BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL UNION #583, AFL-CIO

and

CITY OF BELOIT

Case 139
No. 57224
MA-10556

Appearances:

Mr. John Talis and **Mr. Bruce Ehlke**, Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, Attorneys at Law, 217 South Hamilton Street, P.O. Box 2155, Madison, Wisconsin 53701, appearing on behalf of the Union.

Mr. Richard Holm, City Attorney, City of Beloit, 100 State Street, Beloit, Wisconsin 53511, appearing on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter referred to as the Union and the City respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was transcribed, was held on August 6, 1999, in Beloit, Wisconsin. Afterwards the parties filed briefs and the Union filed a reply brief, whereupon the record was closed on October 13, 1999. Based on the entire record, the undersigned issues the following Award.

ISSUES

The parties were unable to stipulate to the issues to be decided in this case. The Union framed the issues as follows:

1. Did the Employer's unilateral implementation of a change in a settled practice which resulted in a curtailing of hirebacks and rollups violate the agreement? If so, what shall the remedy be?

2. Was the continued implementation of this unilateral change, after the grievance was filed, another violation of the labor agreement? If so, what shall the remedy be?

The City framed the issues as follows:

1. Whether hireback procedures pertaining to replacement of exempt employees are work rules within the meaning of Article IV, Section 1, of the Collective Bargaining Agreement?

2. Whether the Employer violated Article IV, Section 2, of the Collective Bargaining Agreement by failing to give the Union 10 days notice of its intent to change the procedure for hireback when an exempt employe (a shift deputy chief) is off duty?

3. If the answers to questions 1 and 2 are "yes", what is the remedy?

4. Whether the Employer violated the Collective Bargaining Agreement by changing a long standing hireback procedure without notice to the Union and without the Union's consent?

5. If so, what is the remedy?

6. Whether the Employer violated Article XIII, Section 5, of the Collective Bargaining Agreement by requiring that an off duty employee (i.e. deputy chief) be replaced by another available exempt employee (i.e. another deputy chief) before offering overtime to an eligible union employe?

7. If so, what is the remedy?

Having reviewed the record and arguments in this case, the undersigned finds the following issues appropriate for purposes of deciding this dispute:

Did the City's decision to have a deputy chief replace an absent deputy chief and the change which accompanied this decision violate the collective bargaining agreement? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1996-1998 collective bargaining agreement contained the following pertinent provisions:

. . .

ARTICLE II – RECOGNITION

The City recognizes the Union as the exclusive bargaining agent for all the regular full-time employes of the Fire Department of the City of Beloit, excluding all officers above the rank of Shift Commander, the civilian secretary and communication operators.

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ARTICLE IV –

APPLICATION AND INTERPRETATION OF WORK RULES

Section 1 For purposes of this Article, work rules are defined as and limited to: Rules promulgated by the City within its discretion which regulate the personal conduct of employes during the hours of their employment.

Section 2 The Union recognizes the right of the City to establish reasonable work rules. Copies of newly established work rules or amendments to existing work rules will be furnished to the Union at least ten (10) days prior to the effective date of the rule.

. . .

Section 4 The Union reserves the right to grieve the reasonableness of a work rule. Any time a work rule is grieved, said work rule shall be withheld until such grievance is resolved.

. . .

ARTICLE VI – GRIEVANCE PROCEDURE

Section 1 A grievance is defined as an alleged violation of a specific provision of this Agreement.

Only one subject matter shall be covered in any one grievance. A written grievance shall contain a clear and concise statement of the grievance and indicate the issue involved, the relief sought, the date the incident or violation took place, and the specific section or sections of the Agreement involved.

. . .

ARTICLE XIII – OVERTIME

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Section 5 Overtime is to be rotated so as to give all line officers and Line Company Fire Fighters equal opportunity to the additional earnings where practicable and possible within the assigned job description in the assigned division.

Section 6 Employes working a forty (40) hour work week shall have equal opportunity to additional earnings at a comparable base pay dollar value, where practicable and possible, within the assigned job description in the assigned division.

. . .

ARTICLE XIX – WAGES AND SALARY SCHEDULE

Section 1 The salaries of the following designated collective bargaining unit employes shall be bi-weekly on Thursday before 4:15 p.m. unless Thursday is a holiday, then payday shall be on Wednesday before 4:15 P.M.

