BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MENOMONIE PROFESSIONAL FIREFIGHTERS ASSOCIATION, LOCAL 1697, I.A.F.F., AFL-CIO

and

CITY OF MENOMONIE (FIRE DEPARTMENT)

Case 94
No. 64996
MA-13079

(Acting Pay Grievance)

Appearances:

Hawks, Quindel, Ehlke & Perry, S.C., Attorneys at Law, by **John B. Kiel**, on behalf of Menomonie Professional Firefighters Association, Local 1697, IAFF, AFL-CIO.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by **Richard J. Ricci**, on behalf of the City of Menomonie.

ARBITRATION AWARD

The Menomonie Professional Firefighters Association, Local 1697, IAFF, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission provide a panel of Commissioner/staff arbitrators from which the parties could select an arbitrator to hear and decide the instant dispute between the Union and the City of Menomonie, hereinafter the City. Thereafter, the parties selected the undersigned, David E. Shaw, to arbitrate in the dispute. A hearing was held before the undersigned on December 1, 2005, in Menomonie, Wisconsin. There was no stenographic transcript made of the hearing and the parties completed the submission of post-hearing briefs by February 12, 2006.

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

ISSUES

The parties stipulated there were no procedural issues and to the following statement of the substantive issues:

Did the City violate Article 11 of the collective bargaining agreement when it paid Lieutenant Stark and Firefighter Brackett the probationary rates in Appendix "A" for their temporary assignments to Acting Captain and Lieutenant respectively?

If so, what is the remedy?

CONTRACT PROVISIONS

The following provisions of the parties' agreement are cited in relevant part:

ARTICLE 5 – GRIEVANCE PROCEDURE

. . .

Section 5. If the grievance is not satisfactorily settled at the step above, the parties to this agreement must select with mutual agreement one of the following steps within fifteen (15) calendar days of the Mayor's (or his designee's) decision or its due date:

1. Mutual petition to the WERC to submit a list of arbitrators from which both parties shall alternately strike a name until one name is left who shall be the arbitrator. The union shall have the last strike of names.

2. Mutual petition to the WERC to perform arbitration of the grievance. The arbitrator shall limit his decision strictly to the interpretation, application or enforcement of this agreement.

. . .

ARTICLE 10 SUSPENSION, DISMISSALS, PROBATION

Suspension or dismissal from the Fire Department shall be in accordance with Section 62.13 Wisconsin Statutes.

Section 1. Section 1. All newly hired employees shall be considered probationary for a period of twelve months from the date of employment. All newly promoted permanent employees shall be considered probationary for a period of six months from the date of promotion. Probationary newly hired employees may be discharged at the discretion of the Fire Chief without recourse to appeal. Probationary newly promoted employees may be reverted to their previous rank at the discretion of the Fire Chief after showing just cause.

. . .

ARTICLE 11 ACTING POSITION

Section 1. The commanding officer shall have the right to make temporary assignments to positions which are temporarily vacant.

Section 2. Any temporary assignment on a daily basis to a promoted position above an employee's rank shall be compensated $30.00 for any shift of 12 hours or less and $60.00 for any shift between 12 and 24 hours.

. . .

BACKGROUND

The instant grievance involves the assignments of Lieutenant Stark and Firefighter Brackett to Acting Captain and Acting Lieutenant, respectively. Due to the retirement of Chief Vind, Captain Terkelsen was appointed Acting Chief effective June 1, 2005, until a new chief was hired, creating a vacancy in his captain slot. Lieutenant Stark was issued the following from Chief Vind:

TO: Dick Stark

FROM: Fire Chief

DATE: May 31, 2005

SUBJECT: Promotion

This is to inform you that effective June 1, 2005, you will be promoted to the position of Acting Captain on a probationary status. Your pay will be $4,221.00 per month.

If you have any questions, please feel free to contact me.

