**Beitner #4**

## VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration Between:

EMPLOYER

-and

UNION

Arbitrator:

ELLIOT I. BEITNER

GR: Fire Prevention Inspector

## OPINION

An arbitration hearing was held on November 6, 1986 at the Town A City Hall, Town A, Michigan, in accordance with the applicable provisions of the collective bargaining agreement in effect between the parties. At the hearing both parties were afforded the right to call witnesses to testify, to cross-examine witnesses, and to present relevant documentary evidence. The parties have also filed post-hearing briefs that were received at the offices of the American Arbitration Association on December 12, 1986, at which time the hearing was declared closed.

**Background:**

The grievance filed May 13, 1986 (Joint 2) protests the requirement imposed upon Fire Prevention Inspectors to do plan review and construction follow-up. The grievance further states that these duties do not fall under the job classification description of Fire Prevention Inspector. Alleged violated by the Employer are Article XVI - New or Changed Jobs, Section 1, Paragraph

a; Article XXXIII - Validity, and the job classification for Fire Prevention Inspector. The Step 2 denial of the grievance (part of Joint 2) states:

> Grievance denial is based on that portion of the Fire Prevention Inspectors job description which states "work involves responsibility for enforcement of local and state laws and ordinances relative to fire safety." [T]his is true, relative to fire codes, however no reference is made in the job description regarding enforcement of the B.O.C.A. Building Code and/or any other construction codes. Employment requirements for the fire and building inspectors are completely dissimilar.

EMPLOYEE 1, an employee with 26 years of service, was Fire Marshall for five years until he voluntarily relinquished that position and accepted the job of Fire Dispatcher. He was called as a witness by the Union and testified that as Fire Marshall he supervised Fire Prevention Inspectors, who are members of the Union, and civilian Fire Hazard Inspectors, who are members of UNION B. He testified that employees in both classifications performed the duties of inspecting building prints and plans and follow-up inspections. He stated that the job description for Fire Prevention Inspector does not specifically delineate the duties of reviewing building prints and plans or conducting follow-up inspections and that Fire Prevention Inspectors are not required to have three years experience in general building construction. In actuality, one Fire Prevention Inspector had such background, and two did not.

EMPLOYEE 1 testified that he was a Fire Prevention Inspector from 1969 through 1981 and in that position he reviewed construction plans and performed some field inspections as time permitted. He worked under the identical job description that is in effect today. He further testified that in 1974 the Employer created a classification of Fire Hazard Inspector, and these civilian employees also reviewed plans and made follow-up inspections. In 1981 the Employer laid off some of the civilian Fire Hazard Inspectors, and because of the loss of this manpower, the Employer entered into a contract with a Person 1 to do some of the work. In addition, Fire

Prevention Inspectors also performed the same job. In late 1981 an injured Fire Fighter, Person 2, who was assigned to light duty, began performing inspections of plans and follow-up field inspections. In 1983 an additional Fire Prevention Inspector position was created and Person 2 was promoted to the new job; the outside contractor, Person 1, was terminated. Person 2 still performs these duties. Person 2 had 20 years of experience in the building trade and performs most of the on-site inspections.

The Employer, EMPLOYEE 1 stated, requires only two and a half years of experience for a Fire Fighter to be eligible to take the test for Fire Prevention Inspector. PERSON 3, a Fire Fighter, testified that he took the test for Fire Prevention Inspector and was awarded the position. He had no prior construction experience. He was assigned to perform duties including plan review and on-site inspection. He testified that the duties were not contained in the Fire Prevention Inspector job description, that there were no negotiations with the Union to change the job description, and he did not feel qualified to make inspections with regard to construction.

He does feel qualified to inspect for fire safety. PERSON 4 also took the exam for Fire Prevention Inspector and was awarded the job in December of 1985. He testified that he was not advised when applying for the job that a construction background was expected. He is now required to review plans and make inspections on site and does not feel qualified to perform those duties. He believes that his performance of those duties creates a safety hazard.

PERSON 5 is a civilian Fire Hazard Inspector; he testified that he performs the same job duties as those of Fire Prevention Inspectors but receives 25 percent less pay. He has been told by Fire Prevention Inspectors that they do not feel competent to perform certain duties.

