

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MARINETTE FIRE FIGHTERS ASSOCIATION,
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 226**

and

CITY OF MARINETTE

Case 87
No. 59547
MA-11330

(Temporary Vacancies Grievances)

Appearances:

Mr. Michael Kunes, Vice President, International Association of Fire Fighters of Wisconsin, Inc., AFL-CIO-CLC, 4539 Kuchera Lane, Manitowoc, Wisconsin, appearing on behalf of Marinette Fire Fighters Association, Local 226.

Godfrey & Kahn, S.C., by **Mr. John A. Haase**, Attorney, 333 Main Street, Suite 600, P.O. Box 13067, Green Bay, Wisconsin, appearing on behalf of the City of Marinette.

ARBITRATION AWARD

Marinette Fire Fighters Association, International Association of Fire Fighters, Local 226, hereinafter "Association", requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and the City of Marinette, hereinafter "City", in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was designated to arbitrate the dispute. In advance of the hearing, the Association filed additional grievances with the City alleging the same issue, contract clause violation and description as the grievance scheduled for arbitration and the City requested that they be concurrently heard and addressed by the Arbitrator. The Association did not object and hearing was held before the undersigned on May 11, 2001 in Marinette, Wisconsin. There was a stenographic transcript made of the hearing and the parties submitted post-hearing briefs and reply briefs in the matter. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties agreed that there were no procedural issues in dispute but were unable to stipulate to the substantive issues to be determined in this case. The Association suggested the following issues for determination:

Whether the City violated Article 8 of the contract when it unilaterally instituted an overtime policy as directed in the Chief's letter of August 16, 2000?

The City's suggested issue is as follows:

Does the contract guarantee the Union the right to have five bargaining unit members on each shift at all times, such that the employer was required to call in a fifth fire fighter on the dates indicated in each of the grievances?

Having considered the parties' positions and arguments in relation to the evidence offered at hearing, I frame the issue as follows:

Whether the City violated the labor agreement by failing to fill, with 56-hour employees, temporary vacancies that arise between 7 a.m. and 9 p.m., Monday through Friday, excluding holidays, when the Fire Chief or Battalion Chief or both are on duty? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1 **RECOGNITION**

. . .

The term "Employee", as used in or covered by this Agreement, is limited to the employees of the Marinette Fire Department, excluding the Fire Chief and the Battalion Chief. Temporary and probationary employees shall be included as far as representation of their rights under the contract but shall be subject to the provisions herein specifically relating to them.

. . .

ARTICLE 2
RIGHTS OF MANAGEMENT

Except as herein otherwise provided, the management of the work and the direction of the working forces, including the right to hire, promote, demote, suspend, or discharge for proper cause, and the right to determine the Table of Organization, the number of employees to be assigned to any job classification needed to operate the Employer's public jurisdiction, is vested exclusively in the Employer. The Employer agrees, however, to notify the Union prior to the effective date of any change in the Table of Organization.

. . .

ARTICLE 8
WORK SCHEDULE, OVERTIME PAY

Members of the Marinette Fire Department will operate on a three (3) platoon system. Each platoon shall work a twenty-four (24) hour shift, with forty-eight (48) hours off, for an average of fifty-six (56) hour workweek.

Employees called in for emergency overtime and/or fill-in time shall be compensated at the rate of time and one-half of their hourly rate, based on a forty (40) hour work week wage rate. Employees shall receive a minimum of two (2) hours pay for all time worked under a two (2) hour period.

Each employee shall be subject to compensatory time off for all off duty time for training, which is requested by a supervisor.

A Firefighter or Lieutenant who temporarily takes the place and assumes the responsibility of a higher rank will receive the higher rank pay for the actual time spent in the higher classification.

With regard to temporary vacancies in Firefighter or Lieutenant positions, Lieutenants, (sic) and Firefighters shall fill-in on a rotating basis according to the official list posted on the bulletin board.

. . .

ARTICLE 15
GRIEVANCE PROCEDURE

. . .

