BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1021, AFL-CIO and CLC

and

CITY OF MARSHFIELD

Case 151
No. 62684
MA-12395

(Weiland Paramedic Pay Grievance)

Appearances:

Shneidman, Hawks & Ehlke, S.C., Attorneys at Law, by **John B. Kiel**, on behalf of IAFF Local 1021.

vonBriesen & Roper, S.C., Attorneys at Law, by **James R. Korom**, on behalf of the City of Marshfield.

ARBITRATION AWARD

The International Association of Fire Fighters Local 1021, AFL-CIO and CLC, hereinafter the 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 Marshfield, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on January 6, 2005 in Marshfield, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the mater by March 15, 2005. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties could not agree on a statement of the issues, and agreed the Arbitrator will frame the issue within his authority under the parties' Agreement.

The Union states the issue as follows:

Does the City violate Article XI, Section 5 of the collective bargaining agreement when it denies bargaining unit members who are Wisconsin State Licensed Paramedics 3% of a top step firefighter base rate as compensation for obtaining their paramedic license?

If so, what is the appropriate remedy?

The City states the issue as follows:

Did the employer violate the Collective Bargaining Agreement as alleged in Joint Exhibit 2? [1] If so, what is the appropriate remedy?

The Arbitrator concludes that the issues before him are limited to the following:

Did the City violate Article XI, Section 5, of the parties' Collective Bargaining Agreement when it denied Troy Weiland the additional 3% of a top step fire fighter's base rate upon his having obtained a State EMT Paramedic license?

If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The parties cite the following provisions of their 2001-2003 Agreement:

ARTICLE XI – ADDITIONAL COMPENSATION

Section 1: There shall be paid the sum of fifteen dollars ($15.00) per day to an employee when on duty as an Acting Lieutenant.

Section 2: In the event a firefighter is assigned as a Relief Lieutenant for a twenty-four hour shift, the employee will receive a payment of fifteen dollars ($15.00) per day for such assignment.

Section 3: There shall be paid a sum of six dollars ($6.00) per day to an employee when on duty as a Motor Pump Operator (MP)) or Aerial Truck Operator.

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[1] Joint Exhibit 2 is the Troy Weiland grievance filed August 6, 2003.

Section 4: There shall be paid the sum of seven and 50/100 dollars ($7.50) per day per employee for being on the First Ambulance Crew, and an EMT-D. Any employee assigned the responsibility of paramedic shall be paid the sum of ten dollars ($10.00) per day, per employee in lieu of any payment normally received under this paragraph. If not an EMT-D or Paramedic, the basic rate of six dollars ($6.00) per day would apply. This provision shall not apply to back-up crew who might be called in, but only to the First Ambulance Crew.

Section 5: Wages of employees who are Wisconsin Sate licensed paramedics shall be increased by an additional three percent (3%) of a top step fire fighter's base rate as compensation for obtaining the paramedic license. The increase shall be effective upon certification. If the employee loses such certification, the employee shall not continue to receive this additional payment.

Section 6: Effective January 1, 1999, $50.00 per incident shall be paid to each member responding to the site of an incident determined by the Chief to be hazardous materials incident in accordance with the definition of a Level B Incident as spelled out in the contract with Wood County, as long as designated a Level "B" responder for Wood County.

. . .

ARTICLE XXVI – RESERVATION OF RIGHTS

Section 1: The City retains all of the rights, powers, and authority exercised or had by it prior to the time the Union became the collective bargaining representative of the employees here represented, except as specifically limited by express provision of this agreement.

ARTICLE XXVII – AMENDMENT AND RENEWAL PROVISION

Section 1: This agreement is subject to amendment, alteration or addition only by a subsequent written agreement between and executed by the City and the Union, where mutually agreeable. The waiver of any breach, term or condition of this agreement by either party shall not constitute a precedent in the future enforcement of all of its terms and conditions.

. . .

BACKGROUND

The Grievant, Troy Weiland, is a fire fighter in the Marshfield Fire Department. The Department began providing Paramedic services in 1996. The Department sent employees it approved to obtain a Paramedic license to school and paid the tuition. Also in 1996, the

parties negotiated and agreed upon the provisions in their Agreement providing for the additional compensation for paramedics. Licensure requires 1200 hours of training and passing a test. Upon successful completion of the training and test, the State of Wisconsin issues the individual an EMT/Paramedic license/certificate. In addition to having a Paramedic license from the State, the individual must be affiliated with a service provider in order to perform services as a Paramedic.