PERSON 6, Inspection Services Supervisor, testified that the Employer adopted the BOCA Code but deleted the section in that code requiring an inspector to have three years

construction experience. The code as adopted by the Employer was submitted to the State for approval and was approved in July of 1985.

Relevant Contract Provisions:

ARTICLE IV - MANAGEMENT RIGHTS

Section 1. Except as otherwise specifically provided herein, the Management of the Employer and the direction of the work force, including but not limited to the right to hire, the right to discipline or discharge for proper cause, the right to decide job qualifications for hiring, the right to lay off for lack of work or funds, the right to abolish positions, the right to make rules and regulations governing conduct and safety, the right to determine schedules of work, the right to subcontract work (when it is not feasible or economical for the Employer employees to perform such work), together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management. Management, in exercising these functions, will not discriminate against any employee because of membership in the Union.

ARTICLE VIII - GRIEVANCE PROCEDURE

Section 3.

Step 3. Arbitration

b. The arbitration shall be conducted in accordance with the rules of the American Arbitration Association. The power of the arbitrator shall be limited to the interpretation and application of the terms of this Agreement and the arbitrator shall have no power to alter, add to, subtract from or otherwise modify the terms of this Agreement as written. Decisions, on grievances within the jurisdiction of the arbitrator, shall be final and binding on the employee or employees, the Union and Management.

c. The fee and expenses of the arbitrator shall be paid by the Union if the grievance is denied and by the employer if the grievance is granted or as the arbitrator directs otherwise. Each party shall fully bear its costs regarding witnesses and any other persons it requires or requests to attend the arbitration.

ARTICLE XVI - NEW OR CHANGED JOBS

Section 1.

a. Existing classifications and job descriptions may be amended during the life of the Agreement in a manner consistent with Civil Service Board rules for the maintenance of the classification plan.

b. The parties will negotiate as to whether a new and/or changed job should be in or out of the bargaining unit. Disputes as to whether a new or changed job should be in or out of the bargaining unit shall be resolved by the Michigan Employment Relations Commission in accordance with their applicable administrative procedure.

c. The parties will negotiate as to the salary range for all new and/or changed jobs determined to be included in the bargaining unit.

ARTICLE XXXIII – VALIDITY

Section 2. This Agreement is subject to the laws of the State of Michigan with respect to the powers, rights, duties, and obligations of the Employer, the Union and the employees in the bargaining unit, and in the event that any provision of this Agreement shall at any time be held to be contrary to law by a court of competent jurisdiction from whose final judgment or decree no appeal has been taken within the time provided therefore, such provision shall be void and inoperative. However, all other provisions of this Agreement shall, insofar as possible, continue in full force and effect.

**Union's Position:**

It is the Union's position that the duties of reviewing construction plans and making on-site inspections are not contained in the job description for Fire Prevention Inspector. Article XVI, Section la, restricts the Employer's right to change the job classification. The two most recently assigned Fire Prevention Inspectors had no prior construction experience; their review of the job description before applying for the position revealed to them no requirement to have prior construction experience nor any mention of reviewing construction plans and making on-site inspections. Both of them feel incompetent to perform these duties, and public safety may be undermined by the requirement that they perform them.

The testimony revealed that in the past independent contractors and one specially qualified Fire Prevention Inspector performed the plan reviews and construction follow-ups. The Employer's reliance upon an arbitration award by Jerome Brooks dated June 12, 1984 involving UNION B, representing civilian Fire Hazard Inspectors, and the Employer is not persuasive. In

that grievance UNION B was protesting the fact that the Employer had hired a new Fire Prevention Inspector, Person 2, while two Fire Hazard Inspectors were laid off. Brooks, according to the Union, ruled that while the duties of Fire Prevention Inspector and Fire Hazard Inspector were similar, they were not sufficiently identical as to require the recall of the UNION B employees.

The Employer has failed to prove a long-standing practice or history requiring Fire Prevention Inspectors to perform the disputed duties, and a safety hazard is created by assigning this work to employees with limited knowledge and experience. The job description, moreover, does not list these duties. For these reasons the grievance should be upheld, and the Employer ordered to cease and desist from requiring Fire Prevention Inspectors to perform plan review and construction site follow-ups.

