BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL NO. 316, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO

and

CITY OF OSHKOSH (FIRE DEPARTMENT)

Case 331
No. 60393
MA-11601

Appearances:

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

Shneidman, Hawks & Ehlke, S.C., by **Attorney John B. Kiel,** 700 West Michigan Street, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of Local No. 316, International Association of Fire Fighters.

ARBITRATION AWARD

City of Oshkosh, hereinafter City, and Local No. 316 of the International Association of Fire Fighters, AFL-CIO, hereinafter Union, are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding which provides for final and binding arbitration of certain disputes. A request to initiate grievance arbitration was filed with the Commission on September 21, 2001. Commissioner Paul A. Hahn was appointed to act as Arbitrator on September 26, 2001. The hearing took place on December 11, 2001 in the City Hall, Oshkosh, Wisconsin. The hearing was transcribed. The parties were given the opportunity to file post hearing briefs. Initial post hearing briefs were received by the Arbitrator on February 25, 2002. The parties filed reply briefs. Reply briefs were received by the Arbitrator on March 20 and 21, 2002. The record was closed on March 21, 2002.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

Union

The Union states the issue as follows:

Did the City violate the collective bargaining agreement when it changed the workweek of lieutenant of instruction James Austad from a 40 to a 56 hour-workweek in July of 2001?

If so, what is the appropriate remedy?

City

The City states the issue as follows:

Did the City violate the Collective Bargaining Agreement when it temporarily reassigned Jim Austad from his position of lieutenant of instruction, 40-hour workweek, to Fire Lieutenant, 56-hour workweek, as it has done in the past?

If so, what is the appropriate remedy?

Arbitrator

The Arbitrator frames the issue as follows:

Did the City violate the collective bargaining agreement when it temporarily changed the workweek of lieutenant of instruction James Austad from a 40 to a 56 hour-workweek in July of 2001?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II

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.

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ARTICLE IV

NORMAL WORK WEEK – NORMAL WORK DAY – NORMAL WORK SCHEDULE

The average normal work week for the Fire Department shall be fifty-six (56) hours to be worked on a three (3) platoon system, utilizing a duty system of twenty-four (24) hours on duty starting at 7:00 a.m. and a forty-eight (48) hours off duty, with the exception of the following classifications:

A. Lieutenant of Instruction
B. Lieutenant of Inspection

The work week for the following classifications shall be forty (40) hours to be worked in four (4) consecutive ten (10) hour days, from 7:00 a.m. to 5:00 p.m. either Monday, Tuesday, Wednesday, Thursday or Tuesday, Wednesday, Thursday, Friday:

A. Lieutenant of Instruction
B. Lieutenant of Inspection

In some cases an individual will voluntarily work an extra 24 hour shift and then take 3 days in a row off instead of time and one half. (Platoon transfer.)

The words platoon transfer in the above sentence shall mean a transfer of a permanent nature, not a temporary transfer. A permanent transfer shall consist of no less than five (5) work days. Transfers of any nature shall not be used to circumvent Compensatory time and one-half. Any employee who volunteers to attend schools during his off duty time will receive expenses that will cover meals, lodging, mileage and registration fee if approved by the administration. No other compensation for off duty time involved will be paid.

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ARTICLE VII

OVERTIME

When a situation occurs which necessitates the hiring of overtime, whether "off" duty personnel are called in or "on" duty personnel work as a continuation of shift, to work hours in excess of a normal work day or work week, the following rules will apply:

1. All overtime, except FLSA overtime, shall be recorded for all personnel at the direction of the Fire Chief or his designee. Overtime for all personnel shall be recorded.

2. Overtime for line personnel will be for the position vacant. An exception is if a Captain or Paramedic is needed to fill a vacancy then the vacancy will be filled by moving personnel on duty into the position if possible and then hiring from the officers category to replace the Captain or hiring from the Fire Fighter list to replace the Fire Fighter/Paramedic.

3. Overtime shall be awarded by the "lowest total number of hours worked seniority system". Seniority is defined as the number of years an individual has been a member of the Oshkosh Fire Department.

4. When a position vacancy occurs or overtime is necessary as an extension of a normal work day, the individual who is qualified with the lowest total number of overtime hours worked with the most seniority in the appropriate category will have the first opportunity to accept the overtime. If the first individual does not work, the next individual with the next lowest total number of overtime hours worked and most seniority will be called and so on until the overtime assignment is filled.

5. An exception to number 4 is when a senior person is on duty the preceding day. If an individual qualifies for the vacant position and has the lowest total number of hours worked, the person will be offered the overtime assignment if the individual does not pass over three senior off duty personnel.