Section 2 Bi weekly Salary effective:

POSITION	1-1-96	7-1-96	1-1-97	1-1-98
Starting Apprentice	$1,020.38	$1,030.58	$1,061.50	$1,093.35
7 Months Fire Fighter	$1,046.85	$1,057.32	$1,089.04	$1,121.71
13 Months Fire Fighter	$1,110.76	$1,121.87	$1,155.53	$1,190.20
19 Months Fire Fighter I	$1,155.91	$1,167.47	$1,202.49	$1,238.56
25 Months Fire Fighter I	$1,215.13	$1,227.28	$1,264.10	$1,302.02
31 Months Fire Fighter II	$1,252.50	$1,265.03	$1,302.98	$1,342.07
37 Months Fire Fighter II	$1,297.67	$1,310.65	$1,349.97	$1,390.47
43 Months Journeyman Fire Fighter	$1,335.07	$1,348.42	$1,388.87	$1,430.54
49 Months Journeyman Fire Fighter	$1,372.44	$1,386.16	$1,427.74	$1,470.57
10 Year Journeyman Fire Fighter	$1,400.49	$1,414.49	$1,456.92	$1,500.63
15 Year Journeyman Fire Fighter	$1,428.56	$1,442.85	$1,486.14	$1,530.72
Motor Pump Operator I	$1,456.57	$1,471.14	$1,515.27	$1,560.73
Motor Pump Operator II	$1,486.21	$1,501.07	$1,546.10	$1,592.48
Acting Lieutenant	$1,504.88	$1,519.93	$1,565.53	$1,612.50
Lieutenant	$1,640.42	$1,656.82	$1,706.52	$1,757.72
*Assistant Mechanic I	$1,539.16	$1,554.55	$1,601.19	$1,649.23
*Assistant Mechanic II	$1,590.52	$1,606.43	$1,654.62	$1,704.26
*Assistant Mechanic III	$1,640.42	$1,656.82	$1,706.52	$1,757.72
*Mechanic I	$1,640.42	$1,656.82	$1,706.52	$1,757.72
*Mechanic II	$1,676.22	$1,692.98	$1,743.77	$1,796.08
*Master Mechanic	$1,721.43	$1,738.64	$1,790.80	$1,844.52
Captain	$1,721.43	$1,738.64	$1,790.80	$1,844.52
*Shift Commander	$1,869.42	$1,888.11	$1,944.75	$2,003.09

*Indicates Specialist Classifications

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Section 8 Employees will be used out of classification when Motor Pump Operators and officer shortages occur due to vacation, sick time, furlough and compensation time.

1) Employees, when serving as Motor Pump Operators, shall receive Motor Pump Operator's wages.

2) Acting Lieutenants, when serving as Lieutenant, shall receive Lieutenant's wages.

3) Lieutenants, when serving as Captains, shall receive Captain's wages.

4) Captains, when serving as Shift Commander, shall receive the difference between Captain's wages and the Shift Commander wage on active duty or ten ($10.00) dollars per twenty-four (24) hour shift, whichever is greater.

. . .

ARTICLE XX – MANAGEMENT RIGHTS

The Union recognizes and agrees that, except as expressly limited by the provisions of this Agreement, the supervision, management, and control of the City's business and operations are exclusively the functions of the City. The powers, rights and/or authority herein claimed by the City are not to be exercised in a manner that will undermine the Union or as an attempt to evade the provisions of this Agreement or to violate the spirit, intent or purpose of this Agreement.

FACTS

Among its many governmental functions, the City operates a fire department. The Union is the collective bargaining representative for most of the department's employes. The Union and the City have been parties to a series of collective bargaining agreements (hereinafter CBA). The parties' most recent CBA contained provisions dealing with work rules and working out-of-class, among others. The words "deputy chief" are not referenced anywhere in the contract.

In 1993, the management of the City's fire department was considering a reorganization of its operations and organizational structure. While this process was ongoing, Union President Terry Hurm wrote a letter to both the fire department administration and the Beloit City Council about the proposed restructuring. In that letter, he raised numerous questions concerning same. One of the questions which he posed was this:

6. Who will be in charge of a shift when the deputy chief is on vacation, sick, etc? The need for continuity of have a deputy chief on shift on a daily basis is obvious if this proposal indeed has merit. With vacations, sick time, etc., will these absences be filled by another deputy chief, an assistant chief, or the chief of the department?

