

**Beitner #5**

**VOLUNTARY LABOR ARBITRATION**

In the Matter of the Arbitration Between:

EMPLOYER

-and

UNION

GR: Employee 1

Arbitrator: ELLIOT I. BEITNER

**OPINION**

An arbitration hearing was held on January 19, 1987 in City A, Michigan in accordance with the applicable provisions of the collective bargaining agreement in effect between the parties. The parties agreed to consolidate Grievance No. 00-0A with Grievance No. 00-0B and both were heard. At the hearing both parties presented sworn testimony, cross-examined witnesses and offered documentary exhibits into evidence. Both parties have also filed post-hearing briefs which were received by the American Arbitration Association on March 11, 1987, at which time the hearing was declared closed.

**Background:**

The grievance filed by EMPLOYEE 1 alleges that on June 15, 17, and 19 (Grievance No. 00-0A) and on July 12-14-16, 1986 (Grievance No. 00-0B) temporary assignments to Battalion Chief were not made on the basis of "rank seniority." "Rank seniority" refers to the number of years a person has held a particular rank as opposed to "department seniority," which term refers to the number of years with the Fire Department or with the Employer, depending on date of hire. EMPLOYEE 1's grievance (Joint 2), alleging violations of several specific provisions of the contract, reads:

Nature of Grievance: Violation of Article XI Seniority - Sec. 5. Application of Seniority (work assignments) Article XIV Work Assignment - Sec. 1, "Work Assignment, and transfers to fill vacancies." Article XVIII Pay Changes - Sec. 2, para. f (specifically "This shall not include vacation periods.) Article XXX Maintenance of Standards - Sec. 1 "general working conditions shall be maintained"

and contains the following Statement of Facts:

On the above dates Batt. Ch. Person 1 was off duty on vacation. The Senior Capt. should have been placed on acting assignment, instead Cpt. Person 2 was given this work assignment by order of the Fire Chief. This is not in compliance with the above Articles and Sections of the Labor Agreement.

The grievance was denied and has proceeded to this hearing.

Grievant EMPLOYEE 1 has been with the Department for 32 years, has been a Captain for 17 years, and was the highest rank seniority officer at the time the assignments to Battalion Chief were made. Temporary vacancies occur in the Battalion Chief position when a Battalion Chief is on vacation or sick. In the past there had been nine Battalion Chiefs, so it was then a rare situation not to have a Battalion Chief who could fill in for an absent Battalion Chief. As a result of a study of the Department, the number of Battalion Chiefs was reduced from nine to six.

Generally the Department filled temporary vacancies by calling in another Battalion

Chief and paying him overtime. On only three or four occasions during past years could Union witnesses remember a situation where a Captain filled in for a Battalion Chief on a temporary vacancy basis. It was also unclear as to whether the Captains performing these duties were on the eligibility list for Battalion Chief. The Department maintains eligibility lists of Captains who have taken tests, and have been rated on the tests and ranked for that position.

For the contract year 1982-84 the parties negotiated a new provision in the contract, Article XVIII, Section 2.f reading:

Acting Assignment shall mean an assignment for a limited time to a position class as determined by the needs of the service; such assignment not involving promotion, demotion or change of status, notwithstanding any provision or rule to the contrary. Acting assignments, when utilized to fill a permanent vacancy, shall be made from one of the top three standing persons on existing eligible lists or most recent eligible lists, for the position within fifteen (15) days of the onset of the vacancy. Acting assignment with the potential of thirty-(30) days or more shall be filled from one of the top three standing persons on the existing eligible lists or most recent eligible lists for the position. This shall not include vacation periods. This provision shall be implemented within fifteen (15) days of the position opening.

PERSON 3, a 35-year employee of the Department and a Captain at the time of his retirement in 1986, testified that he was on the Union bargaining committee when this language was negotiated. He stated that the purpose of the exclusionary phrase in the provision - - "This shall not include vacation periods" - - was to recognize rank seniority in filling temporary vacancies.

PERSON 4, Treasurer of the Union and a member of the bargaining team, testified that the intended meaning of the above quoted sentence in Article XVIII, Section 2.f was that if the vacancy was for less than 30 days, it would be filled on the basis of rank seniority, but if it was more than 30 days, it would be filled from the eligibility list. He also said that other short-term vacancies in positions below the rank of Battalion Chief (Captains, Lieutenants, etc.) were filled

on the basis of rank seniority.

