

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
LOCAL #127, AFL-CIO-CLC**

and

CITY OF LA CROSSE

Case 345
No. 70337
MA-14942

(Radiological Team Training Pay)

Appearances:

Attorney John B. Kiel, Attorney at Law, 3300 252nd Avenue, Salem, WI 53168, for the labor organization.

Attorney Stephen L. Weld, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, WI 54702-1030, for the Municipal Employer.

ARBITRATION AWARD

The International Association of Fire Fighters, Local #127, AFL-CIO-CLC (“the Association”) and the City of La Crosse (“the City”) are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. On November 18, 2010, the Association requested that the Wisconsin Employment Relations Commission designate a commissioner or member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to overtime pay. The Commission appointed Stuart D. Levitan, a member of its professional staff, to serve as the impartial arbitrator. Hearings in the matter were held in La Crosse, Wisconsin, on March 19 and May 31, 2010; they were not transcribed. The parties filed written arguments, the last of which was received on July 26, 2011.

ISSUE

The Association states the issue as:

“Did and does the City violate the collective bargaining agreement when it refuses to pay overtime at time and one-half the day rate to members of the Regional Hazardous Materials Response Team who attend off duty field team drills? If so, what is the appropriate remedy?”

The City states the issue as:

“Did the City violate an ‘Addendum’ which was not attached to the collective bargaining agreement when it paid the time and one-half, not double, rate to members of the Hazardous Materials Core Team attending Radiological Field Team training sessions which were not the Hazardous Materials Core Team’s monthly drills? If so, was it a violation of the contract? If so, what is the appropriate remedy?”

I state the issues as:

“Are members of the Radiological Field Team who attend Radiological Field Team training considered ‘Hazardous Materials Team members’ for purposes of calculating overtime payments under the 2004 Addendum?”

“What constitutes ‘reporting for drill’ under the 2004 Addendum?”

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 3

GRIEVANCE PROCEDURE

A grievance is defined as any matter involving the interpretation, application or enforcement of this agreement. Any grievance not initiated within thirty (30) calendar days of the date of the last cause of such grievance or from the date the employee knew about the cause of the grievance shall be invalid.

Economic awards shall be retroactive to the filing date of the grievances.

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ARTICLE 14

WAGES AND SALARY SCHEDULE

. . .

C. Premium Pay/Assignment to Special Teams

An employee who is a member of the Hazardous Materials, Rescue, or Water Rescue Core Teams, shall receive \$10.00 per month for being an active member. The Fire Department's policy on assignment to Special Teams described in the Chief's correspondence dated October 20, 1997 shall be continued for the life of the 2010-2011 collective bargaining agreements. It is understood that all assignments to and removals from special teams are the decision of management.

. . .

ARTICLE 16

OVERTIME

Employees subject to this agreement shall be paid for all work over 204 hours in a 27 day work period at time and one-half.

Time not worked shall be exempt from the overtime calculations of the pay period in accordance with the Fair Labor Standards Act. However, employees subject to this agreement will be compensated at time and one-half for hours worked over and above their normal work schedule.

The 27 day work period shall be established on a date at the beginning of the work cycle nearest April 15, 1986. The "A" shift work cycle beginning January 18, 1994 shall be modified by the parties to equalize FLSA overtime availability between all shifts.

. . .

ARTICLE 27

TRAINING OPPORTUNITIES AND EMPLOYEE DEVELOPMENT

The parties agree that staff training is essential to develop employee skill sets to meet the future needs of the Fire Department. It is further agreed that all off duty training assignments to bargaining unit employees, approved in advance by the Fire Chief, shall be compensated at applicable overtime rates. Training opportunities in the Fire Department will be made available to bargaining unit members so that new techniques, ideas and technological advancements and employee development can be brought back and shared with other department members. The Fire Chief shall maintain a posting location on the Fire Department intranet website. Posted training shall include the subject, location,

date, time and eligible employee classifications. Interested bargaining unit members may submit their name for consideration at the same website. Bargaining unit members assigned by the Fire Chief to posted training opportunities shall be eligible for travel costs, tuition, per diem for food and lodging, and overtime if scheduled during off duty time. Employees so assigned shall successfully complete all course requirements. Local 127 members may request that additional training be considered for posting by notifying the Fire Chief with details and support information in writing. Requesting additional training postings does not give preference to requesting employee.

A training fund shall be established for calendar year 2010 and 2011. Training expenses to be taken from this fund shall include course tuition, books, per diem for food & lodging, overtime for training and backfill if schedule during off duty. These funds are for the purpose of funding all training for Local 127 members excluding core team training described in the letter dated October 27, 1997 and addendum, EMT recertification, and training that is reimbursed from outside sources.

. . .

