PUBLIC EMPLOYMENT RELATIONS BOARD
VOLUNTARY GRIEVANCE ARBITRATION PANEL

In the Matter of the Arbitration between

CITY OF WATERTOWN

Public Employer,

-and-

OPINION AND AWARD

WATERTOWN PROFESSIONAL FIREFIGHTERS' ASSOCIATION, IAFF LOCAL 191

Employee Organization.

PERB Case No. A2016-228

BEFORE: Richard A. Curreri, Esq.
Arbitrator

APPEARANCES:

For the City: Bond Schoeneck & King, PLLC (Terence M. O'Neil, Esq. of counsel)

For the PBA: Blitman & King LLP (Nathaniel G. Lambright, Esq. of counsel)

INTRODUCTION

In accordance with Article 8.C.4 of the collective bargaining agreement ("CBA") between the City of Watertown ("City") and the Watertown Professional Firefighters' Association, IAFF Local 191 ("Local 191" or "Union"), the undersigned was designated as Arbitrator pursuant to the Rules of the New York State Public Employment Relations Board to hear and determine a contract grievance brought by the Union on August 29, 2016. While the specific nature or meaning of the that filing is subject to dispute herein,

Local 191 alleged, generally, that the City violated the CBA when it failed to "properly compensate" members who were performing out-of-title duties of an Acting Captain.[1]

A hearing was conducted on April 17, 2017, during and after which the parties reached a settlement of the grievance for a time period up through March 31, 2017, along with issues pertaining to the specific manner or rate by which out-of-title pay would be calculated (Jt. Ex. 8). The hearing was held in abeyance pending further discussions between the parties regarding the balance of the issues in dispute. Some months later, the Arbitrator was advised that the parties had been unable to reach a full agreement, and was asked to schedule additional hearing dates. On November 1 and 2, 2017, and April 12, 2018, three further hearing days were held, at which both parties were given a full and fair opportunity to present testimonial and documentary evidence, and to cross-examine witnesses. Both parties filed post-hearing briefs.

ISSUES

During the hearing, the parties stipulated that the following issues are in dispute:

1. Is that portion of the Union's Demand for Arbitration that alleges that the City utilized at least two firefighters to perform out of title Captains' work without paying them the correct hourly rate arbitrable?

2. If arbitrable, did the City violate Article 4, Section 3a of the CBA when it failed to pay out of title pay to one Firefighter assigned to the ladder and one Firefighter assigned to the Heavy Rescue on each shift from July 29, 2016 and going forward? This is not intended to cover the shifts when a Firefighter on the Truck and/or Heavy Rescue was assigned as an Acting Captain.

3. Did the City violate Article 4, Section 3a of the Collective Bargaining Agreement and 3a of the rules for Administration of [the] Fire Pay Plan in the manner it calculated out-of-title pay for members of the unit who once held the rank of Captain but whose rank was reduced to firefighter, and if so, what shall be the remedy?

[1] Jt. Ex. 2. References herein are denoted "Jt. Ex." If to a Joint Exhibit, "Er. Ex." If to an Employer exhibit, "U. Ex" if to a Union Exhibit, and "Tr." if to the transcript.

As noted above, the third issue was resolved by the parties during the course of the first hearing day and therefore will not be addressed by this Award;[2] any remedy that might otherwise result from a disposition of issues 1 and 2 would at best be effective April 1, 2017.

RELEVANT CONTRACT PROVISIONS

Article 4 – Compensation

Section 3.a. Any member assigned to perform duties out of title in a rank higher than his permanent rank shall be compensated for such performance on a per diem basis, which increased pay shall reflect the differential between the employee's regular pay and the pay which would be received in the higher position in accord with the provisions of 3a of the Rules for Administration of the Fire Pay Plan.

b. Assignment to duty under this Section shall be in accord with the following:

(1) The man scheduled to replace an officer on a predetermined schedule shall be a person standing on a current eligible list, if one exists.

(2) In case of an emergency involving any one day, a man shall be picked from the working shift who is on an eligible list.

(3) In case there is no person on an eligible list working the day of the emergency, the Fire Chief shall pick a person at this discretion.

Article 8 – Grievance Procedures

Section 5.a. DEFINITIONS As used herein, the following terms shall have the following meanings:

3. "Supervisor" shall mean any person, regardless of title, who is assigned to exercise any level of supervisory responsibility over public employees.

4. "Grievance" shall mean a claimed violation, misinterpretation, or inequitable application of the existing rules, procedures, or regulations covering working conditions applicable to the members of the Fire Department and shall be applicable to all provisions of this Agreement, excluding salaries.

[2] It is assumed, of course, that the final clause in the third issue, i.e. "if so, what shall be the remedy," now applies to the first two issues.

c. GRIEVANCES, PROCEDURAL REQUIREMENTS, APPEALS

1. The first procedural stage shall consist of the employee's presentation of his grievance to his immediate supervisor who shall, to such extent as he may deem appropriate, consult with his department head. The discussion and resolution of grievances at the first stage shall be on an oral and informal basis. If such grievance is not resolved within three (3) work days, at the first stage, such employee may proceed to the second stage.

2. The second procedural stage shall consist of a request by the aggrieved employee, if he wishes, for a review and determination of this grievance by the department or agency head. In such case, the aggrieved employee and his immediate supervisor shall each submit to the head of the department or agency concerned a written statement setting forth the specific nature of the grievance and the facts relating thereto. Thereupon such department or agency head shall, at the request of the employee, hold an informal hearing at which the employee, and in accordance with the provisions of these grievance procedures, his representative, if he elects to have one, may appear and present oral and written statements or arguments. The department or agency head shall discuss the grievance and proceedings with the City Manager. The final determination of the second stage of such grievance proceedings shall be made by the head of the department or agency concerned within five (5) work days of the date the grievance was presented to him by the employee.

