

**McCormick #4**

**VOLUNTARY LABOR ARBITRATION**

In the Matter of the Arbitration Between:

EMPLOYER

-AND

UNION

**OPINION AND AWARD**

A hearing was held before the undersigned Arbitrator, Robert A. McCormick, on October 10, 1994 in City A, Michigan. At the hearing, the Parties examined witnesses and introduced documentary evidence in support of their respective positions. Thereafter, the Parties, through their Representatives, submitted written briefs to the Arbitrator. This Opinion and Award is based upon careful consideration of this evidence and argument.

**ISSUE:**

Did the Employer violate the collective bargaining contract by assigning body recovery operations on September 22, 1993 to Cpt. Employee 1?

**RELEVANT CONTRACT PROVISIONS:**

**ARTICLE 4. MANAGEMENT RIGHTS**

**SECTION 1. DIRECTING WORK FORCE**

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 of 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 14 - WORK ASSIGNMENT

#### SECTION 2. CLEANING, DUTY HOURS, REMODELING, RIVER DUTY AND WEATHER CONDITIONS

- E. The hours between 1600 and 0745 on Mondays through Fridays, 1/2 day (1200 - 0700 hours) on Saturdays, Sundays, and general paid holidays set forth in this Agreement shall be termed as Limited Duty Time. Only those non-emergency duties customarily performed in the past shall be required. Employees' responsibilities with respect to river duty shall be limited to river rescue operations and shall not include river clean up details of any kind.

#### **INTRODUCTION:**

In the early morning hours of September 22, 1993, Employer fire fighters conducted a river rescue operation in response to a report lodged by fishermen that they had heard a splash in the river. The search produced no results. Later that morning, Captain Employee 1 was ordered to conduct a second search of the river.

The Union (herein, "the Union") argues that this directive to conduct a second search was improper because body recovery operations are not properly part of fire fighter job duties under the contract. The Employer Fire Department (herein, "the Employer"), on the other hand, takes the position that the contract does not preclude a second river sweep such as the one ordered in this instance and that, accordingly, the order was appropriate under the contract.

#### **FACTS:**

The facts of this case were offered by the following four witnesses:

##### Battalion Fire Chief Person 1

Chief Person 1, a thirty-four year member of the Department and Battalion Fire Chief

for approximately thirteen years, reports to the Deputy Fire Chief who, in turn, reports to the Fire Chief. Chief Person 1 testified that his duties include responsibility for river rescue operations.

Prior to 1982, Chief Person 1 said, fire fighters periodically performed river cleanup and maintenance duties including clearing logs and removing debris from the river. Rescue operations were not part of fire fighter duties, he said, and he knew of no fire fighter being ordered to perform body recovery tasks. Chief Person 1 acknowledged, however, that fire personnel had assisted other agencies in body recovery operations.

Chief Person 1 testified that in 1982 he was a member of the Union bargaining team along with Person 2, President of Union, Person 3 and Person 4. Representing the Employer, he said, were Person 5, then-Labor Relations Director for the Employer, Person 6, Person 7 and Person 8. Messrs. Person 2 and Person 5 were the chief spokesmen for the Union and the Employer respectively. During the 1982 collective bargaining negotiations, Chief Person 1 said, the Union proposed that fire fighters no longer be utilized for river maintenance tasks. Instead, he said, the Union proposed to perform river rescue functions which the Union believed were more properly part of fire fighter duties. Chief Person 1 identified a May 1, 1982 letter from Mr. Person 2 to Mr. Person 5 in which the Union proposed to eliminate the "use of personnel for river maintenance."<sup>1</sup> Mr. Person 1 conceded that during the 1982 negotiations Mr. Person 2 took the position that river rescue functions should not include pulling debris and rocks out of the river.

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<sup>1</sup> Employer exhibit 1.

Captain Robert Employee 1

Cpt. Employee 1, a thirty year employee of the Department and a Captain since 1985, testified that he has performed river rescue operations for approximately thirteen years. He is currently assigned to the Bridge Street Station - the primary river rescue station - where he has been actively engaged in river rescue operations. Cpt. Employee 1 has rescued numerous persons from the river and has received several commendations for his efforts, including one as recently as two or three months prior to the hearing in this matter.

Cpt. Employee 1 described the procedure for responding to river rescue alarms: the sequence is activated; the rescue squad puts boats into the river and as many as two engines with additional personnel might be dispatched to the scene.

