

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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**In The Matter of The Arbitration by and between**

**BUFFALO PROFESSIONAL FIREFIGHTERS ASSOCIATION,  
INC. LOCAL 282**

**and Grievant,**

**OPINION AND AWARD**

**PERB Case No. A2011-041  
Before: John T. Trela  
Arbitrator**

**THE CITY OF BUFFALO**

**Employer.**

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Pursuant to Article XXIII, Section 23.1 of the Collective Bargaining Agreement (hereinafter "Agreement") between the parties, the undersigned was mutually selected as arbitrator in the instant matter by correspondence dated July 18, 2011.

Subsequently, a hearing was held on December 12, 2011, in the Buffalo City Hall Office Building, 1100 City Hall, Buffalo, N.Y. 14202-3379, at which time the parties were offered the opportunity to present their respective proofs, witnesses and arguments. Written closing statements were received by the undersigned, on February 27, 2012. A conference call was held between the parties on Monday, April 2, 2012 at the arbitrator's request. Johnathan G. Johnson, Esq. represented the Grievant (hereinafter, "Grievant" or "Union" or "bargaining unit"), while Omar R. Price, Esq., Director of Human Resources, represented the City (hereinafter "City" or "Employer").

## Statement of Issue

The parties stipulated that the Issue is as follows:

*“Did the City violate the collective bargaining agreement Article III Section 3.2 by assigning an employee in the Arson Investigation Unit to work 4 – 10 hour days?*

*If so, what shall the remedy be? ”*

## Contract Language

This grievance alleges a violation of Article III, Section 3.2 which states in relevant part:

- A. The regular hours of daily work shall be consecutive. The workday shall consist of two shifts; The day shift with hours of 8 am to 5 am and the night shift with hours of 5 pm to 8 am.*
- B. All employees shall be scheduled to work a regular work shift as determined by the Commissioner, which shift work shall have a regular starting and quitting time.*
- C. Except for emergency situations, regular work shift schedules of the line firefighting companies shall not be changed by the Commissioner unless the changes are mutually approved by the Commissioner and the union.*
- D. Work shift schedules, as described in A. above shall not be changed as a disciplinary measure or for the purpose of depriving any employee of the benefits to which he would otherwise be entitled.*
- E. In emergency situations, as determined and declared by the Commissioner, through the media of communications available to him, work shift schedules may be changed, for a reasonable period of time.*
- F. When deemed necessary by an officer or man in charge at a fire or other emergency, a member may be held beyond the regular quitting time.*

*Officers assigned to the Fire Prevention Bureau shall have, at their option, the choice of working the (4) four day, (10) ten hour schedule during the five day period, Monday to Friday, or may continue to work the five (5) day, eight (8) hour schedule, Monday through Friday. (Added by Lewandowski Panel Award - 2/28/97).*

### **General Background Information**

In January of 2011, the Union learned that the City assigned at least one member of the Arson Investigation Unit holding the rank of Firefighter to work 4 ten-hour days. The Union argues that the assignment to this work day work week violates the Agreement. The City argues first, that this matter is not arbitrable and even if it was arbitrable, the City did not violate the collective-bargaining agreement.

Many of the facts in this grievance are undisputed. The Bureau of Fire Prevention was created by the City Charter as part of the Department of Fire of the City of Buffalo. The Bureau is staffed by both Officers and Firefighters of the Department. The Commissioner of Fire is given the power to:

*“... detail such Officers and members of the Fire Department... as shall from time to time be necessary” (C-1).*

In the Fire Department, Officers consist of Division Chiefs, Battalion Chiefs, Fire Captains, and Fire Lieutenants (J-1). Union Local 282 is the exclusive bargaining representative for these Officers. Firefighters are also members of the Department and hold the rank of Firefighter. They are also represented by Local 282.

### Grievant's Argument

The Union argues that pursuant to the collective bargaining agreement (J-1) all Firefighters in the Fire Department are scheduled to work 2 day shifts followed by 2 night shifts followed by 4 days off. The day shift is 8 am to 5 pm and the night shift is from 5 pm to 8 am. This schedule has been in effect in the Fire Department for decades. Any exception to the schedule is set forth in the Agreement or has been substantially added by agreement or by an Interest Arbitration Award (Union Brief P 5).