3. If the employee so requests, a third procedural step shall be held which shall consist of a request for a review and determination of his grievance by the City Manager. Such review, if made, shall follow the procedures described in Paragraph 2. The final determination of the third stage, if held, shall be made within five (5) work days of the date the grievance was presented to the City Manager.

4. If the grievance is not resolved through these steps as outlined in Paragraphs 1, 2 and 3 of this section, either party may then request the New York State Public Employees Relation Board [sic] to provide arbitration service. The authority of the Arbitrator shall be limited to the interpretation and application of this Agreement. The Arbitrator shall have no right to add or to subtract from the Agreement. The decision of the Arbitrator shall be final and binding on both parties. Any expense incidental to arbitration shall be equally borne by the City and the Union.

FACTS

Local 191 is the exclusive bargaining representative for employees of the City of Watertown Fire Department ("Department") in the titles of Firefighter, Fire Captain

("Captain"), and Battalion Fire Chief ("Battalion Chief").[3] The Department operates three fire stations: Station 1, or South Massey Headquarters; Station 2, or State Street; and Station 3, or Mill Street.[4] Station 1 houses an engine, a ladder truck, and a rescue truck. Stations 2 and 3 each house only an engine. Engines and their respective companies[5] are primarily responsible for fire suppression and water transport. The ladder truck is responsible for operations requiring an aerial device, and its company is responsible for proper ventilation of structure fires, as well as entering and searching the building. The rescue truck and company is responsible for more technical aspects of rescue, e.g. incidents requiring river or rope rescues, hazmat responses, building collapses or others requiring rapid intervention or the technical extrication of a victim.[6]

Prior to July 1, 2016, the Department employed twenty (20) Captains, one on each of the five aforementioned pieces of apparatus, on each of four platoons. Each engine and ladder company was additionally staffed with two Firefighters, while the rescue company additionally operated with one Firefighter.[7] Effective July 1, 2016 with the adoption of the 2016-17 City budget, the number of Captains was reduced from 20 to 12. The reduction affected only the Station 1 ladder and rescue companies. All three engines continued to be staffed with a Captain on each platoon. The eight ladder and rescue Captains, however, were in essence "demoted" to the rank of Firefighter.[8] The

[3] Jt. Ex. 1.
[4] Tr. 127, 146.
[5] A "company" consists of those assigned to a particular apparatus. Tr. 127.
[6] Tr. 128-9, 246.
[7] Tr. 130, 228-29.
[8] Tr. 142-47, 520-21, Un. Exs. 5, 6. The term "demoted" was used by both parties during the hearing to characterize the City's action. Eight Captain positions were actually abolished and eight Firefighter positions created, with the former Captains retreating into the new Firefighter positions.

ladder truck would thereafter be staffed with three Firefighters, the Rescue truck with two Firefighters.

In conjunction with the demotions, on July 1, 2016 Department Fire Chief Herman issued SOP 1.25,[9] which stated in part:

> "As there is a need to have an individual assigned to the 'officer seat' of an apparatus, the shift commander will select a firefigher who is working on that day to be designated as a unit leader on an apparatus that does not have a regularly scheduled Fire Captain assigned."

The SOP listed tasks the assigned member was to perform at a minimum, including determining the status of unit activities, assigning specific duties to staff on the apparatus, and ensuring the security of those on the apparatus. It further noted that the parties' CBA permitted members "on a current eligibility list to perform duties out of title at a higher rank" and that such list could be used to designate the unit leader.

On August 1, 2016, SOP 1.25 was updated to, in essence, change the term "unit leader" to member "assigned to the right hand front seat of department apparatus." In all other respects, including the list of attendant duties and manner of designating an individual to this riding position, the update was unchanged from the prior iteration.[10]

A final, and more extensive revision of SOP 1.25 was issued on October 20, 2016.[11] Under the heading "Command and Control of Line Apparatus and Crews," it stated that the "Fire Chief shall ensure the scheduling of at least two Firefighters – eligible, trained and capable of assuming the role of a Fire Captain – to each platoon," and further specified that the "Battalion Chief may, when additional command and control is required beyond the capacity of existing officers, assign a Firefighter(s) to

[9] Un. Ex. 10.
[10] Un. Ex. 11.
[11] Un. Ex. 12.

Acting Captain status." The Battalion Chief was now, at the start of a shift, to "notify those Firefighters whom are most likely to be assigned Acting Captain status." In addition, the revised SOP assigned "oversight" responsibilities regarding the rescue truck and its crew to the Captain assigned to Engine 1, and assigned the same responsibility over the ladder truck and crew to the Battalion Chief. In both of these instances, oversight included but was not limited to training and certain specified administrative tasks.

SUMMARY OF POSITIONS

This case involves not only the parties' differing positions on the merits of the grievance, but also on threshold issues raised by the City regarding arbitrabillity. As to the latter, the City makes arguments of both procedural and substantive arbitrability. The City alleges that the Union's grievance argued only that the *rate* being paid to demoted Captains who were assigned to work out-of-title as Captains was improperly calculated, not that demoted Captains were entitled to payment for all shifts in which they were assigned to the right hand front seat and therefore allegedly did "captain's work," whether or not they were formally assigned such work. The City further alleges that the Union did not clarify the nature of its grievance during pre-arbitration steps of the grievance procedure. The City therefore argues that the grievance is not procedurally arbitrable. As to this, the Union contends that it is not obligated to "exhaustively detail" every fact related to its claim, and that the wording of the grievance along with subsequent communications and actions by the parties at the lower steps of the grievance procedure establish that the City plainly understood and was on notice of its claim.