3. In the event that a satisfactory resolution is not reached through Step 2(b), the grievance shall be submitted to arbitration by giving notice, in writing, to the Employer within ten (10) days. The arbitrator shall be appointed by the Wisconsin Employment Relations Board, from a member of their staff, upon the request of either the Employer or the Union. The arbitrator, after hearing both sides, shall render his decision, in writing. Such decision shall be final and binding on both parties to this Agreement. The arbitrator shall have no power to add or to subtract from, or modify any terms of the Agreement, nor shall they have authority to establish or change any wage rate.

BACKGROUND

The City provides fire suppression services to the public through the City of Marinette Fire Department, hereinafter "Department". The Department operates a three-(3) platoon or crew, hereinafter "crew", system staffed by Firefighters and Lieutenants. Each crew works an average 56-hour workweek based on a rotating 24-hour shift followed by forty-eight hours off. Shifts for 56-hour personnel begin and end at 7 a.m.

The Department currently employs 19 personnel including 17 Firefighters and Lieutenants, Battalion Chief Nor and Fire Chief Giver. Nor works a 40 hour Monday through Friday workweek beginning at 7:30 a.m. and ending at approximately 4 p.m. Giver's work day begins at 8:30 a.m. and ends at approximately 4:30 p.m.

In 1998, the Department was staffed by a total of 22 personnel in the ranks of Fire Chief, Captain, Lieutenant, and Firefighter. Each of the three crews were staffed by one Captain, one Lieutenant and five Firefighters. The Lieutenants and Firefighters were represented by the Association and the Captains were represented by the Marinette Fire Supervisors Union.

During 1999 the Mayor's Task Force on City Spending was reviewing the personnel and personnel costs of all city departments. The Task Force concluded that the staffing and overtime costs in the Department needed to be reduced. Consistent with Task Force recommendations, a vacant position in the Department was "frozen" indefinitely and a memorandum was issued to all personnel of the Department regarding minimum staffing and stated in pertinent part:

Effective June 8, 1999 at 0630 hours, all shifts shall operate with a minimum of five (5) personnel on duty. There will still be one (1) union position allowed off on vacation at a time, and only one (1) person off on comp time, if no one is on vacation, as we have been doing. This will allow us to staff two (2) shifts with six (6) personnel most of the time. The only time that we would be filling in with overtime is if the total staff on duty is less than five (5), or if both Officers are off at the same time.

Effective the end of December, 1999, two of the three Captains retired from the Department prompting a restructuring by the City. The City eliminated the Captain position on January 17, 2000 and Patrick Nor, the last remaining captain rank employee, was appointed to a newly created Battalion Chief management position.

By February 2000, two vacancies existed in the Department as the result of the retirement of Lieutenant Ott and Firefighter Hesyck. The Lieutenant position was filled during June 2000. The vacant Firefighter position has not been advertised and has not been filled. Effective June 2000, two (2) crews were staffed with six (6) line personnel and one (1) crew was staffed with five (5) line personnel.

On August 9, 2000, Chief Giver submitted a memorandum on the subject "Reducing Over Time" to the City Ad Hoc Committee on Fire Department Overtime. Giver testified that the memorandum was in response to a request from the Mayor and the Ad Hoc Committee to generate ideas on how the Department overtime budget could be reduced. The memorandum, in pertinent part, reads as follows

. . .

OPTION 2:

- A commitment to maintain no less than seventeen (17) full time union personnel and two (2) management personnel, which is the staffing we currently operate with.
- Minimum staffing of (5).
- A solution to the over time costs is that Battalion Chief Nor and myself could be counted as the fifth person on the weekdays that we would have overtime. One of us could respond from 7:00 am until 9:00 pm Monday-Friday, to any calls that would require the five (5)-person minimum, during which time we would monitor the radio and respond automatically. From 9:00 pm until 7:00 am we would fill the position

with overtime. This would require us to pay only ten (10) hours of overtime on weekdays, and twenty-four (24) hours on the weekends. Also there will most likely be times that due to vacation or other business that Battalion Chief Nor and myself would not be available to respond and we would cover with overtime.

What would be required:

This would require that Battalion Chief Nor be given a take home vehicle.