It is understood that any overtime compensation paid to employee on approved training shall be limited to an 8 hour workday. Fire Academy training of one (1) week or more may result in employee's work schedule being changed to a 40 hour work week as applicable and will not result in a loss of earnings for the week.

BACKGROUND

The City of La Crosse, Wisconsin, seat of La Crosse County, is a municipality of about 22 square miles and 52,000 residents alongside the Mississippi River. Among its many general government activities, it maintains a Fire Department to provide emergency services, including fire protection and abatement, rescue operations, and treatment of hazardous materials. It does so pursuant to a collective bargaining agreement with Local #127 of the International Association of Firefighters, which represents all regular full time employees of the department other than seven senior management and one clerk.

This grievance concerns the proper overtime rate for bargaining unit members who attend Radiological Field Team training as part of their participation on the Regional Hazardous Materials Core Team (Haz-Mat). The association contends that off-duty employees who participate(d) in Radiological Field Team training pursuant to their participation in the La Crosse Fire Department Regional Hazardous Materials Response Team should have been,

and should be, effectively paid double-time; the city contends they were, and are, entitled to time and one-half.¹

On October 20, 1997, the then-La Crosse Fire Chief Peter J. Stinson issued the following Memorandum, which has been incorporated into the parties' collective bargaining agreement:

The following are the policies set forth to address hazardous materials, high angle\confined space rescue, and cold water rescue core team relating to compensation for the above assignments.

Hazardous Materials Core Team Members

There will be at least 45 hours of overtime training made available throughout the year to each core team member.

All Core team members must attend at least 80% of scheduled training.

All Core team members including the Hazmat officer, will be required to carry a pager in accordance with the Fire Chief's letter to the Union dated October 20, 1997.

The Hazardous Materials core team will consist of all bargaining unit applicants, not to exceed twenty-five (25) members.

High Angle\Confined Space Rescue, Cold Water Rescue Team Members

There will be at least 24 hours of overtime training made available throughout the year to each core team member of the High Angle\Confined Space Rescue, Cold Water Rescue core team members.

All Core team members must attend at least 80% of scheduled training.

The High Angle\Confined Space Rescue Team training, and Cold Water Rescue Team trainer, will be required to carry a pager.

The High Angle\Confined Space Rescue Team will consist of all bargaining unit applicants, not to exceed eighteen (18) members each.

The Cold Water Rescue Team will consist of all bargaining unit applicants, not to exceed eighteen (18) members each.

¹ The difference between time and one-half and effective double-time relates to the dual scheduling system, discussed below.

No one employee may receive more than one special payment of premium each month unless there is an insufficient number of applicants for special team membership.

Pursuant to Article 16, employees on the various teams were paid time and one-half of their normal pay for their respective overtime training activities.

On November 24, 1999, the State of Wisconsin designated the La Crosse Fire Department a Regional Hazardous Materials Response Team under sec. 266.215(1), Wis. Stats. Since 2000, the state and city have entered into a series of two-year agreements for the city, through the Fire Department, to serve as one of eight regional teams responding to incidents involving hazardous materials and other emergencies.

The contract with the state provided funds for the city to pay for additional training. To allocate the resources and duties, the city and the association began bargaining over the compensation to be paid unit members for activities under the arrangement. The unique nature of the fire department schedule provided an opportunity for settlement.

The department uses a dual-staffing system, featuring both a “platoon system” (a 24-hour duty period followed by an equal period of rest, for three consecutive duty/rest periods, followed by three 24-hour rest periods, after which the cycle repeats), and a “day system,” for employees working an eight-hour day, 40-hour week. Employees assigned to the platoon system work 112 hours every two weeks, and receive a lower hourly wage than the day system workers. ²Platoon shift workers who are paid overtime at the day shift worker rates are effectively paid slightly more than double their actual, platoon-shift rate. All the members of the Hazardous Materials Response Team work platoon shifts.

The association proposed the following Memorandum of Understanding:

Memorandum of Understanding

REGIONAL HAZARDOUS MATERIALS RESPONSE TEAM

This memorandum sets forth those agreements reached during the term of the 2002-2004 collective bargaining agreement between the City of La Crosse and IAFF Local #127 regarding compensation for employees assigned to the Regional Hazardous Materials Response Team.

² For example, in 2010, hourly wages for a platoon system engineer ranged from \$15.74 to \$19.08, while the hourly wages for an engineer on the day shift ranged from \$22.00 and \$26.76, depending on seniority. Time and one-half at the respective day rate is thus a bit more than double-time the platoon shift rate.

The employee assigned to Hazardous Materials Response Coordinator shall be paid \$200 per month beginning January 1, 2004.

The employee assigned to Hazardous Materials Response Trainer shall be paid \$175 per month beginning January 1, 2004.