**Employer's Position:**

It is the Employer's position that employees classified as Fire Prevention Inspectors have performed plan review and follow-up construction site inspections since at least 1969 when EMPLOYEE 1 was working in that classification. EMPLOYEE 1 also testified that since 1974 when the Employer established the Fire Hazard Inspector classification as a civilian position, those civilian employees have performed the tasks in dispute, as have outside contractors. Person 2 did such tasks while he was assigned to light duty and continued to do that work after his promotion to Fire Prevention Inspector.

The job classification description in question has remained the same since 1951 and makes several references to inspecting buildings, enforcing ordinances, and doing inspections. In a previous arbitration, Arbitrator Jerome Brooks denied the Union's grievance and concluded that for almost ten years Fire Prevention Inspectors and Fire Hazard Inspectors have been doing the

same things, with the exception that a few duties were done only by uniformed personnel. No change in duties has been proven; thus, no violation of Article XVI occurred. The tasks are also not contrary to the job description.

The Union should have been aware that these duties were being done by Fire Prevention Inspectors when the labor agreement was negotiated and executed. The Maintenance of Standards provision requires that conditions of employment that have not otherwise been addressed are to be maintained as they exist at the time of the signing of the agreement. The Union should not be allowed to obtain in arbitration that which it made no effort to obtain through negotiations.

The Employer also argues that no violation of Article XXXIII – Validity has been shown. Section 109.6 was deleted from the SOCA/National Building Code. This provision addressed the qualifications of assistants to the building official but is not applicable here. No provision of the agreement has been held to be contrary to law as required by XXXIII; therefore, no violation was established.

Article IV - Management Rights reserves to the Employer the right to direct the work force and to decide job qualifications unless the agreement specifically provides otherwise. Here, the tasks under discussion had been performed for many years by Fire Prevention Inspectors, and assignments were made under the terms of the 1951 job classification description, a description that has remained essentially the same since its adoption. While the description may not be as precise as some others and the disputed tasks are not specifically listed, this does not mean the tasks are beyond the scope of the description. The description itself states that the examples given do not include all tasks that may be found in the class.

Decision:

Although the Union argues in its brief that there was no past practice of requiring Fire Prevention Inspectors to perform plan reviews and on-site construction inspections, the testimony proves otherwise. EMPLOYEE 1, the former Fire Marshall, was called as a witness by the Union, and he testified that both Fire Prevention Inspectors and Fire Hazard Inspectors perform these duties. He further testified that he himself was a Fire Prevention Inspector from 1969 through 1981 and that his duties included reviewing construction plans and performing field inspections as time permitted. It was not until 1974 that the Fire Hazard Inspector classification was created. He further testified that after the creation of this new position, both Fire Hazard Inspectors and Fire Prevention Inspectors performed the duties of reviewing plans and making follow-up field inspections.

Thus, the testimony of the Union's own witness establishes a past practice of Fire Prevention Inspectors performing these duties. The arbitration award of Jerome Brooks in 1984 did not involve Employer Fire Fighters, but it is still of interest to this grievance. The Brooks' award involved a grievance filed by UNION B Local 1061 on behalf of laid-off Fire Hazard Inspectors who protested the Employer's hiring of additional Fire Prevention Inspectors while they were on layoff. The Union relied on a provision in the contract that restricted uniformed or supervisory personnel from performing work assigned to the bargaining unit (Fire Hazard Inspectors). Brooks concluded that the work had been shared between Fire Hazard Inspectors and Fire Prevention Inspectors and was not therefore exclusively the work of the civilian classification.

The Union's assertion in its brief is that the Brooks award was predicated on a finding that the work of Fire Prevention Inspectors was not sufficiently similar so as to require the recall

of the UNION B employees. The Union's point, apparently, is that while Fire Hazard Inspectors may have done reviews of building plans and on-site inspections, this does not mean Fire Prevention Inspectors did such work. It argues that the Brooks award confirms that the work done by those in these two classifications differed. The award, however, held to the contrary that the work was substantially similar and therefore was not exclusively the work of the civilian bargaining unit. It was for this reason that the Employer was not held to be required to call back civilian employees. That decision is pertinent to this dispute. Although the decision is not technically binding on the parties because the Fire Fighters Union was not a party to that grievance, Brooks' reasoning is, nevertheless, applicable and persuasive. Brooks reasoned that since Person 2 was made a Fire Prevention Inspector in July 1983 and he had taken over the work of Person 1, the independent contractor from at least June 1981, Hutchins was clearly doing the work previously done by Person 1. That work included "reviewing blueprints and building plans, giving follow-up instructions and issuing occupancy permits" (Brooks, page 9).

