

## BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**SUPERIOR FIRE FIGHTERS, LOCAL #74, IAFF**

and

**CITY OF SUPERIOR**

Case 165

No. 56441

MA-10287

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### 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**

On April 28, 1992, the Union sent the Fire Chief the following with respect to vacation picking procedures:

The following vacation picking procedures were approved at the April 6<sup>th</sup> Union meeting.

#### Vacation picking (sic) Procedures

Full weeks shall be picked by seniority with each member being able to pick as many weeks as he is entitled to for the current year, no vacation held over from previous years may be picked at this time. There shall be no restriction as to the picking of long or short weeks. After everyone has picked their full weeks, members will be allowed to pick single days on a seniority basis. Any days not picked during the second round will be on a first come first served basis. Vacations shall not be dropped within 14 days of the beginning of vacation except in emergency situations. Dropped vacations shall be posted for 1 week, or ½ of the time remaining till the beginning of the vacation period. During this time picks will be on a seniority basis. After this period is up the time will be available on a first come first served basis. ½ day vacations shall be picked as before except 3 days shall be changed to read 1 week.

On June 15, 1992, the Fire Chief issued the following vacation procedures:

1. Only two (2) members from each platoon shall be allowed on vacation on the same day except for the months of June, July, and August. During the months of June, July and August, three (3) members from each platoon shall be allowed on vacation.
2. Vacation shall be selected by seniority.
3. Full week, long or short weeks, shall be selected and each department member shall be allowed to select as many full weeks vacation as he/she is entitled to for the current year. No vacation carried over from previous years may be selected at this time.
4. After all department members have had the opportunity to select full weeks vacations, department members shall be allowed to pick single day vacations on a seniority basis. Vacation days carried over from previous years may be used during this selection.
5. All vacations days not selected under item 3 and 4 shall be granted to the person making the first request.

6. Vacations shall not be canceled within fourteen (14) days of the beginning of such vacation except under emergency situations.

7. All canceled vacations shall be posted for a period of two (2) weeks. The most senior person requesting this "canceled" time shall receive it. Preference shall be granted to full week request over single day request.

8. "Half-day" vacations are allowed, however, they will be only be (sic) granted six (6) or less days prior to the day requested.

(The Fire Chief reserves the right to discontinue half-day vacations at any time).

9. Granting, of "half-day" vacation requests shall not be approved without sufficient time to find a replacement.

The limitation of two (2) off except for June, July and August when three (3) off was the limit was not a change from the prior procedures.

The City had cutbacks in 1995 from four companies and 13 people on platoons to three companies and 11 on two platoons and 10 on the other (Tr. 40).

In December, 1997, the Fire Chief proposed the following changes in vacation procedure.

### **Policy**

Department members will begin picking vacation in December for the following year.

Vacation will be picked by seniority, excluding the Assistant Chief and Battalion Chiefs.

Vacation days held over from a previous year cannot be picked until all department members have made their selection. Held over vacation days will then be picked by seniority.

Only two members from a platoon will be allowed on vacation.

Department members must pick all of their accumulated vacation except that three (3) twenty-four (24) hour days may be reserved for carry over purposes or to be used as available.

All picked vacation will be used and members will not be allowed to cancel vacation without prior permission from the Chief or Assistant Chief.

All vacation days not scheduled will be allowed only if the request does not require overtime to fill the vacancy or does not interfere with scheduled training events or other department activities which in the opinion of the Chief or Assistant Chief are necessary for the member to attend.

On December 16, 1997, the Union filed a grievance over the proposed changes in the vacation procedures. The Chief offered to discuss the procedures and the matter was brought to a labor-management meeting. The Union rejected the changes and the matter was referred to negotiations.

On March 2, 1998, the Fire Chief implemented changes in the vacation procedures which included:

Only two members from a platoon will be allowed on vacation.

All picked vacation will be used and members will not be allowed to cancel vacation without prior permission from the Chief, Assistant Chief or Battalion Chief.

All vacation days not scheduled will be allowed if there is thirty (30) days advance notice and there is no extenuating circumstances which in the opinion of the Assistant Chief or the Chief may cause undue hardship for the department. Vacation request with less than thirty (30) days notice will be allowed only if the request does not require overtime to fill the vacancy or does not interfere with scheduled training events or other department activities which in the opinion of the Chief or Assistant Chief are necessary for the member to attend.

The grievance was denied on March 16, 1998, and appealed to the instant arbitration.

**ISSUE**

The Union framed the issue as follows:

Did the City violate the collective bargaining agreement with Superior Local 74 of the International Association of Fire Fighters when it unilaterally implemented a vacation policy on or about December 3, 1997, and if so, what is the appropriate remedy?

The City framed the issue as follows:

Did the City violate Article 1, second paragraph, and Article 6 a), which were the articles grieved, when the fire chief implemented a standard operating guideline on vacation scheduling dated March 2<sup>nd</sup>, 1998?

The undersigned frames the issue as follows:

Did the City violate the parties' collective bargaining agreement when the Fire Chief unilaterally implemented a change in the vacation scheduling procedures on March 2, 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.

. . .

#### **ARTICLE 16** **VACATIONS**

Vacation allowances will be computed on a calendar year basis and will be granted to members of the bargaining unit to be picked by seniority as follows:

. . .