The employee assigned to Hazardous Materials Response Monitoring Equipment Technician shall be paid \$150 per month beginning January 1, 2004.

Off duty Hazardous Materials Team members shall be considered day workers after reporting for drill or Level A responses effective January 1, 2004.

Hazardous Materials Team members shall receive pager pay in the amount of \$45 a month.

It is understood that the compensation payments described above are subject to funds available pursuant to the contract between the State of Wisconsin and the La Crosse Fire Department. If contract funds are not available the above described compensation shall not be due to the employees.

The city objected to attaching this to the collective bargaining agreement as a memorandum of understanding, concerned that such visibility would lead the bargaining unit representing police officers to demand a comparable improvement in its economic package. To avoid public awareness of the situation, the city proposed to designate the memorandum, with certain modifications, as an Addendum to the contract between the city and state, rather than a memorandum of understanding between the city and the association, as follows:

ADDENDUM
REGIONAL HAZARDOUS MATERIALS RESPONSE TEAM

This memorandum sets forth those agreements reached during the term of the 2002-2004 collective bargaining agreement between the City of La Crosse and IAFF Local #127 regarding compensation for employees assigned to the Regional Hazardous Materials Response Team.

The employee assigned to Hazardous Materials Response Coordinator shall be paid \$200 per month beginning January 1, 2004.

The employee assigned to Hazardous Materials Response Trainer shall be paid \$175 per month beginning January 1, 2004.

The employee assigned to Hazardous Materials Response Monitoring Equipment Technician shall be paid \$150 per month beginning January 1, 2004.

Off duty Hazardous Materials Team members shall be considered day workers after reporting for drill or Level A responses effective January 1, 2004. (Basically equates to double time. We drill once a month.) [emphasis added]

Hazardous Materials Team members shall receive pager pay. (\$45/month + \$10/month team pay). (emphasis added).

It is understood that the compensation payments described above are subject to funds available pursuant to the contract between the State of Wisconsin and the La Crosse Fire Department. If contract funds are not available the above described compensation shall not be due to the employees.

The Union did not object to identifying this as an addendum to the city/state contract rather than to the city/association collective bargaining agreement, but did object to the two parenthetical modifications the city proposed. The city acceded to the association's objections, and the parenthetical comments were removed.

On July 1, 2004, Stinson had his secretary send an email to Randi Wind Milsap, an attorney with the Wisconsin Department of Military Affairs, as follows:

Randi,

Please find attached a copy of an addendum that we would like attached to the Regional Hazardous Materials Response Team contract.

We would also like a letter from you stating this addendum has been attached and is now part of the contract.

As it was requested, so was it done. There is no evidence Milsap was aware of the negotiations prior to a phone call from Stinson just prior to her receipt of the email and attachment. That same day, Milsap replied by postal letter, as follows:

Dear Pete:

Pursuant to our recent telephone conversation, the Wisconsin Department of Military Affairs (DMA) hereby acknowledges the July 1, 2004 electronic receipt of an addendum to the La Crosse Regional Hazardous Materials Team contract outlining revised compensation schedules for team members. This Addendum shall be included in the existing regional response team contract.

Thank you for your professional courtesy in this matter.

The final document read as follows:

ADDENDUM
REGIONAL HAZARDOUS MATERIALS RESPONSE TEAM

This memorandum sets forth those agreements reached during the term of the 2002-2004 collective bargaining agreement between the City of La Crosse and IAFF Local #127 regarding compensation for employees assigned to the Regional Hazardous Materials Response Team.

The employee assigned to Hazardous Materials Response Coordinator shall be paid \$200 per month beginning January 1, 2004.

The employee assigned to Hazardous Materials Response Trainer shall be paid \$175 per month beginning January 1, 2004.

The employee assigned to Hazardous Materials Response Monitoring Equipment Technician shall be paid \$150 per month beginning January 1, 2004.

Off duty Hazardous Materials Team members shall be considered day workers after reporting for drill or Level A responses effective January 1, 2004.

Hazardous Materials Team members shall receive pager pay.

It is understood that the compensation payments described above are subject to funds available pursuant to the contract between the State of Wisconsin and the La Crosse Fire Department. If contract funds are not available the above described compensation shall not be due to the employees.

There were about 90 bargaining unit positions in 2010, plus the Chief, six other officers and a clerk. As capped under the 1997 memo from Stinson, twenty-five were members of the Regional Hazardous Materials Team (with a would-be 26th on military leave). Seven were from the A shift, 10 from B shift, and nine from C. In order to distribute the double-time pay equally, the city has at least since 2004 sought to schedule the core training equally over the three shifts.

