Frost #3

VOLUNTARY LABOR ARBITRATION

In the Matter between:

EMPLOYER

-and-

UNION

ARBITRATOR'S OPINION AND AWARD

INTRODUCTION

This matter was referred to arbitration pursuant to the 1991-94 Agreement between Union ("Union") and the Employer ("Employer"). A hearing was held on July 18, 1994 at the Employer's offices in City A, Michigan. The parties were afforded ample opportunity to examine and cross-examine witnesses, to present documentary evidence and to argue their respective positions. All witnesses testified under oath and a post-hearing brief was filed by the Employer.

ISSUE

Whether or not the Employer violated the Agreement when no acting assignment was made to the Fire Investigator vacancy which arose in March, 1993.

If a violation, what remedy?

STATEMENT OF FACTS

In March, 1993 a vacancy occurred within the Fire Investigator classification.[1] The Employer did not fill the vacancy through promotion from the existing eligibility list which was dated February 20, 1993.[2] Nor did it make from that list a long term acting assignment to the vacancy.[3]

On May 25, 1993 this grievance (8-93) was filed by the Union, contending that "a long term acting assignment should be made off of the existing [February 20, 1993) eligible list." As relief the grievance seeks to "fill the long term acting assignment of Fire Investigator. Make whole all wages, back to the date of the [vacancy)."

In July, 1993, the Employer conducted testing for a new eligible list and a promotion to Fire Investigator was subsequently made off the new list, effective January 19, 1994.[4]

Most of the arbitration testimony concerned bargaining history and/or practice under contractual provisions affecting appointment of long term acting assignments.

First, there was testimony from Union witness Battalion Chief Roger Person 6 that for over 30 years the Employer has always made acting assignments to fill long-term vacancies not filled through promotion. This testimony also pointed out that the Employer never refrained from making an acting assignment nor reserved the right not to fill a position that remained vacant. (It was acknowledged, however, that the Employer can decide not to fill a position through acting or permanent assignment, effectively abolishing the position).

[1] This vacancy was created through the voluntary demotion of Firefighter Person 1.

[2] The decision not to promote is not challenged and the Union agrees that the Employer has the discretion to decide whether and when to promote.

[3] Person 2 the only remaining Fire Investigator, testified that there was a dramatic increase in his overtime after , the March. 1993 vacancy, in the second Fire Investigator position Person 2 explained that he sometimes worked 30 hours a week in overtime.

[4] Fire Equipment Operator Person 3 was promoted to fill the Fire Investigator vacancy.

In the 1980-82 Agreement, and apparently for some time before that, a definition of "acting assignment" was provided in the Article on Pay Changes. In pertinent part:

> 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 existing eligible lists for the position.

In the bargaining for the 1980-82 contract the Union's spokesperson was former President Person 4 and Fire Captain Person 5 and Person 6 were on the Union's team. The Union's May 1, 1982 listing of items to be added to the contract included:

> 7. Article XVIII (Pay Changes) Sec. 2. para f. (last paragraph, last sentence). Change to read: "Shall be made within fifteen (15) days from existing eligible lists or previously eligibility lists for the position."
>
> 24. Article XVIII (Pay Changes) Sec. 2 (g.) Acting assignments with the potential of thirty (30) or more days. This position shall be filled by the first (1) man on the most current or recently expired promotional list. This is not to include vacations periods. This provision shall be implemented within fifteen (15) days of the opening position.

Person 5 testified that by these demands the Union wanted the top person on the eligible list to be chosen for an acting assignment and it wanted the most recent eligible list to be used, even if that list was an expired one. Person 6 explained that the proposal also established a 15-day time limit within which the acting assignment had to be made.[5] Former Labor Relations

[5] Person 6 said there had been delays in the past in the Department's getting around to appointing an actor; sometimes it took a month, sometimes a week and a half, sometimes two weeks, and the Union wanted it to be the same for everyone.

Supervisor Person 7 [6] participated in the 1982 negotiations and Person 8, former Labor Relations Director, was the Employer spokesperson. Person 7 testified that the Employer agreed to the procedure requested by the Union whenever the Employer made a long term acting assignment, but that it retained its discretion to refrain from making any acting assignment. (Person 7 said that Person 8's approach of reserving the right not to fill at all, was probably based on his disagreement with minimum manning).[7]

The Employer's bargaining notes of the June 9, 1982 session provide, in pertinent part:

> [Person 4] then asked about their proposal to amend Article 18. [Person 8] made it clear that he would support this kind of proposal only if it was clear that management would still have the right to decide if it was going to fill the position. He proposed adding a phrase, "if we are going to fill the position," to their proposal.
> [Person 8] said, "1 would want it to read, 'if the department wishes to fill it,' then it would be done as your proposal says."
> [Person 4] responded, "That's right. There's no problem with that."

