

## **VOLUNTARY LABOR ARBITRATION**

In the Matter of the Arbitration between:

EMPLOYER

-AND-

UNION, UNION

Gr: Employee 1,

### **OPINION AND AWARD**

A hearing in the above-captioned matter was held before the undersigned arbitrator, Robert A. McCormick, on June 28, 2007 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 agreement by failing to pay the Grievant, Equipment Operator Employee 1, Sr., an ice rescue stipend for 2005?

#### **RELEVANT CONTRACT PROVISIONS:**

#### **ARTICLE 8. GRIEVANCE PROCEDURE**

#### **SECTION 3. PROCEDURE AND ARBITRATION AND TIME LIMITS**

C. Step 3:

4. 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 9. PAYMENT OF BACK PAY CLAIMS**

### **SECTION 1.**

Back wages will be paid to any employee upon a finding that said employee is entitled thereto, in such amounts as may be determined through the grievance procedure.

### **SECTION 2.**

No claim for back pay or wages shall exceed the amount of pay or wages the employee would otherwise have earned at his/her regular wage or pay rate . . .

## **ARTICLE 52. CONTRACTUAL AMENDMENTS AND EFFECTIVE DATES**

### **SECTION 11. TECHNICAL RESCUE SERVICES**

#### **D. Compensation**

In the event that an employee holds an eligible certification via his/her assignment or other means, he/she would receive an annual stipend of \$250. If that employee holds two (2) or more eligible certifications via his/her draw or assignment or other means, they would receive an annual stipend of \$500. The certifications eligible for stipend include the following: Hazardous Materials Technician; Hazardous Material Specialist; River Rescue/Water Rescue; Light/Medium Building Collapse; Heavy Building Collapse; Trench Rescue; and Rope Rescue I/Rope Rescue II/Confined Space Rescue as a package. The technical stipend would pay at the end of each calendar year. The amount of pay for an employee would be based on the employee's eligible stipend pay (either \$0, \$250, or \$500) times the portion of the year that the employee was assigned to a Technical Service Team based on complete months of service. Portions of the month are not included in the calculation.

### **FACTS:**

The facts of this case were presented through the testimony of four witnesses: Firefighter Person 1; Equipment Operator Employee 1, Sr; Person 2, Labor Relations Manager, Employer; and Fire Chief Person 3.

Fire Fighter Person 1, a twelve year veteran of the Employer Fire Department, testified that he initially received dive rescue training from Dive Rescue International ("DRI") and that in March, 2003 he undertook DRI training to become an ice rescue instructor. He has served as an ice rescue instructor since 2004. He described DRI as a private organization which has created training methods and established certificate levels. It provides the training and the teaching materials (including videos), and it issues ice rescue certifications. As an instructor, Firefighter Person 1 said, he trains others in ice rescue and certifies such training under DRI guidelines. Firefighter Person 1 testified that Equipment Operator Employee 1 first received DRI ice rescue training and certification in 2004 and that such certifications remain valid and do not expire.

In 2005, Firefighter Person 1 recalled, he and his supervisor, Battalion Chief Person 4, program manager for special operations, decided to require that firefighters undergo annual ice rescue recertification. This recertification, he said, was not required by DRI which considers its initial certification to be ongoing. According to Firefighter Person 1, however, this decision to require firefighters to go through the DRI recertification program annually was not announced. Nevertheless, he said, the recertification training has been scheduled by Chief Person 4 since 2005. All firefighters are given the opportunity to attend class, Firefighter Person 1 said, and classes are repeated as many times as necessary to accommodate unit members from all three shifts.

Firefighter Person 1 testified that in November, 2005 he prepared a list of employees eligible for an ice rescue stipend in 2005,<sup>1</sup> based upon his review of the roster of class attendees. In late December, 2005 or early January, 2006, he said, Equipment Operator Employee 1 reported that he had not received an ice rescue stipend check for 2005. Firefighter Person 1 said

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

that when he checked his records, he noticed that Employee 1 had missed one training session in 2005 and that, thus, his name had not been included on this list. The session that the Grievant missed was the initial session which included a video showing. He was not scheduled to work on either that day or on the only other day the class was offered.

According to Firefighter Person 1, ice rescue team members were not notified in 2005 as to the classes they needed to attend to receive the ice rescue stipend for that year. He added that Equipment Operator Employee 1 had attended the same first class in 2004 and that it was the only aspect of the 2005 training that he missed.

