

IN THE MATTER OF ARBITRATION BETWEEN

City of St. Paul,

Employer,

DECISION AND AWARD

and

BMS CASE NO. 10 PA 0796

International Association of
Firefighters, Local 21,

Union.

ARBITRATOR:

Stephen A. Bard

DATE OF HEARING:

October 5, 2010

PLACE OF HEARING:

St. Paul, Minnesota

DATE OF MAILING POST-HEARING BRIEFS:

November 15, 2010

DATE OF DECISION AND AWARD:

December 13, 2010

GRIEVANT:

William Lambert

APPEARANCES:

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INTRODUCTION

This matter came on for arbitration before Neutral Arbitrator Stephen A. Bard, on October 5, 2010, at 8:30 a.m. at the offices of the Minnesota Bureau of Mediation Services in St. Paul, Minnesota. The Employer was present with its witnesses and was represented by Ms. Gail Langfield. The Union was present with its witnesses and was represented by Mr. Jim Michels. The parties stipulated that there were no issues of timeliness or arbitrability and that the matter was properly before the Arbitrator for a decision on the merits.

Testimony and exhibits were taken at the time of the hearing and at the conclusion thereof the parties agreed to simultaneously serve and submit briefs on November 15, 2010.

ISSUES

1. Did the Employer violate the Collective Bargaining Agreement when it detailed the grievant to an apparatus other than his assigned rescue squad without backfilling his position on the squad for the remainder of the shift?
2. If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

Article 5 of the parties' Labor Agreement states in relevant part:

“[t]he Union recognizes the Employer’s right to operate and manage its affairs.... those rights and authority which the Employer has not officially abridged, delegated or modified by this Agreement are retained by the Employer.”

Article 9 of the parties' Labor Agreement states in relevant part that if an employee is “required by the Employer to perform the work duties and accept the responsibilities of a higher class,” the employee “will receive the rate of pay for that class.”

Article 10.6(2) of the parties' Labor Agreement states in relevant part:

“[f]or the convenience of the employer, temporary assignment to a vacant position may be made during the thirty (30) day period for which the position is open for bid.”

Article 10.6(9) of the parties' Labor Agreement states in relevant part:

Assignment to positions on the rescue squads shall be made in the following manner:

- c) Three Firefighter positions will be assigned on each rescue squad. Each Firefighter assigned to one of these positions will remain for a maximum of five years. When a vacancy for Firefighter is filled, the position shall be posted with the other normal vacancies. The Employer shall fill the position with any Firefighter that has bid for the position without regard to seniority.

FINDINGS OF FACT

The Arbitrator finds that the following facts are either not in dispute or have been established by a fair preponderance of the evidence by the party having the burden of proof.

THE DEPARTMENT

1. The City of Saint Paul operates a 24 hour Fire Department. The Department provides fire suppression services to the City and its residents as well as emergency medical services (ambulances). The Department employs firefighters, fire-equipment operators (FEOs), fire captains, district chiefs, deputy chiefs, an assistant fire chief, a fire chief as well as other administrative personnel. Personnel are assigned to 24 hour shifts on a rotating basis.
2. There are 26 fire companies located at fire stations throughout the City. The majority of these companies (23) have 4 personnel assigned to each apparatus or rig. The City also has 3 rescue squads which have 5 positions assigned to each squad. These squads perform specialized technical services for incidents involving hazardous materials and advanced technical rescue operations.

3 Under the provisions of Article 10 of the CBA, a firefighter with more than two years of service can bid for a specific apparatus (in dual stations – that is stations with an engine and a ladder company – there are a separate postings for the engine spots and the ladder spots) and, if he/she is the successful bidder, retain that position virtually for the duration of his/her career barring promotion, a voluntary transfer, transfer by inverse seniority or discipline.

4. The SPFD maintains a pool of unassigned personnel – meaning those with less than two years of experience who do not have bidding rights and those with more than two years who have chosen not to bid for a specific position. The pool is used to fill in for absences of personnel assigned to companies.

5. In the fall of 2008, St. Paul Firefighter William Lambert (hereafter the “grievant”) bid for a vacant position on Rescue Squad 2. He was selected and assigned to the position as of November 19, 2008.

