BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TOWN OF BELOIT (FIRE DEPARTMENT)

and

TOWN OF BELOIT FIREFIGHTERS
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS
LOCAL 2386, AFL-CIO

Case 42
No. 63471
MA-12599

Appearances:

Mr. Patrick A. Kilbane, International Association of Firefighters, 5th District Field Service Representative, 6847 East County Road N, Milton, Wisconsin, appearing on behalf of the Union.

Mr. Alan M. Levy, Lindner & Marsack, S.C., 411 East Wisconsin Avenue, Suite 1800, Milwaukee, Wisconsin, appearing on behalf of the Employer.

ARBITRATION AWARD

The Town of Beloit, hereinafter referred to as the Employer, and the Town of Beloit Firefighters, International Association of Firefighters, Local 2386, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement effective January 1, 2004 through December 31, 2005, that provides for final and binding arbitration of grievances. Pursuant to a Request for Arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over call backs for overtime assignments. Hearing on the matter was held in the Employer's offices in the Town of Beloit, Wisconsin on June 21, 2004. Post hearing written arguments were received by the Arbitrator by July 27, 2004. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties agreed upon the following issue:

"Did the Employer violate the collective bargaining agreement by declining to call back bargaining unit employees for overtime assignments who were on vacation or holiday leave?"

"If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE VII
MANAGEMENT RIGHTS

Section 1 – General Rights. The Union recognizes the prerogative of the Town and the Chief of the Fire Department to operate and manage its affairs in all respects: in accordance with the responsibilities and powers of authority which the Town has not officially abridge, delegated, or modified by this Agreement and such powers and authority are retained by the Town.

Section 2 – Enumerated Rights. These management rights, which are normally exercised by the Chief of the Town of Beloit Fire Department, include, but are not limited to the following:

A. To utilize personnel methods, procedures, and means in the most appropriate and efficient method possible.

B. To manage and direct the employee of the Fire Department.

C. To hire, schedule, promote, transfer, assign, train or re-train employees in positions within the Fire Department.

. . .

E. The Fire Chief agrees to establish a Standard Operating Procedures Manual in which to refer to work rules; said manual to be available to all members.

F. The Union acknowledges that the establishment and modification of the rules of the Town of Beloit Fire Department are within the sole authority of the Town and that it may establish, modify, or repeal rules without negotiations of any type. New rules or changes in rules shall be posted in each operating Fire Station five (5) calendar days prior to their effective date unless an emergency exists which requires more rapid implementation of the rule. The Town agrees that all the rules will be reasonable with the reasonableness subject to the Grievance Procedure.

. . .

H. To take whatever action is necessary to carryout the functions of the Town and the Town of Beloit Fire Department in situations of emergency.

I. The Union recognizes that the Town has statutory rights and obligations in contracting for matters relating to municipal operations. The right of contracting or subcontracting is vested in the Town; including the exercise of said rights in the event of emergency, essential public need, or when it is uneconomical for Town employees to perform said work.

J. The Town has the right to schedule overtime in the manner most advantageous to the Town and consistent with the requirement of municipal employment in the public interest.

Section 3 – Discretion. The Town reserves the total discretion with respect to function and/or missions of the Department, including the budget, organization, and technology of performing this function or mission except as may be modified by State law. The Union agrees that it will not abridge these management rights; and the Town agrees that these rights shall not be exercised to undermine this agreement. These rights shall be exercised in a reasonable manner.

. . .

Section 7 – Overtime and Emergency Callback Hours.

A. Overtime Hours. Employees shall be assigned overtime hours on a rotational basis in accordance with the needs of the Department. Employees

will be called based on qualification and seniority. Said time shall be rotated and distributed as equally as practicable.

B. Emergency Callback. Callback of employees for emergency purposes shall be rotated and distributed as equally as practicable.

C. Callback Pay. The Town agrees to pay time and one-half (1-1/2) for times an employee is called in for emergency, with three (3) hours straight time pay minimum for any time said employee worked less than two (2) hours, and shift fill-in shall be paid at the rate of time and one-half (1-1/2). Twenty-four (24) hour callback shall be paid at the rate of time and one-half (1-1/2).

