

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE VILLAGE OF GERMANTOWN

and

LOCAL 4854 INTERNATIONAL ASSOCIATION OF FIREFIGHTERS

Case 85
No. 71768
MA-15206

AWARD NO. 7882

Appearances:

Mr. Kyle Gulya, von Briesen & Roper, S.C., Three South Pinckney Street, Suite 1000, Madison, Wisconsin 53703-4200, appeared on behalf of the Village.

Mr. Jerry Biggart, Lieutenant, Fire Station No. 1, City of Oak Creek, 240 East Puetz Road, Oak Creek, Wisconsin 53154, appeared on behalf of the Association.

ARBITRATION AWARD

On September 19, 2012, Local 4854 of the International Association of Firefighters and the Village of Germantown 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. Following appointment, a hearing was conducted on February 21, 2013 in Germantown, Wisconsin. No formal record of the proceedings was taken. Post-hearing briefs and reply briefs were filed and exchanged by May 4, 2013.

This dispute regards the level of pay and benefits to which Captain Jeremy Franke is entitled.

BACKGROUND AND FACTS

The parties to this dispute negotiated their first collective bargaining agreement in 2004. As of the date of the hearing the parties' most recent collective bargaining agreement, running

from January 1, 2010 to December 31, 2010, had been extended to cover the period involved in this dispute. Relevant provisions of that agreement are set forth below.

Captain Jeremy Franke was certified as a firefighter in 2003. Franke worked for the Village and the Fire Department as a paid on-call firefighter for several years. Paid on-call firefighters work a sporadic, non-regular schedule. They staff the Department during overnight hours and weekends.

In 2007 Franke was hired as an alternate. As an alternate he was paid hourly to staff the firehouse. His work schedule was similar to how regularly scheduled part-time firefighters are scheduled and paid. An alternate is not on a set schedule.

At the time, paid on-call and alternate firefighters were in a bargaining unit represented by the International Association of EMT's and Paramedics (IAEP). Those employees were not in the bargaining unit represented by the International Association of Fire Fighters (IAFF), nor were they covered by the provisions of the IAFF contract. There were separate collective bargaining agreements regulating the terms and conditions of employment of the employees within the two bargaining units.

In October 2011 Franke was hired as a temporary fill in for a regular, part-time employee and worked in that capacity until February 2012.

In February 2012 Franke was hired as a regular, part-time firefighter and became a member of the IAFF collective bargaining unit. Captain Franke is the first regular, part-time firefighter, with non-bargaining unit service in the Fire Department, hired into the bargaining unit since the IAFF began representing the Germantown firefighters in 2004.

At the point of hire as a regular, part-time firefighter, Captain Franke believed his service as a paid on-call firefighter and as an alternate would count toward his accrual of vacation as a regular, part-time firefighter. When advised that it would not, Franke filed a grievance on or about July 3, 2012. That grievance was appealed to the Fire Chief, Gary Pollpeter, who, on July 3, 2012 granted the grievance. The Chief later talked with someone(s) in the Village administration and reversed his earlier decision. The grievance was appealed to arbitration and forms one of the issues in this proceeding.

When hired as a regular, part-time firefighter, Franke's payroll form indicated a change from "part time" to "part time permanent." His rate of pay was identified as \$15.84. He had previously earned \$19.46 under the IAEP contract, but that rate reflected the irregular hours available in that position. The \$15.84 rate of pay was made effective upon his appointment.

On July 17, 2012, Franke received the following from the City treasurer's office:

From: Jackie Schaefer . . .
To: Jeremy Franke
Cc: Gary Pollpeter, Kim Rath
Attachments: Franke fire over pay.pdf

Jeremy

I apologize for this Jeremy, but there is an error in the rate of pay initially authorized by Chief Pollpeter on the status change report submitted in February. According to your contract:

“During the first six months of employment for new full-time employees and part-time employees who start during the term of this Agreement, the new Employee shall receive 90% of the wage rate offered. During the second six months of employment, the employee shall receive 95% of the wage rate offered.”