City evidence at hearing included a document entitled, "La Crosse Fire Department Regional Haz-Mat Team Training Schedule" for 2004 and 2008-2010, four separate pages showing twelve monthly meetings in such subjects as Chemistry, Night Drill, Team Building, Competencies, Radiation, Plume Modeling, Migration. Each page bore the following notation at the bottom:

All drills will begin at 09:00 hrs and start at Station 1,

*Team members are required to bring there (sic) Haz-mat gear bag to the drill.

City evidence also included a compilation entitled “HazMat Core Drills/Additional Training Dates” for 2003, 2004 and 2008-2010, showing 64 separate listings in 2008, 44 in 2009 and 42 in 2010. Those activities also listed on the respective annual Training Schedule were paid for at day worker overtime rates; with one or two exceptions, the rest were at straight time and one-half.

The department has also established a 12-member Radiological Field Team, drawn from the membership of the Regional Hazardous Materials Response Team.

As indicated on the 2010 annual Training Schedule, the monthly Haz-Mat Training Drill on May 4-6, 2010 was for “Radiation Field Team Training.” All twelve members of the Radiation Field Team attended and were paid as day workers (i.e., slightly more than double their platoon shift wage). The 14 members of the Haz-Mat Team who were not on the Radiation Field Team were paid at regular time, time and one-half, through vacation or other leave, or didn’t work.

On May 12, 2010, the State of Wisconsin contracted with the City to formally expand the responsibilities of the Regional Hazardous Materials Response Team to include radiological events through creation of a Radiological Field Team, one of only two in the state. The contract between the city and state provided, in part, as follows:

ARTICLE 4. **TRAINING AND CERTIFICATION**

The DHS (Wisconsin Department of Health Services) is responsible for providing periodic training to the radiological field teams. Specifically, the DHS Radiation Protection Section will provide periodic training opportunities to ensure that all field team personnel receive necessary training and certification. Contractor (La Crosse Fire Department) agrees and understands that all radiological field team personnel shall attend necessary field team training and refresher to ensure certification for radiological field team response. Any field team personnel who have not attended or completed the required training will not be allowed to participate in a scheduled exercise. Radiological personnel shall also keep current any state required certifications.

In July, 2010, members of the Radiological Field Team attended a two-day radiological training exercise at the Prairie Island Nuclear Facility, outside the walls of Red Wing, MN, which had not been included on the Regional Hazardous Materials Team training schedule. Team members who were off duty were paid the special overtime premium at the day worker rate.

Current La Crosse Fire Chief Gregg Cleveland subsequently became aware that off-duty Radiological Team members had been paid as day workers for the July training. He met with Local 127 President Jeff Murphy on August 19, at which time he told Murphy he would

not pay off-duty personnel as day workers to attend Radiological Field Team trainings, because that was not considered “Core Team” training. Cleveland wrote Murphy on August 27, as follows:

This memorandum is a follow up to our initial discussion of Thursday, August 19, 2010 regarding the pay for members of the hazardous materials team that participate in the radiological program.

Pay for employees who attend these classes will not be paid at time and one-half of the day rate because this training is not considered core team training. Attendance at radiological training will be paid at their time and one-half rate if they are not on duty.

This is consistent with the Addendum for Regional Hazardous Materials Response Team agreement. This agreement states that the time and one-half times the day rate is paid for core team drills. Radiological team training is not for all team members and is not conducted as a core team drill, so therefore it is compensated at the normal time and one-half rate for off-duty participation.

While there may have been some instances where team members have been compensated at the incorrect rate, it is not my intention to recover any overpayments that may have occurred. From this date forward team members shall be compensated at time and one-half at the day rate for all core team drills only. Any other training will be compensated at the normal time and one-half rate for off-duty members participating.

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

On August 30, Murphy filed a grievance, which read in part as follows:

Nature of Grievance: Chief Cleveland stated on 8/19/10 and followed up with a letter that Radiological Training will not be paid at the day worker overtime rate as defined in the Regional Hazardous Materials Response Team Addendum to the collective bargaining agreement. The fifth paragraph of the addendum reads that “Off duty Hazardous Materials Team members shall be considered day workers after reporting for drill or Level A responses effective January 1, 2004.”

Clause of Contract Violated: Regional Hazardous Materials Response Team Addendum to the collective bargaining agreement.

Settlement Desired: Day worker overtime rate paid on all radiological training and drills.

The grievance proceeded through the process. Following a meeting on September 23, Human Resources Director Wendy Oestreich replied on October 28, as follows:

...

Grievant indicates that he was informed by Chief Cleveland that “Radiological Training will not be paid at the day worker overtime rate as defined in the Regional Hazardous Materials Response Team Addendum to the collective bargaining agreement.” Clause of contract violated is noted as the Regional Hazardous Materials Response Team Addendum to the collective bargaining agreement. The settlement desired by the grievant is “day worker overtime rate paid on all radiological training and drills.”

