

BEFORE THE ARBITRATOR

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO-CLC, LOCAL 257

and

CITY OF APPLETON

Case 409
No. 60856
MA-11744

(Investigator Call-In Grievance)

Appearances:

Mr. Paul Jordan Steel, Head Steward, Local 257, P.O. Box 214, Appleton, Wisconsin, appearing on behalf of International Association of Firefighters, AFL-CIO-CLC, Local 257.

Ms. Ellen Totzke, Deputy City Attorney, City of Appleton, 100 North Appleton Street, Appleton, Wisconsin, appearing on behalf of the City of Appleton.

ARBITRATION AWARD

International Association of Firefighters, AFL-CIO-CLC, Local 257, hereinafter "Union," requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Appleton, 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. The hearing was held before the undersigned on March 21, 2002, in Appleton, Wisconsin. The hearing was transcribed. The parties submitted post-hearing briefs and reply briefs, the last of which was received on June 10, 2002. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

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

The parties agreed at hearing that there were no procedural issues in dispute. The parties were unable to stipulate to the issue.

The Union frames the issue as:

Does the City have the right to use a Firefighter/Relief Driver, a Union member, to conduct a fire investigation, when the direct result is injury to a Fire Inspector, another Union member? If not, the Union requests the payment of wages and benefits for two hours of call time and 45 minutes of overtime to the aggrieved Fire Inspector.

The City frames the issue as:

Whether or not management has the right to send a crew to assist and evaluate at a fire scene instead of sending a fire inspector/investigator immediately upon the request of the officer at the scene?

Based upon the relevant evidence and arguments in the case, I frame the issue as:

Was the collective bargaining agreement violated when the Fire Inspector at the top of the call list was not called in on September 10, 2001, at approximately 4:40 p.m. for a fire situation? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 4 – Hours of Work

A. The Basic workweek for the following categories of employees (hereinafter called “Fire Support personnel”) shall consist of forty (40) hours. . . .

. . .

1. Fire Inspector

. . .

B. The basic work week for the following categories of employees (hereinafter called “Fire Operations personnel”) shall consist of fifty-six (56) hours to be worked in twenty-four (24) hour tours on the basis of one day on – one day off – one day on – one day off – one day on – four days off.

1. Mechanics
2. Captains
3. Lieutenants
4. Driver-Engineers
5. Fire fighters

...

- C. The duty day shall begin at 0700 hours for Operations Personnel. The coverage period for Support personnel shall be from 0700 to 1700 hours. The Chief or his designee shall determine staffing needs during that period and the employees shall select their schedules by seniority in compliance with those staffing needs.

...

- E. Whenever necessary because of insufficient staffing to fill crews, the Chief or his designee may call in off-duty personnel. Such call-ins shall be first by seniority within the classification and then by seniority among other qualified employees.

...

ARTICLE 5 - Overtime

- A. Subject to the provisions of sub-paragraphs 1 and 2 of this paragraph, all time worked over forty (40) hours per week shall be considered overtime and be paid for at the rate of time and one-half such employee's base rate. When employees are required to work beyond their normal schedule hours for any reason, they shall be paid overtime at time and one-half for actual time worked. Fire Support personnel may be compensated for such overtime by either pay or time off, at their sole discretion subject to the provisions of Paragraph B below. Fire Operations personnel will be compensated overtime by pay only.

...

- D. Call Time: Employees recalled to duty shall receive two (2) hours pay at their regular rate plus pay for actual hours worked, subject to the overtime provisions of this Agreement, with a minimum payment of not less than three (3) hours straight time. Employees recalled for a period of eight (8) hours or less of overtime will not be charged with time worked on the overtime schedule.

. . .

- G. All overtime will be filled subject to senior qualified from the call list, except where herein specifically stated otherwise. All personnel will be numbered according to seniority on the department. Call lists shall be divided by classifications and overtime call-back of personnel shall be made on a rotating basis.