The Status Change report received stated the rate of pay to be \$15.84. The current amount for regular part-time (with the 1% increase applicable with implementation of the 2010 contract) is \$16.00. 90% of that is \$14.40. I am sorry this wasn't caught immediately instead of now as I was figuring back pay. The amount that's been overpaid to you is \$1,510.92. Please see the attached spreadsheet for details.

We can deduct the full amount in one or two paychecks, or if you have other suggestions we are open to discussion. Please get back to me as soon as possible. Of course, if you want to go over any of this in person, let me know when it would be convenient for you to stop over to my office.

Jackie Schaefer
Deputy Treasurer
Village of Germantown

On July 19, 2012 a grievance was filed relating to the pay reduction. The grievance was processed to arbitration and forms the second issue in this proceeding.

The two grievances were consolidated for hearing and decision.

ISSUES

It is the view of the Village that the issues presented for hearing are:

1. Did the Village of Germantown violate Article IV and Article XI of the Collective Bargaining Agreement by refusing to provide the grievant, a new, part-time firefighter, with prorated vacation benefits and compensation at the top hourly pay rate for regular, part-time firefighters?
2. If so, then what are the appropriate remedies?

The Union views the issues to be:

1. Did the Village violate the Collective Bargaining Agreement when it unilaterally reduced Franke's pay and denied Franke part-time benefits?
2. If so, what is the appropriate remedy?

This Award will address all issues presented.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE IV – SALARIES

Section 4.1: Modify wage chart to provide for a fair and equitable wage increase as follows, consistent with agreed-upon health insurance changes. Salaries shall be paid as listed on Appendix A, as attached hereto, and made a part hereof.

...

ARTICLE X – VACATIONS

Section 10.1 – Vacation Schedule: Employees who are regularly scheduled on a full-time, twelve (12) month basis shall be eligible for vacation with pay on the following schedule:

After one (1) full year of service ten (10) work days

...

ARTICLE XI – PART-TIME EMPLOYEE BENEFITS

Section 11.1: Regular part-time employees who have completed three (3) years of continuous service for the Village are eligible for fringe benefits as follows:

- A. 75% of the vacation benefits of full-time employees.
- B. 75% of the holiday benefits of full-time employees.
- C. Part-time employees who work on any one of the eleven (11) holidays designated in this Agreement shall be paid time and one-half (1-½) for those hours worked.
- D. Part-time employees who reach three years of continuous service will have their holidays folded into their base pay prior to calculating their wage increase.
- E. Employees shall be entitled to sick leave accumulation based on the following formula. One hundred sixty-eight (168) hours of work shall equal ten (10) hours of sick leave. Accumulation shall commence after the three (3) year anniversary date.
- F. Paid on call hours worked will not count towards the calculation of sick leave or other benefits.

...

ARTICLE XIV – SENIORITY CLAUSE

Section 14.1: Seniority shall be determined by the employee's length of service as a full- or part-time firefighter / EMT retroactive to the last date of hire. Current part-time employees hired as full-time employees shall have no break in his or her seniority from his or her original hiring date. Seniority

shall continue to accrue during periods of sick leave, time spent in the armed forces on military leave of absence, approved leave of absence, Worker’s Compensation, and for a period of up to two (2) years while an employee is on layoff.

...

APPENDIX A

WAGE SCALE

Full-Time Employees

January 1, 2007 – Dec. 31, 2007	Jan. 1, 2008 – Dec.31, 2008	Jan. 1, 2009 – Dec. 31, 2009
\$17.61	\$18.40	\$19.21

Part-Time Employees

January 1, 2007 – Dec. 31, 2007	Jan. 1, 2008 – Dec.31, 2008	Jan. 1, 2009 – Dec. 31, 2009
\$14.94	\$15.38	\$15.84

During the first six months of employment for new full-time employees and part-time employees who start during the term of this Agreement, the new employee shall receive 90% of the wage rate offered. During the second six months of employment, the employee shall receive 95% of the wage rate offered.