D. Emergency call-in pay shall not apply to any call-in or hold over which is contiguous to the employee's regularly scheduled shift. Contiguous call-in and hold over shall be paid at the rate of time and one-half (1-1/2) rounded up to the next nearest fifteen (15) minute increment.

Section 8 – Pay for Training Drill.

A. Employees required to attend training drills on off duty hours shall be paid for all such hours. The rate of pay shall be at the rate of time and one-half (1-1/2).

B. Employees who are off duty because of vacation,, compensatory time, or a trade day shall not be required to attend drill.

C. Drill pay shall be paid at rate of time and one-half (1-1/2).

BACKGROUND

The Employer operates a Fire Department that provides fire and medical emergency services. The Fire Department employs ten (10) full-time employees, including Fire Chief Joseph C. Holomy, an Assistant Fire Chief, and eight (8) firefighters. The eight (8) firefighters are represented by the Union. There has been long standing collective bargaining relationship between the parties. The Fire Department also employs paid on-call employees to supplement the work force. The paid on-call employees are not represented by the Union.

During negotiations that culminated in the 1987-1988 collective bargaining agreement the parties agreed that when the Employer determined a need to call back employees due to a need to replace bargaining unit employees, bargaining unit employees would be called back first. If staffing needs were still not met, the Chief retained the right to fill vacancies in any

manner that enabled him to attain staffing levels he deemed appropriate. From at least that time up to the Employer's actions that culminated in the instant grievance, employees who were on vacation or using holiday leave who responded to an emergency call back received their vacation or holiday pay as well as the pay provided for in the Callback provision of the collective bargaining agreement.

During calendar year 1998 the parties made a verbal agreement to assign employees to three platoons, A, B and C. The platoons are comprised of ten (10) employees each assigned to three (3) shifts. Platoon A and B each consist of three (3) bargaining unit employees and seven (7) paid on-call employees. Platoon C consist of one (1) management employee, two (2) bargaining unit employees and seven (7) paid on-call employees. If more employees are needed to perform duties the shift that worked the preceding day is notified by pager to respond, if available, to the call-in. If additional employees are still needed all employees are notified by pager (the parties refer to this as an "all call").

During negotiations that culminated into the current collective bargaining agreement the Employer did not present any provisions that would alter the parties' call in practices. On December 4, 2003 Chief Holomy issued the following Memo to all full time personnel:

> "Any full-time non-management employee who takes a vacation day or holiday off on their respective scheduled shift day CANNOT come back for call backs unless specifically requested by a Chief Officer. The reasoning behind this is an individual cannot be paid twice on the same day under two separate classifications, one under the vacation or holiday and then again under overtime any number of times during the course of the same day.
>
> This is effective immediately."

On December 12, 2003 the instant grievance was filled and processed to arbitration in accord with the party's grievance procedure.

On February 5, 1987 in resolving a grievance the parties agreed to the following provision:

> "3. When the Town determines a need for call back of employees due to a need to replace bargaining unit employees, unit employees shall be called first. If staffing needs are not met, the Chief shall retain the right to fill said vacancies in any manner which enables him to attain the staffing level he deems appropriate."

UNION'S POSITION

The Union contends the December 4, 2003 directive by the Chief violates the collective bargaining agreement and the February 5, 1987 grievance settlement. The Union also contends the directive discriminates against bargaining unit personnel and request the directive be rescinded and affective bargaining unit personnel be made whole for lost wages as determined by an audit.

The Union argues that Union President Jeffrey A. Miller was informed by Chief Holomy that the calling back of an employee who was off duty due to vacation or holiday usage, and paying the employee the contractually required call back benefit was a violation of the Fair Labor Standards Act. The Union also argues that Miller requested proof of this ascertation and argues that no such proof has ever been provided to the Union. In support of its position the Union points to Exhibit No.11 and points out the Employer provided no evidence during the hearing that any provision of the Fair Labor Standards Act or State of Wisconsin statute would support Chief Holomy's reasoning for issuing the directive.

