BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OCONTO FIRE FIGHTERS ASSOCIATION, LOCAL 2739, IAFF

and

CITY OF OCONTO

Case 53 No. 61464 MA-11946

(Wage Parity Grievance)

Appearances:

Mr. Jon R. Schnell, State Labor Representative, International Association of Fire Fighters, on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney James M. Kalny**, on behalf of the City.

ARBITRATION AWARD

At all times pertinent hereto, the Oconto Fire fighters Association, Local 2739, IAFF (herein the Union) and the City of Oconto (herein the City) were parties to a collective bargaining agreement dated August 27, 2001, and covering the period January 1, 2000, to December 31, 2003, and providing for binding arbitration of certain disputes between the parties. On July 30, 2002, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over an alleged violation of the collective bargaining agreement as a result of the City's contract settlement with the Oconto Professional Police Association, and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on January 22, 2003. The proceedings were transcribed and the transcript was filed on February 21, 2003. The parties filed briefs by April 16, 2003, and reply briefs by May 12, 2003, whereupon the record was closed.

ISSUES

The parties stipulated to the following framing of the issues:

Did the City violate Article XXIII, paragraph 2, of the collective bargaining agreement?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE XXIII - NO OTHER AGREEMENT

The City will not give greater benefits to the Police Department on salary, holiday pay or insurance. The City will proceed to arbitration rather than give greater benefits for the life of the contract.

BACKGROUND

The City and the Union have been parties to a series of collective bargaining agreements over the years. In the past, the wages and benefits of the fire fighters were in line with those of the police officers, represented by the Wisconsin Professional Police Association. In recent years, however, disparity developed between the units, particularly in the areas of health insurance and holiday pay. At the end of the previous collective bargaining agreement, which expired October 31, 2000, the fire fighters were paying \$30.00 more per month than the police officers for health insurance. Further, although the members of both units were paid a daily stipend of \$95.47 for each of ten paid holidays, police officers were paid for all hours actually worked on holidays at $1\frac{1}{2}$ times their regular hourly rate, but the fire fighters were not. Largely due to these issues, the fire fighters entered into negotiations over the successor agreement determined to address these discrepancies.

In contract negotiations, the parties agreed to contract language providing the fire fighters the same compensation for holidays worked as the police officers. The parties also agreed to language providing for the fire fighters to pay 10% of the premiums for health insurance, with an additional wage increase representing the difference between the 10% premium and the amount the members were already paying, which the City was also proposing in negotiations with the police unit. The fire fighters also received an additional .22¢ per hour in wages to make up the difference in premium contribution between themselves and the police officers. Having resolved these issues, the Union agreed to the City's wage proposal of 3% across the board in each of three years, which the City was also offering the police unit.

In an effort to prevent the problem of wage and benefit disparity from arising again, the Union also sought a security provision to prevent the City from providing the police unit better terms in the future. This was of particular interest to the Union inasmuch as the City had not yet concluded negotiations with the police unit on a successor agreement. Initially, the Union proposed a "me too" provision to guarantee that any superior benefit negotiated by the police unit would be passed to the fire fighters, as well. The City would not agree to this, but did agree to add an additional paragraph to Article XXIII, as follows:

The City will not give greater benefits to the Police Department on salary, holiday pay or insurance. The City will proceed to arbitration rather than give greater benefits for the life of the contract.

This language was accordingly incorporated into the successor agreement, which was ratified by the parties and signed on April 25, 2001.

Subsequently, the City concluded its negotiations with the police unit and ratified a successor agreement. Thereafter, the fire fighters discovered that the police contract contained a new benefit in the form of a .25¢ per hour shift differential to be paid to police officers working the 8:00 p.m. to 6:00 a.m. shift. This benefit was to be paid to all officers in the unit in the form of an annual lump sum payment of \$125.00 included in the first paycheck issued in July of each year. The Union filed a grievance over the language, arguing that, inasmuch as the fire fighters did not receive a commensurate shift differential, the provision violated Article XXIII of the fire fighters contract. The City denied the grievance and the matter proceeded through the contractual steps to arbitration. Additional facts will be referenced, as needed, in the discussion section of the award.

POSITIONS OF THE PARTIES

The Union

The Union contends that the shift differential provided in the police officers' 2000-2003 contract is a violation of Article XXIII of the City's contract with the fire fighters and the grievance should be sustained. Going into the 2000-2003 contract negotiations, the Union was concerned about maintaining wage parity with the police officers and correcting inequities in the areas of holiday pay and insurance. Due to greater holiday pay and a lower health insurance contribution, the police officers were each receiving an average of \$1,369.20 per year more than the fire fighters, which the City representatives acknowledged during negotiations. As a result, negotiations focused on these issues and were resolved successfully. With respect to wages, the City had already settled contracts with two bargaining units for a 3% across the board wage increase in each year and was offering the same to the police unit. Because the offer would maintain parity with the police officers, therefore, the Union agreed to accept it.