The "Fire Department Administrative Staff" responded to Hurm's letter via a memo to the City Council. The record does not identify who on the "Fire Department Administrative Staff" wrote this memo. That memo, in pertinent part, answered the above question as follows: "The shift captain will be in charge of the shift in the deputies (sic) absence."

In April, 1994, the fire department enacted the proposed reorganization. The reorganization resulted in several changes to its organizational structure. The changes pertinent here are as follows: 1) each shift was to eventually be headed by a deputy chief rather than by a shift commander as was then the case; 2) the shift commander position was to be eliminated by attrition; 3) the number of deputy chiefs increased from two to three; and 4) the deputy chief's work hours increased from an eight hour shift to a 24 hour shift. Some details concerning these changes follow.

Prior to the reorganization, the three shifts (known as the A, B and C shifts) were each headed by a shift commander. The shift commander was in charge of the department's four fire stations and everyone who worked at them. In the department's organizational structure, a shift commander was above a captain and below a deputy chief. Deputy chiefs and above worked an eight-hour shift and were excluded from the bargaining unit, while shift commanders on down worked a 24-hour shift and were included in the bargaining unit. At the time, there were two deputy chiefs and three shift commanders. Shift commander was the highest-ranking position in the bargaining unit. Following the reorganization, each shift was eventually to be headed by one of three deputy chiefs. The heading of each shift by a deputy chief was expected to be accomplished over time by attrition of the existing shift commanders. Thus, over time, the three shift commander positions were eliminated. One of the reasons identified for this particular change in the department's organizational structure was management's desire to have a non-bargaining unit supervisor for each shift.

For about 20 years prior to 1994, when a shift commander was absent, he was replaced on the shift by a captain who moved up to acting shift commander and received shift commander pay. When this happened, a lieutenant would, in turn, move up to fill the captain's slot, and would be paid at the captain's rate, and so forth down the line. This happened hundreds of times. The term used by the parties herein to describe this working out-of-class is "rollups". Rollups occur when an employe scheduled to work, or hired back to work, moves up to temporarily fill a higher ranking position when the incumbent of that position is absent. A related transaction is called a "hireback". Hirebacks are used to ensure minimum staffing, or to remedy a specific shortage of a particular classification of employe, such as an officer, motor pump operator (MPO), or fire fighter. A hireback involves bringing an employe not previously scheduled in to work. It is possible to have both a rollup and a hireback in a single transaction.

After the departmental reorganization was implemented in April, 1994, the Union filed a grievance seeking shift commander pay for each shift in which no unit employe was designated a shift commander. The grievance asserted that all unit employes who had been deprived of shift commander pay as a result of the reorganization should be made whole. On May 1, 1995, Arbitrator Christopher Honeyman found that although the 1994 restructuring resulted in reduced opportunities for rollups (i.e. out-of-class pay) for unit employes, the restructuring did not violate the CBA. He therefore denied the grievance.

Following the reorganization, a deputy chief was assigned to each shift. The deputy chief then became the senior officer on duty. (Prior to this, the senior officer on duty was the shift commander). The deputy chief is now in charge of the department's personnel at all four of the department's fire stations. (Prior to this, the shift commander was in charge of the personnel at all of the City's fire stations). Between April, 1994, and October 2, 1998, there were numerous instances where a deputy chief was absent. When this happened, another deputy chief was not called in as a substitute. Instead, a captain or a lieutenant was rolled up, and used as a substitute. This happened routinely. Whenever a captain or a lieutenant was used as a substitute for a deputy chief, the captain or lieutenant would receive the shift commander's pay referenced in Article XIX, Sections 2 and 8 of the CBA.

On October 2, 1998, Fire Chief James Reseburg issued the following memorandum:

> Effective Immediately: When the Shift Deputy Chief is off due to Vacation, Sick time, Personal Day, or City Business and the need arises to hire back an officer, the other administrative Chief Officers will be offered to fill the vacated administrative position prior to the execution of the hireback procedure as specified in General Order A-23. The Deputy Chief's will train all shift officers on this direction from me. Thank you. Chief Reseburg.