The Union also points out that in his December 21, 2003 response to the grievance Chief Holomy asserts his directive does not restrict any bargaining unit employee who is not on vacation or holiday and that his directive follows the same procedures as that of the bargaining unit's current practices (Jt. Ex. 10). The Union argues that this response verifies that Chief Holomy is restricting certain employees, specifically those in the bargaining unit, from call backs. The Union also argues the practices Chief Holomy refers to are the system for tracking overtime and is codified in the Town of Beloit Fire Department Suggested Operating Guidelines (Jt. Ex. 9) section for Non-Emergency Callback wherein an employee who is on vacation or holiday and is listed "out of service" will be skipped over and not charged for not responding to a non-emergency callback. The Union points out non-emergency callbacks are generally for a full shift, twenty-four (24) hours, and generally employees who are on vacation or holiday notify the Employer they are unavailable for long term non-emergency callbacks. The Union argues employees who are on vacation or holiday do not oppose being called back for emergencies that have a shorter duration. The Union also points out there has been no instance where a paid on-call employee has replaced an absent bargaining unit employee on shift.

The Union also points out that Article XV, Section 8, B, does not require an employee who is off duty because of vacation, compensatory time or trade day to attend drills. The Union argues this gives the employee the discretion to attend or not and argues employees who have been off duty because of vacation, compensatory time or trade day have attended drills and have been compensated in accord with the collective bargaining agreement.

The Union also argues Chief Holomy's reliance on sick leave as yet another bargaining unit practice is without merit. The Union argues employees on sick leave are unable to report for duty and the Union makes no claim that an employee who is on sick leave should be eligible to be called back to duty.

The Union also points to Chief Holomy's testimony during the hearing that if an employee was on vacation or holiday and called back to work the employee would receive more than twenty-four (24) hours of pay. The Union points out that the Chief offered no evidence that would demonstrate such a result would be unlawful or is barred by the collective bargaining agreement. The Union, in support of its position, points out that Article XII and Article XV in fact provide for such compensation.

The Union also points out Chief Holomy referred to his interpretation of the February 17, 1987 grievance and the parties agreed upon platoon system. The Union points out the parties agreement at that time was that bargaining unit employees would be called back prior to calling paid on-call employees. The Union also points out the language was then included in the collective bargaining agreement and has not been modified and is the same language in the current collective bargaining agreement.

The Union points to Town Administrator Robert A. Museus, response to the grievance that it was the Employer's intent to reduce the use of overtime to the greatest extent possible while meeting its obligations to the community. The Union argues the restrictions placed upon bargaining unit employees today is no different then what the Employer attempted to do in 1987. The Union concludes the Employer is clearly violating the agreement reached between the parties concerning callbacks.

The Union acknowledges that the parties made a verbal agreement concerning the platoon system and call backs during calendar year 1998. However, the Union argues that at no time did the parties discuss restricting bargaining unit employees on vacation or holiday from responding to call backs. The Union argues that both sides were living under this agreement until December 4, 2003. The Union argues that the December 4, 2003 directive destroys the spirit of the agreement reached by the parties.

The Union also acknowledges it is bound to abide by the provisions of Article VII, Management Rights. However, the Union argues the Employer is bound to abide by the provisions of the collective bargaining agreement that officially abridge, delegate or modify management rights. The Union points out the Employer is not to exercise its rights in a manner that would undermine the collective bargaining agreement and it is not to exercise those rights in an unreasonable manner. The Union contends the December 4, 2003 directive is unreasonable.

The Union also argues the Employer's position that it has not at any time authorized an agreement that would restrict its right to assign work and to determine the personnel by which organizational operations will be conducted fails to recognize the 2001 verbal agreement between the Chief and the Union, the 1987 grievance settlement, and the collective bargaining agreement's restrictions on the Employer's rights. The Union avers that if the Employer is not bound by the 1998 platoon callback agreement then it is incumbent on the Employer to eliminate the platoon callback system, to live by the 1987 grievance settlement and to rescind the December 4, 2003 directive.

The Union would have the Arbitrator sustain the grievance and to direct to the Employer to rescind the December 4, 2003 direct. The Union would also have the Arbitrator direct the parties to conduct an audit to determine which employees had been adversely affected by the December 4, 2003 directive and such employees be made whole for any and all lost wages.

