BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OCONTO FIREFIGHTERS ASSOCIATION, LOCAL 2739, IAFF

and

CITY OF OCONTO

Case 59
No. 63044
MA-12485

(Overtime 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 Firefighters 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 December 6, 2003, 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 use of non-union personnel to fill open shifts, 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 February 3, 2004. The proceedings were transcribed and the transcript was filed on February 21, 2004. The parties filed briefs by April 13, 2004, and reply briefs by May 25, 2004, whereupon the record was closed.

ISSUES

The parties stipulated to the following framing of the issues:

Did the City violate Article XIX, paragraph 2, of the collective bargaining agreement by continuing to utilize non-union personnel to fill overtime 12-hour shifts?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE XVII – MANAGEMENT RIGHTS

The City possesses the sole right to operate City government and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to, the following:

1. To direct all operations of the City;

2. To establish reasonable work rules and schedules of work;

3. To hire, promote, transfer, schedule and assign employees to positions within the City;

. . .

6. To maintain efficiency of City government operations;

. . .

ARTICLE XIX – SENIORITY

. . .

Twelve (12) hour shifts of overtime will be worked according to seniority. The man with the most seniority will be asked to work first and then next in seniority down the list.

. . .

BACKGROUND

The City of Oconto maintains a fire department, which, at the time of hearing, consisted of a chief and seven bargaining unit firefighters. Prior to Summer, 2003, there had been eight bargaining unit members. At that time, Firefighter Roger Reed retired, creating a vacancy, which the City elected not to fill. Up to that point, the Chief had worked a 40-hour week, eight hours per day, Monday through Friday, at the direction of the Police and Fire Commission, and occasionally took overtime shifts in emergency situations, or where there was no bargaining unit member available to take the hours. In September, 2003, the Commission directed the Chief to return to a regular firefighter's work shift, which he had done prior to 1993, and pick up extra unfilled hours, which he did.

Between September 26, 2003, and February 3, 2004, the Union filed a series of grievances, objecting to the Chief and other non-bargaining unit personnel filling extra shifts which otherwise would have been bargaining unit overtime. The City denied the grievances and the parties proceeded through the steps of the contractual grievance procedure without resolution. Additional facts will be referenced, as necessary, in the Discussion section of this award.

POSITIONS OF THE PARTIES

The Union

The Union argues that regularly using non-union personnel to fill overtime shifts is a violation of Article XIX of the contract. Since 1993, the Chief had worked days and only took vacant shifts in rare situations. Prior to Roger Reed's retirement, the seventh firefighter in the unit was a floater, who normally picked up the overtime shifts created by Garcia law requirements, vacations, etc. Prior to 2003, overtime was equalized by a gentlemen's agreement between the unit and the Chief, which has worked well for both parties and should not be disturbed.

The evidence shows that the ability of the Chief and the Department to perform effectively has been hampered by the decision to have the Chief work the extra shifts. Prior to 2003, the Chief only did bargaining unit work on rare occasions, when bargaining unit personnel weren't available. There was a cooperative relationship between management and the Union that worked well. However, the Union never acquiesced in the decision to have the work of the seventh firefighter absorbed by the Chief after Reed's retirement. This action violates Article XIX, paragraph 2, of the contract, and should be halted.

The City

The City contends that the management rights clause permits it to use non-union personnel to fill vacant shifts. The City's rights to direct operations of the City and maintain efficiency of operations clearly imply the right to fill with non-union employees. Further, the City can determine the kinds and amounts of services to be provided and the methods, means and personnel to be used. These rights are not restricted by Article XIX, paragraph 2.

Bargaining history also supports the City. The Union failed to call the negotiator who bargained the pertinent language, which damages its argument. SHOP RIGHT FOODS, INC., 75 LA 625, 628 (1980). The City negotiator, on the other hand, testified that the relevant language was inserted to allow senior employees to enhance their retirement benefits and was never intended to preclude the City from using non-union personnel from filling vacant shifts. Further, in the past the City has had the Chief and part-time employees fill open shifts without objection from the Union, indicating acquiescence with the practice. The language in question was proposed by the Union and must be construed against the proponent. Thus, although the Union successfully negotiated the language in paragraph 3, requiring ambulance call-ins to be first offered to Union personnel, it did not do so with paragraph 2 and cannot claim the same rights where the language does not exist.

