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132 LA 1188
City of Toledo
Decision of Arbitrator

FMCS Case No. 12/0512-02537-6

November 25, 2013

In re CITY OF TOLEDO and TOLEDO FIREFIGHTERS, LOCAL 92

Arbitrator(s)

Arbitrator: Hyman Cohen, selected by parties through procedures of the Federal Mediation and Conciliation Service

Headnotes

LEAVES OF ABSENCE

[1] Compensatory time — Contract rights and duties ▸100.5201 ▸100.4801 ▸100.0235

Collective-bargaining agreement stating that "upon reasonable request" for compensatory time shall be granted, whenever possible request "shall be made at least two tours prior to requested days off," and compensatory time shall be granted when "forecasted manpower strength" for time requested is at least two members above minimum manpower, means that comp time must be granted when request is made "at least two tours prior" to requested time off and at that point in time forecasted manpower strength is sufficient, since city's position that manpower request can only be determined at least two tours prior to requested time off would eviscerate language allowing request "at least" two tours prior to requested time off.

[2] Compensatory time — Contract rights and duties ▸100.5201 ▸100.4801 ▸100.0235

City violated collective-bargaining agreement when it denied firefighter's request for compensatory time off made three months in advance of day requested, despite chief's claim that database used to track staffing required such forecast take place only "two tours prior" to comp time requested, where database allows manpower forecast at any point in time, clear language of agreement has existed for 25 years providing that request must be granted when, "at least two tours prior" to requested time off, it is submitted and "forecasted manpower strength" is at required level, and record shows four prior instances when comp time was granted in advance of "two tours prior" to date requested.

[3] Compensatory time — Contract rights and duties — Administrative procedures manual ▸100.5201 ▸100.4801 ▸100.0235 ▸24.111

City violated collective-bargaining agreement, which provides that compensatory time must be granted when request is made "at least two tours prior" to requested time off and "forecasted manpower strength" is at required level, when it denied firefighter's request for compensatory time off made three months in advance of day requested, even though fire department administrative procedures manual states that senior battalion chief notifies other chiefs during morning conference call whether staffing numbers allow for advancing time off to line fighters for next two tours of duty, where unilaterally-issued manual cannot override conflicting provision in agreement.

[4] Compensatory time — Contract rights and duties — Management rights ▸100.5201 ▸100.4801 ▸100.0235 ▸100.03

City violated collective-bargaining agreement, which provides that compensatory time must be granted when request is made "at least two tours prior" to requested time off and "forecasted manpower strength" is at required

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level, when it denied firefighter's request for compensatory time off made three months in advance of day requested, despite contention that fire chief retains right to determine method for generating manpower strength forecast under contract provision stating that except as otherwise provided, city retains rights and duties under city charter to operate and direct fire department, where city's right to determine such forecast for day is limited by language of agreement.

[5] Compensatory time — Contract rights and duties — Ohio statute — Authority of arbitrator ▸100.5201 ▸100.4801 ▸100.0235 ▸100.30 ▸100.0764

City violated collective-bargaining agreement, which provides that compensatory time must be granted when request is made "at least two tours prior" to requested time off and "forecasted manpower strength" is at required level, when it denied firefighter's request for compensatory time off made three months in advance of day requested, even though Ohio Code provides that it does not impair right of public employer to maintain efficiency and effectively manage workforce, where this is qualified by language "unless public employer agrees otherwise in collective-bargaining agreement," and arbitrator lacks authority to resolve grievance on basis of external law.

[6] Compensatory time — Contract rights and duties — Remedy ▸100.5201 ▸100.4801 ▸100.0235 ▸100.559501

No remedy is required for city's violation of collective-bargaining agreement when it denied firefighter's request for compensatory time off made three months in advance of day requested, where there was no harm to grievant because he was off work on day requested as he traded his shift with another firefighter.

Attorneys

Appearances: For the employer—Michael Kyser and Anthony Markwood, city law department attorneys. For the union—Donato Iorio (Kalniz, Iorio & Feldstein), attorney.

Opinion Text

Opinion By:

COHEN, Arbitrator.

