STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of Grievance Arbitration Between:

LOCKPORT PROFESSIONAL FIREFIGHTERS ASSOCIATION, IAFF LOCAL 963,

PERB CASE NO. A2006-028

-And-

THE CITY OF LOCKPORT

Re: Minimum Manning Reduction

Before: Dennis J. Campagna, Esq. – Arbitrator

Hearing Dates: May 9, July 19, July 20, 2007
August 6, 2008, April 24, 2009

Hearing Location: City Hall Conference Room,
Lockport, N.Y.

APPEARANCES

A. For the Union:

Tracy D. Sammarco, Esq., Local 963 Counsel
Samuel Oakes, Local 963 President
Patrick Brady, Local 963 Vice President
Luca Quagliano, Local 963 Secretary/Treasurer

B. For the City

David E. Blackley, Esq., Deputy Corporation Counsel
Thomas Passuite, Lockport Fire Dep't Chief

ISSUE (By Stipulation)

Did the Directive of Fire Chief Passuite dated December 29, 2005 violate Article 3, Section 18 and/or 19 of the current Collective Bargaining Agreement?

If so, what should the remedy be?

RELEVANT CONTRACT LANGUAGE

ARTICLE 3, "ASSOCIATION RIGHTS" at SECTIONS 18 and 19 provide as follows:

18. The parties hereto mutually agree to abide by the "Rules Governing the Fire Department" as updated and amended from time to time.

19. The City agrees that it will man all equipment with adequate manpower to assure that any evolutions the men are called upon to perform can be conducted with enough men to assure the safety of the men performing the evolution.

There is no specific language in the CBA that addresses the issue of minimum staffing.

BACKGROUND

A. The Parties to This Dispute

The City of Lockport ("City") and the Lockport Professional Firefighters Association, Local 963 ("Union") are parties to a Collective Bargaining Agreement with effective dates January 1, 1999 through December 31, 2002. ("CBA" – Joint Exhibit 1) Subsequent to December 31, 2002, the CBA has been extended through as series of Tentative Agreements, each of which is appended to Joint Exhibit 1. This is a dispute over the question of whether the City's decision and implementation of a reduction of the Fire Department's minimum manning from ten (10) to nine (9) firefighters effective on or about midnight, December 31, 2005, violated Article 3, Sections 18 and/or 19 of the CBA.

B. Evolution of the Fire Department's Minimum Manning Requirement

The issue involving minimum staffing at the City's Fire Department began in or around 2002. At that time, total staffing had fallen from a high of approximately 74 Fighters in 1980 to 54 Firefighters in 2002. On or about April 9, 2002, in an effort to perform Fire Department services with fewer Firefighters, and to save money in the process, the Board of Fire Commissioners ("Board") passed the following resolution:

> Motion by Comm. Schrader, resolved that in light of the current fiscal crisis facing the City of Lockport, the Board of Fire Commissioners instructs the Fire Chief, effective April 12, 2002, to reduce the minimum manning level to nine. Be it further resolved that the Board of Fire Commissioners notes said resolution is being adopted over the objection of Chief Passuite. Seconded by Comm. Tracy. Ayes 4. Carried.

(Association Exhibit 1)

There is evidence in the record that the number of Firefighters required for minimum manning per shift, and the number of Firefighters established by the City Budget at that time was ten (10).

As a result of the foregoing Board action, the Union initiated several proceedings against the City including impact negotiations, the filing of an Improper Practice Charge before the N.Y.S Public Employment Relations Board ("PERB") and the filing of various grievances. The matter of minimum staffing was resolved when the City and the Union entered into a "Supplemental Agreement" dated December 10, 2002. Among other things, this 2002 Supplemental Agreement provided for:

- An agreement to "maintain ten (10) man minimum maning (sic) staffing levels, per shift, at all times";
- A no layoff guarantee, and
- A modification of the CBA so as to provide "[t]hat only a maximum of three (3) members of the Bargaining Unit per shift, will be scheduled off per shift . . .", and
- That this 2002 Agreement would "[t]erminate on December 31, 2004."