The letter from the Chief, dated August 27, 2010, states, “pay for employees who attend these classes” (*referring to radiological training per grievance*) “will not be paid at time and one-half of the day rate because this training is not considered core team training. Attendance at radiological training will be paid at their time and one-half rate if they are not on duty.” The letter further states “from this date forward team members shall be compensated at time and one-half at the day rate for all core team drills only. Any other training will be compensated at the normal time and one-half rate for off-duty members participating.” The addendum clearly states “we drill once a month.” The City further noted that per the addendum, Level A responses are paid at the day rate, at time and one-half.

The City believes we have complied with the Regional Hazardous Materials Response Team Addendum, therefor the grievance is denied.

As indicated on the annual Training Schedule exhibit, the topic for the HazMat Core Team Drill for September 27, 2010, was “Radiation.” All 25 members of the HazMat team attended. Eleven were paid “HAZMAT DAYS 135.5,” nine were paid “reg 1416,” two “didn’t work,” and one was paid “reg 15 8.” Not all the employees who were paid as day workers were on the Radiological Field Team roster, and not all the employees on that roster were paid as day workers.

The grievance was subsequently advanced to arbitration.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Association asserts and avers as follows:

The parties intended that members of the Regional Hazardous Materials Response Team, also known as the Hazardous Materials Core Team Members, receive double time for all off duty drills. The October 20, 1997 side letter concerning Participation on Special Teams sets an overtime training floor of at least 45 hours of training for each core team member. It is well-established that side letters such as this are grievable.

In 2004 the parties agreed to compensation for employee participation on the Regional Hazardous Materials Response Team. They agreed that "Off duty Hazardous Materials Team members shall be considered day workers after reporting for drill or Level A response effective January 1, 2004." This Addendum defined overtime for members of the Hazardous Materials Team as double time. The parties also agreed to remove the employer's comment that the employees "drill once a month."

After initially paying members of the Hazardous Materials Team Radiological Field Team the proper double time, Fire Chief reversed himself, contending that this was not considered core team training. Radiological Field Team members were only paid their time and one-half rate for training when not on duty.

If the parties had intended to limit double pay to nothing more than single monthly drills they could easily have drafted such a limitation. They did not, and they did remove the City's reference to drilling once a month. There was no meeting of the minds along the lines of the City's interpretation.

The City knows that the Association never agreed to its limitation; if it had, the language would have been included in the agreement, but it was not. The intent to expand the application of double time rate prevailed over the intent to restrict its use. The City is attempting to secure in arbitration what it could not get through negotiation.

The City's claim that Radiological Team Training is not Regional Response Hazardous Materials Core Training compensable at double time must fail. The City's own hearing exhibits refutes its assertion. Members of the Radiological Team are also members of the Hazardous Materials team. And they have previously been paid double time for radiological team training, even if no other members of the Hazardous Materials Response Team participated.

The City has attempted to change the historical application of the Addendum; where it previously conceded such training was to be paid at double time, the City in August 2010 changed its mind and attempted to unilaterally rewrite and redefine the agreement. The effort should be rejected, the grievance sustained, and the members of the bargaining unit made whole.

In support of its position that the grievance should be denied, the City asserts and avers as follows:

The threshold issue is whether this grievance is arbitrable. The Union erroneously describes the Addendum as an addendum to the collective bargaining agreement, when in fact it is an addendum to a contract between the State and the City. The addendum was never intended to be attached to the collective bargaining agreement and it never was attached.

The October 20, 1997 memo provides that no employee may receive more than one special premium pay unless there aren't enough applicants for special team membership. The Union remedy of providing double time pay for all radiological training and drills would be inconsistent with the restriction capping double-pay to one drill a month.

The addendum does not obligate the City to pay overtime at the day worker (double time) rate for all radiological field team training. Double-time pay is limited to Core Team members attending core team drills, just as Core Team members who are also members of the Cold Water Rescue Team don't get double time for attending that team's drills.

None of the versions of the addendum referred to the Radiological Team because it did not exist at that time. When the City created such a team at the state's encouragement, two separate contracts were established. But here the Union is seeking double-time pay under the 2004 Hazardous Materials Response Team Addendum for Radiological Field Team Work performed by Core Team members who happen to also be Radiological Field Team members. But these are different teams with different training objectives. The roles are not interchangeable and Radiological Field Team members are not due double-time for all radiological training merely because they are also members of the Hazardous Materials Core Team.

A yearly Haz-Mat Training Drill Schedule was created precisely to distinguish those drills from other training sessions. Also, they were scheduled as equally as possible on all three shifts so that two-thirds of the members would be off-duty and have equal access to double-pay. The City has not paid double-pay for training sessions not on the annual Haz-Mat training schedule.

The bargaining history, particularly the notes from Union vice president Buley, indicate that once-a-month drills was the standard upon which the addendum was based.