Seniority lists shall be posed [sic] at all stations, and shall indicate the complete account of the overtime scheduling. The lists must be kept up-to-date so personnel can be aware of their status on the schedule. Outlying stations shall be notified of additions to the schedule. For purposes of this paragraph, Captains and Lieutenants shall be classified as Officers.

. . .

- I. A call list will be created for the purpose of allocating overtime for all qualified fire inspectors. Overtime shall be allocated in the following manner:
1. Fire cause investigation and other emergency call-ins: The call list will be rotated monthly. The employee at the top of the list will be called first for any such overtime during that month.

. . .

ARTICLE 30 - Function of Management

Except as herein otherwise provided, the Management of the Department and the direction of the working forces, including the right to hire, promote, demote, layoff, suspend without pay, discharge for proper cause, transfer, determine the number of employees to be assigned any job classification, and to determine the job classifications needed to operate the Employer's jurisdiction is vested exclusively in the Employer.

It is further agreed, except as herein otherwise provided, that the responsibilities of Management include, but are not limited to those outlined in this Agreement. In addition to any specified herein, the Employer shall be responsible for fulfilling all normal managerial obligations, such as planning, changing or developing new methods of work performance, establishing necessary policies, organizations and procedures, assigning work and establishing work schedules and of applying appropriate means of administration and control. Provided

however, that the exercise of the foregoing rights by the City will not be used for the purpose of discrimination against any member of the Union or be contrary to any other specific provision of this Agreement, and provided that nothing herein shall be construed to abrogate the provisions of the grievance procedure contained in Article 23.

BACKGROUND AND FACTS

The essential facts are not in dispute. On September 10, 2001, Truck 324 responded to an automobile engine fire at 4:20 p.m. Upon arrival at the scene, Incident Commander Lieutenant Tony Palma requested assistance from Truck 341 and then cancelled his request for Truck 341 after the fire was extinguished. After speaking with a witness, Palma learned that two individuals fled the scene, which prompted him to radio Battalion Chief Ron Hockett. Palma requested that Outagamie County 911 send a police officer and that the Fire Department send a Fire Inspector/Investigator (hereinafter "Inspector") to the scene to investigate.

Following receipt of Palma's request for an inspector, Hockett attempted to locate the on-duty fire inspector. Fire Inspector Noel's shift had just ended, and Hockett observed him driving his personal vehicle out of the Fire Department parking lot. Hockett then sought out and located Deputy Fire Chief Eugene Reece in Fire Chief Neil Cameron's office and inquired as to whether Reece was able to respond to Palma's request for an inspector. Reece indicated he was not available and told Hockett he needed to "figure out something else." After speaking with Cameron, Reece initiated a second conversation with Hockett and directed Fire Driver-Engineer Rick James and Truck 341 to go to the scene.

Upon arrival at the scene, Palma informed James of the facts of the fire. James viewed the automobile and engine compartment, discussed the scene and concurred with Palma in identifying the object underneath the vehicle. James took photographs of the automobile with a camera supplied to him by Deputy Fire Chief Reece.

Palma completed a Wisconsin Fire Incident Reporting System form on September 10, 2001. Palma described the incident as "District #4 responded to a car fire in the parking lot of Valley Packaging at 2730 Roemer Rd. At arrival we found an auto with the engine compartment totally involved. We used a 1 ¾" pre-connect to extinguish the fire. APD was called in for an investigation because the drivers had fled the scene. After extinguishment the scene was turned over to APD." Palma checked "yes" in response to the inquiry of "Investigation Requested" and wrote "undetermined" in response to the inquiries of "Form of Heat Ignition," "Type of Material Ignited" and "Form of Material Ignited."

