BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 484, AFL-CIO

and

CITY OF STEVENS POINT

Case 153
No. 69828
MA-14754

Appearances:

John B. Kiel, Attorney, The Law Office of John B. Kiel, LLC, 3300 252nd Avenue, Salem, Wisconsin 53168, appearing on behalf of the International Association of Fire Fighters (IAFF) Local 484, AFL-CIO.

Christopher M. Toner, Attorney, Ruder Ware, LLSC, 500 First Street, Suite 8000, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of the City of Stevens Point.

ARBITRATION AWARD

Pursuant to the terms of the collective bargaining agreement (CBA) between the International Association of Fire Fighters Local 484, AFL-CIO (Union) and the City of Stevens Point,[1] the Union requested that the Wisconsin Employment Relations Commission assign a member of its staff to arbitrate a dispute between them. The Grievants, three firefighters employed by the City, attended an instructional conference in Fitchburg, Wisconsin, on February 28, 2009, which included a one-hour lunch period. The present dispute involves the City's denial of one hour of overtime pay to these three firefighters for that lunch period.

I arbitrated the grievance on October 12, 2010, at the Stevens Point City Hall, in Stevens Point, Wisconsin. A court reporter was present and a transcript of the proceedings was subsequently provided. The parties filed post-hearing briefs, the last of which was received on

[1] The CBA relevant to this grievance is entitled, "Agreement Between City of Stevens Point and International Association of Firefighters Local 484, AFL-CIO January 1, 2007 – December 31, 2008".

December 6, 2010. After I received the last brief, I sent a follow-up email to the City (and copied it to the Union) regarding the statement of the issues, to which I received a response from the City on March 7, 2011.

ISSUE

The parties were unable to stipulate to a statement of the issues; however, they authorized me to craft such a statement after considering their respective proposals:

Union's Proposed Statement of the Issues

1. Did the City violate the collective bargaining agreement when, on March 20, 2009, it unilaterally reduced the out of town training overtime eligibility of Local 484 members Dahms, Macht and Skibba by one (1) hour?

2. If so, what is the appropriate remedy?

City's Proposed Statement of the Issues

1. Did the City violate the collective bargaining agreement when it denied overtime compensation to Officers Dahms, Macht, and Skibba for attending a non-training lunch while attending an out of town conference?

2. If so, what is the appropriate remedy?

Arbitrator's Statement of the Issues

I frame the issues as follows:

1. Did the City violate the collective bargaining agreement when it denied one hour of overtime compensation to out-of-town conference attendees Dahms, Macht, and Skibba?

2. If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISION

ARTICLE 8 – OVERTIME

All time worked, other than the normal duty day which is defined in Article 7 of this Agreement, shall be considered overtime. . . .

BACKGROUND

Conference, Lunch Break and Denial of Compensation

At all times material, Grievants Dahms, Macht and Skibba have been employed as firefighters by the City of Stevens Point. On February 28, 2009, they attended a work-related conference in Fitchburg, Wisconsin, entitled, "Leadership, Safety and Survival", presented by Battalion Chief John Salka of the New York City Fire Department (FDNY). The Grievants received overtime compensation for attending the conference; however, the City deducted one-hour of overtime pay for their approximately one-hour lunch break.

There was no formal presentation or training during the lunch break, and no obligation for attendees to discuss anything from the conference or even remain in the building. Nonetheless, the three Grievants remained in the building, ate with other attendees and were present during a discussion of conference-related material that had been taught prior to the lunch break. Such discussion included consideration of various policies of fire departments that employed the attendees, in light of seminar material that had been presented.

City's Practice Regarding Compensation for Lunch Breaks During Conferences/Training

Prior to the filing of this grievance, the City had not issued any formal, written policy regarding compensation for lunch breaks during conferences and training. The Union and the City differ in their views of past practice in this regard. The Union maintains that the Grievants' calculation of overtime to include compensation for the lunch period during the Fitchburg seminar was consistent with a past practice of fully compensating lunch periods for out-of-town seminars, irrespective of how those lunch periods were spent. The City, by contrast, maintains that its past practice has been to compensate firefighters only for *working* lunches during seminars.