The members were also concerned about the possibility of the disparity being recreated in the future. As a result, the Union negotiated protection language, contained in Article XIII, prohibiting the City from voluntarily giving the police unit greater benefits on salary, holiday pay, or insurance. Having accomplished this goal, the Union was satisfied with the agreement and ratified the contract.

On November 30, 2001, the City and police unit ratified their contract, whereupon the Union learned that the contract included a .25¢ shift differential to be paid out to each officer annually in a \$125.00 dollar lump sum. The differential is stated to be for the 8:00 p.m. to 6:00 a.m. shift, averaged over the year, but the work schedule shows that at least two officers work the day shift exclusively, yet receive the annual differential payment. Clearly, the differential payment is not based upon working the night shift, but only upon being a police officer. Contracts of comparable cities that have a shift differential require that the officer actually work the designated shift in order to receive the premium; Oconto does not.

The police officers are considered salaried employees by the City, as are the fire fighters, because they receive fixed compensation for services on a biweekly basis. The City argues that a shift differential is not appropriate in a unit, such as the fire fighters, where the employees work 24-hour shifts. By the same token, the Union is at a loss to understand a shift differential that does not require an employee to work the designated shift in order to receive the premium. The differential is, in fact, no more than additional compensation for the police officers in direct violation of the language of the fire fighters' contract. The Union was unable to bargain for parity with respect to the shift differential, because it didn't exist previous to this contract. In effect, the City has attempted to circumvent the language of Article XXIII by creating a new benefit and calling it something other than salary. It has failed to prove that distinction, however, and the grievance should be sustained.

The City

The ordinary usage of the word "salary" is an employee's base compensation for services rendered. Thus, various courts have distinguished salary from other benefits and items of compensation, such as overtime, college credit, holiday pay, reimbursement for travel expenses, sick leave and vacation (citations omitted.) Therefore, the general rule is that, unless specifically stated otherwise, salary is base compensation.

It is also generally held that a contract term must be construed consistently throughout the contract. In this case, the word "salary" appears in the disputed language of Article XXIII:

The City will not give greater benefits to the Police Department on salary, holiday pay or insurance.

The word "salary" also appears in Exhibit A, setting forth the pay schedule, and in Article V, dealing with salary and overtime. In these sections, the term is synonymous with "wages" and in each case the reference is to base compensation with no suggestion that any other form of compensation is to be included in the definition of salary.

The evidence shows that there was no discussion of salary in the negotiation of the 2000-03 contract that would lend it any other meaning than as base compensation. The Union now uses the term "monetary benefit," which is much broader, but when the language of Article XXIII was agreed upon the Union used "salary," not "monetary benefits." Salary was the term used and it was used in the sense of base wages. The Union, itself conceded as much in Mr. Schnell's June letter to Linda Belongia, wherein he uses the term "monetary benefit," not "salary" to describe the shift differential. It is also hard to believe the fire fighters were unaware that the police were negotiating over the shift differential inasmuch as they work in the same building and the fire fighters demonstrated intimate knowledge of other aspects of the police contract. It should also be noted that shift differentials are not common to fire fighter contracts. Indeed, only one other instance of it was identified by the Union at the hearing. Given that fact, it is not unusual that it didn't come up in the Oconto negotiations.

In the police contract, the shift differential is paid out annually, similar to longevity pay, which also is not salary. The fact that the differential is paid in a lump sum also distinguishes it from salary. It is also noteworthy that in negotiations with the police unit, the shift differential was clearly distinguished from salary as the association made the argument that the comparables all had some form of shift differential. The reason the differential was to be paid out annually was merely to make the bookkeeping easier and it was referenced separately on Exhibit A specifically to distinguish it from salary.

The fire fighters are asking for the same shift differential, but they are only entitled to it if it constitutes salary. The bargaining history indicates it is not salary, but a separate benefit. Further, a shift differential is not appropriate under the fire fighters' contract. The fire fighters' contract makes little reference to shifts, making it difficult to know for what hours a differential should be paid. The fire fighters also did not present any evidence on what the rate of such a differential should be or for what hours. There is no stated 8:00 p.m. to 6:00 a.m. shift, as there is in the police contract, to provide guidance.

It is irrelevant to the issue how the differential is paid. Various communities pay there differentials differently, but they do not lose their character for that reason. The fact that the pay is made annually, therefore, has no meaning in determining the nature of the benefit. It is also irrelevant that the payment is an average of shift hours worked, rather than an exact payout. Some officers work more late shift hours in a given year, and some less, but all get paid the same, reflecting that over the course of time schedules change, so the compensation will eventually roughly even out. This is satisfactory to the police unit and should be of no concern to the fire fighters. In sum, the Union is attempting to obtain a benefit never discussed in negotiations. The assurance language in Article XXIII is specific and does not include shift differential. The grievance should be denied.