STATE CONTRACT

6. The City has entered into a contract with the State of Minnesota which obligates the city’s fire department to respond in certain situations involving hazardous materials. The proposal sent to the State of Minnesota by the Department states that the “Chemical Assessment Total Team Response will be five (5) personnel from Rescue Squad 1 and Haz/Mat 1.” The proposal also states that the Emergency Response Total Team will be comprised of ten employees. The proposal says nothing about having five employees on-duty, on the site of the haz-mat vehicle 24 hours a day. The document entitled “Membership of the Proposed Team” states that the team will consist of “Thirty (30) qualified members with a minimum of twelve (12) members available to respond at all times as a hazardous materials emergency response team.” With three active rescue squads throughout the City, this means the Department actually represented to the State that it would only

have four employees on each squad at all times.

THE COLLECTIVE BARGAINING AGREEMENT

7. The language at issue was first added to the collective bargaining agreement (“CBA”) between the parties in the 1985-1986 CBA. Section 10.6(9) is a subpart of 10.6; a section entitled “Job Transfer by Bid System.” Under the CBA, employees bid for positions within the Department and as a general matter are assigned to requested bids based solely upon seniority. Section 10.6(9)(c) addresses how many employees are assigned to rescue squads and for how long they remain in their assignment. The section creates an exception to the seniority bidding system. The Labor Agreement contains no provision specifying the number of firefighters or firefighter positions that must be assigned with respect to all of the other types of companies operated by the SPFD (i.e., engines, ladders, or ambulances). All of these positions are filled on the basis of seniority.

8. Originally, Section 10.6(9)(c) allowed employees to remain in their assigned positions for a maximum of three years. Through the negotiation of the 1990-1991 CBA that maximum was extended to five years. There have been no other changes made to Section 10.6(9) for 20 years.

9. While Section 10.6(9) has remained unchanged for almost 20 years, the Union has made repeated attempts to add language regarding minimum staffing of apparatus to the CBA by proposing new articles. In the negotiation of the 1992-1993 CBA, the Union proposed the following language:

“The Fire Department shall plan for and schedule a minimum of one employee in the rank and title of Captain, one employee in the rank and title of FEO, and three employees in the rank and title of Fire Fighter on duty with each resue (sic) squad in active service.”

The City did not agree to the proposed addition and the 1992-1993 CBA did not include the proposed article.

10. The Union proposed another minimum staffing clause during negotiations for the 2006-2007 CBA. The clause proposed minimum staffing for Pumps, Aerials/Ladders, and Squads. With regard to the staffing of squads, the proposal stated that:

“[s]quads shall respond with a minimum company of four (sic) (5) suppression personnel.”

The City rejected the Union’s proposal and the CBA remained without a minimum staffing clause for other apparatus

BUDGET CONSTRAINTS

11. In previous years, the fire department’s budget included costs for overtime of approximately 1.3 million dollars, which allowed the department to meet its staffing levels by calling employees back on overtime when absences exceeded expectations. However, by 2008, the department’s overtime budget was reduced to \$300,000.00 per year. In response to this reduction, and in an effort to manage the budget throughout the year, fire department administration devised a system with a limited number of overtime shifts available during each month of the year. Thus, the department created an algorithm used when absences exceed expectations. This algorithm allows the department to meet the Occupational Safety and Health Act (“OSHA”) regulations regarding staffing for each rescue apparatus in the department with four personnel.

THE GRIEVANCE EVENT

12. On October 13, 2009, the department was forced to operate without those employees who were on vacation and also to deal with the unscheduled absences of 21 firefighters, or over 20 percent of its workforce. In response, the department shut down 4 ambulances and one super medic

rig and dropped Rescue Squad 3 to a four-person company. However, even this was not enough to cover the empty slots, and the department was required to call back 6 employees –two more than the department-imposed limit of four—to fill in for employees on a temporary basis. When even that was not enough to keep four people on duty on each rig, the department pulled one firefighter from both Rescue Squads One and Two, and shut down engine 13 to meet its minimum standards for staffing.