The City also contends that the grievance is not substantively arbitrable due to specific language in Article 8 of the CBA that excludes "salaries" from the ambit of the grievance procedure. It argues that out-of-title payments fit within the meaning of "salaries" and therefore cannot be arbitrated. The Union counters by arguing that "salary" disputes concern the general compensation rate for a job, that its out-of-title pay claim does not involve any effort to modify or interpret the general salary provisions of the CBA, that no bargaining history was introduced to show that the parties intended to bar claims of this type from arbitration, and that the exclusion of "salaries" was likely intended to bar the arbitration of interest disputes and not rights disputes.

Should the merits be reached, the Union argues that the record is uncontroverted, and clearly establishes that subsequent to July 1, 2016, demoted Captains were assigned to the right hand front seat of the ladder and rescue trucks, just as they were prior to that date of demotion, and that whether or not they were formally designated as Acting Captain, they did perform, and were expected by the City to perform, the exact same operational tasks as they did when they held the title of Captain. It alleges that while the final version of SOP 1.25 nominally puts the Engine 1 Captain in charge of the rescue company, and the Battalion Chief in charge of the Ladder, the nature of the job is such that neither one is capable of operational oversight and neither has ever exercised that responsibility out in the field. It contends that the record establishes that the City rarely upgrades Firefighters to Acting Captain status, that such upgrades almost never occur in the field, but only after the work has been performed, subject to the City Manager's increasingly infrequent conclusion that a call was "severe" enough to warrant out-of-title pay. The Union finally asserts that the City

is attempting to obtain through arbitration what it could not obtain in contract negotiations.

The City counters by asserting that the CBA requires employees to be "assigned" by a superior to perform duties out-of-title in order to merit extra pay; that they cannot simply unilaterally assign themselves to a higher rank based on indirection, assumption or a perceived "expectation." It further notes that SOP 1.25 now gives the Engine 1 Captain and Battalion Chief supervisory responsibility over rescue and ladder respectively, and that SOPs exist containing "detailed instructions" on field operations under various scenarios and to insure safety and efficiency. Finally, the City contends that the Union is seeking out-of-title pay for an assortment of tasks that can be performed by a Firefighter and which do not require a Captain.

OPINION

Procedural Arbitrability

I turn first to the procedural arbitrability issue, since if the City's claim in this regard is upheld, the substantive question of whether the subject matter herein is excluded from arbitration can if necessary be left to another arbitrator, at another time.

The significance of the pre-arbitration steps of a grievance procedure cannot be doubted, because it is at these stages that a settlement can arise that best fosters a healthy relationship between the parties. It has been stated that:

> "A happy situation exists when the preliminary steps of dispute-settlement machinery function effectively, resulting in settlement of a high percentage of disputes prior to the arbitration stage. If the preliminary steps do not function smoothly, the arbitration forum may be overburdened with cases, leading, in turn to loss of faith in the dispute-resolution system, the overhang of festering problems, and an unhealthy work environment. It is generally agreed that no

> dispute should be taken to arbitration until all possibilities of settlement at the negotiation stages of the grievance procedure have been exhausted."[12]

Unfortunately, by both words and conduct throughout the course of this proceeding, both parties made no secret of their abject dislike for one another, or the fact that their relationship was already, in the words of one, "horrendous."[13] While this would not excuse a serious breach of the grievance procedure, it likely helps explain why talks during the steps designed for settlement discussions were less than robust. The question is whether the conduct here sank to a level that would justify dismissal of the grievance. In this regard, the City must overcome "a general presumption favoring arbitration over dismissal of grievances on technical grounds."[14]

The City argues that the Union neither followed the preliminary steps of the grievance procedure nor provided the information necessary to adequately apprise the City of the nature of its claim. It first contends that no evidence was presented to show that a meeting occurred between the grievant and his/her immediate supervisor -- in this case the Battalion Chief -- as required by the first procedural stage. This, however, is "an oral and informal" step, and the immediate supervisor is himself a unit member, likely well aware of the unit's concern. Moreover, the testimony on cross-examination of Ormsby, a demoted rescue captain, established that he did, in fact, have conversations with the Battalion Chief about why he was not being paid for out-of-title work.[15] In any

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[12] Elkouri & Elkouri, *How Arbitration Works, 6th ed.* (BNA, 2003) at 198.
[13] Tr. 133-34. Also, Tr. 39, 67, 91.
[14] *Rodeway Inn,* 103 LA 1003 at 1013 (Goldberg, 1994).
[15] Tr. 293. The City goes on to assert that Stage one also places a responsibility on the Battalion Chief to discuss the grievance with the department head, i.e. the Chief, and that the record shows no such discussion took place. However, the contract obligates the Battalion Chief to consult with the department head only "to such extent as he may deem appropriate," and the testimony to which the City refers in its brief relates to a subsequent stage of the grievance procedure.

event, the City did not at any time prior to the filing of the demand for arbitration object to processing the grievance on the basis of any Stage 1 omission.[16]

The crux of the City's procedural arbitrability defense is based on the Union's conduct at stages two and three of the grievance procedure. Stage two is the written grievance filing step, and stage 3 is the request for review and determination of the grievance by the City Manager. On August 29, 2016, Daugherty, the Union President, did submit a written grievance to the Chief.[17] On September 9, 2016, Daugherty did file a request for review by the City Manager.[18] The City, however, alleges that these documents, and the Union's refusal to sufficiently particularize its claim, resulted in an inability for it to properly assess or deal with the grievance, and that such conduct was sufficiently egregious as to preclude arbitration herein.