EMPLOYER'S POSITION

The Employer contends the collective bargaining agreement allows it to determine its staffing and overtime needs. In support of its position the Employer points to Article III, Application and Interpretation of Work Rules, wherein section 2 gives it the right to establish reasonable work rules. In support of its position the Employer also points to Article VII, Management Rights, Section A, B, C and J. The Employer acknowledges that Article XV, Salary and Benefits Schedule, Section 7, B, requires it to distribute overtime equally. The Employer argues the current platoon system, which gives priority for callbacks to the platoon that worked the shift prior to shift where the callback is issued, has been accepted by the parties as an appropriate format for accomplishing the equal distribution of overtime. However, the Employer argues the Fire Chief has always retained the right to fill vacancies in any manner which enables him to attain the staffing level he deemed appropriate.

The Employer argues that when overtime is to be distributed as equally as practicable, no employee has a preemptory right to overtime on any particular day that it is available. In challenging the assignment of overtime the Employer asserts the Union must demonstrate a broad inequality, such as an annual comparison among bargaining unit members in which an employee has been shown to have been offered far less overtime opportunities than other employees.

The Employer contends the instant matter is in effect a pyramiding of benefits. The Employer argues the only employee affected by the December 4, 2003 directive is an employee who had been scheduled to work but was absent on paid vacation or holiday leave. The Employer points out that such an employee is already receiving twenty-four (24) hours of pay for that day, such that any callback response the employee makes will result in excess of

twenty-four (24) hours of pay. The Employer argues to add vacation pay and callback pay is pyramiding and such a result should not be allowed unless specifically authorized by the collective bargaining agreement.

The Employer asserts the Union contention that the challenged directive favors non-unit personnel over unit employees fails to acknowledge that the directive allows the three (3) unit members on the prior shift to respond to callbacks without limit, as well as allowing all other unit members to respond to an "all call." The Employer points out the Union has agreed to the platoon system in this regard.

The Employer stresses there has been no showing by the Union that overtime for unit members has not been equalized over a reasonable period of time. The Employer argues there can be no claim of a contract violation absent a showing of unequal distribution. The Employer contends the December 4, 2003 directive does not violate the collective bargaining agreement's requirement that assignments be rotated and distributed as equally as possible.

The Employer also stresses a vacation employee need not report for weekly training drills, cannot be adversely affected for declining an overtime assignment, and is assured rescheduling of the benefit if on sick leave. The Employer argues this is because a person cannot be in two work status classifications at the same time. The Employer contends that if a vacationer cannot be forced to work because leave time is insulated, the employee should not be empowered to pyramid that benefit with an overtime benefit designed for co-workers scheduled to be off duty in their normal rotation. The Employer argues double benefits in the same time period are not a schedule in the manner most advantageous to the Employer as the Employer's right under Article VII, section 2, J.

The Employer concludes the grievance is seeking a pyramid of benefits and because the Union has not demonstrated that the challenged directive denies rotation and equal distribution of overtime during a full year test period, and, because the rule if fully within the Employer's authority, the grievance should be denied.

The Employer would have the Arbitrator deny the grievance in its entirety.

DISCUSSION

The record demonstrates that when the parties voluntarily agreed to resolve a grievance in 1987 they agreed that if the Employer determined there was a need to call back employees because of an emergency, bargaining unit employees would be called back first prior to the call back of any other employees. There is no dispute that employees on paid vacation or paid holiday were allowed to respond to callbacks. The record also demonstrates that in 1998 the parties agreed to a platoon system of work shifts. Each platoon is comprised of both

bargaining unit and non-bargaining unit employees. Under the agreement reached by the parties when an emergency call back is necessary the shift going off duty is called first, even though the shift is comprised of both bargaining unit and non-bargaining unit employees. If additional employees are needed the other off duty shift is called. If more employees are still needed all non-bargaining unit employees are called. Lastly, in general alarms, there is a call for all personnel. When there is a need for all employees to respond the Employer initiates an "all call". When an "all call" is initiated, even employees who are on vacation or holiday status were allowed to respond.