During the 1995-1996 negotiations, the city proposed that the contract be changed so as to allow:

*"Officers assigned to the Fire Prevention Bureau" to work 4 ten-hour days instead of the five day 8 hours schedule. The City also proposed flexible hours for "Training Bureau Officers."*

The Interest Arbitration Award for 1995-1996 ultimately included, among other things, these proposals. Specifically, the Award provided that a new section would be added to this Section 3.2 of the contract as follows:

*"Officers assigned to the Fire Prevention Bureau shall have at their option the choice of working the (4) four day, (10) ten hour schedule during the five day., Monday to Friday, or may continue to work the five (5) day, eight (8) hour schedule, Monday through Friday."*

The parties stipulated that at least one member of the Arson Investigation Unit, holding the rank of Firefighter, was assigned to work 4 ten-hour days in January of 2011, which precipitated this class action grievance (Union Brief P 6).

In response to the City argument that this matter is not arbitrable, the Union argues that the grievance is in fact arbitrable. The grievance and arbitration procedures of the contract clearly provides that:

*“Any controversy or dispute which may arise between the parties regarding the application, meaning or interpretation of this agreement shall be settled in the following manner:”*

The procedures also allow for the filing of class action grievances by the union, specifically providing that:

*“E. In the case of a group, policy, or organizational type grievance, the grievance may be submitted directly to the Commissioner by the Union.” (J-1)*

This matter is about the applicability of the provisions of the collective bargaining agreement regarding hours of work for Firefighters assigned to the Fire Prevention Bureau. There is clearly a dispute over the meaning or interpretation of the Agreement. There is no dispute that the Firefighters assigned to serve in the Arson Investigation Unit of the Fire Prevention Bureau are part of the bargaining unit represented by Local 282. There is no dispute that the collective-bargaining agreement provides for hours of work of Firefighters and that Article III, Section 3.2 provides that there are 2 shifts, the day shift from 8 am to 5 pm and the night shift from 5 pm to 8 am. There is no dispute that for the past several decades, the schedule of the Firefighter has been 2 day shifts followed by 2 night shifts, followed by 4 days off (Union Brief P 7).

The City's argument that the matter is for bargaining and not for the grievance and arbitration procedures is incorrect. The City is certainly free to propose changes to the contract regarding the hours worked by firefighters as it did in 1995-96 for the Officers assigned to the Fire Prevention Unit. The Union must negotiate and might or might not agree. The City could then go to Interest Arbitration and its proposals might or might not be included in the award. In the interim however the City must abide by the provisions of the contract as they exist (Union Brief P 8).

The City argues that because Fire Prevention is created by the City Charter, the City can determine the terms and conditions of Firefighters assigned at will. This is simply not true. The mere fact that the City Charter provides for a Fire Prevention Bureau does not remove these employees for the bargaining unit. The Fire Department itself is created by the City Charter. But this does not mean that the terms and conditions of Officer and Firefighters of the Fire Department are not governed by the collective bargaining agreement (Union Brief P 8).

In fact, in addition to the language in the Agreement allowing Officers in fire prevention to work 4 ten-hour days, there are provisions that relate to employees in the Fire Prevention Department. Article XVI, for example states the Commissioner of Fire is given the ability to transfer Officers and Firefighters to the Arson Investigation Unit without regard to seniority. These provisions would not be necessary if the Officers and Firefighters serving in the Arson Investigation Unit or the Fire Prevention Bureau were not covered by the agreement (Union Brief P 8).

Regarding the merits of the grievance, the Union argues that the contract provides for a fixed schedule of work shifts for Firefighters consisting of 2 days on, 2 nights on, and 4 days off. This is provided for in Section 3.2 and under the Maintenance of Benefits Clause. As testified by Dan Cunningham, this schedule has been the same for decades. He stated that he was not aware of any Firefighter being assigned to a different schedule. All Firefighters are assigned to the rotating 2 days, 2 nights, and then 4 days off. This 8 day work period allows the City to come under the exception in the Fair Labor Standards Act for overtime for fire protection services (Union Brief P 9).

