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BOARD OF PERSONNEL APPEALS

In the Arbitration between: INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 600, MILES CITY, MONTANA, The Union, and THE CITY OF MILES CITY, MONTANA, The Employer.	INTEREST ARBITRATION

Dates and Place of Hearing:	January 5 and 6, 1994; Miles City, Montana
Representing the Union:	James L. Hill Vice President, 7th District, IAFF Tacoma, Washington
Representing the Employer:	Tommy B. Duke Counselor at Law Denver, Colorado

OPINION AND AWARD

FACTS

The Parties' Long-Standing Relationship

The parties began informal collective bargaining in the early 1940's when the Miles City Fire Fighters organized and became Local 600 of the International Association of Fire Fighters. They began formal collective bargaining in 1973 when Montana public employees were authorized by statute to bargain collectively with their public employers.

The parties have had an amicable collective bargaining relationship since 1973, with no impasse prior to their 1993 contract negotiations. Moreover, under their 10 collective bargaining agreements from August 25, 1977 to today, only one grievance went to final and binding arbitration.

THE ISSUES BEFORE THE ARBITRATOR

Following an impasse in their 1993 negotiations the parties proceeded to mediation, as required by Montana law. When their impasse was not resolved, they waived factfinding and proceeded directly to final and binding interest arbitration under Chapter 34, Arbitration for Fire Fighters, of Title 39, Labor, of the Montana Code of Laws.

At the start of the hearing the parties agreed that the wording of the following provisions in their extended 1991-1993 Agreement are before the Arbitrator for a final and binding **AWARD:**

Article 6 - OFFICERS AND PROMOTIONAL PROCEDURE

1. Section (1) Slate of Officers

2. Section (3) Eligibility for Promotion
(Only whether the criteria for "Assistant Chief" -- a non-bargaining unit position -- should be included in this section)

3. Section (4) Vacancy Time Limit

4. Section (6) Responsibility for Promotions

5. Article 7 - DISQUALIFICATION [FOR PROMOTION]

6. Article 10 - HOURS OF DUTY
(Excluding "[Hours of Duty] For Civilian Employees")

7. Article 16 - INSURANCE

8. Article 17 - GRIEVANCE PROCEDURE

(Opening paragraph & Step 1)

9. Article 18 - DISCIPLINARY PROCEDURES

10. Article 23 - COMPANY STRENGTH

11. Article 28 - PREVAILING RIGHTS

12. Article 29 - MANAGERIAL RIGHTS
(Only in dispute if Article 28 is deleted from the parties' contract, as proposed by the Employer)

13. Article 30 - TERMINATION [/DURATION]

14. WAGE ADDENDUM "A"

"1. SALARY SCHEDULE INCLUDING OFFICER'S PAY"
(The parties have agreed on an initial 4% wage increase. The Employer has proposed a 3-year agreement, with the 4% increase effective with the first full payroll period following receipt of the Arbitrator's **AWARD**, and with re-openers only for wages for the fiscal years beginning July 1, 1994 and July 1, 1995. During the hearing the Union indicated its agreement with a 3-year contract (with an initial 4% wage increase and re-openers for the second and third years), provided its proposal for Article 16 - INSURANCE (with re-openers on the employer's health care contributions for the fiscal years beginning July 1, 1994 and July 1, 1995) is adopted).

"2. LONGEVITY BONUSES."

Of the 14 issues listed above, three are direct economic issues:

-- Article 16, Insurance (including the unions's proposal for re-openers in the second and third year);

-- Article 30, Termination [/Duration] (with the union's insistence that a three year contract be conditioned on second and third year re-openers for both wages and health insurance);

-- Wage Addendum "A" -- both Section 1 (with the parties' agreement on an initial 4% wage increase but with the union's

insistence that the employer's wage re-openers for the second and third year be conditioned on insurance re-openers for those same years) and Section 2, Longevity Bonuses.