On March 6, 2002, firefighter Jon Fritz obtained a paramedic license on his own and at his own expense. By letter of March 14, 2002, the Union requested that Fritz be paid the additional 3% of a top firefighter's base rate effective from the date he received his certification from the State. Fire Chief Greg Cleveland responded with a memorandum of March 15, 2002, which stated, in relevant part:

> **SUBJECT:** Paramedic Pay Request
>
> I reviewed your letter regarding the paramedic pay request for Jon Fritz. It is my intention to formally bring Jon on as a paramedic once the Fire and Police Commission and our Medical Director approve him however, Jon will receive his pay from the date at which the Department formally recognizes his paramedic status and places him on line as a paramedic.
>
> In your letter you cite the contract; however, you have misinterpreted the bargaining intent of that provision. The Department has limited control over what members do off the job and the City has no obligation to pay fire fighters for pursuing their own education off the job. If and when the City determines that the paramedic skills of a particular member are required, the City will compensate the member according to the contract.
>
> It is the responsibility of the City to determine the number of paramedics to serve the City and again, it will abide by the contract when the paramedic is recognized and requires that employee to use such skills in the course of his or her employment.

Thereafter, a grievance was filed on behalf of Fritz alleging a violation of Article XI, Section 5 of the parties' Agreement based upon the refusal to pay Fritz the 3% add-on for paramedic certification from the date he obtained his paramedic license from the State. The grievance was processed through the steps of the grievance procedure with the parties taking positions essentially identical to the positions they have taken in the instant grievance. The grievance was denied by the City's Finance, Budget and Personnel Committee, the last step in the grievance procedure before arbitration. By letter of July 16, 2002, the Union informed the City that it was going to proceed to arbitration on the Fritz grievance. The Union did not, however, proceed to arbitration of the Fritz grievance, nor did it communicate further with management regarding the matter. Local President Brad Breuer testified that the Union decided not to proceed to arbitration because, as there was only one month of the 3% paramedic add-on at issue, there was not enough money in issue to be worth it.

Both Chief Cleveland and Deputy Chief in charge of EMS, Robert Haight, testified that if someone is licensed as a paramedic, but is not affiliated with the Department, that person cannot provide paramedic services for the Department. Once an individual receives his/her paramedic license, in order to be affiliated with the Department, the person's name is submitted to the Department's Medical Director, who then meets with the person to assess their skills. The Medical Director must approve in order for the person to be affiliated. Chief Cleveland testified that being affiliated with a different department is not sufficient. Cleveland further testified he was not aware of anyone being paid the 3% add-on without having been designated as a paramedic by the Department. However, both Cleveland and Haight also testified that when the Department has hired individuals who were already paramedic licensed and affiliated through their previous departments, that the Department pays them the paramedic add-on effective with the date of their hire, even though they have not yet been approved for affiliation with this Department. Haight also testified that he was not aware of anyone other than Fritz, Weiland and Fletty being denied the add-on because they were not affiliated with the Department.

In July of 2003, Weiland received his paramedic license/certificate from the State and requested the 3% add-on for paramedics, which request was denied. The denial referenced the decision of the City's Finance, Budget and Personnel Committee in the earlier Fritz grievance. A grievance was filed on Weiland's behalf on August 6, 2003.

At approximately the same time, an issue had arose concerning employees who no longer wished to be on the paramedic rotation. In December of 2003, in negotiations for a successor agreement, the City submitted its "initial proposals" which included the following proposal regarding Article XI, Section 5:

> Section 5: Wages of employees who are Wisconsin State licensed paramedics and designated as paramedics by the City shall be increased by an additional three percent (3%) of a top step fire fighter's base rate as compensation for obtaining the paramedic license. The increase shall be effective upon certification and designation by the City. Once paramedic license is obtained employee must maintain certification as a condition of employment except as described below. An employee wishing to come off of paramedic rotation may give notice to the Fire Chief. The Fire Chief will remove paramedics from rotation on a first come first serve basis through internal assignment or filling of a paramedic vacancy. Upon completion of probation by the paramedic recruit and endorsement by the medical director of the recruit paramedic's skills, and the approval of the management of the Marshfield Fire and Rescue Department, the existing paramedic shall no longer be required to maintain their paramedic license. A paramedic coming off of rotation will have their pay frozen until such time that the top fire fighter pay catches up. The City may place the paramedic back into the rotation during this period of time if the need arises. Should the employee seek to maintain their paramedic license, it shall be at their own expense and on their own time. ~~If the employee loses such certification, the employee shall not continue to receive this additional payment~~.

