BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE DE PERE PROFESSIONAL FIREFIGHTERS ASSOCIATION, LOCAL 141, IAFF

and

THE CITY OF DE PERE

Case 96
No. 71577
MA-15169

Appearances:

Chad Bronkhorst, President, Green Bay Area Fire Fighters Local 141, 1570 Elizabeth Street, Green Bay, Wisconsin 54301, for the labor organization.

Judith Schmidt-Lehman, City Attorney, 335 South Broadway Street, De Pere, Wisconsin 54115, for the municipal employer.

ARBITRATION AWARD

The De Pere Professional Firefighters Association, Local 141, International Association of Fire Fighters, and the City of De Pere are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Association made a request, in which the City concurred, for the Wisconsin Employment Relations Commission to provide a panel of five commissioners and staff members from which they could select an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement relating to the City's authority to impose furloughs on members of the bargaining unit. The Commission did so, and the parties jointly selected Attorney Stuart D. Levitan, a member of the Commission's staff, as the impartial arbitrator. Hearing in the matter was held in De Pere, Wisconsin on October 25, 2012, with a stenographic transcript being made available to the parties and arbitrator by November 5. The parties filled written briefs and replies, with the last received on January 15, 2013, whereupon the record was closed.

ISSUE

The Association states the issue as,

"Did the City of De Pere violate the collective bargaining agreement between International Association of Fire Fighters Local 141 (De Pere) and the City of

De Pere when it unilaterally imposed mandatory furlough days to the members of Local 141 reducing their wages and hours of work without using the practice of good faith bargaining during a closed contract and, if so, what is the appropriate remedy?"

The City states the issue as,

"Did the City violate the CBA by implementing furloughs in accordance with Article 10?"

I state the issue as,

"Did the City violate Articles 3, 8, 10, 12 or 33 of the collective bargaining agreement between the parties when it required employees represented by IAFF Local 141 to take 48 hours of unpaid furlough in January-March, 2012? If so, what is the appropriate remedy?"

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 3 – Management Rights

The management of the City and its business and the direction of its work force is vested exclusively in the employer and that all powers, rights, authority, duties and responsibilities which the City had prior to the execution of the Agreement customarily executed by management or conferred upon and vested in it by applicable rules, regulations, and laws, and not subject of collective bargaining under Wisconsin law, are hereby retained. Such rights include, but are not limited, to the following:

a. To direct and supervise the work of its employees;
b. To hire, promote, and transfer employees;
c. To lay off employees for lack of funds or other legitimate reasons;

. . .

e. To plan, direct and control operations;
f. To determine to what extent any process, service or activity shall be added, modified or eliminated;
g. To introduce new or improved methods or facilities;

. . .

i. To schedule the hours of work;

j. To assign duties;
k. To issue and amend reasonable work rules;

. . .

ARTICLE 8 – Hours of Work

Line Personnel

The workday for line personnel shall be from 7:00 a.m. of one day to 7:00 a.m. of the succeeding day.

The normal workweek shall average fifty-six (56) hours per calendar week with a three (3) platoon system under the procedure of the California plan.

The work period shall consist of twenty-seven (27) workdays coinciding with three (3) recurring nine (9) day cycles under the schedules worked in accordance with the schedules worked by line personnel as set forth above ….

. . .

ARTICLE 10 - Reduction in Work Force

The employer shall have the right to reduce the number of jobs or the number of hours worked in any classification because of a shortage of funds, lack of work, or because of a change in organization or duties. Employees whose jobs have been eliminated or hours reduced shall have the right to bump any employee with less time in their classification or less seniority in their pay range or classifications in pay ranges below in the Department provided they are qualified and physically capable of performing the duties of the lower pay classification. An employee, when exercising such bumping privileges, shall be reassigned and paid at the pay range for the classification to which said employee is reassigned. Such junior employees who have lost their positions as a result of a bump shall have the right to exercise their seniority in the same manner as if their job had been eliminated or hours had been reduced. Employees who are without jobs as a result of reduction in work force shall be placed on a reemployment list. Employees who do not choose to exercise their bumping rights shall also be placed on a reemployment list.

. . .

ARTICLE 12 - Salaries

The pay of employees of the Fire Department occupying classified positions shall be on the basis of the schedule herein presented. The salaries listed below are on an annual basis to be paid biweekly. The rates of pay prescribed herein constitute the base rate for full-time employment ….

ARTICLE 33 – Amendment Provision

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

BACKGROUND

De Pere, Wisconsin is a city in Brown County, Wisconsin, just south west of Green Bay. This grievance addresses whether the City violated its 2011-2013 collective bargaining agreement with the De Pere Professional Firefighters Association when it imposed 48 hours of unpaid furlough (two 24-hour days) on 25 members of the Association to help address a budget deficit caused by reductions in state aid and a statutory cap on property tax increases.

Consistent with the best practices of municipal management, the City has for several years had a policy of maintaining an "unassigned reserve account" at least equal to a certain percentage of general fund expenditures budgeted for the following year, to address unexpected expenses or reductions in projected revenue. Prior to 2006, City policy was to maintain that account at 25 percent. In the fall of 2006, City officials realized that in order to maintain its unassigned reserve account at that level, it would have to raise property taxes; rather than do so, the Common Council and Mayor Michael Walsh instead adopted a new policy to requiring a minimum unassigned general fund balance (the "unassigned" or "reserve account") of only 20 percent of its general fund expenditure.[1]

Prior to about 2007, the City frequently overestimated projected revenue, which it addressed the following year by applying funds from the unassigned reserve account. Bond rating agencies Moody's Investment Services and Fitch Ratings informed city officials that continuing to do so could lead to a "negative outlook" being placed on the City. A negative outlook could lead to an actual lowering of its bond rating, which would result in the city

[1] The policy and its purpose are documented in Management Communications from the City's CPA firm, "General Fund Minimum Fund Balance Policy."

having to make higher interest payments for subsequent bond issues. At no time relevant to this grievance has any rating agency placed a negative outlook on the City or lowered its bond rating.

Following the collapse of the financial and insurance industries in 2008 and the resultant recession, municipalities and other public entities faced great, sometimes insurmountable, financial strain. In 2009, a steam utility in Menasha, about 30 miles south of De Pere, defaulted on its debt. Since then, Moody's and Fitch have reinforced to De Pere officials the need for a healthy reserve account, but have declined the City's request that they state an actual preferred level for the unassigned account.

