NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Arbitration	*	
	*	
between	*	
	*	OPINION
Endicott Professional Firefighters IAFF, Local 1280	*	
	*	AND
and	*	
	*	AWARD
Village of Endicott	*	
	*	
PERB Case: A2009-552	*	

Before:
Ronald E. Kowalski, Ph.D.
Arbitrator

APPEARANCES

For the Village

Paul J. Sweeney, Esq.	Attorney for the City
Stephen Hrustich	Fire Chief

For the Union

Eugene D. Faughnan, Esq.	Attorney for the Union
Brian Botsford	Fire Inspector
Stephen Andrew	Retired Fire Chief
Alexander S. Eaton	Fire Lieutenant
Kenneth Battaglini	Captain

A hearing on the above-referenced matter was held in Endicott, New York on November 19, 2010 before the Undersigned who had been appointed as Arbitrator in accordance with the parties' Collective

Bargaining Agreement and the rules and procedures of the New York State Public Employment Relations Board. The parties were accorded a full and fair hearing including the right to present oral and written evidence and examine and cross-examine witnesses. Briefs were submitted as agreed by the parties.

ISSUE

The parties were able to agree to the issue in this Arbitration. The issue was as follows:

> Did the Village violate Article IX of the Collective Bargaining Agreement when it ended the 24-hour shift?
>
> If so, what shall the remedy be?

BACKGROUND FACTS

On or about January 6, 2010, Village of Endicott (hereinafter "Village") Mayor John R. Bertoni informed the Endicott Professional Firefighters IAFF, Local 1280 (hereinafter "Union") by letter that the 24-hour work schedule would change effective June 1, 2010. (Joint Exhibit 2)

The tours would change to 10/14, which required the firefighters work a tour of four (4) consecutive 10-hour day shifts followed by four (4) days off, followed by a tour of four (4) 14-hour night shifts.

On January 9, 2010 Brian Botsford, President of the Union, filed a grievance in response to the schedule change alleging it was in violation of the provisions of the Collective Bargaining Agreement. (Joint Exhibit 3) The grievance was amended on January 23, 2010 and was processed through the contractually provided procedure to this Arbitration.

RELEVANT CONTRACT PROVISIONS

The relevant contract provisions are found in Article IX of the Collective Bargaining Agreement, as follows:

ARTICLE IX

> It is agreed that the "Base Pay" shall be the base annual salary for the normal 40 hour work week. It is also agreed that, so long as it is practical for the Village, the Fire Department, will work on a mutually acceptable form of the "24 hour schedule" which shall be 24 hours on, 24 hours off, 24 hours on, and five (5) 24 hour days off. A "schedule adjustment" will be added to the annual base pay that will cover the additional work hours necessary to implement the "24 hour schedule". The annual "schedule adjustment" for each member of the Fire

Department will be ninety-six (96) times the base hourly rate calculated at time and one half equaling one hundred forty four (144) hours at straight time rate plus longevity if applicable. Said annual "schedule adjustment" will be paid to all on duty members of the Fire Department, and such increment shall be removed after a 30 day absence from duty.

POSITION OF THE PARTIES

Union

The Union argues the Village violated Article IX of the Collective Bargaining Agreement when it changed the existing 24-hour schedule to a 10 and 14 schedule in June of 2010. Article IX provides for a 24-hour schedule so long as it is practical and the Village has not established the schedule was no longer practical as of June 2010.

The Village has asserted that the reason for the change was safety and specifically an increased use of sick time under the 24-hour schedule in recent years that affected staffing. Union President Brian Batsford reviewed sick leave usage from 2003 forward and did not find a trend in usage. Brian Botsford also testified that as a Fire Inspector going to the 10 and 14 hour schedule would actually reduce the time he could perform his duties as there would be stretches of 12 days when on nights he could not do his work of inspecting.