The City also brings forward correspondence between the negotiators, previous grievances and bargaining notes to support its position. The Union filed a grievance immediately after the contract first adopting the language was adopted, which indicates that the language was intended only to have internal, bargaining unit application. Attorney Rader's detailed bargaining notes also support this position. Finally, correspondence from Mr. Rader to the Chief, and between firefighter Brabant and the Union representative, only a few years after the language was adopted confirms the City's interpretation. This is also confirmed by a claimed "gentlemen's agreement," whereby the Union sought to equalize overtime despite the seniority implications of the language, which shows that the language was intended to have internal bargaining unit application.

It should also be noted that under arbitral precedents there is no inherent right to overtime. Unless the contract so specifies, management has the right to determine whether to declare and assign overtime. Thus, prior to 1993, the Union never grieved the working of open shifts by the Chief or part-time employees, although the Chief was doing this on a regular basis. Finally, the grievance rests on whether the contract language was interpreted and applied correctly, not the City's motivation for its actions.

The Union in Reply

Contrary to the City's position, the question is not whether the City can fill open shifts with non-union personnel. The question is, rather, whether the City can replace a bargaining

unit, firefighter position by not filling it and using non-union personnel instead. This is what the City did when it did not replace Reed and the testimony of Chief Hoppe shows that the effectiveness of the fire department was hampered thereby.

No negative inference should be drawn from the failure of the Union to produce its negotiator at the hearing. The language is clear and unambiguous and is not enhanced by the recollection of Attorney Rader. Further, the Union's failure to object to the Chief initially working overtime shifts is irrelevant since the Chief was working his own 53-hour workweek at the time. Further, the Union was neither confused nor confusing when it identified the provision of the contract it alleged to have been violated. Also, the City's argument notwithstanding, there was a monetary effect to the language, since the Captain earned more than a top firefighter, as evidenced by Captain Warrichaiet's grievance in 1989.

As to the writings on which the City relies, none of these detract from the clear language of the contract. The language is clear and unambiguous and, despite the City's reliance on grievances, letters and bargaining notes, the language stands on its own without reference to these other documents. Likewise, the "gentlemen's agreement" does not dilute the language, but merely affirms the fact that the provision doesn't mandate that the most senior employee work available overtime.

The Union concedes that there may not be an inherent right to overtime, but it has long been recognized that overtime is a special benefit, which is a mandatory subject of bargaining, and the Commission has held that an employer cannot restrict he benefit by transferring open hours to a 40-hour non-union employee rather than filling an open position. CITY OF FOND DU LAC, CASE 150, NO. 57557, MA-10673 and CASE 151, NO. 57558, MA-10674 (SHAW, 4/5/00). Finally, the City's argument that the Union has never grieved the working of overtime by the non-union personnel is refuted by the 53 grievances filed in this case.

The City in Reply

The Union originally tries to argue that this was a discrimination case, which was rejected by the Arbitrator. In its brief, however, the Union makes it clear that what it is really complaining about is minimum staffing, which is not grievable.

The Union also downplays the mount of overtime worked by the Chief in years past without objection. In fact, prior to 1993, the Chief worked a regular shift, as he is doing now, and pulled frequent overtime shifts without Union objection. The fact is the City has no fewer rights to assign these hours to the Chief now than it had then.

The "gentlemen's agreement" is an embarrassment to the Union because it shows that the attempt to shift overtime to more senior employees was obviously, and successfully,

opposed by the less senior firefighters in the unit. It also proves that the language was intended to have internal application within the unit, not affect the City's right to determine staffing in the first instance. The grievance should be denied.

DISCUSSION

In this case, the evidence reveals that, due to a retirement, the Oconto Fire Department lost a firefighter in the fall of 2003, reducing the number of firefighters from seven to six. The City decided not to replace the firefighter. Instead, it reassigned the Chief, who is not in the bargaining unit, to the same 53-hour per week work schedule as the firefighters, up from a 40-hour per week schedule, which he had been working since 1993. Prior to 1993, the Chief had also worked a regular shift. He was assigned to a 40-hour week in 1993, but continued to pick up open shifts occasionally, on an as needed basis. The effect of the move in the fall of 2003 was to eliminate a "floater" position from the bargaining unit and to have the Chief pick up Garcia hours and vacant shifts resulting from vacations, illnesses and emergencies. In the absence of a seventh firefighter, these hours would likely have been mostly picked up by bargaining unit members as overtime, although the Department has also used part-time employees for this purpose in the past. Hence, the multiple grievances for the use of the Chief to pick up extra hours after September, 2003, on the basis that the hours should have been offered to bargaining unit members as overtime.