The pending grievance was filed and processed through Step 3 of the grievance procedure. The grievance alleged a violation of Article 5, Overtime, and sought call-in and overtime compensation as the remedy. The City's Human Resources Director denied the

grievance at Step 3 explaining "I believe that the Department is well within its management rights to assign an additional crew to an incident scene and to call upon the necessary skills of the on-duty personnel to assess a situation. Further, since no investigative report was filed and since no photographs were taken, I do not see how any member's rights were infringed upon by the department's decision."

POSITIONS OF THE PARTIES

The Union

The Union argues that Article 5 of the labor agreement provides fire inspectors "exclusive domain" over fire inspections. The Union argues that the agreement affords all current fire Union inspectors the opportunity for overtime, whether it is after regular working hours, on weekends and/or on holidays. The Union notes that the fire inspectors are obligated to remain in a designated response area and must be contactable while on stand-by. The Union asserts that individuals that are not fire inspectors are not included in the call list and thus, are ineligible for either stand-by or response compensation for fire inspectors.

The Union argues that the City's actions conflict with City Fire Department Administrative Policy I-80, which establishes the guidelines for calling in off-duty inspectors. The Union argues that the incident commander at the scene has the authority and responsibility to determine whether a fire inspector is needed at a fire scene and that the City violated its own policy when it did not send a fire inspector to the scene.

The Union next argues that the Management Function clause of the labor agreement does not allow the City to assign a driver to conduct an after hours investigation when that assignment deprives the fire inspector next on the call list from an opportunity for overtime. The Union asserts that the City engaged in "de facto" discrimination by placing one Union member in an adversarial position to another Union member thereby "discriminating" between them in violation of Article 30.

The Union takes issue with the City's position that an investigation was not conducted. The Union asserts that the evidence establishes that Truck Company 341 was directed by management to respond for the purpose of allowing Driver James to conduct an investigation and that an investigation was conducted. The Union argues that multiple facts demonstrate that a fire investigation was called for and was conducted at the scene including (1) Palma's requested a fire inspector, (2) the fact that the cause of the fire was identified as "undetermined" on the fire investigative report, (3) the fact that Company Truck 341 was not cancelled by the incident commander, and (4) the fact that James examined and took photographs of the vehicle.

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

The City

The City argues that the management rights clause of the labor agreement protects the City's decision to send James and Truck 341 to the car fire on September 10, 2001, rather than calling in an inspector. The City argues that it was not necessary to send a fire inspector to the scene and that management determined that due to Driver James' past assignment as an inspector, he was qualified to go to the scene to "take a look at the situation before a fire inspector was called in." The City acknowledges that the labor agreement addresses the procedure to follow when calling in an employee, but that it remains the right of management to determine when to call in additional officers.

The City argues that fire investigation is a "broad concept" and is not the exclusive domain of fire inspectors. The City relies on the testimony of Fire Chief Cameron who confirmed that firefighters with outside employment or interests have conducted investigations in the past without calling in an inspector.

The City argues that Policy I-80 is solely a guideline to be used when the decision to call in an inspector is necessary. The City asserts that Palma decided he "needed help" and management determined that James and Truck 341 would respond. The City concludes that its decision to send Truck 341 rather than immediately summoning an inspector is a right granted under the management rights clause.

In further support of its position, the City relies on the Union's failure to grieve the City's denial of overtime for the crew of Truck 341. The City notes that Article 4, Section G, of the labor agreement states that fire operations personnel are on-duty twenty-four (24) hours and that after 4:30 p.m. they are to "provide service in matters responding to emergency and non-emergency calls." The City received overtime requests from Truck 341 personnel, which were denied due to the expectation that they are to provide service for emergency and non-emergency calls. The City asserts that the Union's failure to pursue the grievances is an affirmation by the Union that Driver James and Truck 341 were not conducting an investigation.

