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

Case 155
No. 58181
MA-10865

Appearances:

Mr. Joe Conway, Jr., International Association of Fire Fighters, State Representative, appearing on behalf of the Union.

Mr. William G. Bracken, Employment Relations Services Coordinator, Davis & Kuelthau, S.C., appearing on behalf of the City.

ARBITRATION AWARD

International Association of Fire Fighters, Local 400, hereinafter referred to as the Union, and the City of Fond du Lac, 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 collective bargaining agreement. The undersigned was so designated. Hearing was held in Fond du Lac, Wisconsin on January 25, 2000. The hearing was not transcribed and the parties filed post-hearing briefs which were received on March 1, 2000.

BACKGROUND

The facts underlying the grievance are not in dispute. Fire Fighter Michael Johnson was paid for the two hours he performed radio work on September 30, 1999. On October 12, 1999, Johnson and Motor Pump Operator Elmer Peck were paid for one hour of work for a juvenile fire setter meeting and on October 13, 1999, Johnson was paid for two hours for a

juvenile fire setter meeting. On October 19, 1999, the Union filed a grievance asserting that the City violated the agreement between the parties by not paying Johnson and Peck the three hour minimum overtime payment for call-in on these three dates. On October 26, 1999 the grievance was denied and appealed to the instant arbitration.

ISSUE

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

> Did the City violate the collective bargaining agreement when it did not compensate Fire Fighter Johnson and others the minimum 3 hours for overtime?
>
> If so, what is the appropriate remedy?

The City stated the issue as follows:

> Did the City violate Article VI, Section 2 Call-In Time of the Agreement, when it compensated the grievant, Mike Johnson, for actual time worked according to past practice and not the three hours minimum pay since the activity was not a "call-in" for duty but rather a "Voluntary" meeting? If so, what is the remedy?

The undersigned frames the issue as follows:

> Did the City violate the collective bargaining agreement when it did not compensate Fire Fighter Johnson and Motor Pump Operator Elmer Peck the three hour minimum but only actual hours for the work they performed on September 30, October 12 and 13, 1999?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

Article VI
Overtime

. . .

2) Call Time. Fire Fighters recalled for duty shall receive time and one-half (1 ½) pay and a minimum of three (3) hours time shall be paid to each Fire Fighter, except for shift extensions before and after the regularly scheduled shift.

. . .

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.

UNION'S POSITION

The Union contends that the Fire Chief's claim that his interpretation of Article VI is "commonly known" and "understood by everyone" is not supported by the evidence or documentation. It observes that the Chief claims the radio meeting was at Johnson's request so he is not entitled to the three hour minimum but nothing in Article VI supports this claim. The Union notes that it does not have the same understanding as the Chief. It observes that on July 20, 1999, two individuals were paid the three hour minimum which the City claims was a mistake but if it was, why wasn't the money recouped and why was the individual who approved it not called to explain the "mistake?" It points out that there were only four other times when the minimum was not paid and all were between February 16, 1999 and April 21, 1999 in the time period when the contract was not settled compared to fourteen times when the minimum was paid, two of which were "mistakes" and the rest mandatory according to the Chief but the mandatory/voluntary distinction is not memorialized anywhere, especially in Article VI.

The Union contends that the City's claim that the Union's attempt to bargain an increase in the minimum hours requirement included "voluntary" or "unscheduled" activities is absurd. It contends that the Union has always believed that there is no difference between voluntary and mandatory and scheduled and unscheduled. It denies that it ever agreed to the mediator's proposal or that it ever made such an offer in mediation and, even if this was a Union offer, it was never accepted. It claims that the City's argument surrounding the mediator's proposal is confusing. It argues that the bottom line is that the City did not want language differentiating voluntary from mandatory overtime as it pertains to the three hour minimum, so the City recognizes that there is no difference between the two.

The Union points out that the City's list of overtime slips (Ex-11) fails to acknowledge which of these fall under the Training Memorandum of Understanding dated May 22, 1993 (Ex-12). It asserts that when these are eliminated only three slips remain and other overtime was received so the cumulative amount may be over the minimum stated in the contract. It concludes that there is no convincing past practice of payment for less than the minimum for extra hours worked.

It insists that the Chief's contention that voluntary and scheduled overtime are not covered by the minimum because they are not call-ins is incorrect. It notes that call-ins may be turned down, so they are voluntary by nature so there is no distinction, plus an employe called

in can be utilized in other capacities if needed. It observes that Article VI, Section 2 uses the term "Call Time" and there is no distinction between call-ins, voluntary, mandatory, scheduled, non-scheduled, at the Chief's request, the employe's request and any other reason. It argues that the Chief is attempting to insert his distinctions into Article VI when they are not listed, were never negotiated or covered in any other written agreement.

It asks if it is reasonable for an employe to show up for an extra work assignment and not expect to be paid the minimum? It questions whether an employe scheduled for a voluntary meeting with a juvenile fire setter, who prepares for the meeting, puts on his uniform and drives to the meeting and then finds out that the individual he is meeting with is not coming in, should only get paid for fifteen minutes of compensation. It insists that the idea of "minimum hours compensation" is a reasonable approach.

The Union concludes that the City has failed to prove any of its arguments for denying the grievance. It requests the grievance be sustained and the employes made whole for the hours due them.

CITY'S POSITION

The City contends that Article VI, Section 2 applies only to fire fighters "recalled for duty" and not to "optional" or "voluntary" assignments. It asserts that both parties agree that assignments have been classified as "mandatory" and "optional." The City points out that the Chief and the Department's File Clerk testified that the phrase "recalled to duty" means duties normally required of a fire fighter or paramedic and they distinguished "mandatory" recall to duty from "voluntary" or "optional" assignments in that the fire fighter did not have to appear or his or her presence was not required in voluntary assignments. It lists examples of "voluntary" assignments as juvenile fire setter meetings, committee meetings, inservice training meetings, other training sessions and assignments that are above and beyond the regular fire fighter or paramedic duties. It argues that when employes are afforded the opportunity to report to work or not, when such assignment fits in their schedule, it is not considered "mandatory" and the minimum call-in requirement does not apply. It points to the Chief's testimony that employes know the difference between "mandatory" and "optional" because employes are told they must report to duty in the former. It observes that no Union witness contradicted the City's witnesses and employes attending "optional" assignments have been paid actual time and not the minimum. The City states that it has no problem paying the minimum when an employe is required to be present and on duty. It observes that if the City does not require the presence of the employe, the employe can decide to work or not and there is no "inconvenience" as the employe reports to work on his own volition and the City is not obligated to pay the minimum call-in.

The City relies on past practice of differentiating between "voluntary" and "mandatory" assignments as they relate to Article VI, Section 2. The City refers to Ex-10 which it notes lists examples where overtime was paid for less than the minimum since 1996

for training, committee meetings, updating battery list, seminars, juvenile fire setter meetings, etc. It also refers to the overtime pay slips (Ex-11) which it states demonstrates that in all but two situations, the employes were paid according to the practice testified to by the City's witnesses. It asserts that the two exceptions were paid in error. The City argues that the practice of paying for actual time worked for "optional" assignments meets the requirements for a past practice in that it is unequivocal, longstanding, mutually agreed to and accepted. The City reiterates that the juvenile fire setter program is a voluntary program to counsel children that have a predisposition to start fires and because it is voluntary, the minimum call-in provision does not apply. The City claims that the Union's evidence (Exs-5 and 6) supports the City's past practice. It insists that Ex-5 involves "mandatory" assignments and Ex-6 lists "voluntary" assignments where the minimum was not paid.

The City contends that bargaining history supports its position. The City claims in the latest negotiations, the mediator indicated that the Union's proposal for call-in pay would increase from a two hour minimum to a three hour minimum and that voluntary assignments would be subject to the minimum, although the proposal states the opposite and there was confusion over the intent of the language on the past practice of the City. The City told the mediator it wanted no change in the way "voluntary assignments" were treated in the past and the proposal was dropped from the Union's second offer. It insists this history supports the City's position that "voluntary assignments" were not subject to the call time provision and "voluntary assignments" would be handled as in the past.

The City cites arbitral authority in support of its position. It cites PORTAGE COUNTY, MA-6718 (ENGMANN, 2/92) which held that voluntary overtime was not subject to the call-in minimum-pay as call-in only applied to situations in which the employer contacted the employe and directed the employe to report to a job site. It also cites ST. MARY'S HOSPITAL, NOS. 57321 AND 57416 (MEIER, 12/99) where different departmental past practices gave different meanings to the call time provision.

The City, anticipating a Union argument, maintains that the Maintenance of Benefits clause is not applicable because call time is specifically set forth in Article VI, Section 2 and takes precedence over Article XXIX. The City seeks denial of the grievance based on the arguments set out above.

DISCUSSION

Article VI, Section 2 provides as follows:

> Fire Fighters recalled for duty shall receive time and one-half (1 ½) pay and a minimum of three (3) hours time shall be paid to each Fire Fighter, except for shift extensions before and after the regularly scheduled shift.

The issue presented here is whether the minimum of three (3) hours applies to certain assignments, particularly juvenile fire setter meetings and other meetings. The City takes the position that the minimum does not apply to these assignments as they are voluntary and the Union argues that all extra hour activities approved by the Chief are subject to the minimum except training which is covered by a memorandum of understanding.

The City has argued that bargaining history supports its interpretation. A review of the evidence shows that the mediator indicated the Union was willing to exclude voluntary assignments from the three hour minimum. The Union denied ever making such a proposal and the City rejected it anyway. This may have been a mediator's proposal or there may have been a miscommunication in mediation. This evidence simply is not sufficient to establish any meaning for Article VI, Section 2.

Both parties rely on past practice; however, the evidence of past practice fails to show that it meets the consistent standard. The City contends that certain payments were a mistake and the employes were paid in error. The Union argues that certain payments less than the minimum were covered by a Training Memorandum or were a portion of a cumulative amount over the minimum. These various explanations demonstrate that the evidence fails to establish a consistent past practice which might give meaning to the contractual language.

In the absence of a definitive past practice and/or bargaining history, the language of the contract must be interpreted in light of its plain meaning. As pointed out by the Union, the language of Article VI, Section 2 does not contain the words, "mandatory," "optional" or "voluntary." It simply states that fire fighters recalled to duty shall receive the minimum. Thus, resolution of this dispute involves the meaning of the words "recalled for duty." The agreement does not define "duty" to be the normal duties of a fire fighter or paramedic but must be interpreted in its normal sense as any task required by or relating to the position, i.e. whatever falls within the job description. The next word to be interpreted is "recalled" which generally means that an employer has called an employe back to work. In other words, a fire fighter is recalled if the City has directed the fire fighter to perform work at a time he is not scheduled at work. If the employe can determine if and when to perform an assignment without being directed by the City to report to work at a particular time, the employe is not "recalled" to work. Applying this requirement to the instances where an employe attends a meeting with the City's permission but is not directed by the City to attend the meeting, the fire fighter has not been recalled and is not entitled to the minimum hours of call time. Similarly, if a fire fighter could meet with a juvenile fire setter during normal work hours but decides that it is more convenient to meet at some other time, the fire fighter has not been directed to meet at that time but has chosen on his own to do so and again there is no recall and the minimum does not apply. Therefore, unless the City directs the fire fighter to perform duties at a time determined by the City, the fire fighter has not been recalled and Article VI, Section 2 does not apply to require the minimum payment.

Turning to the three instances covered by the instant grievance, it appears that the radio work on September 30, 1999 was at Johnson's request and there is no evidence that he was ordered in by the City. As for the October 12, 1999 juvenile fire setter meeting attended by Johnson and Peck, the evidence failed to establish that either Johnson or Peck was ordered by the City to report to work at that time, so neither were recalled under Article VI, Section 2. As to the October 13, 1999 juvenile fire setter meeting, the evidence failed to show Johnson was ordered to meet at that time, so he was not recalled to duty. As they were not recalled under Article VI, Section 2, they are not entitled to the minimum three (3) hours of overtime.

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

AWARD

The City did not violate the collective bargaining agreement when it did not compensate Fire Fighter Johnson and Motor Pump Operator Peck the three hour minimum for work performed by them on September 30, October 12 and 13, 1999, and therefore, the grievance is denied.

Dated at Madison, Wisconsin this 6th day of April, 2000.

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

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