BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 400

and

CITY OF FOND DU LAC (FIRE DEPARTMENT)

Case 150
No. 57557
MA-10673

and

Case 151
No. 57558
MA-10674

Appearances:

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks and Domer, Attorneys at Law, by **Mr. John B. Kiel**, on behalf of International Association of Fire Fighters, Local 400.

Davis & Kuelthau, S.C., Attorneys at Law, by **Mr. William G. Bracken**, Coordinator of Collective Bargaining Services, on behalf of the City of Fond du Lac.

ARBITRATION AWARD

International Association of Fire Fighters, Local 400, hereinafter the Union, requested the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant disputes between the Union and the City of Fond du Lac, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the requests and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the disputes. A hearing was held before the undersigned on September 14, 1999, in Fond du Lac, Wisconsin. At hearing,

the parties agreed to combine the grievances for the purposes of hearing and decision and waived the thirty (30) day time limit for issuance of an award. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by January 10, 2000. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties agreed there are no procedural issues, but were unable to agree on statements of the substantive issues.

In Case 150 (Paramedic Captain Fill-In Grievance), the Union would frame the issue as follows:

> Does the City of Fond du Lac violate the agreement when it allocates a portion of a 24 hour shift work opportunity to the off-shift position of paramedic captains? If so, what is the appropriate remedy?

The City would frame the issues as being:

> Did the City violate Article XXVII, rights of employer, when it assigned the paramedic captain to fill in for a vacancy created on March 19th, 1999? If so, what is the remedy?

The Arbitrator frames the issues as:

> Did the City violate the parties' Agreement when it assigned the Paramedic Captain to fill part of a 24-hour vacancy in a 56 hour per week position during his normal work hours on March 19, 1999? If so, what is the appropriate remedy?

In Case 151 (Fire Prevention Officer Fill-In Grievance), the Union would frame the issue as follows:

> Does the City of Fond du Lac violate the agreement when it allocates a portion of a 24 hour shift work opportunity to the off-shift position of fire inspector? If so, what is the appropriate remedy?

The City would state the issues as being:

> Did the City violate Article V, Section 3, paragraph 3, when it assigned the fire prevention officer to engine 3 between the hours of approximately 0800 to 1330 on March 19th, 1999? If so, what is the remedy?

The Arbitrator frames the issues as follows:

> Did the City violate the parties' Agreement when it assigned a Fire Prevention Officer to fill part of a 24-hour vacancy in a 56 hour per week position during his normal work hours on March 19, 1999? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited:

Article I
Purpose of Agreement

It is the intent and purpose of the parties hereto that this Agreement shall promote and improve working conditions between the City and the Fire Fighters, and to set forth herein rates of pay and other terms and conditions of employment to be observed by the parties hereto.

. . .

Article V
Hours

. . .

3) Definition of a work week. The normal work week for employees working on the platoon system shall consist of fifty-six (56) hours of duty and shall be on the following schedule: Each twenty-four (24) hour period on duty shall be followed by a twenty-four (24) hour period of rest, except that after the third twenty-four (24) hour period of rest there shall be three (3) additional consecutive twenty-four (24) hour periods of rest, it being the intent that each man's schedule shall be a continuation of the schedule in effect from January 1, 1967.

The normal work week for Fire Prevention Officers shall be forty (40) hours of duty and shall consist of five consecutive eight (8) hour work days beginning on Monday and ending on Friday of each week.

Administration of these schedules and resultant assignments shall be the responsibility of the Fire Chief (Chief) or Assistant Fire Chief (Asst. Chief) as may be designated by the Chief.

. . .

Article XXVII
Rights of Employer

It is agreed that the rights, functions and authority to manage all operations and functions are vested in the employer and include, but are not limited to, the following:

1) To prescribe and administer reasonable rules and reasonable regulations essential to the accomplishment of the services desired by the City Council.

2) To manage and otherwise supervise all employees in the bargaining unit.

3) To hire, promote, transfer, assign and retain employees and to suspend, demote, dismiss or take other disciplinary action against employees as circumstances warrant.

4) To relieve employees because of lack of work or for other legitimate reasons.

5) To maintain the efficiency and economy of the City operations entrusted to the administration.

6) To determine the methods, means and personnel by which such operations are to be conducted.

7) To take whatever action may be necessary to carry out the objectives of the City Council in emergency situations.

8) To exercise discretion in the operation of the City, the budget, organization, assignment of personnel and the technology of work performance.

Nothing contained in this management rights clause should be construed to divest Local 400, Fond du Lac Fire Fighters, of any rights granted by Wisconsin Statutes.

. . .

Article XXIX
Maintenance Of Benefits

The City agrees that, as a result of this contract, no benefits previously granted employees by the City shall be either withdrawn or reduced unless specifically stated in the collective bargaining agreement.

BACKGROUND

The City maintains and operates the Fond du Lac Fire Department, which provides a variety of services to its citizens, including emergency medical services and fire suppression services. Personnel in the Department are assigned to either forty hours per week or fifty-six hours per week schedules. The classifications that work on the forty hours per week schedule are Fire Chief, Assistant Fire Chief, Fire Prevention Officer (FPO), Training-Safety Officer (TSO), Paramedic Captain, Coordinator of Administrative Services and Fire Records Clerk. They work 7:00 a.m. – 4:00 p.m., Monday through Friday. The "line" or "platoon" positions include the classifications of Shift Commander, Captain, Lieutenant, Motor Pump Operator, Firefighter/Paramedic, and Firefighter, which work fifty-six hour per week duty schedules consisting of 24 hours on duty (8:00 a.m. – 8:00 a.m.) followed by a 24 hour rest period, except that after the third 24 hour period of rest, there are three additional consecutive 24 hour periods of rest.

Line personnel are assigned to one of three platoons and staff three fire engines, three ambulances, one tower car and one command car, and operate out of three fire stations in the City. There are normally 20 line personnel assigned to a platoon and the Department tries to maintain a minimum staffing level of 17 line personnel. Minimum staffing vacancies are generally filled from a 24-hour call list if the vacancy is 18 hours or more and from a short-term call list if the vacancy is less than 18 hours. Each shift maintains separate call lists. Personnel on the 40 hours per week schedule are not on the call lists.