The City argues that Article 5 of the labor agreement is clear and unambiguous and, as a result, the standards of contract interpretation require that this Arbitrator conclude the City acted appropriately. The City argues that the Article creates a call list to be used for allocating overtime to qualified fire inspectors and sets forth the rotational procedure for emergency call-ins, pre-scheduled overtime, and weekend and holiday stand-by. The City argues that none of the provisions of Article 5 address "when or if it is critical that a fire inspector be called in to work on an overtime status." (Emphasis in original City brief.) The City therefore concludes that since the language of the Article does not limit its rights, that its action is consistent with the rights it was afforded in the management rights clause.

The City argues that the Union's reading of the job descriptions is incorrect. The City asserts that drivers are required to perform the duties of firefighters and within the firefighter job description is the clause that they will perform "other duties as assigned by supervisors." Thus, the City concludes that the dispatch of Driver James was consistent with the job descriptions.

With regard to the Union's implication that the City sent Truck 341 to the scene "for the purpose of discriminating against a Union member," the City responds that the language of Article 30 requires that management intentionally discriminate and since there was no malicious motive or discriminatory intent, therefore there is no violation.

The City asserts this case is similar to CITY OF БЕЛОIT (FIRE DEPT.), CASE 131, NO. 52425, MA-8965 (BUFFETT, 10/3/96) wherein the issue was whether the City of Beloit had the ability to assign fire personnel out of classification. The City asserts the Arbitrator's conclusion that the contractual provisions provided for payment for out of classification assignment, but did not address whether out of classification assignment could be made, is the same scenario presented in this case.

In response to the Union's argument that an investigation was conducted at the scene, the City challenges the Union's characterization of the testimony of Hockett and Palma. The City clarifies that Hockett and Palma both testified that the issues at the scene had been established, including the need for Police Department investigation, but that at no time did Palma testify that he had determined the cause of the fire. The City restates its argument that Truck 341 was sent to the scene so that James could assist in determining whether an investigation was warranted, not so that James could conduct an investigation.

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

DISCUSSION

This case arises as a result of the City's decision to send an on-duty fire driver-firefighter to a fire scene in lieu of calling in an off-duty fire inspector. The City relies on the Management Rights clause of the labor agreement, and essentially argues that Driver James was sent to decide whether an investigation was needed. The Union grieved this decision claiming that James was sent to do an inspection and that the overtime provisions of the labor agreement were violated. The City and the Union argue their cases citing numerous issues and contract provisions, including management rights, overtime provisions, employee assignment and job classification and discrimination.

Management Rights

The City has, pursuant to Article 30, Management Functions, the right to "fulfill all normal managerial obligations, such as planning, changing or developing new methods of work performance, establishing necessary policies, organizations and procedures, assigning work

and establishing work schedules and of applying appropriate means of administration and control.” This language, coupled with general understanding that management has the right to direct its enterprise, grants the City great latitude when making decisions so long as its decisions are not contrary to the specific terms of the labor agreement or are “so clearly arbitrary or capricious as to reflect an intent to derogate the relationship.” Elkouri and Elkouri, How Arbitration Works, 5th Edition p. 659 (1997) citing FAIRWAY FOODS, 44 LA 161, 164, (1965). Thus, unless the specific provisions of the labor agreement limit the City’s right or it is shown that City’s actions were arbitrary, capricious or in bad faith, then its decision to send Driver-Firefighter James to the fire scene rather than call-in an off-duty fire inspector will be upheld.

Overtime

Both parties argue that the Overtime provisions of the labor agreement are clear and unambiguous as it relates to fire inspector call-in, but arrive at different conclusions. Article 5, Section I, provides that a call list will be used to allocate all overtime to qualified fire inspectors and that overtime for “fire cause investigation and other emergency call-ins” shall be allocated to the employee on the top of the call list. Section I, subsections 2, 3 and 4, address pre-scheduled overtime, weekend and holiday. The Union argues that this language creates an “exclusive domain” for fire inspectors to complete fire investigations thus negating the City’s right to assign any non-fire inspector employees to perform fire investigation work. 1/ Conversely, the City concludes that the language does nothing more than establish the procedure to be followed when a fire inspector is called in, but does not address “when or if it is critical that a fire inspector be called in to work on an overtime status.”