Firefighter Brackett was issued the following:

TO: Rich Brackett

FROM: Fire Chief

DATE: May 31, 2005

SUBJECT: Promotion

> This is to inform you that effective June 1, 2005, you will be promoted to the position of Acting Lieutenant on a probationary status. Your pay will be $3,868.00 per month.
>
> If you have any questions, please feel free to contact me.

These were temporary assignments and neither Stark, nor Brackett, were being recommended for permanent promotion to the Captain and Lieutenant positions, as it was not known if there would be permanent vacancies in those positions.

Both Stark and Brackett were paid at the probationary rate of the positions, rather than the pay set forth in Article 11, Section 2, and the instant grievance was filed on their behalf. Both Stark and Brackett were removed from their acting positions and returned to their former positions on August 22, 2005.

Prior to the parties' 2000-01 agreement, Article 11, Section 2 provided:

> Section 2. Any temporary assignment of 24 hours or longer shall be paid at the probationary rate for that position.

In negotiations for the parties' 2000-01 agreement, the Union's initial proposals included the following proposal:

> **5. ADD AND DEFINE TEMPORARY SUPERVISOR PROVISION AT A PAY RATE OF $50.00 PER SHIFT.**

City Administrator Prange testified that he was on the City's bargaining team and present at all of the bargaining sessions and the mediation session for the 2000-01 agreement. According to Prange, the Union's proposal regarding pay for temporary supervisor was discussed by the parties in terms of "officer in charge" (OIC) of a shift, akin to what the City's police officers had in their collective bargaining agreement. Former Chief Vind likewise testified that the proposal was discussed in terms of OIC pay and that the issue was raised due to a change in the manner vacation could be taken, i.e., it could now be taken in 12 hour blocks, whereas prior to that it had to be taken in 24 hour blocks. Prange also testified that, prior to the 2000-01 agreement, personnel did not receive extra pay for being placed in a higher position for less than a day.

The parties went to mediation in their negotiations for a 2000-01 agreement. Subsequent to that, the City drafted a "Stipulation" as to the agreed-upon items for their agreement, which reads, in relevant part:

> **From Union's Exhibit "A" dated 1/19/01**

1. See exhibit A concerning vacation leave. (Effective 1/1/01)

2. Article XI acting position language changed to read:

   Section 2 Any temporary assignment on a daily basis to a promoted position above an employee's rank shall be compensated $30.00 for any shift of 12 hours or less and $60.00 for any shift between 12 and 24 hours. (Effective upon ratification).

. . .

The parties were unable to resolve their dispute regarding the proper pay for Starks and Brackett while in their temporary assignment to Acting Captain and Acting Lieutenant, respectively, and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union first cites legal and arbitral precedent for the principle that where the contract language is clear and unambiguous, i.e., not reasonably susceptible to more than one construction, the language must be construed according to its plain meaning, and it is unnecessary to look beyond the wording of the agreement and consider extrinsic evidence. Here, the wording of Article 11, Section 2 is clear and unambiguous. That provision specifically entitles Stark and Brackett to acting pay of $60/shift.

It cannot be disputed that Stark and Brackett were temporarily assigned to a higher position when they were temporarily "promoted" into "acting" positions of Captain and Lieutenant, respectively, on June 1, 2005 and returned to their former positions on August 22, 2005. Since they were not promoted on a permanent basis, it follows that their temporary reassignment was on a "daily" basis. Under the plain language of Article 11, 2, they are entitled to $60/day of acting pay.

Any argument that past practice supports the payment of acting pay at the probationary rate of the higher positions is defeated by the bargaining history of Article 11. The language of Article 11, Section 2, of the parties' 1998-1999 Agreement provided:

> "Any temporary assignment of 24 hours or longer shall be paid at the probationary rate for that position."

