDERSON, 1980). “In deciding not to appeal the 1976 grievance, the Union did not prejudice its position when it withdrew since the evidence does not show it was withdrawn with prejudice or that it was intended as a binding precedent on the point in issue.”

5/ As noted earlier, the facts surrounding the grievance of 1985 [Joint Exhibit 2(f) and 2(g)] are too inconclusive to suggest any practice either way regarding scheduling of normal work duties on December 31. It is the practice of the arbitrator to give little weight, if any, to past grievances without agreement by the parties that any settlement was precedential.

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