BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 321, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS

and

CITY OF RACINE

Case 817
No. 71418
MA-15135

(72 Hour Recall Grievance)

Appearances:

Mr. Timothy E. Hawks, Hawks Quindel, S.C., Attorneys at Law, 222 East Erie Street, Suite 210, Milwaukee, Wisconsin 53201-0442, appeared on behalf of the Union.

Mr. Scott Letteney, Deputy City Attorney, City of Racine, City Hall, 730 Washington Avenue, Racine, Wisconsin 53403, appeared on behalf of the City.

ARBITRATION AWARD

On January 24, 2012, Local 321, International Association of Firefighters and the City of Racine filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. A hearing was conducted on March 23, 2012 in Racine, Wisconsin. A transcript of the proceedings was taken and distributed by April 9, 2012. Post-hearing briefs were filed by May 5, 2012.

This Award addresses the consequences of refusing a call back to work.

BACKGROUND AND FACTS

The Racine Fire Department uses the California Plan to schedule its Firefighters. Under the California Plan, Firefighters are scheduled on a 9 day cycle. Firefighters are scheduled to work days 1, 3 and 5 of the 9 day cycle. A day consists of 24 consecutive hours. Days

2,4,6,7,8, and 9 are scheduled days off. The City runs 3 shifts. Each shift has a Battalion Chief, who is in charge, and who is tasked with calling in firefighters when there is a need to do so.

The events giving rise to this grievance are not in dispute. Eric Rasmussen is a private in the Racine Fire Department. Rasmussen was scheduled to work a normal schedule, as described above. Rasmussen had worked a trade with another Firefighter which involved him working on October 6, 2011, which was day number 7 of his work cycle. On October 5 Rasmussen was called in to work, due to a staffing shortage. Rasmussen refused the call, noting that he was scheduled to work on October 4, that he had traded to work on October 6, and if he came in to work on October 5, he would be working 72 continuous hours.

As a consequence of his refusal, Rasmussen was moved to the bottom of the Recall list. The Union takes issue with Rasmussen being moved to the bottom of the Recall list, and contends that he should have been left where he was, at or near the top of the list.

The City recalls firefighters from a constantly updated recall list. If a Firefighter accepts a recall or declines a recall for reasons not spelled out in Article XXVII, par. 8, which is set forth below, he or she is moved to the bottom of the recall list. A firefighter is free to decline a recall, and not be moved to the bottom of the list, under circumstances spelled out in Article XXVII, par. 8. The list recycles approximately twice in a calendar year. In essence, by declining the call-in Rasmussen lost one of the two opportunities he otherwise would have had for a 1 year period.

A grievance was filed, and denied, on October 28, 2011. Subsequent exchanges were made, without a resolution of the grievance.

The Union introduced evidence that Article XXVII, par. 8, which is set forth below, has a word missing, allegedly as a result of clerical error, and argues that the contract should be reformed. Article XXVII was amended in the negotiations leading to a 2006 – 2008 collective bargaining agreement. The revision was prompted by a proposal made by the City. That proposal, dated March 29, 2006 consisted of the following:

10. Revise the Recall Procedure as follows:

> Recall Procedure: Members shall be called back at the discretion of the Chief. Recalls shall be taken from the recall list which will be by the last recall date or by date of hire. A message will be left on an answering machine or voice mail. When the member calls back, if the position is filled, no compensation is due. A member's name will not be removed from the recall list if he/she refuses the call-back because the day for which he/she was called required that he/she work while on vacation or holiday or if the recall creates 72 hours or more continuous hours of work. Provided there is an opening available, any Firefighter called back may be assigned to work within his/her designated rank. Any call back of

less than 17 hours will not remove an employee from his/her position on the recall list.

The underlined portions of the proposal reflect areas of proposed change. The proposal was agreed upon, and became a part of the tentative agreement of the parties. The record establishes that Vic Long, the chief negotiator for the City, prepared summaries of the tentative agreements on an ongoing basis, and provided those summaries to the union. The record contains four such summaries. The first such summary, dated April 12, 2006 included the following tentative agreement:

Amend ARTICLE XXVII (8) as follows:

Recall Procedure: Members shall be called back at the discretion of the Chief. Recalls shall be taken from the recall list which will be by the last recall date or by date of hire. A message will be left on an answering machine or voice mail. When the member calls back, if the position is filled, no compensation is due. A member's name will not be removed from the recall list if he/she refuses the call-back because the day for which he/she was called require that he/she work while on vacation or holiday or if the recall creates 72 hours or more continuous hours of work. Provided there is an opening available, any Firefighter called back may be assigned to work within his/her designated rank. Any call back of less than 17 hours will not remove an employee from his/her position on the recall list.

The T.A. is identical to the previous employer proposal. Three other T.A. documents were created by the employer. They are dated April 18, May 17 and May 24, 2006. Each contains an identical version of the tentative agreement.