(Association Exhibit 2)

The foregoing terms of the 2002 Supplemental Agreement were extended by a second Supplemental Agreement dated November 4, 2004. (Association Exhibit 3) This 2004 Supplemental Agreement expired on December 31, 2005 pursuant to the following:

> It being understood and agreed between the parties that provisions of subparagraphs A. B, and C above in this article, are sunset provisions to start January 1, 2005 and to terminate on December 31, 2005, at which time the former provisions in the C.B.A. shall be reinstated unless they (the provisions of A, B, C) are mutually, collectively or individually agreed upon to continue in the future C.B.A.

December 31, 2005 came and went without a mutual agreement to extend or modify the terms of the 2004 Supplemental Agreement.

On or about December 29, 2005, Fire Chief Thomas Passuite issued a "Directive" regarding "Expiration of Sunset Provisions." (Association Exhibit 4) In relevant part, Chief Passuite noted that in light of the expiration of the 2004 Supplemental Agreement, and effective January 1, 2006, the April 9, 2002 directive from the Board reducing minimum staffing levels from ten (10) to nine (9) would be "[r]estored and will remain in effect until such time that it is revisited or amended." The Chief also detailed operational changes that would occur as a result of the reduction in minimum staffing. The instant class action grievance followed.

C. The Instant Grievance and Resulting Arbitration

On or about January 2, 2006, in direct response to Chief Passuite's "Directive" of December 29, 2005, the Union filed a "class" grievance alleging a violation of Article 3, Sections 18 and 19 of the CBA, together with a claim that the City's action as detailed in the Chief's Directive violated "past practice." (Joint Exhibit 2). It was the Union's stated position that such action "[j]eipardizes the safety of citizens and firefighters and is a reduction of services to the tax payers." (Id.)

Unresolved at the lower administrative steps of the grievance procedure, the Union moved the matter to arbitration with a timely Demand to Arbitrate filed with PERB. Pursuant to PERB's Rules of Procedure, the undersigned became the parties' mutual selection to arbitrate this matter. Subsequently, the matter was heard over five separate dates, beginning May 9, 2007, and concluding April 24, 2009. At all times during the hearing process, the parties were accorded and took full advantage of the right to call and examine witnesses, as well as the right to introduce relevant evidence. At the conclusion of the hearings, the parties agreed to summarize their respective positions with the filing of post-hearing briefs ultimately postmarked on July 17, 2009. Upon receipt of said briefs, the proceedings were closed.

POSITION OF THE PARTIES

A. The Union's Position

It is the Union's position that the instant grievance is meritorious and should therefore be sustained. The Union offers the following in support of their position.

First, the Union asserts that it is clear from a reading of Article 3, Section 19 that the City must provide sufficient manpower to assure the safety of its Firefighters. In this regard, the Union suggests that one need not look any further than Addendum "C" of the Department's Standard Operating Procedures which begins with a statement of the Department's Policy "[t]o provide for and operate with the highest level of safety and health for all members." In addition, the Union adds that the uncontested testimony of IAPP President Charles Morello, who served as this Local's President for a number of years, and who negotiated Article 3, Section 19, revealed that the purpose of this Section was to ensure adequate manning in the Department. Adequate manning translates into Firefighter safety the Union adds. Moreover, Mr. Morello added, manning never dropped below ten during his tenure with the Lockport Fire Department. This being established therefore, the Union maintains that the City has created a scenario whereby firefighting evolutions in the Fire Department cannot be performed in a manner which "assures" the safety of the Department's Firefighters. It is clear therefore, the Union notes, that the City's decision to reduce staffing from ten (10) to nine (9) Firefighters violates the City's pledge to assure Firefighter safety as its number one priority.

Next, the Union notes that the City's own witness and representative provided testimony in support of the Union's case. In this regard, the Union notes that Chief Passuite, the City's main witness, objected to the Board's resolution to reduce manning from ten to nine as far back as April 2002, a fact recorded in the resolution itself. Moreover, and consistent with this statement, the Union asserts that while Chief Passuite noted that given the City's peculiarities, the accepted minimum response to a structure fire is fifteen Firefighters, use of a ten Firefighter standard represents the floor below which the minimum staffing number should not go.

