

SOUTH DAKOTA DEPARTMENT OF LABOR  
DIVISION OF LABOR AND MANAGEMENT

**INTERNATIONAL ASSOCIATION OF  
FIREFIGHTERS, LOCAL 1724,**

**HF No. 8 G, 2004/05**

**Grievant,**

**DECISION**

vs.

**CITY OF WATERTOWN,**

**Respondent.**

This matter came before the Department of Labor based on a grievance complaint filed by the International Association of Firefighters, Local 1724 (Firefighters) pursuant to SDCL 3-18-15.2. A hearing was held before the Division of Labor and Management on May 12, 2005, in Watertown, South Dakota. Thomas K. Wilka represented the Firefighters. Stanton W. Fox represented the City of Watertown (City).

The Firefighters and the City entered into an Agreement Between the City of Watertown and International Association of Firefighters, Local Number 1724 Watertown, South Dakota (Negotiated Agreement) on January 23, 2002. The Firefighters presented two issues at the hearing. The first issue is whether the City violated, misinterpreted or inequitably applied Section 20.04, Out of Grade Pay, of the Negotiated Agreement. The second issue is whether the City violated, misinterpreted or inequitably applied Section 14.01, Vacations, of the Negotiated Agreement.

**FACTS**

The Department finds the following facts, as established by a preponderance of the evidence:

1. There are five ranks within the Watertown Fire Department. These include Firefighter/Paramedic, Lieutenant, Captain, Assistant Chief and Chief.
2. There are three separate crews that work twenty-four hour shifts. On each shift, there are typically six Firefighter/Paramedics, one Lieutenant, one Captain and one Assistant Chief.
3. On any given shift, a Lieutenant, Captain or Assistant Chief may be absent due to illness or planned leave.
4. When these vacancies occur, they are filled either by an identical rank employee from a different shift or by a lower rank employee from the same shift.
5. According to Section 20.04 of the Negotiated Agreement, when either a Lieutenant or a Firefighter fills in for a higher rank employee, that Lieutenant or Firefighter is entitled to out of grade pay.
6. Section 20.04, Out of Grade Pay, specifically provides:

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. (emphasis added).

It is the underlined language that gave rise to this grievance.

7. The language in Section 20.04 has remained unchanged for at least four previous collective bargaining agreements.
8. Historically, the City abided by the terms of Section 20.04 by paying out of grade pay at the hourly rate of the substituted employee. This meant that the lower rank employee received the higher rank employee's hourly rate of pay for those hours worked out of grade.
9. Prior to January 23, 2002, the City adopted a new wage and classification system for all City employees. This classification system placed all City positions into one of nine separate grades based on job factors.
10. Based upon the new classification system, Firefighter/Paramedic positions were placed at Grade 5 and Lieutenant positions were placed at Grade 6.
11. Each grade has a salary range from a minimum to a maximum amount paid for working in that grade.
12. Prior to adoption of the new classification system, all employees within the same rank were each paid an identical base hourly rate, with additional compensation awarded for length of service and certifications.
13. After implementation of the new classification system, individual hourly rates varied for employees within the same rank and grade. Most individual hourly rates are near or above the middle salary range.
14. In January 2003, the City unilaterally changed how it calculated and paid out of grade pay for out of grade work.
15. The City "currently compensates out of grade pay by calculating the difference between an employee's actual rate of pay and the minimum rate of pay for that 'out of grade' an employee temporarily works within." The City began paying only \$.20 per hour for out of grade pay because the minimum at each grade is less than the mid-point for the lower grade.
16. The Firefighters became aware of the change to out of grade pay when they received their paychecks for the pay period ending January 30, 2003.
17. The City admitted that the new classification system rendered the underlined language in Section 20.04 ambiguous.
18. The Firefighters appropriately filed their grievance on this issue and the Department conducted a hearing to investigate the issue.
19. The second issue raised by the Firefighters concerned vacations.
20. Section 14.01 of the Negotiated Agreement provides:

No vacation may be taken without prior approval of the Chief or his designee. The following vacation schedule shall be in effect:

After 1 year	2 days (48 hours)
2-5 years	5 days (120 hours)
6-10 years	8 days (192 hours)

11-16 years	9 days (216 hours)
17 years and over	10 days (240 hours)
20 years and over	12 days (288 hours)

21. At the time of the hearing, Tom Olson had been a Firefighter/Paramedic with the City for eighteen years.
22. In October 2003, Olson completed his sixteenth year of service with the City. Based upon the language in Section 14.01, Olson thought he should receive another day of vacation, going from nine to ten days total.
23. Employees of the City accrue vacation hours on a monthly basis.
24. In the past, the City has consistently applied Section 14.01 so that after employees completed one year of service, they have earned two days of vacation, after completion of their second year of service, they have earned five days of vacation, after completion of their sixth year of service, they have earned eight days of vacation and so forth.
25. The City informed Olson that he would not be entitled to take ten days of vacation until he completed his seventeenth year of service.
26. Olson disagreed with this determination and the Firefighters appropriately filed a grievance and the Department conducted a hearing to investigate the issue.
27. Other facts will be developed as necessary.