Because the City does not have parity between its police and fire labor agreements, it made sense for the addendum to the state contract to avoid advertising the double-time payments.

The final paragraph of the addendum also limits payments to the availability of funds. It would be counter-intuitive for the parties to have the double-pay provisions be expanded or open-ended, as the Union proposes.

Despite the Union's repeated references to the City making "numerous mistakes," there is no evidence that the City has paid overtime in an arbitrary, capricious or discriminatory manner. The Union's attempt to discredit the City's overtime records actually supports the City's contention that there was no past practice of paying double-time for anything other than monthly Haz Mat training drills, and was instead a practice of restricting overtime to those drills. The Union failed to show any pattern or practice of paying double-time to Radiological Field Team members unless they were also Haz Mat Core Team members attending Haz Mat Core Team drills.

There is no outside regulation obliging the City to pay double-time for attendance at radiological training and drills.

The collective bargaining agreement was not violated. An addendum to the City/state contract calling for staffing and funding a Regional Hazardous Materials Team is of dubious relevance to the grievance and, if relevant, was not violated. There is no evidence the City has paid overtime improperly.

In response, the Association posits further as follows:

The City's attempt to separate the Radiological Field Team from the Hazardous Materials Core Team does not pass muster. Just as the special teams are still part of the overall football team, so too is the Radiological Field Team a subset of the Haz Mat Core Team. Response to a radiological incident is a response to a hazardous material incident, and is made by the Hazardous Materials Response Team. It follows that drills to prepare for response to radiological incidents are drills to prepare for hazardous materials incidents. The statute itself supports this conclusion. Radiation training has long been considered training of the hazardous materials response team, and the City's own training schedule defeats its argument that the Radiological and Hazardous Materials Teams are two different teams.

Radiation training occurred in 2008 and twice in 2010, and was considered Hazardous Materials Core Team Training. The City cannot sustain this argument for very long. In May 2010, the only people attending what was admittedly a Hazardous Materials Core Team drill were members of the Radiological Field Team. If Radiological Field Team training were not a Hazardous Materials Core Team drill, why did the Fire Chief treat it as such?

The Radiological Field Team is part of the Hazardous Materials Core Team; Radiological Field Team training is thus a Hazardous Materials Core team drill, paid for at double-time. The language of the addendum applies, and not the limitations the City wants the arbitrator to write into the collective bargaining agreement.

The fact that the Radiological Field Team did not exist when the Addendum was negotiated does not support the City's disingenuous argument that the grievance should be denied.

Further, the argument that overtime payments are limited to once a month must also fail, because the City did indeed have an insufficient number of applicants for special team membership, thus making the exception apply and allowing more than one overtime payment. That is why the parties negotiated the Addendum that modifies the terms of the side letter.

The City further errs in making a strained argument at the eleventh hour that the grievance is not arbitrable because the Addendum is somehow not enforceable as a component to the collective bargaining agreement. Yet the dispute is both substantively and procedurally arbitrable, as is clearly found in the City's initial response. Rather than claim the Addendum was not enforceable, the City claimed its actions complied with the Addendum

The City should be ordered to comply with the contract and directed to make members of the Haz Mat Core Team who attended off duty Radiological Field Team training whole by paying them the day worker rate for off-duty drill.

In response, the City posits further as follows:

The grievance alleges a violation of the 2004 Addendum to the contract between the state and City, which was never intended to be, and never was, attached to the collective bargaining agreement. It was drafted several months after the voluntary settlement in 2004. Since a grievance is a matter involving the interpretation, application or enforcement of the collective bargaining agreement, how can a document deliberately excluded from the collective bargaining agreement be covered by the grievance procedure?

The 1997 memo acknowledges funding limits and caps double-pay at once a month.

There was a six-year time lapse between the 2004 Addendum and the creation of the Radiological Field Services Team. How could it plausibly be argued that a 2004 Addendum for the Hazardous Materials Team set the compensation rate for Radiological Field Services Team members?

The Union errs in arguing that since all members of the Radiological team are also members of the Haz Mat team, all Radiological training is also Haz Mat training. But there are a number of teams, all with different responsibilities and different compensation schemes. What each team member is paid depends on which team is meeting.

The Union further errs in asserting a “widespread practice” of paying double-time for training and drills. Yet the Union offered no payroll verification of any such practice. If Radiological Field Services team training is identified as a Haz Mat Core Team monthly drill, Haz Mat team members (who may or may not also be Radiological team members) are eligible for double-pay. But, conversely, if the Radiological training is *not* a Haz Mat core team drill, but only a Radiological training for the Radiological team, there is no duty to pay double-time to those team members, and no duty to pay anything to Haz Mat team members who are not also on the Radiological team.

