

OFFICE OF COLLECTIVE BARGAINING

Case No. 1-167-83

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In the Matter of the Impasse

-between-

The Uniformed Firefighters Association

-and-

The City of New York

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REPORTS
and
RECOMMENDATIONS
(Re: Equalization of
Overtime)

Before: Walter L. Eisenberg, Impasse Panel

Appearances:

For the Union: John F. Mills, Esq, Counsel

For the Employer: Frances Milberg, Esq., Deputy Director, OMLR

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THE ISSUE

The Uniformed Firefighters Association of Greater New York ("UFA" or "Union") and the Office of Municipal Labor Relations of the City of New York ("Employer", "City", or Department") submitted to the undersigned, as one man Impasse Panel designated to hear and make a report and recommendation on an unresolved dispute between them, the following issue:

What treatment should be accorded to Firefighters returning from medical leave for purposes of overtime eligibility?

Hearings on the issue were held on September 21, and October 3, 1984 at the Office of Collective Bargaining in

Manhattan. The parties were ably represented, and were afforded full opportunity to introduce evidence and present argument on the matter at impasse. The parties also filed post-hearing briefs.

The Union seeks a recommendation which would allow Firefighters who miss overtime opportunities because of illness or injury the opportunity upon return to full duty to recoup lost overtime without limitation if overtime opportunities become available.

The Employer seeks a recommendation which would hold all Firefighters, including those returning from medical leave, to the 45-hour cap over the battalion average for the previous 52 weeks.

BACKGROUND

The issue here involved originates in the parties' negotiations for an Agreement for the period July 1, 1982 to June 30, 1984 ("1982-84 Agreement"). In those negotiations the parties agreed to a system for the "equalization of overtime", effective from January 1, 1983. That agreement was set forth in section 22 (PP. 3-5) of a Memorandum of Understanding (Jt. Ex. 1) executed by the parties. Section 22 called for the joint development of a circular implementing the changes in the system for allocating overtime, pursuant to standards specified in paragraphs a. through j. of section 22. The parties reached an impasse on one aspect of the implementation of the newly negotiated system for the

equalization of overtime--the extent to which a Firefighter who returned to full duty from a medical leave of absence would be provided with overtime opportunity to recoup such opportunity as he may have missed while on leave. In the interim a Department circular entitled FIREFIGHTERS MINIMUM-MANNING POLICY GUIDELINES (PA/ID No.: 5/74 (Rev) was issued on February 1, 1984, effective March 15, 1984 (Jt. Ex. 4). The policy embodied in that circular represents, among other things, the City's view of the appropriate manner of providing overtime opportunity to a Firefighter returning from medical leave, pending the outcome of this Impasse proceeding.

The negotiations between the City and the Uniformed Fire Officers Association ("UFOA") for a 1982-84 contract resulted in a similar understanding on the equalization of overtime, and the Department issued a circular on the implementation of overtime equalization for Fire Officers which is the same in substance as the circular applicable to Firefighters and which is being applied with the concurrence of the UFOA. The parties are sharply disagreed over the significance for Firefighters of the UFOA's agreement to the application of the overtime cap in the manner here proposed by the City.

The overtime distribution system in effect for Firefighters since 1979 and prior to the 1982-84 overtime equalization agreement gave a Firefighter whose overtime-opportunity hours (as reflected in overtime tracking cards) were

low for any reason, the opportunity to catch up with missed overtime hours, without limit. That earlier system reflected a minimum manning procedure, negotiated in 1971, under which vacancies on a tour of duty were filled by ordered overtime.

POSITIONS OF THE PARTIES

Union Position

Among the principal elements in the Union position on the issue are the following, in brief summary: to limit Firefighters who return from medical leave to the 45-hour overtime cap is to deny them overtime opportunities they lost due to injury or illness--a denial which is particularly inequitable where a line-of-duty injury is involved; the exception to the cap sought by the Union is "extremely limited" and because overtime results from City decisions on staffing, any cost factor involved should be borne by the City; the City's preoccupation with the alleged pension impact of the limited exception to the cap sought for those relatively few Firefighters who return from medical leave is based on a gross exaggeration of the potential cost impact; the City's references to only one item in the UFOA contract, the lack of an exception to the overtime cap, are improper because information is lacking about other features of the UFOA settlement and because "comparability" under the City's collective bargaining law requires an examination of contract packages in their entirety and of similarity of