6. An except (sic) to number 4 is when overtime is necessitated for an individual who has special expertise. In this case, the Fire Chief or his designee may bypass the procedure in number 4, and award overtime for direct use of the individuals (sic) special expertise only and not to bypass the selection process in number 4 above.

7. An exception to number 4 is in times of genuine emergency and overtime is necessary for public safety, the Fire Chief or his designee may bypass the selection process in number 4 and call in for duty any firefighter he chooses for the duration of the emergency only.

8. When an Officer cannot be hired to replace an Officer, the Equipment Operator with the lowest total of overtime hours worked and most seniority and is qualified will be contacted next, and so on until the overtime assignment is filled. The same procedure will apply to fill the position of Equipment Operator.

9. An individual has the right to turn down any overtime assignment, except, if a position must be filled and no one else has been found to take the assignment. Then, the individual who has the least time in the position must accept the overtime assignment at the discretion of the Fire Chief.

10. Overtime will be compensated at the rate of 1 ½ times the individuals (sic) normal hourly rate for the classification in which the individual performs. If the individual elects to take comp time, he\she will receive 1 ½ times the number of hours worked.

11. Overtime records will be maintained on a daily basis by the Fire chief's designee and an overtime status report provided periodically.

12. In the event an error is made, the person working the overtime shall be paid and the individual passed by shall be given the first opportunity for the next overtime only, in his category. When an opportunity for an overtime assignment cannot be offered by the end of the year, the person passed by shall be paid.

RECORDING OF TOTAL OVERTIME HOURS WORKED

2-1. The overtime lists will be by job category; officer, equipment operator and firefighter. Within each category, the man with the most seniority as a member of the Oshkosh Fire Department will be first.

2-2. The overtime list will be continued at the end of the year. In the event the list will start over, the City shall be notified in writing two weeks before the effective date.

2-3. An individual may notify the Fire Chief in writing if he\she does not wish to participate in overtime and then the individual will not be included. The individual will be reinstated on the overtime list upon written notification of the Fire chief and then the individual will be assigned a number of hours worked equal to the individual in the same category with the highest number of hours worked.

2-4. If an individual is promoted, he\she will be placed in the new category and assigned the same number of hours worked from his\her previous category.

2-5. When overtime is worked, the total number of overtime hours will be accumulated and will be recorded on the overtime list.

2-6. Overtime accepted in advance of performance will be recorded as worked when the assignment is accepted.

2-7. Personnel on sick leave, medical, family, funeral and emergency leave will not be eligible for overtime.

2-8. New hires will be given a "total number of hours worked" equal to the total of the individual with the highest total in the firefighter category.

2-9. When an individual changes jobs and work schedules from a 40 hour to a 56 hour work week, he\she will be given a "total number of hours worked" equal to the total of the individual with the highest total in the 56 hour category.

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ARTICLE X

MOVE UP LANGUAGE

When more personnel are on duty than are necessary to minimally man fire department apparatus and there are qualified personnel on duty to fill vacant positions, the following rules will apply. Otherwise, if overtime is necessary, hiring will be by overtime policy.

When it becomes necessary to fill the position of Officer of a fire apparatus due to absence, the Equipment Operator permanently assigned to the fire apparatus with the vacancy will fill the vacant position of officer. The most senior Firefighter permanently assigned to the fire apparatus shall fill the position of Equipment Operator.

When it becomes necessary to fill the position of Equipment Operator due to the assigned Equipment Operator moving to acting Officer or absence, the most senior Firefighter permanently assigned to the fire apparatus with the vacancy will fill the Equipment Operator position.

When it becomes necessary to fill the position of Officer or Equipment Operator and the assigned Equipment Operator or senior Firefighter is not on duty due to a trade, the person who is working for the assigned personnel shall fill the vacant position on the fire apparatus if qualified.

A Firefighter-Paramedic, when not assigned to a rescue unit, will be permanently assigned to a fire apparatus. He\she shall fill vacant Equipment Operator positions on that fire apparatus or other apparatus if he\she is the most senior Firefighter assigned to that fire apparatus and is qualified for the vacant position.

The Assistant Fire Chiefs shall have the right to assign any Equipment Operator or Firefighter to act as driver of Car 11. If a Firefighter fills this position, he\she must be compensated at the Equipment Operator rate of pay.

The availability of "extra" personnel to fill vacant positions shall be the only exception to the above rules.

An "extra" Officer may fill an Officer position which is vacant on another fire apparatus or bump a more junior Officer.

An "extra" Equipment Operator may fill an Equipment Operator position which is vacant on another fire apparatus.