The second stage of the parties' grievance procedure requires "a written statement setting forth the specific nature of the grievance and the facts relating thereto." The grievance filed by Daugherty alleged, in relevant part, as follows:

> "On July 29, 2016, the City of Watertown violated the entire Collective Bargaining Agreement including but not limited to, Article 4, Section 3a. The Collective Bargaining Agreement was violated (and continues to be violated) when the City of Watertown failed to properly compensate members who performed duties of an Acting Captain, a position which those members once held and therefore has a previously established rate of pay. Instead, the City compensated the member with a rate of pay with that of an entry level Captain, which is below the level of experience and rightful Captain pay grade of such members.**** This grievance is brought by, and on behalf of, all members of IAFF Local 191, including the member or members who were or have been improperly compensated for performing out of title work.*** As a remedy, Local 191 is demanding that the City cease and desist from violating the Collective Bargaining Agreement and that it cease and desist the practice of improperly

[16] "[T]he right to object to the lack of discussion of a grievance at a preliminary step may be held waived by failure to make a timely objection." Elkouri & Elkouri, *supra,* at 216, and cases cited therein.
[17] Jt. Ex. 2.
[18] Jt. Ex. 5.

compensating those acting out of title and that the City properly compensate the member or members who have already acted out of title."

Not surprisingly, the Union and the City stress differing aspects of the submission. The Union notes that the grievance specifically cites to a violation of Article 4, Section 3a of the CBA, which is the provision requiring, inter alia, compensation to members "assigned to perform duties out of title in a rank higher than his permanent rank." It stresses the broader language in the grievance complaining about "the failure to properly compensate members who performed duties of an Acting Captain." The City contends that the more specific references in the grievance demonstrate that the Union was solely grieving the rate at which Acting Captains were being paid, and not the fact that they were allegedly being denied payment on a regular basis.

While Daugherty consistently testified that his intention in drafting the grievance was to protest the incidences of nonpayment for work out-of-title as well as the proper rate when such payments were made,[19] his intent is not relevant if the grievance was so imprecise as not to allow for the City to possibly comprehend that intent. In this regard, however, Chief Herman's understanding is relevant.[20] As to this, the Chief testified his understanding was "[t]hat they were trying to get pay for those people working out-of-title or presumed to be working out of title."[21] In fact, the implication that the Chief was aware the grievance involved more than just the rate of pay was plainly present when,

[19] Tr. 161, 179-80.
[20] The City objected to questions regarding the Chief's understanding of the grievance claiming that document spoke for itself. However, since the issue here is whether or not the City was able to sufficiently comprehend the Union's claim, the understanding of the City's own police chief is certainly relevant.
[21] Tr. 407, emphasis supplied. Despite rigorous cross-examination attempting to get Chief Herman to limit his understanding of the grievance to the rate of payment, the Chief never clearly did so, noting only, for example, "that is one of the understandings that I had with regards to their grievance." Tr. 418.

referring to why his letter response to the grievance only addressed the rate of pay issue,[22] he stated: "[i]t only dealt with the rate of pay because that was the only thing that I had control over,"[23]and when he further asserted: "I didn't have the ability to upgrade anyone except when there was a captain vacancy. The manager made that quite clear, that she didn't want any captains on the truck or the rescue; therefore, I could not upgrade anyone on those apparatus."[24]

There certainly is ambiguity in the literal language of the grievance, and the Union certainly could have done a better job in framing its issues. But given that grievances are not held to the strictures of legal pleadings, given that the grievance does cite to the specific provision allegedly being violated, given that this is still an early stage of the grievance procedure when precise issues can still be developed,[25] and given the evidence that the Chief appeared to understand that the Union was questioning more than just the rate of pay, I cannot find that arbitration ought be barred on the basis of inadequate stage 2 compliance.

Daugherty filed the Union's request to proceed to stage 3 on September 9, 2018.[26] In relevant part, it stated:

> "We disagree with your interpretation of the CBA with respect to the form and contents of the grievance. However, in order to avoid any further litigation...and waste of taxpayer money, I will provide the following:

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[22] The Chief responded to the grievance filed by Daugherty on September 7, 2016. It also contained a sentence stating that "the definition of grievance excludes salaries, and therefore this claim is not covered by the contractual grievance procedure." Jt. Ex. 4.
[23] Tr. 414.
[24] Tr. 418.
[25] See, *e.g. AFGE,* 113 LA 998 (Paull, 1999): "The general rule is that new contentions relevant to the dispute may be stated at any time prior to the submission of the matter to formal arbitration, including any advanced stage of the grievance procedure, unless the pertinent collective bargaining agreement restricts such action" (at 1004).
[26] Jt. Ex. 5.

> We are claiming that the City violated the CBA, specifically Article 4, Section 3a, when it failed to make out-of-title payments at the appropriate pay rate when members were required to work out-of-title. This has occurred on every single shift since the grievance arose when at least two Firefighters have been required to work as Captains but have not received the appropriate pay. Further, when Firefighters were appointed as Acting Captains, they were also not paid the correct amount."

