

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Arbitration Between  
CITY OF Lockport, NEW YORK  
  
Employer,  
  
-and-  
  
LOCKPORT PROFESSIONAL FIRE FIGHTERS ASSOCIATION  
Local 963, AFL-CIO,  
  
(Class Action, Grievants),  
  
Union.

OPINION

AND

AWARD

PERB CASE NO.

A2014-100  
A2014-354

Before: MICHAEL S. LEWANDOWSKI, Impartial Arbitrator

Appearances:

For the CITY: Bryan Goldberger, Esq.  
Of Counsel

For the UNION: Tracy Sammarco, Esq.  
Of Counsel

The City of Lockport, New York ("City") and the Lockport Professional Fire Fighters Association ("Union" "Association") have a collective bargaining agreement ("Agreement") that contains provisions addressing staffing. The Union filed the instant grievances asserting the City violated the Agreement by reducing staffing to what it asserts are unsafe levels. The grievances were processed thru the steps of the parties' grievance procedure without resolution. Ultimately, demands for arbitration were filed with the New York State Public Employment

Relations Board ("PERB"). Pursuant to the collective bargaining agreement between the parties and PERB's rules, the undersigned was designated arbitrator to hear both grievances.

In accordance with the above designation, a hearing was conducted at the City's offices on May 23, 2019. At the hearing the parties were afforded the opportunity to submit evidence for examination and cross examination.

The parties agreed to submit written closing arguments in support of their positions. I received the writings electronically on August 7, 2019.

#### ISSUE

At the hearing, the parties stipulated to submit the following issues to arbitration.

1. Did the City of Lockport violate Article 3 Section 19 or Article 19, Section 12 of the collective bargaining agreement when it adjusted Firefighter manning from 9 firefighters to 7 per shift in April 2014?
2. Did the City of Lockport violate Article 3 Section 19 or Article 19, Section 12 of the collective bargaining agreement when it adjusted Firefighter manning from 7 firefighters to 6 per shift in September 2014?
3. If so, what shall the remedy be?

**BACKGROUND, AND EVIDENCE**

At the onset of the hearing the parties stipulated that both grievances at issue here were denied by the City of Lockport Fire Board however the only remaining issue here is the reduction in manning.

Former Association President and retired firefighter Samuel Oakes testified that while he was President, the Union filed a grievance asserting that Article 3, §19 was violated when the City had reduced staffing below the 10-man minimum required. The matter was arbitrated. After the arbitration, the City restored staffing to the 10-man minimum.

The 10-man staffing manning level (9 firefighters and 1 dispatch) remained in force until sometime in 2014. The Department laid off 12 people in February 2014. In September 2014, the ambulances were decertified taking the Department out of the ambulance transport business. The parties also had negotiated removing dispatch as a function so manning dropped to 9. The number of line personnel did not change; it remained at 9. The Union agreed to allow the City to operate using the 9-firefighter level of manning.

Officer Oakes testified that after the ambulances were removed, staffing levels dropped to 7 and then to 6 in 2017. Oakes said having staffing at 7 or 6 leaves the Department short and firefighters cannot do their job. "You can't go into a burning building if the water supply can't be hooked up. For every two men in a building, you need 2 men out who are prepared to drop what they are doing to go in and save the guys inside if necessary. 9 firefighters is not optimal but it is workable for us."

Oakes said that with the reduction of staffing, the Department cannot send the same trucks or have the same equipment at a fire for use at a fire. A ladder truck is essentially out of service when staffing is low because there is insufficient manpower to staff the ladder truck.

Officer Oakes also said that when the Department has a second alarm, off duty personnel are notified to come in on overtime however now there is insufficient fire gear to allow firefighters to have a second set of fire gear at home so if firefighters are called in while off duty, they have to go to the station to get gear as opposed to proceeding directly to the fire taking their gear with them. Firefighters sometimes have to drive past the fire to get to the station and then go back to the fire. When there was enough staff this was not a problem.

Officer Oakes cited a fire on Remmick Street as a fire when "we did not have enough staff." Staff reductions can result safety issues and loss of property. The staffing shortage in the Remmick Street fire resulted in a delay of 3-5 minutes. "This is a huge delay in a fire where a 1-room fire can become a 2-3 room fire in 3-5 minutes.

Oakes also said that there are times when it is unsafe for firefighters to enter a burning structure and that has happened more in the past 5 years due to reduced staffing.

On cross-examination, Oakes acknowledged that he did not negotiate the language in Article 19, §12.

He also acknowledged that the Campagna Award reads that the City will restore minimum staffing to 10 and it does not provide for a reduction to 9 should dispatch be transferred therefore it was not the Campagna Award that allowed the City to reduce staffing below 10. The City was allowed to reduce staffing based on an agreement the City had reached with the Union.

Oakes further stated that all fire scenes are not the same and if you do not have enough firefighters the commander on the scene determines what can be safely done to fight the fire. He did not know if the commander at the Remmick Street fire determined there was not enough staff

to fight that fire but Chief Brady deemed it unsafe so he would not allow the firefighters to enter the building until more staff arrived. Oakes was unaware of any incident commander being charged with misconduct for putting fire fighters at risk at a fire scened.