A second FPO position was created approximately 10 years ago and the work schedule for the FPO's was changed to the 40 hours per week schedule. Their schedules are altered at times to accommodate inspections. The primary functions of the FPO's are to perform state fire inspections, fire prevention work and public relations activities. In the past, the FPO's had not remained current in their training and were used very little as firefighters. There was some discussion in 1997 about making the FPO positions civilian positions, and this along with the Union's concerns about an FPO trying to take overtime opportunities from line personnel, led to discussions between the Union and the Chief regarding the FPO position. These discussions led to the following memorandum of understanding:

Understanding of Conditions of Employment
For Fire Prevention Officer

Promotions: 24 month promotional list will be established. Appointed employees must remain FPO for a minimum of two years unless promoted to another position. FPO may return to prior position/rank after 2 year requirement when opening exists, FPO has priority over current/future promotional lists.

Training: FPO shall keep current of fire fighting/EMT training/duties as determined by the Chief. All training will be on duty or under existing training agreement.

Overtime: FPO may be used during normal hours (depending on their daily schedules) for fires/emergencies and out of City ambulance transfers. FPO's are not eligible for 24 hour call backs and may not occupy a partial 24 hour call in need. FPO returning to line work will retain position on 24 hour list in same ratio as when departed.

Ex. Departed @#20, shift total (minus departing FPO) @ 360
Returning @#31 new shift total (minus returning FPO) @560
(20 x 560)/360 = 31.111 rounded to nearest whole

FPO may be called in on over-time for fire inspection duties, also major fires/disasters as all fire department employee's (sic) can be.

We hereby agree to the above additional conditions of employment for the Fire Prevention Officer Position.

Thomas Kania /s/	7-7-97	David Flagstad /s/	7-7-97
Thomas Kania		David Flagstad	
President L-400	Dated	Fire Chief	Dated

The Paramedic Captain position was created effective March of 1999 and is a 40-hour per week position. The main duty of the position is to oversee the Emergency Medical Services Division and the Paramedics. The work schedules of both the FPO's and the Paramedic Captain may be altered based upon their workload and duties. Both positions are in the bargaining unit and covered by the parties' Agreement.

At issue in these cases are the Department's use of FPO Vermeulen and Paramedic Captain Peterson on March 19, 1999, when the illness of one of the line personnel reduced line staffing to 16. Rather than calling in someone on overtime to fill the vacancy, Vermeulen was assigned to "stand by" as Lieutenant on Engine 3 between 8:00 a.m. and 1:30 p.m. and Peterson from 1:30 p.m. to 10:00 p.m. A 56-hour employe, Paramedic Bergen, was called in on overtime from 10:00 p.m. to 8:00 a.m. the next morning.

The Union filed the instant grievances alleging that the use of FPO Vermeulen on March 19, 1999, to fill the line staffing vacancy violated the 1997 FPO Understanding and the Maintenance of Benefits provision in the Agreement, and that the use of Paramedic Captain Peterson in that regard on that date also violated the Maintenance of Benefits provision of the parties' Agreement. The grievances were processed through the parties' grievance procedure and ultimately to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union first asserts that the City's decision to regularly assign 40 hour per week personnel to fill vacancies in 56 hour per week positions represents a reduction in benefits in violation of Article XXIX, Maintenance of Benefits. Arbitrators have long recognized that overtime opportunities represent a special benefit prized by employes and the Commission has recognized that proposals dealing with the assignment of overtime opportunities concern mandatory subjects of bargaining. Here, the parties agreed to contract language specifically preserving the level of benefits enjoyed by bargaining unit members at the contract's execution. The level of benefits enjoyed by personnel assigned to a 56 hour week included the opportunity to fill 56 hour per week vacancies needed to restore the minimum staffing of the

Department. The decision to regularly use 40 hour per week personnel to fill 56 hour per week vacancies represents a sudden reduction in such benefits. Nothing in the Agreement gives the City the specific right to reduce overtime exposure by assigning 40 hour per week personnel to vacancies that have historically been held by 56 hour per week employes.

The decision to assign the FPO's to fill vacancies in the 56 hour per week positions also represents a violation of the "Understanding of Conditions of Employment for Fire Prevention Officer." That mutually agreed-to understanding limits the use of FPO's in the 56-hour per week positions:

> "Overtime: FPO may be used during normal hours (depending on their daily schedules) for fires/emergencies and out of City ambulance transfers. FPO's are not eligible for 24 hour call backs and may not occupy a partial 24 hour call in need." (Jt. Ex. 18).
>
> . . .
>
> "FPO may be called in on over-time for fire inspection duties, also major fires/disasters as all fire department employee's (sic) can be." (Jt. Ex. 18).

The Union made it clear that language was intended to prevent the use of FPO's in 56 hour per week capacities in Kania's e-mail to Chief Flagstad:

> "Attached is a copy of what I intend on iforming (sic) the membership/interested applicants on the defined conditions of employment for the FPO position. Look it over, we can change parts if needed, I believe the idea's are what our discussions (sic) and were our intent. Look at the underlined item. We didn't disscuss (sic) specifically FPO's shortening another employee's 24 hour OT, but I don't think it was your/our intent. Any problems let me know." (Jt. Ex. 19).

The Chief's e-mail response was, "Looks good."

In this case, the assignment of Vermeulen to the 56 hour position between 8:00 a.m. and 1:30 p.m. and of Petersen between 1:30 p.m. and 10:00 p.m. on March 19th shortened the overtime available to a 56 hour per week employe, Bergen. Even the Chief agreed on cross-examination that was the case. Bergen did not receive the full 24 hours of overtime because Vermeulen and Petersen occupied "a partial 24 hour call-in need", violating the Understanding regarding FPO's.