In point of fact, some firefighters have applied for, and been granted, compensation for lunch periods during seminars, irrespective of what they did during lunch. Other firefighters have deducted the time spent eating lunch from their training time, as recorded on their "Off-Duty Training Report" forms. Still others have indicated on those forms that they took a working lunch and thus included that time in their training time.

City's Post-Grievance, Written Clarification of Lunch-Period Compensation

After the Union filed the instant grievance, Stevens Point Fire Chief John Zinda sent an email on October 23, 2009, expressing his view of the Fire Department's distinction in the past between a non-working and working lunch and a firefighter's entitlement to compensation only for the latter. The email also noted a modification in overtime request forms to reflect the distinction between a working and non-working lunch.[2] The email stated:

> It has been the practice of the Stevens Point Fire Department to not pay for non working lunch (meal) time. Our overtime request forms have been modified so the employee must report this clearly. A working lunch (meal) should be something that is well understood by all but I will clarify:
>
> > A working lunch (meal) is a lunchtime (mealtime) during which business/training is transacted. A working lunch (meal) can occur either when an employee continues to work/train through their lunch hour, or when business/training is conducted at the same time.
>
> IAFF Local 484 filed a grievance regarding this practice on March 21, 2009 and the grievance is being processed. The Stevens Point Fire Department is abiding by the practice of not paying for non working lunch (meal) time.
>
> Make certain that all overtime requests that include pay for a working lunch (meal) are accurate. It is the employees [sic] responsibility to make this determination and not falsify documentation. If in doubt, please ask management for assistance.

(Joint Ex. 12)

Notwithstanding this attempt to clarify the distinction between a working and non-working lunch, Chief Zinda believes that the distinction can be "somewhat subjective",[3] that there is "discretion"[4] in making the distinction, and that "it's up to the person's integrity and maybe definition of a working or non-working lunch on . . . how to apply or how to fill out the overtime report."[5]

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[2] Both the old and revised forms contain a line that reads, "Date of Training _____ From ___ hours to ___ hours". (Joint Ex. 11, 13). However, unlike the old form, the revised form contains a line that reads, "Class Hours ___ Meal Hour(s) ___ Working Meal Time □ yes □ no" (Joint Ex. 13).
[3] Grievance Arbitration Hr'g Tr. 139, Oct. 12, 2010.
[4] *Id.*
[5] Hr'g Tr. 133.

Additional facts are set forth below where appropriate.

ANALYSIS

The parties have chosen to fight this dispute primarily on the battlefield of past practice.[6] Each party argues that the burden to prove a past practice rests on the other's shoulders. The Union argues that the City has not met its burden to prove a past practice of denying compensation for non-working seminar lunch periods, while the City maintains that the Union has not met its burden to prove the City's past practice of approving such compensation. However, I need not resolve which party has the burden of proof to establish a past practice or whether that burden has been met, because even assuming *arguendo* the existence of the City's past practice of compensating only *working* lunches, as the City characterizes them, the Grievants did work during their lunch in Fitchburg.

I. "Time Worked" Is Ambiguous Vis-à-Vis Compensation for Lunch Periods

Article 8 provides in part, "All time worked, other than the normal duty day which is defined in Article 7 of this Agreement, shall be considered overtime." The parties do not dispute that the Grievants' lunch period did not occur during their "normal duty day". Accordingly, I must decide whether the informal and optional discussion of seminar-related material during lunch with other conference attendees was "time worked" within the meaning of Article 8, to determine whether the City breached a contractual duty to pay overtime.