Finally, Officer Oakes acknowledged that there is no manning number that would make all fires safe to fight. He also acknowledged that he was never put in an unsafe situation.

Firefighter Kevin Watier testified that he has been employed by the City since 1995. He was on the Executive Board of the Union when the Campagna Award was issued. After that Award, the Union and the City entered into negotiations concerning the impact of the Award. Those talks resulted in the language currently found in Joint Exhibit 1. That language has not been changed since it was negotiated. The language says that minimum staffing would be 9 if dispatch were removed, which it was.

In February or March 2014, the City unilaterally reduced manning to 7. In September 2014, the City unilaterally reduced manning to 6; the number in effect as of the hearing. There were no discussions with the Union concerning the reduced manning.

Officer Watier said there were no changes in technology or equipment that would allow the City to safely reduce manning to 6. The effect of having manning at 6 or 7 is that the ladder truck cannot be used. "We lose the ability to preform more than one evolution." "We used to be able to do more than one task such as ventilation on the roof and fight on the ground" but we can no longer do both.

Watier said that "right now we have 9 but we have been down to 6 half of the time in the past."

On cross-examination Watier said that fire scenes are commanded by an incident commander who oversees the operations to make sure they are performed safely. If an incident commander believes it would be unsafe to perform an evolution, he would not do it.

Watier said that he has gone in without adequate ventilation and leads to a more challenging situation. There was a fire on Hyde Street where firefighters did not have sufficient staff to ventilate so they had to back out.

He acknowledged that policy says firefighters must follow safety standards "but if life is in danger you bypass the safety standards." "To enter a building to save a life and do not follow all standards; that is an allowable deviation."

Watier also testified that sometimes we are short staffed. It is the Incident Commander who makes the determination to enter a building or not. The Incident Commander may know more about the structure than the firefighters. Being short staffed increases risk.

Watier said that if there is insufficient staffing at a fire, a second alarm can be sounded but that then requires waiting for more men to arrive.

The City presented Chief Patrick Brady who testified that he has been employed by the Department for over 25 years; 13 as a firefighter. Chief Brady served as an Incident Commander on numerous occasions. Since Chief Brady became the Chief the Department staffing has increased from 32 firefighting personnel to 36 firefighters.

Chief Brady described fire scenes as dynamic that require adjustments that are determined by the Incident Commander. It is the Incident Commander who determines if it is safe for firefighters to enter a burning structure. The Incident Commander may decide to wait to enter a burning structure.

"Scene safety is paramount." While there are risks in fighting fires, an individual's life is not a risk the



Department is willing to take.

Brady says the Department follows the 2 in/ 2 out standard unless there is a life at risk.

The standards read that firefighting is a team effort and no firefighter shall perform an evolution that cannot be performed outside of the safety standards. This means that an Incident Commander cannot commit men to unsafe evolutions. Further, Chief Brady said that he is not aware of any time an Incident Commander required a firefighter to perform an unsafe evolution nor has he ever had to discipline an Incident Commander for directing men to perform an unsafe duty.

On cross-examination, Chief Brady acknowledged that there is a Federal Emergency grant that provides manpower to fire departments paid for by the Federal government. Brady said the 4 hired firefighters were hired under a Federal grant. Chief Brady said the City did not apply for a grant this year since the grant parameters have changed and not require grant recipients pay an increasing percentage of firefighters hired under the grant. That is the reason Chief Brady decided not to apply for a new grant. The City also could not claim the dire financial circumstances that it had in 2014 when it got the Federal grant. He did acknowledge that the City could have applied

for a grant that would have paid for partial salaries.

Chief Brady also acknowledged that 6 firefighters are not as safe as 9 but added that 6 is safe considering that Incident Commanders can decide not to do evolutions. "Managers always want more staff." He said he agreed with Union Exhibit 3 (a memo to the Board of Fire Commissioners from the Union signed by firefighters and officers) that states staffing is unsafe. "Fewer bodies on the fire ground are less safe depending on the evolutions performed."

Director of Finance for the City of Lockport, Scott Schrader testified that when he was hired in 2015 he reviewed the City's financial documents, accounting practices, cash positions and the Comptroller's reports. He also spoke with the City's leaders to assess the City financial position.

In 2013, the City had a negative fund balance to the tune of \$5 million dollars. If the City had not taken drastic measures in 2014 the City would have run out of cash and would not have been able to even make payroll.

As it was, the City had to layoff employees and had to ask the State to pay State aid early. The City also had to get a \$5 million deficit bond that had to be repaid over a ten-

year period.

The Fiscal Stress report issued by the Comptroller's office shows that the City was under fiscal stress. Even with receiving State aide early, the City did not have enough cash to make it to the end of the year.

Mr. Schrader met with all of the City's department heads including the head of the Fire Department. He determined that since one firefighter costs the City \$78,000 with fringe benefits and since the City was losing the grants for firefighters, the City would need \$1.5 million dollars to fund the staffing the Union here requests. The City simply could not afford the higher staffing levels.

Schrader said he is familiar with firefighting protocols. The City has not had any claims for catastrophic injury from firefighters.

#### **POSITION OF THE PARTIES**

The Union asserts that the collective bargaining agreement is violated.