On or about April 18, 2012, the **TOLEDO FIREFIGHTERS, LOCAL 92,** the **"Union",**on behalf of **DANIEL J. DESMOND,** filed a grievance with the **CITY OF TOLEDO, OHIO,** the **"City",**in which it protested the City's denial of the Grievant's April 13, 2012 request for comp time on July 21, 2012. After the grievance was processed at subsequent levels of the grievance procedure, it was eventually submitted to arbitration, pursuant to the Labor Agreement of the parties.

Factual Discussion

The City and the Union have been parties to a series of successive Collective Bargaining Agreements. The current Agreement is effective January 1, 2012 through December 31, 2014. The Union represents approximately 475 Firefighters in the ranks of Private through Captain.

The Grievant, a Private, has served as a Line Firefighter for roughly 24 years. He has been Vice President of the Local Union for close to five (5) years; and has been a member of three (3) negotiating teams.

On April 13, 2012, the Grievant requested the use of 24 hours compensatory time for July 21, 2012. Later that day, Battalion Chief Christine Davis denied the Grievant's request stating in an e-mail that "We are not authorized to grant Comp Time this far in advance". The "policy at this time is two (2) tours in advance".

Chief Santiago affirmed the denial of the grievance and stated in his letter to the Grievant, dated April 20, 2012 that the grievance "was premature". Also, he indicated the following:

> "The 'forecasted manpower strength for the day and shift does not take place until 2 tours prior. You requested a compensatory day of July 21, 2012 and your request was submitted on April 13, 2012. The forecast is

> not available yet. What is reflected in the Crystal Vision data base at the time is simply scheduled days off. What is reflected 2 hours prior is scheduled days off along with extended sick and injured as well as miscellaneous details such as military leave and union release".

Chief Santiago concluded his letter to the Grievant, by stating that the "grievance will be evaluated 2 tours prior to July 21, 2012". A further appeal of the denial of the grievance was submitted to Deputy Mayor for Public Safety and Personnel, Shirley L. Green. By letter dated May 7, 2012 to the Grievant, she concurred with Chief Santiago that the grievance "was premature". As a result, the dispute was submitted to arbitration.

Discussion

The City and the Union stipulated the issue as follows:

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> "Did the City violate the collective bargaining agreement when it denied Grievant, Private Daniel Desmond's request to use 24 hours of compensatory time? If it did so, what is the proper remedy?"

I. ARTICLE 2125.66

The dispute between the parties is over the interpretation and application of Article 2125.66 of the Agreement, which in pertinent part, provides as follows:

> "2125.66 Compensatory Time
>
> An employee who has worked overtime shall be allowed to receive compensatory time off at the overtime rate in lieu of pay if he/she so elects. Upon reasonable request by the employee, days off, accumulated due to overtime, shall be granted. Whenever possible, the request shall be made at least two (2) tours prior to the requested days off unless an unforeseen emergency makes it impossible for the employee to give such notice.
>
> Compensatory time off shall be granted to members of the fire fighting platoons whenever the forecasted manpower strength for the day and shift requested is at least two (2) members above the minimum manpower established for the entire City * * *".

Before proceeding further, it would be helpful to clarify the terms, "compensatory time off', "tour" and "forecasted manpower strength", which are contained in Article 2125.66.

The Grievant explained that "compensatory time off" occurs when an employee, who has worked overtime, elects to receive comp time off in the future at the overtime rate in lieu of pay for the overtime worked on the particular day. A "tour", is one 24-hour on-duty shift followed by 48 hours off duty.

Furthermore, Article 2125.58 of the Agreement sets forth the minimum daily line strength to be one hundred and three (103) members. Two (2) members above the minimum manpower strength, therefore, are one hundred and five (105) members. Accordingly, the "forecasted manpower strength" for the day off requested is required to be "at least" 105 members.

The City states that the Grievant's request on April 13, 2012 for comp time off, nearly three (3) months before July 21, 2012 cannot be granted under Article 2125.66 because the City has not created "forecasted manpower strength" for July 21. According to the City, the Union relies upon the sentence in the first paragraph of Article 2125.66 which provides "Upon reasonable request by the employee days off * * shall be granted". The City goes on to state that the terms of the second paragraph modifies the "reasonable request" sentence by declaring that comp time shall "only" be granted "whenever the forecasted manpower strength for the day requested is at least two (2) members above the minimum manpower" required, or at least 105 members.