work performed--which in the case of Firefighters and Fire Officers is not similar inasmuch as the Fire Officers are supervisors of the first, second, third, or fourth level whose pay, benefits, and firefighting activity differ more sharply the higher the supervisory level; under Section 487.a-7.1 of the City's Administrative Code. Firefighters are provided an incentive to perform their duties to the utmost by assuring them of no loss in compensation during absence from duty because of illness or injury; limiting Firefighters who return from medical leave to the overtime cap is discriminatory because they can be prevented from having as much overtime opportunity as Firefighters who were not out on such leave; as of June 30, 1984 only 2,207 (or 23%) of the 9,590 Firefighters had over 20 years service and were eligible for retirement, and in September 1984 there were 220 on medical leave and 250 on light duty so that, at maximum, 108 of them (23%) might be eligible for service retirement, but the City offered no evidence for their assumption that those returning from medical leave would have the opportunity to build up their pension base by recouping all lost overtime within one year--especially since not all Firefighters are in the Article 1B Pension System which uses last-year earnings as the pension base; under the pre-1982 overtime equalization system Firefighters could recoup overtime without limit, yet the City did not produce even one case of a Firefighter who built up his pension base by a build-up of overtime in his last year before

retirement; even if there were some cases of increased pension base under the Union's proposal, the City could make a slight revision of the Pension Fund's actuarial assumptions to amortize any cost increase over a period of many years; and Firefighters are entitled to recoup without limitation overtime opportunity lost through line-of-duty injury or illness, in the interests of equity and fairness.

Employer Position

Among the principal elements in the City's position on the issue are the following, in equally brief summary: Firefighters returning from sick leave should be treated in the same manner as other Firefighters under the 1982 ("new") overtime equalization system; the purpose of the new system was to establish a method for allocating overtime which would insure equalization of overtime earnings, would contain no exceptions to the overtime cap, and would eliminate the loopholes in the pre-1982 ("old") system, which permitted manipulation; the old system gave any Firefighter an unlimited right to overtime up to the hours offered the others in his battalion, and so a Firefighter returning from medical leave could catch up with the 52-week battalion overtime average in less than 52 weeks and continue to perform average battalion overtime; under the Union's proposal, a Firefighter returning from a year of medical leave could double his overtime beyond the 45-hour overtime cap and "then perform up to the 45 hour 52 week cap"; there is a potential

for increased pension costs from large amounts of overtime under the Union's proposal; the Union's proposal gives Firefighters returning from medical leave an advantage over those not on medical leave by permitting them to enhance their pension base with overtime in greater amount than that available to those who were not on medical leave; the new overtime system put into effect by the Department contains no exceptions to the overtime cap, thereby treating all Firefighters equally; the UFOA Agreement treats Fire Officers returning from a medical leave no differently than other Fire Officers--the overtime cap applies; Section 487a-7.1 of the Administrative Code was enacted on February 13, 1940, when there was no overtime compensation, so that the State Legislature could not have intended to include overtime in the "full pay or compensation" requirement; and the Union's proposal for an exception to the cap would destroy the integrity of the new system of overtime distribution.

OPINION

The crux of the parties' disagreement on this overtime catch-up issue is inherent in the City's insistence that Firefighters returning from medical leave be held to the cap which is applicable generally to Firefighters and which is a part of the new system of overtime distribution adopted by the parties in their Memorandum of Understanding for 1982-84 (Jt. Ex. 1), and in the Union's contrary insistence that such Firefighters be given the opportunity to make up all overtime offers missed

during a period of medical leave, without reference to the 45-hour overtime cap above the 52-week battalion average. Simply put, the parties have different concepts of what constitutes "equal" treatment for a Firefighter returning from a medical leave.

