AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between:

IAFF, LOCAL 1717

And **OPINION AND AWARD**

TOWN OF BOURNE

No. 01-18-0003-1923
(Fire Academy Training/Retaliation)

APPEARANCES

For the Union:
Patrick N. Bryant, Esq.

For the City:
Robert S. Troy, Esq.

INTRODUCTION

On June 14, 2018, IAFF, Local 1717 ("the Union") filed a grievance alleging that the Town of Bourne ("the Town") violated the parties' collective bargaining agreement ("the Agreement") by failing to send two newly hired firefighters, including Firefighter Daniel S. Babineau ("Babineau"), to the Massachusetts Fire Academy Career Recruit Firefighting Program ("the Academy"). When the parties were unable to resolve the grievance, the Union demanded arbitration and the undersigned was selected as arbitrator. By the time this matter reached arbitration one firefighter had left the Town's employ thus leaving a live controversy only as to Babineau.

A hearing on the grievance was held before the undersigned on December 11, 2018. At that hearing, both parties were present and represented by counsel. Following presentation of the evidence, both parties sought leave to submit post-hearing briefs.

Upon the American Arbitration Association's receipt of those briefs, the dispute was ripe for resolution.

THE ISSUES

1. What shall be the disposition of the grievance?

2. If the grievance is sustained in whole or in part, what shall be the remedy?

RELEVANT PROVISIONS OF THE AGREEMENT

ARTICLE V: MANAGEMENT RIGHTS

Subject to applicable law and the express provisions of this Agreement, the Town and its Selectmen and Fire Chief shall not be deemed to be limited in any way in the exercise of the regular and customary functions or [sic] municipal management. The Fire Department may adopt rules for the operation of the Fire Department and the conduct of employees provided such rules do not conflict with the provisions of this Agreement.

ARTICLE XI: HOURS OF WORK AND OVERTIME

Section 9 – Recruit Class

Satisfactory completion, within two (2) years of initial hire of the Massachusetts Fire Academy Recruit Firefighting Program or its designated substitute and the obtaining necessary certification by the MA Fire Training Council as FF 1/II is understood to be a condition for continued employment and failure to complete said program and obtain certification satisfactorily shall be basis for termination without recourse to the grievance and arbitration procedure even in those cases where the employee has completed the probationary period.

Section 9A= Recruit Class Housing

During recruit fire training as described in Article XI, Section 9, the Town shall provide members with housing within a reasonable distance from the Massachusetts Firefighting Academy or its designated substitute. …

Section 10 – Minimum Training

Before a newly hired Firefighter/EMT/Paramedic will be counted towards minimum staffing provisions of the contract, he or she will first receive a minimum level of training equivalent to a Firefighter I level. This section shall not supersede Article XI, Section 9.

ARTICLE XXII: SEPARABILITY AND SAVINGS

Section 2

All lawful and authorized job benefits, conditions, rights, or privileges that are now being enjoyed by firefighters in this Agreement shall remain in force and shall not b taken away as a result of the signing of this Agreement.

Section 3

The term past practice shall refer to those practices, policies, benefits and procedures which have recurred with regularity over the past nine (9) years.

For those practices which do not occur regularly or with any frequency a past practice shall only be deemed to exist where the practice was known and recognized by the Union and the Fire Chief or the Board of Selectmen, and was applied in the same manner each or most every time the matter arose.

FACTUAL BACKGROUND

Sometime in calendar year 2016, the Town hired Babineau as a Firefighter in its Fire Department ("the Department"). At the time of his hire, Babineau was certified a Firefighter I/II ("FF I/II"). He secured that certification by having passed an examination administered by the Massachusetts Fire Training Council. His became eligible to take that examination by completing the Call/Volunteer Recruit Firefighter training at the Barnstable County Fire & Rescue Training Academy ("the Barnstable Academy").

After Babineau had been employed for approximately two years, the Union correctly concluded that the Town was not intending to send Babineau to the Career Recruit Firefighter Training Program at the Academy. It thus filed this grievance alleging that the Town was violating Article XI of the Agreement.

The evidence demonstrates that prior to this occasion, with one exception, every firefighter hired by the Town was required to complete the Academy program and obtain the certification required by Article XI, Section 9 of the Agreement within two years of

being hired. The only exception was a firefighter, hired from another municipality, who had already completed the Academy program and had achieved the required certification prior to being hired by the Town.