The City's position which refers to the Union's claim under Article 2125.66 is useful for the purpose of advocacy rather than for the purpose of contract interpretation. The "reasonable request" sentence is not relied upon by the Union in this dispute. Rather, the Union relies upon the sentence in the first paragraph which provides, "Whenever possible, the request shall be made '*at least two (2) tours prior*' to the requested days off unless an unforeseen emergency makes it impossible for the employee to give such notice". [Emphasis added.]

Thus, the terms "reasonable request" in the first Paragraph is defined by the parties by the "at least

two (2) tours prior" sentence. This sentence establishes when the request for comp time off is made by an employee.

The importance of the request being made "at least two (2) tours prior" to the requested day off is preceded by the words "[W]henever possible", or when the member is capable of submitting the request "at least two (2) tours prior". The parties then underscored that the request is to be made "at least two (2) tours prior * * unless an unforeseen emergency make it impossible" to provide such notice. Thus, submitting a request "at least two (2) tours prior" is under a severely restrictive and limited exception consisting of an "unforeseen emergency" which "makes it impossible" to provide such notice.

[1] Article 2125.66 provides in clear and unequivocal terms, that a member is to submit a request for comp time "at least two (2) tours prior" to the day off requested. These terms of Article 2125.66 indicate more than a strong preference when the request for comp time is to be made. The request is "at least", or no less than "two (2) tours prior to the requested comp time off unless an unforeseen emergency", makes it impossible to provide such notice. These terms indicate that when the request for comp time off is to be made, it is as close to a requirement as language could provide.

The second paragraph clearly provides that comp time off is to be granted to members whenever the "forecasted manpower

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strength" for the day and shift requested is "at least two (2) members above the minimum manpower" or "at least" 105 members. Unlike the first paragraph which emphasizing when the request for comp time off is to be submitted "at least two (2) tours prior" to the requested comp time off, the second paragraph underscores that the "forecasted manpower strength" of the day requested must achieve a level of 105 members.

As a "forecast" and in light of the language used—"whenever the forecasted manpower strength for the day and shift requested"—meets the required level of 105 members, I have concluded that the "forecasted manpower strength" must also be established "at least two (2) tours prior" to the requested comp time off. When both conditions in Article 2125.66 are satisfied, comp time off is to be granted.

The importance to the parties in emphasizing in Article 2125.66 that the request is to be made "at least two tours prior" must apply harmoniously with and is interrelated to the level of "forecasted manpower strength" required in order for comp time off to be granted. Thus, "at least two (2) tours prior" to the requested comp time off, the request for such time off must be submitted and the level of "forecasted manpower strength" required, must be established in order to be granted comp time off.

To conclude otherwise would mean that the parties agreed under the most stringent exception that the request for comp time off is to be made "at least two (2) tours prior" to the requested time off but, as the City contends, the language requires that the "forecasted manpower strength" is to be established "two (2) tours prior" to the requested time off. It is highly unlikely, that the parties agreed to the severely restrictive conditions that the request is made "at least two (2) tours prior" to the requested time off only to ignore such language by indicating that the "forecasted manpower strength" is to be established "two (2) tours prior" to the requested time off.

Moreover, the determination of "forecasted manpower strength" is consistent with the request being made "at least" or no less than "two (2) tours prior" to the requested comp time off. At such time, "at least two (2) tours prior", the manpower strength for the requested day off constitutes a forecast—or an estimate. If the "manpower strength" is required to be determined two (2) tours in advance of the requested comp time, as claimed by the City, it is no longer the "forecast" contemplated by Article 2125.66. As an estimate it is consistent with determining manpower strength "at least two (2) tours prior" and not merely "two (2) tours prior" to the requested comp time off as claimed by the City.

Were I to sustain the position of the City, it would eviscerate the "at least two (2) tours prior" language of the first paragraph of Article 2125.66. The terms of "at least two (2) tours prior" and "forecasted manpower strength" are interrelated. Accordingly, comp time off under Article 2125.66 is to be granted when the request is submitted "at least two (2) tours prior" to the requested time off, and the "forecasted manpower strength" required for the time off is to be "at least two (2) members above the minimum manpower" established or at least 105 members.