Cpt. Employee 1 identified a Michigan statute<sup>2</sup> entitled "Recovery of Bodies of Drowned Persons" which states, in relevant part,

**18.1221 bodies of drowned persons, recovery; duty of chief of police, sheriff.] Sec.1.** In case any person is drowned in waters within the corporate limits of any Employer, it shall be the duty of the chief of police of said Employer . . . to use every available means in the recovery of any such body. The several chiefs of police of cities and sheriffs of this state are hereby authorized to incur such expenses as shall be necessary in obtaining equipment and in doing the necessary acts in carrying out their duties under the provisions of this act.<sup>3</sup>

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<sup>2</sup> Union exhibit 4. MCLA Section 18.1221. Act 139, 1947.

<sup>3</sup> id.

Cpt. Employee 1 also identified the Department's Standard Operating Procedures for River Rescue<sup>4</sup> which state, in part,

Michigan State law states: body recovery from water is the job obligation of the Chief or Police and his department, or Sheriff's Department, of whomever's jurisdiction the location of incident is in.

Cpt. Employee 1 testified that in light of these rules he has never ordered fire fighters to perform body recovery functions and has never been ordered to do so himself. At the same time, however, Cpt. Employee 1, like Chief Person 1, acknowledged that fire fighters have assisted law enforcement agencies perform body recovery assignments.

On Wednesday, September 22, 1993, Cpt. Employee 1 said, he reported for duty at 0700 hours and was informed by the officer going off duty that the unit had responded to a river rescue alarm at approximately 0100 hours, but that their search produced no results. Cpt. Employee 1 identified the unit's log for that day reflecting such a search having taken place at 0105 hours that morning.<sup>5</sup>

Later that morning, Cpt. Employee 1 recalled, he was called by the Acting Battalion Chief. According to Cpt. Employee 1, the Battalion Chief directed him to conduct a search downstream for a body. This directive was not in response to a second alarm, Cpt. Employee 1 said, and was not to be a full scale river rescue. Cpt. Employee 1 testified that he told the Battalion Chief he thought it improper for his unit to perform body recovery operations and that their duties included only river rescue. To this, Cpt. Employee 1 recalled, the Battalion Chief replied that if he found a body, he should call back. According to Cpt. Employee 1, he and the Battalion Chief did not discuss the possibility that there might be a survivor in the

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<sup>4</sup> Union exhibit 1.

<sup>5</sup> Union exhibit 5.

river. Cpt. Employee 1 conceded that a person may appear dead, but still be resuscitated.

Cpt. Employee 1 testified that the river rescue protocol was not followed in this second search on September 22. He stated that he put a rescue squad in the river in an inflatable boat at the Sixth Street dam, but found nothing in the search. Fire engines and other personnel were not utilized.

#### Person 6

Mr. Person 6, Labor Relations Supervisor and Risk Manager for the Employer from 1980 to 1992, testified that his duties included labor negotiations with Local 366. Mr. Person 6 confirmed Chief Person 1's recollection of the persons representing the Employer and the Union during the 1982 negotiations.

During those negotiations, Mr. Person 6 recalled, the Union proposed contract language that would eliminate river cleanup and maintenance from their duties. The Union, he said, was primarily concerned that clearing logs and debris was not appropriately part of fire fighter duties. Initially, he said, the Union took the position that fire fighters ought to not be responsible for river maintenance, but then changed their position to eliminate river clean-up, a more specific function, from fire fighter duties. Mr. Person 6 stated that body recovery assignments were not discussed during the 1982 negotiations and that the Employer agreed with the Union's proposal based upon the Union's explanation that their concern was with removing logs and other debris from the river.

#### Fire Chief Person 9

Chief Person 9, Employer Fire Chief since March, 1986, testified that Deputy Chief James Person 10 issued the directive to perform the river rescue operation on September 22, 1993. He recalled Chief Person 10 explaining there had been an early morning alarm, that the

unit had responded, but that it had been dark at the time and the search had revealed nothing. Thus, Chief Person 9 stated, Chief Person 10 issued another order the following morning to check downstream.

Chief Person 9 testified that fire fighters were sent out the second time to check for survivors that might have been missed during the search the night before. If survivors were found, he said, the fire fighters were to rescue them. If, on the other hand, a dead body was found, then the police were to have been called to recover the body.

Chief Person 9 testified that there is only one river rescue protocol and conceded that the request on Sept 22, 1993 was not in conformity with that standard protocol. At the same time, however, he stated he was aware of other attempted rescues outside of the standard protocol. He specifically recalled a suspected drowning at a park lake. On that occasion, he said, different equipment was dispatched. The river rescue protocol was not utilized he said, because the river has fast moving water and therefore requires additional equipment and procedures.