Person 7 testified that at the bargaining table Person 4 agreed that the Employer reserved the right to refrain from making long term acting assignments. Person 5 agreed that on June 9th Person 8 said the Employer would only agree if the Employer retained the right to make acting assignments, and Person 8 reserved the ability to fill these positions at will, saying that not making appointments was an exercise of managerial rights. But Person 5 also testified that "it did not come out that way." He said the Union rejected the ability of the Employer to refrain from making a long term acting assignment and maintained that "we won that point on acting assignment that the Employer had to make the appointment."

[6] Person 7 left employment with the Employer in 1992.

[7] Person 7 also said, however, that he had no independent recollection of the (982 bargaining but was relying on his notes from the June 9th and September 13, 19g:02 bargaining sessions.

In his testimony Person 6 said there was never any language to make it voluntary as to whether or not the Employer would fill vacancies with long term acting assignments. He continued that the language added was about the 15 day limit, about agreeing to use the top three instead of the top person on the applicable list, and about use of recent eligible lists; but there was no language to cover discretion to appoint. Person 6 also said there was never a tentative agreement to the give the Employer a prerogative not to appoint anyone to a vacancy on an acting basis. At the bargaining session on September 13, 1982 the parties reached tentative agreement on long term acting assignments. The Employer's bargaining notes from that session in part provide:

> ARTICLE XVIII. PAY CHANGES
>
> We agreed to amend the acting assignment provisions of this Article, Section 2.(f) and (g) so that if a vacancy will be filled by an acting assignment, then it will be filled by one of the top three (3) persons on the existing or most recently expired eligible list. It was agreed that this does not preclude us form not filling a vacancy or from filling it during the first fifteen (15) days with people in the Station House.

In June, 1983 the tentative agreements, including the one on long term acting assignment, were submitted to Act 312 Arbitrator Mario Chiesa, to read:

> 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 assignments with the potential of thirty (30) days or more shall be filled from one of the top three standing persons on 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 7 also testified Person 8 wanted the "when utilized" terminology in this tentative agreement, just as it had existed in the former language of Article XVIII, Section 2.f, because it continued the Employer's right not to fill a long term acting assignment. Thus, the only

substantive changes, Person 7 explained, were in the procedure to chose from three person on the eligible list and comply with the I5-day timeframe if the Employer elected to fill the position through acting assignment.

The tentative agreement on long term acting assignments was incorporated into the 1982-84 contract which resulted from the Act 312 Arbitration, effective July 1, 1984.

The parties 1984-86 contract combined all provisions on long term acting assignment into once Section. The 1989-91 contract provides in pertinent part the same language in Article XXXV (Acting Assignment), Section 1. Without pertinent change, the current language under the 1991-94 contract continues these acting assignment provisions:

> ARTICLE 45. ACTING ASSIGNMENT
>
> SECTION 1 LONG TERM
>
> A. 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 of 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 three most senior persons (department seniority) on the existing eligible lists or most recent eligible lists, for the position within fifteen (15) days of the onset of the vacancy. Acting assignments with the potential of thirty (30) days or more shall be filled from one of the three most senior 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.

Since 1982, Person 5 said, the practice has been consistent. The Employer always filled vacancies with long term acting assignments and there was never a dispute because the Employer refused to fill a vacancy or claimed it did not need to do so.

Person 6 testified that there have been many long term acting assignment grievances and these raised different issues than the one now in arbitration -- they concerned who was selected for long term acting assignments and what lists were to be used for those assignments.[8] He continued that it was always the intent and practice that when a vacancy opened it was filled by promotion or with an acting assignment.

Fire Person 9 has been the Union President for several years. He similarly said that the long term acting assignment issues raised in the past grievances concerned when and how timely the appointments were made or who was selected. And prior to the current dispute the Fire Chief never said anything about an ability not to make an acting assignment to an opening.

Finally, Vice President Person 10 testified that the Fire Chief never claimed a prerogative not to fill a vacancy with a long term acting assignment if the Department was not filling it through promotion. And Person 10 testified that Person 8 never said a long term acting assignment 410 would not be made because the Employer had a right not to appointment.[9]

[8] On April 27, 1990 the Union filed grievance 14-90 claiming violation of Article 45, Sec. l on long term acting assignment "humping" and it was granted by the Employer based on past practice.