Here, EMPLOYEE 1 testified that he had worked as a Fire Prevention Inspector since 1961 and had performed the disputed tasks in that classification. The Fire Hazard Inspector classification was not created until 1974. Clearly, the reasoning of Arbitrator Brooks is pertinent here. A past practice of long duration exists that employees in the Fire Prevention Inspector classification have done the work required of the two newly appointed Fire Prevention Inspectors.

In its grievance the Union made mention of Article XXXIII which provides that the agreement is subject to the laws of the State and that if any provision of the agreement is held to be contrary to the laws of the State, that provision shall be declared null and void, and the balance of the contract shall not be affected and shall remain in full force and effect. In this case

there has been no finding by a court of competent jurisdiction that any provision of the agreement is invalid. Therefore, there has been no showing that Article XXXIII has been violated. The job description for Fire Prevention Inspector states under "Examples of Work" that: "Any one position may not include all of the duties listed, nor do the listed examples include all tasks which may be found in this class." The duties of reviewing plans and making on-site inspections are not specifically listed, but the testimony conclusively established that Fire Prevention Inspectors have performed these duties since at least 1969. EMPLOYEE 1 testified that as Fire Prevention Inspector from 1969 to 1981 he reviewed plans and did field inspections.

It is necessary to discuss Article XVI - New or Changed Jobs in order to resolve this grievance. The Union asserts that the two new Fire Prevention Inspectors did not know when they applied for the new position that the disputed duties would be required of them. Article XVI was not drafted to protect a job applicant seeking a new position, however. A job description is not an offer of a position, and a winning applicant generally cannot rely on that description encompassing all his job duties. The purpose of Article XVI is to protect the classification system by not allowing for the imposition of additional duties without a new pay rate being negotiated.

Furthermore, the provision is intended to protect the bargaining unit by requiring negotiations to determine if an amended or changed classification or job description belongs within or outside of the bargaining unit. The intent is not usually to allow employees to complain that they cannot be required to perform tasks not specifically listed in the job description. That such complaints are not valid is clear when the past practice of the parties establishes that the duties have been performed since 1969 despite the fact that they are not specifically delineated in the job description.

The protection that an employee does have under Article XVI is that he can complain that he is entitled to more compensation for performing additional duties not listed. Here, it has been factually determined that the disputed tasks were performed previously so there can be no argument that any employee working as a Fire Prevention Inspector is entitled to additional compensation. Furthermore, the Union argues that these duties belong to the civilian Fire Hazard Inspector classification, and the testimony shows that that classification earns approximately 25 percent less than the Fire Prevention Inspector classification. In summary then, the job description does not create a contractual right to an applicant that he will be required to perform only certain duties.

**Conclusion:**

The Union has failed to prove a violation of Article XVI or Article XXXIII. The duties required by the Employer of Fire Prevention Inspectors have been performed by at least some employees in that classification since 1969. The assignment of these duties to the two new Fire Prevention Inspectors does not violate the contract. It may be that their apprehension as to their competency in performing these duties is warranted. Perhaps it would be in the Employer's enlightened self-interest to respond to their concern by providing additional training or by making other accommodations. There is, however, no contractual requirement to do so. Because the work assigned is not listed specifically in the job description for Fire Prevention Inspector, because the issue raised by the Union is of importance to both parties, and because an issue of public safety was raised here in good faith by the Union, it is my decision under Article VIII - Grievance Procedure, Step 3c, that the fees and expenses of the arbitrator shall be split equally between the parties.

The grievance is denied. The Employer did not violate the collective bargaining agreement when it required newly appointed Fire Prevention Inspectors to review building plans and to perform on-site follow-up inspections. The arbitrator's fee and expenses shall be shared equally by the parties.

ELLIOT I. BEITNER

DATED: January 15, 1987