The parties continued to attempt to resolve the Weiland grievance, but were unsuccessful and proceeded to arbitration before the undersigned. In June of 2004, firefighter Peter Fletty also obtained his paramedic license from the State on his own and requested to be paid the 3% paramedic add-on. His request was denied and the Union seeks to have the Arbitrator also resolve Fletty's case as part of this case.

POSITIONS OF THE PARTIES

Union

The Union first asserts that the plain language of Article XI, Section 5, supports the grievance. Language is ambiguous only when it is reasonably and fairly susceptible to more than one construction. Here, the language of Article XI, Section 5 is clear and unambiguous and is not reasonably susceptible to more than one construction, and thus must be construed according to its plain meaning. It specifically and unmistakably entitles bargaining unit members to an additional 3% of a top step firefighter's base rate of pay, his compensation for obtaining a State of Wisconsin paramedic license in stating:

> "Wages of employees who are Wisconsin State Licensed paramedics shall be increased by an additional three percent (3%) of a top step firefighter's base rate as compensation for obtaining the paramedic license for obtaining the paramedic license. The increase shall be effective upon certification. . . ." (Emphasis added).

The Union cites CITY OF WAUSAU (FIRE DEPARTMENT) (Arbitrator Bauman) as supporting the Union's position in this case. In CITY OF WAUSAU, the contract stated "When the City becomes certified as a paramedic services provider, EMT-P's shall receive an addition to their base pay rate:

At time of EMT-P licensure 6%. . ."

In that case, the employer argued that the provision provided for paramedic premium pay only when firefighters are assigned to work as paramedics. That contention was rejected by the arbitrator on the basis that the language was clear and she was not willing to read the limitation argued by the employer into the contract when the parties had failed to include it themselves.

Here, there can be no dispute that Weiland received his paramedic license and was certified as a paramedic by the State of Wisconsin. The same is true of Fletty. Since both Weiland and Fletty obtained their paramedic license, both became eligible for paramedic premium pay under Article XI, Section 5 when they received their certificate of licensure from the State.

The Union also asserts that reading the contract as a whole supports its position. In this case, the City has rejected the claim that Weiland and Fletty are entitled to paramedic premium pay for obtaining their paramedic license, contending that paramedics only receive paramedic

pay when they are used as paramedics. However, Article XI, Section 5, provides that employees receive payment upon obtaining a paramedic licensure. Article XI, Section 4, however, provides paramedics with payment when they work in the particular capacity of a paramedic. This is again similar to the CITY OF WAUSAU case where the arbitrator found language that made clear that the parties knew how to write language indicating that additional payment was to be received only when the employee was working in a particular capacity. Unlike Article XI, Section 4, Section 5 does not condition the premium on use, rather, it conditions the pay solely on obtaining paramedic licensure.

The Union next asserts that bargaining history supports its position. It cites Elkouri and Elkouri, *How Arbitration Works (Sixth Edition)*, as stating: "If a party attempts, but fails in contract negotiations, to include a specific provision in the agreement, arbitrators will hesitate to read such provision into the agreement through the process of interpretation." (p. 454). In late December of 2003, the City proposed specific language limiting paramedic pay to those "designated as paramedics by the City." Having failed to obtain the inclusion of that language in bargaining, the City should not be allowed to use the arbitration process to obtain changes that should be bargained.

Regarding the Union's not having processed the Fritz grievance to arbitration, the Union asserts that arbitrators are reluctant to view the granting of a grievance as concurrence in the union's proffered meaning of the provision or the failure to file a grievance as agreement with the employer interpretation, absent a clear indication that the parties had concurred as to the meaning of the language in question. Citing Elkouri and Elkouri at p. 459. In the Fritz grievance, the Union specifically objected to the City's refusal to properly pay Fritz the Article XI, Section 5 premium pay. However, the Union ultimately decided it would not pursue the grievance to arbitration for economic reasons, since Fritz was by then receiving the premium pay and the only economic value left was *de minimis* back pay. In reaching that decision, the Union was not agreeing with the City's interpretation of the agreement, and the Fritz grievance does not provide a basis on which to deny the grievance.