In negotiations for a 2000-2001 agreement, the Union proposed to "Add and define temporary supervisor provision at a pay rate of $50.00 per shift." The City's representative subsequently offered instead to discuss the issue of "temporary supervision" based on a definition of the term and "an agreeable reimbursement amount being established." Subsequently, the City's

legal counsel drafted a "Stipulation" that, rather than add to the existing Article 11, as the Union initially proposed, changed Article 11, 2 to read as it presently reads. Now, the City is asking the Arbitrator to put the old wording back into the Agreement; wording the City had agreed to remove and replace. The parties' agreement on the new wording of Article 11, 2, evidences their intent to change the manner in which temporary assignments had been paid, i.e., they repudiated the manner in which the City had been paying employees temporarily assigned to acting positions at a higher rank.

The Union further asserts that it was the City that drafted the "Stipulation" changing Article 11, 2. Thus, any ambiguity in the language at issue should be construed against the City. Citing Elkouri and Elkouri, *How Arbitration Works* (Sixth Ed.), p. 477.

Next, the Union asserts that the City is asking the Arbitrator to rewrite Article 11, which Article 5, Section 5, paragraph 2, prohibits. Here, the City asks the Arbitrator to "legislate" back in language the parties agreed to remove from the Agreement. It is well established that an arbitrator may not do so, as it would usurp the parties' role.

Last, the Union asserts that the City may not rely on the earlier instances involving Mensing, Entorf, Klass, Terkelsen and Terry as proof that the parties intended to continue paying individuals in acting assignments at the probationary rate of the position. First, the Union never received notice of the manner in which these individuals were paid. A unilateral action by one of the parties does not establish a binding past practice. Second, the facts in those instances differ from the facts in this case. The individuals in those instances were recommended for permanent promotion to the higher positions, with all but one of the promotions being approved by the City's Police and Fire Commission. Thus, even if the Union had been given notice of the manner of their payment, there was nothing to grieve.

The Union requests that the grievance be sustained and Stark and Brackett be made whole by ordering the payment of the acting pay they were entitled to under Article 11, Section 2, plus interest.

City

The City asserts that the wording of Article 11, Section 2, is ambiguous on its face. Evidence that the wording "Any temporary assignment on a daily basis. . ." is ambiguous, i.e., susceptible of being interpreted more than one way, is the fact that the parties have this dispute before the Arbitrator. The Union interprets that wording to mean any temporary assignment, no matter how short or how long it is, while the City reads that language to cover daily assignments akin to OIC payments in the Police Department for filling a supervisory vacant shift.

The City's interpretation is supported by the fact that the provision refers to pay based on a 12 hour or 24 hour time period. If the provision was meant to cover several consecutive days, the 12 or 24 hour time period differential would have no application, as the 24 hours payment would always apply for each day of a long, consecutive days timeframe.

Next, the City asserts that the parties' bargaining history supports its position. It is undisputed that the present Article 11, Section 2, came from the Union's initial proposals in the negotiations for the parties' 2000-2001 agreement. The Union's fifth proposal stated, "Add and define temporary supervisor position at a pay rate of $50.00/shift." By use of the word "Add" it was, and is, the City's understanding that the Union intended to add a provision to the Agreement. As Prange testified, at that time the employees who filled in for a supervisor on a single shift received no extra pay and the Union was attempting to obtain the same type of premium pay the City's police received when an officer filled in as an "officer in charge". Firefighters were already receiving the probationary rate of the position and the focus in bargaining was the OIC concept for filling in for a supervisor on a single shift. Union President Johnson conceded that the OIC concept was discussed and Prange's bargaining notes also reference the OIC concept. Chief Vind confirmed that at that time firefighters did not receive extra pay for filling in for a supervisor on a single shift. He further testified the new language was meant to address the change in the vacation schedule and was never intended to replace the long-term vacancy situation. Prior to the 2000-01 agreement, vacation could only be taken in 24 hour blocks.