Possible problems with this option are:

Page three (3), of the Union Contract, article 8, Work Schedule, Overtime Pay states, With regard to temporary vacancies in Firefighter or Lieutenant positions, Lieutenants, and Firefighters shall fill-in on a rotation basis according to the official list posted on the bulletin board. I believe that the Union will say we are filling Lieutenant and Firefighter positions and that we are violating the contract, and they will file a grievance. The City of Fond du Lac did the same thing and their Union filled (sic) a grievance based on a past practice of using fifty-six (56) hour personnel to fill in to minimum staffing. And they changed to use forty (40) hour personnel to fill in, and the arbitrator ruled in favor of the Union and ordered the City to pay back the overtime that was due the Union. Also the City of Merrill was moving toward the same type of situation, when their Union objected and they ended up with the Chief filling in for the Deputy Chief who is management, for the eight (8) hours during the weekday.

. . .

The Ad Hoc Committee modified and implemented Option 2 outlined above and issued the following on August 15, 2000

Fire Department Overtime Reduction Plan

1. The Department will respond to all fire scenes with no fewer than 5 persons. During the hours of 7:00 AM to 9:00 PM Monday-Friday, the response will be made with at least 4 union personnel and either the Chief or the Battalion Chief or both. During the hours of 9:00 PM and 7:00 AM and on weekends or holidays, the response will include at least 5 union personnel and may include the Chief and/or Battalion Chief.

2. If the responders believe that the call warrants further action, an “all call” may be issued to bring other fire fighting resources to bear.

3. The Battalion Chief will have permission to take the squad car home if there is the potential that he will be a primary responder during the evening hours.

4. The Chief and the Battalion Chief will develop a schedule of coverage that takes into account their planned vacations and training to ensure that both are not absent during any given week. Unplanned absences due to sickness or other reasons which cause both the Chief and the Battalion Chief to be unavailable to respond will be covered by union personnel.

5. The Chief shall set up a system whereby firefighters and lieutenants will notify the Chief via the dispatch or other methodology when they will be out of town and unavailable to respond to an “all call”.

6. The Chief will work with the Police Chief to resolve any and all dispatch issues and inform the Mayor of those issues and solutions.

7. The Chief will provide a six-month training schedule with overtime impact for the department to the Mayor for approval prior to course enrollment.

8. For budgeting purposes in 2001, the Chief will explore training alternatives that minimize the need for overtime.

In response to the decision of the Ad Hoc Committee, Chief Giver issued a memorandum on August 16, 2000 which addressed staffing as follows:

Date: August 16, 2000
Too: All Personnel
From: Chief Joseph E. Giver
Subject: Staffing

Effective is (sic) date, until further notice all shifts shall be staffed in the following manner:

A minimum response to any call, which could be a structure fire, will be with staff of five (5). During the hours of 0700 and 2100 Monday-Friday, the response will be made with at least four (4) union personnel and either the Chief or the Battalion Chief or both, who will provide Incident Command. During this time the Chief and Battalion Chief will be monitoring the radio and will automatically respond with a department vehicle directly to the emergency scene.

During the hours on (sic) 2100 and 0700 weekdays the staff of five (5) will be filled out by union personnel utilizing overtime. Also on weekends, and holidays, union personnel shall fill the staffing of five (5) for the entire twenty-four (24) hour shift on overtime. Also anytime that the Chief or Battalion Chief cannot respond, union personnel will fill the shift on overtime. The Chief and Battalion Chief may also be responding to any incidents if available but should be paged during this time if needed.

During weekdays, (not including holidays) if it is known in advance that the shift will have less than five (5) the Chief or Battalion Chief will be automatically responding. If someone calls in sick or any other reason the shift is short the Battalion Chief will be called at home between 0620 and 0630 and notified of the situation (sic) if he cannot be reached then call the Chief at home, and find out if we (sic) can respond or not.

In the very near future we will develop a system for personnel to call in if they are out of service and unavailable to respond for callbacks.

Sincerely,

Chief Joseph E. Giver
Marinette Fire Department

Firefighter Robert Thull was the first employee whose fill-in overtime rotation was affected as a result of the August 16, 2000 memorandum. Thull testified that during his 15 years with the Department he worked many fill-in shifts. Thull explained that on August 16, 2000 he was called in for an overtime shift of 10 hours beginning at 9 p.m. and ending on August 17, 2000 at 7 a.m. Thull stated that the "chiefs" had worked the beginning portion of the 24-hour vacancy and that he did not relieve a bargaining unit employee when he reported for work. Thull testified that he filled the fifth line position when he arrived.

