STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Petition of	
KENOSHA PROFESSIONAL FIREFIGHTERS UNION LOCAL 414, IAFF	
For Final and Binding Arbitration Involving Fire Fighting Personnel In the Employ of	Case No. 115 No. 38200 MIA-1188 Decision No. 24376-A
CITY OF KENOSHA (FIRE DEPARTMENT)	

APPEARANCES

On Behalf of the Union: Richard V. Graylow, Attorney - Lawton and Cates; And John Celebre, President, Local 414

On Behalf of the City: Roger E. Walsh, Attorney Lindner and Marsack, S. C.

I. BACKGROUND

On January 22, 1987, the Union filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to initiate final and binding arbitration pursuant to Sec. 111.77(3) of the Municipal Employment Relations Act, with regard to an impasse existing between the Parties with respect to wages, hours and conditions of employment of fire fighting personnel for the years 1987 and 1988. An investigation was conducted on March 16 and 25, 1987 by a WERC Commissioner and he advised the Commission on March 26, 1987 that the Parties were at impasse on the existing issues as outlined in their final offers and closed the investigation on that basis.

Subsequently, the Parties were ordered to select an Arbitrator and the undersigned was so selected. His appointment was ordered April 16, 1987. A hearing was held July 8, 1987. A post hearing brief was due September 4 and reply briefs were exchanged October 8, 1987.

II. ISSUE AND FINAL OFFERS

There is only one issue before the Arbitrator. The Union proposes to add new language to the contract concerning pay for employees working out of their classification (WOC). Their proposal reads as follows:

"1. Create new Section 11.07 as follows:

"11.07 Any Firefighter, Apparatus Operator, or Lieutenant (FPB or Line) temporarily assigned to perform the duties of a higher rank than the employee's present rank shall be paid at the lowest scale of the rank to which he/she is temporarily assigned for that period of time. No employee will be assigned to a rank or rate of pay that is less than his/her regular classification or salary.

"In the event of the absence of a Line Captain or House Captain, and a Lieutenant on duty during that absence performs the duties of that Captain, that Lieutenant shall be compensated at the step A rate for Captain for that period of time.

"For the purpose of this section, persons working in another classification as a result of voluntary time trading by two employees will not be entitled to additional compensation under this section."

III. POSITION OF THE PARTIES

A. PRINCIPLE ARGUMENTS

1. The Union

The Union acknowledges that it is their burden to justify a need for a working out-of-classification clause and to convince the Arbitrator that their proposal reasonably address that need. They submit that a need exists for a variety of reasons. First, they believe a policy exists in the City not to replace employees as they resign or retire.

They believe their proposal is appropriately suited to correct this because it maintains the right of the City to manage and direct its employees, while protecting the right of the employee to be compensated at a rate commensurate with the duties performed and the responsibilities assumed. They explain that under their proposal the City remains free to assign or not assign personnel to duties, as in the past. Thus, it is reasonable, in their estimation, that should the City choose to assign personnel to perform the duties of a higher job classification, it should be required to compensate those personnel at the appropriate rate.

Also in support of the reasonableness of their proposal,

they note one internal comparable has this type of language. The City of Kenosha's Agreement with AFSCME Local No. 71 contains a section covering Working Out of Classification. In that Unit, workers are compensated at the top rate of pay in a particular classification when they perform the duties of someone in that classification and includes a minimum payment. This is in contrast to their proposal where the Union asks only to be compensated at the starting rate of pay in the classification they are assigned to temporarily for the actual time only.

In terms of external comparables, they emphasize all of the external comparables have various Working Out of Classification pay provisions in place. Furthermore, they suggest a comparison of similar benefits in other Fire Departments will also show that the Union's demand is modest. For instance, they note that Union Exhibit No. 21 indicates the hourly differentials associated with the Union's proposal are quite reasonable when compared to other Departments. The unanimous existence of this language in external contracts should, in their opinion, outweigh the fact that only one internal unit has the benefit.

Next, they submit the issue of Working Out of Classification Pay is not new to these parties. The Union made a W.O.C. proposal in 1980 before Arbitrator Stern. This was only one of several issues before Arbitrator Stern and while he judged the City's offer more reasonable as a whole, the Union notes he preferred the Union's offer on the W.O.C. issue. He believed it was significant that, while the City claimed the plan was a "Rolls Royce" among the plans in place at all the comparables, they failed to make any proposal to address the need. In this case, the Union notes that not only has it revised its 1980 proposal to be more modest, the City again has not made an offer.