The Understanding regarding FPO's prevents their use as a resource to reduce overtime. On cross-examination, the Chief conceded that on March 19th, Vermeulen was not assigned to respond to a fire, emergency or out of City ambulance transfer; rather, he was simply assigned to "stand by" as a crew member on Engine 3. While the City's Director of Human Resources, Ben Mercer, testified that the parties reached an understanding that permits the use of FPO's to "man" apparatus on a "stand by" basis as part of its ability to use those people to "respond to" a fire or an emergency, Mercer also recognized that there is a distinction between those scenarios and responding to an actual fire. The City, however, never bothered to incorporate a right to use FPO's to man apparatus on a stand by basis into the Understanding regarding FPO's. Since Vermeulen was not used to respond to a fire, emergency or out-of-town ambulance transfer, he was obviously assigned to Engine 3 on March 19th to reduce overtime, and the Chief conceded as much (Tr. at 167; 184). Thus, the City expanded the terms of that Understanding beyond its intended scope. Arbitrators have admonished employer efforts to unilaterally change scheduling practices to avoid payment of overtime. Citing, CARNEGIE V. ILLINOIS STEEL, 5 LA 402, 406 (1946).

The parties' intent is clear and according to the Understanding, the use of FPO's during their normal hours is limited to "fires/emergencies and out-of-town City ambulance transfers." That plain language does not give the City the right to reduce overtime opportunities available to 56 hour per week employes by using FPO's to man or staff apparatus on standby. The Understanding unambiguously prevents the use of FPO's as a source of reducing overtime in providing that FPO's "may not occupy a partial 24-hour call in need."

The Union concludes that on March 19, 1999, the City began a new program of scheduling 40-hour per week personnel to stand by and man vacancies on apparatus previously filled by 56-hour per week employes, and thereby reduced overtime opportunities available to 56-hour per week employes, reducing their wages earned. That overtime opportunity benefit is so important to the Union that it negotiated the Understanding regarding FPO's in order to emphasize a protection it already enjoyed under the Maintenance of Benefits clause in the Agreement.

In its reply brief, the Union notes that the City agrees that it would be a violation of the agreement if it had utilized the FPO or Paramedic Captain after their normal eight hours, but disagree over whether the use of FPO's and the Paramedic Captain to reduce overtime of regular firefighters, even when the former do not earn overtime, violates the agreement. While the City claims that the Management Rights clause and past practice vest it with the authority to schedule work, including assigning regular firefighter and paramedic duties to the FPO and the Paramedic Captain, the City has failed to satisfy the burden of proof necessary to establish the existence of such a practice. The City asserts on one hand that in the past FPO's did not stay current in their training and therefore were utilized very little as firefighters, or that because they had let their training lapse the City was precluded from using them as

firefighters, however, in the next breath it asserts the opposite; that FPO's work schedules fluctuate so that at times they may be able to fill in for a regular firefighter after having completed their regular duties and that they previously have been utilized in this capacity. The City cannot successfully argue that there exists an unequivocal, clearly enunciated and readily accepted practice of using FPO's to fill in and reduce overtime opportunities for 56 hour per week personnel. If the City had enjoyed such a right in the past, why would it have entered into the side letter of understanding regarding the issue? Further, if FPO's had been regularly used in the past to fill in for 56-hour per week personnel, why did the Chief concede that FPO's lacked the training to be regularly used as firefighters?

The record also does not support the existence of the past practice of using FPO's to offset overtime opportunities. Lieutenant Duffy, an eight-year veteran of the Department, testified that he reviewed the Department's daily report forms for the period April 18, 1993 to March 18, 1999. The forms are used to record the names of individuals on duty in the Department on any given day. The daily report for March 19, 1999 shows that Vermeulen was assigned as a Lieutenant on Engine 1 between the hours of 8:00 a.m. to 1:30 p.m. and that Peterson was assigned as Lieutenant between the hours of 1:30 p.m. and 10:00 p.m., and that thereafter Bergen was assigned on an overtime basis as Lieutenant. Duffy testified that the daily records showed that the City fell below minimum staffing level approximately 50 to 60 times per year during the period April 18, 1993 to March 18, 1999. During that period which reflected approximately 350 overtime opportunities, only once did the City use a 40-hour employe to fill a 56-hour position overtime opportunity (May 16, 1994). Other than that one instance, the City called back overtime to meet the minimum staffing. The City attempted to rebut Duffy's testimony with incident reports that showed that an FPO responded to four emergency calls. Unlike the daily reports, the incident reports do not indicate the department-wide staffing on a given day, and thus do not indicate whether a 40-hour per week employe deprived a 56-hour per week employe of an overtime opportunity, and are therefore irrelevant. In three of the incident reports offered by the City, the FPO did not fill a vacancy that would have resulted in overtime, but instead filled in for a paramedic student who would not have been released to attend school had the release created overtime. Thus, the use of an FPO to substitute for a paramedic student did not represent a lost overtime opportunity. In the fourth exhibit, the FPO did not stand by in place of a 56-hour per week employe, but instead responded to an actual emergency. Even the Chief acknowledged that the use of the FPO in that capacity did not represent a lost overtime opportunity for a 56-hour per week employe. Thus, the examples offered by the City are not sufficient to establish a practice of using 40-hour per week employes to reduce overtime opportunities for the 56-hour per week employes.

The City attempts to rewrite the Understanding regarding the FPO's. It argues that the Understanding was intended to permit the City to reduce its overtime exposure by using FPO's to fill in for line personnel, and cites the Chief's testimony that in order to justify keeping the

FPO's in the Department, it would have to be agreed that there would be a benefit to the City above and beyond what an ordinary civilian would have. The Union asserts that the benefit obtained when the Understanding was agreed to was that FPO's could be used for "fires/emergencies and out of City ambulance transfers." The City did not negotiate, nor did the Union agree, that the City could reduce overtime opportunities for 56-hour per week employes by assigning FPO's to stand by in anticipation of "fires/emergencies". Kania's e-mail of May 22, 1997, made clear that the Union did not agree that FPO's could be used to shrink another employe's overtime opportunity to something less than 24 hours, the Chief responded to that e-mail that it "looks good". The City now attempts, nearly three years after the Understanding was signed, to assert the right to assign FPO's to fill a part of a 24-hour shift for the purpose of reducing overtime opportunities for 56-hour per week employes. If the City wishes to use FPO's to shorten overtime opportunities of line personnel, it should make the appropriate proposals in bargaining.