Next, the Union references the Stipulation proposed by the City and agreed to by the Union based on a new work schedule consisting of three platoons (down from four) over a twenty-four hour schedule. If accepted, this new schedule would serve to increase manning on each platoon by virtue of the elimination of the fourth platoon and the redeployment of staff among the remaining and reorganized three platoon schedule. If adopted, the new three platoon schedule would assure that staffing levels would not go below ten. Interestingly, the Union notes, the Fire Board developed and voted in favor of this three platoon schedule as a reflection of their concern for the safety of all Firefighters. Such a concern must carry over to the facts of the instant matter the Union maintains.

Next, the Union notes that aside from the noted language in the CBA and City Policy regarding safety, there is no set and adopted standard by which safety can be judged. Accordingly, the Union notes, the testimony and presentation of Union witness Anthony Hynes together with Mr. Hyne's reliance on the NFPA Standards provides credible guidance for use in the instant matter. In this regard, Mr. Hynes provided a thorough review of the multiple industrial and residential structures in the City, together with both known and potential hazards including the presence of a phosgene gas plant, the exposure of multiple, closely packed residential buildings and the prevalence of vacant structures. The sum total of these known and potential hazards resulted in Mr. Hynes drawing the conclusion that the City's reduction to nine Firefighters presented a "grossly unsafe" situation the Union notes.

Based on the foregoing, the Union urges that its grievance be sustained and the remedy requested ordered.

B. <u>The City's Position</u>

It is the City's position that the instant grievance lacks merit, and that the Union failed in its burden to prove that the circumstances at issue warrant a finding that Article 3 has been violated. Accordingly, the City urges a dismissal of the instant grievance in its entirety. The City offers the following in support of its position.

First, the City asserts that the CBA between the parties is totally silent on the issue of minimum manning of the Lockport Fire Department. In addition, the City adds that while the Union relies upon the language of Article 3, Sections 18 and 19 for the relief it seeks, these two sections are not clearly defined.

Next, the City asserts that the Union was unable to show any harm, real or potential, as a result of the reduction of minimum manning from ten to nine. In addition, the City adds that the Union unable to cite to any provision of the CBA that mandates a minimum manning requirement of ten Firefighters.

Next, the City notes that while the Union relied upon the testimony of Mr. Hynes as its "expert" witness, Mr. Hynes' conclusion relied to a great degree on NFPA and other National Standards. However, the City notes, none of these standards have been adopted by the City or any other municipality in New York State. Accordingly, while the City agrees that these standards do exist, reliance on them to support the Union's position regarding the minimum manning requirement of ten Firefighters is misplaced at best. In addition, the City maintains that while Mr. Hynes rendered an opinion regarding the City's minimum manning level, he never set foot in any facility located in the City that he referenced during his testimony, nor has Mr. Hynes ever seen the Lockport Fire Department in action. Accordingly, given these undisputed facts, the City asserts that Mr. Hynes' testimony is suspect and should not be relied upon in this matter.

Next, the City maintains that to everyone's' good fortune, the number of major injuries, (defined as an injury that results in three or more days of missed work), are down substantially from 28-30 in 2000, to 15 injuries to Firefighters since 2003. The City adds that this figure has held firm to the present date. Accordingly, it cannot be said that the reduction of the minimum manning requirement from ten to nine has had a detrimental effect on Firefighter injuries. Nor can any employee claim that he/she has witnessed a loss in income for overtime has been paid out in the order of approximately $300K to the remaining 51 Firefighters since the City implemented its manning reduction effective January 1, 2006.

Finally, the City notes that review of the Staffing Comparison Chart admitted as City Exhibit 1 conclusively establishes that the City of Lockport is on the "high end of minimum staffing in comparison to other similarly situated municipalities when considering, type of Fire Department, budgeted fire fighters, population and square miles."

Given the foregoing, the City urges the denial of the instant grievance in its entirety.

DISCUSSION

A. The Arbitrator's Task in This Matter

This is first and foremost a contract interpretation case. Accordingly, it must be determined whether or not a fair reading of relevant provisions of the CBA, most notably Article 3 entitled "Association Rights", at Sections 18 and/or 19, support the Union's claim that the City's implementation of a reduced manning requirement (from 10 Firefighters per Tour to 9 Firefighters per Tour) represents a violation of these particular Sections. Given this grievance's non-disciplinary nature, it is well established arbitration precedent that the Union carries the burden of proof under the preponderance of the credible evidence standard. Accordingly, in order to prevail, the Union must demonstrate that it is more likely than not that a fair reading and interpretation of Article 3, Sections 18 and/or 19 support its claim.