In its reply brief, the Union disputes the City's argument that the principles of waiver, collateral estoppel and past practice bar this grievance. In that regard, the Union cites Article XXVII, Amendment and Renewal Provision, Section 1, and asserts the last sentence of that provision indicates the parties agreed that the principles of collateral estoppel/waiver would not apply in situations such as this. The Union cites SOUTH SHORE SCHOOL DISTRICT (Arbitrator Honeyman), where the arbitrator rejected a similar contention by an employer in the face of similar contract language. Here, the City is estopped from using the Fritz grievance as precedent based on the last sentence of Article XXVII, Section 1.

As to the City's past practice claim, it is well established that where, as here, the language of the agreement is clear and unambiguous that paramedic premium pay is compensation for obtaining a paramedic license, the arbitrator should not look beyond the four corners of that agreement to decide the grievance.

By arguing that paramedic premium pay is conditioned upon affiliation, rather than licensure, and claiming that with an unaffiliated license a person is not allowed to perform any paramedic functions, the City is attempting to rewrite the contract to condition paramedic pay on an employee's use of his/her license, rather than the obtaining of such a license. The Agreement does not condition paramedic pay on affiliation, but upon obtaining licensure/certification, such as that possessed by Weiland and Fletty. Moreover, the record establishes that once licensed and certified, paramedics are affiliated with the Department as a matter of course. The City presents the name of the licensed paramedic to the City's Medical Director, who after an interview with the paramedic, endorses affiliation. The record shows that every paramedic whose name has been submitted has become affiliated. Thus, the City controls paramedics' entry into the affiliation process. The City argues that employees who are not affiliated are not eligible for paramedic pay, and in this way attempts to avoid its obligation to increase the wages as compensation for obtaining the paramedic license. This attempt to use its role as affiliation gatekeeper to avoid payment of the paramedic premium should be rejected.

Further, the record reveals that paramedics have historically been paid paramedic premium pay even if they were not affiliated with this Department. It is clearly established that the City frequently hires paramedics who are not affiliated with the Department. Thereafter the City submits the names of these new hires for affiliation, however, the newly-hired unaffiliated paramedic receives the paramedic premium while the paperwork is being processed. Firefighter/paramedic David Patten testified that at the time he was hired by this Department, he was affiliated with the City of Kaukauna Fire Department and that although he was not immediately affiliated with this Department, he received the paramedic premium pay immediately upon his hire. This is consistent with the testimony of Assistant Chief Robert Haight.

Last, the Union asserts that bargaining history refutes the City's contention that it relied on the Union's decision not to process the Fritz grievance to its detriment. The problem with the City's claim is that if, at the time of the Fritz grievance, the City were so confident that its rights had been established by the Union's decision not to proceed to arbitration, it would not have needed to propose the language it did in December of 2003 in an attempt to conform the contract to the position taken by the City in the Fritz grievance. The fact that the City proposed to modify the language of the agreement after the Fritz grievance indicates that it recognized that the Fritz grievance could not be considered to be determinative with respect to similar future disputes. As did the arbitrator in the CITY OF WAUSAU case, the arbitrator here should not read the limitations argued for by the City into the Agreement when the parties failed to include such limitations. The City should not be allowed to achieve through unilateral action that which it did not pursue in bargaining.

The Union requests that the Arbitrator sustain the grievance and direct the City to cease and desist from continuing to violate the Agreement by directing the City to pay paramedic premium pay to all of its employees who are State of Wisconsin licensed Paramedics, issue a back pay award to all Union members who have been denied paramedic premium pay under

Article XI, Section 5, since the filing of this grievance, and issue other orders as the Arbitrator deems appropriate to effectuate the terms of the Agreement.

City

The City raises evidentiary issues regarding Union Exhibit 5 and evidence submitted as to the Fletty grievance. Regarding the former, the City asserts the proposals were part of a "global" effort to resolve this dispute and other related matters. Arbitrators have consistently refused to consider evidence from settlement discussions because of the adverse effects of doing so on collective bargaining. That should be the case here as well. Even if the evidence is admitted, neither party should be compromised by its efforts to clarify disputed language. As to the Fletty grievance, the City was never notified that the grievance would be addressed in this case. Only the Weiland grievance was mentioned in the correspondence preceding the hearing. Further, multiple grievances cannot be heard or reviewed by an arbitrator without the agreement of both parties.