Thull testified that when the Chief or Battalion Chief is the fifth person for response, they do not perform the daily responsibilities in the fire house that the bargaining unit Firefighters perform, but rather they perform their regular job functions. Thull testified that when a bargaining unit member is brought in on overtime as the fifth person during evenings and weekends, he/she performs all of the duties that the other Firefighters perform.

The Department has a rotation established by the Association for fill-in shifts. Approximately 10 years ago, the Fire Chief offered the Association the opportunity to develop and administer the rotation with the caveat that if there were problems, then the City would "take it over". The rotation offers overtime to employees in descending order based on seniority.

The rotation is as follows:

FILL-IN RULES ADOPTED April 2, 2001

1. If a person is scheduled for a fill-in shift on a certain day, and a fill-in is required on an earlier day, that person would be required to take the earlier fill-in.
2. The first person on the fill-in list gets the first day. The second person gets the second, and so on. No picking of days will be allowed.
3. You can refuse a fill-in day without penalty if you are working for someone on that given day, you are on vacation, funeral leave, sick leave on your scheduled work day before the fill-in, someone is working for you or you have a valid doctor's excuse. Comp time does not constitute a valid reason for refusal.
4. A refusal of a fill-in day will move your name to the bottom of the fill-in list.
5. Thirteen (13) hours or more constitutes a valid fill-in day and a move to the bottom of the list. A combination of 13 hours or more in combination of fill-ins also constitutes a move to the bottom of the fill-in list.

Tim Walk, a ten-year member of the Department, testified that as President of the Association, he filed the 15 grievances pending in this case. Walk testified that the grievances are the result of the Chief and the Battalion Chief taking the place of union personnel when they are filling in from 7 a.m. to 9 p.m. per Giver's memorandum of August 16, 2000. Walk testified that on these dates, the Chief and Battalion Chief did not do bargaining unit work.

Walk testified that there is nothing in the bargaining agreement that requires a minimum number of Firefighters to be called to a fire scene. Walk testified that Ch. Comm. 30, Fire Department Safety and Health Standards, Wis. Adm. Code requires five (5) personnel be at a fire scene before entering a burning structure, although emergency situations allow for deviations. Walk also agreed that there is no contractual guarantee to a certain amount of overtime for any firefighter.

Joseph E. Giver testified that he has held the position of Fire Chief with the City of Marinette since 1996. Giver testified that the current staffing of the department is “six, six, five” meaning six employees on two crews and five employees on the remaining crew. Giver testified that he believes the sixth position for the third crew has been eliminated.

Giver testified that prior to his August 16, 2000 memorandum, he responded to fire calls. Giver testified that if the call was a large incident, he would perform incident command and that if it was not a large incident, then he would “stand back and monitor the situation.” Giver testified that when he responds to a fire scene since August 16, 2000 he performs incident command or acts as the safety officer and does not perform fire suppression activities. Giver testified that the only difference in what he does now as compared to before August 16, 2000 is that he now assumes incident command faster.

Giver testified that on the dates giving rise to the grievances, the general operation of the Department was that either he or Battalion Chief Nor would work the beginning portion of a shift and then the remaining portion was filled by either a Firefighter or a Lieutenant. Giver testified that prior to the elimination of the Captain positions, he did not ever fill-in for a Captain, Lieutenant or Firefighter except in one instance for less than two hours when a Lieutenant was scheduled for a medical appointment.

Battalion Chief Nor, a 30 year employee with the Marinette Fire Department testified that up until the elimination of the captain positions, he was a member of the three captain supervisory bargaining unit. Nor testified that since prior to 1994, the Department has used the rotation schedule that is currently in place. Nor testified the purpose of the rotation schedule was to “even out the overtime.”

Jerry Plansky, Association Bargaining Committee Chair, testified that during the bargaining of the 1999-2000 contract the City informed the Union that it intended to eliminate the position of captain from the Department and therefore all references to “Captain” in the collective bargaining agreement should be removed “to clean up” the agreement. Plansky testified that there was no discussion or proposal by the City to replace “Captain” with “Chief” or “Battalion Chief.”