City Manager Addison responded on September 15, 2016.[27] In relevant part, that response states:

> "I will first address your claim that 'on every single shift since the grievance arose...at least 2 firefighters have been required to work as Captains but have not received the appropriate rate" (emphasis added). Based on my knowledge of what has been occurring since the reorganization, I do not believe firefighters have "been assigned to perform" Captains' duties without being paid the appropriate out-of-title pay. Without further explanation of what "out-of-title duties" the firefighters were "assigned to perform" (emphasis added), I deny the grievance."

At this point, there can be no question that, in addition to the rate issue, the Union has claimed that Firefighters were being required to perform as Captains on every shift without receiving appropriate out-of-title pay. The City Manager plainly acknowledges this in her response, and answers it in terms of her belief that an "assignment" was required before an out-of-title payment would attach. The City nevertheless contends that this was the first time such a contention had been raised by the Union, and that it amounted to a "new" grievance. Much of that contention has been disposed of in the Step 2 discussion above; indeed, nothing in the City Manager's response indicates surprise or that she was denying the grievance on the grounds that the contention had not been theretofore raised. Even assuming *arguendo,* that this did amount to the initial recitation of the Union's claim, it was not one wholly unrelated to the Article 4 Section 3a claim as described in the grievance, but rather was directly

[27] Jt. Ex. 6.

related to out-of-title pay. Arbitrators often hear claims "if they involve only a modified line of argument, an additional element closely related to the original issue, refinement or correction of the stated grievance, or introduction of new evidence, so long as the opposing party has had a fair opportunity to prepare to meet the claims."[28] In the latter regard, no argument can be made that the City was harmed by not having time to prepare a defense since hearings in this matter did not ensue for another seven months.

Finally, the City contends that the Union withheld pertinent information, and was kept "in the dark" despite its requests for more specificity and clarification. It notes that while the City Manager's September 15 response sought either further discussions or failing that, information regarding what out-of-title duties the firefighters were assigned to perform, the Union instead filed a demand for arbitration the next day. When a meeting did subsequently occur on September 22, the City cites documentary evidence[29] to demonstrate that Daugherty was less than forthcoming when queried by the City Manager. There is no question that Daugherty was playing it quite close to the vest during his meeting with the City Manager. While that was quite likely a byproduct of the previously mentioned unfortunate and unhealthy labor relationship from which the two parties suffer,[30] it was not a violation of the CBA. Once the grievance was denied

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[28] Elkouri & Elkouri, *supra*, at 298, and cases cited therein. Neither does the CBA itself prohibit the addition or clarification of related claims as the grievance progresses through its stages.

[29] Er. Ex. 5. It was stipulated that this would be the testimony of the confidential assistant to the City Manager were he to testify.

[30] The Arbitrator makes no apologies for what might be seen as gratuitous comments about the parties' unhealthy relationship. As mentioned, they made no secret of it themselves. Since they know it, I urge them – gratuitously -- to do something about it. The Arbitrator and the parties' representatives were able to have lengthy discussions during the first hearing day resulting in settlement of a significant portion of this

by the City Manager, the Union was free to file for arbitration. The CBA itself prescribes no disclosure-type preconditions to such filing.[31] In fact, the CBA provides an opportunity for the production of additional oral or written statements at stages 2 and 3 of the grievance procedure only through an informal hearing "at the request of the employee" (emphasis supplied), not the employer.[32]

Based on the foregoing, I dismiss the City's procedural arbitrability defense.

Substantive Arbitrability

The City contends that the subject matter being disputed in the grievance, i.e. out-of-title payments, amounts to "salaries," a topic specifically excluded from the definition of a "grievance" in Article 8, Section 5.a.4 of the CBA. The contract itself does not specifically define the term "salaries." The ordinary meaning of the term, however, namely "a fixed periodical compensation to be paid for services rendered; a stated compensation, amounting to so much by the year, month or other fixed period..."[33]would not ordinarily seem to encompass out-of-title pay, which accrues only in instances when particular duties beyond the scope of a title are performed. Indeed, while the CBA does not define "salaries," the few times the term is used in the agreement are consistent with

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grievance, and it was hoped that would mark the first step toward establishing a measure of rapport. Instead, the situation deteriorated. If a neutral is necessary to help repair the ugly rift, PERB, the Scheinman Institute at Cornell ILR, and many private individuals are skilled in fostering better labor-management collaboration, and ought be sought out for the benefit of not just the parties, but the citizenry served by the parties.

[31] The Union notes in its brief that the parties are litigating before PERB the issue of whether the City was entitled to additional information. If so, that would involve Taylor Law rights and obligations beyond this Arbitrator's authority; the holding herein deals only with contractual obligations.

[32] Article 8, Section 5.c.2 and c.3.

[33] "What is Salary?,"*Black's Law Dictionary Free 2nd Ed. and The Law Dictionary,* https://thelawdictionary.org/salary/.

this view. Thus, under Article 4, Section 1.b, longevity payments "shall be in addition to the regular salary and shall not be used in determining the hourly rate of pay" (emphasis supplied). The Fire Pay Plan, appended to the CBA and referenced in Article 4, Section 1 of the CBA, makes repeated reference to "the salary schedule," which is the grid-type representation of the specific annual pay for unit members at various yearly service steps.[34] The structure of the Article 4 itself is not amenable to the City's contention. The grievance definition bars "salaries," not "compensation." Article 4 is entitled "Compensation," and within that Article are various forms of compensation, like salary in Section 1.a, longevity pay in Section 1.b, out-of-title pay in Section 3.a, and unused sick leave in Section 4. Out-of-title pay is thus structured as a component of compensation, not of salary.