An "extra" Equipment Operator may fill an Officer position which is vacant on another fire apparatus only if the permanently assigned Equipment Operator is not available or if an individual working for the assigned Equipment Operator is not qualified.

An "extra" Firefighter may fill a vacant Equipment Operator position only if the permanently assigned Firefighter is unqualified or absent.

("Extra" is a term for personnel who are available for duty due to being in excess of the minimum number of personnel needed to man fire department apparatus. This includes scheduled personnel overages or those personnel overages resulting from the shutting down of a fire apparatus.)

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ARTICLE XII

RULES AND REGULATIONS

The employer may adopt and publish rules which may be amended from time to time, provided, however, that such rules and regulations shall be first submitted to the Union for its information prior to the effective date.

This article in no way will affect the rules and regulations falling under the jurisdiction of the Police and Fire Commission as set forth in state statutes. The employer agrees that any rules or regulations pertaining to wages, hours, conditions of employment whether now in force or hereafter adopted shall be voided by this agreement.

. . .

ARTICLE XXII

GRIEVANCE PROCEDURES

The word "grievance" as used in this agreement is any dispute which involves the interpretation, application of, or compliance with the provisions of this agreement or past practices primarily related to wages, hours, and/or conditions of employment or impact which primarily relate to wages, hours, and working conditions resulting from the City's administration of past practices.

. . .

. . . The decision of the arbitrator shall be final and binding and he shall have no right to amend, modify, ignore or add to the provisions of this agreement. Expenses for the arbitrator services and the proceedings shall be borne equally by the Employer and the Union. However, each party shall be responsible for compensating its own representatives and witnesses. For City purposes the arbitration procedures shall follow that outlined in State Statutes.

STATEMENT OF THE CASE

This grievance involves the City of Oshkosh and Local No. 316 of the International Association of Fire Fighters, AFL-CIO. (Jt. 1) The Union alleges that the City violated the collective bargaining agreement by assigning Lieutenant of Instruction James Austad who worked a 40-hour workweek to a 56-hour workweek during the month of July, 2001. (Jt. 2)

The City provides fire suppression services to the public through the City of Oshkosh Fire Department. The City employs individuals in the ranks of Fire Fighter, Lieutenant, including Lieutenant of Instruction and Lieutenant of Inspection, Captain, Assistant Chief and Chief. The bargaining unit includes all ranks except Assistant Chief and Chief.

On April 3, 2001, the Grievant was promoted by the Oshkosh Police and Fire Commission from Equipment Operator to Fire Lieutenant and then to Lieutenant of Instruction effective April 22, 2001. (Jt. 25) A Fire Lieutenant under Article IV, Workweek, works a 56-hour workweek. (Jt. 1) The Fire Lieutenant is responsible for supervision as well as various administrative and training responsibilities. The Fire Lieutenant working a 56-hour workweek works as part of a three (3) platoon system, utilizing a duty system of twenty-four (24) hours on duty and forty-eight (48) hours off duty. (Jt. 1)

The Lieutenant of Instruction works a forty-hour workweek consisting of four (4) consecutive ten hour days from 7:00 a.m. to 5:00 p.m. either Monday, Tuesday, Wednesday, Thursday or Tuesday, Wednesday, Thursday, Friday. (Jt. 1) The Lieutenant of Instruction is generally responsible for designing course material and lesson plans for training employees of the Fire Department and for delivering said training to employees in the department.

In July of 2001, the Grievant, Lieutenant of Instruction Austad, was temporarily transferred from his Lieutenant of Instruction position, working a 40-hour workweek to a Fire Lieutenant position working a 56-hour workweek. [To simplify the writing of this decision, I will refer to the Lieutenant of Instruction as the Grievant even though the grievance was filed by and on behalf of the Union.]

The City takes the position that it had the right to temporarily transfer the Lieutenant of Instruction to a Fire Lieutenant under the terms of the collective bargaining agreement; the Union takes the position that the City violated the collective bargaining agreement by this temporary transfer because the workweek for the classification of Lieutenant of Instruction shall be 40 hours per week and therefore the City could not transfer the Lieutenant of Instruction to a Fire Lieutenant position requiring 56 hours per week.

The Union filed the grievance in this matter on June 21, 2001 when it learned that the Grievant was to be temporarily transferred to a Fire Lieutenant working a 56-hour work schedule. (Jt. 2) The grievance was denied by Fire Chief Timothy R. Franz on July 18, 2001. (Jt. 4) The parties failed to achieve resolution through the grievance procedure. (Jt. 5 – Jt. 10) The matter was appealed to arbitration. (Jt. 10) Hearing in the matter was held by the Arbitrator on December 11, 2001 in Oshkosh, Wisconsin. No issue was raised as to the arbitrability of the grievance.

