

**IN THE MATTER OF ARBITRATION BETWEEN**

<b>AFSCME, COUNCIL 5, LOCAL 2029</b>	)	<b>ARBITRATION</b>
	)	<b>AWARD</b>
<b>UNION,</b>	)	
	)	
<b>and</b>	)	
	)	<b>NORBIE</b>
	)	<b>OUT-OF-CLASS PAY</b>
	)	<b>GRIEVANCE</b>
<b>STATE OF MINNESOTA,</b>	)	
<b>DEP'T OF MILITARY AFFAIRS,</b>	)	
	)	
<b>EMPLOYER.</b>	)	

Arbitrator: Stephen F. Befort

Hearing Date: March 28, 2008

Date of decision: April 17, 2008

**APPEARANCES**

For the Union: Christi Nelson

For the Employer: Carolyn Trevis

**INTRODUCTION**

The American Federation of State, County, and Municipal Employees, Council 5, Local 2029 (Union) brings this grievance as exclusive representative claiming that the State of Minnesota, Department of Military Affairs (Employer) violated the parties' collective bargaining agreement by failing to pay the grievant for out-of-class work performed during March – May, 2007. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the

testimony of witnesses and the introduction of exhibits. The parties decided not to submit post-hearing briefs.

### **ISSUES**

1. Did the Employer violate the parties' collective bargaining agreement by declining to provide out-of-class pay to the grievant for work performed during the period of March – May, 2007?
2. If so, what is the appropriate remedy?

### **RELEVANT CONTRACT LANGUAGE**

#### **2005-2007 Supplemental Agreement**

#### **Article 1**

#### **Work Out of Class**

Article 18, Section 6 of the Master Agreement shall be supplemented and/or modified as follows for Airfield Fighters:

When an employee is expressly assigned to perform substantially all of the duties of a position allocated to a different class that is temporarily unoccupied and the out of class assignment exceeds six (6) consecutive work days in duration, the employee shall be paid for all such hours at the employee's current salary when assigned to work in a lower or equal class or at a rate within a higher range which is equal to the minimum rate for the higher class or one (1) step higher than the employee's current salary, whichever is greater. If an employee is assigned to work out of class, but does not meet the six (6) consecutive work day standard, and within five (5) working days the employee is subsequently assigned to work out of class to the same assignment, the previous work time served on work out of class will count toward meeting the six (6) consecutive work day standard.

### **FACTUAL BACKGROUND**

The Minnesota State Department of Military Affairs employs a firefighting unit at the Duluth Air National Guard Base. The unit provides fire protection and related emergency services pursuant to an operating agreement with the United States Department of Defense.

The firefighting unit is organized on a para-military basis, headed by a departmental fire chief. Three assistant fire chiefs oversee daily operations and share an assignment to the unit's operational command vehicle, R60. The assistant fire chiefs direct the activities of senior airfield firefighters and airfield firefighters. Senior firefighters perform a command function in leading a crew of firefighters in operational activities, while firefighters, according to their job description, "perform various duties as firefighter, rescue man, or as a fire apparatus driver/operator at the scene of fires, aircraft emergencies, . . . and medical emergencies."

The firefighting unit provides around-the-clock services in three 24-hour shifts. Assistant Chief Wade Boyat testified that ten employees generally are deployed on each shift. A usual shift will consist of one assistant chief, two senior firefighters, and seven firefighters. Personnel generally will be assigned to staff five vehicles: a command vehicle (R60), a rescue vehicle (R62), and three crash vehicles. Standard Operating Guidelines require that at least one senior officer (assistant fire chief or senior firefighter) be on duty at all times.

During the spring of 2007, the firefighting unit was operating with several unfilled senior firefighter positions. These vacancies were the result of a combination of retirements, promotions, and military deployments. According to the testimony of the grievant, Firefighter Kevin Norbie, Assistant Chief Mike Ferrazzi informed Norbie that he would be assigned to "crew" the rescue vehicle upon the deployments of two senior firefighters. The testimony does not indicate that Ferrazzi said anything expressly to Norbie about performing out-of-class work.

The assistant chiefs make scheduling assignments by means of postings made to the daily log book. Between March 18 and May 9, 2007, Firefighter Norbie was assigned to the first of two positions on rescue vehicle R62 on sixteen consecutive shifts. The parties agree that the individual listed in the first position on the log for a vehicle is the crew leader of that vehicle, while the individual listed in the second position usually drives the vehicle during the assigned shift.