13. That day, the grievant was originally scheduled to work as a firefighter on Rescue Squad 2. After the department dropped below 80 percent of its minimum staffing level, the grievant was informed by the captain on his squad that he was being detailed to Engine 17 to work as a paramedic. The grievant testified that he was the firefighter chosen to be detailed as he was the lowest in seniority on the squad, and that the Union prefers employees to be detailed by seniority. Ten hours into his shift, the captain on engine 17 went home sick, and the grievant was required to work out-of-title as a paramedic captain for the rest of the day. Because the grievant worked as a captain paramedic for over 12 hours that day, he was paid as a captain paramedic for the entire length of his shift, per the collective bargaining agreement.

14. The evidence established that the Union had verbally agreed to allow management the flexibility to staff rescue squads with fewer than three firefighters in two limited and specific circumstances: (a) to temporarily (for a matter of hours) during a tour of duty to fill in for short-term absences in other fire companies – such as when a firefighter in another company needs to attend a training session; and (b) for Rescue Squad 3 when minimum daily staffing dropped below 118 (the number at the time the Union agreed to allow this practice was 112, prior to the creation of the “Super Medic” companies).

15. The grievant's position on Rescue Squad 2 was not filled and, for the tour of duty beginning October 13, 2009, Squad 2 was operated with only two firefighters instead of its normal complement of three firefighters. The Union filed a grievance alleging that the Employer had violated Section 10.6(9) of the Labor Agreement.

16. The City presented evidence that rescue squads have been operating with less than five members over a period of almost two years prior to the date of the grievance without objection from the Union. Testimony of Payroll Coordinator Denise Harris highlighted the number of times in 2008 and 2009 when Rescue Squads One and Two have operated with less than five fire suppression personnel. In total, her evidence showed that in the years 2008 and 2009, Rescue Squads One and Two operated with less than five employees 80 times.

17. The Union disputed the relevancy of the City's evidence on the grounds that the only relevant situations to this grievance are those for which *the absence from the rescue squad is for the full 24-hour tour of duty*. There are only 3 alleged instances of staffing a rescue squad with less than three firefighters for a full tour of duty occurring prior to October 13, 2009.

18. In March, 2010, the Employer unilaterally adopted a staffing plan whereby, if the total number of fire suppression personnel reporting for duty on any given day was less than 118, the Fire Department ("SPFD") would reassign employees as follows:

- at 117, reassign one firefighter from Rescue Squad 3
- at 116, reassign one firefighter from Rescue Squad 2
- at 115, reassign one firefighter from Rescue Squad 1

Since March, 2010, the Employer has with increasing frequency operated Rescue Squads 1 and 2 with fewer than three firefighters. Thus, although filed regarding a single event, the Union now seeks treatment of the grievance as a class grievance.

POSITION OF THE UNION

The principle arguments of the Union in support of the grievance can be summarized as follows:

1. The plain language of Article 10.6(9) requires three firefighters on a rescue squad.

This sentence is not ambiguous. There is no need for interpretation. The plain meaning is that during each tour of duty (the normal work period for a 24-hour employee beginning at 8:00 a.m. and ending at 8:00 a.m. the next day) the rescue squads shall be staffed with three firefighters.

2. Section 10.6(9) was negotiated by the parties to establish a specific staffing requirement for rescue squads. Prior to the adoption of Section 10.6(9), the Employer could assign any number of personnel to any apparatus. However, all such assignments were made by seniority.

Then the parties negotiated Section 10.6(9) into the Labor Agreement for the 1985-1986 CBA. This provision resulted from a compromise by both parties as to their competing rights. Section 10.6(9) created an exception in favor of management to the strict seniority provisions of the CBA. The Employer gained flexibility and discretion when selecting personnel for a rescue squad in exchange for limiting its managerial right to set staffing levels on these rigs. This contractual staffing requirement relative to the rescue squads (of which there were only two when the contract language was negotiated) is unique and limited in its application. By agreeing to the language of Section 10.6(9), the Employer relinquished its managerial right to staff a rescue squad with other than three firefighters, absent the consent of the Union.

3. Section 10.6(9) establishes an employee's right to bid to perform the duties associated with assignment to a rescue squad. The Employer asserts that a "position" is merely a title which can be separated from the job duties. The Employer is claiming that the bidding rights of an employee

under the language of Section 10.6(9) are limited to the right to bid to the title of rescue squad (and the premium pay associated thereto) but do not include the right to work on the rescue squad thereby leaving the Employer free to assign the successful bidders other duties without limitation or restriction. The Employer's position not only represent a repudiation of the Union's right to negotiate over exceptions to the staffing requirements for rescue squads, but it also abolishes an individual member's bidding rights.