Finally, the City argues the matter of out-of-title pay is excluded from arbitrable subjects based upon its interpretation of the General Municipal Law ("GML"). The City contends that the procedure in the CBA is based upon that set forth in the GML.[35] First off, no bargaining history was introduced to show this to be the case, or that the parties intended their contract language (which somewhat differs), to have the same meaning as that in the GML. But even if the contractual grievance procedure was in fact founded upon the language in the GML, the definition of "grievance" in the GML bars "any matter involving an employee's rate of compensation, retirement benefits, disciplinary proceedings or any matter which is otherwise reviewable pursuant to law or any rule or regulation having the force and effect of law" (emphasis supplied). Even were we to

[34] In its brief the City notes that the Rules of the Fire Pay Plan make multiple references to the word "salary." Again, however, in not one of these instances is out-of-title pay mentioned. Rather it is used in the context of salary increases, grades, steps, ranges and levels, all of which deal with regular, annualized payments.
[35] Originally GML §601 et seq. (Er. Ex. 21), now §681 et seq.

assume the parties' invocation of the word "salary" in the CBA was intended to have the same meaning as "rate of compensation" in the GML, this still does not demonstrate an intent to encompass a potentially inequitable interpretation of an out-of-title pay provision. It is far more likely that the GML's exclusion of compensation rates was done, as the Union posits, because it is an "interest" that is set by and appealable to an entity such as the Division of Classification and Compensation in the Department of Civil Service, which assigns pay grades, classifications and attendant hiring rates.[36] While I need not reach the issue, it may be that if the analogy between the CBA and GML procedures is accurate, the "salary" intended to be excluded by the former is the same type of "interest" intended to be excluded by the latter.[37] The out-of-title pay claim in this arbitration deals with breach of an alleged "right" under the contract, not the establishment or modification of an interest that can only be accomplished through an entity having jurisdiction over such claims, or post-Taylor Law, through collective bargaining.

Based upon the foregoing, I reject the City's argument that the grievance is not substantively arbitrable.

[36] See, e.g. "Rates of Compensation" in Civil Service Law § 131.

[37] For example, if Jeff Bezos decided to bring his new Amazon facility to Watertown, resulting in greatly increased population and physical plant in the City, the Union might well be unable to file a contract grievance claiming, say, a 25% salary increase based upon a 25% increase in workload. That would not involve an existing contract right but rather would be the assertion of a new interest, and as such, appropriate only for collective bargaining. Because it is not presented by the instant grievance, nothing herein should be construed as dealing in any way with the question of whether the grievance procedure would bar arbitration in the event the employer were to breach the salary schedule or other salary rights of the Union as established under the CBA.

The Merits

The Union argues that the record pervasively and uncontrovertibly establishes that since July 1, 2016, the demoted Captains have been performing the exact same operational duties they had performed prior to that demotion date.[38] In fact, the record is replete with testimony establishing this to be the case. Thus, as demoted rescue Captain Jason Ormsby stated:

> "Although I'm not compensated as a captain, I continue to ride in the right-hand front seat. I continue to have the responsibility to dictate route of travel, the safety of the apparatus and the people in the apparatus. I'm still responsible for positioning the apparatus to...provide the best effort and ability to be successful....I would dictate to the crew how we're going to perform our tasks, what tasks we're going to perform and the avenue in which we're going to perform them."[39]

Demoted ladder Captain Andrew Naklick testified similarly:

> "When I come to work I look at the schedule. My name is at the top of the schedule on the ladder company slot so I know that that's [the acting captain seat] where I'm assigned. And I ride in the same seat that I rode in before I got demoted. I talk on the same radio, push the same buttons on the CAD and make the same decisions in route to the call and at the call."[40]

Naklick went on to describe those "same decisions" in detail, from strategizing based on Information received en route, to where to park and position the apparatus, to what tools will be used to access or ventilate a scene,[41] to making the necessary operational determinations on elevator, water, gas leak and rope rescues.[42] "Nothing has changed," Naklick stated. "I still make the determination on how we're going to solve the problem,

[38] The Union accepts that certain administrative functions previously performed by Captains are no longer required of the demoted Captains.
[39] Tr. 261.
[40] Tr. 328-29.
[41] Tr. 334-36.
[42] Tr. 355-57, 363-64.

what tactics we're going to employ, the method of the rescue."[43] Battalion Chief Michael Kellogg, who under SOP 1.25 is the individual charged with designating the person who sits in the front, right-hand "officers" seat, confirmed that such person continues to perform what had been Captain duties prior to the demotion.[44] While the City correctly points out that the Battalion Chief is himself a bargaining unit member, it remains that the City did not attempt to contradict any of the foregoing testimony through Chief Herman, who did testify as to other matters, or the Deputy Chief, who was not called, or any other witness for that matter.

Instead, the City makes three arguments, which will be dealt with *seriatim*.

The City initially contends that whatever functions the demoted Captains might be performing, the CBA requires that an "assignment" by a superior must be made before out-of-title pay can accrue, and that no Captains have been specifically assigned to the rescue or ladder trucks. It argues that assignments cannot be assumed by the employee, but rather must be formally mandated by the employer.

Employees cannot, in ordinary circumstances, essentially "volunteer" themselves into out-of title pay any more than they can volunteer themselves into overtime. Either situation requires the *imprimatur* of the employer before an obligation to pay will accrue. The issue, then, is whether that *imprimatur* can be found in the record presented herein, or whether the employees are attempting to "bootstrap" themselves into additional compensation. In this regard, I find that the record clearly establishes an explicit or implicit assignment of the demoted Captains to the work they previously performed as Captains.