In the fall of 2011, during consideration of its 2012 budget, the City's bond rating was Aa2 (Moody's) or AA (Fitch), the third highest rating possible. [2] Its most recent audit, received that summer, showed that on December 31, 2010, the City had maintained an unassigned reserve account in its General Fund of $3,235,934, 20.6 percent of the $15,652,987 for general fund expenditures in its adopted 2011 budget. According to the audit issued in June, 2012, on December 31, 2011, "the City's unassigned general fund balance totaled $4,726,093 and was higher than 20% of the 2012 budget expenditures which totaled $3,116,328."

About $150,000 of the $1.49 million increase in the unassigned general fund account was due to the contingency fund not being drawn down because temperate weather obviated the need for snowplowing, plus other savings. The vast majority of the increase came from the fire sale of a manufacturing property in January, 2012, which caused the payment to the city of special assessments, credited to the City's accounts in 2011. Under the heading "Financial Highlights," the June, 2012 audit stated, "As of December 21, 2011, unreserved fund balance for the general fund was $4,726,093, or approximately 32% of total general fund expenditures."

As proposed by Gov. Scott Walker and enacted by the Legislature, the 2011 Wisconsin state budget significantly reduced aid to municipalities, and maintained tight restrictions on the ability of local governments to raise property taxes. The state cut the City's shared revenue by $220,139, its transportation aids by $115,000 and its recycling grants by $50,404, a total reduction of $385,543. [3]

The City also had reduced investment income; on August 4, 2011, the City's Finance Director, Joe Zegers, informed Mayor Michael Walsh, City Administrator Lawrence Delo and members of the Finance/Personnel Committee that the City had "currently earned over

[2] The City's bond rating had been at Aa3, one rank lower, until a federal directive caused a readjustment of the ratings of all public entities, effectively raising almost all of them one step.

[3] According to the minutes of the Common Council meeting of November 15, 2011, Mayor Walsh informed the Council that "the City had a $430,000 deficit to work through." Administrator Lawrence Delo testified that the state cuts totaled $460,000, and that is the figure the City cited in its brief. It is not necessary for me to determine the precise accounting of the state-imposed deficit beyond the documented $385,543.

$101,028 in investment earnings in the general fund account through June 30, 2011 while our budgeted amount is $380,000."

During preparations for the 2012 budget, city administrative staff prepared a budget which included a new garbage collection fee of $25 per container, which would have generated approximately $325,000 annually. Mayor Walsh included this revenue in the executive budget he proposed, but the Council eliminated it from the budget it enacted.

On November 15, 2011, the Common Council adopted its 2012 operating budget with several measures to reduce costs, including layoffs, leaving vacant positions unfilled, delaying equipment purchases, reducing/delaying certain maintenance expenses, reducing accounts for memberships and training, reducing accounts for operating supplies, and cutting labor costs through mandatory furloughs of all represented employees.[4] The furloughs (five unpaid 8-hour days for general employees, two unpaid 24-hour days for each of 25 fire fighters) reduced the city's labor costs by a total of $130,816, of which $32,098 ($26,256 in wages and $5,842 in FICA and pension contributions) was attributable to the fire fighters' furloughs, an average of $641.96 per furlough day. The 2012 budget also eliminated funding for one full time fire fighter position, saving the City $64,586 by laying off firefighter Tim Sinkler.[5]

To implement the furloughs, the Council at that meeting also unanimously adopted a resolution stating that "reduced funding and tax levy freeze from the state have resulted in City budget shortfalls that could be remedied by the implementation of mandatory furloughs for employees," and establishing a Mandatory Furlough Policy for all four units of represented employees.

The 2012 operating budget also provided for raises of two percent for all non-represented employees, consistent with increases for the four bargaining units, without any corresponding furloughs for the non-represented employees. The non-represented employees were also awarded six additional days of paid vacation in 2011 and ten more days in 2012 as a partial offset for new contributions to their Wisconsin Retirement System accounts they were required to make under the state Budget Repair Bill.

De Pere firefighters are on duty in 24-hour periods, starting at 7:00 a.m., working a three-platoon system (the California plan) that averages 56 hours of work in a 7-day period. They are eligible for overtime pay and compensatory time off at time and one-half for hours worked beyond the established daily and weekly schedule, and compensatory time off at straight time for certain training activities. The collective bargaining agreement defines

[4] In 2012, the City had collective bargaining agreements with IAFF Local 141, AFSCME Local 358 (the Engineering Department Union and the Municipal Employees Association) and the Wisconsin Professional Police Association. The record is silent on the relevant text in those other agreements, and as to whether any of the other unions grieved the furloughs affecting their members.

[5] The record is silent on whether Local 141 grieved this layoff.

firefighter pay as "salaries," expressed "on an annual basis to be paid biweekly." To ascertain a firefighter's hourly wage, used for calculating biweekly pay, overtime, compensatory time, or other purposes, the parties divide the listed salary by 2,912.

In addition to providing services for its residents, the City provides emergency medical services for various area municipalities. On October 5, 2011, Sarah Burdette, the clerk/administrator of the adjoining Town of Ledgeview, wrote De Pere Fire Chief Robert Kiser to inform him that she calculated the Town's 2012 expenditures for EMS services provided by the City to be $75,087, about $13,000 more than in 2011.[6] On December 2, 2011, Kiser wrote City Attorney Judith Schmidt-Lehman to inform her that the Village of Ashwaubenon, which also adjoins the City, had requested an intergovernmental agreement under which it would pay the City for emergency medical services to the southern end of the Village. Kiser informed Schmidt-Lehman the basic call volume fee would be $300 for each of 60 calls, for an annual fee to the City of $18,000. The City and Village executed such an Intergovernmental Agreement, effective April 1, 2012 through December 31, 2017, under which the Village would pay the City $13,500 in 2012 and $18,000 in 2013, with future charges based on a stated formula. The agreement also provided for the City to invoice each individual user of EMS services, pursuant to an adopted schedule, in addition to the Service Fee charged the Village.[7] The fees which the City received for these EMS services were deposited in the City's general fund. The revenue from the agreement with Ashwaubenon was not known to the Common Council when it adopted the 2012 budget.

On December 8, 2011, city staff met with representatives of Local 141 and unofficially proposed that the City would reinstate the deleted firefighter position for part of 2012, taking $28,000 from eliminating the Paid on Call positions and about $37,000 from the revenue from Ashwaubenon, and that if another firefighter retired by the time the funds lapsed, the firefighter whose position was restored would not be laid off; if there were not a retirement by the time the funds lapsed, the firefighter would be laid off for the remainder of 2012. In exchange, the City wanted Local 141 to agree not to grieve the two furlough days contained in the budget. On December 15, Local 141 declined the proposal.