The Fire Prevention Bureau has various Officers and Firefighters assigned to it. The Battalion Chief in charge of Fire Prevention serves at the pleasure of the Mayor. All other Officer positions, a Captain and five Lieutenants, are bid positions covered by the collective bargaining agreement. There are 10 Firefighter ranked positions in Fire Prevention and all of those Firefighters are assigned to work exclusively in the Arson Investigation Unit. The Firefighters assigned to the Arson Investigation Unit are assigned without seniority bidding because of exemption language in the collective-bargaining agreement. However, despite being exempted from the bidding procedures, Firefighters assigned to the Arson Investigation Unit in the Fire Prevention Bureau have always been subject to the terms and conditions set forth in the collective-bargaining agreement (which is why the exception for bidding is included) and have had the same schedule as Firefighters outside the unit. There was no testimony otherwise (Union Brief P 10).

The Officers assigned to work in fire prevention are treated differently than Firefighters. The Officers in the unit are allowed under the terms of the contract to work 4 ten-hour days. This was changed in 1997 when the city proposed change was included in the Interest Arbitration Award by arbitrator Lewandowski (U-1). There has been no similar provision negotiated or awarded with regard to Firefighters. The City is simply unilaterally changing the Firefighters hours in violation of the contract (Union Brief P 10).

The City attempts to differentiate between Firefighters who work on the trucks and Firefighters who have been assigned to Arson Investigation. This difference does

not appear in any part of the collective bargaining agreement or any other agreement. There is only one title of Firefighter (Union Brief P 10).

There was no testimony that any Firefighter worked all day shifts prior to the one challenged in this instant matter. Deputy Commissioner Tomizzi stated that there were "other guys" who worked dayshift only, but he could not identify any Firefighter ranked employee that did so. He seemed to testify that the Firefighter that was working days was himself but he was also appointed the Director of Arson Investigation and was receiving acting Lieutenants pay. He was not serving as a Firefighter in the Investigation Unit (Union Brief P 11).

The Union filed a grievance when it first learned that Firefighters were being assigned to all day shifts. There was no testimony otherwise. If there was a Firefighter working in Arson Investigation on a different schedule, this cannot and does not alter the collective-bargaining agreement. A Union does not waive provisions of the contract by failing to grieve one violation especially if the Union is not aware of the violation (Union Brief P 11).

Accordingly the grievance should be deemed to be arbitrable and the grievance should be sustained by the arbitrator.



### **Employer's Argument**

The City argues that Article 3.2; Section A provides the Fire Department regular hours of work; Section B grants the Commissioner authority to determine work shift; Section C limits the Commissioner authority to change "line firefighter companies" work shift except for an emergency or with the Unions approval employer brief (City Brief P 2).

The City maintains that it is a well established arbitration precedent that Local 282 carries the burden of proving a violation of the contract by a preponderance of the credible evidence standard. Accordingly in order to prevail, the Union must demonstrate that more likely that its position is supported by the language of the contract. In other words the arbitrator must find that the above relevant Sections of 3.2 applies to Arson Investigators in the Bureau of Fire Prevention. In order to reach such a conclusion the arbitrator must accept the premise or interpret Section 3.2 (c) to mean the Bureau of Fire Prevention is a "line firefighting company". In the opinion of the City, the Union failed to meet its burden because the arguments submitted are substantially flawed (City Brief P 2).

First, and of overriding importance, is that the Code of City of Buffalo (C-2) provides that Arson Investigators are members detailed in the Bureau of Fire Prevention. Specifically, Section (103 – 14 D) reads:

*"There shall also be a section within the Bureau of Fire Prevention for the investigation of fires. The Commissioner of Fire may details such officers and members of the Department of Fire from time to time for investigation of fires as may be necessary."*

In a recent arbitration decision, arbitrator Lewandowski stated regarding Section 103 – 14 (D):

*“... Gives the fire Commissioner the power and authority to detail whatever Officers and/or Firefighters to the Fire Investigation Unit as he/she deems necessary” (No Officer in Charge, January 2012 Lewandowski arb.) (City Brief P 3).*

In that matter, the Commissioner of the Fire Department detailed Joseph Tomazzi, a Firefighter at the time to oversee the Fire Investigation Unit as an Arson Investigator. Consequently, the Union filed a grievance claiming that an Officer must be in charge of the unit. Lewandowski held that sustaining the Union's grievance on this matter would contravene the “Code” and therefore found the grievance was not arbitrable.