After January 1, 2006, part-time employees working in paid-on-call status shall receive the part-time employee wage offered by the Village for any hours worked in paid-on-call status.

POSITIONS OF THE PARTIES

The Association contends that the plain meaning of Article XI, Section 11.1, requires three years of continuous service to qualify for part-time fringe benefits. The grievant has the three years. It is the view of the Association that the Village seeks to have an additional requirement read into the words of the contract.

Similarly, it is the position of the Association that Appendix A requires a reduced level of compensation for “new” employees. Franke is not a new employee.

The Association points to the bargaining history and notes that it sought to remedy the perceived unfairness of requiring employees who had worked for the Village as paid, on-call firefighters to receive no credit for time worked.

It is the view of the Association that its construction and use of the term employee is consistent with the statutory use of the term. For all time worked for the Village, Franke was an employee and the Village was an employer within the meaning of the statute.

The Association notes that Chief Pollpeter initially granted the grievance. Pollpeter was present during the initial round of negotiations and administers the contract. The Association contends that he is best positioned to understand the application of the wage schedule and only changed his answer to the benefits grievance when influenced to do so by others in the Village administration.

It is the view of the Village that the collective bargaining agreement does not require the Village to consider prior work in non-bargaining unit positions. In the nine-year history of the parties' relationship, the parties have not considered non-bargaining unit service in calculating time off or pay. It is the view of the Village that the Union proposed and failed to get the language in bargaining that it now claims is applicable. That proposal is set forth below.

The Village contends that the Union proposal is inconsistent in that it would provide a greater benefit to part-time employees than to full-time employees for time worked outside the bargaining unit. The Village points to Article 10, Vacations, and notes that a full-time employee is credited only for full-time service in the calculation of vacation time. The Village argues that the vacation accrual system cannot be interpreted to reward a part-time employee more generously than a full-time employee.

The Village reads Article 11 to require a part-time employee to complete a service requirement in order to be eligible for the listed benefits. The Village does not read the article to bestow benefits for already completed service. The Village reads the entire article to be prospective looking. The Village reads paragraph F to specifically not count paid, on-call hours in the calculation of benefits.

The Village points to Article 14.1 and the definition of seniority as an employee's length of service as a regular or part-time firefighter. The Village believes the definition of seniority is consistent with its view that an employee accrues benefits and wages only after entering the bargaining unit.

The Village contends that Appendix A is clear on its face. The word "new" modifies full-time or part-time employees. Additionally, the Village points to a 2004 memo (set forth

below) that brought the original negotiations to a conclusion, which indicated that the 90 percent and 95 percent provisions would not be applied on a non-precedential basis.

DISCUSSION

Article XI, Section 11.1, addresses the availability of benefits for part-time employees. It provides that “Regular part-time employees who have completed three (3) years of continuous service for the Village are eligible for fringe benefits as follows” I do not read the words of Section 11.1 to require a prospective completion of the three years’ service. The phrase “have completed” is certainly consistent with a prior completion of the service. The Village contends that the provision must be read to define the three years’ service as three years’ bargaining unit service. Such a construction adds words to the agreement. The sentence in question uses the phrase “... have completed three (3) years of continuous service for the Village” The service that is required to earn benefits is “... service for the Village” It is not bargaining unit service.

My facial reading of the provision is that Franke completed three years of continuous service for the Village during his tenure as a paid, on-call and alternate firefighter. Chief Pollpeter came to the same initial conclusion when he granted the grievance.

The parties dispute the application of paragraph F. Paragraph F makes specific reference to sick leave calculation for part-time employees. Paragraph F must be read in the context of paragraph E which precedes it. Paragraph E sets forth the specific entitlement to sick leave accumulation. A part-time employee who works 168 hours earns 10 hours of sick leave. The accumulation begins after the employee reaches his three year anniversary date. I read the three year anniversary date as the date upon which an employee has completed three years of continuous service for the Village.

Testimony establishes that there are part-time firefighters who also work paid, on-call hours.