On December 28, 2011, Fire Chief Kiser issued a memorandum listing the dates on which members of "C Shift" would be required to take two days of involuntary furloughs each between January 3 and March 17, 2012. On January 3, 2012, he issued a similar memo for members of "A Shift," covering the period January 6 – March 22, 2012. On January 6, he issued a revised memo for members of "B Shift," covering the period January 27 – March 16, 2012. Kiser chose to implement the furloughs during the first quarter of the year because that is the time of the lowest demand for vacation and thus the easiest to schedule the furloughs without creating problems for adequate coverage.

---

[6] Kiser had not been aware of the latest population statistics, which indicated the service area grew from 4618 residents to 5562, an increase of twenty percent.

[7] The primary fees in 2012 ranged from $95.00 for basic life support with no transport to $655.00 for Advanced Life Support with transport, with annual increases thereafter based on changes to the Consumer Price Index.

When scheduled for furlough days, none of the firefighters exercised their contractual right to bump less-senior employees. Each of the 25 represented fire fighters took two 24-hours days of unpaid furlough between January 3 – March 22, 2012.

IAFF Local 141 filed timely grievances on each furlough. Fire Chief Kiser denied all grievances, with the following standard language:

> The management of the City and its business and the direction of its work force is vested exclusively in the City and is so recognized under Article 3 of the Collective Bargaining Agreement between the parties. In particular:
>
> > ARTICLE 3 Management Rights
> >
> > The management of the City and its business and the direction of its work force is vested exclusively in the employer and that all powers, rights, authority, duties and responsibilities which the City had prior to the execution of the Agreement customarily executed by management or conferred upon and vested in it by applicable rules, regulations, and laws, and not subject of collective bargaining under Wisconsin law, are hereby retained. Such rights include, but are not limited, to the following:
> >
> > a. To direct and supervise the work of its employees;
> > b. To hire, promote, and transfer employees;
> > c. To lay off employees for lack of funds or other legitimate reasons;
> >
> > . . .
> >
> > e. To plan, direct and control operations;
> > f. To determine to what extent any process, service or activity shall be added, modified or eliminated;
> > g. To introduce new or improved methods or facilities;
> >
> > . . .
> >
> > i. To assign duties;
> > j. To issue and amend reasonable work rules.
>
> The City and Union have bargained over the implementation of furloughs by including in the collective bargaining agreement Article 10 regarding reduction in work force, which specifically includes language regarding reduction in hours in addition to reduction of jobs. Implementation of contract language previously bargained does not require additional negotiation.

> Additionally, State Statutes give budgeting authority to the Common Council. It determines, within sound budgeting principles, the level of city services to be provided within the State imposed levy limits and funding reductions.
>
> Further, the furlough of employees does not violate the "normal" work week provisions of Article 8 nor the Salary provisions of Article 12 because neither of those articles provides a guarantee of either a 56 hour work week or payment of an annual salary. Additionally, the implementation of furloughs does not drop the department below minimum staffing levels as developed and implemented within the department by the fire chief.
>
> Finally, Article 10 provides (represented employee) with the right to "bump" his furlough to a less senior employee and avoid the hardships complained of in the grievance. Captain Weyers chose not to exercise his contractual right to do so. He cannot now complain that the city has violated the contract when it was his own actions that resulted in a wage reduction due to fewer hours worked.

On February 13, 2012, Mayor Walsh, IAFF Local 141 President Chad Bronkhorst, union executive board member Tom Nelson and City Attorney Judith Schmidt-Lehman wrote the City's Finance and Personnel Committee, in part as follows:

> As you are aware as part of the 2012 adopted budget for the City of De Pere, all line fire personnel were ordered to take to unpaid furlough days as part of this budget. As you also know the De Pere Professional Firefighters Association Local 141 is grieving this action as a violation of the current labor agreement. Every member of the department will have taken one furlough day by Saturday, February 18, thus completing the first round of furloughs.
>
> This letter is to inform the Finance/Personnel Committee that Local 141 intends to grieve the second round of furloughs in the same manner as the previously scheduled furlough days (see Attach. 1).
>
> The City of De Pere hereby stipulates that Local 141 intends to grieve the remaining scheduled furlough days (attach 2) in the same manner as the previously filed grievances. By stipulating to those grievances the City acknowledges that these furlough days be treated and considered as grieved.
>
> Local 141 and the City hereby agree to one hearing before the Finance/Personnel Committee in March 2012 to deal with the Furlough Grievances and the Jansen Vacation Grievance.

Pursuant to the stipulation, the Finance/Personnel Committee considered the Furlough Grievances at its meeting of March 13, 2012. On March 19, City Human Resources Director Shannon Metzler wrote to Nelson, in part as follows:

As you know, the committee denied the grievance.

If you wish to pursue this matter further, I would direct you to Article 31 of the collective bargaining agreement.

On March 1, 2012, Kiser informed the mayor and Common Council that the Fire Department had received a $284,500 grant from the Federal Emergency Management Administration (FEMA) for the purchase of various communications equipment. The grant, from the Assistance to Firefighters Act, required the City to provide a ten percent match ($28,450). The City had previously appropriated $246,954 in 2011 and 2012 for these purchases, and would have $195,222 remaining in the general fund after the FEMA grant was applied. In the letter notifying Walsh and the Council about the grant, Kiser also requested a 2012 budget amendment applying $61,413.20 of the $195,222 to terminate Sinkler's layoff and return the department to full staffing levels, effective March 20, 2012.

On March 6, the Council unanimously approved a resolution declaring that the 2012 budget had "removed funding for one full time fire fighter position in order to address budget shortfalls which occurred due to state mandated revenue reductions and levy limits," but that "receipt of these grant funds will allow the City to redirect general fund dollars earmarked for the radio upgrades to fund the full-time firefighter position left unfunded in the 2012," and amended the 2012 budget as Kiser has requested, leaving $133,808.80 in the general fund which had not been available prior to the federal grant.

Kiser did not request, nor did the Council act, to apply any of the FEMA funds to the furloughs.

On June 12, 2012, Metzler and Delo wrote the members of the City's Finance/Personnel Committee, in part, as follows:

> The Governor's Budget Repair Bill requires all WRS eligible employees not covered by a current contract to contribute 50% of the required WRS contribution rate. The City's four collective bargaining agreements are valid until December 31, 2013. Therefore, the WRS mandatory employee contribution is not effective until 2014 for our represented employees. As you are aware, Police and Fire represented and non-represented employees are excluded from having to contribute.
>
> . . .
>
> In 2011, The Finance/Personnel Committee approved 6 additional paid days off to non-represented employees being they were the only group paying into WRS until 2014. The six days of paid leave was equivalent to a furlough and equal to the WRS paid in 2011. Non-represented employees make up 18% of the workforce.

