

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT**

**INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL NO. 1724,**

HF No. 2 U, 2008/09

Complainant,

v.

DECISION

CITY OF WATERTOWN,

Respondent.

Complainant, the International Association of Firefighters, Local No. 1724 (Local), filed a Petition for Unfair Labor Practice against Respondent, City of Watertown (City). City filed a counter-complaint against Local. The Department denied Respondent's Motion to Dismiss on October 29, 2008. A Hearing was held on March 27, 2009 pursuant to SDCL 3-18-3.3 and ARSD 47:02:03:04. Appearing at hearing were witnesses: Lt. Tyler McElhany, Lt. Scott Jongbloed, Cpt. Donald Rowland, and Mayor Doug Kranz. A supplemental hearing was held on April 16, 2009 for the purposes of taking the testimony of witness Mike Jungemann, former Chief for the Watertown Fire Department. City has withdrawn their counter-complaint against Local.

Complainant is represented by Thomas K. Wilka of Hagen, Wilka, & Archer PC. The Respondent is represented by Stanton W. Fox, City Attorney. The Department having taken consideration of evidence and testimony in the record and the parties having the opportunity to file briefs in support of their argument, the Department hereby makes this Decision.

Hearing Orders on Evidentiary Objections

During the initial Hearing on October 29, 2009, Local offered as an exhibit a document marked as IAFF 9. The City objected to the admission due to lack of foundation. That objection was sustained and No. 9 was not entered. In the supplemental Hearing on April 16, 2009, Local again offered No. 9. City again objected to the admission based upon insufficient foundation as no one knows who created the document. The Department, now having the opportunity to rule on that objection, sustains the objection. IAFF No. 9 is not admitted as there is insufficient foundation regarding the creation of the document.

City made another objection during the supplemental hearing to document IAFF No. 8. The objection is overruled. Local laid proper foundation and IAFF No. 8 is admitted.

ISSUE

Did City commit an unfair labor practice by making personnel changes without negotiations? Did City change the terms and conditions of the collective bargaining agreement (CBA), regarding conditions of employment and compensation, without good faith negotiations?

FACTS

City contracted with Bennett and Associates to study and prepare a report regarding the Classification and Compensation of city employees. A report by the same name was presented to the City on July 6, 2001. The report recommended that the City adopt a 9-grade classification system for all exempt and non-exempt employees. The classification system was created using weighted factors of Education and Basic Knowledge, Experience, Accountability Judgment, Complexity, Supervision Required, Nature and Purpose of Personal Contacts, Work Environment, Physical Demands, Motor Skills, Occupational Risks, Confidentiality, Supervisory Responsibility, and Supervision Exercised.

The City adopted the new classification schedule while still under an existing Collective Bargaining Agreement (CBA). During negotiations for the new CBA, City bargained the new schedule into the CBA with Local. The most recent CBA was effective January 1, 2007 and is effective until December 31, 2011. Within the CBA are two (2) of the nine classifications; Lieutenant at Grade 6 and Firefighter/EMT at Grade 5.

The previous CBA, effective January 1, 2002 through December 31, 2006, contained a provision regarding "out of grade pay." This section reads:

A lieutenant or firefighter working out of grade shall receive out of grade pay. Out of grade pay shall be at the rate of the higher grade or \$.20 per hour, whichever is greater, and shall be paid when there is work out of grade for more than four hours in a day. The most senior firefighter regularly scheduled to work at the time such opportunity arises will automatically move up to fill out of grade positions.

This language of this provision became ambiguous after the new classification system was adopted. Local filed a grievance with the Department of Labor against City for back pay regarding out of grade pay in 2005. Local was successful in their grievance and the Department awarded Local back pay.

When negotiating the new CBA in 2007, Local agreed to remove the out of grade pay provision in exchange for other bargained for items and to prevent impasse. The provision was removed and other provisions requested by Local were adopted. After adoption of the CBA, members of Local worked out of pay grade on an infrequent basis, without being compensated, as per the agreement.