Additional facts bearing upon the resolution of this grievance appear later in this Opinion and Award.

## **DISCUSSION:**

As the Employer points out, the proper starting point for resolving the issue in this case begins with Article 4, the Management Rights clause of the Parties' contract. Section 1 of that clause, entitled "Directing Work Force" states

Except as otherwise specifically provided herein, the Management of the Employer and the direction of the work force, . . . together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management.<sup>6</sup>

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<sup>6</sup> Joint exhibit 1, Article 4, Section 1

This language unambiguously vests in Management the discretion to make work assignments such as the one in question in this matter as long as the contract does not specifically provide otherwise.

Article 14, Section 2 of the contract limits fire fighters' duties to river rescue operations and specifically excludes "clean up details of any kind". Thus, the question in this case is whether or not the language of Article 14, Section 2 limited the Employer's discretion to order Cpt. Employee 1 to undertake a second search of the river.

The Employer points out that the current contract language governing river operations was negotiated in 1982 and that during those negotiations, as all witnesses recognized, the Union primarily sought to eliminate responsibility for removing logs, rocks and other debris from the river. Thus, the Employer argues, only "clean-up details" of this variety were eliminated from fire fighter duties. And, the Employer argues, given the Parties' mutual recognition that body recovery operations are fundamentally different from clearing logs, rocks and debris from the river,<sup>7</sup> the body recovery assignment of September 22, 1993 remained properly within Management's prerogative.

It is important to note that both Parties in this case recognize that Cpt. Employee 1 was ordered to conduct a search of the river for a possible drowning victim and that the likelihood that a live person would be found was not seriously contemplated. While Chief Person 9 testified that the unit was dispatched a second time to check for survivors that might have been missed the night before, the weight of the evidence suggests that the assignment was, primarily, to search for the body of a possible drowning victim. In this regard it is noteworthy

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<sup>7</sup> See, Employer Post-Hearing Brief at 3 and Union Post- Hearing Brief at 5.



that the standard river rescue protocol was neither ordered by Chief Person 10 nor implemented by Cpt. Employee 1. This, by itself, demonstrates that Chief Person 10 did not believe the additional equipment required to respond to a river rescue situation was necessary. Moreover, the various responses to the grievance in this matter describe Chief Person 10's order as a "search for a possible drowning victim."<sup>8</sup> Indeed, the Employer candidly concedes in its Brief to the Arbitrator that "the unit was directed to search the river for a possible drowning victim."<sup>9</sup>

From this perspective, the question in this case becomes whether a body recovery search such as the one ordered on the morning in question is properly part of river rescue operations. While a common understanding of the phrase "river rescue operations" might include body recovery searches, state law and the Employer's own standard operating procedures appear plainly to require that body recovery operations be assigned to police and not to fire fighters.

As recited earlier in this Opinion and Award, the Michigan Recovery of Bodies of Drowned Persons Act states that "it shall be the duty of the Chief of Police of said city. . .to use every available means in the recovery of any such body."<sup>10</sup> Simultaneously, the Employer's standard operating procedures in effect at the time of this incident<sup>11</sup> state that body recovery from water "is the job obligation of the chief of police and his department." The language of these governing instruments could not more plainly direct that body recovery duties, as distinct from rescue operations, be assigned to police and not to fire personnel. Moreover, the fact that Chief Person 10 instructed Cpt. Employee 1 to notify the Police if a

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<sup>8</sup> Joint exhibit 2.

<sup>9</sup> Employer's Post-Hearing Brief at 3.

<sup>10</sup> MCLA Section 18.221.

<sup>11</sup> Union exhibit 1.

body were found shows that the Department, itself, understood the distinction between river rescue and body recovery assignments.

In the absence of the statutory and standard operating procedure provisions, the assignment of a second river search would seem substantially more akin to a river rescue operation than a river-clean up mission. This would be especially so in light of the bargaining history of the contract. In this event, however, the requirements of state law and the Employer's own standard operating procedures mandate that body recovery operations be assigned to police and not to fire fighters.

The Employer does not contend, nor could it, that the Parties operate free from the dictates of state law or that the Employer is free to breach its own published procedures, both of which plainly require that body recovery operations be conducted by police. Accordingly, the grievance in this matter must be sustained.

**AWARD:**

For the foregoing reasons, the grievance is sustained. The Employer shall cease and desist from assigning body recovery operations, such as the one giving rise to the grievance in this matter, to fire fighters.

Robert A. McCormick

Arbitrator

January 5, 1995