The City asserts that the past practice under the present wording of Article 11, Section 2, also supports the City's position. Even if it is held that the provision is not ambiguous on its face, it certainly became ambiguous by its application by the parties. Clear past practice overrides what might otherwise be considered an unambiguous contract provision. Elkouri and Elkouri, *How Arbitration Works*, (1985-1989 Supplement), page 126. Chief Vind testified that in every instance since the language was changed, the probationary rate was used where an employee was placed in a higher vacated position. The record establishes that the 12 and 24 hour shift rates were used in the OIC situations and no grievances were filed.

Employer Exhibit 7 establishes that there has been a consistent practice of paying the probationary rate for acting pay. Firefighter Mensing was made acting lieutenant in February of 2004 and paid the probationary rate. While he questioned the rate, no grievance was filed. Firefighter Entorf was temporarily promoted to lieutenant in March of 2003, and again in July of 2003, and paid the probationary rate. No grievances were filed in either instance. Firefighter Klass was temporarily promoted to Captain in March and July of 2003 and paid the probationary rate and no grievances were filed. Klass was the Union's Secretary and had executed the 2000-01 agreement on behalf of the Union. In January of 2003, Lieutenant Terkel was made acting captain and paid at the probationary rate and no grievance was filed. Terkel had been on the Union's bargaining committee for the 2000-01 agreement. In January of 2002, Firefighter Terry was made acting lieutenant on a probationary basis and paid the probationary rate and no grievance was filed.

The Union's assertion that these situations are different as they were situations where the City was eventually filling the permanent promoted position, fails in light of Terry's situation where he was returned to his former position and never promoted to the higher position. Chief Vind also testified that placing an employee in an acting position never guaranteed that employee would achieve the higher position, as that decision was made by the Police and Fire Commission.

The City asserts that a practice need not be completely uniform in order to be given weight; it is sufficient that it is the predominant pattern. TODD SHIPYARDS, CORP., 50 LA 645 (Arbitrator Paul Prassow, 1968). The City further asserts that any argument that the practice was not known to the unit is not credible.

Last, the City asserts that as the Union was the proposer and drafter of Article 11, Section 2, the provision should be interpreted against the Union. The City cites arbitral precedent for the principle that the burden is on the proponent of the provision to explain the full meaning and intent of the proposed wording to the other party, and that a provision is to be construed to give it a meaning most favorable to the accepting party and most strictly against its proponent. Based on the practice, it is clear the Union either failed to explain its intended meaning of the wording or acquiesced in the City's interpretation.

Union Reply

The Union first asserts that the City's contention that Article 11, Section 2 does not apply to acting assignments longer than a single day is contradicted by Chief Vind's testimony on cross-examination that unit members who served in an acting capacity on consecutive days received the pay set forth in that provision.

Regarding the City's contention that even if the wording of Article 11, Section 2 is not found to be ambiguous, it became ambiguous based on practice, is erroneous. Arbitral precedent is clear that unambiguous terms cannot be modified by past practice and are to be given their plain meaning, even if the results are harsh or contrary to the parties' original expectations.

If the Arbitrator looks beyond the plain language of the provision, he should consider the bargaining history. The Agreement once contained plain language that permitted the City to pay the probationary rate to employees in acting positions. That language was removed from the Agreement. The City drafted that language's removal and it should not be permitted to use past practice to read it back into the Agreement.

The Union disputes the City's reliance on the situation involving Firefighter Terry to establish that the instances cited by the City did not all involve persons recommended for permanent promotions. Terry was returned to his previous rank pursuant to Article 10, Section 1, which allows the Fire Chief to return a probationary newly-promoted employee to his previous rank for just cause.

The Union also disputes the City's claim that the Union failed to fully explain its position regarding the meaning of the wording of Article 11, Section 2, or acquiesced in the City's interpretation by failing to object to it until this grievance. The Union asserts it must have explained its position sufficiently enough that the City agreed to remove the language that permitted it to pay the probationary rate to persons in acting positions. The Union further asserts that it did not acquiesce, as Stark's and Brackett's are the first situations that occurred which did not involve employees recommended for permanent promotion.