The instant grievances arise out of the City's determinations to reduce minimum manning from 9 to 7 per

shift in April 2014 then to further reduce minimum manning from 7 to 6 per shift in September 2014.

The material facts in this case are not in dispute. The Arbitrator is here charged with determining if the reductions in manning at issue here violate the provisions of the collective bargaining agreement (Article 3, Section 19) that specifically require the City to provide "adequate manpower to assure that any evolutions can be conducted with enough men to assure the safety of the men" and to "maintain sufficient apparatus in service to assure that adequate apparatus is available to provide a basic safety factor toward the potential fire situation in a city this size..."

The record demonstrates that the City's reduction of Fire Department manpower from 9 to 7 violates the collective bargaining agreement.

The Arbitrator must also determine whether the reduction to six firefighters per shift violates Article 19, Section 12 of the collective bargaining agreement, which provision regards the "Campagna Award," an arbitration decision and award concerning manning rendered in 2009. The Union asserts that the reductions in manning in 2014 also violates the spirit, intent and language of this provision of the collective bargaining agreement.

Through the 2014 manning reductions, the City of Lockport has created a scenario where firefighting evolutions in the LFD cannot be performed in a manner that "assures" the safety of Lockport's firefighters. This is the language of the parties' Agreement: "enough manpower and equipment to provide assurance of firefighter safety." It is strong, unequivocal language, negotiated by the parties to provide for firefighter safety as a priority in the Department. The word "assure" appears on three occasions in Article 3, Section 19, and its reiteration is clearly meant to reinforce the key intent of the section. In common parlance, the word, "assure" means to guarantee. Merriam-Webster defines "assure" to mean, "1: to make safe (as from risks or against overthrow): insure, 2: to give confidence to..., 3: to make sure or certain: convince..., 4: to inform positively..., 5: to make certain the coming or attainment of: guarantee...".

This focus on firefighter safety is a theme that carries through numerous Lockport Fire Department rules, procedures and manuals. The City's Initial Fire Attack Standard Operating Procedure ("SOP") indicates that the City initially reduced manning to 9 in 2002 over the objection of the then Fire Chief. This manning reduction

was reiterated and adopted into the 2007 SOP. The City's rationalization for the continuation of the reductions in 2007, which adopts the 2002 manning reduction from 10 to 9 was described in that document to be necessitated by a claimed financial crisis in the City. That is the same claim made by the City in the instant matter.

Then Chief Thomas Passuite and twelve of his subordinate, commanding officer in 2007, reiterated their continuing objections to the historical manning reductions taking place in the Department. This group of commanding officers explained that a manning reduction to 8 firefighters in 2006 was fundamentally unsafe for a variety of reasons including the number of personnel required to properly staff departmental equipment and perform fireground operations necessary to ensure firefighter safety. The then Chief and his commanding officers made a specific request to return the minimum staffing to 10 firefighters. A complete recitation of the manning reduction history is contained in the Campagna Award.

The City and the Union participated in five days of hearing from 2007 through 2009 as they arbitrated the reduction in manning to 9 firefighters per shift. Based on

the testimony of the Union's expert witness Anthony Hynes, and the testimony of Chief Passuite, Arbitrator Campagna specifically found that the reduction of firefighters to 9 violated Article 3, Section 19 of the collective bargaining agreement.

After the issuance of the Campagna Award, the parties met and negotiated the transfer of Fire Dispatch duties out of the Fire Department. As a result of that transfer of duties, one firefighter per shift was available to fight fires so the parties then agreed in good faith to allow manning to be set at 9 firefighters per shift, one less than ordered by the Campagna Award.

The Union asserts that no topic is more important to members of the Union than firefighter safety. No other issue, be it wages or other contractual benefits can compare to the vital importance of preserving and protecting firefighter lives and health. This fact cannot be overstated.

The Union asserts that the reduction from 9 to 7 firefighters per shift violates the contractually required assurance of firefighter safety. The record in this matter

is replete with evidence that proves this to be the case.

Clearly, the documents from both management and the union's perspectives demonstrate that the manning reduction as it stands is fundamentally unsafe. This premise has been arbitrated and negotiated into the parties' Agreement and the City should not now be allowed to revisit this question in the absence of any evidence that fireground operations are somehow different or have evolved since the inception of this fundamental disagreement between the parties. And certainly, the City has been arguing its position relying upon alleged "fiscal crisis" for some seventeen years. The City here seeks to resurrect this corpse once again. Arbitrator Campagna was not persuaded that monetary issues were more compelling than firefighter safety, and this Arbitrator should not be so persuaded now.

Firefighter Kevin Watier and retired firefighter and former Union President Sam Oakes testified that no technological, geographic or other relevant factors have presented themselves, which would change the nature of fireground safety. The City did not dispute this point. In fact, City witness Fire Chief Pat Brady acknowledged that there have been no such advancements or changes. He



further testified that there has been no change in the role of officers in charge at a fire scene between the issuance of the Campagna Award and the fireground to date. Brady acknowledged that more firefighters on the fire ground was safer under any circumstance.

All of the witnesses at hearing in this matter were clear on one point, every additional minute a fire is allowed to burn before initial attack is commenced significantly increases the risk to firefighter safety. Further, the witnesses all testified that the preservation of human life is a key element to the job of firefighting. This fact is also referenced in City Exhibit B, which reads, in part, "(1) We will risk our lives a lot, in a calculated manner, to save SAVEABLE LIVES."