The argument advanced by the Employer ignores the definition of "position" established by the Labor Agreement and Civil Service Rules. Section 2.6 of the Labor Agreement defines "position" to mean "any specific office, employment or job in the fire department." Thus, "position" clearly refers to duties. Similarly, Rule 2 of the St. Paul Civil Service Rules defines "position" as "any specific employment for the performance of certain duties and for the exercise of certain responsibilities by one individual." Contrary to the Employer's position, the duties cannot be separated from the job title.

4. The Employer can meet its operational goal of maintaining companies while avoiding overtime without violating the Labor Agreement. The Union acknowledges that the SPFD, like all other governmental agencies, is presently under budget constraints. However, austerity is not a license to violate a collective bargaining agreement and abrogate the bidding rights and staffing requirements of Section 10.6(9). The Union acknowledges that the Employer has an interest in keeping as many fire companies in service as it can while minimizing the cost of overtime. The Union shares this interest. Management and the Union disagree, however, on how best to achieve these goals. Some options available to the Employer without violating the Labor Agreement are:

- (a) putting eight personnel on the scene by having three on an engine and five on the rescue squad rather than having four arrive on the engine and four on the rescue squad.

(b) pulling personnel from one of the new “Super Medic” companies that are staffed by a captain, a driver and four fire fighters. There is no contractual staffing requirement for ambulances.

(c) negotiating with the Union for relief from the staffing requirements of Section 10.6(9).

5. The Employer is misrepresenting the bargaining history in order to claim that the Union is attempting to gain through grievance arbitration what it could not achieve at the bargaining table. The evidence clearly establishes that to the extent the Union proposed either specific changes to Section 10.6(9) or general modification of staffing provisions, all were done to either:

(a) expand the staffing clause from the rescue squads to other apparatus; or

(b) move the staffing clause from “Article 10 – Seniority” to its own Article.

6. There is no past practice that establishes that the Union has acquiesced to the repudiation of Section 10.6(9). The Employer offered exhibits to show its alleged “practice” of staffing the rescue squads with fewer than three firefighters. The evidence does not meet the legal requirements of being unequivocal, clearly enunciated and acted upon, or readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties.

POSITION OF THE EMPLOYER

The Employer’s principle arguments in defense of its actions are summarized below.

1. The placement of Section 10.6(9) within the seniority article of the CBA establishes that it only applies to the bidding process. The Union claims that since Section 10.6(9) was included in the CBA, it has acted as a minimum staffing clause. Looking at one sentence in isolation, Section 10.6(9) may appear to be a minimum staffing clause. However, if the Arbitrator examines Section 10.6 as a whole, it becomes clear that Section 10.6(9) has no bearing on the day-to-day staffing of

squads, and could never be seen as a minimum staffing clause.

The placement of Section 10.6(9) within the CBA demonstrates that it is part of a bidding process for job assignment, not a minimum staffing clause. Section 10.6(9) is included in the contract under Article 10 – Seniority. Because Section 10.6(9) was included in the contract in the seniority article, the intent of the section is to impact the bidding process, and the bidding process alone.

2. Section 10.6 states that if an opening occurs “which the employer determines should be filled by a lateral transfer,” then it must be filled in accordance with the CBA. That language gives the employer complete discretion in filling vacancies in the department.

3. As further evidence that the word “assigned” in Section 10.6(9) means the position to which the employee has bid, and not to the position at which an employee works on a temporary basis, one only needs to examine other clauses in the collective bargaining agreement where the words “assigned” or “assignment” are used, to determine that the word assigned is consistently used when referring to an employee’s bid position. Section 10.6(2) states “[f]or the convenience of the employer, temporary assignment to a vacant position may be made during the thirty (30) day period for which the position is open for bid.” Like Section 10.6(9), Section 10.6(2) also falls within Section 10.6; therefore the words “assigned” should have the same meaning. As the term “temporary assignment” already exists in Section 10.6(2), it can be implied that an assignment under Section 10.6(9) is not temporary and must be achieved through the bidding process.