B. The City

The City doesn't believe that the singular issue before the Arbitrator can be viewed in a vacuum. The City's position is that the Arbitrator must look at what has already been agreed upon by the Parties to understand this dispute. They believe the Parties have already negotiated a contract with more than adequate compensation and benefits to both sides, and that the Union's demand for "more" on top of this amounts to greed. On a complete package basis, they contend they have agreed to enough and any more is unreasonable.

The other significant portions of their agreement include (1) 4% wage increase in 1987 with an additional 1% for Lieutenants and 2% for Captain, (2) 5% in 1988, (3) a new starting scale, (4) frozen COLA, (5) a new probationery period and (6) a change from amounts to full health insurance contributions along with other coverage changes. They contend based on a detailed analysis that the other parts of the agreed items enhance, rather than detract, from the economic package.

Based on their tentative agreements, the City submits that they have already provided the Kenosha Firefighters with a substantial economic settlement, one that is in excess of the economic settlements granted other City of Kenosha bargaining unit employees as well as granted to firefighters in other comparable communities. They submit for 1987, the additional 2% to the 12 Captains and additional 1% to 21 Lieutenants amounts to an average of .36% to each of the 126 members of the bargaining unit. Thus, the average wage increase for 1987 will be 4.36% and the average wage increase for 1988, with the 5% not taking effect until February 1, will be 4.58%. This is more than the increases to be received by other City employees which range from 3.2 to 4.0 in 1987 and 3.0 to 4.58% in 1988.

In terms of external comparables, they contend the Kenosha Firefighters will receive more in 1987 than any firefighter in comparable communities and the City predicts that the 1988 increase of 4.58% will also exceed the increases that will be granted to any of the comparable firefighters. The settlements range between 3.5 and 4.0%. If the W.O.C. benefit were added they estimate it would amount to about an additional .4% on their package. This new benefit would bring the total economic percentage increases in 1987 to 4.76%, over three-quarters of a percent higher than granted to any other City of Kenosha bargaining unit employee and over three-quarters of a percent higher than granted firefighters in other comparable communities. In 1988, this new benefit would bring the total economic percentage increase to 4.98%, four-tenths of a percent higher than the police settlement and one and two percent higher than the settlements with AFSCME and the School Crossing Guards. It is also in excess of the cost of living. Thus, they argue there is no basis for granting this new and costly benefit.

They also believe that the Union's proposal is the "Cadillac" of Out of Classification pay provisions among the comparables. They summarize the other provisions and note the Union's proposal does not contain as the others do any restrictions as to how long an employee must work out of classification, the type of employee who qualifies or procedures as to who should receive it. They also contend that the Union's provision creates an irreconcilable conflict with an existing provision, Section 7.04 which also distracts from their offer.

Next, the City concedes that it is the only City among the comparables in which there is no type of acting pay provisions. However, it is their contention that the fact that Kenosha's Firefighter contract contains no acting pay provisions, while the contracts in comparable communities do, is not determinative of this issue. This is because Kenosha Firefighters enjoy several other economic benefits that none or only one of the other comparable communities offer. They include (1) beneficiary pay, (2) educational incentive pay, (3) contractual restriction on maintenance work and hours of training, (4) retiree and widow/widower health insurance, (5) sick leave (Kenosha Firefighters enjoy unlimited sick leave). It is also

noted that there is very limited out of classification pay for employees in the City of Kenosha with only one unit on a limited basis enjoying that benefit.

Last, on the face of it, they don't believe the proposal is justified since assigning employees to acting positions in Kenosha does not involve significant additional duties which justify acting pay. In this regard, they note for instance, when a firefighter is assigned as an Apparatus Operator in Kenosha, he checks the rig out at the beginning of the workday and exchanges information with the off-going Apparatus Operator. Those are his only Apparatus Operator duties if there are no calls for this equipment that day. The Employer points out there are numerous days each month when equipment is not used. They give other examples as well.