There are three shifts which run for 24 hours on, 48 hours off, with a “Garcia” day off for each employee for each 54 day work period. Employees work about 10 days per month. In 2007, at the time of the CBA, the Fire Department’s hierarchy was: the Fire Chief (40-hour work week), three Assistant Chiefs, three Captains, three Lieutenants, and 18 Firefighter/EMTs. All employees were assigned to a specific shift, except the Fire Chief. Each shift had an Assistant Chief, a Captain, a Lieutenant, and 6 Firefighter/ EMTs. Either the Assistant Chief or the Captain was in charge for a particular shift. Both positions could not be absent on the same day.

On July 1, 2008, an Assistant Chief retired and City decided to eliminate one position of Assistant Chief. Six Firefighter/EMT positions were added on or about that time, two per shift. City made a policy change whereby the Assistant Chiefs were to work 40-hour work weeks. The policy was changed whereby both the Captain and the Lieutenant of a particular shift could not be absent on the same day. Lieutenants now act as shift commander in the absence of the Captain. This did not occur prior to July 1, 2008 as either the Captain or an Assistant Chief was present at all times.

During the day, the Assistant Chief is in charge of the fire house and operates as shift commander. When the shift gets an emergency call, the most senior officer (1st Officer) stays at the Department as shift commander and makes sure there are enough crew members available for subsequent events. During the day, while at a normal fire or rescue scene, the 2nd Officer serves as scene commander and is in charge of instructing and supervising the crew. From 5 pm to 8 am, the Captain is in charge of the station and takes over the responsibilities of an Assistant Chief and the Lieutenant takes over the Captain’s responsibilities. In the absence of the Captain, the Lieutenant takes the Captain’s role and the senior Firefighter takes the Lieutenant’s role. The job descriptions for the officer positions contain the provision that they will assume supervisory responsibility in the absence of a supervisor.

When only one officer is on duty, and by reason of necessity, the most senior Firefighter takes over the responsibilities of Lieutenant and therefore, scene commander. Prior to July 1, 2008, Firefighters were regularly put in the position of serving as a lieutenant and scene commander for rural fires. However, Firefighters did not typically act as scene commander for fires occurring within city limits. Since July 1, 2008, this situation usually occurs in the evenings when the Lieutenant must remain at the station and act as 1st Officer putting the senior Firefighter in the role of 2nd Officer.

At all times, the Assistant Chiefs are “on-call” for emergencies. The Assistant Chiefs may be called into the station or to a major incident if there is an absence of officers on duty. This rarely happens as the Firefighters are able to handle most incidents that occur and the senior Firefighter is able to “step up” into the role of scene commander.

Since July 1, 2008, the Captains and Lieutenants have had to assume some of the duties that the Assistant Chiefs were assigned to prior to July 1, 2008. The Lieutenants have not had as many options for taking time off, as they have to coordinate with the Captains before taking leave. The Lieutenants also act as shift commander or 1st Officer, on a regular basis. Prior to July 1, 2008, Lieutenants regularly acted as a 2nd Officer, but they did not regularly assume the duties of the 1st officer. Likewise, Firefighters usually did not

act as 2nd Officer prior to July 1, 2008, but since that time, they been expected to act in that capacity on occasion. The Lieutenants and senior Firefighters regularly work 1 or 2 pay grades above their rank.

The job description for the Lieutenant position has a requirement that they are expected to assume supervisory responsibilities in the absence of a supervisor. The function as stated in the job description reads, "14. Assumes supervisory responsibilities in the absence of supervisor."

The Firefighter/EMT job description does not contain a similar requirement. Firefighters are not officers and their job description does not have a supervisory requirement. However, Firefighters are assigned duties according to their seniority in the department. The most Senior Firefighter, although still a Grade 5, may be called to supervise other Grade 5 Firefighters. Furthermore, the Firefighter/EMT job description leaves open the possibility that a Firefighter may be asked or required to perform functions not listed in the job description. The specific proviso reads:

The essential functions or duties listed below are intended only as illustration of the various types of work that may be performed. The omission of specific statements of duties does not exclude them from the position if work is similar, related, or a logical assignment to, or extension of, the position.