POSITIONS OF THE PARTIES

Union

The Union argues that no dispute exists between the parties that a Fire Lieutenant works a 56-hour a week job and the Lieutenant of Instruction works a 40 hour a week job pursuant to Article IV, Workweek of the collective bargaining agreement. The Union points out that since Grievant's promotion he has consistently held the classification of Lieutenant of Instruction. The Union states that in July of 2001, over the Union's objection and in violation of the plain language of the collective bargaining agreement, the City unilaterally assigned Grievant to a 56-hour workweek Fire Lieutenant position despite the fact that the labor agreement under Article IV specifically states that the Lieutenant of Instruction shall work a 40-hour workweek. The Union states that because Grievant was assigned to a Fire Lieutenant position for this period of time other bargaining unit members were denied overtime and move-up pay opportunities which could have resulted in increased pay for other bargaining unit members. This, the Union argued, was because the Grievant filled a position as Fire Lieutenant that would normally have been filed by other bargaining unit members.

It is the position of the Union that the correct principle to be followed in this case is that the language of an agreement will not be given a meaning other than that which is clearly and unequivocally expressed. The Union argues that the language in this case is clear and unambiguous and establishes a distinct work schedule for the classification of Lieutenant of Instruction. The language expressly provides:

> The workweek for the following classifications **shall** be forty (40) hours to be worked in four (4) consecutive ten (10) hour days, from 7:00 a.m. to 5:00 p.m. either Monday, Tuesday, Wednesday, Thursday or Tuesday, Wednesday, Thursday, Friday:
>
> A. Lieutenant of Instruction
> B. Lieutenant of Inspection
>
> (emphasis added)

The Union argues that contrary to the express terms of the agreement the City unilaterally and temporarily changed the Grievant's work hours.

The Union argues that the Arbitrator must not go outside the contract to consider interpretative devices like bargaining history, past practice, other grievance settlements, other grievance arbitration awards or any other form of evidence to resolve this dispute. The Union argues that the plain language of the contract "says it all," and urges the Arbitrator in this case to give the language its proper effect.

In its reply brief the Union essentially refutes the main arguments of the City's initial post-hearing brief. The Union submits that in a recent grievance settlement, in which a Lieutenant of Inspection was transferred from a 40-hour to a 56-hour line position, the Union grieved and in the course of settling that grievance the City agreed that it could not rely on past practice to transfer a 40-hour employee to a 56-hour vacancy. The Union argues that a record exhibit signed by the Fire Chief states that past practice has not been to hire 40-hour personnel for line or 56-hour positions. The Union further argues that the incidents during the 1970's and 1980's in which there were some examples of a transfer of a Lieutenant of Instruction from a 40-hour week to a 56-hour week, do not override the recent settlement mentioned above. Further those incidents do not override established arbitration case law that a past practice cannot be used to modify plain contract language. The Union posits that any alleged past practice has not been shown to meet the necessary elements of past practice in that it has not been shown to be unequivocal, clearly enunciated and acted upon and readily ascertainable over a reasonable period of time as a fixed and established practice established by both parties.

The Union avers that the City's argument that the Grievant was assigned to work a 56-hour week as a Fire Lieutenant in order to better able him to train fire fighters does not stand up as the Grievant during the month of July 2001 only worked a total of eleven 24-hour duty days which would hardly support a program that the Grievant was to work a full schedule as a Fire Lieutenant. The Union points out that the City could just as easily have assigned the Grievant, while a Lieutenant of Instruction and working his contractual 40-hour workweek, to work side-by-side with a fire fighting unit during the course of his regular workweek.

The Union also refutes the City's arguments that the Grievant was part of a platoon transfer during his transfer to a line fire fighter during the month of July because a platoon transfer, as defined by the collective bargaining agreement, is a permanent not temporary transfer and the City's intent was only to temporarily transfer the Grievant to the 56-hour workweek line position. Further, the Lieutenant of Instruction is not assigned to a platoon and therefore he could not have been involved in a platoon transfer.

The Union refutes the relevance of the City's arguments regarding overtime and move-up pay; those articles are only relevant as to remedy.

Lastly the Union points out that the management rights clause must be looked at in its entirety and submits that the contractual management rights clause states that management rights must be exercised consistent with the provisions of the agreement and cannot be exercised in a manner to evade the provisions of the agreement.

In conclusion, the Union argues that the City has failed to offer any plausible argument to support its violation of Article IV, which requires it to assign employees occupying the classification of Lieutenant of Instruction to a 40-hour workweek. The Union submits that its grievance should be sustained; the remedy sought by the Union is to order the City to make whole those bargaining unit members who would have been eligible for overtime and/or move-up pay but for the City's violation of the agreement. The Union asks the Arbitrator to retain jurisdiction over the case for purposes of resolving any dispute that may arise in connection with the implementation of the remedy.