B. REBUTTAL ARGUMENTS

1. The Union

First, in rebuttal, the Union argues the tentative agreements alone are not an equitable basis for settlement when the Kenosha Firefighters' position is compared to that of the internal and external comparables. For instance, they note the current wage adjustments for Captains and Lieutenants of one (1%) percent and two (2%) percent respectively are portrayed by the City as part of the overall wage increase received by all one hundred and twenty-six (126) members of the bargaining unit. These increases were agreed to in order to address a significant disparity. They assert at the end of 1986, Kenosha's Lieutenant's wages were thirteen (13%) percent less than the highest paid Lieutenant in the comparable Fire Departments and nine (9%) percent below the average. Captains faired even worse at eighteen (18%) percent below the highest paid Captains and ten (10%) percent below the average. Thus, they submit the present compensation was meant to make some movement toward the remedy of this situation. The gap will not be narrowed much in 1987.

Along these same lines, they maintain that the City's efforts to "pat" itself on the back for bringing starting wage rates for Kenosha Firefighters "in line with the starting rates of Fire Fighters in comparable communities" is hollow since the 1987 increases still put the starting rates for Kenosha Firefighters in fourth (4th) place out of the six (6) units. Additionally, attention is drawn to the fact that in 1986, the wage rates for Top Fire Fighters in Kenosha were three point nine (3.9%) percent below the average of the comparable cities' Top Fire Fighters. Apparatus Operators rates fell six point five (6.5%) percent short of the average. Thus, with disparity like this it is completely understandable to them that Kenosha Firefighters should receive wage increases slightly in excess of the other groups.

They also diminish the importance of the internal settlements since there is no consistency among them. It is their opinion that the pattern of settlements indicates that some of the units will do better than the others and in their case rightfully so since Kenosha Fire Department personnel fare so poorly compared to comparable Fire Department employees. This makes it necessary for them to receive above average economic packages if they are to achieve some sort of parity in the coming years. The gap must be narrowed. Moreover, the percentage increase Firefighters are to receive is only marginally higher than the increases received by the other City units. Additionally, they argue an increase is only logical since Firefighters, even with the current increases, still have lower starting rates than Kenosha Police Officers.

The Union also rejects the notion advanced by the City that the Union proposal is "new and costly." It is not new since it was first introduced in the 1980 arbitration and already exists in the AFSCME contract and all the external comparables. Additionally, it amounts only to .4% of total payroll and will not change Kenosha's relative ranking among comparables.

Next, the Union takes exception to the Employer's contention that the other tentative agreements enhance the economic package. It is their position they represent concessions on the Union's part. In fact, their argument implies that these concessions were designed in view of their W.O.C. proposal to make their package "modest." These concessions include (1) the suspension of the COLA increase, a very significant concession in their mind and far outweighs the cost of the W.O.C. proposal. (2) Health insurance changes which benefit the Employer too. (3) A reduced starting rate and addition of two classification steps which will lower the cost of hiring a Firefigher for the City. They note this proposal was in the City final offer in 1986. (4) A lengthened probationery period which clearly benefits the City.

The Union does not believe their proposal is anything but modest since unlike most of the comparable provisions, the Union's provides for compensation at only the lowest rate of pay for the position the employee is temporarily assigned. Again, they emphasize that a significant difference between the 1980 proposal and this proposal is the absence of any requirement for the City to assign people to work in a higher classification. Thus, the City can avoid all the expense of Working Out of Classification pay by simply not assigning anyone to work in a higher classification. Management can control the cost of this proposal by exercising its right under Section 2.01(a) of the contract. "To determine the general business practices and policies and to utilize personnel, methods and means in the most appropriate and efficient manner possible."

Additionally, the Union does not believe that it would be reasonable to include all the limitations found in other agreements since to do so would virtually nullify the provision.

In their opinion, the Union's offer does contain limitations, limitations that make the offer as a whole reasonable. Also, the Union does not see any conflict with Section 7.04 of the Agreement and believes if this were a significant concern it would have been raised in bargaining which it was not.

Next, the Union notes the City attacks the few benefits the Union enjoys that are not common to all of the comparable cities' Fire Fighters; Beneficiary Pay, Education Incentive Pay, Unlimited Sick Leave, etc. It is the position of the Union that Kenosha Firefighters do not have a multitude of benefits not enjoyed by the external comparables. First, in this regard, they suggest that undoubtedly, the comparables have benefits that the Kenosha Firefighters do not enjoy. Even so the benefits highlighted by the City are not really significant. In this case of considering the fact that a Fire Fighter has to die before the City must pay Beneficiary Pay, it can hardly be called a benefit. In the case of educational incentive pay Wauwatosa and Racine have this benefit in their contract and Janesville and West Allis have, as a matter of policy, tuition reimbursement instead of educational incentive pay. Thus, only Waukesha is without any type of education benefit.