1/ The Union does not challenge the use of management employees to conduct fire investigations.

When the plain language of the agreement is “clear, conveying a distinct idea,” then interpretation is unnecessary. Elkouri and Elkouri, SUPRA, p. 482, (1997). Section I states that a call list will be used to allocate overtime for fire inspectors. It further states that when there is an overtime fire cause investigation or emergency call in, then the City will call in the fire inspector on the call list. Nowhere in this section does it restrict who may perform fire investigation work. Looking solely to the language of Section I, I find the City’s argument that the decision that an inspector is or is not needed remains within management’s discretion to be more plausible than the Union’s claim that calling an inspector is mandatory.

That said, Section I must be viewed in concert with the other sections that address overtime and in conjunction with the entire labor agreement. Article 5, Section G, states that “all overtime will be filled . . . from the call list” and explains that the call list is divided by

classification and listed by seniority. Fire inspector is a job classification. This section limits overtime fire inspection work to only fire inspector's on the call list. There is a call list for fire inspectors listed in seniority order. These sentences allow for the conclusion that all overtime fire cause investigations and overtime emergency call-ins for fire investigation purposes are to be conducted by the fire inspector at the top of the call list. Thus, if a fire investigation was conducted, the City violated Article 5.

Was a fire cause investigation conducted?

The City argues that it was premature to call-in a fire inspector and that a fire investigation was not conducted. The evidence does not support this contention.

The City asserts that they did not assign James to perform fire inspector functions, but rather sent James to the scene to assist Incident Commander Palma. Palma radioed dispatch and requested a fire inspector be sent to the scene. Hockett intended to send an inspector and attempted to send on-duty Fire Inspector Noel. After learning that Noel was not available, he attempted to send Chief Deputy Reece. It was only after Reece directed Hockett to send James to the scene that the City claims it no longer was necessary to have an inspection conducted. Its actions up to that point all demonstrate a conviction that an inspection was required.

The evidence convincingly establishes that James, as a result of his prior assignment and experience as a fire inspector, was sent to the scene to conduct an investigation. Hockett testified that the reason James was sent to the scene was "because I know in the past, Rick has had occasion to deal with fire, fires, fire scenes, fire investigations, using the camera, and I – at the time that I assigned him to do this, I honestly believed that that – that information did not fall out of his head, that he retained the basic information, the basic knowledge to go out and assist Lieutenant Palma . . ." (Tr. 46) Reece testified that he sent James out to "assist the officer at the scene of the fire" (Tr. 65) and clarified that James was "assisting the officer in determining the cause of a fire." (Tr. 66) It is clear to this Arbitrator that James was sent, as a result of his past knowledge and experience as a fire inspector, to the scene to conduct an investigation.

Upon arriving at the scene, James was apprised by Palma of the facts of the fire at the scene. James visually reviewed the scene and took photographs. Palma testified that James offered his opinion as to the cause of the fire and that he and James concurred on the cause. Thus, the record evidence demonstrates that the City wanted an investigation conducted, that it assigned James because it believed he was qualified to do an investigation, and that James actually did conduct an investigation. Granting the City's claim that it has reserved to itself the right to decide whether an inspection will be conducted, the facts here clearly show that it made the decision and decided in favor of an investigation by James. 2/

2/ Driver-Engineer Rick James and three employees of Truck 341 requested half-time compensation for working ¾ hours for the reason of "fire investigation" as a result of their response to the September 10, 2001, engine compact fire. All requests were denied by Reece on the basis that the "work was associated with an emergency response." The overtime denials were not grieved. No

evidence was produced at hearing as to why the grievances were not pursued. These requests for compensation, denials and the subsequent decision not to grieve the denials do not provide sufficient credible evidence to support the City contention that the Union abandoned its position that Truck 341 and James conducted an investigation.