Deputy Fire Chief PERSON 5 also testified that the practice had been to fill temporary assignments below Battalion Chief on the basis of rank seniority. The Union had previously won a grievance (in about June of 1985) wherein it was determined that department seniority was controlling for work assignments. PERSON 5 stated that he assumed, based on that award and discussions in a committee meeting, that the Union wished departmental seniority to control when there was a conflict between rank and departmental seniority.

In about January of 1986 the Department determined to fill any temporary vacancy to Battalion Chief by moving a Captain into that position rather than another Battalion Chief. This method eliminated the need to call in off-duty Battalion Chiefs and was more economical after the total number of Battalion Chiefs had been reduced. On December 27, 1985, then Acting Fire Chief PERSON 6 issued a memo (Joint 4) stating that effective January 2, 1986 an on-duty Captain would be used to fill temporary vacancies for Battalion Chief and that rank seniority would be the basis for filling those vacancies. The memo further provided that this would be done on an experimental basis.

On January 3, 1986 a memo (Joint 5) was issued that by implication changed the criterion for filling temporary vacancies in the position of Battalion Chief to the department seniority of the Captains. Then, on January 8, 1986 a final memorandum was issued changing again the method to rank seniority. That last memo (Joint 6) reads:

After further consideration it has been decided to go with rank seniority for the acting assignment of Captains to the Battalion Chief's positions. The original memo dated 12/27/85 is correct. Sorry about that.

In May or June, the new Fire Chief, PERSON 7, determined that temporary assignments to Battalion Chief would be filled on the basis of current or past eligibility lists for promotion to

Battalion Chief on a shift basis. If there was no Captain on the shift who was on the eligibility list,-then departmental seniority was to be used. It is this change of procedure initiated by Fire Chief PERSON 7 that the Union has protested in the two combined grievances.

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. Grievances will be processed in the following manner and within the stated time limits:

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 XI – SENIORITY

Section 1. Definition. Seniority shall mean the status attained by length of continuous

service with the Fire Department. (See however Article 13 and Article 14.)

(Except that employees who entered the Fire Service prior to 7-1-82 shall have their seniority determined by length of continuous service with the Employer.)

**Section 5.** Application of Seniority. Seniority shall apply to work assignments, transfers, vacation, layoff and recall and to promotion as otherwise provided in this Agreement.

#### **ARTICLE XIV - WORK ASSIGNMENT**

Section 1. Where the needs of the service permit, Department Seniority shall be recognized as the basis of work assignment, and transfers to fill vacancies.

- e. During the life of the contract, a joint committee shall be established to study and make recommendations to the Chief concerning the provisions of this section as well as the acting assignment provisions of the contract.

#### **ARTICLE XVIII - PAY CHANGES**

**Section 2.** Definitions for Purposes of this Article.

- f. Acting Assignment shall mean an assignment for a limited time to a position class as determined by the needs of the service; such assignment not involving promotion, demotion or change of status, notwithstanding any provision or rule to the contrary. Acting assignments, when utilized to fill a permanent vacancy, shall be made from one of the top three standing persons on existing eligible lists or most recent eligible lists, for the position within fifteen (15) days of the onset of the vacancy. Acting assignment with the potential of thirty (30) days or more shall be filled from one of the top three standing persons on the existing eligible lists or most recent eligible lists for the position. This shall not include vacation periods. This provision shall be implemented within fifteen (15) days of the position opening.

#### **ARTICLE XXX - MAINTENANCE OF STANDARDS**

**Section 1.** Management agrees that all conditions of employment not otherwise provided for herein relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at the standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement.

**Union's Position:**

It is the Union's position that the standards effective at the time of this grievance require that the highest rank seniority officer on a shift be assigned to fill any temporary vacancy created by a short-term absence of an officer, particularly an absence created by a higher ranking officer being on vacation. Eligibility lists have never been used when a Lieutenant was assigned to fill the position of Captain temporarily. Seldom, if ever, has a Captain been required to fill a vacancy for a Battalion Chief, but the reduction in the number of Battalion Chiefs has recently created such situations. Article XVIII requires that eligibility lists not be used when a vacancy results because of a vacation.

The method to be used when filling such vacancies is rank seniority as stated in Joint Exhibit 6, a letter dated January 8, 1986 from then Acting Fire Chief PERSON 6. The Grievant had rank seniority on the dates grieved and should be paid at the pay scale for a Battalion Chief for those dates. All others similarly aggrieved since the date of the grievance should be paid at the scale and in the manner set out in the collective bargaining agreement. Future assignments should be processed in accordance with the contract.