In contrast, what would be the purpose of the inclusion of Section 10.6(2) regarding temporary assignments if assignments could be on a temporary basis? In determining the meaning of the word “assigned,” all provisions of the contract must be given effect. One must find that the term temporary assignments refers to the temporary placement of an employee in a non-bid position

and assignment must refer to an employee's permanent placement in a bid position. Thus, even though the grievant was temporarily detailed to engine 17, his assignment never changed. The grievant was, and still is, assigned to Squad 2. As such, the department did not violate Section 10.6(9) of the contract when it did not backfill the grievant's position.

4. The Management Rights Clause within the Collective Bargaining Agreement provides further evidence that the City has retained the right to temporarily detail its employees away from assigned positions. Section 10.6(9) is the procedure to be used *if* the City determines a vacancy should be filled due to the occurrence of one of the events specified in Section 10.6. On October 13, 2009, the City did not determine that backfill for the position necessary.

5. If the Department determined it was necessary to backfill for the grievant, it would have. However, the department had already shut down several ambulances and one engine, and hired back six employees to work overtime in effort to fill its operational needs. At the point the grievant was detailed to Engine 17, the department determined that it would not use additional resources to hire back another employee to work overtime. The department is required to deal with unexpected absences under a very tight budget, and hiring back employees to work overtime simply is not an option on an everyday basis. The department has determined it to be a priority that all vehicles in operation be staffed with at least four employees. As the squad had an excess employee and other vehicles were short, it was necessary to move the detail one firefighter from Rescue Squad 2 to Engine 17.

6.. The inclusion of Article 9 – Working Out of Classification within the Collective Bargaining Agreement is further evidence of the City's right to temporarily assign its personnel. The article states that if an employee is "required by the Employer to perform the work duties and accept the

responsibilities of a higher class,” the employee “will receive the rate of pay for that class.” The article is not limited in its application and it does not state that certain employees in the department may not be asked to work in a higher class. The article states that “any” employee who is required to work in a higher class may receive a higher rate of pay.

In this grievance, the Union is claiming that those employees who are assigned to Rescue Squads One and Two are untouchable; that they may not be required to work anywhere but their appointed positions on the squad. However because the language of the “Out of Classification” clause in the CBA provides without exclusion that any employee can and may be required to work in a position other than his or her assigned position, the Union’s position that the squad positions are unalterable is without merit.

7. While the Union’s contends that Section 10.6(9) represents a minimum staffing clause in the agreement that has been in place for 25 years, the negotiation history between the parties proves that the Union has known ever since the section was put in its final format that it never guaranteed minimum staffing of squads.

8. While the City contends that the clear language of the CBA should be dispositive in the resolution of this grievance, there is also evidence of a past practice which establishes that the CBA was not violated. The City presented strong evidence of an established past practice of rescue squads one and two frequently operating with less than five members over a period of almost two years prior to the date of the grievance. This evidence establishes both the clarity and the consistency of the City’s practice of operating rescue squads one and two with less than five employees in times of high absenteeism and a low overtime budget. While the evidence does not cover an extraordinary amount of time, the frequency of the occurrences alone over the past two years is enough to establish a past practice. The City’s past practice documentation purposely omits

the number of times when Squad 3 operates with less than five employees. Had the city included such evidence, it would have shown that Squad 3 operates with less than five employees almost on a daily basis Squad 3 is always the first squad in the department to be reduced in staff, as it is a highly specialized rig that only becomes necessary in the event of rare emergencies.

With all of these instances of squads running with less than five employees, the Union failed to grieve any personnel movements until October 13, 2009. Since the Union failed to object to the practice, mutual assent to the practice should be implied.

9. The Union's allegations that the City violated the State Contract cannot sustain this grievance. The evidence does not support the Union's claims, and, in any event, the Union is not a party to the contract between the City and the State of Minnesota and that contract is irrelevant to whether the City has violated the CBA.