II. FORECAST FOR JULY 21, 2012—"CRYSTAL VISION"

The Grievant supported his April 13, 2012 request for comp time off on July 21, 2012 by submitting to the City "a staffing sheet" obtained from the staffing office which showed that on July 21, the staffing level to be at least 105; or two (2) members above the minimum staffing for the entire City. The

Grievant described the staffing sheet as an Excel spreadsheet that was generated by a "Crystal Vision" database. The spreadsheet was generated prior to April 26, 2012 when the grievance was appealed to the Safety Director, Shirley Green.

As I have previously stated, in denying the grievance by letter to the Grievant, dated April 20, 2012, Chief Santiago indicated that the "forecasted manpower strength" for the day and shift does not take place until "two (2) tours prior" to the day or comp time off requested. Moreover, he stated that the "forecast is not yet available".

This brings me to consider the Grievant's testimony with respect to scheduling for the Fire Department and the subject of "forecasting manpower strength". According to the Grievant, the work schedule for the members is set a year in advance from January 1 through December 31. The schedule is planned and drafted during the final quarter of the previous year. The Grievant said that at the beginning of the year he knew whether he was working on December 31.

The Grievant described Crystal Vision as a computer software program utilized by the Department that contains data. From that data, an Excel spreadsheet is generated in order to determine the staffing for the day. The data inputted,

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according to the Grievant are such factors as "vacation days scheduled", "Kelly Days", "long term sick * * they input just about any data they want to into Crystal Vision * * as far as how they want to do their staffing for the year". Such input determines the forecast for July 21, 2012, the date the Grievant requested comp time off.

Chief Dave Dauer is a Battalion Chief and has served as Chief Financial Officer since January 2011. He said that he was involved in the development of Crystal Vision. The program, he stated was developed in approximately 1996.

Chief Dauer said that over the years, the Department has used different forecasting tools and Crystal Vision "happens to be the most recent one". He added that "our intent is to get out of it totally". Microsoft stopped support for the program, according to Chief Dauer.

Documentation was submitted by the City consisting of Excel spreadsheets, beginning with July 18, 2012, which contrary to Article 2125.66 is three (3) days before the requested comp time off sought by the Grievant. The documents indicate four (4) changes in the manpower strength for July 21.

In light of the unequivocal terms of Article 2125.66, Chief Dauer's testimony cannot be given much if any weight. It bears repeating that under Article 2125.66 the request for comp time must be made "at least two (2) tours prior" to the requested day off when the "forecasted manpower strength" for the comp time off requested is at 105 members.

[2] The Excel spreadsheets which Chief Dauer referred to were dated a few days before July 21, 2012 when the Grievant sought the comp time off. Contrary to the clear and unequivocal language of Article 2125.66, the spreadsheets failed to provide data on manpower strength "at least two (2) tours prior" to the comp time off which the Grievant sought. It is significant that Chief Dauer failed to identify the forecasting program, or whether any forecasting program was used to generate the Excel spreadsheets prior to, or within three (3) days of July 21, 2012.

In this connection the terms of Article 2125.66 are clear in providing for "forecasted manpower strength". The forecast is an estimate of manpower for the comp time off requested. The terms "forecasted manpower strength" in the Article are not qualified by "accurate", "best", "reliable" or "efficient". A forecast is an estimate, plain and simple.

Chief Dauer said that "in my opinion, especially as we look at things now, Crystal Vision was never built to be a forecasting tool. It was built only as a scheduling tool * *". However, I take constructive notice that the word or function of "scheduling" is often used with the word "forecast". Scheduling may be referred to as a "planned operation" or a "timed plan for a procedure or project". Whereas "forecast" is "to estimate" or to "calculate in advance".

It would seem that a schedule may be based upon a forecast which is an estimate. But this academic exercise may be irrelevant, since it is of great weight that Chief Dauer acknowledged that Crystal Vision "happens to be the *most recent forecasting tool used by the City*". Emphasis added.

According to both Chief Dauer and Deputy Chief Gary Martin, there are too many variables to be included in Crystal Vision in order to determine "forecasted manpower strength". Based upon an example of a Crystal Vision forecast, Chief Dauer said that the "numbers can be off [by] 10 to 15 people every day". Moreover, Deputy Chief Martin acknowledged that granting comp time "at least two (2) tours prior" would inhibit the Department's "ability to hit the normal 103 * *."