The CBA contains a lengthy Management Rights Section. The City has written into the CBA, by and through this section, a reservation of all management rights, both statutory and common law, that existed prior to the CBA and prior to City's relationship with Local. The section includes a non-exclusive laundry list of management rights. Within the laundry list are the rights to: change job descriptions, change working hours or schedules, change the size of the work force, determine the allocation of resources and employees, determine the assignment of employees, determine kinds and number of personnel necessary; and take any necessary action to carry out the mission of the City in cases of an emergency.

Prior to retiring on January 5, 2009, former Chief Jungemann suggested to City that a rank of Battalion Chief be created at the same time that the job duties for the two Assistant Chiefs were changed. He proposed that the current officers be promoted and a new group of Lieutenants be hired. Jungemann made this proposal as he felt there needed to be one more officer position in each shift. City rejected the proposal.

Other facts will be developed as necessary.

ANALYSIS

The Complaint alleges that City's elimination of a position of Assistant Chief resulted in members of Local being required to perform functions and bear responsibilities not contemplated at the time of the negotiated agreement. The Complaint also alleges that wages were assigned by rank and that these ranks were assigned based upon factors from the Classification and Compensation Study prepared by Bennett & Associates. The Complaint prays that the Department direct City to cease and desist from changing the

conditions of employment until good faith negotiations may be held in regards to the change in condition and that City compensate members of Local who have been required to perform increased job functions and responsibilities.

Local files their complaint pursuant to SDCL 3-18-3.1. This statute reads:

It shall be an unfair practice for a public employer to:

- (1) Interfere with, restrain or coerce employees in the exercise of rights guaranteed by law;
- (2) Dominate, interfere or assist in the formation or administration of any employee organization, or contribute financial or other support to it; provided, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
- (3) Discriminate in regard to hire or tenure or employment or any term or condition of employment to encourage or discourage membership in any employee organization;
- (4) Discharge or otherwise discriminate against an employee because he has filed a complaint, affidavit, petition or given any information or testimony under this chapter;
- (5) Refuse to negotiate collectively in good faith with a formal representative; and
- (6) Fail or refuse to comply with any provision of this chapter.

SDCL §3-18-3.1.

The South Dakota Supreme Court has looked at whether or not issues are subject to mandatory negotiations. In the case of *West Central Education Association v. West Central School District*, the Supreme Court looked at whether a school calendar is an inherently managerial subject. The Court determined that it was not a mandatory subject for collective bargaining. The pertinent analysis by the Court is as follows:

SDCL 3-18-2 gives public employees the right to join labor organizations. SDCL 3-18-2 also gives public employees the right to designate representatives for the purpose of meeting and negotiating conditions of employment. Those conditions of employment include “rates of pay, wages, hours of employment, or other conditions of employment.” SDCL 3-18-3.

However, these statutes do not give public employees the right to engage in negotiations over all issues relating to rates of pay, wages, hours and other conditions of employment. “[T]he state is different from a private employer inasmuch as it has the unique responsibility to make and implement public policy. Accordingly, the scope of negotiations in the public sector is more limited than in the private sector.” *Rapid City Education Association v. Rapid City Area School District No. 51-4*, 376 NW2d 562, 564 (SD 1985) (citing *In re Local 195, IFPTE, AFL-CIO v. State*, 443 A2d 187, 191 (NJ 1982)).

Therefore, to determine whether any issue is mandatorily negotiable in public employment, one must not only determine whether the subject falls within SDCL 3-18-2 and SDCL 3-18-3, but also whether the issue is one properly decided by the political process or by collective negotiations. *Rapid City*, 376 NW2d at 562. In making that determination, the interests of the parties must be balanced to decide whether negotiations will significantly impair the state's ability to make policy decisions.

The role of the courts in a scope of negotiations case is to determine, in light of the competing interests of the State and its employees, whether an issue is appropriately decided by the political process or by collective negotiations. In making this sensitive determination, the mere invocation of abstract categories like "terms and conditions of employment" and "managerial prerogatives" is not helpful. To determine whether a subject is negotiable, the Court must balance the competing interests by considering the extent to which collective negotiations will impair the determination of governmental policy.