> To try and maintain equity between employees, we recommend providing 10 additional days of paid leave to non-represented employees contributing to WRS in 2012 (pro-rated for part-time employees). The WRS contribution by non-represented employees in 2012 is equivalent to a 15 day furlough. As you are aware, the employees that are not required to make WRS payments in 2012 are being furloughed for 5 days (2 days for Fire Fighters).
>
> By providing 10 paid days off, this helps mitigate the gap between those that are paying into WRS and those that are not. The fiscal impact to the employees paying 5.9% of their wages into WRS is over 300% greater than the employees that were furloughed. In addition, the employees furloughed in 2012 have those days away from work, where the employees paying into WRS do not have time away from work.
>
> There would not be any budgetary impact as this recommendation provides additional one time paid leave instead of a monetary payment. Again, this only affects 18% of the workforce.

. . .

According to the Fire Department's annual reports, the Department had the following call volume in the decade prior to the decision to furlough:

2002	1580
2003	1513
2004	1764
2005	1825
2006	1793
2007	1833
2008	1946
2009	1871
2010	1898
2011	2057

The De Pere Fire Department undertook no internal reorganization prior to, or simultaneous with, the Council's decision to impose mandatory furloughs.

POSITIONS OF THE PARTIES

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

> The City violated Article 3, line i., by scheduling work hours in a manner to have a negative impact on employee wages. It violated Article 8 by unilaterally

changing employees' normal workweek by imposing non-negotiated furloughs which caused a loss of compensated time. It violated Article 10 by reducing the number of hours without satisfying any of the contractual requirements (shortage of funds, lack or work or change in organization or duties.) It violated Article 12 by imposing furloughs which caused employees to be paid less than the contractual base wages. It violated Article 33 by imposing its will on the bargaining group rather than amend the labor contract by agreement with the Association.

The City is in excellent financial shape. The unassigned fund has grown, leaving the city with a 32% cash reserve. Money in this fund could have been used to offset the manufactured budget shortfall put forward by the Mayor of just over $400,000 of which the Fire Fighter furloughs accounted for around $30,000 and still put $1 million into the cash reserves to potentially increase the City's bond rating. The City took advantage of a political environment that saw others cutting and taking wages and benefits in open contracts throughout the state and wanted to jump in on the action. If this is allowed to be the norm throughout the state, contracts will be attacked in the name of tough budgets, and unassigned funds will grow from ignoring mutually agreed obligations.

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

The City implemented fire employee furloughs in accordance with Articles 3 and 10 of the collective bargaining agreement. The City faced serious fiscal conditions not of its own making when it adopted its 2012 budget, with dramatic cuts in state aid combining with a tax levy increase close to 0% to leave a $460,000 gap between revenues and expenses. This budget hole is the "lack of funds" which gave the City the right to reduce hours under Article 10 of the labor agreement.

The Union's argument that having a reserve fund balance in excess of 20% proves the City did not lack funds for the 2012 budget has no merit for several reasons. First, its audit was not available when the Council adopted the 2012 budget; the 2010 audit, which it did have, shows the unassigned reserve fund at $3,235,934, or $1,490,159 less than at the close of 2011. The record shows this increase was unexpected.

More importantly, statutes and arbitral precedent make funding decisions policy matters for the Council, not the Union. The record shows the elected officials believed using reserves would result in future adverse bond rating which would negatively affect the City in the future. The Council was not willing to risk those long-term consequences and did not consider using unassigned reserve funds to fill the budget deficit.

City administrators communicated directly with Union officials during consideration of furloughs, and thus did not violate Article 1.

The use of the word "normal" in Article 8 implies the potential for some deviation, and that the hours are not guaranteed. The City's imposition of furloughs resulted in an allowed-for deviation of hours and was not contrary to the language of Article 8.

Likewise, the salary provision of Article 12 is not a guaranteed salary, but may be diminished if hours are reduced, as was done here.

The City acted within the confines of the collective bargaining agreement in implementing the two furlough days for Association employees in 2012. The grievance should be denied.

In response, the Association posits further as follows:

What this case comes down to is does the City have the money or not. The City claims a reduction in its unassigned reserve fund could potentially result in a negative mark on its bond rating, but there has never been any proof to support that claim. The City Administrator could not say whether the City's investments had increased or decreased, and the City gave a two percent raise to non-represented employees in 2012 (on top of an additional 16 days vacation in 2011 and 2012). This hardly seems to be the move of a financially strapped city. And Mayor Walsh did not deny the budget had a surplus, and that even if all the 2012 furloughs were eliminated, the City would still have an unassigned reserve account equivalent to 29% of the adopted budget.

The reality of this case comes down to poor budgeting practices. The facts are clear in this case the City had no basis to furlough the union firefighters. The union has disproved all three criteria that the city must fulfill to exercise their right to reduce staffing. If the city had the arbitrary right to reduce wages through furloughs at will the three criteria would not be listed in the collective bargaining agreement.

The City should be ordered to make the fire fighters whole through payment of $26,256 as reimbursement for the 48 hours of unpaid furlough.

In its response, the City posits further as follows:

The City was not required to bargain a change in hours or wages because Articles 8 and 10 of the labor agreement permit the modifications. The union's

argument is contrary to the language of the agreement and contrary to grievance awards. The union also errs in contending an amendment to the agreement is necessary for the City to implement the furloughs.

The City faced a shortage of funds in budgeting for 2012 and implemented furloughs as a reasonable response to the shortfall and budgeting pressures. None of the union's spurious allegations about the City purportedly acting in bad faith are supported in the record or in fact. Article 10 of the labor agreement gives the City the right to reduce the number of hours due to a "shortage of funds." That phrase is not defined, making it appropriate to look to usual and customary definitions. The question is therefore whether the City had a deficiency of funds in 2012; the union asserts it did not, because the unassigned reserve account as of December 31, 2011 was above the City's previously established policy requiring 20% of general fund expenses to be held in that account. This argument is contrary to the labor agreement and well-settled arbitral precedent that budget decisions are public policy choices which lie within the discretion of the elected officials. Moreover, there is nothing in the record indicating that the Council policy on unassigned reserve balances requires that it spend anything over a 20% balance; in fact, that balance has been both above and under that mark in recent years. Also, the Council did not have the 2011 audit figures in time for the 2012 budget adoption, and the receipt of delinquent taxes, the bulk of the unexpected influx into the unassigned reserve account, was neither known nor anticipated.