Firefighter Person 1 identified a March, 2006 grievance filed by Fire Captain Person 5<sup>2</sup> seeking the \$250 ice rescue stipend based upon his status as an ice rescue instructor. Cpt. Person 5's grievance was granted at step one of the grievance procedure, despite the fact that he did not hold a current ice rescue certificate, but held a different certification. He also identified a May 4, 2006 letter<sup>3</sup> setting forth his view that the Grievant had completed all the training requirements previously and that he "had successfully participated as a member of the river rescue/ice rescue team for numerous years."<sup>4</sup> He provided a copy of this letter to Chief Person 4, the program manager, and to Employee 1.

During 2005, Firefighter Person 1 said, Equipment Operator Employee 1 was a full member of the ice rescue team, and his duties and responsibilities did not differ from others who received a 2005 ice rescue certificate.

Firefighter Person 1 testified that instructors, along with Chief Person 4, now create the ice rescue class schedule and endeavor to make classes available to personnel on all shifts. In

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<sup>2</sup> Employer exhibit. 3.

<sup>3</sup> Joint exhibit. 4.

<sup>4</sup> Id

2005, he said, Chief Person 4 or Chief Person 6 designated the available training days, but that after the instant situation arose, instructors became involved in the scheduling of classes. In 2005, Firefighter Person 1 recalled, the ice rescue training was done between January and March, but only two class sessions were scheduled. The classroom instruction, he said, consisted of a video depicting an airplane crash in the Potomac River and an ice rescue of a boy, the filling out of training rosters, and class discussion. A quiz and an examination, he said, were also administered.

Firefighter Person 1 testified that the training roster was submitted to DRI to show who had attended the classroom instruction. The test results, however, were not also submitted. Because the Grievant did not attend either of the two available first classroom sessions, his name was not recorded. For this reason, Firefighter Person 1 said, DRI did not issue him a 2005 ice rescue certificate. He also recalled, however, that he subsequently asked DRI to issue a 2005 certificate to the Grievant after the fact, but that DRI would not do so because he had already completed the certification requirements and held a valid DRI certificate.

Equipment Operator Employee 1, a twenty-three year veteran of the Employer, served as Union spokesperson during negotiations for the 2003-07 contract. The language of Article 52, Section 11, he said, was new to this contract. Stipends for any technical rescue team members were not paid prior to 2003, he said, and the first such stipend was a one-half stipend for the period July, 2003 through December, 2003 which he received. At that time, he said, no certification process was required to receive the stipend. In 2004, however, the DRI guidelines were adopted. Thus, he said, in 2004 he completed DRI certification training, was told a certificate had been placed in his personnel file, and received an ice rescue stipend. In 2005, he said, he received a stipend for river rescue, but not for ice rescue.

Equipment Operator Employee 1 testified he received no notice in 2005 as to the training he would need to complete to be recertified nor any notice that he had missed some required training. Neither, he said, was he informed in 2005 that he would be required to take the same training he had taken in 2004. He added that he has seen the Potomac River rescue video many times. Normally, he said, if training is scheduled on a day off, the class is repeated to make sure all employees have the opportunity to attend. The Grievant noted that he was a fully active member of the ice rescue team for all of 2005 and that if an ice rescue situation had arisen, his role would have been the same as always.

Mr. Person 2 testified that he was a member of the Employer's bargaining team in 2003 and that the Parties first agreed upon the stipend language in the current contract. The spokesperson for the Employer during those negotiations was Person 7, he recalled, while the Grievant was the spokesperson for the Union. Battalion Chief Person 4 served as an expert to discuss the technical rescue services.

In February, 2006, Mr. Person 2 said, the Parties amended Article 52, Section 11 (D) of the contract<sup>5</sup> to list ice rescue and swift water rescue independently. The Parties also had discussions, he recalled, regarding which stipends would be earned by assignment or by certification, and they agreed that swift water rescue and ice rescue stipends would require certification. Mr. Person 2 added that stipend pay has been problematic since it became part of the contract.

