BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

RHINELANDER FIREFIGHTERS, LOCAL 1028,
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, CLC

and

CITY OF RHINELANDER

Case 84
No. 56806
MA-10421

Appearances:

Mr. Joe Conway, Jr., IAFF, State Representative, appearing on behalf of the Union.

Mr. Philip I. Parkinson, City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

Rhinelander Firefighters, Local 1028, International Association of Firefighters, AFL-CIO, CLC, hereinafter referred to as the Union, and the City of Rhinelander, hereinafter referred to as the City, are parties to a collective bargaining agreement. The parties jointly agreed to arbitrate a grievance over the meaning and application of the terms of the agreement. The parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide the grievance. The undersigned was so designated. Hearing was held in Rhinelander, Wisconsin, on February 24, 1999. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on March 16, 1999.

BACKGROUND

The facts underlying the grievance are not in dispute. On June 5, 1998, the City's Fire Chief issued a consecutive hours worked policy which stated, in part, as follows:

> NO INDIVIDUAL WILL BE ALLOWED TO WORK MORE THAN FORTY-EIGHT (48) CONSECUTIVE HOURS IN ANY SEVENTY-TWO (72) HOUR PERIOD. EACH PERIOD OF FORTY-EIGHT (48) CONSECUTIVE HOURS WORKED BY ANY INDIVIDUAL MUST BE FOLLOWED BY A MINIMUM REST PERIOD OF TWELVE (12) HOURS. EXCEPTION(S): THE ONLY EXCEPTION TO THIS POLICY WOULD BE IN CASES WHERE THE FIRE CHIEF OR OFFICER IN-CHARGE (sic) OF THE DEPARTMENT HAS DETERMINED THAT AN EMERGENCY SUCH AS SOME SUDDEN AND SERIOUS FIRE, ACCIDENT OR OTHER PERIL EXISTS, WHICH IN THEIR JUDGMENT DOES NOT ALLOW FOR THE NORMAL REST PERIOD TO BE GIVEN.

The impetus for this policy was a firefighter who switched days so that he worked 3½ days for a total of 84 hours in a 96-hour period. The Chief relied on Sec. 62.13(11), Stats., and asserted the policy was for a firefighter's safety as well as that of other crew members and the public. On June 6, 1998, a grievance was filed asserting a violation of past practice with respect to exchange days and overtime. The Chief denied the grievance which was appealed and the Finance, Wage and Salary Committee directed the Chief to amend the policy on consecutive hours to read as follows:

> NO INDIVIDUAL WILL BE ALLOWED TO WORK MORE THAN FORTY-EIGHT (48) CONSECUTIVE HOURS IN ANY SEVENTY-TWO (72) HOUR PERIOD. EACH PERIOD OF FORTY-EIGHT (48) CONSECUTIVE HOURS WORKED BY ANY INDIVIDUAL MUST BE FOLLOWED BY A MINIMUM REST PERIOD OF **TWENTY-FOUR (24) HOURS**. EXCEPTION(S): THE ONLY EXCEPTION TO THIS POLICY WOULD BE IN CASES WHERE THE FIRE CHIEF OR OFFICER IN-CHARGE (sic) OF THE DEPARTMENT HAS DETERMINED THAT AN EMERGENCY SUCH AS SOME SUDDEN AND SERIOUS FIRE, ACCIDENT OR OTHER PERIL EXISTS, WHICH IN THEIR JUDGMENT DOES NOT ALLOW FOR THE NORMAL REST PERIOD TO BE GIVEN.

The Fire Chief issued the amended policy on consecutive hours worked on June 23, 1998, and the grievance proceeded to the instant arbitration.

ISSUE

The parties were unable to agree on a statement of the issue. The Union frames the issue as follows:

In issuing the memo on June 5, 1998, did the City violate the collective bargaining agreement, Article IV, Section A, Article X, Section F, Article XII and misinterpret Sec. 62.13(11), Stats.?

If so, rescind the memo.

The City frames the issue as follows:

Did the City violate the collective bargaining agreement by imposing restrictions on approval of officer switches of shifts for safety reasons?

If so, what is the appropriate remedy?