Arbitrators seek to interpret collective bargaining agreements so as to reflect the intent of the parties. Intent is determined from a review of various sources, including express language (or lack thereof), statements made by the parties to the agreement, bargaining history, and in some cases, past practice.

With the foregoing basic principles in mind, we now review the circumstances that gave rise to the instant grievance.

B. Obligations Under Article 3, Sections 18 & 19

Section 18 provides that the "parties hereto mutually agree to abide by the 'Rules Governing the Fire Department' as updated and amended from time to time." Aside from whatever rules might be promulgated by the Board of Fire Commissioners, to which both parties to the CBA agree to comply, the Union would have this Arbitrator interpret Section 18 so as to include the relevant provisions of the National Fire Prevention Association, Section 1710. However, it is clear that the City has not adopted this or any other National Standards. Accordingly, Section 18 would have no application in the instant matter to the extent urged by the Union. However, Section 19 as agreed upon by the parties places a substantive mandate on the City.

Section 19 provides that:

> The City agrees that it will man all equipment with adequate manpower to assure that any evolutions the men are called upon to perform can be conducted with enough men to assure the safety of the men performing the evolution.

The City urges that Section 19 provides no relief for the Union in this matter since the terminology of Section 19 is not "clearly defined." However, in our analysis of Section 19, we begin with the basic premise that the parties to this CBA surely intended for Section 19 to have some meaning. Otherwise, they would not have exerted any effort to include this language in their Agreement.

To this Arbitrator, Section 19 reflects the Parties' understanding that while the City may possess certain rights to manage its affairs, including those affairs associated with the operation of its Fire Department, that in the exercise of these rights, the City is required to meet certain obligations. These obligations include the requirement of adequate manpower in order to perform those day-to-day and often dangerous assignments with an eye toward efficiency and safety. Indeed, it was IAFF President Morello's uncontested testimony that Section 19, which he negotiated, was designed to ensure adequate staffing in the Department for this very purpose. This being established, there is clear evidence in the record that the Board's decision to reduce the Department's minimum manning requirement from ten to nine was grounded solely for

economic reasons reflecting "[t]he current fiscal crisis facing the City of Lockport". While the prudent use of taxpayer dollars is a laudable objective, Section 19 requires that in the process, the City is obligated to place the safety and well being of its Firefighters first above all else. Respectfully, the City's decision to reduce the Department's manning requirement falls short of this important obligation. This conclusion is supported by the following:

First, I found the testimony of Anthony Hynes significant in that it provided a framework for the analysis of the City's minimum manning reduction decision, particularly in light of Chief Passuite's noted objection to the City's decision. In this regard, Mr. Hynes, who over his nearly 30 years as a Firefighter with the City of Buffalo Fire Department, and who retired from the position of Battalion Chief, provided an independent view of the City of Lockport's known and potential fire hazards. Mr. Hynes began his review with an eye toward the City's "Firefighter Safety and Health Standard Operating Procedure", also referred to as "Addendum B". (Association Exhibit 6) Addendum B begins with the following stated purpose:

> It is the policy of the Lockport Fire Department to provide for and operate with the highest level of safety and health for all members. The prevention and reduction of accidents, injuries and occupational illnesses are the goals of the safety and health program and shall be primary considerations at all times. This concern for safety and health applies to all department members and to any other persons who may be involved in fire department activities.

Mr. Hynes noted that the Fire Department's procedures and strategies were built around this stated purpose. In this regard, the Department has traditionally utilized a minimum staffing number of ten Firefighters, one of which would act as the Dispatch, leaving the remaining nine to perform firefighting and/or rescue operations. Mr. Hynes noted that reducing the complement to nine, with one Firefighter acting as Dispatch, resulted in one Truck being taken out of service continuously, and while the City has not adopted NFPA standards per se, the reduction to nine falls below the nationally recognized and accepted standard for minimum fire suppression staffing requirements. Further, Mr. Hynes noted that the recognized and accepted minimum fire service standard given the types of structure and facilities within the City's borders is fifteen (15) firefighters. In addition, when viewing a complement of eight Firefighters, two are necessarily assigned to Truck 1 as well as Rescue 1. Under the best of all circumstances, Mr. Hynes testified that the system exposes working Firefighters to additional hazards and potential harm over and