City

The City commences its argument by stating that the transfer of employees is a well recognized managerial right and that, unless the City has limited its right by some express provision in the collective bargaining agreement, it has reserved to itself the right to transfer fire fighters from a 40-hour workweek to a 56-hour workweek as it did in the case of the Grievant. Citing arbitration case law, the City argues that unless restricted by agreement, law, custom, practice or estoppal, management has the right to effect transfers as a necessary element in the operation of its business. The City argues that arbitrators generally require that any restriction upon management's right to transfer employees must be clearly stated. The City argues in this case that the City has reserved to itself the right to transfer fire fighters from a 40-hour workweek to a 56-hour workweek. There is no contractual provision in this collective bargaining agreement before the Arbitrator restricting that right.

The City next argues that under Article IV, Normal Workweek-Normal Work day-Normal Work schedule, the City was not restricted in its right to transfer the Grievant to a 56-hour workweek because there is not any restriction in Article IV on the City's right to transfer fire fighters from a 40-hour workweek to a 56-hour workweek. The City takes the position that when the City assigns a fire fighter to perform the duties of Lieutenant of Instruction (Grievant) then the 40-hour workweek applies; when the City transfers a fire fighter to Fire Lieutenant, as was done in the case before the Arbitrator, then the 56-hour workweek applies. Article IV, Normal Workweek, cannot be interpreted to exclude a temporary transfer. Nor, the City argues, does Article VII of the collective bargaining agreement, Overtime, restrict the City's right to transfer fire fighters from a 40-hour workweek to a 56-hour workweek. The City argues that for the Arbitrator to find otherwise would mean that the City is obligated to incur overtime without any discretion and such a result is not supported by contract language.

The City also argues that Article X, Move-up Pay, does not guarantee move-up pay to fire fighters but rather provides for the allocation of move-up pay when it is deemed necessary. The City argues that Article X does not restrict the City's right to transfer fire fighters from a 40-hour workweek to a 56-hour workweek. The City argues that the Union conceded through

testimony of one of its executive board members that neither Article VII, Overtime, nor Article X, Move-up Pay of the collective bargaining agreement restrict the City's right to transfer fire fighters from a 40-hour workweek to a 56-hour workweek. The City argues that the overtime and move-up pay provisions cannot be read to preclude a temporary transfer and that the temporary transfer of the Grievant did not result in negative implications for the bargaining unit members that would preclude the City from making such transfers.

The City avers that the Arbitrator does not have the authority to substitute his judgement for that of management and that in order for the Arbitrator to adopt the Union's position, he would in essence be dismantling the City's management rights provision which is not only outside the Arbitrator's jurisdiction but flies in the face of the very purpose of arbitration which is to uphold and enforce the agreement between the parties.

The City then makes its argument that past practice, as set forth in the hearing record, demonstrates that temporary transfers from a 40-hour workweek to a 56-hour workweek have been accomplished on numerous occasions in the past. The City argues that it does not rely solely on past practice but that it adds a significant measure of persuasion, although such practice even if it did not exist would not be a necessary factor in the decision of this case. Citing arbitration case law regarding the analysis of past practice set forth in CELANESE CORP. OF AMERICA (citation omitted) the City argues that all the elements of an acceptable past practice between the parties exist in this case: (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established of the practice.

The City submits that the Union position, that when the overtime and move-up pay articles were placed in the agreement in 1999 this eliminated any past practice, is not accurate as there was no material change in the collective bargaining agreement that would eliminate the past practice of transferring fire fighters from a 40-hour workweek to a 56-hour workweek. The City argues that two recent grievance settlements resolved in the Union's favor, arising from the transfer of a Lieutenant of Inspection from a 40-hour workweek to a 56-hour workweek, could not be relied upon because the underlying circumstances in each case are different from the circumstances supporting the City's past practice argument before the Arbitrator in this case.

The City posits that it is necessary and reasonable for the City to have the ability to transfer the Lieutenant of Instruction to a 56-hour workweek so the Lieutenant in charge of training can ". . . get a first hand feeling for what is going on with the fire fighters on the line." The Lieutenant of Instruction must be able to assess the performance of fire fighters, to locate areas where training may be provided and to improve their performance.

Lastly the City argues that the Union failed to restrict the City's right to transfer fire fighters from a 40-hour workweek to a 56-hour workweek when it negotiated Article VII, Overtime and Article X, Move-Up Pay into the collective bargaining agreement. Therefore, the City argues that the grievance is a clear example of the Union trying to gain through arbitration that which it has been unable to obtain in collective bargaining.