Fire Lieutenant Alexander Eaton compared time cards for the periods of June 2010 to October 2010 and June 2009 to October 2009 and found that in both periods the number of firefighters on duty remained at between five and six with no drop in staff. Sick time use in the time periods was also constant. (Union Exhibit 5)

Kenneth Battaglini, Municipal Training Officer for the Fire Department, testified that he believed less training could take place under a 10 and 14 schedule than the 24-hour schedule. The 24-hour schedule allowed him to complete training sessions there would not be sufficient time for under a 10 and 14 schedule.

The Village's use of sick time incentive pay and its decrease in the last years' does not demonstrate a substantial increase in sick leave use. The Village also has not shown how the 24-hour schedule would have caused increased sick time use. The Village therefore has not shown the 24-hour schedule is not practical.

The Union therefore submits the grievance has merit. The Union requests the Arbitrator sustain the grievance and direct the Village to reinstate the 24-hour schedule.

Village

The Village argues it did not violate Article IX of the Collective Bargaining Agreement when it switched from a 24-hour schedule to a 10

and 14 hour schedule in June 2010. The 24-hour schedule was no longer practical and the Collective Bargaining Agreement allowed for such a change under the provisions of Article IX if it was not practical.

The Village contends that increasing sick time usage in the period from 2008 through 2010 made the 24-hour schedule no longer practical and justified the change to a 10/14 hour schedule. Fire Chief Stephen Hrustich studied the use of sick time in 2009 and discovered that when one looked to incentive pay for non-use of sick time it had decreased on average from 2007 to 2010. (Village Exhibits 2 through 9) It was especially true of the years from 2008 to 2010 decreasing from 16,100.00 paid out in 2008 to 7,450.00 in 2010. As such Chief Hrustich concluded and testified that sick time usage was increasing substantially under the old 24-hour system. The increase in sick time usage impacted the ability of the Fire Department to perform its mission. It limited training as firefighters were not present. If a firefighter missed a 24-hour shift the Department loses all those hours as opposed to one day at 10 or 14 hours on the new schedule.

Captain Battaglini testified that while he performed the 24-hour schedule because it gave him more time to see his family and work his other business that the 10/14 hour is all right once you get used to it. Chief Hrustich further testified that there was a dramatic decrease in the actual number of sick time hours utilized once the new 10/14 hour

schedule was introduced. Village Exhibit 2 shows that while the number of sick days missed did not change, the impact on hours was less lost.

Chief Hrustich further noted that productivity is better under the 10/14 hour schedule as seen in the Code office. The Code work covered by Chief Griswold and Mr. Denman who work a traditional four or five day schedule results in much more complaint responses than that for those four employees on the 24-hour schedule. (Village Exhibit 11)

Chief Hrustich also testified that training which promotes safety is better conducted under a 10/14 schedule. Maintenance of equipment is improved as well as it is checked more frequently under a 10/14 schedule.

The Village therefore submits that it is no longer practical for the Village to maintain the 24-hour schedule. The Village further argues that the issue is a non-mandatory subject of bargaining as it goes to staffing and as such should not be subject to the review under the grievance procedure. The Village requests the Arbitrator deny the grievance in its entirety.

OPINION

The issue before the Arbitrator in the instant matter is a question of contract interpretation and application. The issue centers on the provisions of Article IX which state that "It is also agreed, so long as

practical for the Village, the Fire Department will work on a mutually acceptable form of the 24-hour schedule which shall be 24 hours on, 24 hours off, 24 hours on and 5 24 hour days off." (Joint Exhibit 1) The Village has argued that it had the right to change from the 24-hour schedule to a 10/14 schedule under the provisions of Article IX as such a chang is a non-mandatory subject of bargaining and it was no longer practical to maintain the 24-hour schedule given problems with sick leave usage as well as other issues concerning safety. The Union has argued the provisions of Article IX require that for a change to take place it must be demonstrated by the Village that the 24-hour schedule is not practical and the Village failed to do so as any increase in sick leave use was not shown to be related to the 24-hour schedule.