Deputy Fire Chief Person 3, a thirty-three year member of the Employer, has held every classification in fire suppression. He now oversees the Employer's budget, purchasing, staffing, shift assignments and other administrative tasks. In 2005, he recalled, an issue arose regarding

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<sup>5</sup> See, Joint exhibit. 3.

payment of an annual stipend to employees in technical rescue with their last 2005 paycheck. Thereafter, however, he received a December 28, 2005 e-mail from Chief Person 8<sup>6</sup> regarding this matter and he, in turn, referred it to Mr. Person 2's office.

Later, Chief Person 3 said, he learned that the Union and the Employer had agreed to amend the contract language regarding the water rescue stipend.<sup>7</sup> He was then instructed, he recalled, to pay the individuals who had not been paid for ice rescue certification. These payments were made in February, 2006. Thereafter, however, further disputes arose, and grievances regarding Cpt. Person 5<sup>8</sup> and EO Employee 1<sup>9</sup> were filed. He denied the instant grievance, he said, because the Grievant did not have the necessary certification to make him eligible for the stipend.

In May, 2006, however, Chief Person 3 received Firefighter Person 1<sup>10</sup> May 4, 2006 letter<sup>10</sup> which, he said, differed from their earlier conversation and, thus, he "began to question" his earlier decision. He testified that he then talked at length with Chief Person 4 who later sent him an email<sup>11</sup> summarizing their discussion. This communication, Chief Person 3 said, led him to the same conclusion that Equipment Operator Employee 1 was not entitled to a 2005 ice rescue stipend because he did not have a 2005 certificate and, thus, that the original decision denying the grievance was correct.

Chief Person 3 acknowledged that the Grievant received an ice rescue stipend for half of 2003 and all of 2004 and 2006, although the 2003 and 2004 stipends, he said, were for water rescue. He also acknowledged that when he denied the instant grievance, he was unaware that

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<sup>6</sup> Employer exhibit. 2

<sup>7</sup> See, Jt. Exhibit 3.

<sup>8</sup> Employer exhibit. 3.

<sup>9</sup> Joint exhibit. 2.

<sup>10</sup> Joint exhibit. 4.

<sup>11</sup> Employer exhibit. 5.

the Grievant had been certified in ice rescue in 2004, or that such certifications did not expire.

The reason Equipment Operator Employee 1 did not receive an ice rescue stipend for 2005, Chief Person 3 said, was because he did not have a 2005 certificate. He also testified, however, that he was not aware before the arbitration hearing that the Grievant was certified in 2004.

Firefighter Person 1 had told him that Employee 1 did not have the 2005 certification to receive the stipend, and that was how the decision was made. Had he known that Equipment Operator Employee 1 had received ice rescue certification in 2004, and that that certification did not expire, he may have pursued the matter further, he said, but he did not know that at the time.

Other facts that bear upon the resolution of this grievance appear later in this Opinion and Award.

#### **DISCUSSION:**

The issue in this case is plain. Did the Employer violate the collective bargaining contract by refusing to pay Equipment Operator Employee 1 a \$250 ice rescue stipend for 2005? Article 52, Section 11 (D) of the contract governs ice rescue stipends and sets forth the circumstances under which a stipend is to be paid. It states simply that "In the event that an employee holds an eligible certification via his/her assignment or other means, he/she would receive an annual stipend of \$250."<sup>12</sup> The question in this case, then, is whether Equipment Operator Employee 1 held "an eligible certification" in ice rescue in 2005. If he did, then he was entitled to a \$250 stipend, and the Employer's failure to provide it to him breached the contract. Conversely, if he did not hold such certification, then he was not entitled to the stipend, and the Employer's refusal to pay him was consistent with the contract.

The facts reveal that the Grievant first received a prorated ice rescue stipend in 2003. At

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<sup>12</sup> Joint exhibit. 1, Article 52, Section 11 (D).

that time, no certification process was required to receive the stipend. In 2004, however, the DRI guidelines were adopted and he undertook the ice rescue training program, receiving a certificate, and was awarded an ice rescue stipend.

In 2005, a decision was made that firefighters would be required to undergo ice rescue training and be certified annually, but little or no notice was given to the employees. In 2005, Equipment Operator Employee 1 again undertook ice rescue training, but missed an initial class that was conducted on a day he was not scheduled to work. The class was offered one other time, but that session, too, was held on a day the Grievant was not scheduled to work. Firefighter Person 1 persuasively testified that this initial class replicated the same class he had taught in 2004 and covered the same material as the class that Equipment Operator Employee 1 had attended the previous year.