The two issues presented by Article 17, Grievance Procedure, and Article 18, Disciplinary Procedures, must stand alone; however, the two presented by Article 28, Prevailing Rights, and Article 29, Managerial Rights, must be considered together.

The five issues presented by Article 6, Officers and Promotional Procedure, and Article 7, Disqualification, involve promotional opportunities for the members of the bargaining unit and must be considered together.

Finally, the two issues presented by Article 10, Hours of Duty [For Shift Personnel], and Article 23, Company Strength, involve hours of work, manning and overtime eligibility and therefore must be considered together.

ARGUMENTS

The Employer's Position and Arguments on Economic Issues

The employer's underlying position is, in effect, that unless it can gain absolute control over its costs for health insurance for all of its employees, its financial ability to pay wages and fringe benefits will soon be eroded, ultimately to the point where drastic layoffs could become necessary and it might be forced to contract out some services now performed by employees on its payroll.

To obtain absolute control over its health insurance costs the employer has already negotiated a three-year contract with

AFSCME Local 283A which calls for the employer's maximum monthly contribution per employee to be $250.00 by the third year (just as it will then be for its non-represented employees). Moreover, the employer has made the same proposal for capping its health insurance costs to the members of its police bargaining unit (represented by AFSCME Local 283B). That same proposal on health insurance is before the Arbitrator.

The employer notes that not only has it agreed with the union on an initial 4% wage increase, but that it has offered to negotiate with the union, during the proposed wage re-openers for the second and third years of a three-year contract, on what portion of any wage increase for either year should be allocated to wages and what should be diverted to health insurance.

The employer argues, therefore, that a three-year contract (with its health insurance proposal and only wage re-openers for the second and third years) would not only be within its ability to pay but also in the interest and welfare of the public and the members of the bargaining unit.

The Union's Position and Arguments on Economic Issues

The union's reply is that it cannot buy "a pig in a poke." In the first year of a three-year contract the union is willing to have the members of the bargaining unit share a greater portion of the costs of their health care coverage than that proposed by the employer. But it cannot agree that by the third year of that contract the bargaining unit members must give the employer a blank check for monthly health insurance costs in excess of $250.00 per

employee.

Moreover, the union argues that any wage increases negotiated for a second and third year (under the employer's proposed wage re-openers) are needed to keep the members of the bargaining unit even with the cost of living and to restore some of the reduction in take-home pay caused by their greater assumption of health care costs in the fiscal year ending June 30, 1994 (under the union's insurance proposal).

Accordingly, the union argues that the interest and welfare of the public and the bargaining unit members will be served if the parties have a three-year contract with second and third year re-openers for both wages and health benefits.

The Employer's Position and Arguments on All Other Issues

The underlying position and arguments of the employer on all of the other issues were succinctly stated by its counsel in his opening statement:

> "Rights [management rights] which the city has ceded [to the union] over the years are the main issue.
>
> "Are the employees going to continue to hold a very dominant position, or are the mayor and the city council going to recapture its managerial rights...It's just a question of who's going to run the fire department, who is going to make the decision about how many fire fighters [there should be], how many officers and who is promoted?"

The Union's Position and Arguments on All Other Issues

The union replies that the long-standing contract provisions which the employer seeks to change deal with hours and other terms and conditions of employment and therefore are mandatory subjects of bargaining. Hence the union argues that the employer's mere

claim that the mayor and city council must regain control over the city's fire department is not enough to prove a real need for the employer's proposed changes.

Moreover, the union contends that, in accordance with the applicable statute, it has offered both testimonial and documentary evidence to show why its non-economic proposals are in the interest and welfare of the public, as well as that of the parties' continued amicable collective bargaining relationship.

Above all, the union stresses that it considered the employer's legitimate questions about the wording of certain articles in the parties' contract and during the arbitration hearing it responded in good faith with revised contract language proposals which addressed those questions. Accordingly, the union urges the Arbitrator to adopt its non-economic proposals.