The City asserts that in order to analyze the disputed contract language, the history of the City's paramedic program in the Department must be reviewed. In 1996, the City decided to offer paramedic services to its citizens through its Fire Department and invested substantial funds in the in-house paramedic training program, paying both for the cost of the program and also paying its employees to attend those programs. During this training questions arose between the parties concerning how to compensate the employees for the additional services they would be providing. Employees were trained through the in-house program and then the employees' training was reviewed and approved by the City's Medical Officer. The appropriate paperwork was submitted to the State for an affiliated license, and it was only after receiving the affiliated license that employees would begin performing paramedic services for the Department.

The City also asserts that the process for obtaining a paramedic license must be clearly understood to understand the disputed contract language. The State issues two types of paramedic licenses – unaffiliated and affiliated. A person with an unaffiliated license may have received the required training in order to become a paramedic, but is not allowed to perform in a paramedic function with such a license. Deputy Chief Haight confirmed that a person with an unaffiliated license can perform no meaningful paramedic services. To receive an affiliated license, the City must sponsor the paramedic, review his training and experience and seek approval of that person's skills by the Medical Officer. It is only then that a firefighter can receive the affiliated license and actually perform paramedic services for the public.

From 1996 up until 2002, no employee ever received paramedic pay with an unaffiliated paramedic license. Haight testified that in order to not penalize the employee for paperwork delays, the additional paramedic pay would normally be provided while the paperwork was being processed for the affiliated license. In March of 2002 the Fritz grievance arose. This was the first time an employee sought to receive paramedic pay with an unaffiliated paramedic license he obtained on his own after being employed by the City. Fritz

requested the additional pay upon receiving his unaffiliated license, and his request was denied by the City. The Union then grieved that denial. The grievance was processed through the grievance procedure to the last step before grievance arbitration. Both parties submitted their arguments to the City's Finance, Budget and Personnel Committee. The Committee denied the grievance. The Union's President, Brad Breuer, notified the City that the Union was going to proceed to arbitration over the issue, but never did pursue arbitration. Subsequently, the parties continued to operate under the City's interpretation of the Agreement. It is undisputed that the legal and factual claims presented in the Fritz grievance are identical to the instant Weiland grievance.

With that background, the City asserts that the contract language in question is ambiguous and must therefore be interpreted in light of the context in which it was negotiated. The two primary ambiguities in Article XI, Section 5 are that it provides that wages are increased for "licensed paramedics" which starts after they receive "the" license. The parties do not articulate whether that license is an affiliated or an unaffiliated license. It would be odd for the City to agree to pay extra money, however, for a paramedic with an unaffiliated license, as they could not do anything for the benefit of the community. It makes far more sense to consider the license to be the affiliated license which the parties agreed would meet the prerequisites for the extra paramedic pay. The other ambiguity is the "employees who are Wisconsin State Licensed Paramedics. . ." The language does not say that the pay is due to employees who could be paramedics; rather, the clear implication is that employees actually must be paramedics.

Arbitrators regularly consider the context within which contract language was negotiated, in interpreting its ambiguous terms. Further, the Second Restatement of Contracts holds that when the principal purpose of the parties' intentions can be ascertained, that purpose is to be given great weight in interpreting ambiguous contract language. Arbitrators favor interpretations that are consistent with the purpose of the provisions, rather than interpretations that would conflict with that purpose. In this case, the City invested a substantial amount of money in training its firefighters to provide better services to its community and followed a consistent pattern of seeking and achieving the necessary affiliated licensing for those employees and again paying them the extra pay at nearly the same time as they began providing those services to the community. In that context, it is clear that the intent of the parties was to provide the additional pay to those who completed the City's training program and achieved the affiliated license, as they are only then eligible to provide services to the community. Further, arbitrators construe ambiguous language in a manner that is reasonable and equitable, as opposed to one that is unfair and unreasonable. To construe the provision to require the City to pay employees for services that neither the City nor its citizens can utilize is both unreasonable and inequitable.