The undersigned frames the issue as follows:

Did the City violate the parties' collective bargaining agreement by the consecutive hours worked policy dated June 5, 1998, which was amended on June 23, 1998?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE IV – NEGOTIATIONS

A. All negotiations regarding wages, hours, benefits and conditions of employment shall be conducted by the authorized representatives of the Employer and the authorized representatives of the Union.

. . .

ARTICLE X – MISCELLANEOUS PROVISIONS

. . .

E. Safety. For the welfare and protection of both the firefighters and the public, the Chief shall designate and enforce safety rules and safe operation of the Fire Department.

F. Firefighters may exchange days between themselves subject to prior approval of the officer in charge; provided, however, the Employer shall not be liable for overtime which arises solely due to the exchange of work hours.

. . .

ARTICLE XII – PAST PRACTICE

A. Operational practices governed in This Agreement relative to the functioning of a Fire Department shall be governed by past practice of the Rhinelander Fire Department.

UNION'S POSITION

The Union contends that the Chief's memo changed working conditions without entering into negotiations with the Union. It asserts that the City's reliance on Sec. 62.13(11), Stats., is misplaced and does not deal with safety but with work hours per week. It claims that Sec. 62.13(11) should be given no consideration because it was created in 1924 when firefighters still worked a one platoon system and the three platoon system did not come into existence until the 1960's. It asserts that the Chief's safety claims are not supported by the evidence and instead the evidence suggests that the real reason was the Assistant Chief's personal preference that he did not like firefighters working more than 48 consecutive hours. It submits that the Assistant Chief's opinion is not wrong or unreasonable but it is opinion and not facts and the change in the labor agreement must be negotiated. It argues that sincere opinions are not grounds for violating the contract.

The Union contends that the City failed to prove that firefighters working more than 48 consecutive hours constitute a safety hazard. It submits the example of the firefighter who worked 84 consecutive hours, which was the basis for the change, disproves the City's assertion. It refers to the testimony of the Assistant Chief who also worked the last 24 hours with that firefighter and confirmed that the firefighter was not impaired, excessively fatigued or a safety hazard during this 24-hour period. It states that the fear of a safety hazard is not grounded in fact and the City produced no studies or incidents to support its claim. The Union points out that firefighters seldom work more than 48 consecutive hours so it is nearly impossible to cause an ongoing safety problem.

The Union asserts that the implementation of the consecutive hours worked policy violates Article IV. It maintains that consecutive hours worked is a mandatory subject of bargaining and the City's failure to even discuss it prior to implementation was a clear violation of Article IV. The Union claims the policy also violated Article XII as there has been a past practice dating back to 1980 of being able to work more than 48 consecutive hours. It also observes that the past practice on overtime has been modified, and thus, the policy modified these two longstanding past practices. The Union insists the implementation of the

new policy modifies Article X, Section F, without the Union's consent. It notes that Article X, Section F allows firefighters to exchange days subject to approval of the officer in charge. The new policy, according to the Union, removes discretion in the officers in charge to grant such exchanges, thereby modifying Article X, Section F without negotiations with the Union.

In conclusion, the Union alleges that the City breached numerous articles of the agreement and there was no overriding safety concern that allowed the Chief to modify the contract and the grievance must be sustained.

CITY'S POSITION

The City contends that the contract has not been violated in any manner by the Chief's order limiting the voluntary switching of officers. It notes that exchanges are subject to approval and the Chief set forth guidelines under which this approval is to be exercised. It refers to Article X, Section E, which allows the Chief to enforce safety rules and the memo was a safety order which the Chief is entitled to designate and enforce.

The City disagrees that there is any "past practice" with respect to switching days between officers because two crews followed one procedure and the third crew a different procedure. It points out that since 1992, the Assistant Chief never allowed a firefighter on his crew to work longer than 48 hours in a row. It argues that there can be no past practice where some employes are treated one way and others another. It contends that a past practice must be consistent and there can be no past practice where there are clearly two different ways of doing something. It points out that the evidence established that officers in charge applied the issue differently and in the last five years, officers worked in excess of 48 hours only eight times. It claims that the Chief was not aware of the problem until the Assistant Chief brought it to his attention in May, 1998. It submits the Union may have had one understanding but it was not with the Chief and Assistant Chief, the only non-Union firefighters.