Article 8 of the 1998-1999 collective bargaining agreement relating to temporary vacancy fill-ins read as follows:

With regard to temporary vacancies in Firefighter or Lieutenant positions, Captains, Lieutenants, and Firefighters shall fill-in on a rotating basis according to the official list posted on the bulletin board.

Richard Boren, Marinette City Attorney for 14 years, testified that the Captain positions were eliminated in January 2000. Boren testified that during his employment with the City, the captains were never in the same bargaining unit as the firefighters and lieutenants. Boren testified that the word "Captain" was removed from the parties' collective bargaining agreement as a "house cleaning measure."

Additional facts, as necessary, will be set forth below.

ARGUMENTS OF THE PARTIES

Association's Position

The Association asserts that the City has violated Article 8 of the collective bargaining agreement. The Association acknowledges that the City has the right to establish the level of staffing, but maintains that paragraph five of Article 8 creates the method by which the City is obligated to fill temporary vacancies. The Association takes issue with the City's assignment of 40-hour per week management employees to these vacancies when the collective bargaining agreement provides that the temporary vacancies are to be filled with 56-hour per week Firefighters and Lieutenants.

The Association contends that the City has established a past practice of filling the temporary vacancies as referred to in Article 8 with Firefighters and Lieutenants or with supervisory union personnel when the collective bargaining agreement included Captains in Article 8. The Association notes there is a long standing practice of filling temporary vacancies pursuant to the official list posted on the bulletin board which establishes the rotation and guidelines for over-time fill-ins. The Association contends that the City's new procedure of filling the temporary vacancies with management non-union personnel is a deviation from the established practice.

The Association notes that in the past supervisory union member Captains filled in for temporarily vacant Firefighter and Lieutenant positions because the Captain position was in the rotation language of Article 8. The Association argues that when the Captain position was

eliminated during the last round of bargaining, the City did not offer a proposal to replace “Captain” with “Chief” or “Battalion Chief”. The Union argues that since there was no discussion or any proposal on this subject, then the City does not have the right to include the Chief or Battalion Chief in the filling of the temporary vacancies.

The Association next points out that Article 8 of the contract defines a shift as 24 hours. It contends that the City’s division of that 24-hour period into a 7 a.m. to 9 p.m. “shift” and 9 p.m. to 7 a.m. “shift” is nothing more than an attempt to circumvent overtime expenses. The Association alleges that the City is changing the minimum staffing “when it is suitable for them” and notes that this division of the 24-hour period only occurs on weekdays and does not apply on weekends or holidays.

The Association argues that the decision reached in CITY OF FOND DU LAC, WERC GRIEVANCE AWARD 6044 (GALLAGHER, 4/5/00) wherein she found that the City had violated the collective bargaining agreement when it assigned 40-hour work week employees to fill in for 56-hour work week employees is applicable to this fact situation. As such, the Association argues that the same conclusion should be reached in this case.

Based on all of the above arguments, the Association asserts that the City has violated the current agreement and the grievances should be sustained.

City’s Position

The City asserts that the management rights clause of the collective bargaining agreement provides the City the authority and unrestricted right to determine staffing levels. The City asserts that labor relations case law supports the unfettered right of an employer to change minimum staffing levels in the absence of a contractual restriction, bad faith, or the creation of a safety hazard. The City notes that there is not a contractual clause restricting the City’s right to determine minimum staffing, it has not acted in bad faith, and that the Union has not offered any evidence to support that safety is at issue.

The City maintains that it has established that the minimum staffing from 7 in the morning to 9 at night is four union personnel and after 9 at night until the next morning minimum staffing is five union personnel. The City argues that temporary vacancies are only created when sickness or vacation cause staffing levels to be less than the management established staffing levels.

The City maintains that it has unilaterally changed the minimum staffing level in the past with the full knowledge of the Association. The City asserts that these minimum staffing changes have occurred in such a manner as to create a binding past practice. The City points

to the Association's unsuccessful attempt to bargain a minimum staffing clause as evidence that the Association has no rights relating to minimum staffing and it is attempting to obtain through grievance arbitration what it could not obtain at the bargaining table.