The City suggests that it would be deprived of any benefit from the Understanding regarding FPO's if the Union prevails. That is not true. To the extent that a *quid pro quo* was an essential element to keeping FPO's in the bargaining unit, the benefit to the City is its ability to use FPO's for "fires/emergencies and out of City ambulance transfers". As a result of the Understanding, FPO's who were previously not able to engage in fire suppression due to the lack of training, are now trained and used when an actual fire occurs, and are even eligible for overtime when doing so. However, the Understanding also limits the use of FPO's. Further, if the existence of FPO's could only be justified by reducing overtime, the Union questions why it took nearly three years to begin using FPO's in that capacity.

The City's argument that there was no 24-hour call-in on March 19th because eight hours of the 24 were already assigned to the FPO or Paramedic Captain is an unpersuasive attempt to get around the limitation in the Understanding. The City's contention actually recognizes that but for the use of the FPO and the Paramedic Captain on March 19th, a firefighter would have worked the full 24 hours overtime. The reason there was not a 24 hour call is because the FPO occupied a "partial 24-hour call in need" in violation of the Understanding.

The Union asserts that it does not dispute that the City gained the right to utilize FPO's as firefighters in the event of an actual fire, and that they can be recalled to duty to suppress major fires. Thus, the City gets exactly what it bargained for, dual-trained employes who can be engaged in both fire inspection and fire suppression.

The Union disputes the claim that the Management Rights clause permits the City to use 40-hour personnel to deprive 56-hour per week personnel of overtime opportunities. The City makes that assertion even though the duties that have historically been performed by line

personnel are outside the duties of the normal job classification of FPO's and Paramedic Captain, and asserts the right to make such assignments on a regular, rather than on an emergency basis in order to avoid overtime. Any rights that the City might enjoy to make assignments that deprive line personnel of overtime opportunities must give way to the Maintenance of Benefits clause in the Agreement and the Understanding regarding FPO's. The Union asserts the City must have recognized that its right to unilaterally determine the assignment and use of FPO's was restricted by the Maintenance of Benefits clause, or else why did it bother to negotiate the Understanding regarding the use of FPO's. The same limitations that moved the City to negotiate over the use of FPO's also apply to the use of Paramedic Captain. While the Management Rights clause is not without meaning, in the exercise of those rights the City cannot adversely affect the economic opportunities previously enjoyed by employes covered by the Agreement and guaranteed by the Maintenance of Benefits clause. The Union concludes that the record supports the conclusion that in the past, vacancy in line positions needed to meet the minimum staffing requirements of the Department were filled by other employes assigned to 56-hour per week schedule, even if they were called back to work on overtime, that the Management Rights clause in the Agreement is limited by the Maintenance of Benefits clause and the Understanding regarding FPO's, and that the decision to use Vermeulen to fill a partial 24-hour vacancy violated the Understanding regarding FPO's, as well as the Maintenance of Benefits clause in the Agreement, and that the decision to use Peterson to fill a partial 24-hour vacancy similarly violated the Maintenance of Benefits provision in the Agreement. Therefore, the grievances should be upheld and the appropriate remedy awarded.

City

The City first asserts that its rights under Article XXVII, Rights of Employer, give it the right to assign the FPO and Paramedic Captain to regular firefighter duties during their normal work hours. The assignment of such employes during their work hours are proper functions explicitly granted to the City pursuant to Article XXVII, paragraphs 2, 3, 5, 6 and 8. Also, the Chief, Peterson, and Assistant Chief Hahn all testified that 40-hour employes have been used to fill in for 56-hour regular firefighters, with the Chief testifying that the FPO's have in the past even responded to a fire from their inspection duties in their inspection vehicle when the Department was short-staffed. The Chief further testified that the Department had lost that capability because the FPO's had lost their training and so the Department was reestablishing that it had the right to use them (FPO's) in that capacity. (Tr., p. 107-108).

Article XXVII, paragraph 5 explicitly grants the City the right to "maintain the efficiency and economy of City operation entrusted to the Administration," meaning that the City can achieve efficiency by using employes during their regular work hours when they are trained as paramedics or firefighters, so as to provide work for the FPO and Paramedic

Captain and save on overtime costs. There is no specific clause that restricts the City's ability to schedule and assign employes during their regular work hours and without such limiting language, the argument that the City has violated the Agreement must fail.

Further proof the parties have agreed to the City's ability to administer work schedules and resultant assignments is found in the explicit language under Article V, Section 3 of the Agreement, which states:

> Administration of these schedules and resultant assignments shall be the responsibility of the Fire Chief (Chief) or Assistant Fire Chief (Asst. Chief) as may be designated by the Chief.

Next, the City asserts that there is an established binding past practice of utilizing the FPO, and by extension, the Paramedic Captain, as a regular firefighter during his/her regular work hours. Chief Flagstad testified that as long as he has been in the Department, they have used the Assistant Chief to fill in many, many times over the past 10 years, as well as the Training/Safety Officer, that a now-retired FPO, Jack Mohr, used to carry his helmet, coat and hat in his car and would respond at times even from his inspecting duties as the third individual on a responding engine, and that both he and another now-retired FPO, Brian Fox, were sometimes called back to the station to put an ambulance in service or when a firefighter had to leave for an emergency. The TSO, Peter Hahn, testified that he has filled in for firefighters a number of different times since 1991, although not for an eight-hour shift. Hahn also testified about the past use of Fox and Mohr to fill in on the ambulance and for firefighting and MPO duties as well. Peterson testified that he fills in for regular paramedics if his schedule permits, at times working from 8:00 a.m. to 4:00 p.m. or for short periods of time related to an ambulance transfer, or if someone has to leave on emergency family leave, or there has been a fire call and extra staffing is needed. City Exhibits 1 through 4, 7 and 8 prove that FPO's have been used to fill in for either a part of a 24-hour call back or for short-term manpower shortages. Thus, it is clear that the City has established an existing practice of using 40-hour employes to fill in for 56-hour employes; that the Union knew of the practice, and that both parties accepted it and it was part of the normal operation of the Department.

The City also asserts that it had the right to utilize the FPO during his normal working hours pursuant to the parties' Understanding regarding the FPO's working conditions. It is essential to understand the reason why and how the Understanding came into existence. Concerned over costs, the City Manager directed the Chief to consider making the FPO's civilians and removing them from the bargaining unit. This prompted discussions between the City and Union over how the FPO's could be utilized. At the same time, one of the FPO's was entering his last years of employment and was looking for additional overtime to enhance his retirement pension. While the Chief and the Union were in agreement to try and retain the FPO's in the bargaining unit, the Chief testified that:

> . . . there had to be an agreed effort that these individuals [FPOs] would have a benefit to the city above and beyond of what an ordinary civilian would have or we could not justify the position staying in the fire department or the union.