The City refers to the Chief's testimony that he believed the safety of the firefighters and the public was foremost in his mind and a firefighter working more than 48 hours in a row would not be as effective as one who had time off to rest.

The City asserts that even if there was a past practice protected by Article XII, the Chief could change the past practice by an order that addresses issues of safety of firefighters and the public. It asserts that Sec. 62.13, Stats., applies to the City because it does not have a second platoon or double shift system and safety statutes cannot be ignored as a violation is per se negligence for which the City would be liable. It observes that the Chief and Assistant Chief testified they believed a firefighter who worked longer than 48 hours was subject to fatigue, impaired judgment and distraction and would possibly miss training scheduled for the

officer's regular shift. The Chief, according to the City, sought uniformity for safe operations and fair treatment of all firefighters as it was conceivable that a firefighter could work five or more consecutive work days in one work week and the crew chief would have no control over one of his crew scheduling work on his off day.

It refers to Exhibit 9 showing a summary of fire or EMT runs at night or early in the morning which would disturb a firefighter's sleep and the Chief could determine the criteria to promote the health and safety of citizens and firefighters and the Union should not be allowed to second guess the Chief's determination as to a legitimate safety concern.

In conclusion, the City argues that the Chief violated no provisions of the parties' agreement by imposing a safety order as authorized under Article X, Section E, by restricting officers from working more than 48 hours in a row. It insists there is no consistent and definable past practice prohibiting this restriction as one platoon consistently prohibited officers working longer than 48 hours in a row. It asserts that the Chief was enforcing a safety statute, Sec. 62.13(11), Stats., which was within the scope of his authority under the contract and it asks that the grievance be denied.

DISCUSSION

Article X, Section F, provides that firefighters may exchange days between themselves subject to prior approval of the officer in charge. The City has asserted that the Chief merely issued guidelines for prior approval of exchanges. The Chief issued more than mere guidelines. He issued an absolute prohibition on exchanges that resulted in working in excess of 48 hours unless there was an emergency. Had the parties intended such a limitation they would have put it in the agreement. The collective bargaining agreement does not contain any such prohibition but allows approval within the discretion of the officer in charge. The Chief's memo as amended does not take into account individual factors and diminishes the contractual rights of employes. The City asserts that this is a safety rule which by law and Article X, Section E, of the contract overrides the exchange provision. It seems that it is clear that exchanging days is a mandatory subject of bargaining as the parties clearly provided a provision in the contract and it primarily relates to hours of work and working conditions. The City and the Fire Chief are given statutory authority and can establish policies concerning the safety of employes and its citizens, but it also has the statutory obligation to bargain with the Union where such policies affect wages, hours and working conditions. CITY OF MERRILL, DEC. NO. 15431 (WERC, 4/77). Thus, there may be some circumstances on a case-by-case basis where a shift exchange may be denied due to safety reasons, crew training or other factors; however, a blanket prohibition or limitation as provided in the Chief's memo as amended violates the provisions of Article X, Section F.

The Chief's opinion and the Assistant Chief's opinion are not supported by any hard evidence or even any anecdotal evidence. The incidents of a firefighter working more than 48 hours in a row are very few which indicates that the officers in charge maintain a fair amount of control on exchanges. Additionally, the anecdotal evidence of the firefighter that worked 84 hours straight failed to prove any safety hazard.

Although the City referred to the statutes to support its position, the undersigned is not a court and can only interpret the contract and in this case, the Chief's memo as amended violates Article X, Section F, of the contract because the language provides for the exchange of days subject to the prior approval of the officer in charge which means approval would not be unreasonably denied. The Chief's memo places such limitations and restrictions that the bargain the parties struck is no longer applicable. Thus, the City violated the agreement by implementing the consecutive hours worked policy. Any change or limitation should be bargained at the negotiating table.

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 by the Chief's consecutive hours worked policy dated June 5, 1998, as amended on June 23, 1998. The City is directed to rescind the policy and abide by the terms of the contract.

Dated at Madison, Wisconsin, this 6th day of April, 1999.

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

mb
5838.doc