The reasons behind the City's action are in dispute. The City maintained the decision was driven by budget concerns caused by the threat of reduced revenue from the State and a corresponding need to cut costs. The testimony of the City clerk-treasurer, Linda Belongia, and personnel committee and budget records were offered to show that three total positions, one in the Police Department and one in the Department of Public Works, in addition to the firefighter position, were reduced by attrition to cover the anticipated shortfall. The Union contends that the move was retaliatory, based on the fact that the decision corresponded in time to an arbitration award favorable to the Union and adverse to the City on a compensation issue. Ultimately, however, the pertinent question is not why the City took the action, but whether it violated the collective bargaining agreement. For the reasons set forth below, I conclude that it did not.

The contract provision in dispute, Article XIX, paragraph 2, provides that 12-hour overtime shifts will be worked according to seniority, with the most senior employee having first right of refusal to available overtime and so on down the seniority list. The testimony reveals that this provision was bargained into the contract in 1989 for the purpose of allowing more senior unit members the opportunity to maximize earnings at the end of their careers in order boost their retirement. Apparently, prior to this case, there have been few grievances over this language. Further, where grievances have arisen the issue has been over whether available overtime was offered to the most senior employee, not whether open hours can be offered to non-union personnel. In fact, prior to 2003 there have been no grievances over the

working of open shifts by the Chief or part-time employees. Admittedly, the occurrences were much more infrequent prior to that time, but, to the extent that any practice can be said to have existed, it appears to favor the City's position. So, the bargaining history and evidence of past practice would suggest that the provision was intended to control distribution of overtime within the bargaining unit, not allocation of open hours between union and non-union employees.

Other than Article XIX, the contract is silent on the allocation of overtime. Article XVII, the management rights clause, on the other hand, makes it clear in several places that direction of operations, assignment of personnel, determination of hours and the size of the workforce are management prerogatives. This is not an issue of whether overtime hours were properly offered to the appropriate bargaining unit members, which Article XIX addresses. Rather, this is a matter of whether the vacant shifts belong to the bargaining unit as overtime opportunities as a matter of right. In general, absent express contract language there is no guaranteed right to overtime. Ordinarily, the decision of whether to declare overtime is a management prerogative. Once the determination to offer overtime is made, then the question of allocation is a matter of contract, but at the outset the Union has no inherent right to insist that open shifts be offered as overtime. Thus, as set forth above, I conclude there is no right to overtime expressed in the contract and neither bargaining history nor past practice suggest otherwise.

The Union cites CITY OF FOND DU LAC, CASE 150, NO. 57557, MA-10673 and CASE 151, NO. 57558, MA-10674 (SHAW, 4/5/00) for the proposition that an employer may not assign a 40-hour workweek non-union employee to fill a vacant 53-hour per week bargaining unit shift, but in my view that case is distinguishable on its facts. In CITY OF FOND DU LAC, the issue had to do with offering a 24-hour shift to a 40-hour employee, where there was no existing practice of doing so and where there was a practice of offering open shifts as overtime. Arbitrator Shaw concluded that the action violated the past practice and the contract's maintenance of benefits clause. Here, there is no maintenance of benefits clause and the past practice is far less clear. Up to 1993, the Chief worked a regular shift alongside the other firefighters and, presumably picked up vacant shifts. The evidence indicates that after 1993 he continued to work extra shifts occasionally, though a 40-hour employee, without objection from the Union. The action of the Police and Fire Commission in 2003 in reassigning the Chief to a 53-hour schedule merely reinstituted the status quo existing before 1993. The Union does not contend that the City had a contractual obligation to replace Firefighter Reed, only that his vacated hours should be distributed as overtime. Yet, the record reflects that on a previous occasion, when the Department was short a man due to an extended absence, the City replaced him with interim part-time employees rather than distributing his hours as overtime, to which the Union agreed. There is no evidence that the Union challenged the City's authority or decision to change the Chief's schedule in 1993 nor evidence that it challenged the use of non-union personnel to cover a subsequent long-term absence and no evidence in this record convinces me that there is any basis for challenging its

decision to change his schedule in 2003. It may be, as the Union warns, that the City's action will damage what has heretofore been an amicable working relationship, but that is beyond the power of this arbitrator to resolve.

Based upon the foregoing, and on the record as a whole, I hereby enter the following

AWARD

The City did not violate Article XIX, paragraph 2, of the collective bargaining agreement by continuing to utilize non-union personnel to fill overtime 12-hour shifts. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 14th day of September, 2004.

John R. Emery /s/
John R. Emery, Arbitrator

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