This directive/memo was unilaterally implemented and was not bargained with the Union. General Order A-23 (which is referenced in this memo) specifies the procedure used in the department for hirebacks. There is nothing in General Order A-23 that references deputy chiefs. Specifically, nothing therein identifies who fills in for deputy chiefs in their absence. The practical effect of the October, 1998 directive/memo was this: it provided that whenever a deputy chief was absent, his position would henceforth be filled by another deputy chief if one was available; if another deputy chief was not available, then a bargaining unit member (i.e. a captain or lieutenant) would be used as a substitute as before and receive shift commander pay as before.

Chief Reseburg testified that he made this change because he felt it was in the best interest of the department to replace one administrative officer with another administrative officer, as opposed to a bargaining unit employe. He also testified that deputy chiefs, when on

duty, perform those duties described in the shift commander's job description as well as those duties normally performed by deputy chiefs. When a captain or lieutenant replaces an absent deputy chief though, they do not assume all of the duties of the (absent) deputy chief; instead, they are simply the officer in charge of the shift.

The record indicates that in the first eight months of 1999, there were seven instances where a deputy chief was absent, and another deputy chief was used as a substitute, rather than a captain or lieutenant being rolled up as a substitute. Captain Rich Lochowicz testified that each time a captain is not rolled up to replace an absent deputy chief on a shift, the captain loses about $35 in pay.

The Union filed the instant grievance in response to the Chief's October, 1998 memo. The grievance alleged that the Chief's memo violated Articles IV and XIII of the CBA as well as the parties' past practice. Five similar grievances were subsequently filed. The parties have agreed that the Arbitrator's disposition of the instant grievance will govern the resolution of the remaining grievances.

No one in the department is currently classified as a shift commander, but the rank is still listed in the parties' last CBA along a corresponding pay rate on the pay grid.

None of the pertinent contract language has changed since the Honeyman Arbitration Award was issued in 1995.

POSITIONS OF THE PARTIES

Union

The Union contends that the Chief's 1998 directive violated a past practice as well as several contractual provisions. It makes the following arguments to support this contention.

The Union views this case primarily as a past practice case. Consequently, it makes the arguments traditionally made in such cases, namely that a binding past practice exists which the Employer unilaterally changed. The Union contends that the parties' practice covers hirebacks and rollups, and as it relates to this case, who fills the position of a deputy chief when the deputy chief is absent. According to the Union, the past practice was that it was a captain or lieutenant who rolled up and filled the deputy chief position. The Union asserts that this practice was 1) unequivocal; 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period of time. It elaborates on these points as follows. The Union avers that for 25 years prior to October 2, 1998, whenever the chief officer on a shift (whether it was the shift commander or deputy chief) was absent, a captain filled the position. It asserts that happened hundreds of times during that period – even after the 1994

reorganization and the Honeyman Arbitration Award. Conversely, it notes that there are no instances documented in the record where prior to October 2, 1998, the City did not rollup a captain in either the shift commander's or the deputy chief's absence. Aside from that, the Union maintains that the City acknowledged this practice in writing. To support this premise, it cites the City's response to question number 6 of Hurm's 1993 letter wherein the City responded: "The shift captain will be in charge of the shift in the deputies absence." The Union avers that this case is governed by this past practice. The Union argues that the chief unilaterally changed this practice when he decided that henceforth when a deputy chief was absent, another deputy chief would replace him (rather than a captain). The Union further contends that the Chief's unilateral change of this established rollup practice has caused a substantial financial loss to the bargaining unit as a whole because the number of hireback and rollup opportunities that bargaining unit employes get has been reduced. The Union notes in this regard that every time a captain is not rolled up, there are employes underneath the captain that are not rolled up too. In the Union's view, it would be a wholly unreasonable result for this practice to be disregarded simply because the Chief believes he is not bound to the practice.

Aside from the past practice argument just noted, the Union claims that the contract language supports the Union's position on rollups and hirebacks, and that the Chief's directive violated several sections of the CBA.

First, the Union contends that the Chief's directive violates Article XIX, Sections 2 and 8. To support this premise, it cites the language contained at the beginning of that section which provides that "employes will be used out of classification when. . .officer shortages occur due to vacation, sick time, furlough and compensation time." The Union asserts that the use of the word "will" in that language indicates a mandatory responsibility for hirebacks and rollups. The Union argues that the City should not be permitted to modify this mandatory contractual duty unilaterally. The Union then calls attention to the remainder of Section 8. In the Union's view, the remainder of that section is significant for two reasons: it identifies a rollup mechanism by which employes can earn additional wages, and it makes explicit reference in subparagraph 4 to the rank of shift commander. According to the Union, the reference in this section to shift commander, plus the fact that Article XIX, Section 2 continues to contain the rank of shift commander "supports the Union's reliance on the existing practice with regard to hirebacks and rollups."