The Employer did not dispute that when the parties agreed to the platoon system no restrictions were placed on bargaining unit employees who were on vacation or holiday from responding to "all calls". The Employer did not dispute that it did not raise during the negotiations that culminated in the 2004-2005 collective bargaining agreement that it desired to alter the agreed upon platoon system and call back process. The Employer also did not dispute that since initiation of the platoon system in 1998 and up to the issuance of Chief Holomy's December 4, 2003 directive, bargaining unit employees who were on vacation or holiday responded to "all calls".

The Employer, pointing to Article III, Application and Interpretation of Work Rules and Article VII, Management Rights provision, has argued that the December 4, 2003 directive, in effect is an attempt to continue to distribute overtime as equally as possible as required by Article XV, Section 7, B, Emergency Callback. The Arbitrator finds no merit in this argument. In effect, the December 4, 2003 directive eliminates an overtime opportunity and disregards the system agreed upon by the parties in 1998 for the call back of employees. Under that agreed upon system an "all call" goes to all personnel. As noted above there is no dispute that the platoon system was agreed upon between the parties. While that agreement clearly modified the 1987 agreement that bargaining unit employees be called back prior to non-bargaining unit employees, the agreement to implement the platoon system is clearly an agreement to officially abridge, delegate or modify the agreement. Given that the parties have voluntarily agreed to the platoon system and the procedure for calling back employees, the Arbitrator concludes the Employer cannot rely on Article III or Article VII to unilaterally modify this agreement.

The Employer has also argued that the December 4, 2003 directive in effect eliminates the pyramiding of benefits. However, the record demonstrates that at least since 1987 the Employer has been aware that employees who were in vacation or holiday status were allowed to respond to callbacks. The Employer was aware of this when it agreed to the platoon system in 1998 and it did not seek any changes. When the Employer agreed to the platoon system it agreed that all personnel could respond to an "all call". It sought no limitations then nor did it seek any when it negotiated the current collective bargaining agreement. Given the Employer has been aware of this and given that the Employer reached a voluntary agreement on the

callback procedure the Arbitrator finds the Employer is bound by the agreement it entered into voluntarily even though this may result in the pyramiding of benefits.

The Arbitrator also finds the December 4, 2003 directive in effect eliminates an opportunity for overtime for certain employees. This is in the last stage of the callback process. Thus, if employees who are on vacation or holiday leave status do not respond, no other bargaining unit employee is available to be offered the overtime. The result is a lost opportunity for overtime. Given Article XV's requirement that overtime be equalized the lost opportunity impacts on the entire bargaining unit. Therefore the Arbitrator finds no merit in the Employer's argument that the rule does not result in unequal distribution of overtime. Clearly, if an employee on vacation or holiday leave status responds to an "all call" the next overtime opportunity would go to a different employee. If the employee on vacation or leave status is prohibited from responding to an "all call" that employee would receive the next overtime opportunity. Thus taking a overtime opportunity from another bargaining unit employee. Therefore, the Arbitrator finds the December 4, 2003 prohibition on responding to an "all call" has a ripple effect on the entire bargaining unit by reducing the number of overtime opportunities for all employees.

Therefore, based upon the above and foregoing and the testimony, evidence and arguments presented, the Arbitrator concludes the Employer violated the collective bargaining agreement when it declined to callback bargaining unit members for overtime assignments while they were on vacation or holiday leave. The Arbitrator directs the Employer to cease not calling back bargaining unit members who are on vacation or holiday leave for overtime assignments. The Arbitrator also directs the Employer to make employees whole for any lost wages. The Arbitrator will retain jurisdiction of this matter for ninety (90) days to allow the parties to resolve any issues concerning the make whole remedy.

AWARD

The Employer violated the collective bargaining agreement when it declined to callback bargaining unit members for overtime assignments while they were on vacation or holiday leave. The Employer is directed to cease and desist from violating the collective bargaining agreement and to make employees whole for all lost wages.

Dated at Madison, Wisconsin, this 11th day of October, 2004.

Edmond J. Bielarczyk, Jr. /s/

Edmond J. Bielarczyk, Jr., Arbitrator

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