The Union in Reply

The Union does not disagree with the City's definition of "salary" as "fixed compensation paid regularly for services." The shift differential is fixed compensation (\$125.00) paid regularly (yearly) for performing services (police officer duties) and so is salary. The Union did not raise the differential during negotiations because it didn't exist in the police unit at the time and the Union was only concerned with achieving parity. What the Union did or did not know about the contemporaneous police negotiations is speculative and irrelevant, because bargaining positions and even tentative agreements can change. Had the Union known about it, however, it would not have settled without negotiating a comparable increase.

The shift differential is a monetary benefit, because it impacts other aspects of the agreement, such as computing holiday pay and retirement contribution, which it does because it is a part of an officer's salary. Also, although shift differentials are unusual in fire fighter contracts, it should also be noted that it never existed in the police contract before, either.

The shift differential is not similar to longevity pay, which is paid variably, depending on date of hire and months of service. The shift differential is a fixed some, which is paid regardless of whether the officer ever works the 8:00-6:00 shift. Also, the argument that the yearly payout was determined for ease of bookkeeping is questionable. The City has to document the time worked anyway for other purposes and the other record keeping involved in operating the payroll is much more complicated. Further, it is pointless that the fire fighter contract doesn't have defined shifts since clearly working a specified shift is not a requirement of receiving the premium. The other police contracts in evidence that contain differentials clearly make working the specified shift a requirement for receiving the premium. Oconto does not.

The City in Reply

There is no support for the Union's position that the flat dollar amount of the shift premium makes it salary. The only evidence regarding the nature of the shift differential was offered by the City, wherein the City's negotiator testified to the bargaining history behind the provision. This showed that the shift premium language was drafted to reflect an average to be paid out annually to provide the members the benefit without having to calculate exact amounts on each payroll. Even if the amounts weren't exactly reflective of the time worked, the payment was clearly intended to be shift differential, not salary.

The premium is similar to longevity pay, which is paid out annually, even though it is earned monthly and is not rolled into salary for police or fire employees. The payment of the premium based upon an average of hours worked, rather than actual hours is the same as how holiday pay is calculated. Police and fire employees receive holiday pay based upon a

formula, regardless of whether they work the holidays or not, because over the course of time it evens out. According to the Union's argument, holiday pay, because it is based on an average, rather than actual hours, should be treated as salary, but this is not the reality.

The Union's arguments based upon other contracts are entitled to little weight. The Green Bay fire fighters' contract, which contains a shift differential, clearly distinguishes between the premium and regular pay. Further, the language taken from other contracts is not on point. The contracts from Algoma, Peshtigo, Niagara and Kewaunee either provide for shift posting or are silent on the subject, thus they cannot be compared to Oconto, which has rotating shifts. Because the officers rotate, they will all work the late shift from time to time, so averaging the premium payment makes sense in the context of Oconto's system. The parties' intent in the police contract was to create a shift differential separate from salary. This is not covered by Article XXIII of the fire fighters' contract and the grievance should be dismissed.

DISCUSSION

The issue in this case is whether, in the context of the 2000-2003 contract negotiations, the shift differential added to the police association's collective bargaining agreement is properly characterized as salary. If it is, then the City violated Article XXIII of the fire fighters' contract by giving the police unit a salary increase in excess of that given the fire fighters and an appropriate remedy is warranted. If it is not, then no violation has occurred and the grievance must be dismissed. For the reasons set forth below, I conclude that the shift differential is salary and the grievance is sustained.

To begin with, most collective bargaining agreements address compensation in terms of wages calculated on an hourly basis. Exhibit A of the City's collective bargaining agreements with the fire fighters and police officers, however, contain monthly wage schedules. The fire fighters' contract further explains that the employees are paid biweekly at 1/26 of the fire fighters' annual salary. Article V, however, discusses payment for overtime and makes it clear that the overtime rate is based upon the employee's hourly wage. Thus, as the parties agree, the terms "wages" and "salary" are used interchangeably in the agreement and are virtually synonymous.

