

STATE OF CONNECTICUT  
DEPARTMENT OF LABOR  
STATE BOARD OF MEDIATION AND ARBITRATION

**AWARD**

In the Matter of	:CASE NO. 2023-A-0096
	:
TOWN OF FAIRFIELD	:Hearing Date: August 29, 2023
	:
AND	:Date of Award: January 31, 2024
	:
IAFF, LOCAL 1426	: LOCATION OF HEARING:
	: State Board
	: of Mediation and Arbitration
	: 38 Wolcott Hill Road
	: Wethersfield, CT 06109
	: (ZOOM)

**APPEARANCES:**

Eric W. Chester, Esquire  
Ferguson, Doyle, & Chester, P.C.  
35 Marshall Road  
Rocky Hill, CT 06067

Christopher R. Henderson, Esquire  
Berchem Moses, P.C.  
75 Broad Street  
Milford, Ct 06460

For the Union

For the Town

**ISSUE**

Did the Town violate Article XIX, Section 2 (Acting Positions) of the Collective Bargaining Agreement when it placed Assistant Chief Patrick Barry into the position of Assistant Chief-Training pending the outcome of the lateral transfer process?

If so, what shall be the remedy consistent with the Collective Bargaining Agreement?

## **FACTS**

This proceeding concerns a grievance filed by IAFF, Local 1426 (“Union”) claiming violation of Article XIX, Section 2 (Acting Positions) of the Collective Bargaining Agreement (“CBA”) between the Union and Town of Fairfield (“Town”).

Both parties (Union and Town) appeared before the Panel on August 29, 2023 and presented documentary and testimonial evidence, were afforded the opportunity to examine and cross-examine witnesses, made argument in behalf of their respective positions and filed post-hearing briefs.

This matter centers around the filling of the vacant Assistant Chief-Training position which occurred due to the retirement of another Town firefighter.

On September 8, 2022 Chief McCarthy (“Chief”) announced the pending departure of Assistant Chief Bisson (“Bisson”). Bisson held the Assistant Chief-Training position within the Department. The email notification was sent to all Assistant Chiefs within the Fairfield Fire Department (Town Ex. 3). The notification by the Chief was notification of the lateral transfer opportunity/process under Appendix D of the CBA. In addition to the notification to all Assistant Fire Chiefs, the Chief included Lieutenant Barry in the notification. At the time of the notification Lieutenant Barry was scheduled for approval of promotion to Assistant Chief before the Fire Commission on October 13, 2022, which was when the Assistant Chief-Training position would be officially vacated. Two

members of the bargaining unit, Lieutenant Barry and Assistant Chief George Gomola expressed interest in the lateral opportunity.

The Union raised an objection to the September 8, 2022 posting by lateral transfer as it included a Lieutenant in the notice. On September 16, 2022 the Chief suspended the lateral transfer process (Town Ex. 3). On October 13, 2022, the Fire Commission promoted Lieutenant Barry, effective October 17, 2022 to the position of Assistant Chief-Training. The announcement indicated: "Lt. Patrick Barry to Assistant Chief #211 off D shift into vacant training division effective Oct. 17, 2022 subject to consideration of lateral training process." (Town Ex. 3).

The lateral transfer process continued until the Chief assigned Assistant Chief Barry to the position of AC-Training sometime after November 15, 2022. The Chief interviewed both Gomola and Barry for the position in mid-November. At the conclusion of the Gomola interview the Chief told Gomola that he was selecting Barry for the position.

## **TOWN POSITION**

The Town argues that this matter involves a contract interpretation and therefore the Union has the burden of proof to establish the employer violated the agreement. The proof required by the Union is by a preponderance of the evidence. The Town maintains that the Union has not met its burden in this grievance and the grievance should be denied.