#### **UNION'S POSITION**

The Union contends that the City violated Article 6 a) by unilaterally limiting the number of firefighters that can take vacation in June, July and August to two per platoon as the

past practice of allowing three per platoon is a working condition within the meaning of Article 6 a). It insists that vacation scheduling is a mandatory subject of bargaining as it is primarily related to wages, hours and working conditions. It claims that vacation scheduling primarily relates to a right, privilege or working condition enjoyed by employees as opposed to a managerial function. It notes the contract only addresses vacation accruals but that would be meaningless unless vacations could be taken. It argues that the three person limit in summer vacation is protected by Article 6 a). It submits that the City's justification for the change, the need to schedule training and to control overtime costs do not take vacation scheduling out of the realm of "conditions of employment." It observes that scheduling of training primarily relates to wages, hours and conditions of employment. It fails to see how training is affected by three off but not two off on vacation. It points out that the Chief was unable to cite any specific training that had to be conducted during the summer. The Union notes that overtime is a monetary issue and if the City can limit vacations because of overtime then it could prohibit them altogether to eliminate overtime but it is against this sort of unfettered management discretion that Article 6 a) protects the existing privileges of the employees.

The Union observes that Article 6 a) requires mutual consent for a change but the Union never gave its consent and the Chief unilaterally promulgated the changes in vacation procedures.

### **CITY'S POSITION**

The City contends that the grievance was filed over a proposed change in vacation policy and is not timely. It submits that the core change in the standard operating guideline is the restriction that only two members of a platoon can be off on vacation during June, July and August and the Chief was operating under the authority of Article 6 c) which guarantees the City the right to schedule and assign employees to maintain the efficiency of the Fire Department's operations. It claims that minimum staffing is a management right and a permissive subject of bargaining. The City maintains that the determination of the maximum number of employees allowed off on vacation has been retained by the City and is not a privilege of the employees. It insists that the City has not agreed to bargain this issue.

The City notes the 1995 reduction in companies and staff made it unduly disruptive to allow three members per platoon on vacation as the minimum staffing is three per apparatus, therefore the vacation policy was impacted by that decision and the change in policy was to maintain the efficient operation of the Department on a year round basis. The City claims it made a good faith effort to discuss this with the Union but did not surrender its management rights.

The City argues that this case is not about vacation scheduling but about minimum staffing levels. It insists that the Chief has had control of this policy and it is not a negotiated policy. It points out that the June 15, 1992 policy includes provisions not "negotiated" with

the Union especially paragraph #1. It also observes that the posting of cancelled vacations and the six-day requirement on ½ day vacations were not in the April 28, 1992 letter from the Union. It points out that the number of employees off at any one time is not mentioned in the April 28, 1992 letter and this is because that provision was established by the Chief and it has been an accepted management right for the Chief to determine staffing levels. It contends that the Chief controlled staffing levels at all times herein and the City did not violate the agreement but exercised a right that rests with the City.

### DISCUSSION

The instant case involves the balancing of the vacation scheduling under Article 6 a) against the City's management right to maintain efficiency of Fire Department operations. Obviously, the City can limit the number of employees who may be on vacation at any one time, otherwise all the employees could take vacation at the same time, leaving the City without any fire protection. Article 16 allows vacation selection by seniority and this would be unnecessary without some limit on the number of employees that can be on vacation at any one time. The Union does not challenge the limit of two (2) off per platoon at any one time but seeks to maintain the three (3) off per platoon during the summer months.

In the past, the City has been able to operate the Department efficiently within the limits of two (2) and three (3) set out above. The issue here is whether the record establishes changes affecting the Department's operations that necessitated the reduction of three off during the summer to two off during the summer. The basis for the change in the summer months is the cutbacks in 1995 where the Department cut a truck company so that there was a reduction of nine positions. At present there are 33 members in 3 platoons with a minimum staffing of nine (9). The City also asserted that training was an issue but this would appear to be minor because two per platoon are allowed on vacation and the three is for only three months, so the impact on training appears minor at best.

Where the underlying basis for a practice or policy changes, the practice may be modified. It would appear that the reason for the three per platoon allowed off during the summer months was to allow more employees to take vacation during the summer months. However, with a reduction in the number of employees down to 33, this benefit has a greater impact. The additional one out of 33 is better than that one out of 42. The Chief testified without contradiction that over the July 4<sup>th</sup> week, there were vacation openings and that is peak vacation time (Tr. 42). The City noted that one week may not hold true for the entire summer season, but the record did not show that there was a large number of vacation denials during the summer months. Certainly, it is a benefit for employees to be able to take vacation in the greatest numbers during the summer, but this must be balanced against the need of the City to run the Department efficiently and to provide fire safety protection to the residents of the City. On balance, the City's operational efficiency, pursuant to its management rights, prevails over



the employees' Article 6 a) right to additional persons off during the summer. This is a close case and were the evidence such that the limitation on vacation selection imposed by the City could be accommodated, the result would be different.

The City made other changes in the vacation policy such as not allowing the cancellation of vacation and imposing certain limitations on the scheduling of vacation. The evidence presented failed to establish that these changes were required by reasons to maintain efficiency of Fire Department operations and on balance, the provisions of Article 6 a) prevail and the City cannot change these benefits, privileges and working conditions.

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

**AWARD**

The grievance is denied in part and upheld in part. The City did not violate the parties' collective bargaining agreement when the Fire Department changed the number of employees who could be off on vacation during June, July and August from three to two. The City violated the agreement when it changed the vacation scheduling policy to no longer permit cancellations and placed limitations on vacation days not selected under paragraphs 3 and 4 of the June 15, 1992 vacation procedures. The City shall immediately remove these latter requirements and reinstate paragraphs 5 and 6 of the June 15, 1992 vacation procedures.

Dated at Madison, Wisconsin, this 24<sup>th</sup> day of November, 1998.

Lionel L. Crowley /s/  
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Lionel L. Crowley, Arbitrator