Rapid City, 376 NW2d at 564 (quoting *IFPTE*, 443 A2d at 191).

To assist in making that sensitive determination, a three-part test is applied.

1. A subject is negotiable only if it intimately and directly affects the work and welfare of public employees.
2. An item is not negotiable if it has been preempted by statute or regulation.
3. A topic that affects the work and welfare of public employees is negotiable only if it is a matter on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy.

Id. (citing *IFPTE*, 443 A2d at 190-191).

West Central Ed. Ass'n. v. West Central Sch. Dist., 2002 SD 163, ¶ 11-14, 655 NW2d 916, 920-921 (footnotes omitted).

In the above case, the Supreme Court further adopted the following holding regarding management prerogatives pertaining to the determination of governmental policy:

Without a doubt, the right to determine what work will be done, and by whom and when it is to be done, is at the very core of successful management of the employer's business.

Id. at ¶17, 922 (quoting *West Point Elementary School Teachers Ass'n v. Federal Labor Relations Authority*, 855 F.2d 936, 942 (2d Cir. 1988) (quoting *National Treasury Employees Union v. Federal Labor Relations Authority*, 691 F.2d 553, 563 (C.A.D.C. 1982)). The Federal Circuit Court in *National Treasury Employees Union*, went on to say, "It

follows necessarily that this right is essential to management's ability to achieve optimum productivity, and accordingly to the agency's ability to function in an effective manner.”

In this case, the subject is whether City can eliminate a job position and change the job duties of non-members of the Local, thereby affecting the job duties of Local members without an adjustment in pay. The facts indicate that City adopted the 9-grade classification system without negotiations with Local. After the adoption of the current system, City and Local negotiated the System into the CBA. These negotiated ranks, in general, are still present; the pay grades based upon job duties regularly assigned. The City and Local did not negotiate the number of people that would hold these ranks. The City eliminated only one of the assistant chief positions, and formally changed the job duties of the other two assistant chiefs. By these changes, City essentially changed the job duties of the all employees that had lower ranks than Assistant Chief.

City argues that the current CBA allows City to temporarily assign employees out of grade. Particularly, the provision of the CBA reads:

Section 10.09. Notion of Positions or Assignments: (a) The Employer shall have the right to temporarily assign employees within the bargaining unit, irrespective of seniority status, from one job classification to another to cover for employees who are absent from work due to illness, accident, vacation or leave of absence for a period not to exceed thirty (30) regular scheduled working days. The Employer shall also have the right to temporarily assign employees within the bargaining unit, irrespective of seniority status, to fill jobs or temporary vacancies and to take care of unusual conditions or situations

It is clear that the elimination of the assistant chief position and the reassignment of duties directly affects the work and welfare of Local, and meets the first criterion under the *IFPTE* test. However, Local has not met the requirements of the third *IFPTE* criterion. City has shown that scheduling and assignment of duties is an inherent management prerogative pertaining to the determination of governmental policy. It is also a management right written into the CBA. Local has the burden of showing that the changes they request would not interfere with the inherent management prerogative of the number of personnel needed for each position and the number of personnel assigned to each shift. That burden has not been met by Local.

The CBA provides for the occurrence that members of Local may be expected to perform tasks and duties not in their job descriptions and ranks. This CBA was entered into in good faith negotiations. The CBA does not have to be renegotiated when City acts within their rights written into the CBA. Local has not met their burden of proof. The Unfair Labor Practice complaint by Local is denied.

Counsel for City shall submit proposed Findings of Fact and Conclusions of Law, and an Order, consistent with this Decision, within 10 days of the receipt of this Decision. Local shall have 10 days from the date of receipt of City's proposed Findings of Fact and Conclusions of Law to submit objections or submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and

Conclusions of Law. If they do so, counsel for City shall submit such stipulation together with an Order consistent with this Decision.

DONE at Pierre, Hughes County, South Dakota, this 29th day of June, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

Catherine Duenwald
Administrative Law Judge