Regarding health insurance for retirees, they admit they are the best of the comparable cities, yet all of them have some sort of protection for employees leaving the fire service. Also, in terms of unlimited sick leave they suggest this is a benefit to the City since it lowers sick leave usage.

Last, to stress the need for the W. O. C. proposal, the Union notes in 1986 there were one thousand nine hundred and seventy (1970) moves out-of-class totalling six thousand five hundred and sixty-four (6,564) total hours. Using forty-six (46) hours/work as the basis work week, this figure approximates three (3) full-time equivalents per year. In short, they maintain the City has used the equivalent service of three (3) full-time Fire Fighters at no out-of-class expense to it at all.

B. The City

First, the City dispels the illusion the Union seeks to create concerning a grandiose plan by the mayor not to fill vacancies. In short, they don't believe there is any reliable evidence of this. They also note he is only one component of the decision making process. Moreover, the delay in filling the Captain's vacancy is not unusual and for explainable reasons. Nor did it have any effect on the number of incidents of working out of classification from prior years. The City projected the annual amount of hours of out of classification work at 41,655. This was based on actual figures for the first five months of 1987, which would have included two months of the Leiting vacancy. The Union's number of hours of out of classification work amounted to 45,564 and this was based on actual figures

for all of 1986. The difference in figures is quite slight, but it is interesting that the 1987 figures show a lower projected annual amount, even with the Leiting vacancy.

Regarding the Union's reliance on the Local 71 contract as an internal comparable the Employer stresses that it applies to only 3 of the 67 job classifications included in that bargaining unit and that there is no such provision in the three other City of Kenosha contracts that cover more than one job classification, i.e., Police, Library and Transit. They also stress the importance of internal comparables and in doing so provide a detailed analysis distinguishing the case citations relied on by the Union.

They seriously question as well whether any significant disparity exists between Kenosha and other cities. They note again Kenosha Firefighters enjoy several fringe benefits not available to firefighters in comparable communities or only available to those firefighters in a substantially reduced fashion. The only valid comparison is the total fringe benefit program and the Union has not offered evidence to demonstrate any substantial disparity between the total fringe benefit program of Kenosha Firefighters and firefighters in comparable communities.

They also submit that when new fringe benefits are proposed a corresponding quid pro quo becomes very significant. They assert the Union here has not agreed or proposed any such quid pro quo. For instance, the firefighters have not even agreed to eliminate their educational benefit (Article 18) as did the Kenosha Police for employees hired on and after January 1, 1986. The City had this as one of its initial proposals. Thus, in their opinion, there just is an insufficient quid pro quo to justify the Union's acting pay proposal.

Regarding the 1980 award by Arbitrator Stern the City notes that the out of classification pay issue was only one of six issues in dispute. While the City's offer was adopted they note that many of the Union's 1980 proposals have since been realized through voluntary collective bargaining. For instance, the City has increased its pension contribution to 8%; the City has increased its EMT pay from $15 per month to those assigned more than 50% of their time per month to rescue squad duty to $5 per day for those assigned to and working on rescue squad duty for more than 12 hours on that day (potentially, the payment could be $50 per month); and the City, as part of the 1987-88 contract, will pay the "full cost" of the health insurance premiums. Again, the City argues that if acting pay is to become part of the contract in Kenosha, it should be accomplished through voluntary collective bargaining.

IV. OPINION AND DISCUSSION

The Union appropriately recognizes that it is their burden to justify their proposal. At a minimum, they must, as a general matter, convince the Arbitrator that there is not only need for the W.O.C. language but that their language reasonably addresses that need. Support in the comparables is also very important in this respect.

However, sometimes this is not enough. The Union must also convince the Arbitrator that their proposal in the context of the entire bargain is reasonable. In other words, a proposal might be perfectly justified in terms of need and the manner it operates and it might be perfectly justified in terms of comparables. Yet in some circumstances a proposal might simply be "too much" when considering all the other gains the employees have made during the course of a single bargain. It might be the proverbial "straw that broke the camel's back."