The City contends that the "forecasted manpower strength" when the request is made "at least two (2) tours prior", is not reliable because all the variables are "not pulled off the database" for the comp time off that is sought. The "variables" include "Union release, military leave, sick time, long-term sick time, abuse of sick time, vacation, Kelly days, injury [and long-term injury]".

However, Article 2125.66 is not a recently negotiated provision in the Agreement. The language providing for "at least two (2) tours prior to the requested days off" as well as the "forecasted manpower strength" language has existed, unchanged, for twenty-five (25) years. During this period of time, or a significant part of this period of time, the variables set forth above, have been present without challenge or protest by the City with respect to the "at least two (2) tours prior" and "forecasted manpower strength" language.

The City contends that "the number of variables that impact staffing levels go beyond vacation and Kelly days" which is the only variables included in the Crystal Vision software. However, the Grievant stated, that depending upon the data inputted, the Department may determine the "forecasted manpower strength" for a particular day. As the Grievant

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indicated, the data inputted and generated on the Excel spreadsheet from Crystal Vision, included "vacation days, Kelly days, long-term sick and just about any data the Department wants to include" in Crystal Vision. In addition, as I have previously stated, Chief Dauer acknowledged that Crystal Vision was the "most recent forecasting tool used by the City".

There is no question that as the forecast draws closer to the requested time off, the City is better able to determine more accurately the manpower strength. But Article 2125.66 which controls this dispute cannot be unilaterally modified by the City. Clearly, the City's position is contrary to the clearly expressed and unequivocal language of Article 2125.66, which provides for the request to be submitted "at least two (2) tours prior" when "forecasted manpower strength" is to be at the required level.

The City contends that there is no language in Article 2125.66 dictating how, when or by what means, the City must generate the "forecasted manpower strength". Also, the City indicates that Article 2125.66 does not require the City to grant the use of compensatory time before the manpower strength is forecasted. In this case, the City further contends that the Grievant submitted a request prior to the manpower forecast for July 21, 2012. Pursuant to the Article in question, the City claims that the Grievant's request could not be granted until the "forecasted manpower strength" accurately showed the minimum manpower would be at least 105 members.

The facts of this case establish that on April 13, 2012, the Grievant requested comp time off on July 21, 2012. In support of his request, the Grievant relied upon the Excel spreadsheet generated by Crystal Vision, the City's "most recent forecasting tool". The City failed to disclose the identity of any forecasting tool it had used, except that Excel spreadsheets on July 18, 2012 established four (4) changes to manpower strength on July 21, 2012. Thus, in compliance with Article 2125.66, the Grievant made his request on April 13, 2012, "at least two (2) tours prior" to July 21, 2012, when the "forecasted manpower strength" was at least 105 members.

The City's defense is that comp time cannot be granted until the City creates the "forecasted manpower strength", which occurs "two (2) tours prior" to the requested days off. However, Article 2125.66 requires a "forecasted manpower strength" no less than or "at least two (2) tours prior" to the requested time off. Clearly, the City failed to establish "forecasted manpower strength" as required by the terms of Article 2125.66. Accordingly, the Union carried its burden of proving by a preponderance of evidence, that the Grievant satisfied the requirements in Article 2125.66.

Were I to sustain the position of the City, it would be contrary to the terms of Article 2125.66 as written and agreed upon by the parties. I cannot engage in the re-writing of the Agreement which the parties entered into. The appropriate place for altering the writing of a contract is for the parties to engage in doing so, at negotiations.

III. PRIOR INSTANCES

Before considering prior instances when requests for comp time were made "at least two (2) tours prior" to the requested comp time off, which was also when the "forecasted manpower strength" was apparently reached, it should be pointed out that the terms of Article 2125.66 have been reaffirmed with each successor Agreement since 1988, including the current Agreement, negotiated in March 2012.

Just a month thereafter, the City denied the Grievant's request, in part, because the request was not made "two (2) tours prior" to the requested comp time when the "forecasted manpower strength" is

to take place. Clearly, the City's position is contrary to the agreed upon terms of the bargain reached with the Union in March, 2012, as well as their experience with the terms of Article 2125.66 for twenty-five (25) years.