Lewandowski also held that the Commissioner has full discretion in detailing the unit and found that the grievance had no merit. Essentially, the Union cannot impede on the Commissioner's authority under the Code. Here, the Commissioner's authority in detailing a member to the Fire Investigation Unit is distinguishable from the Commissioner's authority to detail an Arson Investigator to work a 4 – 10 hour day work shift. Both are members in the Bureau of Fire Prevention and both are working as Fire Investigators in the Fire Investigation Unit. Therefore consistent with Lewandowski's decision the Union should not interfere with the Commissioner's authority under the code. Accordingly the grievance should be denied (City Brief P 3).

Second and equally critical, is that the language of Section 3.2 in the collective-bargaining agreement does not apply to Arson Investigators. Specifically, no relevant Subdivisions of Article III, Section 3.2 Hours of Work, restrict the Commissioner's authority to change an Arson Investigators work shift. Conversely, Subdivision B grants

the Commissioner the authority to change work shifts and Subdivision C places limits on changing “line firefighter companies” regular work shifts. There is no language in the contract that suggest that the members in the Bureau of Fire Prevention are in “line firefighting companies”. It is a well-established principle in labor arbitration contract interpretation that “the expression of one thing is the exclusion of another.” Here, the contract language expresses that engines, trucks, or rescues are line firefighting companies. Based on the above stated principal one may affirmatively conclude that the Bureau of Fire Prevention is not covered as a line firefighting company because it is not expressed in 16.4 (d) of the contract. (City Brief P 3-4).

A remedy in this instant matter, would essentially modify a provision of the contract as the arbitrator would be exceeding his authority under the contract. Section 23.2 (h) Matters relevant to grievance procedure in the CBA states:

*“No arbitrators functioning under provisions of the grievance procedure shall have the power to amend, modify or delete any provision of this agreement or render any award contrary to the laws of the state of New York.”*

If the grievance is sustained, the contract would effectively be modified to include the Bureau of Fire Prevention to be covered by Subdivision C as a line firefighting company. As such the modification would have no basis in law because it would violate Section 23.2 (h) in the CBA. Here, the unit provided no credible evidence to support the notion that an Arson Investigator which is covered by the Code, is also covered by Article 3.2 in the CBA. In fact, the CBA gives considerable deference and/or does not impede on the positions in the Fire Department covered by the Code. For example, the CBA specifically expresses that the personnel in the Fire Investigation Unit are not covered by the contract seniority provision. Arson Investigators in the Bureau of Fire

Prevention are not “line firefighting companies” and therefore the grievance should be denied (City Brief P 4).

The Union provided no credible evidence to support their alleged contract violation. In this instant case, Union President Daniel Cunningham's testimony primarily focused on how Arson Investigators are political appointees. On cross-examination he stated he was representing all members who are not given an opportunity to work in the Arson Investigation Unit. Since the Commissioner appoints the members in the Arson Investigation Unit, he is basically saying he does not represent their interest. Here, the intent is to stifle the members in the Arson Investigation Unit because their opportunity is based on management's discretion. Such actions are improper in the arbitration forum (City Brief P 4).

Finally, the 1996 arbitration award, which included a City proposal that effectively added a 4 – 10 hour day work shift for Officers assigned to the Fire Prevention Bureau has no probative value and actually weakens the Union's position in this matter. In the instant case the Union is arguing that members in the Arson Investigation Unit must work regular hours covered by Subdivision a of 3.2, which includes 2 9 hour days and 2 15 hour nights. However the proposal in the 1996 Lewandowski award clearly states that the Officers assigned in the Fire Prevention Bureau regular hours are 5 day 8 hours schedule, Monday through Friday. Consequently there is no plausible connection between Subdivision A of 3.2 in the CBA and the City proposal submitted in the 1996 Lewandowski award. Had the City proposal change work hours as defined by Subdivision A of Article 3.2, to a 4 – 10 hour day work shift, the Unions Exhibit 1 may have had some probative value in the instant matter. However in Unions Exhibit 1 the

Officers assigned to the Fire Prevention Bureau work a 5 day 8 hours shift schedule which is not covered by Article III, Section 3.2. Hence the relationship of Union Exhibit 1 in the instant matter is spurious at best. Accordingly the city argues that the grievance should be denied (City Brief P 5).