The City's financial advisor, professional staff and bond rating agencies all warned about possible adverse consequences to the City's bond rating if the City took money out of the unassigned reserve account. That there were funds in this account does not mean the Council faced no shortage of funds; while the Union argues that only about $30,000 was needed to fully fund Union labor costs, the real shortage of funds addressed in the 2012 budget amounted to over $130,000 when all furloughed employees are included, about 28% of the full $460,000 shortage. This was a significant part of the Council's entire budget fix for the dilemma which the State dealt the City. The shortage of funds was not $30,000 but $460,000, and the actions of the Council need to be viewed in this larger context.

Finally, nothing in the record supports the union's claim that the City acted in bad faith. While the union is correct that the Council could have made different budgeting decisions, it is simply wrong when it asserts that the Council was required to make those different choices. Budgeting is a public policy decision for the Council, not the union. The shortage was not of the City's making and the Council dealt with it in a reasonable manner, and the grievance should be dismissed.

However, if the City is found to have violated the labor agreement, any remedy should be limited to restoring two days pay to the least senior represented fire fighter at the time of the furloughs. None of the other fire fighters exercised their contractual right to bump, so any financial hardship which members suffered was the result of their own actions, and not caused by the City.

DISCUSSION

This grievance measures the municipal employer's inherent and broad budget authority against a collective bargaining agreement which explicitly limits its unilateral ability to set personnel levels. Because I have found the employer did not satisfy the contractual requirements for imposing unpaid furlough on firefighters covered by the agreement, I have sustained the grievance and ordered the appropriate remedy.

The Association claims the City violated five Articles in the agreement when it imposed two 24-hour days of unpaid furlough on each of 25 firefighters, cutting their collective pay by $26,256. The reduction in hours also saved the City $5,842 in FICA tax and pension contributions, making the full savings to the City $32,098, an average savings of $641.96 per furlough day. The firefighter furloughs were part of a series of furloughs in the 2012 budget affecting all four bargaining units and non-represented public safety personnel, totaling $130,816, implemented to help address between $385,000 and $460,000 in cuts in state aid from a budget with $15,581,641 in general fund expenditures and an unassigned reserve account greater than $3.5 million.

The city presented testimony from Administrator Delo, and explicitly asserts in its brief, that the issue is not just the $26,256 in firefighter wages, but the full economic impact of all the furloughs throughout city employment, $130,816. It could not have exempted the firefighters, the City asserts, because that would have been bad for morale for the rest of the city workforce.

I understand and appreciate the City's concern for employee morale, but I reject its contention that the issue before me is anything other than the firefighter furloughs. This grievance arises out of the collective bargaining agreement between City and Local 141, and all the evidence relates to those two parties; there is no evidence in the record at all concerning the collective bargaining agreements or activities of any other labor organization. Moreover, it has been, and continues to be, the public policy of Wisconsin to treat protective service employees such as firefighters differently than general public employees. Accordingly, the only economic or personnel interests of the City's that I am to consider are those affecting the firefighters.

Four of the Association's assertions can be addressed and denied in short order.

The Association's first claim is that the City violated its Article 3i. management right "to schedule the hours of work" by scheduling the firefighters hours of work to include 48

hours of furlough. I share the employer's uncertainty as to the theory behind this allegation. The association has offered no evidence to establish the City did anything other than what the agreement empowers it to do.

I also reject the Association's claim that the City violated Article 33 by showing bad faith and not bargaining over the issue (a charge which would seem more appropriate for a prohibited practice complaint than a grievance arbitration). The record shows that the City and the Association discussed the matter, each negotiating in good faith, but were unable to reach agreement. Nor did the City engage in poor budgeting practices or "manufacture" the budget shortfall it faced in 2012; the reduction in state aid which Gov. Walker and the Legislature enacted was very real, very serious, and not of the City's doing.

The Association next asserts the furloughs violated Article 8, which provides that the "normal workweek shall average fifty-six (56) hours per calendar week …." This challenge, too, is unfounded.

Language in a collective bargaining agreement establishing the "normal" work day or "normal" work week language does not guarantee that every work day or work week will consist of that number of hours. Waupaca County, MA-13252 (Bauman, 2/07). When such modifiers to the hours of work are used "there is no guarantee that the work week will be as described." Marathon County, MA-12962 (Gordon, 11/2005).

The word "normal" in this context has the same meaning as the word "regular," which "has almost universally been held not to guarantee the hours set forth in the defined week," so that "some variation is tolerated." Jackson County, MA-12338 (Houlihan, 3/2005). In that case, a senior arbitrator held that a "single incident, involving a three-day variation," did not violate "either the spirit or the intent of the Article" defining the "normal" workweek. Here, there is a furlough of 48 hours over a three-month period, a variation of reasonably similar scale.

There have been some furlough grievances on which unions have prevailed. In Fond du Lac County, MA-13502 (Bauman, 3/2007), the labor agreement provided for a "normal" workweek of 37.5 hours. Commissioner Bauman sustained a grievance over the reduction of one hour per week from mid-May through the end of December, reasoning (correctly, I believe) that a work schedule could not be considered normal if it were followed for less than half a year.

But in School District of Omro, MA-14628 (Bauman, 7/2010), the same arbitrator held the Employer did not violate the collective bargaining agreement when, following a cut in state aid of about $300,000, it reduced the hours of the least senior members of the bargaining unit by 26 days and that of the remaining members of the bargaining unit by four (4) days over the course of the coming school year, notwithstanding contractual language defining the "normal"

work day and work week. "There is no question," she held, "that the deviation from the normal workday-workweek rules is clearly within the bounds of 'normal' and there is no contract violation." Id., at 10.

The unique nature of the firefighters' schedule – a 27-day work period consisting of three recurring nine-day cycles under the California plan – means that some weeks firefighters will work more than 56 hours, and some weeks they will work less. That is why Article 8 defines the "normal" workweek as an "average" of 56 hours.

Defining as "normal" a 56-hour week over a 7-day period necessarily implies that, on occasion, a workweek will be other than 56 hours over a calendar week. Under the agreement, a 56-hour workweek is "normal," not guaranteed. Because the reduction of 48 hours over a three-month period does not negate the standard of what is "normal," the City did not violate Article 8 when it imposed the furloughs.

The Association asserts the City violated Article 12 because the furloughs reduced each firefighter's pay below the listed "annual … base rate for full-time employment." This argument is also unsuccessful.