The City asserts the Union's reliance on the award in CITY OF WAUSAU is misplaced, as that decision supports the City's position in this case. First, the WAUSAU case involved a wholly different contract issue, i.e., out-of-class pay and not a paramedic pay provision. Second, that decision must also have involved employees with affiliated licenses, rather than

unaffiliated licenses. This distinction is revealed in the arbitrator's decision where she notes that just as HAZMAT certified individuals received premium pay for the knowledge they have obtained and their "readiness to perform" HAZMAT duties, EMT-P's retain their additional medical knowledge even when driving fire apparatus and may well be called upon to "utilize these skills" even when the primary reason they are on site is not because they are serving as an EMT. The fundamental flaw with the Union's reliance on the WAUSAU case is that a paramedic holding only an unaffiliated license cannot "utilize these skills" in the exercise of their normal job duties. The additional work that paramedics are allowed to do cannot be performed with an unaffiliated license. Unlike in WAUSAU, the Union is trying to force the City to pay for skills that paramedics are prohibited from performing. It was decided in WAUSAU that citizens should not get the benefit of the paramedic service for free, but here, the citizens received no free benefit from an unaffiliated license. Thus, WAUSAU does not control in this case.

The Union may also attempt to rely on Article XIV, Section 2, providing for additional pay for individuals who complete certain education levels. The City's taxpayers will benefit from the higher education levels which those degrees confer, however, under an unaffiliated license, firefighters cannot perform paramedic duties on behalf of the citizens, and therefore taxpayers cannot and will not receive a benefit from this type of paramedic licensure.

The concepts of past practice/waiver/collateral estoppel also preclude the Union from prevailing in this case. The Union had the opportunity to litigate the Fritz grievance, but chose not to do so. There is no reason the Union could not have proposed to the City that the Fritz grievance be resolved on a non-precedential basis or even to unilaterally assert that the grievance would not be appealed to arbitration on a non-precedential basis or without prejudice to the Union's position in the future. Had the Union taken any of those steps, the City would have been put on notice of the Union's position, and could have acted accordingly.

While the doctrine of past practice generally requires that repeated and multiple examples over a long period of time are generally considered necessary, that is not necessary or applicable in all cases, such as here, where both parties were clearly put on notice of the existence of a dispute over the contract language, and the Union failed to pursue its position to arbitration.

As to waiver, two elements must exist: (1) A voluntary relinquishment or abandonment - express or implied - of a legal right; and (2) the party alleged to have waived the right must have had both knowledge of the existing right and the intention of foregoing it. *Black's Law Dictionary*, 7th Ed. (1999). Here, the Union purposely decided not to pursue grievance arbitration on this issue, i.e., it voluntarily abandoned its legal right to challenge the City's interpretation on this issue. The Union was fully aware of the implications of its decision. The parties have a long-established grievance procedure designed to address such situations as this and when the Union abandoned its attempt to pursue grievance arbitration, it acquiesced to the City's interpretation of this contract provision. Elkouri and Elkouri, *How Arbitration Works*, at p. 560 and note 344.

The doctrine of collateral estoppel requires four elements: (1) the issue at stake is identical to the issue involved in the prior litigation; (2) the issue has been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation was critical and a necessary part of the judgment in the action; and (4) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding. Elkouri and Elkouri, at p. 387. Those standards are met in this case. The precise factual legal issues are the same here as in the Fritz case. It is undisputed that the Union grieved (litigated) its case under the Fritz grievance. All the legal and factual arguments were raised, debated and decided by the City's Finance, Budget and Personnel Committee, which decision could have been appealed to arbitration. It is undisputed that the Union ultimately acquiesced and accepted the City's interpretation by deciding not to fully pursue arbitration. It is also undisputed that the Union had a full and fair opportunity to present its case and willfully decided not to appeal the decision.

Last, the City acted in reliance upon the Union's failure to litigate the matter when it first arose. It could have budgeted additional monies, and had the Union appealed the Fritz grievance, the City would not have invested any time, money or energy in litigating this grievance or pursuing any of the settlement discussions related to that grievance or future contracts. There would also have been no need to try to conform the contract language to the interpretation used in the Fritz grievance, as the parties would have had a definitive answer from an arbitrator. The City acted in reliance on the Union's failure to litigate the Fritz grievance and should not be penalized because the Union sat on its rights. Had the City known the interpretation of its contract language was still an open question, the City may well have taken a very different approach in this case. Settlement discussions could have occurred and compromise language could have been negotiated. Believing the matter had been resolved in its favor in the Fritz case, the City now pursues its position in this grievance.