The City, in its reply brief, essentially re-emphasizes its arguments made above. The City argues again that there is nothing in the contract to restrict its right to transfer and assign employees. Further, the City argues that arbitration case law, which it cites extensively, supports the City's position that use of the word "normal" in describing the workweek under Article IV of the collective bargaining agreement has been looked upon by arbitrators as allowing an employer to temporarily transfer employees as long as the overall work schedule of employees remains normal and regular. The City adds that where management, in this case the Fire Chief, has a reasonable and nonarbitrary reason for the transfer, arbitrators have upheld such changes in work schedules, transfers and assignments in order to achieve the reasonable objective of management.

The City again restates its past practice argument that there have been numerous past temporary transfers and assignments of lieutenants from a 40-hour week to a 56-hour week.

The City argues that transfers and shift assignment changes are something that are routinely done within the fire department and the City must have the flexibility to accomplish this. The City submits that the Grievant did not hold the position of Lieutenant of Instruction at all relevant times to this proceeding but was merely assigned as a Fire Lieutenant for the month of July and therefore was appropriately scheduled to work a 56-hour workweek. Lastly, the City argues that in the unlikely event the Arbitrator sustains the grievance, neither the Grievant nor any other member of the Union is entitled to any monetary remedy because (1) the Grievant maintained his higher rate of pay at all times and (2) the Union did not prove or identify any Union member who lost out on overtime or move-up pay and there is no guarantee in the contract of overtime or move-up pay.

In conclusion, the City submits that the Union has not sustained its burden of proof and therefore the grievance must be denied.

DISCUSSION

This is a contract interpretation case. As set forth in more detail above, the Union alleges that the City violated the parties' collective bargaining agreement by assigning the Grievant, a Lieutenant of Instruction who worked a 40-hour workweek, to a Fire Lieutenant's position, a 56-hour workweek position, during the month of July 2001. This dispute centers

on the relationship of the Management Rights clause and Article IV, Workweek. The City argues that the management rights clause gave it the right to assign the Grievant to a Fire Lieutenant position; the Union argues that the clear and unambiguous language of the workweek article requires that the Grievant "shall" only work a 40-hour workweek.

Before addressing the relationship between these two articles, which I find to be the nexus of the case, there are a number of arguments that need to be considered. Clearly, most employees are line employees whose essential job is to fight fires and other disasters. The positions of Lieutenant of Instruction and the Lieutenant of Inspection have specific job duties that do not regularly involve fighting fires; their titles make self-evident their primary duties. (Tr. 18) Further, the line employees are organized in a three platoon system under Article IV of the contract:

> The average normal work week for the Fire Department shall be fifty-six (56) hours to be worked on a three (3) platoon system, utilizing a duty system of twenty-four (24) hours on duty starting at 7:00 a.m. and a forty-eight (48) hours off duty, with the exception of the following classifications:
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> A. Lieutenant of Instruction
> B. Lieutenant of Inspection
>
> The work week for the following classifications shall be forty (40) hours to be worked in four (4) consecutive ten (10) hour days, from 7:00 a.m. to 5:00 p.m. either Monday, Tuesday, Wednesday, Thursday or Tuesday, Wednesday, Thursday, Friday:
>
> A. Lieutenant of Instruction
> B. Lieutenant of Inspection

I find that the platoon system only applies to line employees and specifically excludes employees assigned as Lieutenants of Instruction and Inspection. 1/ While there may be changes in assignments and shift changes within the platoon system (not in issue in this case), I reject any argument that the platoon system applies to the Lieutenants of Instruction and Inspection, and I reject any argument that the platoon language can be used to justify the transfer of employees between the platoon system and the positions of Instruction and Inspection. Further, the last paragraph of Article IV specifically states that a transfer under the platoon system is permanent if it lasts more than five days.

1/ There is no dispute between the parties that the Grievant was promoted to Lieutenant of Instruction on April 3, 2001, becoming effective on April 22, 2001.