Other than this one individual, the Town sent all newly hired, full time firefighters to the Academy. It did so even for those individuals who commenced their careers as call firefighters and completed the program at the Barnstable Academy when they were hired by the Town. This group included even those firefighters who had the required certification after having attended the Barnstable Academy prior to being hired by the Town. In one case, a true outlier, an individual who had completed a firefighting program run by the United States Department of Defense was required to attend the Academy and obtain the necessary certification.

Babineau, along with his now departed colleague, appears to have been the first firefighter hired under the Department's then relatively new Chief. The Chief explained his decision to rely upon Babineau's training at the Barnstable Academy and his certification, as meeting the requirements of the Agreement. The Chief was familiar with the Barnstable Academy, having served on its faculty. In his view, recent upgrades to that program made it equivalent to the program at the Academy. This was especially true, he testified, when viewed in light of the in service training in "the Bourne way" that a newly hired firefighter like Babineau would receive. He also testified that he was trying to save the Town that $30,000 it would cost to provide Babineau with housing while he was attending the Academy in Stowe.

The Chief acknowledged the Town's prior practice of sending all new firefighters to the Academy. He testified that as a new Chief, the Agreement did not require him to adhere to any past practices that may have arisen under his predecessors.

The Chief's judgment about the equivalency of the program at the Barnstable Academy requires, for factual recitation purposes at least, a comparison of is program with the Academy's. The Academy program is designed for career recruit firefighters. It consists of over four hundred hours of instruction over an eleven week period. Classes meet and practical training exercise occur during a normal workday. Because of the intensity of the program and its distance from the Town, its recruits and those of many other Massachusetts communities must obtain housing convenient to Stowe. In short hand, it is a full time, residential program for full-time career firefighters.

The Barnstable Academy is considerably different. It has no organizational relationship to the Academy. Its program is aimed at call firefighters. Call firefighters are not permanent, full time employees of their municipality's fire departments and do not work regular shift schedules. The Barnstable Academy trains many of the firefighters working on Cape Cod. Its program consists of approximately one hundred and seventy five hours of classroom and practical training. The classroom and training sessions are held on nights and weekends over a seven plus week time period. The Barnstable Academy also offers an Advance Program consisting of one hundred and twenty eight hours of additional classroom and practical instruction. Completion of the program at the Barnstable Academy appears sufficient to meet the requirements for a Firefighter I.

The basic call firefighter program run by the Barnstable Academy appears to be less intense than the call firefighter program run by the Academy. That consists of two

hundred and forty hours of classroom and practical training, once again on evenings and weekends over an eight week period.

Graduates of the Academy and both call firefighter programs are eligible to take the examinations enabling them to secure the certification required by Article XI of the Agreement. In all cases, graduation from any of those programs does not result in an individual's being certified. Securing the certification requires passing a test administered by the Massachusetts Fire Training Council, using standards developed by the National Fire Protection Association.

There is no evidence that the parties discussed using the Barnstable Academy program or the Massachusetts Fire Academy call firefighter program as being sufficient to satisfy Article XI, Section 9 of the Agreement. The only evidence of any bargaining history about that section shows that the parties have agreed to two modifications.

At some point prior to the events giving rise to this grievance, the parties added the word "or its designated substitute" to Section 9. The evidence demonstrates that the language was added to allow Town firefighters to satisfy the program requirement of that section by attending Fire Academies then operated by Boston and Springfield, both of which were full time programs. The Springfield Fire Academy was later taken over by the Massachusetts Fire Academy.

The second change added the certification requirement to the program requirement. The evidence suggests it was added at the request of a prior Fire Chief. It was ostensibly designed to assure that Town firefighters were both graduates of the required training program and secured the stated certification.

POSITIONS OF THE PARTIES

Union Position:

The Union claims to have demonstrated that the Town violated the Agreement by failing to send Babineau to the Academy. The Town, the Union avers, is bound by the past practices developed between the Union and those Fire Chiefs who served prior to the arrival of the present incumbent. That those practices cannot be abolished upon a change in the Chief's identity, it avers, is established by overwhelming mainstream arbitral jurisprudence and other relevant legal doctrine.