The Association is correct that Article 12 defines firefighter pay as an annual salary, with a specific base rate for each step. However, the firefighters are not "salaried" employees as that term is commonly understood in labor relations. They are non-exempt under the FLSA, earn overtime, and have other indicia of employees paid on an hourly basis. Their pay is annualized on the salary schedule, but they are not salaried employees. As the City rightly notes, Article 12 establishes the base rate *for* "full-time employment," but is not a guarantee *of* full-time employment.

Moreover, the Article 12 "annual salary" cannot be the absolute minimum a firefighter can be paid in a year, because that would conflict with the authorization for layoffs in Articles 3c. and 10, the explicit text of which prevails over the Association's theory of Article 12. The City did not violate Article 12 by its furlough of the firefighters.

The City is wrong, however, in contending the furloughs reduced the firefighters below full-time employment and assigned them to part-time work. The firefighters remained full-time employees; their temporary and limited lay-offs did not deprive them of the status of full-time employees.

Finally, the Association claims the City violated Article 10 by imposing the furloughs without meeting the required conditions of "of a shortage of funds, lack of work, or because of a change in organization or duties." The employer has not claimed any lack of work or change

in organization or duties, but maintains a shortage of funds existed due to the cuts in state aid, which it asserts made it impossible to pay the firefighters their full wages without risking the City's bond rating and related long-term economic damage.[8]

The city is rightly concerned how rating agencies would regard its fiscal management. Depending on its extent, poor fiscal management would, and should, result in a negative outlook and lower rating, leading to the city paying higher interest rates. The City has a legitimate interest in staying on the right side of the bondsmen and bondswomen. But merely having a proper motive does not mean the City's action was likewise right.

When it adopted the 2012 budget on November 15, 2011, the City made two staffing decisions affecting Local 141 and its members. It temporarily laid off one firefighter, saving $64,586 and reduced the hours of 25 others, saving another $32,098. By setting the furloughs and layoffs at that level, the City was effectively declaring it was short $96,684 to fully fund its firefighting function.

But two events which occurred after that date which materially increased how much money the City had available for firefighter wages and roll-ups.

On December 2, 2011, the City learned that an intergovernmental agreement with Ashwaubenon would generate $13,500 in guaranteed revenue for 2012, and $18,000 annually thereafter, plus open-ended direct service charges. On or about March 1, 2012, the City learned of the federal matching grant of $284,500 to purchase various pieces of communications equipment, which, after the ten percent match, it would apply to replace $256,050 it had already budgeted as an expense.

The Fire Department thus received $269,550 in unanticipated revenue after the 2012 budget was adopted -- almost three times the total pay cut the City imposed on the firefighters, and almost nine times the value of the furloughs alone. This was all new revenue beyond what the City determined it needed to support its firefighting function, and any claim by the City of a shortage of funds to justify the layoffs must account for it.

With each furlough day having an average value of $641.96 in wages and roll-ups, just the guaranteed revenue of the 2012 billing to Ashwaubenon, $13,500, would have paid for slightly more than 21 days of furlough.[9] That is, even prior to the start of the furloughs, the City was anticipating new, unbudgeted revenue which would pay for more than forty percent of them.

---

[8] Neither party has offered any argument based on Art. 3c. , stating the City's right to "lay off employees for lack of funds or other legitimate reasons," and so this Award declines from analyzing that provision as well.

[9] The record does not relate the number of calls in 2012, nor the revenue generated thereby. With rate charges that ranged from $95.00 for basic life support to $655.00 for advanced life support with transport, it is likely that such charges would also generate revenue sufficient to underwrite several, if not all, of the furlough days. However, because no evidence on this point was offered at hearing, I have not included any such revenue in my analysis.

The City correctly recognized that this revenue addressed its shortage of funds and should be applied to address firefighter personnel cuts. But it erred in its application.

When it learned of the Ashwaubenon contract in December, 2011, the City proposed to apply $37,000 (more than two years of direct charges to the Village, and more than the full value of the unit-wide furloughs) to partially restore the laid off firefighter in exchange for the Association not grieving the furloughs. The Association rejected that proposal, and the City made none further.

But these funds were fungible, and money available to restore the layoff was also available to offset the furloughs. Having understood that it now had more funds than when it imposed the layoff and furloughs, the City had the management right to choose which to address first, the temporary layoff of a full-time firefighter or the furloughs for the full bargaining unit. It chose to address the single layoff, which was its right. But when it was unable to reach agreement with the Association to address the single layoff, it then should have proposed to apply the new revenue to the furloughs. Its error was in limiting that application to one, and not offering for the other. By not applying the $13,500 in unbudgeted revenue from the Ashwaubenon contract to offset either the layoff or the furloughs, the City violated Article 10. The extent, if any, to which the City had a shortage of funds to justify the full pay cut of $32,098 in wages and roll-ups must thus be reduced to $18,598.

The federal grant had a similar impact, and the City had a similar response – to restore the full-time position, but not the furloughs.

The City immediately recognized the federal grant had a far greater positive impact than the Ashwaubenon contract by promptly restoring $61,413 for the full-time firefighter position that had been eliminated in the 2012 budget. This was almost twice the value of all the furloughs, more than five times the value of the post-March 1 furloughs, and doing so still left $194,637 available from the federal grant.

Because this money was also not anticipated when the City set the furlough level that it did, its availability further undercuts the employer's assertion of a shortage of funds. But for the vagaries of timing, this event alone would have nullified both the layoff and all furloughs.

Fire Chief Kiser made the reasonable determination to schedule furloughs in the first three months of 2012, when low demand for vacation days would present the fewest scheduling problems. The plan which Kiser set covered the period January 3 to March 22, with 19 days of furlough coming on or after March 1. With an average value of $641.96, those 19 days of furlough saved the city $12,197.24.

That is, *after* the City received an unanticipated grant of $284,500 (netting 256,050 after the City match) on March 1, it still claimed it had an ongoing shortage of funds to justify imposing $12,197.24 worth of furloughs. It cannot do so.

As of March 1, the City did not lack funds to justify continuing to reduce firefighter hours. By continuing the furloughs following receipt of the federal grant, the City again violated Article 10.

Subtracting the value of the post-March 1 furloughs from the amount remaining after the Ashwaubenon contract leaves $6,400.76 at issue, which is 0.0004 of the 2012 general fund expenditures of $15,581,641. This represents .0019 of the known unassigned account of $3,325,934, or .0013 of the actual 2011 reserve account of $4,726,555. This is the amount the employer maintains it could not afford to fund without risking its bond rating.