However, because Equipment Operator Employee 1 did not attend this initial session, his name was not on the class roster. Consequently, when Firefighter Person 1 created the list of persons who had completed the ice rescue training on the basis of the class roster, the Grievant's name did not appear. Thus, he did not receive a new, 2005, ice rescue certificate, and was not paid a \$250 stipend. Nevertheless, as in prior years, the Grievant was at all times a fully active member of the ice rescue group, and his responsibilities did not change.

When it came to the attention of Firefighter Person 1 that Equipment Operator Employee 1 had not received an ice rescue stipend for 2005, he contacted DRI and requested that they issue a 2005 certificate after the fact. DRI, however, responded that they would not do so because he had already completed the certification requirements and held a valid DRI certificate.

Other difficulties had arisen regarding the interpretation of the contract language

governing the payment of annual stipends to employees in technical rescue which led, in part, to the Parties' decision to amend the applicable contract language in February, 2006. These amendments, however, did not resolve all the problems, and grievances from Cpt. Person 5 and Equipment Operator Employee 1 followed.

When the instant grievance reached Chief Person 3, he conferred with Firefighter Person 1 and Chief Person 4 and reached the conclusion that because the Grievant did not then have an "eligible certification," he was not entitled to a 2005 stipend. He was unaware at the time, however, that Equipment Operator Employee 1 had been certified in ice rescue in 2004 or that such certifications remain valid and do not expire. Indeed, Chief Person 3 stated that he did not know that the Grievant had been certified in 2004 until he testified in this matter.

The Employer relies on the plain language of the contract, arguing that inasmuch as Equipment Operator Employee 1 did not have a 2005 certificate, he could not be eligible to receive a 2005 stipend. It is understandable that Chief Person 3 and Mr. Person 2 would interpret this language strictly, viewing it their responsibility to enforce the unambiguous terms of the contract. In the judgment of the arbitrator, however, this interpretation is so narrow as to contradict the Parties' intent.

First, it can be said, as the Union argues, that the Grievant held an "eligible certification" in 2005 because his 2004 DRI certification was valid and did not expire. Even if his 2004 certification was not an "eligible certification" within the meaning of the contract because it was not issued to him in 2005, the circumstances of this unusual case require that the Grievant be awarded the 2005 ice rescue stipend.

The following factors lead to this result. First, there was little or no communication to the unit members in 2005 that thenceforth they would have to undergo ice rescue training annually

in order to receive a stipend. Second, the class that Equipment Operator Employee 1 missed was only offered on days he was not scheduled to work, contrary to the usual scheduling of training classes. Third, the only aspect of the training that he missed was the initial class which focused, at least in part, on a video he had seen while taking the same class the previous year. Fourth, he was a full member of the ice rescue team during 2005 with the same responsibilities as other ice rescue technicians. Finally, Chief Person 3, and perhaps others, were unaware that the Grievant had been certified in ice rescue the previous year and that that certification was ongoing and did not lapse.<sup>13</sup> Such knowledge, Chief Person 3 candidly conceded, would have induced him to at least reconsider his initial decision denying Equipment Operator Employee 1's grievance.

In the judgment of the Arbitrator, Equipment Operator Employee 1 held an unexpired ice rescue certificate in 2005 and, even if he did not, the unusual circumstances of this case require that his grievance be granted and his 2005 ice rescue stipend be paid. For these reasons, the grievance in this matter must be granted.

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<sup>13</sup> This Opinion and Award should not be read to mean that firefighters can miss scheduled training sessions and still be deemed to be eligible for a stipend, because the Parties have a right to insist that the requirements for certification be met annually.

**AWARD:**

For the foregoing reasons, the grievance is sustained. The Employer shall compensate the grievant, Equipment Operator Employee 1, \$250 for his 2005 ice rescue stipend. In accordance Article 8, Section 3(C)(4), the fees and expenses of the Arbitrator shall be paid by the Employer.<sup>14</sup>

Robert A. McCormick,

Arbitrator

September 27, 2007 East Lansing, Michigan

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<sup>14</sup> The Union contends that this Award should also include interest at 5% per annum in order to make the Grievant whole. Article 9, Section 2 of the contract, however, specifically limits back pay to "the amount of pay or wages the employee would otherwise have earned at his/her regular wage . . ." Accordingly, the compensation due him under this Award is limited to the actual stipend he would have received, or \$250.