The Union next contends that the Town violated the Agreement by failing to send Babineau to the Academy. Thus, it contends, the plain language of the Agreement compels finding that the Town was required to send Babineau to the Academy or its designated substitute. It also says that this obligation is separate and distinct from the contractual requirement for a recruit to obtain the required certification. There is no evidence, it contends, that the Town formally designated the Barnstable Academy as a substitute, only that it deemed its training equivalent to that provided by the Academy. The finding of equivalency, it argues, is not the same as the designation required by the Agreement, thus compelling a finding that the Town cannot utilize the Barnstable Academy as a substitute for the program referenced in Article XI, Section 9.

Even if the language is deemed ambiguous, the Union continues, the result does not change. This is so, it avers, because the parties' past practice demonstrates that every recruit has been required to complete the Academy program, even if they had already completed the program to which Babineau was directed. The only exception, it says, was a recruit who already completed the program and was hired with the required

certification. It notes that even a recruit who had completed a federal firefighting academy course of instruction was required to attend the Academy.

That the grievance must be sustained, the Union continues, is evidenced by both the bargaining history of Article XI and its evident purpose. Thus, the Union argues, the evidence demonstrates that the term "designated substitute" was added to encompass the possibility that the Town might be able to send recruits to fire academies with full time programs, not the Barnstable Academy. The Agreement, the Union continues, was intended to enhance the safety of its members. Because, it continues, the Barnstable Academy program cannot be deemed equivalent, much less a substitute for the Academy, that purpose is further by its proffered interpretation.

The Union thus requests that the grievance be sustained. As a remedy it asks that the Town be directed to send Babineau to the Academy. Moreover, it says, because Babineau was improperly counted towards the Town's satisfaction of the Agreement's minimum staffing provisions, Town must pay overtime for each shift on which Babineau's counting towards that level was necessary to comply with those provisions.

Town Position:

The Town contends that the Union failed to demonstrate its entitlement to relief. Most notably, the Town avers, the Union failed to demonstrate that the Town's actions violated the express provisions of the Agreement.

The controlling portion of Article XI, Section 9, the Town avers, demonstrates that its purpose is to assure that newly hired firefighters become certified as FF I/II within two years of being hired. Since Babineau achieved that certification it suggests, the Town complied with the Agreement.

The Union's theory, the Town continues, ignores the fact that the Agreement does not require that recruits attend the Academy, since the Agreement also provides that the training may occur at "a designated substitute." The Town contends that the cited language does not preclude the Barnstable Academy or any other Call/Volunteer program from being such a substitute, so long as the firefighter achieves the required certification. The claimed past practice, it avers, is irrelevant since it is inconsistent with the express provisions of the Agreement.

Under the Agreement, the Town continues, the Chief had the right to designate a substitute program and did so in this instance. Nothing in the Agreement, the Town says, limits the Chief's right to make that designation, and that right is specifically recognized in the Agreement's Management Rights as well as the "strong Chief" provisions of the General Laws which became operative in the Town in March 2018. The only implicit limitation, it avers, is that the designated substitute enable to recruit to achieve the appropriate level of certification, a condition that was satisfied in this instance.

The Union's reliance on past practice, the Town continues, is misplaced. Because it implicates a management right, the claimed past practice is outside the scope of Article XXII, Section 2. Nor, it says, was the claimed practice shown to be a "benefit", much less a benefit recognized by the Chief or Board of Selectmen for the past nine years. Finally, it says, the claimed past practice analysis cannot be used to vary the meaning of clear and unambiguous contract language.

In any event, the Town continues, the Town's recent adoption of the Strong Chief law, vests the Chief with the statutory authority to determine the method by which a recruit becomes eligible for certification, as that decision falls within the power of

"assignment" referenced in the statute. That power, it contends, may not be limited by the collective bargaining process. That authority, it avers, certainly includes the right to designate a "substitute" as referenced in the Agreement.

The Town thus requests that the grievance be denied.

OPINION

As in any contract interpretation case, the Union has the burden of demonstrating that the Town violated the Agreement. On its face, it appears that the dispositive issue is whether the Barnstable Academy is a "designated substitute" for the Academy under Article XI, Section 9 of the Agreement. Before we get there we must confront the Town's claim that the Union is misreading Section 9 by viewing its reference to the Academy or a "designated substitute" as an independent element of the Agreement.

The Town's view is premised on its claim that Section 9 was intended to assure that all newly hired Town firefighters become certified as FF I/II. So viewed, the programmatic requirement lacks independent significance so long as the firefighter completes a program qualifying an individual to sit for the certification examination. Babineau's completion of the Barnstable Academy program and his securing the necessary certification would, the Town believes, satisfy Article XI, Section 9. The Town's view is not persuasive.