The Town argues the defining event for this grievance is when the Chief placed Assistant Chief Barry, following his promotion, into the only vacant role available – the Training Chief position – on October 17, 2022, at the time Barry’s promotion to Assistant Chief became effective. The Town further asserts that Article XIX, Section 2 does not apply in this case and because of that, the Town did not violate the CBA. The Town asserts that the Chief exercised his discretion to determine that Article XIX was not triggered and that it was not a situation that called for an acting appointment. The Town argues that this was not a case where the Chief was required to appoint Assistant Chief Gomola into an acting position of the Training Chief position taking his seniority into consideration since this was not a “classification higher than his regular classification” (Town Brief, pg. 12). It was in the same classification, according to the Town. The Assistant Chief-Training was a transfer for Assistant Chief Gomola when he applied for the lateral transfer (Town Ex. 3). The Town argues Assistant Chief Barry was equal with all other Assistant Chiefs and his placement into the role of Assistant Chief was not a higher classification and it was now just one of the roles he could fill within the Assistant Chief classification. The Fire Commission promoted Assistant Chief Barry, he was not appointed as an Acting Assistant Chief, he was an Assistant Chief on a permanent basis, according to the Town. He was placed in the only vacant slot by the Chief pending the outcome of the lateral transfer process for the Training Chief position. The Town further urges that Gomola was already in the highest classification in the bargaining unit and not eligible for an

acting position. The Town concludes that Article XIX would not apply to Assistant Chief Gomola, Assistant Chief Barry or any other Assistant Chief.

The Town further argues that: (1) there is no binding past practice which negates the plain and unambiguous language of Article XIX; (2) the Fire Chief has the discretion to select a candidate at the end of the lateral transfer process; and (3) the Panel is limited to deciding the agreed upon submission.

### **UNION POSITION**

The Union argues that Barry was not promoted to AC-Training until completion of the lateral transfer process and any assignment in the interim was an acting one. The Union contends there are limited ways to become AC-Training. Appendix D governs the process once the position becomes vacant or a vacancy is imminent. There is only a lateral transfer opportunity for Assistant Chiefs, and not for rising Lieutenants. The Union points out that Barry was appointed as AC-Training prior to completion of the lateral transfer process and the only way that can happen is by the Chief making an acting assignment. The Union argues that Barry was assigned as an “actor” until the completion of the lateral transfer process, or he was promoted prior to it. The Union contends if it is the latter, the grievance must be sustained. If the former, the Town violated Appendix D, which is the subject of a pending grievance. The Union argues Barry knew he was acting as of October 16, 2022 when he wrote to the Department: “I truly do not know how long I will be here..should my position develop into a longer commitment I will be meeting with each of you...”(Union Ex. 4).

The Union further argues that Article XIX is clear and when assignments are made, the actor receives the higher rate pay. Acting appointments, according to the Union, must be awarded to the most senior person when there is no eligibility list. The Union argues there was no eligibility list and Gomola was senior to Barry and Gomola should have been made Acting AC-Training from the date Barry was in the position (10/16/2022) until the lateral transfer process was concluded and a permanent appointment made on November 16, 2022.

The Union also asserts that the AC-position is still an Assistant Chief, paid at a higher rate than Gomola's regular Assistant Chief rate and the position also comes with a Town vehicle and Gomola was denied the benefits afforded by Article XIX. The Union requests a remedy of sustaining the grievance and making Gomola whole.

## **RELEVANT CONTRACT LANGUAGE**

### **ARTICLE XIX – ACTING POSITIONS**

#### **Section 1**

Whenever an employee is required to work in a classification higher than their regular classification, they shall receive the rate of pay at the lowest step in the salary range of the higher classification in which they serve in the acting capacity.

#### **Section 2**

All acting assignments shall be at the discretion of the Chief. In exercising such discretion, the Chief shall give consideration in the following manner:

- a. If there is an eligibility list for Fire Lieutenant or Fire Assistant Chief, the Acting Officer shall be selected from said list.
- b. If there is no such eligibility list or if no employee on the list is working where the acting assignment is needed, then it shall be selected by seniority as set forth in Article iX.

## **ARTICLE IX-SENIORITY**

### **Section 1**

Seniority shall be by classification and shall consist of the length of accumulated service for each employee in their respective classification. For the purposes of this Article, classification shall mean and include the following:

Firefighter

Fire Lieutenant

Assistant Chief

Fire Master Mechanic

Fire Mechanic

## **ARTICLE XXXIV-PRIOR PRACTICE AND MANAGEMENT RIGHTS**

### **Section 2**

Except as such rights or authority are in conflict with or abridged or modified by the provisions of this Contract, the Town of Fairfield reserves and retains the solely and exclusively, all rights and authority as existed prior to the execution of this Contract, and except such right which is in conflict with or abridged or modified by the provisions of this business, operations and affairs; to establish wages, hours of work and other items or conditions of employment, to change combine, establish and discontinue jobs or operations, shall be unimpaired. The Town's not exercising any right in a particular way, shall not be deemed a waiver or any right or preclude the Town from exercising the same in some other way not in conflict with the provisions of Section 1 of this Article or other terms of this Contract.