Read in context, I believe the paragraph F reference to paid, on-call hours is a reference back to paragraph E and the calculation of sick leave benefits. Such a construction explains the specific reference to sick leave in paragraph F, as the paragraph follows paragraph E. The last phrase, “or other benefits,” merely serves to extend the determination not to count paid, on-call hours in the calculation of benefits.

I believe paragraph F specifically addresses the calculation of benefits once the qualifying period has run. I do not read it as a part of the calculation of the service period.

The Village points to the treatment of two other bargaining unit employees who followed a career path similar to Franke and did not have paid, on-call hours counted. Those

employees' tenure predates the collective bargaining agreement. The parties stipulated that Franke was the first employee to come up under the language of the collective bargaining agreement.

There was bargaining history presented at hearing. It was the position of the Union that it sought to change the practice of not counting the hours worked which predated entry into the bargaining unit for purposes of benefit computation. It was the position of the Village that no such interpretation was ever advanced.

The Village points to proposals made by the Union in the initial bargaining. Those include the following:

ARTICLE VI

SECTION 1. Probationary Period. New employees shall be on a probationary status for a period of 365 calendar days. If still employed after such date, seniority shall date from the first date of full or part-time employment with the Fire Department. Probationary periods may be extended by mutual agreement between the Association and the Employer. Only one probationary period is required to be served by the employee in the event he moves from part time to full time.

. . .

SECTION 5. Full / Part-Time Seniority. Seniority shall be determined by the employee's length of service as a regular full or part time firefighter / EMT retroactive to the last date of hire. Regular part-time firefighter / EMT's shall be given first consideration for available full-time positions. Current part time employees hired as full time employees shall have no break in their seniority from their original date. Seniority shall continue to accrue during periods of sick leave, time spent in the armed forces on military leave of absence, approved leave of absence, Worker's Compensation, and for a period of up to two (2) years while an employee is on layoff.

. . .

ARTICLE VIII

PART-TIME EMPLOYEES

SECTION 1. Regular part-time employees who have completed the one-year probationary period for the Village are eligible for fringe benefits as follows:

1. 50% of the vacation benefits of full-time employees
2. 50% of the holiday benefits of full-time employees.
3. 50% of the personal leave benefits of full-time employees.
4. Part-time employees who work on any of the holidays designated in this agreement shall be paid time and one-half (1 1/2) for those hours worked.
5. Employees shall be entitled to sick leave based on the following formula: Two hundred (200) hours of work equals 12 hours of sick leave. Accumulation shall commence after the one (1) year anniversary date.
6. Part-time employees who work over 1250 hours during the previous year, shall be entitled to Health, Dental and Life Insurance as designated in Article XVII.
7. All hours worked for any Department of the Village will count as hours worked for the Fire Department for benefit calculations.

It is the position of the Village that the Association proposed to have “All hours worked for any Department ...” count toward fringe benefit computation and failed to secure that benefit.

The Association’s seniority proposal is essentially what the parties agreed to. The Association proposal on part-time benefits was significantly modified. The proposed paragraph 7 was not agreed upon. It would have counted all hours worked for any department in the benefit calculation. This dispute does not involve hours worked outside the Fire Department. The hours in dispute in this proceeding are all hours worked in the Fire Department. What was agreed upon follows a different format than that which was proposed.

Under the Union’s proposal regular part-time employees who have completed the one-year probationary period for the Village are eligible for fringe benefits. That proposal did not become a part of the agreement. The one-year probationary period was defined by the proposed Article VI. It was the 365-day period as a full- or part-time employee. The one-year period began with an employees’ bargaining unit status. Those employees were then eligible for fringe benefits. The parties rejected that approach.

In contrast, the collective bargaining agreement provides eligibility for fringe benefits to employees who have completed three years of continuous service for the Village. Unlike the proposal, the contractual three years is not defined as the probationary period or the first year of employment as a part-time employee. To qualify, an employee has to complete three years of continuous service for the Village. The Village argues the clause should be read to say three years continuous service as a bargaining unit employee. As noted above, this inserts a substantive clause into the contract. It further inserts a service definition that the parties rejected.