The Union also argues that the City's arguments regarding the discretion of the officers in charge at the fire scene and their ability to safeguard the firefighters under their command should not be credited. The command structure has not changed since the Campagna Award. Both Chief Brady and Union witnesses testified that is the case. Thus, the City has not and cannot point to any difference in the command structure that makes firefighting safer with

fewer bodies in 2019 than it was in 2009. Additionally, the nature of the fire scene dictates that the longer it takes for enough bodies to arrive on scene and establish firefighting operations, the higher the risk to firefighters. Also, there is no way for an officer in charge to predict every element of the internal workings of a structure fire. Finally, it is clear that the Department's own mandates require firefighters to save lives, first and foremost.

The Union concedes the City's point, as expressed at the hearing, that firefighting is a dangerous profession. The Union asked in 2009. And asks again now, that the Arbitrator find that the City has a reasonable obligation to mitigate that danger to whatever extent possible, according to the terms of the parties' collective bargaining agreement. The history of these proceedings cannot be ignored; the City will find any available avenue to chip away at minimum manning to the detriment of the safety of Lockport's Firefighters.

Based on the above, the Union submits that the reduction in manning to anything less than 9 firefighters on duty unnecessarily jeopardizes firefighter health and

safety and is in violation of the collective bargaining agreement. As remedy for the above proven violation, the Union petitions the Arbitrator to issue an award requiring the City to restore manning to a minimum of nine (9) as well as any other remedy the Arbitrator may deem appropriate. The Union further petitions the Arbitrator to retain jurisdiction over the implementation of the remedy in this matter.

The City asserts that the Agreement is not violated.

First, the City asserts that the collective bargaining agreement authorized the City to adjust staffing levels.

In October 2009, Arbitrator Dennis Campagna issued an Award finding the City violated the collective bargaining agreement by reducing minimum staffing from 10 to 9 per shift.

Two months after the above Award was issued, the City and the Union reached an agreement on a successor Agreement covering the period January 1, 2008 to December 31, 2012. That agreement specifically resolved the Campagna arbitration adding new language in Article 19, Section 12

that allowed the City to adjust staffing levels under certain circumstances. That "new" language reads in relevant part as follows. "...and provided, that nothing contained herein shall prohibit the City, subject to the terms of the parties' agreements and applicable law, from adjusting staffing levels for changes in population, technology, and apparatus, or other relevant circumstances."

The City ultimately took its ambulance apparatus completely out of service and discontinued providing ambulance service in 2014. The removal of apparatus from service is one of the criteria set forth in Article 19, Section 12 of the Agreement, which specifically authorizes the City to adjust staffing levels.

Article 19, §12 also allows the City to adjust staffing levels due to "other relevant circumstances." The City's financial condition in 2014 was precarious. City Director of Finance, Scott Schrader, testified and submitted financial exhibits clearly showing the City had a negative fund balance of over 1 million dollars in its general fund in 2014 and was in danger of running out of cash to meet its payroll by August or September of that

year. The then Mayor reduced the size of the City's workforce by approximately 229 full time equivalent positions to 178 full-time equivalent positions. Additionally, the City removed one, then its second ambulance from service saving the City between \$800,000 to \$1 million dollars per year. The City also sought and received assistance from New York State to refinance its aggregate deficit in the amount of 5.3 million dollars. This testimony was un rebutted.

The City's dire financial condition in 2014 constituted a "relevant circumstance" under Article 19, authorizing the City to adjust staffing in the Fire Department from 9 to ultimately 6 firefighters per shift.

It is clear that the language of the parties' agreement reached in December, 2009, incorporated into the Agreement as Article 19, Section 12, allowed the City to adjust staffing levels if any of criteria set forth in that section was met. The City's desperate financial condition in 2014 (a relevant circumstance) and its removal of ambulance apparatus from service met two (2) of the criteria specified in Article 19, Section 12 allowing the City to adjust staffing. There was no testimony or evidence

offered by the Union to refute the City'S position that the changes it made to staffing levels were authorized by the clear language contained in Article 19, Section 12.

It is clear that the removal of ambulance apparatus and the transfer of dispatch permits the City to adjust staffing.

Article 19. Sections 11 and 12 were added to the collective bargaining agreement in 2009 to resolve, among other matters, the Campagna Award and to permit the City to adjust staffing levels in the future if certain criteria were met. The Union offered no evidence to the contrary. Since the City met not just one, but two of the criteria set forth in the provisions authorizing the City to adjust staffing, the City's change from 9 to 7, and ultimately to 6 did not violate the Agreement.

Similarly, the City adjustment to staffing did not violate Article 3 of the collective bargaining agreement. That provision states in relevant part " The City agrees that it will staff all equipment with adequate firefighters to assure that any evolutions the firefighters are called

upon to perform can be conducted with enough firefighters to assure the safety of the staff performing the evolution."

To prove a violation of this Section of the CBA, the Union had to show that firefighters have been required to perform evolutions at fire scenes which are unsafe. The Union offered no evidence in support of their grievance; in fact, former Union President Sam Oakes testified he never was asked to perform an unsafe evolution in his career with the Lockport Fire Department.