In its reply brief, the City asserts that the Union's brief exposes the very ambiguity in the contract language asserted by the City. If any paramedic license would do, then the parties would have used the word "a" or "any", but the parties instead used the word "the", clearly indicating they were referring to one specific type of paramedic license. In the context of the bargaining history, and the practice, it is clear that the specific type of paramedic license referred to in the contract language is the affiliated license, which allows employees to actually perform paramedic duties. The distinction between "the" and "a" is the focal point of this case. "The" is a definite article which is used as a function word to indicate that the following noun is a unique or particular member of its class. *Black's Law Dictionary* defines "the" as:

> An article which particularizes the subject spoken of "grammatical niceties should not be resorted to without necessities; that it would be extending liberality to an unwarrantable length to confound the articles "a" and "the". The most unlettered persons understand that "a" is indefinite, but "the" refers to a certain object.

Black's Law Dictionary 1324 (5th ed.) (defining "the").

This interpretation is consistent with the introductory language of Article XI, Section 5, which requires employees to be "Wisconsin State Licensed Paramedics." That language requires two things: (1) that the employee is licensed by the State, and (2) that the employee is a paramedic. Employees cannot be paramedics unless they are affiliated with the Department or some other provider of services. The Grievant was not affiliated with this Department or any other provider. The case might be different if he had received an affiliated license through another agency, but that is not this case.

There are two key aspects of the WAUSAU decision that must be emphasized. First, in Wausau, to be eligible for pay, the employee had to be eligible to actually perform services for the public as a paramedic. As the arbitrator pointed out, even when serving as an acting engineer, the person licensed as a paramedic could still be called upon to perform paramedic duties. Non-affiliated paramedics working for this Department however, may not perform paramedic duties and services for its citizens. Second, is the language of the WAUSAU decision cited by the Union. The arbitrator concluded that the contract language in WAUSAU was devoid of any statement requiring that firefighters actually serve as paramedics. That is a significant distinguishing factor in this case, as Article XI, Section 5, states the additional pay is provided to "employees who are Wisconsin State Licensed Paramedics." Unlike the language in WAUSAU, under this Agreement, to receive paramedic pay you must be a paramedic and be certified as a paramedic.

The Union argues that if a party attempts, but fails, in contract negotiations to include a specific provision in the agreement, arbitrators will hesitate to read such provision into the agreement through the process of interpretation. However, arbitrators have found that "If, in fact the parties were in dispute on the proper interpretation of the contract clause and one of them unsuccessfully sought in collective bargaining to obtain clarification, it would not necessarily follow that the interpretation sought by the unsuccessful party was wrong." Elkouri and Elkouri, at 455. Here, the City attempted to settle this case by proposing to amend the language to clarify the intent of the parties. This was done after the Union dropped the Fritz grievance, and the City attempted to do the responsible thing by clarifying the language consistent with that resolution.

Citing the Fritz grievance, the Union quotes Elkouri and Elkouri as stating that arbitrators are "reluctant" to find that "neither the failure to file a grievance nor the settlement of a grievance prior to arbitration can constitute a precedent." However, the Fritz grievance is neither a failure to file or a settlement. To the contrary, the Union filed the grievance and processed it up to the arbitration step, and then failed to process it any further without comment or agreement. While arbitrators may be reluctant to read too much into a union's failure to raise a grievance in the first instance, there is nothing in the Union's brief that suggests that the assertion and detailed argument of legal rights and the subsequent unilateral abandonment of those same rights cannot constitute a waiver. Also, the Union cites the amount of money at stake in the Fritz grievance as being *de minimis*, however, the amount of money at stake in this case is equally *de minimis*. The Union cannot have it both ways, i.e., it cannot ignore the Fritz grievance and the Union's waiver under a *de minimis* theory and then

assert that this grievance is somehow of supreme importance. Further, the precedential impact of the Union's theory on the Fritz case must be considered. If the Arbitrator decides the present grievance against the City and the City could appeal it to court and chose not to do so, without further comment or communication with the Union, would it then be free to ignore the Arbitrator's award in future cases? Of course not. That is why the City's reliance upon the Union's failure to have this contractual question addressed in the Fritz case has the legal force and effect asserted in the City's initial brief.

The City requests that the grievance be denied.