The parties disagree, however, as to the import of the first seat assignment. The Union asserts that if two or more firefighters are assigned to a vehicle crew, the first position is always filled by a senior firefighter. Assistant Chief Boyat's testimony disputes this claim. He testified that although the first position on R62 was occupied by a senior firefighter for many years, there is no formal policy that compels such a result. He also testified that a review of the log book assignments for the period between July 2006 and May 2007 revealed that senior firefighters were assigned to the first position on R62 for only 50% of all shifts.

The parties additionally disagree about the duties expected of someone assigned to R62's first position. Firefighter Norbie, as well as Senior Firefighter Tom Gavitt, testified that a person assigned to the first crew position is expected to perform all of the duties of a senior firefighter. The Union also points out that the Firefighter job description states that a firefighter "may be required to act in the position of Senior Firefighter temporarily." Assistant Chief Boyat, in contrast, testified that the first position assignment represents a privilege of seniority, but does not entail any delegation of the command duties performed by senior firefighters. Boyat also testified that during his 20 years of service with the unit, out-of-class pay has been authorized only when a

senior firefighter has been assigned to perform in the stead of an assistant chief and never when a firefighter is assigned the first position on a vehicle.

Firefighter Norbie requested out-of-class pay for the sixteen shifts on May 9, 2007. The Employer denied that request, and the Union filed the instant grievance in protest. Assistant Chief Ferrazzi denied the grievance at the initial step citing two grounds:

1. I did not expressly assign you to perform substantially all of the duties of a Senior Firefighter.
2. SOG 13 and OI 32-2013 do not require that the person sitting in the right seat of any vehicle be considered a lead worker.

The grievance advanced through the remaining steps of the grievance procedure and now is ripe for resolution in this arbitration proceeding.

### **POSITIONS OF THE PARTIES**

#### **Union:**

The Union contends that Kevin Norbie met all of the contractual requirements for earning out-of-class pay. In terms of those pre-requisites that are contested, the Union asserts that the Employer “expressly assigned” Norbie to a senior firefighter position by means of log book assignments designating Norbie to serve in the first position on vehicle R62. The Union further maintains that an individual assignment to the first position on a multi-person crew is expected to “perform substantially all of the duties” of the senior firefighter position.

#### **Employer:**

The Employer counters that Kevin Norbie has not met two essential requirements for establishing an entitlement to out-of-class pay. First, the Employer contends that

there is no evidence of any written or oral assignment of Norbie to perform work in the capacity of a senior firefighter. Second, the Employer maintains that an assignment to ride in the right-hand seat of a vehicle does not entail the delegation of any command functions. As such, the Employer argues, the grievant was not performing substantially all of the functions of the senior firefighter position.

### **DISCUSSION AND OPINION**

Article 1 of the parties' 2005-07 Supplemental Agreement provides that a covered employee may be entitled to a higher rate of pay for performing out-of-class work under the following circumstances:

When an employee is expressly assigned to perform substantially all of the duties of a position allocated to a different class that is temporarily unoccupied and the out of class assignment exceeds six (6) consecutive work days in duration, the employee shall be paid for all such hours at the employee's current salary when assigned to work in a lower or equal class or at a rate within a higher range which is equal to the minimum rate for the higher class or one (1) step higher than the employee's current salary, whichever is greater.

The apparent purpose of this provision is to deter the Employer from avoiding the pay rates set out in the parties' contract by means of an ongoing assignment of a lower-paid employee to perform the work of a more highly-rated classification.

Article 1, in essence, establishes four pre-requisites to a claim for out-of-class pay:

- 1) An employee must be expressly assigned;
- 2) to perform substantially all of the duties of a position allocated to a different class;
- 3) that is temporarily unoccupied; and
- 4) which exceeds six (6) consecutive work days in duration.

In this instance, the parties do not dispute the existence of the latter two prerequisites. The record establishes that the firefighting unit had five temporarily unfilled senior firefighter positions during the spring of 2007. In addition, the Employer assigned Mr. Norbie to the first position on vehicle R62 for sixteen consecutive work days. The dispute, accordingly, comes down to whether the first two prerequisites have been satisfied. Each of these requirements is addressed below.

### **Express Assignment**

The parties present very divergent viewpoints with respect to the first prong of the out-of-class pay formula. The Employer argues that Mr. Norbie has not satisfied this requirement because no Employer representative gave him any sort of express written or oral directive to perform senior firefighter duties. The Union, in contrast, claims that the Employer's daily log assignment of Mr. Norbie to the first position on vehicle R62 functions as a sufficient express assignment.