On April 27, (990 the Union filed grievance (2-90 claiming violation of Article 45, Sec. l on tong term acting assignment and Article XXX (Maintenance of Standards) because a particular individual had not been placed in a long term acting assignment in an Acting Lieutenant position. Concerns focused on replacing existing acting assignment personnel from older lists upon certification of a new eligible list.

On April 29, 1990 the Union filed grievances 12-90 and 15-90 claiming violation of Article 45, Sec. l on long term acting assignment and Article 30 (Maintenance of Standards) because "a permanent vacancy on Engine 6, C-shift, has yet to be filled. The vacancy exists because of the recent retirement of Lieutenant Person 11. His last day on duty was a vacation day on March 25, 1990."

[9] Person 7 did not recall the Employer ever raising the issue of management rights in prior grievances over the ability to decide not to fill a vacancy with a long term acting assignment.

POSITION OF THE UNION

The Union contends that a long term acting assignment should have been made to the Fire Investigator, off the February 20, 1992 eligible list, and should have been made within 15 days of that vacancy. Instead, the position remained vacant until after testing and creation of a new list, all in violation of Article 45, Sec. 1.A

The Union argues that the disputed language is mandatory, that the parties worked under the old language a long time with consistent practice, and that the language required the Employer to fill the vacancy in issue through a long term acting assignment.

The Union also points out that many grievances have been processed under the long term acting assignment provision and that this is the first time the Employer has ever raised the claim of a right not to fill a long term acting assignment or ever referred to the "when utilized" language to support such a claim.

Next the Union points out that the Fire Investigator opening which arose in March, 1993 was clearly a needed position which remained open and in need of filling until the Department made a promotion off the newly created eligible list. (Here it points to the testimony of the incumbent Fire Investigator who was overworked and unable to cover all classification work in the absence of the second Fire Investigator).

Finally, the Union contends that if the Employer had expected to exercise a right not to make a long term acting assignment it should have obtained it in express contract language, since the practice had been that the Employer always filled an opening through this means or by promotion.

POSITION OF THE EMPLOYER

The Employer contends it is not contractually obligated to make long term acting

assignments whenever a vacancy or position opening occurs. Article 45, Sec. 1.A does say its provisions shall be implemented within 15 days of "the position opening or "onset of the vacancy," but the Union presented the language in question and the understanding of the parties when it was mutually agreed upon was that this language was contingent on the understanding that management retained the right to decide if a vacancy was to be filled by acting assignment.

The Employer continues that the first sentence of Article 45, Sec. 1.A indicates that making of acting assignments is to be based upon the needs of the service and this clearly gives management the prerogative to decide if there is a need, before any 15-day period is triggered. And this conditional intent is supported by the language "when utilized to fill a permanent vacancy," which also shows a bargaining intent to permit the Employer to first decide if it will fill through acting assignment. Moreover, this exact intent is supported by the bargaining history testimony of Person 7 and the bargaining notes he provided. Clearly, the Employer bargainers told the Union they retained the right not to make an acting appointment and the Union agreed.

Here the Employer asserts it is well-established under arbitral precedent that the fact that the Employer has not utilized a reserved right does not render that right lost and that an employer is entitled to the exclusive determination of whether a vacancy exists and whether, if one does, it should be filled. It also argues that this is a core managerial prerogative that should not be eroded unless it is shown that management clearly and unequivocally gave away that discretion. Yet the evidence shows that the Employer did not give up its right to make an unencumbered determination whether or not to temporarily fill a vacant position while waiting to fill it via promotion.

Next, the Employer points out that the two Union witnesses who testified about the 1982 bargaining disagreed with each other. One, Person 5, supported Person 7's testimony that Labor

Relations Director Person 8 said he would agree to the new procedures for appointing acting personnel only if the Employer retained the right not to appoint. And Person 5 could not recall who rejected the Employer's right to "at will" decide if a vacancy would be filled. Further, neither Union witness supplied any documentary evidence to support their testimony although both were present throughout the 1982 negotiations.

The evidence and unequivocal testimony of Person 7 shows that the Employer reserved its right to decide whether or not to make acting assignments and if the Employer chooses not to make such assignment the provisions under Article 45, Sec. 1.A do not apply. Thus, the Union has failed to carry its burden of showing that the Employer violated the contract.