As concerns the first of the Village's argument, that the issue itself goes to staffing and mannimg and is therefore a non-mandatory subject of bargaining that should not be subject to review under the grievance procedure, this is a matter for a different forum and is certainly one that could also be raised and addressed in negotiations as well. The Court has ruled in this case that the issue is a matter subject to the grievance and arbitration procedure and one the Arbitrator must address. Whether it is an issue that is a non-mandatory subject of bargaining is a determination beyond the authority of the Arbitrator. It is a valid question to be determined by the Public Employment Relations Board. The Arbitrator's

authority in this case is limited to interpreting the provisions of the Collective Bargaining Agreement. Article IX is one of the provisions in the current Agreement agreed to by the parties.

With respect to the merits of the issue the Arbitrator must look to the rights and obligations conferred by the specific provisions in Article IX that is the subject of this dispute. It is clear that from the testimony and the history concerning the language in the Article that when the parties first negotiated the provisions in 2001 it was a year trial to see if it was practical and workable. It is also clear that the parties at that time deemed it was workable for both parties as the reference to a trial period was dropped in the subsequent Collective Bargaining Agreement which is the current Agreement. (Joint Exhibit 1) The phrase "as long as it is practical for the Village" remained as part of the provision. The Union thus gained the right to a preferred 24-hour schedule and the Village gained benefits from that schedule and retained the right to alter it if it became no longer practical. However, that right was subject to a condition which was that the Village had to demonstrate that it was no longer practical as that was the only condition that could trigger a change from the 24-hour schedule and eliminate the benefit enjoyed by the Union which it had secured in negotiations. The Village thus has a contractual obligation to demonstrate that the 24-hour schedule is not practical.

The Village has argued that the principal reason it sought the change from the 24 hour schedule was the increased sick leave usage observed in recent years as noted in the decline of sick leave incentive pay in 2009 and 2010. There are two problems with this argument. The first is whether the decline in incentive pay gives a true picture of sick time usage. The second and far more important is whether any decline in sick leave usage is in any way tied to the 24-hour schedule or makes it no longer practical. The Village clearly has the right to alter the schedule but must prove that the condition giving rise to the change makes the schedule no longer practical for demonstrated reasons and would be corrected by the change to a new schedule.

A review of the evidence indicates there may have been an increase in sick time usage in 2009-2010 but that there is still no demonstrated trend of an increase over the history of the 24-hour schedule going back to 2001. If the 24-hour schedule was causing an increase in sick leave usage it should have been evident over the entire history of the implementation from 2001 through 2010. There is no evidence of that relationship. There are a number of different factors that can lead to an increase in sick leave usage and the evidence does not support that the cause is the 24-hour schedule or that the increase would be reversed by changing the schedule.

Training and safety were raised as issues as well, but once again the training officer gave reasons why to the 24-hour schedule was more

conducive to training and there was concrete evidence demonstrating training was not taking place as was needed because of the 24-hour schedule over the last nine years.

The Village has a right to change the 24 schedule under Article IX, however, it also has an obligation to demonstrate that there are circumstances directly related to that schedule which make it no longer practical and would be resolved by such a change. In the instant matter the Arbitrator is of the opinion the evidence and testimony adduced at the hearing does not provide such a demonstration. While a 10/14 schedule may be more desirable for the Village and there is still the question of whether it is a non mandatory subject, there is insufficient evidence to prove in this instance that it is not practical at this point.

For the reasons set forth above, the Arbitrator would therefore adjudge that Village did violate Article IX of the Collective Bargaining Agreement when it changed from a 24-hour schedule to a 10/14 schedule. The Arbitrator would direct the Village to reinstate the 24-hour schedule as remedy.

AWARD

The Village did violate Article IX of the Collective Bargaining Agreement when it ended the 24-hour shift.

The Village shall reinstate the 24-hour shift.

March 20, 2011
Date

Ronald E. Kowalski, Ph.D.
Arbitrator

State of New York)
) SS:
County of Onondaga)

I, Ronald E. Kowalski, Ph.D., do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

March 20, 2011