If the purpose of Section 9 was simply to require newly hired firefighters to achieve the required certification within two years of being hired, the provision's reference to the Academy or a "designated substitute" would have been unnecessary. This is because a recruit would have to attend and complete some type of program to be eligible to secure the required certification. The arbitrator cannot assume, as the Town's

argument effectively requires, that the programmatic references are verbal surplus. In construing a collective bargaining agreement or any other contract, one generally presumes that language is there for a purpose, not decoration.

That the controlling language has independent significance is demonstrated by two other facts. Section 9 specifically provides that a firefighter's "failure to complete said program **and** (emphasis added by arbitrator) obtain certification satisfactorily" within two years permits the firefighter's termination without recourse to the grievance procedure. The use of the conjunctive linguistically compels the conclusion that the issue of program completion must be viewed separately from the requirement of certification.

Section 9's bargaining history is fully consistent with this view. The evidence demonstrates that the contractual reference to the certification requirement was added at the Town's behest to assure that recruits did more than complete the Academy. The Town, it appears, wanted assurance that program graduates would also obtain the specified certification. This reinforces the idea that the programmatic and certification requirements are separate and distinct.

With that issue having been resolved, we can then proceed to determine whether Town's decision to have Babineau attend the Barnstable Academy, rather than the Academy, violated the Agreement. The answer to that question requires one to determine whether the Barnstable Academy can be deemed a "designated substitute" within the meaning of Section 9. The meaning of that term is not self-evident.

The Union has suggested that this issue need not be reached since the Town only claimed that the program was "equivalent" to the Academy, not that it was a substitute.

The argument is a little too clever. A dispassionate view of the record demonstrates that the Town considered the Barnstable Academy to be a designated substitute.

Equally unpersuasive is the Town's claim that it management rights under the Agreement permitted it unilaterally to determine that the Barnstable Academy was a "designated substitute." The problem with this argument starts with the Management Rights provision itself. Article V of the Agreement specifically provides that the rights it preserves are "subject to the express provisions of this Agreement." Article XI, Section 9 is an "express provision" of the Agreement. The fact that it was negotiated strongly suggests that the parties did not intend to confer unilateral authority on the Town to determine whether a particular program could be deemed a designated substitute.

That this suggestion is correct is evidenced by the bargaining history. The evidence demonstrates that the language "designated substitute" was added to permit recruits to satisfy the programmatic requirement by attending the fire academies operated by the Boston and Springfield. This demonstrates that the definition of the term "designated substitute" was deemed to be a matter for bilateral determination and not within the Town's contractual management prerogatives.

We thus come, finally, to the dispositive question: whether the Barnstable Academy should be deemed a "designated substitute" within the meaning of the Agreement? That question must be answered in the negative.

Whether or not the Barnstable Academy is "equivalent" to the Academy is not the critical issue. Instead, the question is whether the Agreement evidences the parties' joint understanding that it can or should be deemed a "designated substitute." We can start with the fact that the Academy program is a residential, full time program designed for

career firefighters. As a matter of contract construction, it is more likely than not that the parties intended to define a "designated substitute" by reference to similar metrics.

The Barnstable Academy program is not a full time, residential program and is not designed for full-time professional firefighters. On that basis alone it does not seem to fall within the parties' joint understanding of a "designated substitute."

This conclusion is bolstered by two other facts. Contracts must be construed as a whole. It is thus significant that Article XI, Section 9A requires the Town to provide "housing within a reasonable distance from the Massachusetts Firefighting Academy or its designated substitute" while "in fire training as described in Article XI, Section 9…" This section helps us understand Section 9 in two ways. By envisioning the Town incurring housing costs while recruits are in training, the section presupposes that such training will be at a residential, likely full time program some distance from the Town. The Barnstable Academy program does not fit any of those criteria. Further, Section 9 specifically references the firefighter's attendance at a "designated substitute." This reinforces the view that the critical term was intended to be defined by reference to the nature of the Academy's program, not a program like the Barnstable Academy.

Article XI, Section 9's bargaining history is consistent with this view. The evidence demonstrates that words "designated substitute" were added to permit the Town to send recruits to fire academies operated by Boston and Springfield, perhaps in anticipation of the latter being taken over by the Academy. Both programs share common attributes with the Academy. They are full time programs and a sufficient distance from the Town to require the provision of housing for recruits. They are designed for professional, full-time firefighters.