The City disagrees with the Association's conclusion that the decision reached by Arbitrator Gallagher in CITY OF FOND DU LAC is relevant to the pending matter. The City asserts that the facts are sufficiently different inasmuch as Marinette has not entered into a Memorandum of Understanding nor are the Chief and Battalion Chief performing bargaining unit work as were the facts in CITY OF FOND DU LAC and therefore that case can be distinguished.

With regard to the Comm. 30, the City acknowledges that it requires five certified firefighters be present at the scene to conduct an interior attack. The City points out that both the Chief and the Battalion Chief are certified firefighters, therefore there is no vacancy should an "interior attack" be required since the Chief and/or Battalion Chief are available to fill in as needed. The City further asserts that it has been the practice in the department for the Chief or Battalion Chief to be called to fires and assume incident command. The City points out that when the Chief or Battalion Chief respond, they are not performing bargaining unit work and therefore they have not replaced or filled-in for a union position.

In response to the Association suggestions that the safety components of Comm. 30 are at issue, the City denies that any safety risk exists as a result of a four-man crew. The City asserts that no evidence was offered by the Association asserting a four-man crew constituted a safety violation, and further, that even if such an allegation was offered, the City follows all state and City fire safety requirements.

For all of the above stated reasons, the City argues that the grievance should be denied.

DISCUSSION

At issue in this case is whether the City's actions post-August 16, 2000 violate Article 8 of the collective bargaining agreement. The Association argues that the contract was violated, and relies on several theories for its proposition – principally, the fill-in language of Article 8, the 24 hour shift language of Article 8, a past practice of using only unit personnel to fill-in and arbitral precedent established in Arbitrator Gallagher's CITY OF FOND DU LAC award. Each of these arguments is addressed below.

The primary directive of an arbitrator in a dispute of this nature is to attempt to ascertain the intent of the parties, and specific to this case, what was the parties' intent when they adopted the language of Article 8. Standards of contract interpretation direct this arbitrator to first view the language and determine whether the words "are plain and clear,

conveying a distinct idea” and if so, then there is no need to apply technical rules. *The Common Law of the Workplace*, p. 66-67 citing *Elkouri & Elkouri*, p 470. Further, the “surface meaning of the agreement itself provides the most reliable basis for determining the parties’ intent”. *Id.* at 67.

Looking first to the language of Article 8, it provides in pertinent part:

With regard to temporary vacancies in Firefighter or Lieutenant positions, Lieutenants, (sic) and Firefighters shall fill-in on a rotating basis according to the official list posted on the bulletin board.

The parties disagree as to whether the shifts in question are temporary vacancies as contemplated by Article 8. The Association asserts that these are temporary vacancies because the City has established five (5) bargaining unit personnel as the minimum staffing and the labor agreement is “crystal clear” as to what ranks can fill these temporary vacancies. The City argues that the shifts are not temporary vacancies because a vacancy does not exist since the City reduced the minimum staffing from five (5) bargaining unit personnel to four (4) bargaining unit personnel between the hours of 7 a.m. and 9 p.m., Monday through Friday, except holidays when the Chief or Battalion Chief or both are on duty.

Article 2 of the parties’ agreement provides the City with the right to “the management of the work and the direction of the working forces.” The clause further states that the City has the right to “. . . determine . . . the number of employees to be assigned to any job classification” limited by the notice requirement to the Association prior to the effective date of any change. Thus, the City has the right to manage its workforce and establish minimum staffing without any restrictions.

Giver’s memorandum of August 16, 2000 states that the City has reduced the minimum staffing from five (5) bargaining unit personnel to four (4) bargaining unit personnel on specific days and hours when the Chief or Battalion Chief or both are on duty. This action is consistent with Article 2. The result of this is that for most shifts the minimum staffing is five (5) bargaining unit personnel as the Association concludes, but that the City has also established minimum staffing at four (4) bargaining unit members when the vacant shifts occur Monday through Friday, except holidays, between the hours of 7 a.m. and 9 p.m. when the Chief or Battalion Chief or both are on duty.