10. The definition of the word "position" within the City's Civil Service Rules is not controlling. The Union has argued that the definitions of the word "position" in both the CBA and the Civil Service Rules somehow incorporates the duties of a specific assignment and that once the grievant was assigned to the squad his duties could not be unrelated to work on the squad. By incorporation of Article 30 -Maintenance of Standards in the CBA, only those subjects that are not covered by a collective bargaining agreement are subject to the minimum standards set by the City's Civil Service Rules. The term "position" is defined in Section 2.6 of the CBA as "...Any specific office, employment or job in the Fire Department in a class specified in Article 3.2." The definition makes no mention of specific duties or connection with an employee. Although he was temporarily detailed to another position in the department on October 13, 2009, his assignment remained to the position of firefighter on Squad 2, shift C. The definition for "position" as defined

in Civil Service Rule 2 has no bearing on this decision.

11. In formulating his award, the Arbitrator must avoid which would create absurd or nonsensical results. During her testimony, Denise Harris, stated that once a fire department employee is assigned to a certain position, his or her pay can never fall below the designated pay for that assignment, no matter where that employee works. Currently, the grievant is assigned as a firefighter on a hazardous materials apparatus, and receives a nine percent premium above the base rate for a regular firefighter. Even if the grievant is detailed to a non-hazardous materials apparatus, he still receives his haz-mat premium, as he is still assigned to Squad 2, a hazardous materials apparatus. In addition, when the grievant is out on sick leave, on vacation, or attending union functions, he still receives the premium, as he is still assigned to a haz-mat vehicle.

The Union's position is that once the grievant was detailed off of Squad 2 to engine 17, he left the rig with only two firefighters assigned to the rig, in violation of Section 10.6(9) of the CBA. If the Union's position is awarded, the method of paying employees will be drastically altered. If an employee is only considered to be assigned to an apparatus when he or she is actually on-duty and on-site, employees will not be given their premium pay for times when they are at training, out on sick leave, out on vacation, or attending Union functions. The only employees who will be allowed to keep their premiums when not on-duty on a rig are those employees assigned to the pool, as they have contract language to protect their pay. Other than those employees, everyone else in the department will receive the premium of EMT-Unassigned whenever they are not on-duty and on-site, which, for those employees who are currently receiving premium pay, would result in a decrease in pay. Such a result should undoubtedly be categorized as absurd. It is highly unlikely that when the Union initiated this grievance they were seeking less pay for their members. Yet, if the Union's position is awarded, that is the exact result they will achieve. Not only will rigs be shut

down and the City less safe, but firefighters will receive less pay.

DISCUSSION

THE STATE CONTRACT

The Arbitrator is persuaded by the arguments of the City on this issue. The Union is not a party to the contract with the State and the Arbitrator does not agree that the language or the requirements of that contract are a violation of Article 10.69(c) of the CBA. Accordingly, the contract with the State of Minnesota has played no part in the Arbitrator's decision.

IS ARTICLE 10.69(c) A MINIMUM STAFFING REQUIREMENT FOR RESCUE

SQUADS?

The City has raised several arguments based on principles of contract interpretation, summarized above, in support of its argument that the language at issue does not create a minimum staffing requirement for rescue squads. These arguments do contain internal logic and are not wholly without merit. However, for the reasons outlined below, the Arbitrator has concluded that the Union's position on this critical issue is stronger and should prevail.

The placement of the relevant language within the Seniority Article does not compel the conclusion that it was meant solely to affect the bidding process. Since there was (and still is) no minimum staffing requirement for any of the other equipment operated by the department, there was no contract article on the subject. Its placement in Article 10 was a logical drafting decision since it also affected the use of seniority.

The City further contends that in order to make sense of the CBA in its entirety, the term "temporary assignment" in the CBA refers to the temporary placement or "detailing" of an employee in a non-bid position and the term "assignment" must refer to an employee's permanent

placement in a bid position. Under this interpretation, even though the grievant was temporarily detailed to engine 17, his “assignment” never changed. The grievant was at all times “assigned” to Rescue Squad 2 and, accordingly, the City did not violate Section 10.6(9) of the contract when it did not backfill the grievant’s position.

The Arbitrator believes that to avoid an absurd result, this argument must be rejected. The *obvious* and clear meaning of the first sentence of Article 10.6(9)(c) is to require the rescue squads to be *staffed and operated* by a minimum of three firefighters. There is no other conceivable reason why the Union would have agreed to give up seniority in bidding for this position unless it was to get a minimum staffing guarantee in return. There is truth in the Union’s assertion that job duties cannot be separated from the job title and that to adopt the City’s interpretation of the term “position” would treat employees who successfully bid for a rescue squad position the same as pool employees – meaning they could be assigned any other duties at the whim of the Employer – thereby rendering the clear language of Section 10.6(9) meaningless.