## Discussion and Opinion

Arbitrators are required to render determinations by a preponderance of the evidence in accordance with the contract language the parties themselves have negotiated. Regarding the question of arbitrability raised by the City, the undersigned has determined that the grievance filed by the Union is arbitrable as it falls within the definition of a grievance set forth in article 23.1 (A) of the contract which states:

*“Any controversy or dispute which may arise between the parties regarding the application, meaning or interpretation of this agreement shall be settled in the following manner...:”*

The original grievance (J-2) of February 3, 2011 falls well within the definition of a contractual grievance and states:

*“...arson investigation – change of work hours with the date of occurrence of January 27, 2011, alleging a violation of article 3, section 3.2 of the contract... The remedy sought is that fire Marshal members work regular 2 – 9 hour day, 2 – 15 hour night per platoon schedule. “*

Neither the City Code nor the Lewandowski award overrides or negates the terms of the CBA in this instant matter. What does control are the words of the contract that were negotiated by and between the parties themselves.

Article III Section 3.2 establishes a number of controls that delineate, shifts, hours of employment, work days and work weeks for members of this unit, all who work in various functions and Departments of the Fire Department of the City of Buffalo. The gravamen of the instant dispute involves unit members holding the job title of Firefighter who are assigned to the Arson Investigation Unit, which is organizationally established in the Fire Prevention Bureau (C-1). The collective-bargaining agreement specifically addresses the workday workweek schedules of “Officers” assigned to the Fire Prevention Bureau, but does not specifically mention or differentiate the workday of

"Firefighters" assigned to the Fire Prevention or Arson Unit. Had this section of the Agreement included the word "Firefighter(s)", the outcome of this matter would have been different. However, it does not.

This contractual language was established through an Interest Arbitration Award (2/28/97) which provided that there would be certain modifications to terms and conditions of employment for "Officers" assigned to the Fire Prevention Bureau. This language, has survived to date without change and clearly states:

***"Officers** assigned to the Fire Prevention Bureau shall have, at their option, the choices of working the (4) day, ten (10) hour schedule during the five (5) day period, Monday to Friday, or may continue to work the five (5) day, eight (8) hour schedule, Monday through Friday. (Emphasis added.)*

It is clear that the duties and responsibilities of Firefighters assigned to the Arson Unit differ from those assigned to line Firefighters. Their physical working conditions (areas of assignment) are not in firehouses. While they are not line firefighters, their hours of work are controlled by the collective-bargaining agreement as established in Article III, Section 3.2. The Commissioner has the right in limited circumstances (Section 3.2 E) of the contract to change schedules:

*"In emergency situations... work shift schedules may be changed... for a reasonable period of time."*

This section however does not negate or override the obligations of the City to honor the remaining Sections of the contract in routine non-emergency situations.

Accordingly, the undersigned has determined that the collective-bargaining agreement has been violated and the grievance is sustained.

**Award**

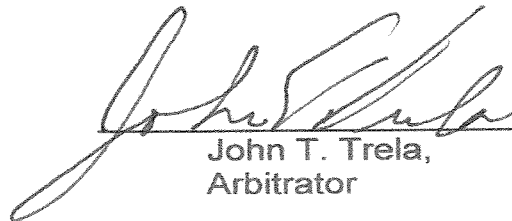
- The City of Buffalo did violate Article III, Section 3.2 as alleged in the revised grievance filed by the Union.
- The City is directed to return the Grievant to the work day and work week shift schedule Grievant worked prior to the change implemented by the City as alleged in this grievance.

State of New York        )  
County of Albany        )ss.:

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I, John T. Trela, do hereby affirm my oath as an Arbitrator; that I am the individual described herein, and who executed this instrument, which is my award.

April 17, 2012

  
John T. Trela,  
Arbitrator