Chief Brady testified that he was appointed Chief in December 2014 and became permanent in March 2015. At the time Brady was appointed, staffing was at 32, plus a training officer and the Chief. The Chief obtained a Safer grant that resulted in 4 more firefighters being added to the Department bring staffing to 36 firefighters. Staffing today is higher than when the instant grievances were filed in 2014. There are 9 firefighters assigned to each of the 4 platoons, with staffing set at 6 per platoon. A maximum of 3 firefighters may be off on each shift.

Fire fighting is an inherently dangerous profession. Chief Brady testified that each fire scene is unique and dynamic. The Initial Fire Attack Addendum to the Department's Standard Operating Procedures was amended in 2007. That amendment was found not to be in violation of the collective bargaining agreement. Chief Brady said that each fire scene is directed by an Incident Commander who assesses the particular fire scene and determines what evolutions are to be performed. Brady added that firefighter safety is of paramount concern to him and his staff. The SOP specifically states that the Incident Commander is responsible for integrating the risk management levels of engagement into the strategy developed and tactics employed in an emergency. It reads in relevant part: "No member or members shall commence or perform any firefighting function or evolution that cannot be performed in accordance with recognized and accepted firefighting safety standards."

The record is absent any evidence that shows firefighters were ever asked to perform an evolution at a fire scene that was unsafe. If there is insufficient personnel to any evolution(s) at a fire scene, the



uncontroverted testimony of Chief Brady was that a second alarm and, if necessary, mutual aide are called.

Article 3, Section 19 specifically refers to ensuring the safety of firefighters. The Chief's testimony and the SOP mandate that no firefighter perform any evolution that cannot be performed in accordance with recognized and accepted firefighter safety standards. An Incident Commander will not have firefighters perform any evolution if he determines that there are insufficient firefighters to safely do so. If the Incident Commander makes that decision, the consequence is only a possible delay in fire suppression activities, not a risk to firefighter safety.

Further, former Union President Oakes testified that his safety was not compromised in his 20 years of service with the City. No witness testified that the City sought to discipline any Incident Commander for violating firefighter safety protocols nor has any Incident Commander been accused of violating such standards.

On September 23, 2014, a health inspection of the Department was initiated by the NYS Department of Labor

Public Employee Health Safety and Health ("PESH") Bureau. The Department of Labor determined that it is possible to meet safety requirements for entry into immediately dangerous environments with six assigned firefighters. While not controlling, the City petitions the Arbitrator to consider the PESH determination. No evidence was presented in the instant proceeding to refute the conclusion reached by PESH.

The City also asserts that the Union offered no evidence that any firefighters was ordered to perform an unsafe evolution. Inasmuch as Article 19, §12 specifically authorizes the City to adjust staffing levels under certain conditions, i.e. the removal of ambulance apparatus and the City's dire financial situation, no violation is here shown. The Union offered no evidence contradicting the City's position that it adjusted staffing based on the removal of ambulance apparatus and a significant relevant circumstance (its precarious financial condition). Article 19 expressly authorizes the City to adjust staffing upon the occurrence of one or more of the listed criteria.

Further, the Union offered no evidence that a return to a staffing level of nine is required to ensure that enough firefighters are present to safely perform evolutions at fire scenes, except the general argument that firefighting is a dangerous profession and more firefighters are preferable to less. Regarding the specific issue before the Arbitrator, however, that argument fails. A delay in fire suppression because of insufficient personnel at a fire scene is not the same as ensuring the safety of firefighters called upon to perform evolutions at a fire scene. Neither of the Union's two witnesses testified that they were ever required to perform unsafe evolutions at a fire scene or that the Fire Department's Fire Attack Policy Addendum "B" had been violated. Addendum "B" specifically requires an Incident Commander to ensure firefighter safety prior to directing them to perform evolutions at any fire scene. As testified to by Chief Brady, Incident Commanders are able to sound a second alarm and call for mutual aid when they deem it necessary. While there may be a delay in fire suppression activities pending arrival of additional personnel, no firefighter is directed to perform unsafe evolutions until the Incident Commander determines that it is safe to do so. No evidence was offered by the Union that any of its members have been placed in danger, besides the fundamental, inherent danger

of firefighting.

Based on the above, any claim that Article 19 is violated must be denied.

Finally, the City argues that the Union's proposed remedy is not supported by the record and would imperil the City's finances.

The instant grievances have been pending for five years. If the Union's case were truly about safety and not simply about increasing the number of firefighters, these matters could have been heard three years ago when the City was unsuccessful in its attempt to stay arbitration. Staffing level at 6 firefighters has been in force since 2014. The unrefuted testimony of Chief Brady was that during his entire tenure as Chief, no significant injuries have occurred with the existing staffing level. The parties were engaged in negotiations and reached an agreement in June 2017. Even after carving out the instant grievances for arbitration as part of that agreement, it still took almost 2 years for the instant cases to be heard. Accordingly, due to the long period of time it has taken for these grievances to be heard and the lack of any evidence of any firefighter's safety

being imperiled in violation of the relevant sections of the Agreement, no retroactive remedy of any kind should be awarded in this case.

