

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SUPERIOR FIRE FIGHTERS, LOCAL #74, IAFF

and

CITY OF SUPERIOR

Case 164

No. 56440

MA-10286

Appearances:

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, by **Attorney Timothy E. Hawks**, appearing on behalf of the Union.

Ms. Mary Lou Andresen, Human Resources Director, City of Superior, appearing on behalf of the City.

ARBITRATION AWARD

Superior Fire Fighters, Local #74, IAFF, hereinafter referred to as the Union, and the City of Superior, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Superior, Wisconsin, on July 21, 1998. The hearing was transcribed and the parties filed post-hearing briefs which were exchanged on September 9, 1998. The parties reserved the right to file reply briefs and each party indicated that it would not file one and the record was closed on October 12, 1998.

BACKGROUND

Since at least 1985, members of the bargaining unit have selected crew assignments on a seniority basis annually. In November or December, 1997, a shift change form was given to the Battalion Chief and employes by seniority selected a shift, platoon and station for the next

year. The shift change was usually implemented during a three-day period in January. Employees completed the shift change selections in 1997, but in 1998, they were never implemented. The Assistant Fire Chief indicated that outstanding "personnel issues" had to be settled in negotiations before the shift change would be implemented. The personnel issues were three fire inspector positions changing from 40 to 56 hours and the change of a utility driver position to firefighter. On March 1, 1998, the Union filed a grievance over the failure to implement the shift change selection which was denied and appealed to the instant arbitration.

ISSUE

The Union stated the issue as follows:

Did the City violate the collective bargaining agreement when it unilaterally changed a long-standing past practice of allowing selection of crew assignments on a seniority basis?

The City stated the issue as follows:

Did the City violate Article 1, second paragraph, and Article 6 a) as established in the grievance filed when it did not implement for 1998 the annual selection of crew assignments?

The undersigned frames the issue as follows:

Did the City violate the parties' collective bargaining agreement when it did not implement the annual crew selection in 1998?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 6 **PREVAILING RIGHTS**

a) All rights, privileges, and working conditions enjoyed by the employees at the present time, which have not been included in this Agreement, shall remain in full force, unchanged and unaffected in any way, during the term of this Agreement, unless they are changed in mutual consent.

. . .

c) The City possesses the sole right to operate the City Government and all management rights reside in it, subject only to the provisions of this Contract and applicable law. These rights include:

A. To direct all operations of the Fire Department.

B. To establish work rules and schedules of work.

C. To hire, promote, transfer, schedule and assign employees to positions with the Fire Department.

D. To suspend, demote, discharge and take other disciplinary action against employees.

E. To determine the order of layoff pursuant to 62.13 Wis. Stats. (1979).

F. To maintain efficiency of Fire Department operations.

G. To take whatever action is necessary to comply with State or Federal law.

H. To introduce new or improved methods or facilities.

I. To determine the methods, means and personnel by which Fire Department operations are to be conducted.

J. To take whatever action is necessary to carry out the functions of the City in situations of emergency.

UNION'S POSITION

The Union contends that the City violated Article 6 a) by failing to conduct crew selection on a seniority basis for 1998. The Union points out that this case is not about the City's ability to specify the number of positions in the Department, on a shift or a platoon or station, nor the number of positions in a particular rank, whether shift, station, platoon or department. The Union claims that after the Department reaches its conclusions about these things, the individual fire fighters have the opportunity to select by seniority the shift and station they will be assigned. It relies on the Chief's testimony that there would probably be no difference had the shift change been implemented. The Union argues that the station and shift an employe works is a condition of employment and employes occupying a position of the

same rank are interchangeable with little if any effect on job performance or the functions of the Department. It observes that this is demonstrated by the practice of “trading” work days which exists under the contract.

The Union argues that the alignment of employees is the product of seniority selection and not management assignment and personnel actions occur due to retirement, quit, termination or promotion which does not require the selection process to be redone. It maintains that the reason offered by the City is a “red herring” and the balance between “conditions of employment” enjoyed by bargaining unit members outweighs the assertion of management rights which is completely without factual support in the record.

CITY’S POSITION

The City relies on the management rights clause, Article 6 c) asserting that the Chief can exercise his right to establish assignments based on the needs of the service. It submits that the outstanding issues of personnel matters impacted six positions, more than ½ a platoon and supported the decision to defer implementation of the shift change in 1998.

The City denies that it was punishing the Union because these matters were not resolved in negotiations and the record established that this is an unfounded claim.

The City observes that crew shift and station selection is not a provision of the contract and has been overridden by the Chief where he has determined that such was necessary for the efficient operation of the Department.

The City insists that it was exercising its management right to schedule and assign and acted within its authority to delay crew assignment selection pending resolution of various personnel matters and it did not violate the contract or past practice.

DISCUSSION

The evidence established that since at least 1985 there has been an annual shift change selection by seniority which has been implemented during a three-day period in January of each year. This clearly is a past practice as it is unequivocal, clearly enunciated and acted upon and readily ascertainable over a long period of time as a fixed and established practice. (Elkouri & Elkouri, How Arbitration Works (BNA, 5th Ed., 1997 at p. 632)). The parties are in disagreement as to whether the “shift change” process primarily relates to working conditions or whether it is controlled by the City’s management rights. The undersigned finds that the practice primarily relates to a working condition. The City failed to establish any special needs requirement that would make a driver on one platoon not to be interchangeable with another driver on a different platoon or a station for that matter. The present assignments

are based on seniority selection and have been for the last 12 years, and the Chief could offer no reason that a prior year's selection was any better than the next year's selection (Tr. 43). There might be some circumstances that would allow the Chief to deny "shift change" selection by seniority but none were shown in this case. The "personnel issues" raised by the City do not constitute circumstances which on balance override the past practice. The "shift change" selection by seniority is a right, privilege and working condition protected by Article 6 a) of the contract and the City's failure to implement the shift change in 1998 violated Article 6 a).

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

AWARD

The City violated the parties' collective bargaining agreement when it did not implement the annual crew selection for 1998. As 1998 is almost over, implementation at this late date would not be an appropriate remedy; therefore, the City is directed to cease and desist from failing to implement the annual crew selection and shall commence and implement the annual crew selection in 1999 in the same time frame it has done so in the past.

Dated at Madison, Wisconsin, this 24th day of November, 1998.

Lionel L. Crowley /s/

Lionel L. Crowley, Arbitrator