What is common about each of these documents is that each of them contain the word "or" in the sentence identifying when a refusal will not lead to a firefighters name being removed from the recall list. The employer proposal and the T.A. documents each provide that a firefighter will not be removed from the recall list for refusing a call back "… while on vacation or holiday or (emphasis added) if the recall creates 72 hours or more continuous hours of work."

When the 2006 collective bargaining agreement was printed the word "or" was missing. The text of that agreement was identical to the text of Article XXVII, par. 8, set forth below. There is no explanation as to how the word "or" came to be deleted. The contract text has not changed from 2006 -2008 to the current contract, 2011 – 2012.

The Union offered evidence as to how the clause has been administered. Mark Villalpando testified that he had declined a call back under the same circumstances, and had not lost his position on the call back list. On cross-examination Villalpando indicated that the event(s) to which he referred occurred 5-6 years ago. The Union also called Rick Moriarity to

testify. Mr. Moriarity, who is retired, had been a Battalion Chief for the 11 years which preceded his retirement in January, 2011. As a part of his responsibilities he recalled firefighters on a routine basis. It was his testimony that there were numerous occasions in which firefighters declined call backs due to 72 continuous hour objections, frequently involving trades, and no one was ever sent to the bottom of the recall list.

On cross exam, Moriarity produced several names of firefighters who had declined call backs. Many of the events he described occurred "several years ago".

The City offered evidence as to how the clause has been administered. James Madisen, a Battalion Chief, testified on behalf of the City. It was his testimony that the recall list is computerized and depending on how a refusal is coded either leaves a firefighter in place or sends the firefighter to the bottom of the list. Madisen testified that there were at least two firefighters sent to the bottom of the list in calendar 2011. Rasmussen was sent to the bottom of the list on October 5. A firefighter named Romeis was sent to the bottom of the list on November 18, 2011.

Madisen also testified that there were a number of firefighters who worked 72 continuous hours, including some who did so as a result of trades. On cross exam Madisen testified that a firefighter can refuse a call in on a vacation day or a holiday, without penalty, regardless of whether or not 72 continuous hours are worked. He further testified that when he is recalling firefighters he avoids 72 continuous hours. If he sees that a firefighter is scheduled the day before and the day after he will simply not call that firefighter to come in.

It was his testimony that the language in question was designed to be applicable to days 2 and 4 of the schedule. He testified that it was not intended to be applicable to the 4 day block of scheduled off days. He indicated this dispute arises in the four day block because the scheduler may not be aware of trade days that create the potential for a call back to create a 72 hour continuous work schedule.

ISSUE

The parties stipulated the issue to be:

> Did the employer violate the collective bargaining agreement when it removed Private Rasmussen's name from the top of the recall list and placed him on the bottom of the recall list?
>
> If so, what is the remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE VI
MANAGEMENT RIGHTS

The City possesses the sole right to operate the Racine Fire Department and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this Agreement and the past practices within the Racine Fire Department unless the past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules of the Racine Fire Department. These rights, which are normally exercised by the Chief of the Racine Fire Department, include, but are not limited to, the following:

A) To direct all operations of the Racine Fire Department.

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

. . .

ARTICLE XII
ARBITRATION

. . .

5) Scope of Award: The decision of the Arbitrator shall be limited to the grievance and shall be restricted solely to the interpretation of the Agreement and such past practices as are existent in the Department unless said practices have been modified pursuant to Article VI of this Agreement. The Arbitrator shall not modify, add to or delete from the express terms of this Agreement or past practices unless said practices have been amended pursuant to the terms of Article VI of this Agreement. The determination of the Arbitrator shall be final and binding upon the parties.

. . .

ARTICLE XXVII

. . .

8) Recall Procedure: Members shall be called back at the discretion of the Chief. Recalls shall be taken from the recall list which will be by the last recall date or by date of hire. A message will be left on an answering machine or voice mail. When the member calls back, if the position is filled, no compensation is due. A member's name will not be removed from the recall list if he/she refuses the call back because the day for which he/she was called required that he/she work while on vacation or holiday if the recall creates 72 hours or more hours of continuous work. Provided there is an opening available, any Firefighter called back may be assigned to work within his/her designated rank. Any call back of less than 17 hours will not remove an employee from his/her position on the recall list.

. . .

ARTICLE XXIX
WORK OUT OF CLASS AND TRADES

. . .

The City and Local 321, IAFF, agree that the parties are not bound by past practices, if any, concerning application of work trades, and such past practices are hereby terminated.

. . .

POSITIONS OF THE PARTIES

It is the position of the Union that the failure to include the word "or" in the 2006 - 2008 contract was a "scrivener's" mistake, a mutual mistake and asks the Arbitrator to reform the contract to correct the error. As corrected, the Union contends that the language is clear and unambiguous. The Union reviews the history of the City proposal and the various tentative agreements. Each points to an agreement to include the word "or" in the contract. The Union points to testimony of its bargaining team members that no one from the City ever indicated that the terms of the tentative agreement were to be modified.

The Union cites authority for the proposition that where there is a mutual mistake as to the terms of the contract, the appropriate remedy is for the Arbitrator to reform the written provisions of the contract to conform to the intent of the parties.

The Union argues that the clause, as written, is both ambiguous, and contradicts departmental policy. The Union points to testimony from City witnesses that firefighters are not called back on days 2 or 4 because to do so would cause them to work 72 hours in a row. If the clause were read literally, it would mean that a firefighter would be bumped if he or she refused a recall on a vacation or holiday unless it would also have the consequence of causing a firefighter to work 72 hours in a row. That is not how the provision is administered.

The Union points to Chief Madisen's testimony that it was his recollection that the language was only to be applicable to days 2 and 4. The Union contends that this testimony only makes sense if the word "or" is included.

The Union contends that the past practice of the parties is to administer the contract consistent with the Union's interpretation.

It is the view of the City that the terms of the collective bargaining agreement are clear and unambiguous. The City argues that the Union is attempting to use parole evidence to re write the agreement.

The City notes the tentative agreement documents drawn from the 2006 negotiations, but contends that none of the documents is signed and further contends that there is no evidence that those documents represent the actual agreement of the parties beyond the self-serving testimony of union members.

The City takes issue with the existence of a practice favoring the union. The City notes that Union witnesses could not identify specific dates, and that many of the instances which were referenced occurred before 2008.

The City contends that the language is clear as written. The right to refuse a call back and not be sent to the bottom of the recall list is tied to a vacation day or a holiday. The City cites authority for the proposition that if the language is clear and unambiguous an Arbitrator should not look to extrinsic evidence to strip the agreement of its plain or ordinary meaning.

The City argues that the Arbitrator cannot consider parol evidence in this proceeding. The employer cites the Parol Evidence Rule:

> When parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written or oral agreement in the absence of fraud, duress, or mutual mistake.

It is the position of the City that there is no evidence suggesting that the parties intended anything other than what was written. As to the alleged tentative agreements, the City contends that there is nothing to suggest that they were an actual agreement between the

parties. The City does not consider them as evidence of anything, and believes they are supported by purely self-serving testimony.

The City contends that the parol evidence offered is applicable to the 2006-2008 contract. Whatever value such evidence may have with respect to that contract requires a stretch of monumental proportions to rewrite a contract two generations hence.

The City cites Article XII, par. 5 to caution me that the parties have expressly limited the authority I exercise to "…not modify, add to or delete from the express terms of this Agreement…"

The City also points to Article XXIX for the proposition that past practices relating to work trades are terminated. The City cautions that I should not consider any past practice in this matter, since the underlying dispute arose in the context of a work trade.

DISCUSSION

I believe the record establishes that the word "or" was negotiated to be a part of the collective bargaining agreement, and subsequently deleted from the final draft of the contract. The Union introduced four separate documents, purporting to be the tentative agreement of the parties. Each contained the disputed word. Their status as tentative agreements of the parties was supported by the testimony of Union called witnesses. The City regards the exhibits as unpersuasive and the testimony as self-serving.

However, the City called two witnesses to testify, Battalion Chief James Madisen and Fire Chief Steven Hansen. Chief Madisen indicated, on cross examination, that a firefighter can refuse a call in, without consequence, if called to work on a vacation or holiday, without regard to whether it results in a 72 hour work cycle. The testimony of Fire Chief Steven Hansen confirms that fact. When asked the meaning of the "…if the recall creates 72 hours or more continuous hours of work.", Madisen indicated that he felt "This is bad language in my opinion." The essence of this testimony is that the operations reality is that the 72 continuous hours clause has no meaning.

Madisen offered insight as to the origins of the language in dispute. He offered this testimony as to the purpose of the language:

> There is a long-standing past practice of which shift is the on-call shift and that is defined in other places in the contract. But that has never been spelled out and there was no prohibition in the contract previous to '06 that said we could not call persons and bump them to the bottom of list for those two days, days 2 and 4. So my recollection—my honest recollection from 2006 when this language appeared was that this was both sides - city's and management's – effort to provide some protection for the members for that day 2 and day 4 situation.

Q: Was there an intention that applied to Days 6, 7, 8, and 9?

A: There was not, not to my recollection.

Chief Hansen concurred in this testimony.

If Madisen's and Hansen's recollection as to the purpose of the language is correct, the inclusion of the word "or" makes sense. Inclusion of the term would serve to insulate a firefighter from recall on a day sandwiched between two scheduled days. Without the word "or" the sentence does not address that scenario, and seems not to address the circumstance which prompted the proposal. Indeed, the proposal includes the word "or".

Chief Hansen testified that he was present for some of the 2006 negotiations. It was his testimony that tentative agreement summaries were prepared by Vic Long, who was the city's labor negotiator at the time.

All record testimony supports a finding that the word "or" was negotiated into the contract.

There is no explanation as to how the word "or" disappeared in the final document.

It is the view of the City that the Parol Evidence Rule operates to bar me from considering extrinsic evidence. Several cases are cited in support of this proposition: State ex rel. Journal /Sentinel, Inc. v. Pleva, 155 Wis. 2nd 704, 711, 456 N.W. 2nd 359 (1990), Huml v. Vlazny, 2006 Wi. 87, 293 Wis. 2nd 169, 716 N.W. 2nd 807, Town Bank v. City Real Estate Dev., LLC, 2010 Wi 134, 330 Wis. 2nd 340, Patti v. Western Machine Co., 72 Wis. 2nd 348, 241 N.W. 2nd 158 (1976), Yee v. Giuffre, 176 Wis. 2nd 189, 499 N.W. 2nd 926 (Ct. App. 1993), In re: Spring Valley Meats, Inc., 94 Wis. 2nd 600, 288 N.W. 2nd 852 (1980) Each of the cases cited involved the question of whether the contract language was clear and unambiguous or was susceptible to interpretation by extraneous evidence. In each instance the Court invoked the Parol Evidence Rule to exclude consideration of the extrinsic evidence in favor of clear language. None of the cases involved a claim that there was a mutual mistake.

By its own definition the Parol Evidence Rule is not intended to be applicable to situations where there exists fraud, duress or mutual mistake. The claim in this proceeding is that a mutual mistake occurred. It has always been the rule that Parol Evidence is admissible to determine whether or not there exists mutual mistake, fraud or duress. To prevail in such a claim three elements must be proved by clear, satisfactory, and convincing evidence. Those elements are (1) the parties reached an agreement; (2) the parties intended that such an agreement be included in the written expression of agreement; and (3) the oral agreement was not included in the written expression because of the mutual mistake of the parties. Frantl Indus., Inc. v. Maier Constr., Inc., 68 Wis. 2nd 590, 592-3 (1975), cited in Tyler v. Schoenherr and Associated Banc-Corp., Ct. App., No. 2011 AP 2075 (7/12/12).

I believe the elements are present in this case. The parties did come to an agreement. The various tentative agreement documents establish as much. All evidence suggests the tentative agreements were to be included in the contract. The agreement reached by the parties was in written form, and thus more defined and certain than an oral agreement. It did not reach the collective bargaining agreement by error. Contract reform is the appropriate remedy under circumstances of mutual mistake. (Tyler, *supra.*)

This outcome would follow if the contract had been unilaterally changed. The Union would have been entitled to notice of a last minute unilateral change. (Hennig v. Ahearn, 230 Wis. 2nd 149, 601 N.W. 2d 14 (Ct. App. 1999)). Reformation would also be the appropriate remedy under the circumstance of unilateral modification (Park Terrace, LLC v. Transportation Insurance Company, 338 Wis. 2nd 484 (2011).

It is the view of the City that Article XII restricts the authority of the Arbitrator to modify provisions of the contract. Specifically, Article XII prohibits the Arbitrator from adding to the express terms of the contract. The question posed in this proceeding is what are the express terms of the contract? Contract reformation asks whether or not the written agreement accurately reflects the final and complete expression of the parties agreement. (Town Bank v. City Real Estate Development, LLC., 2010 Wi. 134, 330 Wis. 2nd 340, (12/14/10)). I believe the parties negotiated a contact that included the word "or" in the operative sentence. This decision does not add to or modify that agreement.

The collective bargaining agreement calls for a Private to earn $64,318.28 annually, at the end of a 36 month period. If this case involved a misplaced decimal point, which presented that salary as $643,182.8 per year no one would be heard to argue that Article XII served as a bar to the correction of the error.

Arbitrators have generally followed the path taken by the courts in this area. Contract reformation of collective bargaining agreements have occurred following mutual mistake. See Elkouri & Elkouri, *How Arbitration Works*, 6th Edition, BNA, 2003 and 2010 Supplement; see also *The Common Law of the Workplace*, 2nd Ed., 2005, BNA.

Both parties made arguments relative to the interpretive practice surrounding the clause. In light of the above, it is not necessary to address those arguments.

AWARD

The grievance is granted.

REMEDY

Private Rasmussen is to be placed at the top of the recall list, and provided with recall opportunity(ies) consistent with this Award. Once he has exercised his rights to accept or decline recall from the top of the list, he is to be placed back on the recall list where he was at the time he was moved to the top.

Dated at Madison, Wisconsin, this 29th day of August, 2012.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

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