Further there is no basis in the record to support the Union's proposed remedy to increase staffing to 9 per shift. There is simply no evidence presented by the Union to show firefighters were ever asked to perform unsafe evolutions. This point was supported by the testimony of former Union President Oakes who said that in the 20 years he worked for the City his safety was not compromised. In the absence of such evidence the grievances must be denied.

Additionally and significantly, the unrefuted testimony of Director of Finance Schrader granting the Union's remedy would be financially devastating to the City. Currently there are 36 firefighters plus the training officer and the Chief. Each of the 4 platoons is staffed with 9 firefighters with 6 as a minimum staffing per shift. 3 firefighters may be off work on any given shift. Should the Union's position be accepted, the City would have to hire 12 new firefighters at a cost of \$78,000 per firefighter, including wages, taxes and benefits for a total of \$936,000. In addition, since 4 firefighters are currently funded

under a grant the Chief obtained in 2016, when that grant expires the City would have to bear the full cost of those firefighters as well bringing the total cost of the Union's proposed remedy to \$1,248,000. Finally, the City would be liable for legacy costs of approximately \$500,000 for each firefighter.

Such a remedy is not supported by the evidence in the record. The City cannot bear an unbudgeted increase the size of such an increase amounting to an increase of 30-40% of the Fire Department budget plus legacy costs.

While staffing was initially set at nine as a result of the parties' 2008 - 2012 Agreement, the City presented evidence that the adjustments it made in staffing in 2014 were in accord with applicable sections of the collective bargaining agreement. The Union did not sustain its burden of proof that the sections of the Agreement cited in their grievances, Article 3, Section 19 and Article 12, Section 19, were violated by the City. In addition, since the City met more than one of the requisite contractual criteria set forth in Article 19, Section 12 for adjusting staffing, its decision to do so should not be disturbed. Awarding the Union's requested remedy would place an unfathomable financial burden on the City and negate the language of Article 12, Section 19,

which clearly authorizes the City to adjust staffing levels if certain conditions are met.

For the reasons cited above, the City petitions the Arbitrator to dismiss the grievances in their entirety.

### **DISCUSSION AND ANALYSIS**

Because it brings the grievance, the Union assumes the burden of proving the claims it makes are true and that the facts show the collective bargaining agreement is violated.

There is no dispute that firefighting is an inherently dangerous activity. There is also no dispute that firefighter safety is of paramount importance. What is in dispute is whether the City's reductions in manning in 2014 results in having firefighters work in unsafe conditions.

Article 3, Association Rights, Section 19 reads as follows in its entirety. "The City agrees that it will staff all equipment with adequate firefighters to assure that any evolutions the firefighters are called upon to perform can be conducted with enough firefighters to assure

the safety of the staff performing the evolution. The City will maintain sufficient apparatus in service to assure that adequate apparatus is available to provide a basic safety factor toward the potential fire situation in a city of this size."

As noted in the Award issued on minimum staffing by Arbitrator Dennis Campagna dated October 7, 2009, this provision does not define nor specify the number of firefighters per evolution necessary to assure safety to the firefighting staff performing an evolution. Arbitrator Campagna found that the provision "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."

In Arbitrator Campagna's Award, he rejects the notion that the City may reduce manpower to an unsafe level simply to cut costs. Arbitrator Campagna noted that "While the



prudent use of taxpayer dollars is a laudable objective, Section 19 requires that in the process, the City is obligated to place safety and well being of its Firefighters first above all else." I concur.

The City has a contractual obligation under the provisions of Article 3, §19, which expressly states that the City will "staff all equipment with adequate firefighters to assure any evolutions the firefighters are called upon to perform can be conducted with enough firefighters to assure the safety of the staff performing the evolution."

Again, the dilemma here is the determination as to what number of firefighters fulfills that obligation. Both parties agree that safe staffing levels are of the utmost importance.

The evidence submitted in support of the Union's position is as follows. First, I consider that Arbitrator Campagna's Award expressly supports the Union's position albeit that when it was issued the Department had more responsibilities than it has now; specifically manning dispatch and ambulance apparatus but Arbitrator Campagna

held that 10 men per evolution meets the safety requirement. Second, Union exhibit 2, a letter signed by all of the City's then Fire Officers dated February 13, 2007 clearly reads that those Fire Officers believed that an 8 man staffing level was unsafe. It is true that the City has since eliminated dispatch and ambulance but it is also here undisputed that no changes in technology or equipment have occurred since the Campagna Award was issued or since the Fire Officers' letter of 2007 was penned.

In 2007, the then Fire Officers wrote; "The Fire Officers of the Lockport Fire Department know that suppression capability is an expression of how much firefighting power can be put into action when there is a fire. It includes that amount of apparatus, equipment and personnel. This is all of the components that add up to an effective fireground operations. An early aggressive and offensive primary interior attack on a working fire is usually the most effective strategy to reduce loss of lives and property damage. The minimum staffing must be adequate to provide an effective, efficient and safe environment to operate a sound basis to protect and reduce the risk to lives and property. The Fire Officers strongly request the Lockport Fire Board to review 8 man minimum staffing levels

and recommends the returning to 10 men minimum staffing levels."

I note again that this missive was signed by the then Chief and all of the then Fire Officers.