During the hearings, the Union moved to bar the introduction of City Exhibits 1, 2, 3, and 4, pertaining to the overtime allocation system in use for Fire Officers under the UFOA Agreement. I deferred a ruling on that motion until the whole of the parties' presentations was before me. Based upon my examination of those proffered Exhibits and the rest of the record at hand, I find no basis for excluding the material related to overtime distribution under the UFOA Agreement. It is material which is an arguable part of the City's position on the issue before me. As to how much weight the overtime system adopted for Fire Officers should be given, I am not persuaded that the system agreed to by the Fire Officers is necessarily a decisive determinant of the system to be implemented for Firefighters. The contracts involved are separate and distinct, and are negotiated independently by two employee organizations that are independent of one another. What may be an acceptable overtime allocation system for supervisory personnel may not be regarded as an acceptable system by their subordinates. It could be-- as the Union has argued--that the UFOA contract settlement contained a quid pro quo for the firm cap on overtime catch-up for an Officer returning from medical leave; the documents in the

record before me contain no information about the totality of the terms of that contract settlement. Accordingly, I shall look to other factors for an indication of an appropriate recommendation for the issue involved.

There is no foreseeable added overtime cost in the Union's proposed exception to the overtime cap--in order to grant more overtime to a Firefighter returning from a medical leave--because application of the exception would simply result in such a Firefighter replacing another Firefighter who would have been scheduled for the overtime. However, there would be a possible added pension system cost attributable to the exception if the Firefighter benefitting from the exception were to retire with a salary base enhanced by above-cap overtime earnings. The alternatives suggested by the Union for moderating any such increase in the pension costs are not adequate to the negation of the added costs that may occur. There is no basis for assuming that any such potential for increased pension costs could only be de minimis. Significant increases in pension base in a 20-year normal retirement plan can readily yield added pension costs in the millions, even where there are 220 Firefighters on medical leave of more than a month's duration and 250 more Firefighters who are assigned to light duty.

I consider one of the principal gages for assessing the validity of the Union's proposal for an exception to the equalization-of-overtime cap to be the existence of any such exception for other City employees who go off on medical

leave under an overtime equalization plan under circumstances comparable to those involving Firefighters. Notably lacking in the Union's ably presented argument of its position on the issue is any indication that the exception it seeks is one that is already in use for other City employees in high-risk occupations. It is not enough that the exception sought may have been the practice for Firefighters prior to 1982, and therefore prior to the negotiation of a general contractual cap on overtime for Firefighters. The 1982-84 Memorandum of Understanding made a significant change in overtime allocation by imposing a different cap than the one which applied in the past. That change to "equalization of overtime opportunity" can only reasonably be construed to require application, with the cap, to Firefighters while they have been on full active duty, and not without the cap to Firefighters who have been on medical leave, retroactively for the period of their medical leave. There is no showing in the record before me that there is a uniqueness in the nature of the medical leaves

Given the wording and reported background of the requirement in the Administrative Code for "full pay or compensation" for a member of the uniformed force "during" an absence from duty caused by injury or sickness", I am not convinced that this statutory provision is applicable to the overtime proposal here at issue. For one thing, the uncapped overtime opportunity here sought for returnees from medical leave involves pay for overtime worked after a return from a leave, and not pay "during" the period of leave. For another, there was evidently no overtime compensation for Firefighters at the time that provision of the Code was enacted. Hence, it is by no means apparent that applicable law requires provision of an uncapped opportunity to recover all overtime missed during a medical leave.

In sum, I find no adequate basis for recommending the adoption of the exception to the overtime cap proposed by the Union. My RECOMMENDATION shall be consistent with the foregoing findings and conclusions.

RECOMMENDATION

The Undersigned, constituting the duly authorized Impasse Panel to whom was submitted the matter in controversy (OCB Case No. 1-167-83) between the parties above-named, and having heard the allegations and received evidence and argument bearing on the controversy, makes the following RECOMMENDATION:

1. Firefighters returning from medical leave should be held to the same overtime cap as all other Firefighters, that is, the 52-week battalion overtime average plus 45 hours.

2. The procedure for implementing the "new" overtime equalization system should be that set forth in Department Circular PA/ID No.: 5/74 (Rev), entered in this proceeding as Jt. Ex. 4, and now tentatively in use pending the outcome of this proceeding.

Walter L. Eisenberg
Impasse Panel

State of New York)

ss:

County of Kings)

I, WALTER L. EISENBERG, do hereby affirm upon my oath as Impasse Panel member that I am the individual described in and who executed this instrument, which is my REPORT and RECOMMENDATION.

April 13, 1985
Date

(Signature of Impasse Panel Member)