Substantial evidence and argument was put in the record regarding past practice. Putting the arguments of the parties and their evidence in the best light, I do not find conclusive evidence to prove that the parties have agreed to any practice of allowing a Lieutenant of Instruction to be assigned to a Fire Lieutenant line position. Under any legal or arbitral standard of past practice, I do not find in this case any such alleged practice to be unequivocal, of longstanding or accepted by the parties. It is true that in the 1970's and 1980's there were instances where either the Lieutenant of Instruction or Lieutenant of Inspection were assigned to a line position as Fire Lieutenant. (Jt. Ex. 19) It is also true that this "practice" was not accepted by the Union as confirmed by the testimony of Officer Gee that when the Fire Chief did make such a transfer the Union complained and was assured that it would not happen again. (Tr. 115-116) I note here that the current Fire Chief was not Chief during any of those instances. Further, for most of the 1990's no one officer filled the Lieutenant of Instruction position. The Assistant Fire Chief testified that since 1987 he could find no examples of a transfer of a 40-hour employee (hours a week worked by the Lieutenants of Instruction and Inspection) to a 56-hour a week line Fire Lieutenant position. (Tr. 86) I do not believe there is evidence of a past practice; I also note the strong argument by the Union that I should not consider any past practice argument given its position that the contract language is unambiguous and should be the sole determinative of this award.

The City argues that a recent grievance settlement proves that the Union agreed to allowing such transfers. (Jt. 15) In this case of a grievance settlement in favor of the Union, the Chief confirmed his understanding of some discussions held with the Union that he could transfer a 40-hour position to a 56-hour position. (Jt. 15 and Tr. 35) The pertinent language of the Chief's letter is as follows:

. . .

1.) A person transferred from a 40-hour to a line position will be eligible for line position overtime during that time period he/she is assigned to a line position.
2.) When a person is transferred from a 40-hour to a line position that person shall carry their "total number of hours worked" from their previous category and the same would hold true if and when they are transferred back to a 40-hour week.

. . .

I do not read this language as any agreement by the Union to permit a transfer but only what happens if there is a permissible transfer. The Union, by its President, immediately

responded and stated that he did not agree with the Chief's interpretation of the discussions and that he recognized this was a concern of the Chief but that the parties should discuss it during negotiations that were then underway. (Jt. 16 and Tr. 21-23) 2/

2/ In March of 2001, the parties settled a grievance where the Lieutenant of Inspection filled a line position that required overtime. In discussing the transfer of a 40-hour a week position filled by the Lieutenants of Training and Inspection to 56-hour week line position, the Union proposed that the parties discuss the situation during negotiations. This was never done. (Jt. 14-16, Tr. 24)

I further find that the Overtime and Move-up pay articles are not relevant except for any possible remedy if I rule in favor of the Union. Those articles do not contain any language regarding assignment or transfer of employees. Nor was the Grievant an "extra" officer as that is defined in Article X unless he was properly assigned to the 56-hour line workweek during July of 2001. 3/ I further agree with the City that neither of these two articles guarantees overtime or move-up pay. These articles neither restrict nor grant the City rights as far as transferring a Lieutenant of Instruction to a line Fire Lieutenant position.

3/ Refer to the definition of "extra" under the contract provisions, Article X set forth earlier under the heading "Contract Provisions."

I do not find that Fire Chief Franz acted in bad faith by assigning the Grievant to work on the line as a Fire Lieutenant. I note that the Chief never testified that he could merely change the Grievant's position classification on a temporary basis as argued by the City in its reply brief. Certainly the Chief, and I am sure the Grievant, have a legitimate belief that one of the best ways for the Grievant to enhance and keep current his training skills is by working with line officers performing their duties with them. The Union does not disagree with this position, only arguing that it could be done without assigning the Grievant to a 56-hour workweek in violation of the labor agreement. The Union suggests that the Grievant could have been assigned during his 40-hour workweek to ride with line officers on their calls.

I also do not find relevant the City's argument that Grievant volunteered to take the assignment and that his assignment in July of 2001 allowed line employees to have more leave time. Whether the Grievant, who never testified, volunteered was never corroborated and it is the Union that decides to take a matter to arbitration and decide whether it believes the contract was violated. Grievant's assignment may have given line employees more time off, but clearly the Union, whose decision it is, believed that the assignment eliminated overtime and move-pay opportunities and that was more important.

I now turn to the heart of this case; the language of the Management Rights clause and the language of the Workweek article and whether considering those two articles together, as I must, the City had an unrestricted right to transfer or assign the Grievant to a Fire Lieutenant 56-hour workweek position in July of 2001.

The City has cited to me in numerous cases, several principles of accepted arbitration case law. I do not disagree with those principles, but they are only as good as the facts applied to them in the particular case in which they are used. 4/ Another well accepted principle is that contract provisions are not read or considered in a vacuum but must be read together. Under the facts and issue in this case, that means that the Management Rights Clause and the Workweek Article must be considered together.

4/ The cases cited in the City's initial post-hearing brief do not have similar factual situations to offer conclusive guidance though helpful insofar as setting out and confirming principles of arbitration law relative to the issues in this case. Joint 11 in this case concerned a different issue, the posting of a temporary transfer to the training division.