#### ISSUE I

#### WHETHER THE CITY VIOLATED, MISINTERPRETD OR INEQUITABLY APPLIED SECTION 20.04, OUT OF GRADE PAY, OF THE NEGOTIATED AGREEMENT?

SDCL 3-18-15.2 provides for an appeal to the Department of Labor when a public employee's grievance remains unresolved. SDCL 3-18-1.1 defines a grievance as "a complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies or rules of the government of the state of South Dakota or the government of any one or more of the political subdivisions thereof, or of the public schools, or any other authority, commission, or board, or any other branch of the public service, as they apply to the conditions of employment." The burden of proof is on the Firefighters, the party alleging the violation. Rininger v. Bennett County Sch. Dist., 468 N.W.2d 423 (S.D. 1991).

"Disputes over the meaning of terms in [a negotiated agreement] are resolved under the general principles of contract law." Gettysburg Sch. Dist. 53-1 v. Larson, 2001 SD 91, ¶ 11. Terms in a contract are to be given "their plain and ordinary meaning." Harms v. Northland Ford Dealers, 1999 SD 143, ¶ 12 (citation omitted). "When the terms of a negotiated agreement are clear and unambiguous, and the agreement actually addresses the subject that it is expected to cover, 'there is no need to go beyond the four corners of the contract.'" Wessington Springs, 467 N.W.2d at 104 (citation omitted). "The only circumstances in which we may go beyond the actual language of the collective-bargaining agreement are where the agreement is ambiguous or fails to address a subject that it is expected to address." Id.

The City must abide by the terms of the Negotiated Agreement. See Wessington Springs Educ. Ass'n v. Wessington Sch. Dist. No. 36-2, 467 N.W.2d 101, 104 (S.D. 1991). According to the Negotiated Agreement, any Lieutenant or Firefighter working out of grade shall receive out of grade pay. The dispute here concerns the amount the City shall pay for out of grade pay.

The Negotiated Agreement provides that out of grade pay shall be at the rate of the higher grade or \$.20 per hour, whichever is greater. (emphasis added). The City admitted that when it implemented the new classification system, it rendered the language "at the rate of the higher grade" ambiguous. The Negotiated Agreement does not address or define this language. "When a latent ambiguity in the terms or language of an agreement exists, extrinsic sources such as bargaining history and past practice may be considered." AFSCME v. State of South Dakota, 444 N.W.2d 10 (S.D. 1989). "If a past practice which does not derive from the express terms of a bargaining agreement becomes a part of the employer's structure and conditions of employment, it takes on the same significance as the other terms of employment and is protected from unilateral change." Oberle v. City of Aberdeen, 470 N.W.2d 238 (S.D. 1991).

Here, the City had a well-established practice of paying out of grade pay at the rate of the substituted employee until the City unilaterally changed its method of payment. The City could not unilaterally change the method of payment for out of grade pay without first negotiating with the Firefighters. That did not happen in this matter. The past practice of paying out of grade pay at the rate of the substituted employee became an integral part of the Negotiated Agreement. Out of grade pay must be paid at the hourly rate of the substituted employee.

The City violated and misinterpreted Section 20.04 of the Negotiated Agreement. The City failed to pay the Firefighters for out of grade pay according to the City's past practice. The Firefighters' request for relief is granted. The Firefighters are entitled to back pay from each date that \$.20 per hour was used instead of the substituted employee's rate of pay, plus prejudgment interest.

## ISSUE II

### WHETHER THE CITY VIOLATED, MISINTERPRETED OR INEQUITABLY APPLIED SECTION 14.01, VACATIONS, OF THE NEGOTIATED AGREEMENT?

As previously stated, Section 14.01 of the Negotiated Agreement provides:

No vacation may be taken without prior approval of the Chief or his designee. The following vacation schedule shall be in effect:

After 1 year	2 days (48 hours)
2-5 years	5 days (120 hours)
6-10 years	8 days (192 hours)
11-16 years	9 days (216 hours)
17 years and over	10 days (240 hours)
20 years and over	12 days (288 hours)

The plain meaning of the Negotiated Agreement contemplates that the number of vacation days an employee may take depends upon the number of years of service completed. The schedule in Section 14.01 is clear and unambiguous and there is no need to go beyond the provisions of the agreement.

The City has appropriately interpreted and applied Section 14.01. Olson is not entitled to take ten days of vacation until he completes his seventeenth year of service. The City did not violate, misinterpret or inequitably apply Section 14.01 of the Negotiated Agreement. The Firefighters' request for relief is denied.

Findings of Fact and Conclusions of Law shall be submitted within ten days from the date of receipt of this Decision as follows:

The Firefighters shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision on Issue I and proposed Findings and Conclusions addressing Issue II; and

The City shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision on Issue II and proposed Findings and Conclusions addressing Issue I.

Upon receipt of the Findings of Fact and Conclusions of Law and proposed Findings and Conclusions, each party shall then have seven days to submit any necessary objections. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, the Firefighters shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 25<sup>th</sup> day of October, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp  
Administrative Law Judge