The textual, contextual and extrinsic evidence all point in one direction. Under the Agreement, on these facts, the Town's only option was to send Babineau to the Academy because the Barnstable Academy cannot be deemed a "designated substitute" within the meaning of Article XI, Section 9.

That the Town has, until this occasion, always required recruits to complete or to have completed the Academy is further evidence of the parties' intent and until recently, their understanding of the Agreement. Given the other evidence of the Agreement's meaning, however, the past practice evidence is the cherry on top of the icing on top of the cake. It is thus unnecessary to consider the Union's claims predicated upon past practice. Nonetheless some comment is in order.

It is not clear that either section of Article XXII is relevant to the determination of this grievance because both sections appear directed at unwritten past practices. From the arbitrator's perch, the cited past practice is more relevant to defining the term "designated substitute" in Article XI, Section 9. That use of past practice differs from that envisioned by Article XXII because past practice is being used to give meaning to ambiguous contract language, rather than to preserve unwritten practices.

If Article XXII was relevant, the arbitrator could not agree that a new Chief was free to abrogate a past practice encompassed by Article XXII, Section 3 that had been recognized by his predecessors. That section accords contractual dignity to certain past practices "known and recognized by the Union and the Fire Chief." The term "Fire Chief" is best understood as referring to the office, not a specific occupant. So viewed a new Fire Chief cannot assume office and disclaim being bound by any past practices that were recognized by the Union and prior Fire Chiefs.

One could write an essay about why the view expressed by the Chief at the hearing and wisely not stressed in the Town's post-hearing brief is incorrect. Simply put, contract provisions like Article XXII are designed to ensure stability and predictability. Adopting the view asserted at the hearing would be antithetical to that purpose because it would foster considerable instability and uncertainty in the parties' relationship. The parties would likely have chosen much different language if that was the intended result.

Before reaching the question of remedy, we must also address the Town's claim that the decision challenged in this grievance is within the Fire Chief's non-delegable power of assignment under the "strong chief" statute, G.L. c.48, § 42. The Town's adoption of that statute became effective in March 2018. Acts of 2018, c.37. §20.

Absent compelling judicial authority showing otherwise, the arbitrator cannot conclude that the choice of training program falls within the power of assignment referenced in the statute. Article XI, Section 9's specification about a new firefighter's required training is really concerned with safety. It appears designed to assure Town residents that its firefighters have through training and, through testing, have achieved a defined level of competence. It also appears intended to provide similar assurance to a recruit's more experienced firefighter colleagues. Its safety aspects outweigh any potential impact upon the allocation of personnel resources in providing services to the Town's residents. The arbitrator is not aware of any judicial authority encompassing the issue underlying this grievance squarely within the concept of "assignment."

This leaves the question of remedy. The Union is seeking a directive to have Babineau sent to the Academy. It also seeks to have the Town to pay a sum equal to the overtime expense the Town would have incurred on those shifts on which Babineau's

presence was required for the Town to meet the Agreement's minimum staffing obligations. The arbitrator does not believe either remedy is appropriate.

The arbitrator is concerned that an order requiring Babineau to attend the Academy will raise a question about whether he has complied with the requirements of Article XI, Section 9. Such a question could result in his losing his job without recourse to the grievance procedure. The Union specifically disclaimed seeking such a result at the hearing, but it cannot control what the Town might decide to do. To avoid exposing Babineau to innocent victimhood, it is a more prudent use of the arbitrator's remedial authority to view his status as settled and his having met the requirements of Section 9.

So viewed, the remedy shall only be prospective. This also precludes granting the Union's compensation requests. In any event, that request could not, on this record, be justified. The evidence suggests that completing the Barnstable Academy program suffices to meet the contract standard that any firefighter counting towards the minimum must have training "equivalent to a Firefighter I level." The Agreement does not require such a firefighter to be certified. Thus, on this record the evidence supports finding that that Babineau would have been counted towards the minimum staffing compliment.

An appropriate Award shall enter.

AWARD

1. The grievance is sustained. The Town violated the Agreement by failing to send Babineau to the Academy or to a "designated substitute" as that term is used in the Agreement.

2. The Town shall cease and desist from further such violations of the Agreement.

Marc D. Greenbaum, Arbitrator
Dated: February 6, 2019