The training of the FPO's had lapsed so that the City was precluded from using them as regular firefighters. Under the Understanding, the FPO's would become trained so that they could be utilized as firefighters or EMT's. The City thereby gained the right to train and use them as firefighters, and the Union kept two positions in the unit. The Union drafted the Understanding and the Chief agreed to it because,

> . . . we needed to have the ability to use them [FPOs] during the day, during their normal hours, to justify their existence.
>
> . . .
>
> "we would be able to use these individuals [FPOs], if needed, during their normal hours.
>
> (Tr. pp. 107-109).

The Understanding prevented FPO's from working overtime after their regular 8:00 a.m. to 4:00 p.m. shift, however, it gave the City the freedom to utilize them during their regular hours. According to the Chief, one of the repercussions of the Understanding was that overtime of FPO's "would be restricted". They would not be allowed to work overtime and partially fill a call back. (Tr., p. 109). Mercer was also in attendance at the discussions with the Union and echoed the testimony of the Chief, testifying:

> One, the fire department was looking to keep the positions [FPO] within the fire department rather than to have them go outside the fire department for services, and the city would be able to use fire prevention officers during the normal hours that they worked to respond to fires and emergencies.
>
> (Tr. p. 182)

Mercer further testified that it was the Union's goal to keep the FPO's in the bargaining unit, and that in the discussions involved in the development of the Understanding, the City made clear to the Union that in using the FPO's during their normal working hours to respond to fires and emergencies and to man the apparatus, included manning the apparatus on stand by so as to be ready to respond to a fire or to an emergency, and it was not the intention just to keep them in their regular duties until there was an actual fire. With regard to the second sentence of the Understanding, Mercer testified that in the discussions, the City stated that it

would not use the FPO's beyond their normal schedules and thereby would not decrease the ability of other firefighters for overtime, but that for the first part of the regular schedule, they would in effect deprive the regular firefighters of some overtime. (Tr., p. 183-184). With regard to the "partial 24-hour call in need" the Chief testified that:

> That to us meant that we could not – no longer allow the fire prevention officers to work the 16 hours they were requesting from the end of their regular 8 hour cycle till the next morning, but it could not break that out and pay them regular time for the first eight and pay them overtime for the next 16.
>
> (Tr. p. 111).

Thus, an FPO would have his overtime opportunities restricted as far as working as a regular firefighter to only major fires and disasters. It is the Chief's belief that the Understanding gave the City the right to utilize FPO's during their normal hours, but not give them overtime by making inroads into the next 16 hours. Here, however, there was no 24-hour call in because eight hours of the 24 were already assigned to the FPO or Paramedic Captain and thus there was no violation of the partial call-in need provision. The Chief also testified that the Understanding did not change the practice that existed as to utilizing the FPO's during their normal work hours, rather it stated the assurances that the City would be able to use them while they were on duty, as the City had fallen away a little bit from that practice because of the lapse in their training. With regard to the instant situation, the Chief testified that he did not believe that the Understanding or the Agreement were violated because the overtime opportunity for a 56-hour employe was not available until 10:00 p.m., as the Department had adequate staffing up until that time. Thus, on that day, an FPO was used for a portion of the shift, the Paramedic Captain for another portion, and a regular firefighter for the third portion of the 24-hour shift. The Chief concluded that a 24-hour opportunity never exists until there is a need for it, and because of the adequate staffing available, that never occurred on March 19th. Thus, there was no violation of the Agreement.

The City asserts that Union President Kania was coy regarding the background of the development of the Understanding regarding FPO's. While he first testified that the City's intent was to lower the pay of FPO's, he then testified that the City did discuss pulling the FPO's out of the bargaining unit. He also testified that the phrase in the Understanding dealing with the partial 24-hour call in need was unilaterally altered by the Union, and not discussed between the parties. Thus, if there is any ambiguity in the second sentence of the Understanding over the overtime section, it should be resolved against the drafter of the language, i.e., the Union. Further, the City's version of the history and intent of the FPO Understanding is more credible. Not only were the two FPO positions to be maintained in the unit, they would be trained and utilized as firefighters. This was the entire foundation upon

which the Understanding came into existence. Therefore, when FPO's were not in demand to perform their regular duties, they could be utilized during their regular work hours to fill in for regular firefighters, and that is what the City got out of the deal, and it also confirmed the practice. The restriction on overtime is significant because it specifically addressed the need at the time where an FPO was trying to obtain more overtime at the expense of the 56-hour employes. The heading "overtime" in the FPO Understanding is important, as it emphasizes that it sought to restrict the overtime of the FPO beyond his normal schedule. The first sentence of the Understanding, however, clearly and expressly permits the City to assign an FPO to regular firefighter duties. In this case, the City only utilized the FPO and Paramedic Captain during their regular work hours and had the right to utilize staff in that manner and had done so in the past on numerous occasions.

The argument that FPO's could be used during normal work hours for actual "fires/emergencies" and not in "stand by" mode does not make sense, since the City has always had the right to utilize all Department personnel to fight major fires and to respond to actual emergencies. The issue is the ability to use FPO's to fill in for regular firefighters in the "stand by" mode, and to be prepared to respond to fires and emergencies, during the regular work schedule of the FPO or Paramedic Captain.

With regard to the allegation that the City's action violated the Maintenance of Benefits provision in the Agreement, the City asserts that it has not withdrawn or reduced any benefit previously granted to Department employes. When there is a full 24-hour overtime opportunity, the City utilizes the procedures established in the Department guidelines, as it also does with regard to short time overtime opportunities. Employes are not always assured of a 24-hour call in as it can be modified by the City's staffing needs. In this case, the Department utilized the FPO and the Paramedic Captain to remain fully staffed, and there was no 24-hour overtime available. Further, the Union does not have the right to determine the length of time available for a firefighter to fill, as that is the City's right pursuant to Article XXVII. As this situation has occurred previously, and the City has a practice of utilizing 40-hour employes to fill 56-hour vacancies, the Union cannot establish a violation of Article XXIX.