#### **Employer's Position:**

It is the Employer's position that the management rights provisions of the contract reserve to the Employer the right to manage the affairs of the Employer, including directing the work force, and these rights are vested exclusively with management unless specific contract language limits this right. Absent language requiring the Employer to make acting assignments based on rank seniority, the Department has the right to employ whatever reasonable criteria it judges to be appropriate. Nothing in the seniority provisions requires that assignments be made as argued by the Union, and Article XIV, Work Assignments, Section 1 addresses work assignments and transfers and is not applicable to the subject of acting assignments to different ranks or

classifications.

With regard to Article XVIII, Section 2.f, the Employer states that its provisions constitute a definition of the term "acting assignment" and set down certain conditions that must be observed in applying the clause. Nothing in the language of this provision imposes a seniority consideration of any kind. Article XXX, Maintenance of Standards, is not applicable because those provisions address only conditions of employment not addressed in the contract and related to wages, hours of work, overtime differentials and general working conditions. Acting assignments are covered in the contract; thus Article XXX is inapplicable. The criteria for choosing an employee to fill a short-term acting assignment are a prerogative of management under the provisions of Article IV.

There is no past practice, the Employer maintains, for making short-term acting assignments as the Union asserts they should be made. Before January 2, 1986 such assignments were extremely rare, and none of the witnesses were able to testify with any certainty of the practice followed and the criteria applied when making such assignments in the past. The Employer had the right to establish the experimental procedure announced by then Acting Chief PERSON 6, and Fire Chief PERSON 7 had the right to discontinue it. Management's exercising of its right to direct the work force does not make that procedure a binding past practice. To read into the contract a requirement to impose rank seniority as the Union asserts would constitute adding to the contract, and the powers of an arbitrator do not include such authority. The policy covering the assignment in dispute was discussed in negotiations, and Article XXXIV, Entire Agreement, is the acknowledgement of the parties that this is the full agreement.

**Decision:**

Violations of several contractual provisions are alleged by the Union: Article XI, Section

5; Article XIV, Section 1; Article XVIII, Section 2.f; and Article XXX, Section 1. The key provision requiring interpretation is Article XVIII, Section 2.f, which clause provides that acting assignments made to fill permanent vacancies are to be made from one of the top three standing persons on existing eligible lists or most recent eligible lists. This method of filling a vacancy is also to be followed in filling an acting assignment with the potential of thirty days or more. This language setting forward the procedure to be used in these two situations is followed in the provision by this exclusion; "This shall not include vacation periods."

Section 2.f clearly means that permanent acting assignments and assignments that may last for thirty days are to be filled by relying on eligibility lists. By implication, these lists are not to be used when making temporary assignments of less than thirty days. The sentence excluding vacation periods appears to be consistent with this reading. The meaning of the exclusionary sentence can certainly be taken to mean that temporary assignments occasioned by vacations are excluded from the requirement that the position be filled from eligibility lists. The sentence can also be read to mean that even if the vacation period were for more than thirty days, it is still not necessary to fill it from eligibility lists.

It is understandable that the Chief might want to fill a temporary vacancy in the position of Battalion Chief from the eligibility lists inasmuch as this procedure would offer potential appointees to that position an opportunity to gain experience and would also give the Department an opportunity to observe and evaluate them while they were performing the duties of Battalion Chief. The contract clause, however, does not provide for this method of selection.

Article XI, Seniority, Section 5, one of the provisions listed in the Union's grievance, does recognize seniority as the prescribed method of making assignments. That provision states that "[seniority shall apply to work assignments, transfers, vacation, layoff and recall and to

promotion as otherwise provided in this Agreement." It is not clear, however, from the language of this provision whether the term "work assignments" means the same as, or includes temporary assignments. Furthermore, Article XI, Section 1, defines seniority as departmental seniority, but rank seniority has been used in the past to fill short-term, temporary assignments for ranks below Battalion Chief. Article XI, Section 5 is thus not clearly applicable to the dispute before me. This is also true of Article XIV, Work Assignment, Section 1, in which it is required that seniority be "recognized as the basis of work assignment, and transfers to fill vacancies." Short-term vacancies are not specifically mentioned, and the practice of using rank seniority as the basis for assigning a man to a temporary duty when a rank below Battalion Chief was involved is contrary to the departmental seniority called for in Section 1 of the seniority provisions.