The Union asserts that the phrase, "[a]ll time worked" is unambiguous, and that therefore I should apply its plain meaning to find that the Grievants' lunch period was compensable overtime. "Where the terms of a contract are clear and unambiguous, we construe the contract according to its literal terms." *GORTON V. HOSTAK, HENZL & BICHLER, S.C.,* 217 WIS. 2D 493, 506, 577 N.W.2D 617 (1998). On the other hand, "[c]ontract language is considered ambiguous if it is susceptible to more than one reasonable interpretation." KERNZ V. J.L. FRENCH CORP., 2003 WI APP 140, ¶ 16, 266 WIS. 2D 124, 137, 667 N.W.2D 751, 757, *QUOTING DANBECK,* 245 WIS. 2D 186, ¶ 10, 629 N.W.2D 150.

In support of its argument for lack of ambiguity, the Union cites Chief Zinda's testimony, "When you're attending training, it would be time worked."[7] However, the Chief's statement merely begs the question of whether the Grievants' activity during the lunch period was training. In addition, the Union offers the testimony of Macht and Skibba regarding past instances in which they received overtime compensation for lunch periods during out-of-town

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[6] The City also counters the Union's apparent argument in its original grievance that the City must pay overtime under the Fair Labor Standards Act (FLSA). However, the Union did not brief, and thus effectively abandoned, this argument. Accordingly, I need not address it.

[7] Hr'g Tr. 138.

seminars. However, this is evidence of past practice, not application of plain meaning.

I find that the phrase, "All time worked" is susceptible to more than one reasonable interpretation and is therefore ambiguous. A broad but reasonable construction of the phrase would consider lunch periods during out-of-town seminars to be time worked, because an attendee's liberty is invariably restricted merely by being out of town. On the other end of the reasonable spectrum, time worked might exclude compensation for lunch periods when no formal instruction or training is provided. Accordingly, I find that the phrase, "All time worked" is ambiguous when considering whether lunch periods are compensable.

II. The Grievants' Lunchtime Discussion Was "Time Worked" Within the Meaning of the City's Past-Practice Construction

Because "All time worked" is ambiguous, resort to past practice is appropriate. "The custom or past practice of the parties is the most widely used standard to interpret ambiguous and unclear contract language." FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 623 (ALAN MILES RUBEN ED., 6TH ED. 2003).

As noted above, after the Union filed the instant grievance, Stevens Point Fire Chief John Zinda attempted to clarify the Fire Department's past practice of distinguishing between a non-working and working lunch and allowing compensation only for the latter:

> It has been the practice of the Stevens Point Fire Department to not pay for non working lunch (meal) time. Our overtime request forms have been modified so the employee must report this clearly. A working lunch (meal) should be something that is well understood by all but I will clarify:
>
> > A working lunch (meal) is a lunchtime (mealtime) during which business/training is transacted. A working lunch (meal) can occur either when an employee continues to work/train through their lunch hour, or when business/training is conducted at the same time. . . .

(Joint Ex. 12)

Chief Zinda's acknowledgement that the distinction between a working and non-working lunch can be somewhat subjective, that there is discretion in making that distinction, and that "it's up to the person's integrity and maybe definition of a working or non-working lunch on . . . how to apply or how to fill out the overtime report"[8] perhaps explains the lack of

[8] Hr'g Tr. 133.

absolute consistency in compensation for seminar lunch periods, as noted above. Rather than weigh, winnow and sift the evidence each party presents to determine what the City's past practice was, I assume without deciding the accuracy of the City's characterization of its past practice and apply that characterization to the facts of this case. So doing compels the conclusion that even under the City's interpretation, as set forth by its Fire Chief, the Grievants' lunchtime discussion of seminar-related materials constituted a "working lunch" and thus "time worked" within the meaning of Article 8.