To go on, the parties are in essential agreement as to the basic meaning of the terms. That is, they agree that salary is comprised of "fixed compensation paid regularly for services." Where they disagree is whether the shift differential meets this definition – the Union asserts that it does, whereas the City argues it does not. The City's position is buttressed by case law distinguishing salary from other forms of compensation, such as overtime, college credits, holiday pay, sick leave, vacation and reimbursement for travel expenses. Shift differential pay, however, is distinguishable from these other forms. Holiday pay, sick leave and vacation are benefits are forms of compensation which extend beyond pay

specifically for services performed, are usually tied to the fact of employment or length of employment, rather than the actual time worked or work performed and, thus are more properly characterized as fringe benefits. Mileage expense reimbursement is merely the return of money spent by the employee for work related travel and, thus, is not synonymous with wages or salary for work performed. Overtime pay, while compensation for work performed, is not fixed, but, by definition, is only paid for work beyond the contractually prescribed workday or workweek. Shift premium pay, like salary, is compensation directly resulting from the performance of regularly scheduled work, albeit at specified times.

The City also relies on the usage of the word salary in other parts of the fire fighter contract to support its argument. The term is used in Article V, Article XXIII and Exhibit A as previously stated, and, as the City points out, refers to base salaries in Article V, which, it contends, should also be its presumed meaning in Article XXIII. Thus, the reasoning runs that the language of Article XXIII only refers to base pay when it refers to salary and not any additional increments, such as shift premium. There are some difficulties with this logic, however. In the first place, the use of the term "base salary" in Article V is apparently intended to distinguish the regular fire fighter pay rate, which takes effect 18 months after employment, from the probationary rate, which starts at 10% below the "base salary" and increase to 5% below after 6 months. Thus, the term "base" in this sense is intended not to restrict the definition of salary to just regular wages, but to set the baseline from which probationary rates are established. Also, there are no other forms of pay in the fire fighters' contract beyond the regular salary that the term base salary could refer to were it intended to be exclusionary because the fire fighters' contract contains no forms of premium pay other than overtime, which obviously could not have been intended. Further, it certainly could not have been in the Union's mindset that the word salary in Article XXIII was intended to exclude shift differential pay in the police contract, since the benefit did not at that time exist. Thus, I do not find that the use of the word "salary" elsewhere in the fire fighters' contract excludes a shift differential from its definition.

The City argues that shift differential or any other monetary benefit was not contemplated when the word "salary" was added to Article XXIII, as testified by Mr. Rader. Again, this is not surprising since the benefit did not then exist so, from the Union's perspective, it was probably not an issue. The City also asserts that the shift differential was clearly distinguished from salary in the police negotiations and thus should not be equated with it. What the parties to the police contract thought or meant, however, is irrelevant to the fire fighters' agreement, since the fire fighters were not parties to it and had no input. What is relevant is whether under objective standards the shift differential has the distinguishing characteristics of salary as opposed to some other form of benefit.

The City likens the shift differential to longevity pay. In reality, however, the only similarity is the fact that they are both paid out annually. Longevity pay is compensation for time of service, separate from compensation for actual time worked. Shift differential, however, regardless of when it is paid out, is intended to be compensation for time actually

worked during the 8:00 p.m. to 6:00 a.m. shift. As the City, concedes, the reason the differential was set up to be paid in a lump sum was to ease the bookkeeping process, not because of the character of the benefit.

Finally, the City notes, with some merit, that the fire fighters do not work shifts per se, as the police do, so a shift differential does not make sense in the context of the fire fighters' contract. This argument might have carried more weight under other circumstances, but the unique features of the differential here undercut it. The fact is, as revealed by the evidence, not all police officers work the designated 8:00 to 6:00 shift, but all receive the premium payment alike. The City suggests that these officers may work the shift in other years, so the shifts and payments will average out, but this is speculation. What is fact is that at least two officers who are only scheduled to work the day shift receive the premium along with all the others. In this sense, if the sine qua non of a shift differential is the requirement of working the specified shift, the lump sum payment is really a payment in lieu of shift differential. determined that working the designated time period is not necessary to receive the premium payment eliminates the difficulty of the fire fighters' schedule, because they could either receive a premium payment on the basis that they all work 8:00 p.m. to 6:00 a.m. during their work periods, or that the payment is really in lieu of a shift differential to alleviate the attendant bookkeeping problems of paying the premium each pay period. In either event, there is really no impediment to providing the fire fighters the same premium payment as the police officers.

For the foregoing reasons, and based upon the record as a whole, the Arbitrator enters the following

AWARD

The City violated Article XXIII, paragraph 2, of the collective bargaining agreement when it agreed to add a shift differential payment to the police association collective bargaining agreement. As and for a remedy, the City is ordered to pay each fire fighter in the bargaining unit back pay of \$375.00, representing shift differential payments to the police officers in 2001, 2002 and 2003 and, in the future, to make payments to the fire fighters in the same amount and manner as shift differential payments made to the police officers.

The Arbitrator will retain jurisdiction of this award for a period of sixty (60) days in order to resolve any issues arising with the implementation of the award.

Dated at Fond du Lac, Wisconsin, this 5th day of September, 2003.

John R. Emery /s/

John R. Emery, Arbitrator

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