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[43] Tr. 356.
[44] Tr. 427-31.

First, testimony established that even after issuance of revised SOP 1.25, the Battalion Chief consistently notified the demoted Captains that they were likely to be the person who would be promoted to acting Captain; that their names were at the top of the posted daily run sheets, which is where the officer always had been listed; and that they were in fact assigned by the Battalion Chief to the front, right-hand "officer's" seat on a daily basis.[45] Second, as already discussed above, the demoted Captains were plainly continuing to do what theretofore had been Captain's work – as is made clear not only from the testimony but through a comparison of the job descriptions promulgated for "Firefighter" and "Fire Captain"[46] – and in fact, such performance was an expectation on the part of the City. While the City strenuously contends that an expectation is not tantamount to an "assignment," an expectation certainly can be one of the criteria by which an assignment is measured.[47] Here, the Battalion Chief(s) certainly expected the demoted Captains to make operational decisions and perform operational supervision over firefighters on the apparatus.[48] Moreover, to borrow a phrase from adverse possession law, the duties being performed by the demoted Captains were "continuous, open and notorious." This was not some one-off of which the City might not have had notice. The City did not remove the ladder and rescue trucks from operation, so there was no curtailment of service. As a result, *someone* had to do the Captain's work on those apparatus when they were on call, and the City

[45] Tr. 187, 283-4, 388, 476, 497-98.
[46] Un. Exs. 1 and 3. Work activities listed in the Fire Captain job description include: "Supervises activities of a fire company members at the station, and at the scene of a fire, other emergency or company assignments," and "Directs fire suppression, rescue, laddering, ventilation, salvage and overhaul operations during and immediately following a fire."
[47] See *Armco*, 94 LA 1147 (Strongin, 1990), at 1149.
[48] Tr. 273, 277, 293, 359, 370, 427-30.

certainly knew who was doing it. Third, and directly related to the last point, the demoted Captains were never told *not* to perform these duties, or to make these operational determinations or to supervise the firefighters on their rig, despite their regular performance of these tasks, and were never reprimanded or disciplined by the Chief or any other City officer for these actions.[49] As Naklick succinctly concluded:

> "I've never been directed to stop acting in the manner that I do. It's expected when I come to work that I'm going to sit in that seat, I'm going to act like a captain."[50]

In sum, this was not an attempt by the employees to "unilaterally" assign themselves into out-of-title work. The foregoing circumstances demonstrate if not an outright "formal" assignment by the City, then certainly outright condonation and an implicit or tacit assignment that I find is clearly sufficient to constitute an "assignment" within the meaning of the CBA.

The City next contends that under revised SOP 1.25, operational control and supervision for the ladder truck was specifically assigned to the Engine 1 Captain, and to the Battalion Chief for the rescue truck. It additionally introduced numerous other SOPs that it claims contain detailed instructions on how firefighters should operate under different scenarios.[51] The problem for the City is that whatever its SOPs nominally purport to dictate, actual practice as established by the record is far different. Testimony firmly established that the Engine 1 Captain and Battalion Chief cannot, or do not, make or perform the operational determinations and tasks attendant to the ladder and rescue trucks, either due to their lack of physical presence or proximity to the fire scene, the responsibilities they have for their own apparatus, or the overall

[49] Tr. 273, 368-70.
[50] Tr. 370.
[51] Er. Ex. 13.

command tasks for which they are otherwise responsible.[52] As Battalion Chief Kellogg testified:

> "...my job is to be at the command post to manage the entire scene. I cannot focus on one company when I have multiple companies out doing jobs. My responsibility is for the whole – all of my companies, the whole scene. I cannot do that from a location within or on the building."[53]

As for the operational SOPs, it is evident from testimony and the documents themselves that they provide guidance on safety, tasks and objectives, and are not detailed "how-tos" intended to substitute for the professional discretion and judgment that Captains need to make on an incident to incident and sometimes split-second basis.[54] As Naklick testified regarding an SOP dealing with structural fire response and the ability of a firefighter, as opposed to a Captain, to read that SOP and know how to perform:

> "...there's quite a bit to correctly spotting an apparatus. It's not something they teach in the basic fire academy....If you look at the policy, the policy states...this is what you're going to do. It doesn't say this is how you're going to do it. That is the job of the company officer, to figure out the how....You can't read that as a firefighter and say, well, it says ladders so – well, yeah, what do you do with the ladders? Well, it depends on the situation. Are we going to rescue someone? Are we going to ventilate the building? How are we going to conduct the ventilation?...Are we going to use positive pressure? Negative pressure?...You need to know what you're doing. That's not something a basic firefighter –"[55]

Finally, the City contends that under revised SOP 1.25, the Battalion Chief "may, when additional command and control is required beyond the capacity of existing officers, assign a Firefighter(s) to Acting Captain status," and that he has done so on a number of occasions when "circumstances warranted" or were "severe enough." There

[52] Tr. 230-31, 263-65, 269-70, 336-39, 360-66, 428-29, 431-32, 435.
[53] Tr. 432.
[54] Tr. 297-98, 351-52.
[55] Tr. 351-53.

are a number of problems with a defense based on this practice, known colloquially as "shazam".[56] First, it is clear that "shazaming" was transactionally based on the severity of the call, rather than simply on whether captains' duties were in fact performed.[57] The fact that such upgrades by the Battalion Chief were subject to the City Manager's approval, and that she would frequently deny them,[58] makes this doubly evident. While the Arbitrator is well aware of the strains on municipal budgets and is sympathetic regarding the pressures on local officials to manage finances, the contractual right to out-of-title pay, like salary or any other contractual right, is not subject to the fiscal predilections of an administrator, no matter how well-intentioned he or she may be, unless the contract so allows. The City cannot, absent contractual authority, relegate out-of-title pay to a reward based on perceived severity and the willingness of an official to make resources available.