While the respective arguments of the parties on this issue are understandable, the "express assignment" requirement is really a non-issue in this matter. Since the purpose of the daily log is to provide notice of daily assignments, such notice operates as a sufficient "express assignment" for purposes of the out-of-class provision. What is not clear, however, is whether this assignment requires the performance of senior firefighter duties. Thus, the outcome of this grievance depends wholly on the second prong of the four-part formula.

### **Performance of Out-of-Class Duties**

The Union claims that the assignment of a firefighter to the first position on a multi-member crew is the functional equivalent of an assignment to perform senior

firefighter duties. The Employer disagrees, maintaining that the first position designation is merely a seat assignment on a vehicle that comes with no significant change in job duties.

The Union's position finds support in three pieces of evidence. First, as Assistant Chief Boyat acknowledged, a senior firefighter occupied the first position seat on the rescue vehicle for a number of years. Second, the job description for the firefighter position expressly states that a firefighter "may be required to act in the position of a Senior Firefighter." Third, both the grievant and Senior Firefighter Tom Gavitt testified to their belief that a firefighter temporarily assigned to a senior firefighter position is expected to perform all of the duties of that position. While Mr. Norbie's belief was expressed as a matter of opinion, Mr. Gavitt premised his belief on his own personal experience. He testified that he was temporarily assigned by the Employer to perform senior firefighting work in 2007 while the unit had several vacancies in that position. During that assignment, the Employer disciplined Mr. Gavitt for failing to perform all of his senior firefighting duties in a proper fashion. Based on this experience, Mr. Gavitt concluded that such a temporary assignment necessarily requires the performance of *all* of the duties of the senior firefighter position.

This evidence, however, is far outweighed by the countervailing evidence submitted by the Employer. This evidence includes the following six items:

- 1) The Standard Operating Guidelines do not require that the senior employee on a multi-person crew be a senior firefighter. Instead, the only pertinent requirement is that each shift must have at least one senior officer (assistant chief or senior firefighter) on duty. Accordingly, so long as at least one senior officer is available, the guidelines do

not require vehicle crew members with seniority to assume senior firefighting responsibilities.

2) Assistant Chief Boyat testified that, in spite of the historical presence of a senior firefighter on vehicle R62, it was not uncommon in more recent times for the assistant chief to assign only two firefighters (thus, no senior firefighter) to vehicle R62. According to Boyat, a review of the log book assignments for the period between July 2006 and May 2007 indicates that senior firefighters were assigned to the first position on R62 for only 50% of all shifts.

3) Mr. Gavitt's experience is not analogous to that of Mr. Norbie. The Employer expressly assigned Mr. Gavitt on a long-term basis to serve as a senior firefighter and he was paid at that higher classification rate. As such, the Employer maintains, this provides no precedent with regard to someone like Mr. Norbie who was assigned, not to the position of a senior firefighter, but only to the right-hand seat of vehicle R62.

4) The Employer points out that the principal distinction in the job duties of the two firefighter positions is that senior firefighters are responsible for exercising command and leadership functions. But, the Employer asserts, the assignment of Mr. Norbie to the first position seat was not accompanied by any delegation of command and leadership responsibilities.

5) The Union did not submit any evidence showing any new command or leadership functions that Mr. Norbie exercised while serving in the first position on vehicle R62.

6) Fire Chief David Dodge and Assistant Chief Boyat, with a collective experience of more than 30 years with the unit, could not recall any instance in which a

firefighter had received out-of-class pay due to serving in the first position on a vehicle. Both testified that the only instances of out-of-class pay of which they were aware involved situations in which the Employer assigned a senior firefighter to serve temporarily as an assistant chief. They explained that out-of-class pay was appropriate in the latter context because the senior firefighter would assume the shift command functions of the assistant chief. That same rationale does not apply to the grievant's situation, however, since the first position assignment did not actually entail the performance of senior firefighter functions.

Viewing the record as a whole, the weight of the evidence clearly supports the conclusion that the assignment of Mr. Norbie to the first position on vehicle R62 did not entail an accompanying delegation of command and leadership functions. As such, Mr. Norbie did not substantially perform all of the duties of a senior firefighter, and he is not entitled to out-of-class pay for such assignment.

#### **AWARD**

The grievance is denied.

Dated: April 17, 2008

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Stephen F. Befort  
Arbitrator