City Reply

The City first asserts that the Union's claim it did not have notice of the practice flies in the face of the evidence. The evidence shows that Mensing questioned the manner in which he was paid, but did not grieve after being told that the probationary rate was the appropriate payment in his situation. The Union should be held to have notice based on Mensing's having questioned the payment of the probationary rate, as well as Klass, the Union's Secretary, having been paid the probationary rate. This is a small bargaining unit and several of its members were paid at the probationary rate since the 2000-01 agreement. The City asserts it is not asking the Arbitrator to add language to the Agreement, but to interpret the Agreement based on the practice.

The City disputes any assertion that it was the drafter of Article 11, Section 2. While it is true that the City put the "Stipulation" together, that merely consisted of assembling all of the language and economic items the respective parties had drafted. As it was the Union's proposal in the first place, any question about who drafted the wording should be decided against the Union. Thus, the provision should be interpreted against the Union.

DISCUSSION

It is first noted that the wording of Article 11, Section 2, is not unambiguous. The phrase "on a daily basis" is unclear as to the parties' intent; i.e., does it mean any temporary assignment to a higher position, regardless of the duration of the assignment, or does it only apply to assignments of one day at a time or less, as the City claims. In order to answer that question, it is necessary and appropriate to look at both bargaining history and the parties' practice of applying the provision.

Regarding the bargaining history, the record establishes that in negotiations for their 2000-2001 Agreement, the parties ultimately agreed upon a change in the language of Article 11, Section 2, from the old wording that provided for payment at the probationary rate of the higher provision for a "temporary assignment of 24 hours or longer", to the present wording providing for the payment by shift for a "temporary assignment on a daily basis to a promoted position." The City asserts the intent of the change was not to alter the application of the old wording, rather, the intent was to add to that existing practice payment for a temporary assignment of a day or less to a higher position at the per shift rate. The problem with that assertion is obvious. The parties did not add the new wording to the existing language of Article 11, Section 2, they replaced the existing wording with the new language. While former Chief Vind testified the new wording was meant only to address the change in the manner vacation could be taken, i.e., it could now be taken in half-day (12 hour) increments, the elimination of the old wording does not support this limited application of the

provision. On its face, the change in wording supports the Union's position that the provision applies to temporary assignments of a day or longer as well, where the assignment is not in the context of the process for a permanent promotion to fill a vacancy. [1]

The City's reliance on past practice is not supported by the record. It appears from Chief Vind's testimony that in all of the instances cited in Employer Exhibit 7, those individuals had been recommended by the Chief for permanent promotion to those positions, and only Terry was not ultimately permanently promoted. Chief Vind acknowledged that, in this case, Stark and Brackett were not recommended for permanent promotion to their acting positions. Thus, their situation is distinguishable from those instances cited by the City in Employer Exhibit 7.

The City's argument that if Article 11, Section 2, applies to temporary assignments of consecutive days, the reference to 12 or 24 hour time periods in the provision would have no application, is without merit. The argument ignores the fact that it is still necessary to distinguish between an assignment for half a day (12 hours) and assignments for full days (24 hours).

Based upon the foregoing, it is concluded that Article 11, Section 2, applies to such temporary assignments as in this case. Therefore, by paying Stark and Brackett the probationary rate for the higher positions, instead of the rate set forth in Article 11, Section 2, the City has violated that provision of the parties' Agreement.

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

AWARD

The grievance is sustained. The City is directed to immediately pay Lieutenant Stark and Firefighter Brackett the difference between what they were paid in their acting assignments in this case and the rate set forth in Article 11, Section 2, of the parties' Agreement that they should have been paid in those assignments. [2]

Dated at Madison, Wisconsin, this 17th day of August, 2006.

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

[1] As to the parties' arguments regarding who drafted the present language of Article 11, Section 2, the evidence in the record does not establish which party drafted the language the parties ultimately agreed to place in their Agreement, especially with regard to the inclusion of the term "daily basis".

[2] As there is no provision in the parties' Agreement authorizing the award of interest, it is not awarded.

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