Before looking at the question of the past practices of the parties, it should perhaps be pointed out that Article XXX, Maintenance of Standards, is also not directly applicable to this dispute. That provision does require that all conditions of employment related to wages, hours of work, overtime differentials and general working conditions not otherwise provided for in the contract be maintained. Acting assignments are, however, covered in the contract. It is the interpretation of that provision relating to acting assignments, Article XVIII, Section 2.f, that is the crux of the matter to be decided. It should also be pointed out that a procedure such as that disputed is not generally considered to be a condition of employment as that term is understood in labor relations. Arbitrators often deem a custom to be binding and thus a condition of employment when it bestows a benefit of a peculiar personal value to the employees. Examples of such a benefit would be paid breaks, free coffee or meals, bonuses.

Turning now to the practices followed in the past by the parties, it is clear, at least with regard to appointments to positions other than Battalion Chief, that short-term vacancies have

been filled on the basis of rank seniority. Both Battalion Chief PERSON 8 and Lieutenant PERSON 4 testified that this was the method used. It is undisputed that the question of how to make temporary appointments to Battalion Chief has rarely arisen. In the past there were a sufficient number of Battalion Chiefs available to fill such assignments; it is only because of the reduction of personnel in that rank that the matter has arisen recently. No binding practice relevant to the specific circumstances presented here can therefore be said to exist.

For a past practice to have binding effect, it must be "unequivocal; clearly enunciated and acted upon; and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." (Arbitrator Jules J. Justin in Celanese Corp. of America, 24 LA 168, 172 (1954)). These criteria obviously cannot be shown here with regard to the temporary assignment of personnel to Battalion Chief because of the infrequency with which this situation has come up. Even in those instances where the situation did arise, no clear recollection that rank seniority was followed was expressed by witnesses. There has been a practice, as previously pointed out, to apply rank seniority/when assigning employees to fill temporary positions below the rank of Battalion Chief.

The memoranda written under the subject "Acting Assignment for Captains" are not controlling with regard to this issue. On December 27, 1985, Acting Fire Chief PERSON 6 wrote that rank seniority would be applied in filling vacancies for Battalion Chief. Later, on January 3, 1986, this procedure was impliedly changed because the lists of Captains noted departmental seniority for Captains on various shifts. A memo that followed on January 8, 1986 returned to the use of rank seniority. In none of these memoranda does the Department state or suggest that rank seniority is the method for filling a particular type of vacancy. Neither can a past practice be shown based on these memoranda; all three memoranda were written within a period of two

weeks, and the need for a procedure to cover the specific situation involved had arisen only recently.

In summary, no contractual obligation and no binding practice require that the Department make short-term assignments to Battalion Chief based on rank seniority. No clear contract language or clear past practice demand such a method of assignment. What is clear is that Article XVIII, Section 2.f, makes an exclusion for temporary, short-term assignments, and thus these are not to be filled from existing or past eligibility lists. Rather, they are to be filled on the basis of seniority. No showing was made, however, that rank seniority must be followed instead of departmental seniority.

Deputy Fire Chief PERSON 5 testified that it makes no difference to him whether departmental or rank seniority is used in the situation where a temporary assignment is made, but the person assigned is not on the eligibility list. It would be in the best interests of the parties to agree between themselves whether departmental seniority or rank seniority should be applied under such circumstances even though the contract does not preclude the Employer from unilaterally making such a determination. Clearly, however, the eligibility lists are not to be considered in making these temporary assignments. With regard to the grievance filed, it is evident from the exhibits that Captain EMPLOYEE 1 had not only greater rank seniority, but also more departmental seniority than the officer who was granted the temporary assignment. He, therefore, shall be reimbursed the difference in wages he would have earned had he been granted the assignment on the dates stated in his two grievances.

The grievance is granted. The Department violated the contract when it relied upon eligibility lists in making a temporary, short-term assignment to Battalion Chief. The Grievant had both greater departmental seniority and greater rank seniority on his shift and should have

been assigned to the position on June 15, 17, and 19, 1986 and on July 12, 14, and 16, 1986. The Grievant shall be made whole for all losses. In accordance with the contract provisions, the Employer, as the losing party, is responsible for the fee and expenses of the arbitrator.

APRIL 9, 1987

ELLIOT I. BEITNER