Second, the Union argues that when the Chief unilaterally changed the settled practice, the City also violated several procedural aspects of Article IV (the work rule provision). This contention is obviously premised on the Chief's memo being considered a work rule. To support this premise, the Union relies on the fact that the Chief's memo modified General Order A-23. The Union avers that since General Order A-23 is a work rule governing

hirebacks, the directive/document modifying the terms of that General Order must be a work rule too. Building on the premise that the Chief's memo is a work rule, the Union contends that the City failed to give the Union the ten-day notice required by Article IV, Section 2. It also asserts that the City failed to withhold the new work rule as required by Article IV, Section 4. The Union therefore maintains that the Chief's directive was procedurally flawed and in violation of Article IV.

Finally, the Union comments on the City's reliance on Arbitrator Honeyman's 1995 Award. According to the Union, "Honeyman's award did not contemplate a further erosion of the bargaining unit's hireback and rollup rights, and therefore cannot stand as a justification for the City's most recent action." Aside from that, the Union maintains that Honeyman's award cannot address what happened factually in the more than three years after his award. In the Union's opinion, that decision upholding the 1994 reorganization as a whole cannot be used to justify the destruction of a past practice which continued unabated until the end of 1998.

In order to remedy this contractual breach, the Union seeks a make-whole remedy. It argues that the remedy proposed by the City (i.e. a cease and desist order) is unfair and unreasonable under the circumstances.

City

The City contends that the Chief's 1998 directive did not violate the CBA. It makes the following arguments to support this contention.

The City asserts at the outset that Arbitrator Honeyman's 1995 Award between the parties is largely dispositive of the issues raised herein. For background purposes, the City notes that after the fire department reorganization was implemented in 1994, the Union filed a grievance requesting that all unit employes who had been deprived of shift commander pay as a result of the reorganization be made whole. The City further notes that while Honeyman found that the 1994 restructuring resulted in reduced opportunities for out-of-class pay for unit employes, he nonetheless found no contract violation and he therefore denied the grievance. The City believes the Arbitrator should do likewise.

Second, the City contends it did not violate Article IV (the provision dealing with work rules) as claimed by the Union. According to the City, Chief Reseburg's directive was not a work rule within the meaning of Article IV, Section 1 because it did not regulate the personal conduct of employes and because it did not regulate their conduct during hours of their employment. Building on the premise that the Chief's directive was not a work rule, the City believes it had no obligation under Article IV, Section 2, to notify the Union ten days prior to

its effective date. Building on that same premise (i.e. that the Chief's directive was not a work rule), the City asserts it did not have to hold the Chief's directive in abeyance during the pendency of this grievance, but instead could implement the directive as it did. Responding to the Union's argument that if an employe can be disciplined for not following a directive then a directive must be a work rule, the City avers that the Union made a similar argument to Arbitrator Honeyman, and he rejected it. In the City's view, the Union's argument is nothing more than an attempt to change the definition of "work rules". The City contends that should not happen because the parties have already contractually defined "work rules" in Article IV, Section 1. The City notes that that provision expressly governs conduct "during hours of employment". The City submits that since the Chief's memo mandates that unit employes who are off-duty will not be hired back to fill in for a deputy chief if another deputy chief is available, this directive impacts the unit employe "outside of" and not "during" the unit employe's hours of employment.

Third, the City argues it did not violate Article XIII (the overtime provision) either. It notes in this regard that although the Union claimed this article was violated, the Union never identified which section or sections were involved. By the process of elimination, the City concludes that the Union is relying on Sections 5 and 6 (which deal with the distribution of overtime) as the basis for its grievance. The City asserts that no evidence was adduced to show that some line officers and firefighters have been denied an equal opportunity to overtime. The City concedes that while line officers and firefighters may not have as many opportunities for overtime now that deputy chiefs are used as substitutes for other deputy chiefs, the City maintains it does not follow that the remaining overtime has been distributed in some fashion that deprives any unit member of an equal opportunity for overtime.