ANALYSIS AND CONCLUSIONS

The issue before the arbitrator is whether or not the Employer violated Article 45, Sec. l.A by refusing to fill a Fire Investigator opening for about a year after the vacancy arose in March, 1993. Initially, the arbitrator notes that several matters are not part of the consideration or resolution of this issue. Thus it is clear that the Employer was under no obligation to promote to the vacant Fire Investigator position, but had full discretion on whether and when it would promote. Also, it is undisputed that the Fire Investigator position remained open throughout the period of dispute; this was not a case of the Employer's deciding to eliminate the position all together and thereby remove any necessity for long term acting assignment or promotion.

The pertinent language in Article 45, Sec. l.A provides that from one of the three most senior... on the... eligible lists.... within long term acting assignments such as the one in dispute "shall be made fifteen (15) days of the position opening." Non-compliance with this mandatory procedure is undisputed and forms the basis of the grievance. The Employer contends non-

compliance is irrelevant because this mandatory procedure never came into play. Thus, it retained the right and in this case exercise the right not to make any long term acting assignment; it thereby exercised its discretion to leave the position open and unfilled until the time it was ready to made a permanent promotion to fill it. In support of the Employer's position is the language in Article 45, Sec. l.A that "acting assignment, when utilized to fill a permanent vacancy" shall be subject to the mandatory procedure. (Emphasis Added).

The arbitrator has considered the phrase "when utilized" and finds its meaning to be ambiguous. Although it clearly presents the possibility that the acting assignment procedure will not be "utilized" under certain circumstances, this does not necessarily mean the Employer retained the right to keep a permanent vacancy open and not use an acting appointment. For the "when utilized" language might only be referring to the possibility of promotion rather than use of acting personnel. (There is also the confusing lack of repetition of the "when utilized" phrase with respect to the third sentence in Article 45, Sec. 1.A which addresses permanent vacancies with the potential of lasting more than 30 days).

To resolve the ambiguity the arbitrator has considered the bargaining history testimony of Person 7, Person 5, and Person 6 together with the notes from the 1982 bargaining when the disputed language was changed to its present form. And, this bargaining history has been considered in light of the way the Department has gone about the business of making long term acting assignment for at least twenty years prior to the 1982 negotiations which established the disputed language. From this background it is clear that the Employer had always made an acting appointment to any vacancy which, for one reason or other, it chose not to fill immediately through promotion. This pattern was accompanied by lack of any Employer claim that it maintained a right to refrain from making an acting assignment while leaving a position open

which it did assert in the 1982 bargaining at the June 9th session. Former Labor Relations Director Person 8 made that assertion clear and the Union, through the recollection of bargainer Person 5, recognized that his statement was made. The arbitrator finds, however, that the critical matter here is what happened after that assertion by the Employer on June 9th. The Employer's own bargaining notes of June 9th show that the Employer proposed adding a phrase to the contract, "if we are going to fill the position," or "if the department wishes to fill it." And, it appears to the arbitrator that there would have been no need for such added language if the former terminology (ie "when utilized" in Article XVIII, Section 2.f) had established the right the Employer now contends existed. Moreover, in light of the long history of always making acting assignments, it appears to the arbitrator unreasonable for the Employer to have assumed that it had maintained or reserved a right not to make acting appointments absent some written expression in the 1982 contract to memorialize the agreement it claims was struck on June 9th. Yet, this did not happen. By the September 13th meeting when the language now found in Article 45, Sec. 1.A was agreed upon, no phraseology such as "if we are going to fill the position" was added. The absence of such language in light of the background persuades the arbitrator that the right the Employer asserts was not intended.

In reaching this conclusion the arbitrator-also notes that both Union witnesses Person 5 and Person 6 clearly testified that no agreement was made in the final language to permit the Employer not to make acting appointments to permanent vacancies.

In light of the mandatory language in Article 45, Sec. 1.A covering appointment of long term acting personnel, and absent inconsistent past practice or sufficiently inconsistent bargaining history, the arbitrator is persuaded that the Employer violated the Agreement when no acting assignment was made to the Fire Investigator vacancy which arose in 411 March, 1993.

AWARD

1. The grievance is granted.

2. The Employer shall make the bargaining unit whole for wages and other benefits lost as a result of its violation of Article 45, Sec. 1.A with respect to the Fire Investigator vacancy which arose in March, 1993.

3. The arbitrator shall retain jurisdiction for 90 days from issuance of this award in the event the parties are unable to agree on distribution of make-whole relief.

ELAINE FROST

Dated: October 15, 1994