The Village offered testimony as to how other bargaining units and non-represented employees have operated. From the record, it appears that the career path for firefighters is unique among Village employees. The testimony as to how other bargaining units operate is illustrative of the Village perspective, but sheds only partisan light on the construction of the contract.

The Village contends that the construction urged by the Association would create a greater benefit for part-time employees than exists for full-time employees. On its face the clause provides a part-time employee 75 percent of the vacation and holiday benefit provided the full-time employee. It is possible for a part-time employee with three plus years of Village-related service and seven plus years in the bargaining unit to receive 75 percent of 15 days, or 11.25 days' vacation. A new full-time hire would receive 10 vacation days. The result is the product of different methods of calculation.

The Village points out that the contract defines seniority as the length of service as a full-time or part-time employee. This ties seniority to bargaining unit status. That fact does not determine whether or not prior service to the Village should be included in the calculation of fringe benefits.

WAGE RATE

Appendix A provides that "... new full-time employees and part-time employees ..." shall receive a reduced level of pay. The question raised in this proceeding is whether or not Franke is a "new" employee within the meaning of Appendix A. He is not new to the Department or to the Village. He is new to the bargaining unit and to the position of part time. A number of those tasked with establishing Franke's rate of pay concluded that he should be paid \$15.84, the top rate for part-time employees.

Appendix A refers to the first six months of employment for new full-time employees. The Appendix uses the terms "first," "new" and "start" in referring to those who will be paid a percentage of the scheduled pay rates. On its face the provision is susceptible to both interpretations advanced in this proceeding.

I believe that the term “new” is a reference to new to the bargaining unit and not new to the Department or Village. This conclusion derives from my reading of how Appendix A relates to Article XIV and to the history surrounding the initial bargain. Article XIV, the seniority clause, defines bargaining unit seniority as beginning when an employee enters the unit. Length of service as a full-time or part-time firefighter / EMT describes a period of time when an employee is in the unit. Part-time employees are in the unit. Paid, on-call employees are not in the unit. Section 14.1 uses the term “hire” in a number of places. The term is used to set the seniority date, i.e., seniority dates back to the “last date of hire.” The reference to the last date of hire implies that there could be more than one such date. More notably, the provision describes the process of moving from part time to full time as being hired into the full-time slot. The use of the term “hire” to describe the process of moving from one status to another is a non-traditional use of the term.

I believe that construing the term “new” in Appendix A as referring to someone who is new to the position as opposed to someone who is new to the Department or Village is consistent with the use of the term hire in Article XIV. “[N]ew full-time employees” would likely be “[c]urrent part-time employees hired as full-time employees” That employee would be new to the position and not the Department. Similarly, the record indicates that it is a common career path for part-time employees to be drawn from the ranks of paid, on-call firefighters. Their seniority is calculated from the date they became a part-time firefighter, which could be one of a number of dates of hire.

When the parties were concluding their initial collective bargaining agreement in 2005, the Village, in an email negotiating the final edits on the contract, offered the following:

In exchange and presuming there are no other substantive changes that need to be bargained, the village, in the interests of furthering settlement and on a nonprecedent setting basis, will not apply the 90% and 95% wage limitations in Exhibit A to current bargaining unit employees when the Village calculates back pay.

The record indicates that there were bargaining unit members in positions that parallel that of the grievant. The email is contemporaneous to the negotiation of the language. It certainly sheds insight as to how the Village understood the language. There is no indication of a contrary interpretation by the Union. It further supports the interpretation advanced by the Village.

AWARD

The grievance with respect to part-time employee benefits is sustained.

The grievance with respect to the wage scale is denied.

REMEDY

The Village is directed to credit Franke with three years continuous service for the time he spent as a paid, on-call firefighter, for purposes of calculating benefits under Article XI. He is entitled to receive the benefits described in Section 11.1 upon his being hired as a part-time firefighter in February 2012.

Dated at Madison, Wisconsin, this 5th day of December 2013.

/s/ William C. Houlihan

William C. Houlihan, Arbitrator