DISCUSSION

Introduction

Underlying the parties' dispute are two facts and one "perceived political fact-of-life:"

-- The ever-rising cost of health insurance (with the employer's legitimate desire to control, and eventually "cap," its share of those increasing costs);

-- The employer's difficulties in raising additional revenue.

-- The public's dissatisfaction with the ability of the city's fire fighters to hold their full-time jobs with the city and (because of their 24-hours-on/72-hours-off schedules) hold regular jobs with other employers as well.

This perceived political fact-of-life has convinced the mayor, and apparently a majority of the city council, that they have an obligation to explore the possibility of an all-volunteer fire department (as opposed to a paid fire department, with a cadre of full-time employees supplemented by paid part-time employees).

The Heart of the Matter

The employer's difficulties in raising additional revenue and its legitimate desire to control its health care costs are givens which the Arbitrator must take into account in accordance with the statutory mandate that he consider "the employer's ability to pay" and "the interest and welfare of the public" in choosing between the parties' conflicting proposals.

Accordingly, the crucial threshold question is: Under the Montana statute providing for interest arbitration, how must the Arbitrator deal with the apparent hostility of a large segment (or at least a vocal one) of the Miles City electorate to a full-time city fire department, with the customary and usual fire fighter schedule of one shift on and three shifts off?

Arbitrator's Analysis and Reasoning on This Question

If the elected officials of Miles City wish to explore the economic feasibility of an all-volunteer fire department, they are free to do so, even during the life of a collective bargaining agreement.

Moreover, if a majority of the city council and the mayor wish to refer the issue of an all-volunteer fire department to the city's voters (at a regular or special election), they are free to

do so. (Of course, such a change, if approved, must await the expiration of the parties' new contract.)

Accordingly, while the Arbitrator must consider the interest and welfare of the public in choosing between the parties' conflicting economic and non-economic proposals, he cannot consider whether a volunteer rather than a paid fire department would be in the best interest of the citizens of Miles City. They alone must make that decision.

On the other hand, as long as there is to be a contract between represented fire fighters and the city, the Arbitrator must consider the conflicting promotional, manning and overtime proposals of the parties and determine which would be in the best interest and welfare of the public.

The Arbitrator's Analysis and Reasoning on the Economic Issues

The essential differences between the parties' economic proposals are three:

One, the employer seeks to "cap" its monthly contribution for health coverage at $250.00 per employee by the fiscal year ending June 30, 1996. The union would require bargaining unit members to bear a large share of the costs of their chosen health care coverage in the fiscal period ending June 30, 1994, but would leave open for negotiation the amount of health care costs to be shared in fiscal years 1995 and 1996.

Two, the employer would change, and ultimately drastically reduce, the longevity bonuses paid its full-time fire fighters, while the union would leave longevity bonuses at the current level.

Three, the employer seeks a three-year contract (with only wage re-openers in the second and third years), while the union will consent to a three-year contract only if the re-openers in the second and third years cover both wages and health insurance.

The Arbitrator understands the employer's desire for uniformity in its health care costs over its entire workforce and for a cap on those costs as quickly as possible. However, the city's fire fighters are engaged in a most dangerous activity and therefore their health care needs are not necessarily the same as those of other city employees. Hence, the lack of uniformity in the employer's health insurance costs (if the Arbitrator were to accept the union's insurance proposal) cannot be controlling.

Instead, the controlling questions are two:

First, is the union's proposal on insurance reasonable, in light of the additional cost-sharing by members of the bargaining unit in the fiscal period ending June 30, 1994?

Second, do re-openers on health insurance in the second and third years outweigh the advantages of a three-year contract?

But for the employer's proposal for wage re-openers in the second and third years of a three-year contract, the Arbitrator would consider that the union's proposal for health insurance re-openers would negate the advantages of a three-year contract. However, with the employer and the union now in agreement on a three-year contract which includes wage re-openers for the fiscal years ending June 30, 1995 and June 30, 1996, the Arbitrator cannot ignore the cost savings to the employer of the union's good faith

proposal for health coverage cost-sharing for the fiscal period ending June 30, 1994. Moreover, he cannot ignore the union's "pig-in-a-poke" argument and he must recognize that a $250.00 per employee monthly cap on the employer's contribution (beginning July 1, 1995) would indeed be draconian -- particularly in light of the reasonably anticipated July 1, 1994 increases in premiums for health coverage.