The City's evidence to support its position follows. First, the City has operated with the 6-man minimum since 2014 without any serious injury to firefighters. The City asserts that this is because the Incident Commanders at fire scenes do not commit men to perform unsafe evolutions. This claim is supported by the testimony of both City witness Chief Brady and Union witnesses who testified that they have never been ordered to perform unsafe evolutions. Second, the City's financial crisis was such that it provides a basis under Article 19, MISCELLANEOUS PROVISIONS, §12 to reduce staffing in 2014. That provision contains language that allows the City to adjust staffing levels "to account for changes in population, technology, apparatus, or other relevant circumstances;" the dire financial condition of the City being "other relevant circumstances." The testimony of the City's Financial Director and the numerous documentary evidence submitted by the City indisputably supports this claim. Third, the City points to documents showing the City was investigated by the New

York State Department of Labor's Division of Health and Safety in 2014 following a Public Employee Safety and Health complaint and that investigation resulted in a finding that "The minimum staffing level has not fallen to the level where it is impossible to maintain two in and two out." That same document also reads; "However, if backup firefighters are assigned duties that prevent them from immediately rendering assistance to the entry team during non-rescue interior firefighting operations, it will result in a violation of 29 CFR 1910.134." The record shows no instance where the City "assigned backup firefighters duties that prevented them from immediately rendering assistance to the entry teams.

I find first that the City's reliance on Article 19, §12 as a basis to permit the reduction in staffing must be rejected. That provision reads that the City may not be prohibited from adjusting staffing levels to account for changes in population, technology, apparatus and other relevant circumstances. In my opinion, three of the four criteria are such that the cited criteria clearly connote instances where staffing level reduction would be appropriate when relevant changes apply. Relevant being that which is directly related to firefighting.

Specifically, a significant reduction in population could logically justify a reduction in staffing levels as the number of fires logically would decline with population decline. Changes in firefighting technology could also logically justify reductions in staffing levels that could occur without endangering firefighters. Similarly, changes in apparatus could logically justify a reduction in staffing levels if the technology were improved to permit a lesser number of firefighters needed at a fire scene. While the parties did not specify what the term "other relevant circumstances" includes, it is proper to deem the term to mean circumstances related to the number of firefighters needed to man fires. Under the contract interpretation doctrine of *Ejusdem Generis*;" "When parties follow a list of specific terms with a more general or inclusive term, it is assumed that they intend to include under the latter only items that are like the specific ones, that is, the same general nature or class as those enumerated, unless it is shown that a broader scope was intended." Elkouri and Elkour, How Arbitration Works, 468 (2003). To infer a meaning from the term "other relevant circumstances" that includes the City's financial condition

would be to violate the principal of *Ejusdem Generis* because in this provision each of the enumerated items, as mentioned above, relate directly to the logical criteria for the number of firefighters needed to fight a fire. Population, apparatus, and technology can all logically affect the number of fire fighters needed to suppress a fire. It then follows that because the parties wanted to include other criteria that would affect the staffing needed to suppress a fire but could not foresee what all of the circumstances are or would be, they agreed to leave the door open to permit the City to adjust staffing levels to accommodate those circumstances. The City's financial situation is not similar to the criteria expressly listed in Subsection 12. Further, the allow the City to adjust staffing levels based on financial circumstances should I conclude that the provision is not related to fire suppression criteria would lead to a potential violation of Article 3, the provision that guarantees firefighter safety a result that would be nonsensical. Parties do not write nonsensical language.

I find that Article 19, Subsection 12 sets forth the conditions under which the Campagna Award minimum staffing determination may be adjusted and that the criteria used by

the City to reduce staffing was not in accordance with Award and thus was not in accordance with the language of the collective bargaining agreement.

Based on the above, I find that the City did violate Article 19, section 12 of the collective bargaining agreement when it "adjusted" Firefighter manning below 9 per shift in 2014.

I next address the claim that Article 3, Section 19 is violated.

As referenced above, this provision requires the City to assure staffing is adequate to provide enough firefighters to safely perform evolutions they are called upon to perform.

The parties both agree that firefighting is inherently dangerous. Absolute safety might not ever be attained. The best the City can do is to provide sufficient manpower, equipment and apparatus to reasonably assure that the avoidance of injury is assured.

The record before me essentially contains the assessments of the parties as to what is a safe minimum staffing level.

While I note the City produced the results of a PESH investigation, I do not find the conclusion reached by the PESH investigator can be viewed as superior evidence to that of those firefighters who perform this work for the City day in and day out. The PESH investigator was an outsider whose only exposure to the operation of the City of Lockport Fire Department and its activities is the limited number of times he visited for the inspection. Further, the conclusions reached contain a conditional finding that the manning level is safe if certain conditions exist.

With respect to the difference in testimony between the Union witnesses and the City witness (Chief Brady) at the instant hearing, I find the following. It is my judgment that the superior evidence here is that of the Fire Officers who do the work for the City. What the evidence in this area boils down to is the assessment of the current Chief versus the assessment of the prior Chief and his entire cadre of 12 Fire Officers. The considered



assessment of the entire cadre of Fire Officers is superior evidence to the assessment of one Chief.