above those associated with a complement of ten Firefighters. Moreover, in reality, should the Assistant Chief decide to leave one of the vehicles at the garage and that vehicle is subsequently needed, there is a built in delay of approximately 30 minutes before the vehicle left behind can report to the scene. This time frame could very well result in the delay of fire suppression activities. Given the various hazards present in the City, including the existence of a Phosgene gas facility, the exposure of multiple, closely packed residential buildings, and the prevalence of vacant structure, Mr. Hynes testified that a real or potential delay of any kind is clearly not in the best interest of those Firefighters left to suppress fire activities in a short-handed fashion, or in the best interests of those they serve.

Next, I found the testimony of Chief Passuite both relevant and instructive. In conjunction with an overview of the Department's routine activities, Chief Passuite testified that while the City may have adopted a minimum staffing number of nine, given the leave usage of the members of the Department, particularly where it is possible for up to four Firefighters to be off at any one time, a Platoon of twelve firefighters with four off on various types of leave often results in only eight firefighters left to perform crucial Department services. Where, as here, the City has adopted a staffing level of nine, it is more than possible that each Platoon will always be down by one Firefighter. Accordingly, it is unlikely that the Department will be able to maintain a level of nine Firefighters in the majority of circumstances. Given the potential and often dangerous consequences of operating under staffing, it is understandable why Chief Passuite raised his objection to the Board's decision to reduce minimum staffing requirements. I found this to be a significant factor particularly given the Chief's stated goal of placing the safety and well-being of his staff first and above all.

The sum total of testimony given by Mr. Hynes and Chief Passuite provided persuasive evidence that the minimum staffing reduction from ten to nine is insufficient, in light of all relevant circumstances, to provide the "adequate manpower" necessary to assure the safety and well being of the Department's Firefighters. Accordingly, based on the credible testimony of both Chief Passuite and Mr. Hynes, it is this Arbitrator's conclusion that the adoption and implementation of the December 29, 2005 directive, which implemented the Board's April, 2002 Resolution, violated Article 3, Section 19 of the CBA because it fails to provide adequate

manpower to assure that any evolutions that Firefighters are called upon to perform can be conducted with sufficient staffing so as to assure the safety of all Firefighters performing the evolution.

C. The Appropriate Remedy

Having concluded that implementation of the December 29, 2005 "Directive" violated Article 3, Section 19, there remains a question of an appropriate remedy. In the parties' agreement to the stipulated issue, they agreed to leave the question of an appropriate remedy to the Arbitrator. Accordingly, I find the following to be appropriate measures:

1. The City shall forthwith restore the minimum staffing in the Department to a minimum of ten;

2. Given the fact that the Union has agreed, "in concept" to the terms of three-Platoon system with a 24-hour work schedule, the terms of which were voted upon by the Board on or about March 15, 2007, it would behoove the parties to continue their negotiations over any terms that are associated with this new three-Platoon system. Where an impasse over such terms may exist, the Union reserves its right to resolve any such impasse using the Taylor Law's impasse resolution procedures, including the use of Interest Arbitration.

3. The Union seeks an award for "lost overtime to any firefighter affected by the City's failure to meet minimum staffing". Given the uncontested testimony of Chief Passuite that the use of overtime dramatically increased due to the reduction of the minimum staffing requirement (resulting in the payout of approximately $300,000 over a two year period), it has not been established that bargaining unit members have witnessed a loss in income and that such loss is directly attributable to the reduction of the minimum staffing number. Accordingly, the Union's request for overtime is respectfully denied.

4. Finally, as requested by the Union, the Arbitrator shall retain jurisdiction in this matter in order to resolve any issues that might arise during the implementation of this Remedy.

CONCLUSION AND AWARD

For the reasons noted and discussed above, it is the Conclusion of this Arbitrator that implementation of the December 29, 2005 Directive violated Article 3, Section 19 of the CBA. As a remedy, the City is directed to take the measures noted in the Remedy section at page 12 above.

I, Dennis J. Campagna, do hereby affirm upon my oath as Arbitrator, that I am the individual described in and who executed this instrument, which is my Award.

OCTOBER 7, 2009
Date

Dennis J. Campagna
Dennis J. Campagna, Arbitrator