DISCUSSION

This grievance requires interpretation of the city’s agreement to pay a premium overtime rate for “off duty Hazardous Materials Team members ... reporting for drill or Level A responses effective January 1, 2004.” Elements of each aspect – who the “Hazardous Material Team members” are, and what “reporting for drill” means – figure in the analysis.

But because that agreement is in an addendum to a contract between the city and state, rather than to the collective bargaining agreement between the city and the association, the city first contends the grievance is not even arbitrable.

The city is correct that the labor agreement defines a grievance as “... any matter involving the interpretation, application, or enforcement of this agreement,” and that the addendum has been memorialized in a different manner. The city is therefore also correct that the association misstated the case when its grievance identified the Addendum as being “to [the] collective bargaining agreement.” On its face, it is not.

But at its essence, it is. Which is why the city which errs most fundamentally in making this argument.

Article 16 of the collective bargaining agreement sets how overtime is assigned and paid; an understanding about a modification of that provision would customarily and ordinarily be attached to the agreement – just as the original statement on compensation for overtime training for Hazardous Material, High Angle and Cold Water teams has been appended to the collective bargaining agreement since 1997.

But the relationship between the addendum and the collective bargaining agreement is more than just customary: the city *knows* that the addendum was not negotiated between the city and state, but was negotiated between the city and the association. The relationship is not just implicit, but explicitly stated in its very first paragraph:

This memorandum sets forth those agreements reached during the term of the 2002-2004 collective bargaining agreement between the City of La Crosse and IAFF Local #127 regarding compensation for employees assigned to the Regional Hazardous Materials Response Team.

The city cannot reasonably argue that the Addendum is not effectively a memorandum to the collective bargaining agreement.

The city *also* knows that the only reason the Addendum was incorporated into the contract between the city and state, rather than in the labor agreement between city and association, was so the city could keep it hidden, primarily from the police union. The city acknowledged this in its testimony and written argument. I am sure the city did not also intend to immunize the provisions of the addendum from the grievance process.

The city intentionally sought to conceal the details of the Addendum. It cannot now benefit from that obfuscation by having the grievance summarily dismissed on a hyper-technicality.

Moreover, the city's Human Resource's Director, Ms. Oestreich, essentially agreed the Addendum was valid and enforceable in her October 28 reply, in which she concluded that the city believed it had "complied with the Regional Hazardous Materials Response Team Addendum, therefore the grievance is denied." The city simply cannot now contend it did not have to comply with the Addendum.

The city also argues that the 2004 Addendum cannot establish the pay rate for activities which were not envisioned at that time, and which did not occur until 2010. But that argument ignores the fact that the collective bargaining agreement is a living document, and that subsequent developments supplement the *status quo ante*. The parties are presumed to know the elements to their agreement, and anticipate how an event in 2010 will be understood in light of the pre-existing terms. When Chief Cleveland contracted with the state for Radiological Field Team activities in 2010, he did so under a status quo that reflected both the 1997 memorandum and the 2004 addendum. If the facts of 2010 conform to those of 1997 and 2004, the premium payment would be authorized, regardless of its later development.

I also reject the city's argument that payment is barred because of the limitation expressed in the Addendum that payment is "subject to funds available" between the city and state. While such limitation is obviously relevant to the program's administration, there is nothing in the record to support a claim that there were insufficient funds to pay the wages as sought by the association.

I do not find support in the record for the city's assertions about members of the Haz-Mat Core Team also serving on the Cold Water or High Angle/Confined Spaces Rescue Teams. The record shows membership on the Haz-Mat Core Team to be a requirement for being on the Radiological team, but not any relationship between the Haz-Mat team and either Rescue Team.

I find the record also contradicts the city's stated understanding of the actual terms of the addendum. In her October 28, 2010 response, Oestreich wrote, "(t)he addendum clearly states 'we drill once a month,'" as the city had initially proposed in 2004. City witnesses also testified that this original version of the addendum, which included the disputed parenthetical statements, was what it found in the files, and which it identified as the document as filed with the state.

But that is not accurate. The document which the city submitted to the state clearly *removed* the statement "we drill once a month," as the association had demanded.

I agree with the city that neither state nor federal statutes or regulations require the payments as sought by the association.

I do not agree with the association's assertion that the city initially agreed that Radiological team training was to be paid for at double time, and that Chief Cleveland "subsequently reversed himself."

There were two radiological training activities in 2010 prior to submission of the grievance. In May, there was a three-day activity that had been listed on the annual "Training Schedule" exhibit, for which members of the Radiological Field Team were paid as day workers, and those who were not members were paid otherwise. In July, members of the Radiological Field Team who attended a two-day exercise at the Prairie Island Nuclear Facility – which had not been included on the annual "Training Schedule" – were paid overtime at the day worker rate.