The City cites three arbitration awards in support of its primary argument that budget decisions reflect basic public policy choices that are properly entrusted to the elected local officials. Although that it is certainly an accurate statement of general principle, the language of the respective collective bargaining agreements and the particular facts make the decisions which the City cites less than entirely supportive of its argument. Moreover, even while claiming full discretion to impose furloughs, the City essentially accepts that it does have to establish it suffered from a shortage of funds or had some other legitimate reason when it did so.

In Taylor County, MA-14797 (Levitan, 1/2011), I denied a grievance over the imposition of a five-day unpaid furlough on courthouse and human services employees. The labor agreement granted the employer "the right to lay off employees from their duties for lack of work or any other legitimate reason," without a specific enumeration of "lack of funds," or "a shortage of funds," as is the case here. That is a significant textual deviation.

Further, I found significant factual differences as well, starting with a degree of economic distress far beyond anything the City has experienced or projects. The County was suffering from increasing operating deficits (growing annually from $246,571 to $700,000 over four consecutive years, totaling about $1.6 million) and a declining general fund balance (from $3.75 million to $2.83 million in a three-year period). Also, the furloughs at issue in MA-14797 were not the first the County had imposed; the County had furloughed represented employees the year prior, and the union had not grieved. And, unlike the present case, the County had furloughed unrepresented employees as well.

Finally, the City edits Taylor County selectively, to hold that "a determination how to address elemental budgetary pressures is a basic public policy choice that is reserved for the elected officials." However, the City fails to acknowledge or account for the critical qualification contained in the sentence immediately prior: "...the management of the county's affairs is entrusted exclusively to the county, subject only to the terms of the labor agreement and applicable law." (emphasis added). The agreement now before me, of course, has just such terms, making the phrase quoted by the City inapposite.

"Given the steady decline of the Taylor County General Fund balance, the streak of

cannot find the county acted in an illegitimate or unreasonable manner by the policy choice it made." In the matter before me, in contrast, there was no decline in the general fund, no streak of deficit spending, and manageable financial and political pressures. Taylor County does not support the City's position.

The employer also cited Village of Germantown, MA-14653 (Emery, 4/2011), where I believe the contract and the facts are closer to Taylor County than they are to the case before me. As in Taylor County, the Village had the right to institute layoffs "because of lack of work or any other legitimate reason," without the explicit requirement that it demonstrate "shortage of funds," as the City here must do. And like Taylor County, the Village was suffering a marked and verifiable weakening of its financial stability – so much so that had already *received* a negative outlook due to reductions in its general fund reserve. And again contrary to the situation in De Pere, the Village did not increase the wages of non-represented employees, but instead froze those wages and directed the non-represented employees and Department heads to take six unpaid furlough days. Given "dwindling reserves, a poor economy and a threatened reduction in its bond rating," and the contract language before him, Arbitrator Emery concluded, "I cannot find that its decision was unreasonable on its face" and thus denied the grievance. In the case before me, while the economy had still not fully recovered, the City's reserves were growing rather than dwindling, there was no threatened reduction in its bond rating, and rather than freezing the pay for non-represented employees, the City gave them a raise. Again, these are significant factual and textual differences between that case and the one before me.

The contract language and background facts in Village of Grafton, MA-15001 (Carne, 4/2012) were also more akin to those in Germantown than those in the instant matter. Again, the labor agreement gave the employer the exclusive right and authority to lay off employees, with no explicit criteria stated. Again, the municipality faced a demonstrably dire economic situation, as it suffered an $80 million decline in its assessed valuation over a two-year period and faced a projected budget deficit of about $600,000 (which would have been $130,000 without furloughs). Again as in Germantown but contrary to the situation in De Pere, Grafton froze the wages for non-represented employees. Also unlike the City, Grafton spent an inordinately high amount from its reserve fund to balance the budget (spending an amount equal to about 7% of its reserve, notwithstanding its policy limiting the use of reserve funds to 5% or less in a year). The one significant similarity between the case before me and the facts before Arbitrator Carne is that the Village, like the City, maintained a reserve balance that exceeded the employer's target (in Grafton, set at 25 per-cent). The case the City cites is therefore fundamentally different from the one before me, and has an implicit holding directly contrary to its interest.

The discussion in Village of Grafton highlights the critical importance of the specific language of the labor agreement under review:

Finally, the Association also asserts that its grievance should be granted because

> the Village has failed to provide sufficiently concrete evidence to show that it was in a financial situation that justified furloughs. The Agreement here permits layoffs, but does not identify specific circumstances under which they may occur. The Association's arguments suggest that an "ability to pay" standard should be applied. The Agreement does not contain any such restriction. In the absence of a standard, the question is whether the Village's decision to mandate furloughs was arbitrary and capricious under the circumstances. (emphasis added).Id., at 11.

The concept of "ability to pay" is another way of saying "shortage of funds." In Grafton, with no such specific limitation stated, Arbitrator Carne held that *because* the agreement did not have limiting language, the employer's decision would be measured under an "arbitrary and capricious" standard. In the grievance before me, the agreement explicitly requires there be a "shortage of funds" for the employer to impose furloughs or layoffs; thus, according to the case the City itself cites, because the language before me *does* have such a limitation, the standard is *not* arbitrary and capricious, but something higher.

The state had peremptorily cut the City's aid by between $385,000 and $460,000 and restricted its levy ability. In partially addressing the cuts, the City made the policy decisions that maintaining a higher surplus in the unassigned reserve account and not raising the garbage fee were more important than fully funding firefighting services. In the absence of language limiting its ability to reduce hours or positions, it would be its right to make such choices, subject to reversal only if found to be arbitrary and capricious. But there was, of course, such language.

As already noted, the City certainly had a legitimate interest in acting to protect its bond rating. A lower credit rating means higher interest costs. Money spent on debt service is not available for municipal services, tax relief, or other purposes. If paying the remaining $6,019 would have led to a lower rating, or even a negative outlook, the City would have indeed faced a shortage of funds and been within the contract to refuse to do so. But if reducing the unassigned general reserve to make that payment would not have had those negative consequences, the City would have been acting outside the agreement.

In the past, the City has not feared to reduce the percentage it was holding in the unassigned reserve. Although the City had established a policy of maintaining a reserve account of at least 25 percent, it changed that policy, apparently for reasons that were more ideological/political than economic; as City Administrator Delo testified, the city "arbitrarily moved the amount down to 20 percent at that time so they would not have to raise taxes…." That is, the City knowingly reduced by 20 percent the percentage kept in the unassigned general reserve, without raising concerns with rating agencies. Further, the City's actions indicated a belief that maintaining the unassigned reserve at 20 percent would satisfy the ratings agencies, and the policy remained at 20 percent when the Council adopted the 2012 budget in November, 2011.

Delo also testified that applying the full $26,256 towards salary "would have given the rating agencies a reason to suspect that we were moving in the wrong direction," and "could have then led to a negative outlook for us." Giving the ratings agencies a "reason to suspect" the City was "moving in the wrong direction," which "could have then led to a negative outlook" is a very tenuous testimony, especially in light of the City's earlier action lowering the percentage kept in the reserve account by 20 percent.

Moreover, Delo reflected the bond rating agencies' concerns about *moving* money from the unassigned reserve account to cover operational costs; but had the City fully funded fire fighter personnel costs at the start, there would have been no such "movement" of funds, and thus nothing to alarm the agencies.

According to the audit issued in June, 2012, the City had $4,726,093 in its unassigned reserve fund on December 31, 2011, an increase of 46 percent over the $3,235,934 it held in that account at the end of 2010. The City asserts that the $1.49 million increase in the unassigned reserve fund balance was "unexpected," and unknown to the Council during its 2012 budget deliberations in October and November, 2011, and thus should not be considered in analyzing whether it had a shortage of funds.

While the City may not have known the precise figures until the audit, it was not entirely in the dark as to the state of its finances. The City knew that it entered 2011 with $3.235 million in the unassigned reserve account. With an Administrator and a Finance Director, it certainly monitored its ongoing expenditures and revenues; it must have known that it was ending 2011 with a healthier unassigned reserve account than when it started.

Delo testified that the "vast majority" of that increase came from a fire sale of a manufacturing property that did not happen until January, 2012, but which resulted in funds being credited back into the balance through special assessments. He also testified that about $150,000 of the increase came from the contingency fund because there were no emergencies in 2011 that needed to be accounted for, there was reduced overtime snowplowing due to the warm November and December 2011, and other savings.

Even if the City could not have known about the fire sale until after January, it knew by year's end about the lack of snow, absence of emergencies, and other incidents which would have drawn down the unassigned reserve. Before the furloughs began in January, 2012, the City knew that it had not spent the $150,000 or so as Delo estimated, meaning it knew that it had about $3,385,934 in its unassigned reserve account.

Transferring the $6,400 from that reserve account to restore the furloughs would put the account ($3,379,534) at 21.68 percent of the general fund expenditures ($15,581,641). Not doing so kept it at 21.7 percent. Using the actual unassigned reserve account as of December 31, 2011 -- $4,726,093 – would make the respective percentages 30.29 and 30.33

The question thus becomes – using the calculation most favorable to the City, was it reasonable for the City to believe that reducing the amount in the unassigned reserve account from 21.7 percent to 21.68 percent would lead to a negative outlook or lowered rating?

I do not see how it could have been. The City had previously determined that an unassigned reserve of 20 percent was adequate, and had not suffered for it. Under the calculation most favorable to the City (without adding the special assessments to the unassigned reserve account), foregoing the firefighter furloughs would have still left the account almost ten percent higher than that target. Under the calculation that includes those assessments, reflecting the actual, audited amount, the reserve account jumps to 50 percent more than the adopted policy.

It is implicit in having an unassigned reserve account that such account may be used, in part to pay unanticipated expenses. But if that account can be used for expenses which were not expected, surely it should first be used for expenses which were expected, especially expenses which the City had contracted for. The city is absolutely right in wanting a healthy unassigned reserve account. But it cannot build that account by improperly refusing to pay for goods and services it had determined were appropriate and agreed to purchase.

There is no evidence that Mayor Walsh, members of the Common Council, or administrative staff had any improper motive or anti-union animus; the record establishes that they sincerely believed that the firefighter furloughs were necessary for the City's long-term financial stability. They were acting in good faith to preserve the City's bond rating, an appropriate policy choice for them to make. But there must be a connection between the City's stated concern and its action, and here there is none.

It is axiomatic that the labor organization has the primary burden in a contract interpretation grievance such as this. In the absence of language limiting its management right to set a budget and determine personnel levels, the City would only have to establish its act was not arbitrary, capricious or discriminatory. But the terms of Article 10 predicate the right to layoff or furlough on there being "a shortage of funds, lack of work, or because of a change in organization or duties." This provision places on the City the burden of establishing the existence of at least one of those conditions. Indeed, the City has not denied the applicability of Art. 10, asserting instead that it has met its terms by showing there was a shortage of fund.

The record does not support the City's contention. Before the furloughs even began, the City was aware that the agreement with Ashwaubenon would generate at least $13,500 in unanticipated revenue in 2012; while the furloughs were still going on, the City became aware that the FEMA grant would provide another $256,050 in unanticipated revenue, fully funding all post-March 1 shifts and leaving $6,400.76 outstanding. There is no evidence in the record that maintaining an unassigned reserve account of $3,379,534 rather than $3,385,934 (21.68 percent rather than 21.7 percent of the general fund expenditures) would have had a negative impact on the City's outlook or bond rating. There is even less evidence that maintaining an unassigned reserve account of $4,719,693 rather than $4,726,093 (30.29 percent rather than

30.33 percent) would have done so. Given the post-November, 15 revenue, the City did not have a shortage of funds to justify the firefighter furloughs.

Finally, as to remedy, the City asserts that the decision by firefighters not to exercise their contractual right to bump less-senior colleagues precludes all but the least-senior employee from obtaining any financial redress. I reject this argument on two grounds. The first is that the City's own internal communications seems to indicate that this may not in fact have been an option open to members of Local 141; according to the November 10, 2011 memo from City Attorney Schmidt-Lehman and Human Resources Director Shannon Metzler to Mayor Walsh and the Common Council, the situation where a senior employee bumps a junior employee to avoid the reduction in hours "should occur infrequently and *only with the current Police CBA* [collective bargaining agreement]*.…" (emphasis* added). Further, even if bumping were allowed in this situation, the fiscal affect to the bargaining unit – the aggregate loss of wages -- would have been the same, just focused on only one firefighter instead of 25.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is sustained. The City violated Article 10 by reducing the number of hours worked in the Firefighter classification without there being a shortage of funds, lack of work or change in organization or duties. The City shall make the affected firefighters whole for all wages and benefits lost during their furloughs of January – March, 2012.

Dated at Madison, Wisconsin, this 24th day of April, 2013.

Stuart D. Levitan /s/
Stuart D. Levitan, Arbitrator

SDL/gjc
7862