In its reply brief, the City asserts that the Union has mischaracterized the testimony of Chief Flagstad and Peterson. The Union argues that the Chief understood that FPO's would not be used to deprive line personnel of overtime opportunities. That mischaracterizes the Chief's testimony. He indicated that in this case there was no 24-hour overtime opportunity for the line personnel because of the right to utilize FPO and the Paramedic Captain during their regular work hours to fill in for the 56-hour firefighter, and that therefore the regular firefighter did not lose any overtime opportunities. The Chief also testified that the intention of preventing overtime for the FPO was to restrict the FPO from extending overtime past their normal workday when performing regular firefighter duties. That testimony supports the

City's case by noting the exceptions to using a regular firefighter on an overtime 24-hour call back, which exceptions are exactly what occurred in this case. The testimony of the Chief cited by the Union supports this interpretation:

> (By Kiel):
>
> Q: Isn't it true that in the past you have gone to the overtime call-in procedure and called back a 56 hour employee to fill that 56 hour vacancy?
>
> A: Most of the time you're correct.
>
> (Tr. p. 134)

That answer is accurate because those are the exceptions that occurred in this case, i.e., the City utilized other staff to avoid a 24-hour overtime situation. The Union's claim that Peterson's testimony supports its position is also not true. When asked if the events of March 19, 1999 represented a change in practice, Peterson responded that he had seen other people used in that capacity for that type of situation. This proves that other non-56-hour employes were used in a firefighter capacity to avoid overtime and meet minimum staffing requirements. Kania's testimony that 40-hour employes have never been used to fill in for 56-hour employes is not credible given the overall testimony of the Chief, Peterson and Hahn, as well as the incident reports submitted by the City.

The City also asserts that contrary to the Union's view of its rights under the Maintenance of Benefits provision, the City has the right to determine if overtime is needed and to reassign staff to temporary vacancies pursuant to its rights under Article XXVII. One right that the City retains, which has a bearing in this case, is the right to determine if overtime is needed, as there is no provision in the Agreement restricting that right. This important right goes to the heart of the City's operation and has significant financial implications. The City obviously has an interest in keeping overtime costs at a reasonable level. A second important and relevant right in this case, which the City retains, is the right to reassign staff to temporary vacancies. Again, there is no restriction in the Agreement on the City's ability in that regard. In fact, the Agreement explicitly provides the Chief with the ability for such administration and assignments to work schedules in Article V, Section 3, as well as Article XXVII. In the latter, the Union has also agreed that the City can determine the "methods, means and personnel by which operations are conducted." Utilizing 40-hour employes to substitute for 56-hour employes is certainly within the rights granted to the City by those express provisions. Further, the City had a long-standing practice of doing so. While the Union argues that the 1997 FPO Understanding and the Call Back Guidelines are the exclusive means of resolving

this case, that view ignores the strong evidence presented of the City's practice of reassigning staff to fill vacant positions in order to avoid overtime. There is nothing in either of those documents which require overtime; rather, they become operative only after the City determines overtime is needed. While arbitrators have recognized employes may be desirous of receiving more overtime to supplement their incomes, arbitrators have also upheld the employer's right to determine whether overtime work will be available in the first place, especially where, as here, the Agreement does not guarantee overtime to employes. The City then cites a number of arbitration awards where arbitrators have upheld the discretion of the employer as to how it will fill shift shortages, including the discretion to make temporary transfers in order to avoid overtime, the right to change employe work schedules to avoid overtime, and the right to schedule work in such a manner as to avoid the need for overtime.

The Union's argument that the actions of March 19th represented an attempt by the City to begin regular use of 40-hour per week personnel to fill 56-hour per week vacancies, representing a sudden reduction in benefits protected by the Maintenance of Benefits provision, is not true. The City is not "regularly" using 40-hour employes to fill in; rather, the Chief testified that such assignments only happen when the 40-hour per week employe's schedule permits it. Secondly, this was not a "sudden reduction in benefits", but rather a confirmation of a long-standing practice. The Union has the concept of management rights backwards. The City does not need to cite a specific provision of the Agreement in order for it to have the right to transfer or reassign employes, rather, it retains all rights to manage all operations pursuant to Article XXVII, including the right to assign employes, and nothing in the Agreement prohibits it from doing so, as it did on March 19th.

Next, the City asserts that the understanding regarding the FPO's has not been violated since the City utilized its long-standing practice of reassigning staff to cover vacancies, and in that way, avoid overtime. The Union's interpretation of the Understanding completely ignores the first sentence, which states, "FPO may be used during normal hours (depending on their daily schedules) for fires/emergencies and out of City ambulance transfers." (Emphasis added). That is exactly what the City did in this case. Further, the Chief did not violate Kania's e-mail, as he understood the Union's concern that FPO's would not be used to cut into the firefighter's 24-hour overtime, but felt that the first sentence gave him the right to utilize the FPO during their regular work hours. It is the overtime after the FPO's regular workday that the FPO could not "take" from a regular firefighter pursuant to the Understanding. The City reiterates that it believes that there is no 24-hour overtime call back involved in this case because it averted that situation through its right to assign staff to fill a temporary vacancy. When the City elects to assign an FPO to a regular firefighter's duties during the FPO's regular work hours, as is permitted under the Understanding, this has an inevitable effect on the overtime opportunities for firefighters. However, the second sentence of the disputed provision in the Understanding is subservient to the first sentence, as to find otherwise would make a nullity of the first sentence.