The City’s interpretation of its rights is defeated by the application of the logical principle of *reduction ad absurdum*. If the City can reduce the actual staffing of rescue squads to less than 3 firefighters, it could, in the name of its management rights, send out rescue squads staffed with no firefighters at all. This could not possibly have been the intention of the parties when the Union ceded its seniority rights in bidding for this position.

The inclusion of Article 9 (Working Out of Classification within the Collective Bargaining Agreement) does not support that City’s argument that it may staff the rescue squads with less than three firefighters. That article simply states any employee who is required to work in a higher class may receive a higher rate of pay. It recognizes the City’s general management rights to temporarily reassign or “detail” employees out of their regular positions and guarantees to the affected

employees that they will receive the compensation appropriate to the actual duties they are performing while in that temporary assignment. Article 9 does *not* say that every employee in the department is subject to temporary reassignment, especially when such reassignment would result in a violation of another contract provision.

Finally, in respect to this issue, the Arbitrator does not agree that the bargaining history supports the City's position. That history basically reveals that since the time that Article 10.6(9) was first agreed to, the Union has made other demands for minimum staffing in respect to other equipment to which the City would not agree. The attempt to move Article 10.6(9) into a separate Article on staffing levels does not, in the opinion of this Arbitrator, constitute evidence that the Union regarded the Article as not being a minimum staffing guarantee.

Based on the foregoing considerations, the Arbitrator has concluded that Article 10.6(9)(c) is a minimum staffing guarantee in regard to rescue squads. The term "assigned" in the first sentence of that section includes the broader concept of "staffed and operated." The Arbitrator is further persuaded by the Union's arguments in this regard that budget constraints do not give a party to a contract the right to breach the contract and that there are alternative methods available to the City to meet its staffing challenges without violating the contract language at issue here.

THE PAST PRACTICE ISSUE

Elkouri and Elkouri, How Arbitration Works, Sixth Edition, contains the following discussion on the elements necessary to prove the existence of a past practice binding on the parties:

"When it is asserted that a past practice constitutes an implied term of a contract, strong proof of its existence ordinarily will be required. Indeed, many arbitrators have recognized that, 'In the absence of a written agreement, past practice, to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties.'" *Id.* at 607-608.

In this case the City presented evidence to establish a past practice of rescue squads consistently operating with less than five members over a period of almost two years prior to the date of the grievance. The evidence consisted of testimony and supporting documentation by the city's Payroll Coordinator Denise Harris. The evidence showed the number of times in 2008 and 2009 when Rescue Squads One and Two operated with less than five fire suppression personnel. In total, those documents show that in the years 2008 and 2009, Squads One and Two operated with less than five employees 80 times. Prior to October 13, 2009, squads ran with less than 5 employees in 2008 and 2009 68 times.

The Union responded to this evidence by claiming that:

1. "Past practice" is a tool of contract interpretation to resolve disputes over vague or ambiguous language. It is not a doctrine that is used to rewrite clear contract provisions. The staffing requirements of Section 10.6(9) are clear; there is no ambiguity and, therefore, a past practice is irrelevant in this case.
2. The only entries relevant to the "practice" at issue here are those for which *the absence from the rescue squad is for the full 24-hour tour of duty*. There are only 3 alleged instances of staffing the rescue squad with less than three firefighters for a tour of duty occurring prior to October 13, 2009, the date of the event that triggered the present grievance.
3. There is no evidence that the practice was "clearly enunciated and acted upon." Unlike the situations in which the Union acquiesced to a departure from the strict provisions of Section 10.6(9) which were discussed with the Union in advance (*i.e.* the staffing of Squad 3 with less than 3 firefighters), there is no evidence of any such notice or communication here.

The first of the above arguments has limited application in this case. It is clearly true that the primary use of the "past practice" doctrine is to look to the parties conduct to determine what

they intended when they used words in their contract which are ambiguous. The basis for this is the logical notion that where words in a contract are susceptible to more than one reasonable interpretation, the manner in which the parties interpreted the words, as determined by their conduct in implementing the ambiguous provision, is the best evidence of what they intended when they drafted the language. The corollary to this rule is that where the words are clear and unambiguous a finder of fact cannot look to the actions of the parties to give clear words a different meaning.

However, the “past practice” doctrine has another application which the Arbitrator believes is what the City is arguing in this case. That is using the conduct of the parties subsequent to an agreement to establish what amounts to an implied *de facto* **amendment** to clear and unambiguous contract language. This is quite different than using conduct to change the meaning of clear and unambiguous language. *Elkouri* sets forth an illuminating discussion of this point as follows:

“Of course, the parties to a contract may amend it by a subsequent agreement. ... While one arbitrator emphasized that evidence of past practice ‘is wholly inadmissible where the contract language is plain and unambiguous,’ he also recognized that, on the basis of very strong proof, it may establish that the parties had agreed to amend the provision:

‘While, to be sure, parties to a contract may modify it by a later *agreement*, the existence of which is to be deduced from their course of conduct, the conduct relied upon to show such modification must be unequivocal and the terms of modification must be definite, certain, and intentional.’

To similar effect, another arbitrator noted that where contract language is clear, the

‘Existence of a binding past practice may be established where it is shown to be the understood and accepted way of doing things over an extended period of time. Mutuality of the parties must be shown.’

Likewise, an arbitrator declared that a party contending that clear language has been modified must ‘show the assent of the other party and the minds of the parties...to have met on a definite modification.’ Other arbitrators have required convincing proof that the

practice reflected mutual agreement to amend the contract.” *Elkouri* at 629.

A summary of the evidence in this case is that on approximately sixty-eight occasions, for a period of approximately two years prior to the grievance, the City ran Rescue Squads One and Two for all or parts of a 24 hour tour of duty with less than a full complement of three firefighters. This practice first began almost twenty-three years after Article 10.9 (6)(c) was first introduced into the CBA. There is no explanation as why the Union waited so long to protest the practice. There is evidence that the Union entered into a verbal agreement with the City granting it the express right to use this practice in regard to Rescue Squad 3 only. There is no evidence that the City ever gave either the grievant or the Union formal written notice of the practice, but it is clear from the frequency with which firefighters assigned to squads 2 and 3 were detailed elsewhere that the Union had actual or implied knowledge of the practice.

The City notes in regard to the verbal agreement pertaining to Rescue Squad 3, that the City employee who entered into the agreement had no authority to do so and, in any event, the agreement, if it existed at all, was verbal and non-binding. While this argument is probably both accurate and correct, it is irrelevant since, for purposes of establishing the elements of clarity, mutuality, and unequivocal, the existence of such a verbal agreement reinforces the Union’s position that it was always preserving its rights to have three firefighters on squads one and two and that there was never a meeting of the minds to the contrary.

The City also raises the absence of previous objection or grievance to the practice as evidence of assent to the practice. This argument is contrary to the general rule that a party’s failure to file grievances or to protest past violations of a clear contract rule does not bar that party from insisting on compliance with the clear contract requirement in future cases. See *Rock County, Wis.*, 80 LA 1217, 1220(Briggs, 19983); *Master Builders’ Ass’n. of W. Pa.*, 74 LA 1072. 1076

(McDermott, 1980); *C&S Wholesale Grocers*, 71 LA 676, 679 (Charm, 1978).

After weighing all of the factors, the Arbitrator has concluded that the City has failed to carry its burden of proof in establishing a binding past practice to amend the clear language of Article 10.6 (9)(c). The evidence simply falls short of the required longevity, clarity, or mutuality of agreement necessary to sustain the heavy burden of proof required for this purpose.

DECISION AND AWARD

For the above stated reasons the grievance is sustained. The Arbitrator finds that the Employer's practice of staffing Rescue Squads One and Two with fewer than three firefighters violates Article 10.6(9)(c) of the CBA. The Employer is ordered to cease and desist from the practice of detailing firefighters who have successfully bid to one of these rescue squads and who report for a scheduled tour of duty to work on a different apparatus until such time as the parties negotiate language amending Section 10.6(9) to allow for staffing the Rescue Squads with fewer than three firefighters.

Respectfully Submitted

Stephen A. Bard, Arbitrator