The evidence indicates that the portions of the shifts that are the subject of the grievances began at 7 a.m. and ended at 9 p.m., Monday through Friday when the Chief and/or Battalion Chief were on duty. There were four (4) bargaining unit members working

these shifts and the minimum staffing established by the City pursuant to its management rights clause was four (4) bargaining unit members. Given this, I find that temporary vacancies did not exist and that the City acted within its contractual rights when it did not call-in a bargaining unit member to fill-in on overtime.

Even assuming that these are temporary vacancies as contemplated by Article 8, the City does not have an obligation to fill them as the Association argues. It is well-recognized that “management, under its inherent right to operate a plant, is entitled to the exclusive determination of whether a vacancy exists in a particular classification and whether, if one exists, it should be filled”. GREAT LAKES PIPE LINE CO. 25 LA, 885, 888 (ROBERTS, 1955) See also REYNOLDS METAL CO. 16 LA 352 (KLAMON, 1951) and MAGNET COVE BARIUM CORP. 20 LA 720 (ABERNETHY, 1953). This right is limited by the existence of a contract clause stating a specific number of employees are to be assigned to a shift or if there is a contractual obligation to fill all vacancies. *Id.* at 888.

Article 8 provides that the City “shall fill-in on a rotating basis according to the official list posted on the bulletin board.” Although this states that the City “shall fill-in, . . .” and it could be superficially interpreted to mean that the City must fill the temporary vacancies, reading the sentence in its entirety leads me to a different conclusion. The sentence does not state that all vacancies shall be filled, but rather states that the vacancies shall be filled in the manner prescribed. The testimony confirms that the Fill-In Rules as created and adopted by the Association are what is referred to by the language of Article 8. Nor testified that the purpose of the rules “was to try and even out overtime.” There is no contractual clause that obligates the City to fill all vacancies. Thus, the language of Article 8 does not obligate the City to fill all temporary vacancies, but rather obligates the City to fill temporary vacancies pursuant to the Fill-In Rules which equalize the distribution of overtime if the City decides to fill these vacancies.

In this case the City has decided, per the action of the Ad Hoc Committee on Fire Department Overtime, that it is not necessary to fill portions of 24-hour Firefighter or Lieutenant shifts that become vacant from 7 a.m. to 9 p.m., Monday through Friday, when at least the Fire Chief or the Battalion Chief are on duty. The Committee further determined that for purposes of safety and compliance with Comm. 30, the Fire Chief or Battalion Chief would respond to these calls along with the bargaining unit personnel. 1/ As such, the City has established two minimum staffing patterns and the collective bargaining agreement does not contain a clause which sets forth the number of line personnel to be assigned to a shift. The Association concedes that it sought such a provision during bargaining and failed to obtain it. Given this, and in light of the City’s right to manage its workforce and determine the number

of employees, I find that the City acted within its agreement rights when it decided to not fill the vacancies created by Firefighter or Lieutenant absences during the hours of 7 a.m. to 9 p.m. as a result of the fiscal constraints that the City was experiencing.

1/ The Association asserts that since the City did not replace the "Captain" reference in Article 8 with either "Chief" or "Battalion Chief" during bargaining, then the Chief and/or Battalion Chief cannot fill-in for the temporary vacancies. The testimony confirms that the Chief and Battalion Chief did not fill-in for either Lieutenants or Firefighters, but rather the positions were left vacant. The Chief and Battalion Chief did not perform Lieutenant or Firefighter responsibilities. The testimony indicates on those days when a crew was staffed by four (4) line personnel, the only effect this had on the Chief and/or Battalion Chief was that their working hours were realigned. As such, the Association argument is not consistent with the facts of this case.

The Association next argues that Article 8 defines a shift as 24-hours and that the City has unilaterally changed the meaning of a "shift" by dividing it into smaller increments. Essentially, the Association is arguing that since Article 8 states that employees ". . . shall work a twenty-four (24) hour shift, . . ." then only 24-hour shifts exist and therefore shifts should only be filled in 24-hour increments. This argument is flawed. First, the language of the Fill-In Rules which states "thirteen (13) hours or more constitute a valid fill-in day . . ." indicates that the parties have already accepted that the totality of a shift may be 24-hours, but that the 24-hours can be and is divided. Association President Walk defined temporary as "anything from one hour to several 24-hour shifts" and Giver testified that he filled-in for "a short time period" for a represented employee on one occasion in the past when the employee had a medical appointment to attend. Thus, the evidence supports that the parties have not viewed 24-hour shifts as indivisible blocks of time. Second, the Article itself states that increments of less than two hours of work will be compensated at a minimum of two hours worked. Since the contract identifies an increment of two hours, it is not possible for the parties to have intended the minimum work increment to be 24 hours and thus the Association's argument fails.