## **APPENDIX "D" – GENERAL SELECTION CRITERIA FOR LATERAL MOVEMENT & JOB DESCRIPTIONS**

The Local requested a general statement regarding the method of selection and movement of personnel within rank. This type of movement would occur within the rank of Assistant Chief for the positions of Fire Marshal and Training Officer. Within the rank of Lieutenant this type of movement would occur for the position of Fire Prevention Lieutenant. Within the rank of Fire fighter this type of movement would occur for the position of Fire Prevention Inspector. Not included is the movement of personnel from platoon to platoon or (in the case of company officers) from apparatus to apparatus. This is a general statement and not meant to be comprehensive in scope or application.

**STEP ONE:** Opening exists by vacancy, request for transfer or administrative decision to transfer.

**STEP TWO:** Requests made to fill vacancy by personnel in same rank.

**STEP THREE:** Job description minimum requirements in education, experience and training evaluated.

**STEP FOUR:** From available personnel left after steps one thru three, evaluation on following criteria (not in priority order):

- (a) Desirable knowledge, skill and abilities (from job descriptions) evaluated.
- (b) Past performance.
- (c) Overall needs of the department (may be needed more in another position).
- (d) Confidence of supervisors.

**STEP FIVE:** Position filled by Chief.

**CAVEAT:** If no requests to fill the position are received or no one successfully completes the selection process, the Chief may make a transfer of a person of the same rank who meets the requirements of the job description, even if such person did not request transfer to the position. Such transfer will be the “lowest senior” person in that rank. If there is an actual vacancy in the position, an alternative to this could be filling the position by promotion.

Personnel who receive lateral transfer as described herein shall remain in their assigned position for a minimum of three years before requesting transfer, unless that individual is either reassigned by mutual agreement of the Chief and the individual promoted, or retired. All training for attaining and maintaining required certifications shall be at the cost of the Town.

## **DISCUSSION**

This matter involves an interpretation of the CBA and accordingly the Union has the burden of proof in this matter and this burden is by a preponderance of the evidence.

The submission agreed to by the parties and marked as Joint Exhibit 1 clearly places into question whether the Town violated Article XIX, Section 2 (Acting Positions) of the CBA when it placed Assistant Chief Barry into the position of Assistant Chief-Training pending the outcome of the lateral transfer process (Emphasis Added). The Town’s position is that Article XIX, Section 2 does not apply in this case. The Panel agrees with the Town on this threshold question.

The Chief exercised his discretion and determined that Article XIX was inapplicable and was not a situation that called for an acting position. This was not a classification higher than Gomola's regular classification and his seniority was not an issue for the Chief. The Town's argument that Gomola's seniority need not be considered as this was not a classification higher than his regular classification is persuasive. It was the same classification.

A review of the Seniority provisions of the CBA (Article IX) discloses that there is no separate classification for the Assistant Chief of Training as Gomola holds the same rank as the Assistant Chief of Training. When Assistant Chief Barry was promoted and placed in the AC-Training position it was the only vacant position. He was equal with all other Assistant Chiefs and he was not placed into a higher classification.

The Panel further concludes that the Union has not met its burden of proof in this matter nor has it met its burden of establishing a binding past practice that overcomes the plain and unambiguous language of Article XIX.

After a review of all the documentary and testimonial evidence and by a preponderance of the evidence, the Town did not violate Article XIX, Section 2 (Acting Positions) of the CBA when it placed Assistant Chief Patrick Barry into the position of Assistant Chief-Training pending the outcome of the lateral transfer process.

**DECISION**

The grievance is denied

/s/ Gerald T. Weiner

Gerald T. Weiner

Public Arbitrator and Chairperson

/s/ Betty M. Kuehnel

Betty M. Kuehnel

Labor Arbitrator

/s/ Michael C. Culhane, Sr.

Michael C. Culhane, Sr.

Management Arbitrator