There is no evidence senior department management was aware that this training would be paid for at the special overtime premium. There is evidence that Chief Cleveland did not find out about this payment until August, and that when he did he immediately informed the association he did not believe the special overtime premium was called for under the Addendum. Given the alacrity with which Cleveland challenged paying the employees as day workers, I do not believe the initial payment of the special double-time premium reflected a considered decision by management that such payments were proper and appropriate.

The association also argues unity of identity and bargaining history.

The bargaining history certainly supports the association, although not to the extent that the association claims. The city did propose adding the parenthetical statement "We drill once a month," the association did object, the phrase was not included. Inclusion of the phrase

would have been largely dispositive against the grievance, so its absence is very helpful to the association. But I do not believe its absence is as important as its inclusion would have been, and think the association's comment that, "plainly the intent to expand prevailed..." overstates the significance of the exchange.

I also appreciate the association's argument about the overlapping identity of Haz-Mat and Radiological team personnel, especially its athletic analogy. Yes, to be on the kicking squad, you first have to be on the full football team; yes, to be on the radiological team, you first have to be on the full Haz-Mat team.

But even with membership on the Haz-Mat team a requirement for being on the Radiological team, the question remains whether the employees are acting as Haz-Mat team members when attending Radiological team drills. While membership on the Haz-Mat team is a *requirement* for being on the Radiological team, it is equally true that members of the Haz-Mat team are *not* required to also be on the Radiological team. Indeed, fewer than half of them – 12 of 25 – are.

The association seeks the special premium of day worker overtime for a purpose it acknowledges did not exist when the addendum was adopted in 2004. But for the premium to be proper, the new purpose – radiological field training -- must be consistent with the existing agreement.

Certainly, the subject matter conforms; even prior to the contract with the state, the Haz-Mat team drilled and trained for radiological events.

But the purpose of the special premium in the addendum is to support Haz-Mat Team Training. That requires involvement of the entire Haz-Mat team, not just those on the Radiological team. But with less than half of the Haz-Mat team on the Radiological team, it cannot be said that Radiological team training satisfies the broader Haz-Mat training need.

Members of the Radiological team maintain their status on the Haz-Mat team throughout, but they are not acting as "Hazardous Materials Team members" when they attend Radiological team training or drills.

The nature of the work has also been at issue. The association argues for a broad application, so that all training is covered. The city is restrictive, limited to designated monthly drills.

Chief Cleveland's testimony that he regards the terms "drill" and "training" as interchangeable is awkward for the city's argument that they are not. The documentary evidence is more supportive of the city's case.

First, there is Article 27 of the collective bargaining agreement itself, *Training Opportunities and Employee Development*, which explicitly defines the activities referenced in the October 27, 1997 letter as "core team training," as follows:

These funds are for the purpose of funding all training for Local 127 members excluding *core team training described in the letter dated October 27, 1997* and addendum, EMT recertification, and training that is reimbursed from outside sources. (*emphasis added*).

The collective bargaining agreement thus defines the 1997 Memorandum as describing core team training, providing significant support for the employer's argument.

Other record evidence includes the dozens of entries each year on the "Core Drills/Additional Training Dates" exhibit that were not considered drills for double-time purposes.

I also find particularly convincing the four pages entitled "La Crosee Fire Department Regional Haz-Mat Team Training Schedule" for the years 2004 and 2008-2010, showing a single activity each month, distributed roughly equally over all three platoon shifts. Each page also bears the notation, "All drills will begin at 09:00 hrs and start at Station 1." As the city reasonably asks, why would the department annual prepare and publish such a schedule, with that notation, other than to designate what training activities were to be considered a "drill" under the Addendum? I cannot think of an answer.

The association has correctly noted times when the city paid double-time for activities it now says were properly only entitled to time and one-half, and other instances when the city deviated from its stated policy. In any complex payroll and scheduling system, such as that involved in tracking the training activities of various teams operating under several contracts, there are going to be occasional mistakes. A code will be entered incorrectly, a policy will be misunderstood, an error might or might not be noted and rectified.

But what really matters is the essence of the agreement, as reflected by the parties' understandings and actions. While the association may maintain there was no mutual understanding as to the nature of the work at issue, I believe the record establishes that the parties have generally interpreted "reporting for drill" under the 2004 Agreement as the monthly drills listed on the annual Training Schedule.

Accordingly, pursuant to the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

1. That members of the Radiological Field Team who attend Radiological Field Team training and drills are not considered "Hazardous Materials Team members" for purposes of calculating overtime payments under the 2004 Addendum.

2. That “reporting for drill’ under the 2004 Addendum refers to the monthly listings on the annual “Haz-Mat Team Training Schedule.”
3. That the grievance is denied.

Dated at Madison, Wisconsin, this 25th day of October, 2011.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator