

IN THE MATTER OF ARBITRATION BETWEEN

CITY OF HIBBING, MN
(Employer/City)

and

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL NO. 173, AFL-CIO
(Union)

DECISION AND AWARD
(grievance)
BMS Case No. 08-PA-0053

ARBITRATOR: Frank E. Kapsch, Jr.

DATE AND PLACE OF HEARING: November 8, 2007, at the Hibbing City Hall,
Hibbing MN.

RECEIPT OF POST-HEARING BRIEFS: Both Parties submitted timely briefs
which were received by December 17, 2007.

APPEARANCES

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JURISDICTION

The Parties stipulated that this Arbitrator has been properly selected in accordance with the provisions of Article 8, Section C of the current labor agreement and possesses the responsibilities and authorities set forth therein to decide and determine this dispute. The Parties also stipulated that this Arbitrator may formulate the Statement of the Issue.

THE ISSUE

Did the City violate the current labor agreement when it issued a policy memo in May, 2007 allegedly clarifying release procedures for Fire Department employees who respond to call-ins outside of their normal work shifts? If so, what shall the remedy be?

THE EMPLOYER/CITY

The City of Hibbing is located in St. Louis County in northern Minnesota. The City is in the heart of the historic Iron Range and is known as the Iron Capital of the World. The current population of the City is about 17,000.

THE UNION

The International Association of Firefighters (IAFF) was founded in 1918 and represents some 290,000 firefighters and emergency medical personnel throughout the United States. The IAFF currently has some 3000 affiliated Local Unions, including Local No 173; which represents the regular, full-time firefighter/paramedics employed by the City.

COLLECTIVE BARGAINING HISTORY

The Union has been the certified bargaining representative for the City's regular, full-time firefighter/paramedics since the early 1970's and the Union and the City have been Parties to a continuing series of successive labor agreements over those years. The current labor agreement (a/k/a contract) was effective January 1, 2007 and is scheduled to expire on December 31, 2009. According to the agreement, the bargaining unit consists of "... *the Employees of the Hibbing Fire Department, except the Fire Chief...*"

THE HIBBING FIRE DEPARTMENT

The City's Fire Department currently consists of about 25 regular, full-time firefighters/paramedics and about 18 paid-on-call firefighters. The regular full-time firefighter/paramedics all work out of the Headquarters Fire House/Station which is located in the City. The paid-on-call firefighters work out of two fire house facilities located in rural areas adjacent to the City proper.

In addition to providing essential fire prevention and protection services to the City's citizens, the Department also provides emergency medical services. All of the current regular, full time firefighters are also cross-trained and certified as Medics, Emergency Medical Technicians (EMTs) or paramedics. In addition to fire trucks, the Department also operates ambulances to carry out its emergency medical services function.

The Department is essentially structured as a paramilitary organization. The highest ranking official is the Fire Chief, who is manager/supervisor of the entire Department. He reports to the City Manager. The Battalion Chiefs are the next level of authority and they function as shift supervisors, in the absence of the Chief. The next level of authority below the Battalion Chiefs is the Captains; who in the absence of the Fire Chief or a Battalion Chief, also function as shift supervisors. Finally, there are the rest of the bargaining unit personnel in the

Department - Engineers, Mechanics and Firefighters. In addition to their regular firefighter duties, there are two individuals who serve as Training Officer and Fire Marshall within the Department.

Because of the essential and critical nature of the Department's missions, it is obviously an 24 hour-a-day, seven-days-a-week (24/7) operation. Article 3 (Hours of Work) of the current agreement specifies how the operation is staffed;

"Section 1: The normal hours of work shall be based on scheduled twenty-four (24) hour shifts using a three platoon system, with each platoon scheduled to work eight (8) twenty-four hour shifts in a twenty-four (24) day cycle. Provided, however, each employee shall be scheduled for and shall take one (1) twelve (12) hour unpaid leave period during each twenty-four (24) day scheduling cycle..."

"Section 2: The Marshall and Training Officer shall work a normal week consisting of forty (40), with overtime pay at time and one-half (1.5) for all hours worked in excess of forty hours (40) for the one-week period."

This scheduling system is intended to provide a typical 8-person Shift Crew consisting of a Battalion Chief (shift supervisor), a Captain, four Engineers (apparatus drivers) and two Firefighters. This shift crew does not include the Fire Marshall or the Training Officer.

Article 3 also contains a re-opener provision with respect to possible limited negotiations with respect to the scheduling system during this contract term.

The Fire Chief typically works a normal forty-hour week, Monday through Friday to maintain contact with City officials and to accomplish his administrative duties in running the Department.

Article 15 (General Provisions), Section 1 of the contract states that; *"The Employer recognizes the desirability of having a minimum of six (6) persons on duty at the fire hall on each shift and shall make every reasonable effort to do so."* It is unclear from the record as to whether that minimum number includes the Fire Marshall or the Training Officer; who as indicated above, typically work a straight forty-hour week during the day shift.

As noted previously, in addition to its mission of preventing and fighting fires, the Department also has a second essential and critical mission. That mission is providing emergency medical care to the City's citizens on a 24/7 basis. Those emergency medical situations typically involve the dispatch of an ambulance and at least two medically-trained firefighters. A typical medical call can result in at least three possible situations; 1) treatment of the victim at the scene, but no transport, 2) treatment at the scene and subsequent transport to the local Hibbing hospital or 3) treatment at the scene and transport to a higher level

trauma care center, such as those in Duluth MN. Depending on the situation, an emergency medical call can be less than 30 minutes or could involve several hours in the case of a long distance transport/transfer. In order to maintain the six (6) person minimum staffing for fire fighting, the Department uses an On-Call system to obtain additional staffing from among the off-duty regular firefighters, as needed to help cover emergency medical calls and other contingencies.

The On-Call system is outlined in Article 3 (Hours of Work), Section 4 of the current agreement:

“An employee called in for work at a time other than the employee’s normal scheduled shift, will be compensated for a minimum of two (2) hours’ pay at 1.75 times said Employee’s regular hourly rate. For all hours between 11:00 p.m. and 7:00 a.m., the Employee will be compensated for a minimum of three (3) hours’ pay at 1.75 times said Employee’s regular hourly rate. An extension of or an early report to a scheduled shift does not qualify the Employee for either the two (2) or three (3) hour minimum. An Employee called for work on one of the holidays designated in Article 4 will be compensated for a minimum of three (3) hours’ pay at 1.75 times the Employee’s regular hourly rate in addition to their regular holiday pay. Any Employee who is called back for either the two (2) or three (3) hour period as referred to above, shall remain at the station until his presence is no longer required. Should he/she be released from the station prior to the two (2) or three (3) hour callback period, it is understood that he/she will remain on call for the remaining portion of that period, and should he/she be required to return to the station during that period, he/she will receive additional pay only for that period of time that exceeds the two (2) or three (3) hour call back period.”

Based on the record testimony and evidence, it appears that the premium pay incentive for responding to a Call Back has historically enabled the Department to readily obtain volunteers from among the off-duty firefighters, without having to “order” anyone to come in.

THE GRIEVANCE SITUATION

The following facts, as established by the record testimony and evidence are not in dispute or challenged by the Parties. On Tuesday, May 29th, 2007 the Department received a call for a medical emergency ambulance run. A Call Back for that call was accepted by off-duty firefighter Doug Lunning, who is also the Local Union’s Secretary/Treasurer. Apparently the medical run was of rather short duration and the ambulance routinely returned to the fire hall. The time was early afternoon. Fire Chief Anthony Pogorels was at the station when Lunning returned from the run and approached and informed him that he was to remain at the station. Lunning told Pogorels that he couldn’t stay because he had to go to a doctor appointment and asked to be relieved of further duty at the station. Pogorels asked Lunning why he had accepted the medical Call Back

knowing that there might be a conflict with his doctor appointment? Lunning stated that the Department should have a policy because there was a lack of consistency as far as requiring firefighters to stay at the station for the duration of a paid Call Back. Pogorels did excuse Lunning from further duty at the station so that he could keep his doctor appointment, but Lunning was only paid Call Back pay for his actual time in service on the medical run. Pogorels testified that later that same afternoon, after reflecting on the conversation with Lunning, he prepared and issued the following Memo to All Personnel in the Department:

“Effective 5/29/07 when an employee is on overtime, he/she will remain at the station (unless on a call) for the remaining portion of his/her overtime call. If an employee needs to be released before his/her time is up, he/she will only receive pay for the time that he/she was present for that call.

When an employee is on overtime and the equipment is back in service and the employee still has time remaining to finish on overtime, he/she will work on daily duties, preplans or some training topic on fire or EMS. When the EMS Director, Fire Training Officer, Fire Marshall or Mechanic is on overtime they may finish their overtime with duties assigned to their positions.

Each employee must read and sign this memo and understand it.”

The next day, Wednesday, May 30, 2007 Lunning approached Chief Pogorels about the May 29th Memo. Lunning suggested that Pogorels consider limiting the effect of the Memo to the period from 0700 (7 AM) to 2300 (11 PM) reasoning that this would minimize the interruption to a firefighter’s normal sleep hours. In consideration of Lunning’s request and suggestion, Chief Pogorels issued another Memo to All Personnel dated May 30, 2007. This memo modified the first paragraph of the May 29th Memo as follows:

*“Effective 5/29/07 when an employee is on overtime, he/she will remain at the station (unless on a call) for the remaining portion of his/her overtime call, **0700-2300 hrs**. If an employee needs to be released before his/her time is up, he/she will receive pay for the time that he/she was present for that call.” (change from 5/29 Memo underlined and bold)*

The remainder of the 5/30/07 Memo remained unchanged from the Memo of 5/29/07.

THE GRIEVANCE

On 6/15/07 Matt Ashmore, the Union’s Local President, filed a grievance with the City stating that “Memo from administration dated 5/29/07 titled ‘Overtime’ is in conflict with Article 3, Section 4.” On 6/18/07 Chief Pogorels responded to the grievance – “Denied. A revised memo was on overtime on May 30, 2007.”

On 6/18/07 Ashmore submitted a revised copy of the 6/15/07 grievance. The revised version deleted the reference to the 5/29/07 memo and merely stated, "Memo from administration titled 'Overtime' is in conflict with Article 3, Section 4." In his written response to this revised grievance, Chief Pogorels stated, "Denied. Article 3, Section 4 states that the employee will remain at the station until his/her presence is no longer needed."

On 6/21/07 Local Union Officers Matt Ashmore and Doug Lunning sent a memo to Brian Redshaw, the City Administrator, stating:

"A grievance was filed with the Fire Department Supervisor on 6/18/07. This grievance is in response to the Memo titled "Overtime". This Memo was issued on 5/29/07 and then revised on 5/30/07. This Memo is in conflict of Article 3, Section 4 of the contract, not allowing members to be released after their duty is completed for which they were called back. Along with this, there has been a prior practice to allow members to be released and that no other city entity that follows this memo's practice. The memo should not be enforced. Because we have already met on this subject, and if you should find this grievance to be unfounded, I recommend that we continue to Step 3 or file for mediation with BMS."

On June 26, 2007 City Administrator Redshaw responded in writing to the Union's memo of 6/21/07. In pertinent part, Redshaw's memo stated:

"This memo represents STEP Two in the Grievance Process. I am officially in agreement with the Fire Chief's interpretation of the contract on this issue. I must remind you of Article 3, Section 4 which states the following: "Any employee who is called back for either the two (2) or three (3) hour period as referred to above, shall remain at the station until no longer required."

It is Management's position that the Fire Chief as the highest ranking member of the department is the sole determiner of when an Employee's presence is no longer required. The policy as determined by the Fire Chief has been affirmed by the City Administrator's Office and will be in effect until further notice."

On July 5, 2007 the Union gave the City written notice of its intent to proceed to arbitration on the grievance. Ergo, here we are.

UNION POSITION

The Union believes that the City is obligated under the current labor agreement and/or past practice to allow bargaining unit members to be released from duty when the emergency or other situation for which they were Called Back to work has been abated.

The hearing record testimony and evidence reflects a long standing practice of releasing firefighters when the apparatus (vehicles/equipment) used in the Call Back situation has returned to the station and staffing at the station is back to normal.

The key provisions of Article 3 of the current labor agreement have essentially remained unchanged since 1973 and has been routinely followed and adhered to by Chief Pogorels, until he issued his Memos to the staff regarding Overtime on 5/29 and 5/30/97.

Key Arguments:

- A. Article 3, Section 4 of the labor agreement is clear in the fact that firefighters responding to a call back are able to be released anytime during the day and does not set a time frame in which they are required to stay, after the situation for which they were called back has abated. The Chief's Memo of 5/30/07 states that called back personnel are to remain on duty for the remainder of their call back period, if they are called back between 0700 – 2300 hrs. According to the memo, this prohibits the release of these personnel during the two (2) hour call back period and that is contrary to the contract language.
- B. The long-standing practice of allowing called back personnel to be released prior to the end of their callback period clarifies any question there may be with respect to contract language. Battalion Chief Vice Puhek testified that in his 27 years in the Department, call back personnel were released from duty once the apparatus was back in the station and again ready for service. Chief Pogorels also attested to that practice during his testimony. In How Arbitration Works, Elkouri and Elkouri, Sixth Edition, page 606, it states, "*...It is well recognized that the contractual relationship between the parties normally consists of more than the written word. Day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are not at variance with any written provision negotiated in to the contract by the parties and where they are of long standing and were not changed during contract negotiations.*"
The Union's interpretation is correct because the plain language of the contract specifies, 1) minimum hours of compensation, not minimum hours of work; 2) clearly contemplates consequences for release, being responsible for remainder of callback time and 3) the contract language changed, but not the practice of releasing employees. The Union also pointed out that other City departments follow the same practice of releasing called back employees, when the reason for their call back has abated or been resolved, regardless of whether they have fulfilled the total call back time period.
- C. Inconsistency of how personnel are released from call back does not allow

management to change the long standing practice. Battalion Chief Pulek did testify that there were times when he would hold call back personnel at the station, rather than releasing them early. As an example, he said he allowed personnel to stay and clean up and get ready for the next call. Chief Pogorels testified that he issued the Memos to make consistency between all shifts. Because of the nature of work in this field, there is virtually no way to predict when emergency calls will come into the Department. For this reason there has always been inconsistency between shifts as to when call back personnel are released and when they are not. That is why the release decision has been typically left to the Battalion Chiefs, as the shift supervisors.

The two day-shift positions of Fire Marshall and Training Officer are not counted as part of the six-person minimum shift staff level. However, when the staffing level falls below six people, those two individuals are counted. As a result, it is impossible to know if the Fire Marshall and Training Officer will be available during any specific two hour call back period. Call back personnel have stayed for the entire call back period when asked to stay. If a particular call back person cannot be responsible for or stay for the remainder of his/her compensated call back period, then another person is called back to cover that situation.

In How Arbitration Works, Elkouri and Elkouri, Sixth Edition, page 626, it states, "...*To be given interpretative weight, past practice need not be absolutely uniform. Arbitrators have held the 'predominant pattern of practice' to be controlling even though there have been scattered exceptions to the 'clearly established pattern'. So it is that once established, the binding effect of a past practice generally will not be nullified by such isolated inconsistent actions, absent some manifestation by the parties to presently discontinue or alter the practice.*"

- D. The City has the same practice, in its other departments, of releasing call back employees when the job or task for which they were called in is completed. Testimony and evidence were presented in the hearing that in the City's labor agreements with American Federation of State, County and Municipal Employees (AFSCME) and Law Enforcement Labor Services, Inc. (LELS) covering employees in other departments, e.g. Public Works and Police, contain call back provisions similar to Article 3, Section 4 of our contract. The AFSCME Local Union President testified that it is the typical practice within the Public Works Department to release called back personnel as soon as the job for which they have been called in has been completed.
- E. The history of the contract language shows that the City has changed the language for overtime, but has kept the practice of how to release personnel from call back. Over the course of successive contracts, since 1973, the basic language of Article 3, Section 4 has been relatively unchanged. The only significant modifications over the years have been an increase in the premium pay rate for call back hours, an increase in the number of paid call back hours as a function of the time of day in which

the call back occurs and, finally, a prohibition on “pyramiding” of call back time. Despite those changes and modifications to the call back language of the contracts, the practice of releasing call back employees upon completion of the task for which they were called in has been the routine practice long before this current contract.

The Union acknowledges that it bears the burden of proof in this matter. There could hardly be a clearer case of binding past practice. The City has followed the practice of releasing employees when their presence is no longer needed and still continues that practice, under the terms of the Chief’s 5/30/07 memo, allowing for called back employees to be released upon completion of the task for which they were called in if the call back occurs between 2300 and 0700 hours. The practice has always been when the apparatus is back in service and the staffing levels at the station were back to normal, the called back employees were released. This is confirmed by the testimony of witnesses from both Parties and from the history of the contract language. Chief Pogorels stated that he does not micro-manage and makes it clear that he may not know what is going on with the shift operations. This makes it necessary for the shift supervisors (Battalion Chiefs) to make decisions based upon the needs of the Department at the time. Because the nature of the work makes call backs unpredictable, there have always been inconsistencies with this practice for the past 27 years. However, this does not give management the right to alter the practice. The City’s argument that they were trying to make it more consistent because of Doug Lunning’s complaint is unfounded. The City is required to meet and negotiate on this issue. At no time was the Local Union President officially contacted to discuss this matter

The reasons the City gave to stop this practice show no advantage to the Department’s operations or an economic impact to the Department. The City states that there is a desire to obtain a higher ISO fire rating for the City. The two categories that were mentioned in the hearing regarding ISO were training and preplans. The City stated that the training of employees needed to be done and that can do this when the employees remain on duty during their full call back period. From the time of the 5/30/07 memo and the arbitration hearing about six months had passed and there has been no training program put in place to accomplish the goal. The City also stated that fire pre-plans were a big part of the ISO rating and provided a status printout at the hearing that showed the pre-plans that had done thus far in 2007. It shows that the Department has a plan and is working to complete that plan. Chief Pogorels testified that the ISO examiners look for the intent of the Department on these pre-plans when doing their ratings. The intent to complete the pre-plans is certainly there, but the bargaining unit members are not responsible for the City’s shortcomings of operations due to the lack of a training program.

The City’s managerial rights are not violated in this case. The City loses its managerial rights when that right is negotiated away in the contract. An example

of this is our work schedule. Scheduling of hours is a managerial right. However, in our case the schedule of work hours has been negotiated as set forth in Article 3, Section 1 of the current contract. The fact that the City has allowed this call back release practice to continue for such a long period of time shows mutuality in the interpretation of that language. The City has made no attempt to negotiate that language with the Union. Elkouri and Elkouri states, *“continued failure of one party to object to the other party’s interpretation is sometimes held to constitute acceptance of such interpretation so as, in effect, to make it mutual. Even when there is no direct evidence that one party was aware of the practice, mutuality may be inferred”*. This practice carries the same weight as if it were a negotiated item. Furthermore, as previously noted, the City has similar practices with other bargaining units and has made no attempt to stop the other units from continuing the practice.

The Department employees are very passionate and dedicated to their job. This is shown by the willingness of the employees to voluntarily come in for overtime on a consistent basis. They do this in order to maintain safe staffing levels in the Department. The inherent nature of our profession is dangerous, not only for the employees doing the job, but for the citizens of the City. This willingness comes with a price far more than the City can compensate. Because emergencies happen at a moment’s notice, the employees are being called out at inopportune times. Holidays, birthdays and weekends that take the employees away from their families make a large impact on personal lives. By releasing the employees, as the practice has always been and is after 2300 hrs., this allows them to be able to return to their lives without much interruption. The reason that the contract states that the employee will be compensated for 2 or 3 hours gives an incentive for employees to come in on non-work day. Although, overtime call back is not mandatory, the employees feel a duty to protect the City, the citizens and their fellow firefighters for which they were hired. By the City attempting to make employees stay beyond for what they were called in for, shows to the Union no sympathy to the impact of the employee’s life. Therefore, the City should not be rewarded by this grievance being denied.

In summation, the Arbitrator should rule that the City, by issuing the 5/30/07 memo regarding Overtime, violated the contract and should allow the past practice to continue without time constraints on the employees. The Union also requests that the Arbitrator direct the City to refrain in the future from attempting to change the contract without notifying the Union President.

EMPLOYER POSITION

The improbable premise of the Union’s grievance is that management has ceded to the bargaining unit the discretion to determine how long unit members, who are in paid status, will remain at work. The Union contention is that the Fire Chief is powerless to direct the Battalion Chiefs in how to exercise the discretion which he has assigned to them. In fact, management has expressly retained the right

to assign and direct the workforce and has merely chosen to exercise that right through certain bargaining unit members, i.e. Battalion Chiefs. The Union has failed to prove that Fire Chief Pogorel's memo of 5/30/07 exercising the retained rights of management violated either the labor contract or binding past practice.

Although the grievance claims a violation of Article 3, Section 4 of the labor agreement, the plain language of that Section provides no basis to challenge the Fire Chief's memo. There is absolutely no requirement in the language that employees be released from duty at any time during the course of the call back period. The contract language in Article 3, Section 4 literally states that employees "*shall remain at the station*" so long as required. The phrases "*until his presence is no longer required*" and "*should he/she be released*" indicate the exercise of management discretion. There is no language requiring that management discretion be vested in a Battalion Chief. Finally, the fact that a called back firefighter, even if released from the Fire Station, can be "*required*" to perform additional service in response to a subsequent call without added compensation, demonstrates that for the entire duration of paid work time the firefighter remains subject to management assignment and direction.

First, the Fire Chief's decision to delegate discretion to the Battalion Chiefs as to when to release firefighters is simply the way that management has chosen to exercise its management function. The Fire Chief assigns certain duties to the Battalion Chiefs because, as Chief Pogorel testified, he cannot be on duty and at the station 24 hrs a day, 7 days a week. However, the Battalion Chiefs are still under his supervision and direction. The fact that management has elected to exercise its management right in a certain way does not preclude management from exercising that right in a different way in the future. That is why it is called a management right.

Thus, under Article 9 (Employer Authority) of the current contract, the Employer specifically retains the full and unrestricted right to "*...operate and manage all manpower...; to...assign, direct and determine the number of personnel; to issue, amend and revise policies, rules, regulations and practices; and to establish work schedules.*"

Article 9 goes on to expressly incorporate the exact point of rebuttal to the Union's past practice argument, stating;

"...The Employer's failure to exercise any right, prerogative, or function hereby reserved to it, or the Employer's exercise of any such right, prerogative or function a particular way, shall not be considered a waiver of the Employer's right to exercise the same in some other way not in conflict with the express provisions of this Agreement." (emphasis added)

Simply put, the Department is a paramilitary organization in which the Battalion Chiefs work under the supervision of the Fire Chief. The discretion the Fire Chief

accords to the Battalion Chiefs, on one occasion, can be taken away or directed elsewhere the next. There is no express or implied obligation to vest continuing discretion in the Battalion Chiefs to exercise the management rights set forth under Article 9.

Second, past practice is not available to interpret Article 3, Section 4 of the contract because the contract is not ambiguous. The determination of whether a firefighter's presence is "*no longer required*" or the firefighter "*should...be released*" is encompassed in the management rights listed under Article 9. The singular fact offered by the Union to suggest that the Employer was bound to continue to assign the Battalion Chiefs that discretion was the fact the Employer had assigned the Battalion Chiefs that discretion in the past. Since management can exercise its management rights in different ways from time-to-time, this fact does not create an ambiguity. Chief Pogorels, the only witness at the hearing with knowledge of the contract negotiation history, was clear that Article 3, Section 4 has always contemplated the exercise of discretion by management, not the bargaining unit.

Third, even if the language of Article 3, Section 4 was to be considered ambiguous and susceptible to interpretation through past practice, which the Employer denies, the Union has failed to prove a binding past practice. There was an obvious lack of a consistent, well-established practice. Indeed, the whole episode was precipitated by Union Secretary/Treasurer Lunning's statement to Chief Pogorels that there was an *inconsistent* practice of some people being required to stay at the Station and some not. Whereas the Union cited incidents of the Battalion Chiefs releasing firefighters, Chief Pogorels provided uncontroverted testimony that he has required the Fire Marshall, Training Officer and others to stay at the Fire Station for the duration of the minimum paid call back period and that he has exercised his discretion to require firefighters to stay at the Station during the grass fire season.

Fourth, there was a lack of "mutuality". The Union's apparent attempt to show that the Employer had acquiesced to the Union's position, by having Battalion Chief Puhek testify that he had failed to enforce Chief Pogorels' memo/directive, without challenge, lacked any showing that Chief Pogorels was ever aware of such conduct by Puhek.

Two other Union arguments are also readily refutable. The Union called John Sporer, an Officer of the Local AFSCME Union, regarding the call back procedure under the City's labor agreement with AFSCME, covering Public Works Department employees. However, he provided no evidence that the AFSCME contract and the Firefighter contract had been negotiated jointly or with reference to each other. The contracts have entirely different language. Additionally, Brian Redshaw, the City Administrator, testified that there is no City-wide policy regarding call backs within the various City departments.

The Union also argued that the ability to leave early, while still on paid call back status, is a benefit that employees receive under the call back language, a premium for the disruption of responding to a call during off-duty time; which can only be removed through negotiations. However, the premium is the opportunity for overtime pay for a minimum number of hours. It cannot be contended that leaving early while still in paid status is the intended premium because the evidence was that call backs can last from 15 minutes to four or more hours if a medical transfer to Duluth becomes necessary. The expected duration of a callback can change when unanticipated circumstances arise. Thus there is no assurance a call back will not last the full period of premium pay. The supposed benefit is illusory, amounting to nothing more than the possibility that the firefighter *might* be released early.

Finally, Chief Pogorels memo of 5/30/07 regarding Overtime was reasonable and issued in good faith. The memo was in response to the request of a Union Officer for a consistent policy. It was consistent with the practice that Chief Pogorels already had in place as to some firefighter and in certain situations, such as the grass fire season. In the hearing, he articulated the workload factors which were of concern to him.

The determination of when a firefighter's "*presence is...required*", within the meaning of Article 3, Section 4, ultimately needs to be defined by the Fire Chief, who is accountable for the Department's performance. It cannot be left to the bargaining unit members nor to resolution in grievance arbitrations whenever a firefighter contends that s/he was not really needed at the Station. That would paralyze the effectiveness of the Department and undermine its essential paramilitary structure.

The Union has failed to prove that neither the Chief's memo of 5/29/07 nor his revised memo of 5/30/07 violate Article 3, Section 4 of the current labor agreement. Accordingly, the grievance should be denied.

ANALYSIS, DISCUSSION AND FINDINGS

The Union correctly acknowledges that, in this matter, it bears the burden of fully proving the validity of its grievance by establishing by a preponderance of the testimony and evidence that it is more likely than not that the contract has been violated.

The key arguments in the Union's case are essentially that;

1. The basic language, in what is Article 3, Section 4 of the current labor agreement, has been unchanged with respect to the provision relating to the release of a firefighter called in (a/k/a called back) for work by the Department, outside of the employee's scheduled shift. The Union points

out that the release language first appeared in the 1984-1985 contract which read;

“...Any employee who is called back for either the two or three hour period as referred to above shall remain at the station until his presence is no longer required.”

The Union’s assertion is correct in that the release language in the current contract is essentially the same – the only notable changes being cosmetic and grammatical and having no effect on the basic statement;

“...Any employee who is called back for either the two (2) or three (3) hour period as referred to above, shall remain at the station until his presence is no longer required.”

It is clear from the record testimony and evidence that the Parties are in agreement that called back employees, under the contract provision above, do not have authority to release themselves during their call back period of two or three hours. Instead, they must be released by the Fire Chief, as the primary manager/supervisor. But, because the Fire Chief cannot be present at the Station 24/7, he has historically delegated release authority, apparently along with other personnel management and operational authorities/responsibilities to the respective Battalion Chiefs, who serve as shift supervisors/managers, in his absence. In their capacity as shift supervisors, the Battalion Chiefs serve at the pleasure of the Chief; that is he is free to expand or restrict the degree of delegation and discretion of authority that they may exercise in that role and in his absence. Although the Battalion Chiefs are nominally members of the bargaining unit, when they are serving as shift supervisors with such authority delegated by the Chief, they are his agents and representatives and directly accountable to him in the exercise of those authorities.

A perusal of the contract clearly indicates that the Battalion Chiefs have no inherent supervisory or managerial authority. Instead, they possess only that authority which they have been granted and delegated by the Fire Chief. With respect to the release of called back firefighters, the actual language of the provision in Article 3, Section is clear and unambiguous as to the release procedure. Unless and until released by the Fire Chief or one of his agents or representatives (Battalion Chiefs); called back employees must remain at work for the full period of the call in.

2. The Union contends that, since the call back provision first appeared in the 1973 contract, there has been a clear-cut practice by the City/Department of typically releasing called back employees from the remainder of their call in period once they completed the job, task or assignment for which they were called in and had properly serviced the apparatus and equipment used and returned it to service.

Contrary to the Union's contention, the record evidence and testimony indicates that there has not been a clear-cut past practice of releasing called back employees whenever the reason for their call back has been completed and the appropriate equipment has been returned to serviceable condition. Instead, both Union and City witnesses jointly agreed on a number of "exceptions" to that contention. Those exceptions included; 1) routinely keeping called back employees on duty for their entire call back period during circumstances where the danger and number of grass fires in the area was high, 2) routine/periodic maintenance projects within the Department such as painting, etc., 3) circumstances where the departure or absence of regular shift personnel brought the station staffing level below six (6) people and 4) where multiple emergency calls come in during a particular call back period. Additionally, Chief Pogorels credibly testified that during his conversation with Union Officer, Doug Lunning, on 5/29/07; Lunning didn't accuse him of violating the contract by asking him to stay until the end of his call back period; but accused him and the Department of being "inconsistent". According to Pogorels, Lunning came to see him again on 5/30/07, after the memo of 5/29/07 had issued. In that conversation, Pogorels testified that Lunning acknowledged the memo, but argued that the Chief should consider modifying it so that firefighters called back during normal sleep hours (2300 – 0700hrs) be released as soon as they returned from the task for which they had been called out and as soon as they returned the apparatus/equipment used in the call to service. Pogorels subsequently issued a revised memo later that same day adopting Lunning's recommendation. Lunning did not testify at the hearing.

With respect to the definition of a "practice", Arbitrator Nathan, in Weyerhaeuser Co., 105 LA 273, 276, (Nathan, 1995), stated "A '*practice*' as that concept is understood in labor relations refers to a pattern of conduct which appears with such frequency that the parties understand that it is the accepted way of doing something." Arbitrator Brodsky, in Monroe County Intermediate School District, 105 LA 565, 567, (Brodsky, 1995), gives a somewhat more stringent definition, "[A] practice can be established if, when one circumstance occurs, it is consistently treated in a certain way. The occurrence need not be daily or weekly, or even yearly, but when it happens, a given response to that occurrence always follows." However, as the Union aptly points out, to be given interpretative weight a past practice need not be absolutely uniform. Other arbitrators have held the "predominant pattern of practice" to be controlling even though there had been scattered exceptions to the "clearly established pattern". (See How Arbitration Works, Elkouri and Elkouri, Sixth Ed., 2003, page 626)

3. The Union points out that the release practice historically used by the Fire Department is the same practice that is used in other City Departments where those employees, while represented by different labor

organizations, have contracts with call back release language similar to that in the Fire Department contract.

The relevance of call back release procedures within other City departments and pursuant to other labor agreements is, for purposes of this matter, frankly, non-existent for a number of reasons. The employees in the other City departments are performing totally different job duties under totally different circumstances and requirements. There is no evidence that there was any coordination of negotiations between the various unions with respect to the call back release language in their respective contracts. Finally, there is no evidence that the City applies a common or standard management policy or practice across the various departments, personnel and labor agreements with respect to call back release practices or procedures. Therefore, I find that there is no basis for further consideration of such comparison as a factor in this matter.

4. The Union contends that management, in this instance, has lost its inherent or contractual rights relative to the argued release practice because that practice has existed for at least two decades and management didn't object or question the practice until Chief Pogorels memos of 5/29 and 5/30/07. The Union further argues that the City's failure to voice any objections or questions regarding the argued practice establishes "mutuality"; that is the City and the Union have at least tacitly accepted early call back release, in some circumstances, to be a practice.

I agree with the Union's basic position with respect to "mutuality". There is no record evidence to indicate that the City and the Union have ever formally or informally comprehensively discussed or conferred about the call back release system or policy, other than in the context of negotiating the contract language. In the absence of such evidence and in view of the circumstances, I presume that call back release practices and procedures historically utilized by management have developed either by happenstance without design or deliberation or, alternatively, they may have developed as choices to accommodate circumstances by the various Battalion Chiefs, in exercising their authority as shift supervisors. Although I tend to give greater credence to the latter supposition, it is very possible that the release practices/procedures are a result of a combination of both. In any case, the City and Department management can be reasonably presumed to have been aware of those practices and procedures over the course of time and, thereby, at least tacitly approved of them.

In assessing the foregoing Union arguments and their case-in-chief, I conclude that; 1) the Union is unable to establish that the basic contract language in Article 3, Section 4 with respect to the called back release requirement is "ambiguous", 2) the Union has established what could arguably be considered a "practice" with

respect to the release procedure, but it is not a strong argument in view of the generally accepted arbitral definitions, 3) the Union's argument with respect to the management rights issue is "cloudy" and will merit further examination and 4) the Union has established at least tacit "mutuality", but not full overt acceptance or agreement by the City, with respect to the argued practice.

In reviewing the City's arguments and case-in-chief, I find several points to be particularly relevant and pertinent to this matter.

1. The City contends that given the paramilitary structure of the Department, the Fire Chief is the sole individual imbued with managerial and supervisory authority. The Battalion Chiefs operate as shift supervisors, but only with such authority and discretion as the Fire Chief may grant them.
2. The City argues that in order to put this matter into perspective, the language of Article 3, Section 4, with respect to the call back release procedure, needs to be examined by the Arbitrator relative to Article 9 (Employer Authority) of the contract. Article 9 reads;

"A Public Employer is not required to meet and negotiate on matters of inherent managerial policy. Matters of inherent managerial policy include, but are not limited to, such areas of discretion or policy as the functions and programs of the Employer, its overall budget, utilization of technology, the organizational structure, selection of personnel, and the direction and number of personnel. The Employer retains the full and unrestricted right to operate and manage all manpower, facilities and equipment; to establish functions, policies and programs; to set and amend budgets, to determine the utilization of manpower and technology; to establish and modify the organizational structure; to determine the qualifications for positions and applicants; to hire, assign and direct and determine the number of personnel; to issue, amend and revise policies, rules, regulations and practices; and to establish work schedules. Provided, however, the Employer shall meet and confer with the Union before using independent contractors or subcontractors to perform work which would otherwise be performed by bargaining unit members. All rights and authorities which the Employer has not specifically abridged, delegated or modified by expressed provisions of this Agreement are retained by the Employer. The Employer's failure to exercise any right, prerogative, or function hereby reserved to it, or the Employer's exercise of any such right, prerogative, or function in a particular way, shall not be considered a waiver of the Employer's right to exercise the same in some other way not in conflict with the express provisions of this Agreement."

Upon review of Article 9, several points readily come to the fore;

- The Article clearly states that the Employer (City) possesses the inherent management right to “*direct..personnel*”; to “*operate and manage all manpower*” and to “*assign, direct and determine the number of personnel*”.
- The Article further states that the Employer retains the full and unrestricted right to, “*...issue, amend and revise policies, rules, regulations and practices and to establish work schedules.*”
- Finally, the Article states that, “*All rights and authorities which the Employer has not specifically abridged, delegated or modified by express provisions of this Agreement are retained by the Employer. The Employer’s failure to exercise any, right, prerogative, or function hereby reserved to it, or the Employer’s exercise of any such right, prerogative, or function in a particular way, shall not be considered a waiver of the Employer’s right to exercise the same in some other way not in conflict with the express provisions of this agreement.*”

The language of Article 9 is, on its face, clear and unambiguous and is certainly relevant to this Issue. Essentially it says that the Employer possesses the inherent managerial authority to assign and direct the Department personnel and to operate and manage and determine the utilization of the Department’s manpower. It also states that the Employer possesses the inherent managerial authority to issue, amend, and revise policies, rules, regulations and practices. Finally, it says that unless the Employer has specifically abridged, delegated or modified any of its enumerated rights and authorities, by express provisions of the labor agreement, it retains them and that the fact that the Employer has failed to exercise any of its rights or has chosen to exercise them in some particular way; does not constitute a waiver of its right to exercise those rights in some other way not in conflict with the express provisions of the labor agreement. The bottom line is that the Union has negotiated and agreed to this contract language.

What are the effects and implications of the language in Article 9 to the Issue at hand? In one word, “Considerable”. The situation is probably best explained by the following statements by Arbitrator Justin in Phelps Dodge Copper Products Corp., 16 LA 229, 233, (Justin, 1951):

“Plain and unambiguous words are undisputed facts. The conduct of Parties may be used to fix a meaning to words and phrases of uncertain meaning. Prior acts cannot be used to change the explicit terms of a contract. (emphasis added) An arbitrator’s function is not to rewrite the

Parties contract. His function is limited to finding out what the Parties intended under a particular clause. The intent of the Parties is to be found in the words which they, themselves, employed to express their intent. When the language used is clear and explicit, the arbitrator is constrained to give effect to the thought expressed by the words used."

In view of the language of Article 9, as outlined above, it is clear to me that, notwithstanding that an arguable practice may have been historically established with regard to the release of called back employees, the City and Chief Pogorels were acting in accordance with the contract, and specifically within their rights, as set forth in Article 9, when the Chief chose to issue his memos of 5/29/07 and 5/30/07. In reviewing the remainder to the contract I find no provisions which prohibit or restrict that action.

Additionally, I find myself in accord with other arbitrators who are hesitant to permit unwritten past practice or methods of doing things to restrict the traditional and recognized functions of management, i.e. assigning and directing the work of employees and related personnel management activities. Arbitrator McCoy, in Esso Standard Oil Co., 16 LA 73,74, (McCoy, Reber & Daniel, 1951), stated;

"But caution must be exercised in reading into contracts implied terms, lest arbitrators start re-making the contracts which the parties have themselves made. The mere failure of the Company, over a long period of time, to exercise a legitimate function of management, is not a surrender of the right to start exercising such right. If a Company had never, in 15 years and under 15 contracts, disciplined an employee for tardiness, could it thereby be contended that the Company would not decide to institute a reasonable system of penalties for tardiness? Mere non-use of a right does not entail a loss of it."

I recognize that, on a practical basis, the Department employees are probably unhappy with the new release policy for call backs. By the Union's account, many of them have enjoyed the opportunity to respond to a call back, report for the call, finish the call early, bring the equipment back to the station, clean/restock it and be released. The good part of that situation, of course, is being back at home and continuing to collect one's base wage, times 1.75, for the remainder of the call back period of 2-3 hours. Unfortunately, that situation has never been "guaranteed", either by call back circumstances or by practice. As soon as an employee responds to a call back, they are back on duty and "on the clock" for the duration of the applicable call back period and the circumstances of his/her release from duty during that call back period, according to the current contract, rests with the authority of the Fire Chief, or in his absence, the Battalion Chiefs, acting under his authority. As the adage goes, "He, who pays the money, calls the shots."

I also note that in addition to his stated desire to restore basic “consistency” to the call back release procedure, Chief Pogorels also testified that he would like the retained call back employees to address the backlog of uncompleted Pre-Plans. As I understand that situation from his testimony, the number of Pre-plans that the Department can complete has a direct impact on the City’s fire rating and that, in turn, directly affects the rates that home and building owners in the City pay for their property insurance policies. The result being that not only are the Department’s employees routinely protecting the citizens in connection with fires and medical emergencies, but they are also working to save those taxpaying citizens money on their property insurance. This is obviously a desirable and legitimate goal and function of both the City and the Department.

CONCLUSION

In view of my analysis, discussion and findings, above, I conclude that the Union has been unable to establish, by a preponderance of the testimony and evidence, that the City has violated the current labor agreement, as alleged.

DECISION

Having found the Union’s grievance in this matter to be without merit, it is hereby dismissed.

Dated this 14th day of January, 2008 at Minneapolis, Minnesota.

Frank E. Kapsch, Jr.
Arbitrator

Note: I shall retain jurisdiction in this matter for a period of forty-five (45) calendar days from the issuance of this Decision to address any questions or problems related thereto.