[3] Undisputed evidence established prior instances when comp time was granted to employees, as required by Article 2125.66. Thus, in the following instances, comp time off was granted: a) on July 5, 2011 the Grievant requested comp time off on December 23, 2011; b) on March 23, 2012 the Grievant requested comp time off on May 25, 2012; c) on October 15, 2011 T. Bolger requested comp time off on November 14, 2011; on June 8, 2011 Lt. R. Murd requested comp time off on December 26 and 29, 2011.

The City failed to explain the reason for granting comp time off in these instances. It is especially significant that in the situations involving the Grievant's request on July 5, 2011 and Lt. Murd's request on June 8, 2011, the "forecasted manpower strength", apparently, was established some five (5) to six (6) months before the requested comp time off.

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In granting comp time off in these four (4) situations, the City complied with the clear and express terms of Article 2125.66. It is also of great weight that the City failed to submit into the evidentiary record a single instance in which comp time was required "two (2) tours prior", and the "forecasted manpower strength" was established "two (2) tours prior".

Parenthetically, it should be noted that the instances in which comp time were granted do not establish a practice. Past practice is a useful principle in order to establish an implied term of the contract, which is not present in this case. In this case, the express terms of Article 2125.66 are clear and unequivocal in stating that "the request shall be made" "at least two (2) tours prior" to the requested days off" which is also when the "forecasted manpower strength" of 105 members is established. The Union's claim of a past practice is not applicable in light of the clear and unequivocal language of Article 2125.66.

IV. "POLICY CHANGE"

Deputy Chief Martin was promoted to his position as Deputy Chief of Operations in July, 2011. Until July, 2011, he said that "it has been done" that a member was granted comp time off if the member requested such comp time off "at least two (2) tours prior". It is important to underscore again, that the City's "two (2) tours prior" claim has never "been done" before the events giving rise to this grievance. In other words, there is nothing in the evidentiary record that the City deleted the "at least two (2) tours prior" language and applied its claim of "two (2) tours prior" to the requested days off.

Moreover, Deputy Chief Martin failed to explain the four (4) instances when comp time was granted after he was promoted to his current position on July, 2011. The City's position was also seriously undermined by Deputy Chief Martin when he was asked on cross-examination whether there was a "policy change" from receiving a request for comp time off when the request is made more than two tours in advance of the requested days off and he said, "Correct". He was then asked, "And that was negotiated with the Local [Union], Correct?" and he replied, "I don't feel that it needed to be, no".

The sanctity of a collective bargaining agreement cannot be so easily undermined by Deputy Chief Martin in referring to an alteration of negotiated agreed upon terms, which has been included in successively negotiated Agreements for twenty-five (25) years. By indicating that the City need not negotiate with the Union over a "policy change" is of no assistance to the City. A "policy change" is no more than a euphemism and may be considered less offensive than a "change in contractual language", but in fact such change occurred.

To sustain the City's position in this case would reduce contract negotiations to meaningless and idle talk. It is well established that the City's action in unilaterally changing the terms of a collective bargaining agreement constitutes a violation of the Agreement.

V. ADMINISTRATIVE PROCEDURES AD MANUAL

[4] In support of its "two (2) tours prior" claim, the City referred to the "Toledo Department of Fire and Rescue Operations Administrative Procedures Ad Manual" which was effective February 15, 2003. The Manual, in relevant part, provides that the Senior Battalion Chief notifies all Battalion Chiefs during the morning conference call "if staffing numbers allow for advancing of time-off to line fighters for the present tour or the next two (2) tours of their shift".

It is sufficient to state that "Company-[Employer] issued booklets, manuals and handbooks that have not been the subject of negotiations or agreed to by the Union have been found by arbitrators to

constitute merely a unilateral statement by the [Employer] and [are] not sufficient to be binding upon the Union". *How Arbitration Works*, Seventh Edition by Elkouri & Elkouri (ed. in chief Ken May) (BNA, 2012) at page 9-36.

There is another matter related to the "Administrative Procedures Ad Manual". The Manual was effective February 15, 2003. Since that time, there have been at least four (4) instances which have been referred to, when members made requests in compliance with the "at least two (2) tours prior" to the requested days off, and were granted comp time off as required by Article 2125.66. Thus, the City failed to follow its unilaterally adopted Ad Manual which provides for allowing time off to line firefighters "for the present tour or the next two (2) tours of their shift". Indeed, the City followed the terms of Article 2125.66. The Ad Manual is not entitled to any weight in this case.