The Employer enunciated their concern that one more benefit given all the existing tentative agreements on top of the existing agreement was too much. This is a relevant concern under the statutory criteria directing the Arbitrator to take into consideration:

> "h. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the Parties, in the public service or in private employment."

One such factor normally taken into consideration is the nature and course of collective bargaining absent interest arbitration as an impasse mechanism. Sometimes it is relevant to ask, if one Party or the other couldn't hide behind the all too easily erected cloak of interset arbitration, and if this were the real world of collective bargaining--"is it likely the Parties would agree to the proposal voluntarily?"

We know from experience that in the real world the Parties don't make too many changes at once. Union's don't gain too much at a time. Nor do Employers when seeking concessions get too much at a time. We also know that in real collective bargaining there are often trade offs made in order to gain new benefits. So this becomes relevant too. All tolled, the Arbitrator must be convinced that the process of interest arbitration is reasonably being used (not abused) as a legitimate substitute for free collective bargaining.

Thus, it is necessary and legitimate to look at the W.O.C. proposal as one issue against the broad background of the Parties bargaining and in the light of these considerations determine if "enough is enough." However, it must be kept in

mind at the same time that this is one of several factors to be simultaneously weighed and balanced in evaluating the Union's proposal. And, last of course, all this must be weighed against the Cities final offer which is silent on the W.O.C. issue. Accordingly, there are a number of considerations to be taken into account.

It is the Arbitrator's opinion that based on all the considerations discussed above that there is more evidence to support the Union's final offer than the City's final offer. First, the Arbitrator is convinced there is a need for the W.O.C. language. There is little dispute that employees work out of classification with great frequency. Both Parties are very close with their cost estimates of the benefits which are necessarily predicated on substantial numbers of hours being worked out of classification. This establishes a need for the language.

Also, the mere fact that all the employees in each and every external comparable group have such language establishes a need for the language purely on an equity basis. It is also equitable that employees be paid the appropriate rate for the work they are assigned. It is noted as well that Arbitrator Stern expressed a preference for the Union's W.O.C. proposal in 1980. Obviously, he was convinced of the need for it in 1980 and nothing in this regard has changed since then.

The Union's W.O.C. proposal also reasonably addresses the equitable need for such language. Most significant here is the fact--as recognized by the Union--that the Employer has the option not to have employees perform higher rated duties which would require W.O.C. compensation. Nor is there a minimum payment regardless of the amount of time spent out of classification and only the starting rate applies. It is not fatal that other restrictions are not present. These are significant enough and not wholly out of line with the comparables.

There is also the matter of internal comparables. While this militates against the Union's proposal to some extent it isn't enough to sink it in view of a variety of other considerations. These include the overwhelming, in fact unanimous, support in the external comparables. Also important is the very distinct likelihood that other internal units don't have W.O.C. because they don't need it since it is an infrequent occurrence. The fact only three classifications in Local 71 are entitled to W.O.C. pay may be because they are the only ones who do so with any regularity. For instance, it is unlikely a waste collector is going to work as a key punch operator or that a secretary will work as a mechanic.

The Arbitrator also cannot conclude that the Union's proposal is a "too much" or a "reach." The Union isn't asking for too much in view of (1) the overwhelming support in the external comparables for W.O.C. pay. (2) The fact there are

already noteworthy wage disparities between Kenosha and the comparables. (3) The fact the existing tentative agreement are not a one-way street and include some less than insignificant accommodations on the part of the Union. (4) The fact that considering the pre-existing wages disparities the aggregate wage agreement wasn't excessive relative to internal or external comparables (it justifiably included catch-up) and (5) The fact that considering the pre-existing wage disparities the employees' total compensation even including a W.O.C. benefit would not be excessive.

Last, it is significant that the Union's proposal, even though it has some drawbacks, is being weighed against no offer on the Employer's part concerning W.O.C. Given a need exists and the fact the Employer fails to address that need, weighs against the Employer.

In view of the foregoing, the final offer of the Union is deemed more consistent with the statutory criteria and is accepted.

AWARD

The Final Offer of the Union is adopted.

Gil Vernon, Arbitrator

Dated this 26th day of January, 1988 at Eau Claire, Wisconsin.