Second, it was made apparent that upgrades by the Battalion Chief were almost never made prior to a response or at the scene, but nearly always sometime after the work had been performed.[59] This was attributable, as noted previously, to the fact that the Battalion Chief might well have been absent from the scene, or was understandably preoccupied with accomplishing his own command function at the scene.[60] As a result,

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[56] Tr. 284, 433.
[57] Tr. 329-30.
[58] Tr. 190, 273-74, 433-34.
[59] Tr. 272, 284, 330, 341.
[60] A strikingly similar fact pattern was presented in *Borough of Saddle River*, 106 LA 684 (DiLauro, 1996). There, both after the death of a sergeant and then, after a sergeant position was abolished, police officers below sergeant rank performed the former sergeant's road supervisor duties. The employer claimed a Lieutenant was available to perform the supervisory duties, but the Arbitrator adopted the Union's position that the individuals "continue to be held to a greater level of responsibility than a regular police officer at the scene of an incident," and that the Lieutenant had overall second-in-

the demoted Captains could not simply wait to perform captain's duties until they were shazamed, not with the potential loss of life and property on the line.[61] They had to perform those functions, and hope an upgrade would later be forthcoming.

Finally, the City notes that the Battalion Chief, a unit member, was required by SOP 1.25 to file certain paperwork each time he sought to upgrade a Firefighter to Acting Captain status, and failed to do so for all occasions on which the Union is claiming a right to out-of-title pay. Initially, it must be noted that the Battalion Chief's compliance or noncompliance with an SOP unilaterally promulgated by the City might have repercussions for the Battalion Chief, but would not in and of itself govern whether or not a Firefighter is entitled to out-of-title pay. More important is that the Battalion Chief on many occasions was not at the scene and therefore not in a position to file a first-hand upgrade recommendation, and above all, believed that regular upgrades to Acting Captain would simply be denied by the Chief or City Manager. In fact, as noted earlier in the discussion on procedural arbitrability, the Chief testified that "[t]he manager made...quite clear, that she didn't want any captains on the truck or the rescue."[62] Both Ormsby and Naklick testified they were told by the Battalion Chief that he was no longer putting in for upgrades as often due to the frequency of denial.[63] Again, as Naklick testified:

> "I had a conversation with Chief Timmerman about it, and I questioned him directly why I haven't been shazamed as much as I had before. And he said quite frankly it's because it's just going to get denied by the chief or the City

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command duties and thus was often not on-scene and "frequently unaware of an incident until he reports for duty on his next shift" (at 689).

[61] Tr. 349-50, 515

[62] Tr. 418.

[63] Tr. 293, 341-42.

> Manager anyways so I just don't do it because I feel bad that you're going to do the work and not get paid for it...."[64]

Battalion Chief Kellogg himself agreed that the demoted Captains perform the captain's work whether he shazams them or not.[65]

The City did not call any of its own witnesses in an attempt to rebut or refute any of the testimony offered by any of the Union's witnesses. In light of the foregoing discussion, I find that the demoted Captains on ladder and rescue continued to perform the same operational duties and supervisory functions that they had performed prior to the date of demotion, and that the City, at the very least, condoned, permitted, expected and tacitly or constructively assigned them to perform those tasks.

AWARD

The grievance is arbitrable, and is sustained on the merits.[66] The City violated Article 4, Section 3a of the CBA when it failed to pay out-of-title pay to one Firefighter assigned to the ladder and one Firefighter assigned to the Heavy Rescue on each shift[67] from July 29, 2016 and going forward, and is ordered to provide back pay in accordance with the following:

Due to the settlement previously reached between the parties, back pay is awarded from April 1, 2017. Neither this Award, nor back pay, is intended to cover any

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[64] Tr. 341-42.
[65] Tr. 436.
[66] Nothing in this Decision and Award should be read as dealing in any way with the *propriety* of the City's decision to abolish the eight Captain positions. It simply says that if the City makes that decision, it cannot then make Firefighters assume the Captains' duties without providing them with out-of-title pay.
[67] The record appears to establish that acting captains were paid for an entire shift when so designated. Tr. 441, 443. If not, the Award is intended to cover payment for whatever period of time constituted the prior practice.

shifts when a Firefighter on the Truck and/or Heavy Rescue was assigned as an Acting Captain, nor any shifts during which demoted Captains remained at Station 1 and therefore did not respond to an alarm or call, nor any shifts during which demoted Captains were solely performing ministerial, clerical or administrative functions such as signing for packages or receiving phone calls, nor any shifts during which the City can establish that the Battalion Chief or Engine 1 Captain, rather than a demoted Captain, actually took on the *de facto* operational and supervisory functions of a ladder or rescue Captain at an incident scene, as opposed to a command function.

The Arbitrator will retain continuing jurisdiction over the remedial aspects of the Award for sixty (60) days.

AFFIRMATION

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

I, Richard A. Curreri, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this Instrument, which is my Award.

RICHARD A. CURRERI

Dated: August 21, 2018
Voorheesville, New York