The City also asserts that the Union's interpretation of the FPO Understanding is illogical and not supported by the record. The argument that the first sentence of the Understanding restricts the City's ability to utilize FPO's in 56-hour positions, except when there is an actual fire/emergency or out of City ambulance transfer, is not credible or supported by the evidence. The City has always had the right to call in employes for a major fire or emergency and stating it in a special memorandum does not make sense as it would be redundant. It is important that the Arbitrator understand the background as to how the Understanding came to be. The joint concern of both parties was to keep the FPO position in the bargaining unit and yet make sure that it could be utilized as a regular firefighter during the FPO's regular work hours and prevent the FPO from "gobbling up" the overtime of a regular firefighter once the FPO's regular workday ended. The argument that the City is prevented from assigning an FPO on "stand by" status is not persuasive. The first sentence of the understanding does not say "respond to a fire/emergencies." In the language of the Department, assignment to a firefighter position means standing by and, if necessary, responding to an emergency or fire. The Union's interpretation is not credible and does not reflect the intent as testified to by the Chief and Mercer, both of whom testified that it was the intent to use the FPO during their regular work hours in the same capacity as a regular firefighter. No distinction was made as to "standing by" or "responding" to an actual fire or emergency, and it was only raised after the grievance occurred. The City has not attempted to expand the terms of the Understanding beyond its intended scope; rather, it is upholding the intent and express provisions, along with the underlying rationale that lead to the Understanding in the first place. The City had a chance to use FPO's in the regular capacity of a firefighter and this had not been done before as their licenses and training had lapsed. The Understanding allowed the FPO's to receive the training and it would not make sense for them to do so if the City could not utilize it. The Union kept the FPO's in the bargaining unit and also gained the assurance that they would not be used to deprive overtime opportunities for regular firefighters, with the exception that FPO's could be used during their regular work hours to fill in for a regular firefighter. That is what both parties got out of this deal, and what is spelled out in the Understanding. The reason for the Understanding in the first place was to prevent the FPO from taking overtime from a regular firefighter after the FPO's regular workday ends and that is prevented by the second sentence of the Understanding. The Union's interpretation would deprive the City of any benefit in agreeing to the Understanding and that it's why its version simply does not make any sense.

Lastly, the City asserts that contrary to the Union's argument, arbitrators have upheld management's ability to control overtime costs. The City asserts that where, as here, the contract is silent, arbitrators have consistently upheld the employer's right to change work schedules and reassign staff to avoid overtime. The City concludes that there is no restriction on its right to transfer employes to firefighter positions to minimize overtime, and that the Union cannot determine the length of overtime that is needed. The City has acted pursuant to

its rights under Article XXVII and Article V, Section 3 and has not violated the guidelines for overtime call back or the Understanding regarding FPO's working conditions. Thus, the grievances should be denied.

DISCUSSION

There are two distinct situations involved in these cases. The parties have a memorandum of understanding regarding the FPO position that includes certain rights and restrictions on the use of the FPO's. There is no such memorandum of understanding regarding the Paramedic Captain position and the parties' rights and obligations with regard to that position must be ascertained from their labor agreement and practice, if any is found to exist.

Fire Prevention Officer

In early July of 1997, the parties reached agreement on an "Understanding of Conditions of Employment for Fire Prevention Officer" which, in relevant part, reads as follows:

> **Overtime:** FPO may be used during normal hours (depending on their daily schedules) for fires/emergencies and out of City ambulance transfers. FPO's are not eligible for 24 hour call backs and may not occupy a partial 24 hour call in need. FPO returning to line work will retain position on 24 hour list in same ratio as when departed.
>
> . . .
>
> FPO may be called in on over-time for fire inspection duties, and also major fires/disasters as all fire department employee's (sic) can be.
>
> . . .
>
> (Emphasis added).

The underlined portion was included in a May, 1997 draft of the Understanding that Union President Kania e-mailed to the Chief along with his cover memo which read:

> Attached is a copy of what I intend on iforming (sic) the membership/interested applicants on the defined conditions of employment for the FPO position. Look it over, we can change parts if needed, I believe the idea's are what our

> discussions (sic) and were our intent. Look at the underlined item. We didn't disscuss (sic) specifically FPO's shortening another employee's 24 hour OT, but I don't think it was your/our intent. Any problems let me know.

The "underlined item" referred to in Kania's e-mail is the underscored wording that ended up in the Understanding.

The underscored wording in the Understanding is not ambiguous, and even if it were, the bargaining history in the form of Kania's e-mail makes clear it was the Union's intent that FPO's could not be used to shorten what would otherwise be a 24-hour call in overtime opportunity for the 56-hour employes. Although this additional wording was not discussed face-to-face, the Chief acknowledged the receipt of Kania's e-mail the same day with an e-mail responding, "Looks good." This overcomes Mercer's testimony that the City made known to the Union in their discussions that it intended to utilize FPO's during their regular work hours to fill a vacancy in a line position on a stand-by basis rather than calling in a 56-hour employe on overtime to fill the vacancy. Further, while the Understanding states FPO's may be used for fires/emergencies and out of City ambulance transfers during their normal hours, the next sentence qualifies the first by precluding FPO's from occupying a partial 24-hour call in need, whether or not it is during their normal work hours. Contrary to the City's assertion, that does not make the first sentence a nullity. The FPO's can be utilized during their normal work hours for the stated purposes as long as it is not in lieu of using a 56 hour employe in a 24-hour call in need situation.

While the City is correct that it has the right under Article XXVII, Rights of Employer, to assign employes, maintain efficiency and to determine the personnel by which the operation of the Department is to be conducted, those rights have been modified by the express language of the parties' Understanding regarding the FPO's. The City asserts that there was no "24-hour call in need" in this case "because of its use of FPO Vermeulen and Paramedic Captain Peterson on March 19th during their regular work hours. There was, however, a 24-hour vacancy in a line position and the City, as was its right, determined that it would fill all 24 hours of that vacancy in order to maintain its minimum staffing level. Vermeulen did in fact occupy part of a 24-hour call in need by covering 5½ hours of that 24 hour vacancy on a stand-by basis during his regular work hours. To conclude otherwise would render the language that an FPO may not occupy a partial 24-hour call in need meaningless, as any time an FPO occupied part of a 24-hour vacancy, it would no longer be a 24-hour call in under the City's interpretation. With regard to the assertion that the City would not have obtained any benefit from the Understanding under such an interpretation, by keeping the FPO's in the bargaining unit and keeping up their training, they are available to use in line positions in case of "fires/emergencies and out of City ambulance transfers" or for "major fires/disasters". Presumably, if the FPO's had been made civilian positions and taken out of the bargaining unit, that would not be the case.