VI. ARTICLE 2125.92

Article 2125.92 of the Agreement, which is entitled "Administrative Responsibility", provides

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"*Except as otherwise provided herein*, the City shall retain all rights and duties pursuant to the Charter of the City to operate and direct the Department of Fire and Rescue Operations". [Emphasis added]. The exception to the City retaining all rights and duties under the City Charter to operate and direct the Fire Department, with respect to the granting of comp time is provided in the Agreement, namely, Article 2125.66.

The City claims that the method for generating the "forecasted manpower strength" for a day is reserved to the Fire Chief, who, under the City Charter, is the Director of the Toledo Fire and Rescue Department. The City has the right to determine the "forecasted manpower strength" for a day. However, in doing so, it is limited by the language of Article 2125.66. As I have previously established, the request for comp time off is required under the Article to be made "at least two (2) tours prior" to the requested days off. The only exception to the "at least two (2) tours prior" to the requested days off is an unforeseen emergency which makes it impossible to provide such notice".

Moreover, pursuant to Article 2125.66 comp time is to be granted whenever the "forecasted manpower strength" for the day requested, which is also established "at least two (2) tours prior", to the days off requested, and are at 105 members. There is no language in Article 2125.66 which provides that the "forecasted manpower strength" is to be determined "two (2) tours prior" to the requested day off. To imply such terms in Article 2125.66 would constitute a re-writing of the Article and is contrary to the intent of the parties; and a serious departure from the experience of the parties of twenty-five (25) years.

VII. OHIO REVISED CODE SECTION 4117.08(C)

[5] The City also relies upon Ohio Revised Code Section 4117.08(C) in support of it position. In pertinent part, Section 4117.08(C) provides that unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117 of the Revised Code impairs the right and responsibility of the public employer to "maintain and improve the efficiency and effectiveness of governmental operations" and the right to "effectively manage the work force". Referring to these rights under O.R.C. Section 4117.08(C) the City claims that it has exercised its management right and determined that the most efficient and effective method of forecasting manpower strength for a day is by generating a forecast "two (2) tours prior" to the requested day off.

Rather than belabor the point with respect to the rights and responsibilities of the public employer in 4117.08 (C), which are qualified by the phrase "unless a public employer agrees otherwise in the collective bargaining agreement", it is sufficient to point out that I have no authority as an Arbitrator to resolve this grievance on the basis of law external to the collective bargaining agreement.

This conclusion is reinforced by Article 2125.15, which defines a grievance as "any controversy, complaint, misunderstanding, or dispute arising from the interpretation, application or observance of any of the provisions herein or any supplement, hereto". Thus, the grievance is limited to a dispute under the Agreement. To address issues arising from law external to the Agreement, there is another forum that is more appropriate and better equipped to address such issues.

Conclusion

There are personal benefits to the members for requesting comp time off, "at least two (2) tours prior" to the requested day off. The Grievant has a sister and family living in California, that he would enjoy visiting. In order to use comp time off, the Grievant said he is able to purchase an airline ticket a few months in advance. The cost of the airline ticket is less expensive than the cost of the ticket only "two (2) tours prior" to the requested comp time. In addition, planning for time off, and extending such time off are additional personal benefits to the members.

Another issue raised by the Union is that the refusal to grant the Grievant comp time off was in retaliation by the Department because negotiations in early 2012 were contentious and hostile. It is sufficient to state that given the nature of this case and the reasoning of this decision, I find that the Union's claim to be without merit.

[6] Finally, there is no harm to the Grievant caused by the City's violation of Article 2125.66. The Grievant was off work on July 21, 2012 because he traded his shift with Firefighter Florez. No compensatory time was deducted from his accumulated compensatory time bank for July 21, 2012.

AWARD

Based upon the aforementioned considerations, I have concluded that "the City violated

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the collective bargaining agreement when it denied Grievant, Private Daniel Desmond's request to use 24 hours of compensatory time". Since the Grievant was off work on July 21, 2012, because he traded his shift with another Firefighter, there was no harm caused to the Grievant as a result of the City's violation of Article 2125.66.

The grievance is sustained.

- End of Case -

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