It is true under a residual rights theory there is no language in the Management Rights clause that restricts the City from transferring firefighters. But there is language in the Article that makes it clear that ". . . such rights must be exercised consistently with the other provisions of the Agreement". (Jt. 1) Further, the article states that the City's management rights are not to be exercised in a manner that will ". . . evade the provisions of this Agreement." Therefore, it is clear that the City, in its Management Rights clause, has recognized an obligation to abide by the other provisions of the agreement that it has negotiated with the Union. I therefore find that the City is obligated to abide by the provisions of the Workweek article. Any right the City has or has retained to transfer or assign the Lieutenant of Instruction is affected by the language of the Workweek article that defines the hours and days of work of this position.

I find that the specific language of this article that applies to the positions of Lieutenants of Instruction and Inspection does not permit the City to modify the hours or days of work of these two positions. The City has cited several arbitration decisions to me where arbitrators have permitted or upheld the right of the employer to transfer or make temporary assignments to carry out the operational needs of the particular employer. Those cases however do not have language parallel to the language in the contract before me. 5/ Those cases, as I have noted in the footnote, speak to language where the words 'standard' and 'normal' are used to describe the workweek. Here, the language is more specific: "The workweek for the

following classifications (Lieutenants of Instruction and Inspection) shall be forty (40) hours to be worked in four (4) consecutive ten (10) hour days. . . ." With these employees, unlike the language in the Workweek article applied to line firefighters, there is no use of the word "normal" to describe hours or workweek. Words negotiated into a labor agreement are generally there for a reason; to hold that the City can transfer the Lieutenant of Instruction as it did in this case is to abrogate the word "shall," and this is particularly true where in the same article the parties used the word "normal" to describe the workweek for line and platoon employees. That is why examples of employees working a line position being assigned from a 56-hour workweek to the 40-hour workweek Instruction and Inspection positions are not applicable. Further, it is clear that if the Lieutenant of Instruction is on vacation or sick leave there is no one to fill his position where if a line firefighter is absent there are other firefighters to fill that position if it drops the manpower below the minimum level required by the Fire Chief.

5/ Since I have found limiting language in the Workweek Article in this case, those cases describing an employer's right to change shifts and schedules are not applicable except for the general proposition that absent limiting language, the employer can do it. As different from the cited cases, in this case the words "standard" and "normal" and "regular" do not apply to the Lieutenant of Instruction. The Lieutenant of Instruction is specifically "excepted" from the "normal" workweek language of the 56-hour workweek line employees.

The language defining the workweek of the Lieutenant of Instruction has been in the labor agreement since 1976. (Jt.22) Looking at the entire language of the Management Rights Clause and the Workweek Article I find that the language is clear and unambiguous and does in fact restrict the City from assigning the Lieutenant of Instruction to a workweek other than 40 hours worked on four consecutive ten-hour days. The City violated the collective bargaining agreement when it assigned the Grievant to work the month of July 2001 on the line or to a 56-hour work schedule.

Even though I have found no bad faith on the Fire Chief's part by said assignment, I believe a remedy is appropriate as requested by the Union in its grievance and confirmed at hearing and in its post hearing briefs. The City opposes any remedy because no evidence was introduced by the Union at hearing to prove any officer lost overtime or move-up pay. However, Union President Johnson testified that two line fire fighters did not receive move-up pay and that Grievant's assignment diminished overtime opportunities. (Tr. 14) It is not unusual for parties to an arbitration to confront the details of back pay etc. after an award rather than deal with it at the hearing not knowing what the arbitrator's award might be. The employer usually is the party with the payroll records who can best develop that information.

Therefore I reject the City's argument and pay will be awarded to any fire fighter who lost pay through move-up opportunities and overtime denied to the fire fighter due to the Grievant's temporary assignment; the Grievant's pay for this period of time will not be affected.

I do not believe the Union opposes the concept of the training lieutenant spending time and effort with line fire fighters. The Union has offered one suggestion and based on the testimony of its witnesses seems prepared to discuss this issue at the bargaining table.

Based on the foregoing and the record as a whole, I issue the following

AWARD

The City violated the Collective Bargaining Agreement when it temporarily assigned the Grievant to a 56-hour workweek in July of 2001.

REMEDY

The City will make whole those bargaining unit members who would have been eligible for overtime and/or move-up pay had not the City violated the Agreement by Grievant's assignment. At the Union's request and without objection from the City, I will retain jurisdiction over this case for the purpose of resolving any dispute that may arise in connection with the implementation of the remedy.

Dated at Madison, Wisconsin, this 4th day of April, 2002.

Paul A. Hahn /s/

Paul A. Hahn, Arbitrator

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