Accordingly, the Arbitrator's **AWARD** will include the union's proposals on Article 16, Insurance, Article 30, Termination [/Duration] and Wage Addendum "A" (as detailed to the Arbitrator in the union's final contract proposals at the end of the arbitration hearing on January 6, 1994).

The Arbitrator's Analysis and Reasoning on Articles 17 and 18

When faced with judgment calls on Articles 17 and 18 the Arbitrator must go with contract language which has served the parties well in the past and which will most likely serve them well in the future.

The Arbitrator notes, however, that the one difference between the union's final proposed language for Article 17, Grievance Procedure, and the employer's proposed language for that article, is the union's continuation of the broad language ("Grievances and disputes that may arise, including the interpretation of this Agreement, shall be settled in the following manner:") and the employer's insistence that "Only grievances and disputes that involve the violation or interpretation of this Agreement are subject to this Grievance and Arbitration procedure ..."

(Arbitrator's emphasis).

With the elimination of the language now found in Article 17 re "the continuance of past practices not expressly covered by this Agreement," the union has attempted to answer the problem presented in part by the Holmlund arbitration case. The grievance in that case was the first one that ever went to arbitration under the parties' ten formal collective bargaining agreements from August 1977 to today. Hence in that sense the language in the opening paragraph of Article 17 (which the union has slightly modified) has partially answered the employer's objections.

On other hand, under the opening paragraph of Article 17, as contained in the union's final proposal, an employee or the union could still use the contractual grievance procedure to take to arbitration a dispute which does not involve either an interpretation or application of the parties' contract. In that respect the union's proposal is still too broad, and the employer's proposal for the opening paragraph of Article 17 is reasonable and fair to both parties. Accordingly, the Arbitrator's **AWARD** will include the employer's proposal on Article 17.

Turning to Article 18, Disciplinary Procedures, the Arbitrator notes that the essential differences between the parties' proposals are again two:

One, the employer's proposal expressly states that "However, progressive discipline is not mandatory," while the union's proposal expressly states that "Discipline shall be applied at progressive and escalating levels..." (Arbitrator's emphasis).

Two, the union's proposal continues the requirement for "a pre-disciplinary hearing" for all discipline beyond "verbal counseling," while the employer's proposal would remove such a requirement.

The employer's proposal for Article 18, however, still continues the requirement for "just cause" for discipline and for discharge. And under the just cause standard excessive discipline, including discharge, for a minor offense could still be set aside by an arbitrator. Moreover, clearly under the holding of the Supreme Court of the United States in Cleveland Board of Education v. Loudermill et al., 470 U.S. 532 (1985) a public employee has a constitutional right to a pre-disciplinary hearing prior to termination. However, a pre-disciplinary hearing for a written reprimand is too onerous a requirement on the employer. Accordingly, the Arbitrator finds the union's revised contract language for Article 18 to be too broad. Hence his **AWARD** will include the employer's proposed wording for that article.

Arbitrator's Analysis and Reasoning on Articles 28 and 29

The union proposes that if the Arbitrator were to adopt the employer's proposal and remove Article, 28 Prevailing Rights, from the parties' contract, he should then also delete Article 29, Management Rights.

Counsel for the employer pointed out, and the union president agreed, that the language in Article 29, Management Rights, is verbatim the language found in 39-31-303 of the Montana Code of Laws (Section 3, Chapter 441, 1973 Laws of the State of Montana).

Accordingly, whether or not Article 29 is part of the parties' contract, the employer has, by operation of law, all of the managerial rights detailed in that article. The crucial issue, therefore, is whether in the interest of fairness Article 28, Prevailing Rights (as worded in Union Exhibit 35) should be included in the Arbitrator's **AWARD**.