As to the City's alleged practice of using FPO's to fill in for 56 hour employes for part of a 24-hour call in during their regular hours, such a practice, even if proved, does not supersede the express prohibition in the Understanding on FPO's occupying part of a 24-hour call in need. Further, as discussed below, the evidence in that regard shows that 40-hour personnel have been used to fill short-time vacancies, rather than parts of 24-hour vacancies. The prohibition on utilizing FPO's to fill a part of a 24-hour call in need enhances overtime opportunities for 56-hour personnel and thus also constitutes a "benefit" for overtime purposes for 56-hour employes within the meaning of Article XXIX, Maintenance of Benefits.

Based upon the foregoing, it is concluded that the City violated the Understanding of Conditions of Employment for Fire Prevention Officer and, as discussed below, Article XXIX, Maintenance of Benefits, of the parties' Agreement, by assigning FPO Vermeulen part of the 24-hour call in on March 19, 1999.

Paramedic Captain

As noted previously, there is not a written understanding or side agreement regarding the Paramedic Captain position. The Understanding regarding the FPO's is specific to that position and cannot be expanded beyond its terms to include the Paramedic Captain position. That being the case, in order to prevail the Union must establish that it previously enjoyed the benefit it now claims, i.e., that 40-hour employes may not be used to avoid overtime by filling part of a 24-hour vacancy in a 56-hour position in order to meet minimum staffing requirements. This case involves the use of a 40-hour employe, the Paramedic Captain, to fill part of what would otherwise be a 24-hour call in on overtime for a 56-hour employe, and it is not necessary or appropriate to determine the parties' rights beyond these circumstances.

Union President Kania and Union Executive Board member Duffy testified that they were not aware of any instances in their tenure in the Department where 40-hour personnel were used prior to this to fill in for 56-hour personnel in order to maintain a minimum staffing level. In addition, Duffy testified he had reviewed all of the "daily reports" for the Department from April 18, 1993 to March 18, 1999, and found only one instance of a 40-hour employe filling a vacancy in a 56-hour position, which occurred in May of 1994. Duffy further testified that falling below the minimum staffing level occurred 50 to 60 times per year, and that 24-hour call ins were used and filled by 56-hour personnel in those instances (Tr. 85). Duffy conceded it was possible that the daily reports might not show transfers of personnel and that it was possible that 40-hour personnel filled in for 56-hour personnel without it being indicated on the daily report. Duffy also conceded that whether the form is filled out accurately varies with who is filling it out. The Chief testified that since he became chief 10 years ago, 40-hour personnel have filled in many times for 56-hour personnel to cover short-time manpower shortages due to emergency leave, testing procedures, doctor appointments, ambulance transfers, or to respond to a fire, and that the duration varied from an hour to three

or four hours (Tr. 117-18, 120, 134). Training/Safety Officer Hahn testified that since 1991 he has filled in for 56-hour positions, but only for short periods of time, "nothing extended, never an eight hour shift." (Tr. 204). Paramedic Captain Peterson testified he has filled in for Paramedics a number of times since taking his position in March of 1999 mostly for short periods of time, though perhaps eight hours on occasion. (Tr. 194). However, he conceded that the Union has grieved some of those instances. The City also submitted incident reports which indicate that on three occasions in 1998, an FPO, Brian Fox, filled in for Paramedics who were attending Paramedic school and could not find a 56-hour employe to work for them. Students are told they must find someone to work for them while they are attending paramedic school, as the City is not liable for paying overtime, and when they cannot find someone, 40-hour personnel are at times assigned to fill in for them. The Paramedics finish the last 16 hours of their shift when they return from the school. A fourth incident report indicated that Fox responded to a fire when three line personnel were absent, but there is no indication that he worked any longer than that fire call. None of those instances involved 24-hour vacancies in a 56-hour position.

It must again be noted that this case involves a 40-hour position (Paramedic Captain) that worked part of what would otherwise have been a 24-hour call in, i.e. to fill a 56-hour position that was vacant for the full 24 hours and which management decided would be filled for the full 24 hours (albeit by three different individuals covering three portions of the 24 hours). That situation is distinguishable from the situations where the 56-hour employe is gone for a short time or for eight hours at Paramedic school and then returns to complete his/her 24-hour shift. Those are not 24-hour call in situations. Beyond demonstrating that 40-hour personnel have been used at times during their normal work hours to fill in for 56-hour personnel on a short time basis, the City's evidence as to what has occurred in the past does not address the instant situation. The evidence is, however, sufficient to establish that 24-hour call ins are utilized, and that 56-hour personnel are used to fill them, when there is a 24-hour vacancy in a 56-hour position and it is determined that it is necessary to fill the vacancy for the full 24 hours. The Chief conceded that was the case at least "most of the time." (Tr. 134). To that extent, there is a "benefit" within the meaning of Article XXIX. The rights the City retains under Article XXVII, Rights of Employer, and Article V, Hours, paragraph 3, are qualified to the extent the Union has been able to establish the existence of such a benefit protected by Article XXIX, Maintenance of Benefits.

It is concluded that by using Paramedic Captain Peterson during his normal work hours to fill part of what would otherwise have been a 24-hour call in on March 19, 1999, the City reduced a benefit previously granted to the 56-hour employes in violation of Article XXIX of the Agreement. For the same reasons, that would also be the case as to the City's use of FPO Vermeulen in that same manner on March 19, 1999.

REMEDY

Had the City followed the normal procedure and utilized a 56-hour employe on a 24-hour call in on March 19, 1999, the employe then on the top of the 24-hour call list for the appropriate shift would have had the opportunity to work 24 hours of overtime. Presumably, that individual did eventually have that opportunity; nevertheless, 14 hours of overtime work was lost due to the City's actions. As the only individual identified in this case as being injured by the City's actions was Paramedic Bergen, who worked the last 10 hours of the 24 hour shift as overtime, the 14 hours of overtime have been awarded to Bergen.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

As to the Fire Prevention Officer Fill-In grievance, the grievance is sustained.

As to the Paramedic Captain Fill-In grievance, the grievance is sustained.

Therefore, the City is directed to immediately pay to Paramedic Timothy Bergen fourteen (14) hours of wages at the contractual overtime rate in effect on March 19, 1999.

Dated at Madison, Wisconsin this 5th day of April, 2000.

David E. Shaw /s/
David E. Shaw, Arbitrator

DES/gjc
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