Chief Passuite and his Fire Officers specifically called for the return to 10-man minimum staffing. They noted that fires must be addressed early and aggressively as the way to reduce loss of life and property. They advanced that delay in responding to a fire has an impact on operations can translate into can increase the risk to civilians and firefighters.

I find that the above shows that minimum staffing levels below what was recommended by the Fire Officers in 2007 does indeed lead to a reasonable lack of assurance for the safety of firefighters. Again, there have been no changes in technology, equipment or apparatus since the Fire Officers signed this letter.

I have also considered that the City has had a 6-man minimum in force since 2014 without a serious injury. While this appears to be compelling evidence that a 6-man minimum is safe since firefighters have not been injured the assurance of safety is not proven simply because no one has been hurt. It would be inappropriate to reach a

decision that rests solely upon a lack of injury when that can change with the very next fire. It is the assessment of what level is necessary to assure safety in the future that is appropriate. Again, the assessment of the entire cadre of Fire Officers is superior to the fact that the Department has avoided a disastrous event while the grievance was being processed.

The language of the Agreement requires the City to assure the safety of firefighters. Safety is paramount to all other considerations when employees are performing a dangerous activity. I find it appropriate to interpret the assurance expressly contained in the parties' collective bargaining agreement in such a manner as to err on the side of caution. That, I find, is in keeping with the intent of the parties. This is not a situation where after an injury or death occurs it is appropriate to conclude that well, we should have had more firefighters. The potential cost is too high.

Further, this matter was reviewed in depth by Arbitrator Campagna would reached a determination that minimum staffing of 10 firefighters per evolution provides the proper minimum staffing level. The position of the

City appears to be an attempt to take another bite of the apple since nothing has changed in the areas of equipment, apparatus or the technology used to suppress fires.

The only changes I can see that have occurred since the issuance of the Campagna Award is the removal of dispatch and ambulance services and the parties addressed those changes by agreeing to the 9-man minimum. Those changes account for a reduction of 1 firefighter per evolution as agreed to by the parties after the Campagna Award was issued therefore the only modification to the Campagna Award that is appropriate is the reduction to 9 firefighters per evolution pursuant to the parties' agreement.

Based on the totality of the evidence I reviewed here, I find the reduction/adjustment of firefighters per evolution that was implemented by the City in 2014 constitutes a violation of the collective bargaining agreement.

Considering that there were no significant injuries during the period reviewed here, the proper extent of the remedy here is to direct the City to correct the deficiency

immediately or at least as soon as possible.

As remedy for the violation, the City must restore firefighter staffing to nine (9) per shift effective immediately recognizing that such directive is subject to the time it takes to appoint additional firefighters under the Civil Service process.

**AWARD**

1. The City of Lockport did violate Article 3 Section 19 or Article 19, Section 12 of the collective bargaining agreement when it adjusted Firefighter manning from 9 firefighters to 7 per shift in April 2014.
2. The City of Lockport did violate Article 3 Section 19 or Article 19, Section 12 of the collective bargaining agreement when it adjusted Firefighter manning from 7 firefighters to 6 per shift in September 2014.

As remedy for the above violations, the City must restore firefighter staffing to nine (9) per shift effective immediately recognizing that such directive is subject to the time it takes to appoint additional firefighters under the Civil Service process.

**AFFIRMATION**

STATE OF NEW YORK )  
                              )     ss.:  
COUNTY OF ERIE     )

I, MICHAEL S. LEWANDOWSKI, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

Date: September 8, 2019

  
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MICHAEL S. LEWANDOWSKI

Michael S. Lewandowski  
P.O. Box 363  
Clarence, New York 14031

## Fee for Professional Services

Phone: 716-566-8887

Bill To:
City of Lockport Director of Finance One Locks Plaza Lockport, NY 14094

Date	Invoice No.
09/08/19	1270

Item	Description	Quantity	Unit Price	Amount
Hearing Day	Each Party owes 1/2 of the fee for trhe hearing of 5/3/19: City of Lockport & Lockport Professional Firefighters; Staffing Minimums: PERB CASES #A2014-100 & A2014-354	0.5	2,000.00	1,000.00
Study	Study evidence, review testimony, read briefs, consider facts, reach conclusions, etc Each part owes 1/2 of 2.5 days. Each party owes for 1.25 days	1.25	2,000.00	2,500.00
Mileage	Clarence\Locport\return Each party owes 1/2 of 30 miles round trip	15	0.54	8.10
Administrative Fees	emails, docketing, clerical, postage, etc.: Each party pays 1/2 of \$100.00		50.00	50.00
TOTAL DUE = \$7,116.20. EACH PARTY OWES \$3,558.10				

**PLEASE FORWARD TO THE PERSON RESPONSIBLE FOR PROCESSING PAYMENT. THANK YOU**

THE QUANTITY SHOWN FOR DAY(S) OF HEARING AND STUDY IS ONE-HALF OF THE TOTAL QUANTITY. FOR EXAMPLE; 1.5 STUDY DAYS MEANS YOU ARE BEING BILLED FOR ONE-HALF OF THREE (3) STUDY DAYS. THE TOTAL SHOWN BELOW IS THE AMOUNT OWED BY EACH PARTY.

Social Security # 059-36-0415



TOTAL OWED BY EACH PARTY	\$3,558.10
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