The union insists that not all of the "rights, privileges, and working conditions enjoyed by the employees [in the bargaining unit]" throughout the years, and therefore on the effective date of the Arbitrator's **AWARD**, can possibly have been detailed in the parties' new contract and that hence there is a proven need for the retention of Article 28. Moreover, the union has no objection to Article 29 remaining in the contract if Article 28 is retained.

The basic defect in the union's argument is that it requires the employer to buy "a pig in a poke:" Article 28, even as revised in Union's Exhibit 35, goes beyond a customary and usual maintenance-of-benefits clause and guarantees members of the bargaining unit "All rights, privileges and working conditions enjoyed by the employees [in the bargaining unit] which are not included in this Agreement...". What those "rights, privileges and working conditions" are nobody really knows.

Moreover, at the hearing the only example the union could give of items covered by Article 28 were practices which in and of themselves would constitute "proven, mutual, controlling past practices of the parties." But such proven controlling, mutual past practices would be valid and binding on the parties, even

without the language in Article 28.

Accordingly, the Arbitrator's **AWARD** will reflect the employer's proposal to remove Article 28 from the parties' contract, as well as the union's proposal to remove Article 29. The Arbitrator specifically finds that the legitimate interests of both parties are not harmed by these omissions -- the employer will enjoy all of the managerial rights expressly reserved to it as a public employer by Montana law, and the members of the bargaining unit will enjoy all of the benefits of any proven, mutual, controlling past practice.

Arbitrator's Analysis and Reasoning on Articles 10 and 23

The union has conclusively demonstrated, by the preponderance of both testimonial and documentary evidence, that the minimum, safe manning on a shift (under all of the facts and circumstances in the employer's full-time fire department) is three. Accordingly, the Arbitrator's **AWARD** will include the union's final proposal on the wording of Article 23, Company Strength.

Moreover, the union has also conclusively demonstrated, again by the preponderance of the evidence, that the customary and usual shift schedule for full-time fire fighters is 24 hours on and 72 hours off. The employer has not offered any compelling reason why this customary and usual work schedule should be changed. Hence, the Arbitrator's AWARD will also include the union's final proposal on the wording of Article 10, Hours of Duty [For Shift Personnel].

Arbitrator's Reasoning on Articles 6 and 7

The employer contends that its proposed changes to Articles 6

and 7 are needed in order to restore to the mayor and city council the power to run the city's full-time fire department. However, that power is already vested in the mayor and city council by various Montana statutes:

-- Section 39-31-303, "Management Rights of Public Employers," of Title 39, Labor (discussed earlier);

-- Section 7-33-4103, Composition of Fire Department, of Part 41, Municipal Fire Departments, Title 7, Local Government;

-- Section 7-33-4104, Duties of Chief and Assistant Chief of Fire Department, Part 41, Municipal Fire Departments, Title 7, Local Government;

-- Section 7-33-4106, "Appointment of Firefighters," Part 41, Municipal Fire Departments, Title 7, Local Government;

-- Section 7-33-4121, "Rules Governing Employment in Fire Departments," Part 41, Municipal Fire Departments, Title 7, Local Government;

-- Section 7-33-4122, "Term of Appointment of Firefighters - Probationary Period," Part 41, Municipal Fire Departments, Title 7, Local Government;

-- Section 7-33-4123, "Authority to Suspend Firefighters," Part 41, Municipal Fire Departments, Title 7, Local Government;

-- Section 7-33-4124, "Suspension Procedure," Part 41, Municipal Fire Departments, Title 7, Local Government;

-- Section 7-33-4125, "Reduction and "Subsequent Increase in Number of Firefighters Based on Seniority," Part 41, Municipal Fire Departments, Title 7, Local Government;

-- Section 7-33-4127, "Compensation of Fire Department Personnel," Part 41, Municipal Fire Departments, Title 7, Local Government;

-- Section 7-33-4130, "Group Insurance for Firefighters - Funding," Part 41, Municipal Fire Departments, Title 7, Local Government.