DISCUSSION

Regarding the evidentiary issue as to Union Exhibit 5, it appears on its face to be a settlement offer made by the City to resolve the dispute in this case, as well as a related issue. As the City notes, arbitrators are generally reluctant to admit or consider settlement offers, both because what a party is willing to do to avoid litigation provides no real guidance in resolving the dispute and also the chilling effect considering such offers would have on the parties' willingness to enter into settlement efforts in future disputes.

As to the procedural issue of whether the Fletty grievance is properly before the Arbitrator, that question must be answered in the negative. Absent mutual agreement of the parties, the Arbitrator has no power to expand the scope of his authority beyond the grievance that was originally submitted and processed through the steps of the grievance procedure. In this case, that is the Weiland grievance. As the City has objected to the Arbitrator deciding Fletty's grievance in conjunction with the Weiland grievance, he has no authority to do so.

Turning to the parties' substantive dispute in this case, the provision in question, Article XI, Section 5, provides:

> **Section 5**: Wages of employees who are Wisconsin Sate licensed paramedics shall be increased by an additional three percent (3%) of a top step fire fighter's base rate as compensation for obtaining the paramedic license. The increase shall be effective upon certification. If the employee loses such certification, the employee shall not continue to receive this additional payment.

Contrary to the City's claim, the wording of this provision is not ambiguous. While the City strives mightily to create an ambiguity by focusing on the word "the" in the first sentence of the provision, the argument is not persuasive. The City's statement of the grammatical rule is correct; however, it does not follow that the term "the" must be referring to a paramedic license other than the paramedic license required to be a "Wisconsin State licensed paramedic" referenced earlier in that sentence.

The provision also goes on to state that the pay increase is to be "effective upon certification." The City essentially argues that the increase is to be effective upon the licensed

paramedic's becoming affiliated with the Department, rather than upon becoming certified as a paramedic, as only a paramedic who is affiliated with the Department may provide paramedic services to the Department. However, besides requiring something beyond what the parties stated in the provision, the argument is inconsistent with the testimony of both Chief Cleveland and Deputy Chief Haight. They testified that when the Department has hired individuals who were already licensed paramedics who had been affiliated with other departments, they received the paramedic add-on immediately upon hire, not when they completed the process to be affiliated with this Department.

The City's arguments as to its ability to control who and how many receive the additional pay and the inequity of paying someone for a service they are not permitted to provide would have meaning in the context of negotiations, but in light of the clear language of Article XI, Section 5, are not relevant to resolving this dispute. Further, it is noted that the City makes the decision regarding affiliation.

The City's arguments that the Union's failure to take the earlier Fritz grievance to arbitration establishes a past practice and constitutes a waiver are also not persuasive. While the decision to drop a grievance may have ramifications in some instances, in these circumstances, this instance, without more, is not sufficient to establish the tacit agreement necessary to find a binding practice. As to waiver, Article XXVII, Section 1, provides, in relevant part:

> The waiver of any breach, term or condition of this agreement by either party shall not constitute a precedent in the future enforcement of all of its terms and conditions.

Given the above, even if the Union's decision to drop the Fritz grievance were found to have constituted a waiver in that case, it cannot serve as a precedent in future disputes, such as this case.

The City also argues that the doctrine of collateral estoppel applies in this case, based upon the Union's failure to arbitrate the Fritz grievance. The difficulties Article XXVII, Section 1, presents to that argument aside, the doctrine of collateral estoppel requires that the issue had been actually litigated in the prior action and that there was a final judgment by a presumably impartial third party empowered to make such a judgment. Without any intent to impugn the integrity of its members, the decision of the City's Finance, Budget and Personnel Committee, itself an arm of the City's government, to deny the grievance, would not constitute such a judgment.

For the foregoing reasons, it is concluded that the City violated Article XI, Section 5, of the parties' Agreement when it denied Weiland the additional 3% of a top step fire fighter's base rate effective upon his having obtained his State of Wisconsin paramedic license/certificate.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is sustained. Therefore, the City is to immediately make Troy Weiland whole for the compensation he lost as a result of the City's refusal to pay him the additional pay required pursuant to Article XI, Section 5, of the parties' Agreement from the date he was licensed/certificated as a paramedic by the State of Wisconsin.

Dated at Madison, Wisconsin this 7th day of September, 2005.

David E. Shaw /s/
David E. Shaw, Arbitrator

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