Assignment

The City next argues that even if James was sent to the fire scene to conduct an investigation, the assignment was not inconsistent with the labor agreement. The City argues that the management right's clause provides it the right to assign duties and the Driver-Engineer job description includes the work that James was sent to perform.

As has previously been discussed, absent limiting specific contractual language or arbitrary, capricious or bad faith motivation, management has considerable leeway with regards to the assignment of job duties. The City argues that its decision to send James to the fire scene is covered by the "and all other responsibilities" assigned by the employee's supervisor clause of the Driver-Engineer job description and the City's decision to assign the job duty to James was consistent with the management rights clause.

I disagree. First, looking to the job descriptions, "investigates fires to determine cause, origin, circumstances" is an essential job function of the Fire Inspector job description. No such function is contained in the Fire Driver-Engineer or the Firefighter job description. Second, this is not the assignment of a *de minimis* task to Driver James. Rather, this is the assignment of the primary responsibility of the Fire Inspector classification to the on-duty Driver-Engineer who had previously held the position of Fire Inspector. See SHELL CHEMICAL Co. 47 LA 1178, 1180 (ROHMAN, 1/14/67). Finally, I concur with the line of thought that "will not permit assignment of work to employees in another classification if the primary goal of the unusual assignment is to avoid overtime payments to those employees who ordinarily perform the work." Theodore St. Antoine, The Common Law of the Workplace, (BNA, 1999) p. 120. The City in this instance attempted to avoid the payment of call-in and overtime compensation by assigning Fire Inspector work to a Driver-Engineer which is inconsistent with the Overtime provisions of the labor agreement and arbitrary, capricious and in bad faith.

Finally, although the City has asserted that it has assigned investigative responsibilities in the past to firefighters, the record evidence falls far short of proving a past practice that allows non-inspectors to conduct investigations in lieu of calling in a fire inspector on overtime.

Discrimination

In addition to its overtime arguments, the Union argues that the City's decision to send James to the fire scene rather than call-in Fire Inspector Noel was "de facto discrimination" in violation with the language of Article 30. Article 30 provides that the City will not exercise its

rights “for the purpose of discrimination against any member of the Union.” The commonly held view is that language of this type, when included in a labor agreement, is intended by the parties to protect employees engaging in Union activity. 3/ It does not create a cause of action under the contract every time an employment decision is made that favors one member of the unit over another member of the bargaining unit, or render every adverse action an act of discrimination simply because it may involve a member of the Union. Such an interpretation is not impossible, but requires very clear evidence that is what the parties intended. There is no such evidence.

3/ Elkouri and Elkouri, SUPRA, p. 937-938, and footnote 251. See also SAUER, INC. 100 LA 191, 197 (FRANCKIEWICZ, 7/2/91); GRANITE CONSTRUCTION Co. 100 LA 585, 591 (RICHMAN, 3/11/95).

The City argues that CITY OF BELOIT, SUPRA, is analogous factually and thus, the same conclusion should be reached. The facts and controlling contractual language in CITY OF BELOIT are different than those posed in this case. Thus, CITY OF BELOIT is distinguishable.

Having found that the labor agreement provides that all fire cause investigations and emergency call-ins that occur outside the duty day are to filled from the fire inspector classification call list and that Driver-Engineer James was sent to the scene to conduct a fire investigation, I therefore find that the City violated the labor agreement when it failed to call-in Fire Inspector Noel on September 10, 2001.

AWARD

1. Yes, the City violated the collective bargaining agreement when it failed to call-in Fire Inspector Noel on September 10, 2001, at approximately 4:40 p.m. for a fire situation.
2. The remedy shall be payment by the City to Fire Inspector Noel for two hours call-in pay and $\frac{3}{4}$ hour overtime pay for September 10, 2001.

Dated at Wausau, Wisconsin, this 19th day of September, 2002.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator