BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 316, IAFF

and

CITY OF OSHKOSH

Case 311
No. 58046
MA-10825

Appearances:

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, S.C., 700 West Michigan Street, Suite 500, Milwaukee, Wisconsin, 53201-0442, by **Mr. John B. Kiel**, on behalf of the Union.

Davis & Kuelthau, S.C., 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin, 54903-1278, by **Mr. William G. Bracken**, Employment Relations Services Coordinator, and **Mr. Tony J. Renning,** on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "City", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Oshkosh, Wisconsin, on February 9, 2000. There, the parties agreed that I should retain my jurisdiction if the grievance is sustained. The hearing was transcribed and both parties filed briefs and reply briefs that were received by May 11, 2000.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

Since the parties did not agree on framing the issue, I have framed it as follows:

Did the City violate Articles IX and/or XV of the contract when it failed to post a temporary transfer to the training division in the summer of 1999 and, if so, what is the appropriate remedy?

BACKGROUND

The City's Fire Department consists of several divisions, including the inspection and training divisions. For a number of years, there has not been a full-time Lieutenant in the training division. As a result, the City has temporarily assigned its regular firefighters – who work a 56-hour week – to its training division, which are 40-hour a week positions. While firefighters work less hours in the training division, they generally are able to offset that loss of earnings by receiving higher step-up pay as a Lieutenant. In addition, temporary transfers are prized by some firefighters because they get their weekends off; because they work four ten-hour days, thereby enabling them to spend more time at home; and because they gain additional experience for promotional purposes. The City also regularly temporarily assigns firefighters to its inspection division which also is a 40-hour a week position.

Firefighter John C. Gee, who formerly served as the Union's president, testified that the City regularly posts temporary vacancies in the training and inspection divisions and that it then awards those vacancies to the most senior firefighter. If it does not do that, he said, the Union would grieve. He said that the Union in 1993 filed a grievance over the way the City was assigning inspection duties (Joint Exhibit 8), and that the City then agreed to ask for volunteers to work in the inspection division. He also stated that the City over the years has posted for other temporary vacancies in the inspection and training divisions; that the City filled one training position based on seniority by asking the most senior applicant what time slot he wanted; that the Union agrees the City has "the right to determine what qualifications are needed for continuing education. . ."; and that he in 1998 complained over the City's failure to post a position in the inspection division awarded to firefighter Scott Abbrederis and that the City subsequently agreed to post such positions.

He added that firefighter James Austad in August, 1999, was temporarily transferred to the training division without a posting and that the Union grieved that situation, hence giving rise to the instant proceeding. He also stated that the City in the last two contract negotiations unsuccessfully proposed contract language expressly granting it the right to schedule work (Joint Exhibits 26 and 27), and that the Union on both occasions refused to agree to it.

On cross-examination, Gee testified that firefighter Jeffrey Johnson in 1998 was allowed to pick the time he wanted his temporary training assignment; that he did not know what criteria the City has used in selecting applicants; that seniority did not have to be followed in 1993, 1994 and 1995 because there was only one applicant for the postings and that he was unaware of any written documents stating that seniority must be followed for temporary training assignments. He also agreed that the City's negotiator in contract negotiations stated that the City had made its contract proposals (Joint Exhibits 26 and 27) dealing with scheduling work by saying words to the effect: "This is an example of a clause over certain rights that we already possess."

Firefighter Frank Jarapko testified that he was temporarily assigned to the inspection bureau in December, 1994 after he bid for it; that he had more seniority than the only other applicant for that position, Douglas Keator; that other temporary vacancies were posted and filled on the basis of seniority; and that he could only think of one employe (Johnson), who received a temporary job based on seniority.

Firefighter Abbrederis testified that he temporarily transferred to the inspection division in 1998; that then-Union President Gee complained to Battalion Chief Piper over the fact that the transfer was not posted and that Piper told Gee the City henceforth would post such transfers; and that temporary vacancies in the instruction and training divisions are posted and filled on the basis of seniority.

Firefighter Austad testified that he in 1998 and 1999 filled two temporary training vacancies after they were posted and after he bid for them and that he was awarded the disputed transfer herein in the summer of 1999 without a posting after Assistant Fire Chief Vincent Straus asked whether he wanted that assignment.

Union President Johnson testified that he temporarily transferred to the training division in 1994 and 1998 after both positions were posted and that other applicants also applied for those postings. For the 1998 posting, he explained, the least senior employe, Mike Cotter, was not selected. He also said that Battalion Chief Timothy Franz told him in 1998 that he would get the first chance to pick the time of his temporary training opportunity because of his seniority, and that Franz's actions were consistent with the Fire Department's past practice. He added that he was unqualified for the temporary training assignment in dispute herein that was awarded to Austad because he is not EMS qualified, one of the requirements for that assignment.

On cross-examination, Johnson testified that different applicants applied for different training times in 1994 (Joint Exhibit 13); that Battalion Chief Franz told him in 1998 that he was the most senior person and that "I was given the first selection for time"; and that he believes seniority determined who got the 1998 training posting and the inspection slot involving Jarapko and Keator.

Battalion Chief Franz, who is in charge of training and special operations, testified that Austad was the only firefighter who was qualified to teach all aspects of the disputed eight-week 1999 training course; that he did not post the position because he knew no other firefighters were qualified; that he did not consider seniority in filling the position; that he in the past had never used seniority in the selection process and that it was only used to select "time slots" after firefighters were selected to teach; and that inspections are different from training because training involves unique skills that are not commonly shared and because all firefighters know how to conduct inspections. He also said that several applicants bid for a

training course in 1994 and that he did not then follow seniority in choosing Johnson and that when he, Franz, was in the bargaining unit, he himself was selected for training in 1992 and 1993 without a posting even though he was not the most senior employe.

On cross-examination, he said that William Zimmerman was the only firefighter who applied for an April, 1994, training opportunity; that it is unclear how many other training opportunities were made available in the past and who applied for them; that training opportunities were posted between 1994-1999; that but for the 4-8 hours of EMS training in the disputed 1999 summer course, Johnson was qualified to teach the other aspects of the 40-hour week training course; and that the City twice before had conducted training programs which were only taught by one person.

Assistant Fire Chief Straus testified that when he was in the bargaining unit in 1980-1985, it was commonly understood that filling temporary vacancies "was at the direction of the personnel chief at that time, meaning that seniority had absolutely no basis for who was selected." He added that he could not think of any temporary training transfers that were not posted between 1994-1999; that but for the Zimmerman/Gerarden situation involving the inspection division, the most senior employe was always selected; that since 1995 temporary training positions were "Never" filled on the basis of seniority; that this issue was never bargained across the bargaining table; that seniority is used only in determining who teaches particular time slots after they have been selected; and that his 1998 memo (Joint Exhibit 22), reflects that fact. On cross-examination, he stated that there were permanent employes assigned to the inspection and training divisions in 1985.

POSITIONS OF THE PARTIES

The Union claims that the City violated Articles IX (Seniority) and XV (Present Benefits) of the contract when it failed to post the temporary training position it awarded to Austad in the summer of 1999. It argues that a past practice dating back to 1994 establishes that all temporary training and inspection vacancies have been posted and have been awarded to the most senior qualified applicant; that the City's failure to consider seniority here violated the contract; and that the City has tried "to implement that which it did not achieve in bargaining."

The City, in turn, contends that there is no merit to the grievance because it retains the right under Article II (Management Rights), to temporarily transfer employes based on "qualifications and availability as opposed to seniority"; because the Union has failed to prove any past practice to the effect that seniority must be followed in filling temporary training vacancies; and that the Union "is trying to gain through arbitration that which it did not gain through bargaining."

DISCUSSION

At the outset, it must be noted that the Union itself acknowledges there is no express mention of temporary transfers in the contract. Hence, this case does not involve applying temporary transfer language to a given set of facts. That is why the Union, instead, relies on Articles IX and XV, the Present Benefits and Seniority clauses of the contract, in support of its grievance.

The question then becomes whether those two contractual provisions supersede or limit Article II of the contract which states:

> **MANAGEMENT RIGHTS**
>
> The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this agreement.
>
> The powers, rights and/or authority herein claimed by the City are not to be exercised in a manner that will undermine the Union or as an attempt to evade the provisions of this agreement or to violate the spirit, intent or purposes of this agreement.
>
> . . .

This language enables the City to exercise its management rights which - absent any contract language to the contrary - normally includes the right to assign work.

Whether the City could do so here turns on the disputed factual question of whether there been a past practice to the effect that seniority must be followed in filling temporary transfers in the training division. If such a practice exists, (which represents a mandatory subject of bargaining), the City must continue to use seniority pursuant to Article XV of the contract which provides:

> **PRESENT BENEFITS**
>
> The parties agree to maintain the present level of benefits and policies that primarily relate to mandatory subjects of bargaining, not specifically referred to in this agreement. This provision is expressly limited to mandatory subjects of bargaining.

On the other hand, if no such binding past practice exists for training vacancies, Article XV is inapplicable.

As correctly pointed out by the City, it is important to differentiate between temporary vacancies in the training division as opposed to temporary vacancies in the inspection division. The record establishes a past practice surrounding the inspection division dating back to about 1994 when the City agreed to post and fill such positions after the Union grieved the City's failure to do so. But that has little bearing here since this case turns on whether a past practice exists relating to the training division.

As to that, Franz testified that it is important to select the most qualified person for training, irregardless of seniority, because not all firefighters are qualified to train as opposed to inspection duties which all firefighters can perform. Indeed, Union President Johnson testified that he was unqualified to teach all aspects of the disputed 1999 course. Moreover, this record fails to establish that any other firefighters were qualified to do so. That is why there are different policy considerations as to whether seniority must be followed in filling temporary training vacancies as opposed to temporary inspection vacancies.

In this connection, it is well established that "A practice is no broader than the circumstances out of which it has arisen, although its scope can always be enlarged in the day-to-day administration of the agreement." *Proceedings of the 14th Annual Meeting of the NAA: Past Practice and The Administration of Collective Bargaining Agreements*, pp. 32-33, Mittenthal (BNA Books, 1961). See too, *How Arbitration Works*, Elkouri and Elkouri, p. 633 (BNA Books, 5th Ed., 1997).

Here, the circumstances establish that the City has never used seniority as a basis for selecting applicants to fill temporary training vacancies, as both Franz and Straus testified that the City in the past has only considered an applicant's qualifications and that seniority played no role in that selection process. In addition, Franz testified without contradiction that he was selected for training, even though he was not the most senior applicant. That also was the practice followed in 1998, because it was only after applicants were selected that they were allowed to select time slots based on their seniority. Indeed, Gee himself acknowledged on cross-examination that seniority was then used to select blocks of time. That is why the situation in 1998 is not controlling here. The 1993 grievance settlement between the parties also is controlling (Joint Exhibit 8), since it only involved the inspection division and not the training division.

In addition, while some training vacancies have been posted, it appears that others were not. Hence, the practice at best has been mixed. Since a past practice, by definition, must be "unequivocal" and consistently acted upon, this record does not establish a binding past practice. See *How Arbitration Works*, supra., p. 632. Hence, Article XV is inapplicable.

It is true that the Union in 1998 successfully complained over the City's failure to post the temporary position it awarded to firefighter Abbrederis and that the City in response ultimately posted it (Joint Exhibit 22). However, that position was not in the training division, which is why it does not serve as a precedent here. Moreover, even though the City on certain occasions has posted temporary training vacancies, that does not necessarily mean that seniority was followed in filling those positions, as Gee acknowledged that the failure to fill posted vacancies "happened frequently". Seniority also was not involved for those postings where only one applicant applied.

The Union argues that the City was required to follow seniority under Article IX of the contract which states:

> The Employer agrees to the seniority principle.
>
> Seniority shall be established for each employee and shall consist of the total calendar time elapsed since the date of his/her employment. Seniority for employees hired on the same day will be determined by position on the hiring list. Seniority rights terminate upon discharge determined after appellate rights have been consummated, or upon resignation of the employee.

Contrary to the Union's claim, this language does not require the City to follow seniority in filling temporary training vacancies. It, instead, merely defines seniority and acknowledges how it is to be measured. That is a separate question of whether it is to be followed in given situations. As to that, the contract elsewhere expressly states under what circumstances seniority must be followed. Since there is no contract language expressly mandating the use of seniority in filling temporary training vacancies, none can be implied.

The Union's Reply Brief at page 5, asks: "If Article IX (Seniority) does not apply to matters like temporary transfers, when does it apply?" The answer is that it applies whenever the parties expressly agree it applies – be it in layoff, recall, vacation scheduling, overtime situations, etc. Absent any express agreement to that effect, the generalized language in Article IX represents only that – a generalized statement of how an employe's seniority is to be counted with the City recognizing seniority only in those specific areas negotiated between the parties.

The Union also asserts that its grievance must be upheld because the City in the last two contract negotiations tried, and failed, to obtain contract language expressly granting it the right to assign work (Joint Exhibits 26 and 27). The City's proposals, however, were not made to secure a right the City did not already have, but rather, were made to clear up the fact that it did enjoy that right. Gee himself thus admitted on cross-examination that the City's chief negotiator in negotiations told Union representatives words to the effect: "This is an example of a clause over certain rights that we already possess." I agree.

In light of the above, it is my

AWARD

1. That the City did not violate Articles IX or XV of the contract when it in the summer of 1999 failed to post a temporary vacancy in the training division.

2. That the grievance is therefore denied.

Dated at Madison, Wisconsin this 20th day of July, 2000.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

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