The Association next asserts that there is a past practice of filling all temporary vacancies with contractually identified Firefighters and Lieutenants. The existence of such a practice can be utilized to give meaning to an ambiguous clause in a labor agreement or can create a separate enforceable condition of employment. *The Common Law of the Workplace, Theodore St. Antoine, (BNA, 1999) p. 81.* In either case, the essential question is whether the parties intended to be bound by the alleged practice. *Id. at 82.*

A binding past practice is “a pattern of prior conduct consistently undertaken in recurring situations so as to evolve into an understanding of the parties that the conduct is the appropriate course of action.” *Id.* It is not in dispute that the City has since at least 1994 filled all temporary vacancies caused by vacation leave, sick leave or compensatory time with Firefighters, Lieutenants and Captains when they existed. Though I find that the Association has established that the City has a pattern of recurring conduct when filling temporary vacancies, I do not find that the parties have reached an understanding since no evidence was presented to establish that the parties had mutually agreed to the practice. As was well-articulated by Arbitrator Harry Shulman:

There are other practices which are not the result of joint determination at all They may be choices by management in the exercise of managerial discretion as to convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion, such practices are, in the absence of contract provisions to the contrary, subject to changes in the same discretion. . . .

FORD MOTOR CO., 19 LA 237, 241-242 (SHULLMAN, 1952). See also OHIO STATE UNIVERSITY, 81 LA 1060 (MODJESKA, 1983).

The Association’s reliance upon a binding past practice to establish a contractual violation is not substantiated. Though the Association has found the manner the City has utilized in filling vacancies to be satisfactory, there is no evidence to suggest that the City intended to be bound by this practice. The evidence indicates that the City’s use of unit personnel for fill-in shifts was an operational decision by the City in directing its workforce. This practice was convenient for the City at the time it was implemented due to the availability of overtime funds, but the financial situation of the City has changed and the labor agreement allows the City to change its method of operation in light of the fiscal constraints.

Finally, the Association relies upon the decision reached in CITY OF FOND DU LAC, WERC GRIEVANCE AWARD 6044 (GALLAGHER, 4/5/00) in support of its position in this case. In CITY OF FOND DU LAC, the Arbitrator was presented with a similar overtime fill-in grievance where the City had allocated a portion of a 24-hour shift work opportunity to the 40-hour per week positions of paramedic captain and fire prevention officer rather than offer overtime to 56-hour employees. Arbitrator Gallagher specifically stated that her conclusion that fire prevention officer position could not fill-in for 56-hour employees was guided by the

memorandum of understanding entered into by the parties which contained the language “that the position may not occupy a partial 24 hour call in need. . . .” She further stated that her conclusion that the paramedic captain could not fill in for 56-hour employees was based on the maintenance of standards clause contained in the parties’ collective bargaining agreement and a finding that a reduction in benefits had occurred since the 56-hour employees previously had worked the full 24-hour fill-in shift rather than just a portion of the 24-hour fill-in shift.

These facts distinguish the situation in FOND DU LAC from the facts in this case. The collective bargaining agreement between the City and the Association does not contain a maintenance of standards clause nor is there a memorandum of understanding or any other negotiated document that limits the City’s management rights in this area. As of result of these differing facts, the Association’s reliance on this is not persuasive.

Based on the foregoing, the record as a whole and the arguments of the parties, the undersigned makes and issues the following

AWARD

1. No. The City did not violate the labor agreement by not filling with 56-hour employees temporary vacancies that arose between 7:00 a.m. and 9:00 p.m., Monday through Friday, excluding holidays, when Fire Chief or Battalion Chief or both were on duty.

2. The grievances are dismissed.

Dated at Madison, Wisconsin this 13th day of November, 2001.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

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