Accordingly, although the current wording of Articles 6 and 7 (which the employer proposes to change) does indeed place some restraints on the employer's power to select members of the bargaining unit for promotion and into what positions, nevertheless the statutory power of the mayor and city council to ultimately, for good cause, reject employees the fire chief has selected for promotion remains unchanged by those contractual provisions.

The Arbitrator's **AWARD** therefore will contain the union's proposals on Articles 6 and 7.

Arbitrator's Analysis and Reasoning on Wage Addendum "A"

The last item in dispute is the Longevity Bonuses covered by Section 2 of Wage Addendum "A."

The employer proposes to "grandfather" the longevity bonuses of those currently in the bargaining unit at their current levels, but to reduce their future longevity bonuses (as well as those of any new hires) to "One Percent (1%) of $750 for each year of service"-- that is, to $7.50 per month.

Such a proposed reduction in longevity bonuses is an additional draconian measure aimed at saving the employer money, when the members of the bargaining unit are already asked to share

a greater part of their monthly health care costs and, in fact, are required to do so under the Arbitrator's **AWARD**.

Accordingly, the Arbitrator's **AWARD** will contain the union's proposal on longevity bonuses.

CONCLUSION

As expressly required by Section 39-34-103 of the Montana Code of Laws, the Arbitrator finds that the following **AWARD** is "a just and reasonable determination," issue by issue, of the parties' final positions on the 14 issues in dispute:

A W A R D

Article 6 - OFFICERS AND PROMOTIONAL PROCEDURE

1. Section (1) Slate of Officers (Union's Exhibit 6)
2. Section (3) Eligibility for Promotion (Union's Exhibit 6)
3. Section (4) Vacancy Time Limit (Union's Exhibit 6)
4. Section (6) Responsibility for Promotions (Union's Exhibit 6)
5. Article 7 - DISQUALIFICATION [FOR PROMOTION] (Union's Exhibit 9)
6. Article 10 - HOURS OF DUTY [For Shift Personnel] (Union's Exhibit 10)
7. Article 16 - INSURANCE (Union's Exhibit 11)
8. Article 17 - GRIEVANCE PROCEDURE (Employer's Exhibit 3; pages 9-10)
9. Article 18 - DISCIPLINARY PROCEDURES (Employer's Exhibit 3; pages 11-12)
10. Article 23 - COMPANY STRENGTH (Union's Exhibit 23)
11. Article 28 - PREVAILING RIGHTS

(To be omitted from the parties' 1993-1996 Agreement, as proposed by the employer. See page 14, Employer's Exhibit 3.)

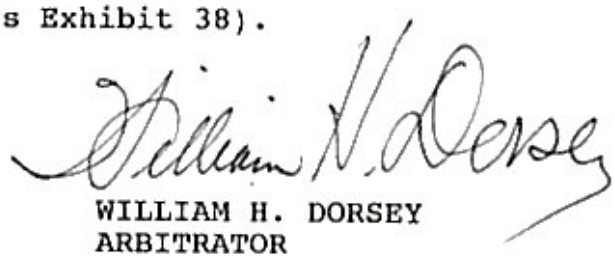
12. Article 29 - MANAGERIAL RIGHTS
(To be omitted from the parties' 1993-1996 Agreement, as proposed by the union. See Union's Exhibits 35 and 36, as explained in the testimony of Union President Tod Miller.)

13. Article 30 - TERMINATION [/DURATION] Union's Exhibit 37)

14. WAGE ADDENDUM "A"

"1. SALARY SCHEDULE INCLUDING OFFICER'S PAY"
(Employer's Proposal, including the employer's proposed effective date -- "the first full payroll period after the effective date of the Agreement [i.e., the date of the Arbitrator's OPINION AND AWARD];" see page 16, Employer's Exhibit 3.)

"2. LONGEVITY BONUSES" (Union's Exhibit 38).



January 21, 1994

WILLIAM H. DORSEY
ARBITRATOR

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