Chief Zinda clarifies that a firefighter is considered to be working during lunch *either* when he or she proactively "continues to work/train through their lunch hour" or when he or she is present while "business/training is conducted" by someone else. There was no speaker or trainer conducting business or training during the lunch period in Fitchburg. However, conference attendees present at the lunch discussed conference-related material that had been presented prior to the lunch break. This discussion included consideration of various policies of fire departments that employed the attendees, in light of seminar material that had been presented. In fact, Arthur Dahms testified that the discussion at times even became "very heated".[9]

The lunchtime discussion in Fitchburg constitutes "work" and the lunch period was thus "time worked" within the meaning of Article 8. While Chief Zinda self-servingly denied this ultimate conclusion in testimony, he presented no persuasive rationale for his denial. He did state, "I think anyone with common sense in most cases can tell whether something is a working lunch or not."[10] Here, common sense suggests that the lunchtime discussion was work. The conference itself was compensated as work, and the objective of the conference was to learn material presented. To that end during their lunch period, conference attendees not only discussed the material that had been presented but also applied that information to the policies of their respective fire departments. That the discussion became "heated" when the information presented was applied to various departmental polices evidences both the relevance and seriousness of the discussion. I find this sort of discussion – including, if not especially, the attempt to apply the information learned – to be at least as valuable a learning tool as the more passive receipt of information imparted during a presentation. Common sense suggests that vigorous discussion and argument regarding seminar topics as applied to different departmental policies are learning experiences, just as listening to conference presentations is.

Moreover, proactively exchanging and applying new ideas, testing their merits and evaluating their flaws is no less a learning experience, just because it is done voluntarily or without an instructor. Thus, that the lunch participants did not have to be there or to discuss seminar-related topics ultimately is not dispositive. Chief Zinda's clarification of a "working

[9] Hr'g Tr. 147.
[10] Hr'g Tr. 142.

lunch" could have, but did not, state that a working lunch (meal) can occur either when an employee *is required to, and does,* continue to work/train through their lunch hour, or when business/training is conducted at the same time.

Moreover, such an unduly narrow interpretation of "work" in the context of past practice to clarify the usage of "time worked" in Article 8, would not comport with the common understanding of the meaning of "work". "Terms used in contracts are to be given their plain or ordinary meaning, and it is appropriate to use the meaning set forth in a recognized dictionary." WATERS V. WATERS, 2007 WI APP 40, 300 WIS. 2D 224, 229, 730 N.W.2D 655, 658, *CITING* JUST V. LAND RECLAMATION, LTD., 155 WIS. 2D 737, 745, 456 N.W.2D 570 (1990). *See also* WILDIN V. AMERICAN FAMILY MUT. INS. CO., 2001 WI APP 293, ¶ 9, 249 WIS. 2D 477, 484, 638 N.W.2D 87, 90 (noting that "ordinary meaning may be established by reference to a recognized dictionary".) The word, "work" has been defined in relevant part as "a specific task, duty, function, or assignment often being a part or phase of some larger activity".11 Thus, while work can be a "duty" imposed by others, it can also be simply a task. And here, the lunchtime discussion was a part or phase of a larger activity – *i.e.* the learning experience of attending a conference.

In sum, I find that even under the Fire Chief's characterization of the City's past practice regarding the distinction between working and non-working lunches and the compensation of working lunches only, the Grievants participated in a compensable, working lunch.

CONCLUSION

For the foregoing reasons, I conclude that the City violated the collective bargaining agreement when it denied one hour of overtime pay to Grievants Dahms, Macht and Skibba for their lunch period at the Fitchburg conference on February 28, 2009. Accordingly, the City must, and is hereby ordered, to compensate the firefighters for one hour of overtime pay, to be calculated in a manner consistent with the terms and conditions of the collective bargaining agreement.

Dated at Madison, Wisconsin, this 8th day of March, 2011.

John C. Carlson, Jr.

John C. Carlson, Jr., Arbitrator

[11] *Merriam-Webster Online Dictionary* (visited March 7, 2011) <http://www.merriam-webster.com/dictionary/work>.

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