Finally, the City addresses the Union's claim of a past practice violation. In doing so, it notes that Article VI, Section 1 defines a grievance as "an alleged violation of a specific provision of this Agreement." The City submits that while the Union is contending that there was some type of past practice, it has not identified any portion of the CBA which deals with past practice. That being the case, the City believes this particular claim does not comply with Article VI, Section 1. Aside from that, the City disputes the Union's claim that it somehow had a duty to bargain with the Union about replacing deputy chiefs with other deputy chiefs. According to the City, Article XX (the management rights clause) expressly permits the City to control staffing levels and assignment of personnel, and therefore to assign administrative officers as substitutes for other administrative officers. Thus, as the City sees it, the City acted within the rights set forth in Article XX when the Chief issued the 1998 directive. In making this argument, the City again acknowledges that the Chief's 1998 directive has had an adverse effect on the employment opportunities for unit members. Be that as it may, it asserts that these employment opportunities are outside the bargaining unit and involve the

management and control of the City's business and operation. Thus, in the City's view, the management rights clause allows the City to issue the directive in question, and mandates the conclusion that no contract violation follows from it.

The City therefore requests that the grievance and the requested remedy be denied. In the event however that the Arbitrator finds a contract violation, the City believes that the only appropriate remedy is a cease and desist order.

DISCUSSION

This case involves the written directive/memo the Chief issued October 2, 1998 and the change which accompanied it. The Chief's directive/memo provided that henceforth when a deputy chief was absent, they would be replaced by another deputy chief if one was available. Prior to the Chief's memo, whenever a deputy chief was absent, they were replaced by a captain who rolled up (i.e. was elevated) as the substitute. The Chief's memo changed this because it meant that henceforth when a deputy chief was absent, they would be replaced by another deputy chief if one was available; if another deputy chief was not available, then a captain would rollup as before and receive shift commander pay as before.

The Union contends this memo and the change which accompanied it violates various substantive and procedural provisions in the CBA. Specifically, the Union contends it violates Article XIX, a past practice, and Article IV. These contentions will be addressed in the order just listed.

Attention is focused first on the substantive provision which the Union relies on, namely Article XIX (the article covering wages). My discussion on this point begins with an overview of the two sections which the Union claims were violated: Sections 2 and 8. Section 2 establishes basic pay rates for all positions in the bargaining unit. The last position on the pay grid is that of shift commander. While the position of shift commander is still listed in Section 2, the record indicates that no one is in that position anymore because the City eliminated the position after the 1994 departmental reorganization. To that extent then, the listing of the position of shift commander in Section 2 is dated. Section 8 then goes on to establish a mechanism whereby certain employes can earn additional wages beyond those specified in Section 2. Broadly speaking, this section provides that when certain employes are used outside their regular classification in a higher rated classification, they will be paid at the rate of the higher classification (although number 4 in that section establishes a monetary alternative when a captain serves as a shift commander). In the opinion of the undersigned, Section 8 can fairly be characterized as a working out-of-class provision. The Union relies on the fact that number 4 in Section 8 provides that captains will rollup to the position of shift commander. However, captains no longer officially rollup to the position of shift commander;

when they rollup, they rollup to the position of deputy chief. This point is important because the former position (shift commander) is a bargaining unit position, while the latter position (deputy chief) is not. The position of deputy chief is a managerial position that is outside the bargaining unit. All of the rollups specified in Section 8 are for bargaining unit positions. What the Union is attempting to do here is use Section 8 as a contractual basis for captains to rollup to a management position. The problem with that contention is this: Section 8 does not provide that captains can rollup to the position of deputy chief – it only provides that captains can rollup to the position of shift commander. If number 4 provided that captains can rollup to the position of deputy chief, then this would obviously give the Union a contractual basis for its claim. However, number 4 does not say that; it only addresses captains rolling up to the position of shift commander. The senior officer on duty is now the deputy chief – not the shift commander as it was prior to the 1994 reorganization. When the deputy chief is absent, the City needs a replacement deputy chief – not a replacement shift commander. Since number 4 in Section 8 does not provide that captains can rollup to the position of deputy chief, that provision does not establish a contractual basis for captains to do so. That being so, the City did not violate Article XIX by its actions herein.

Having so found, the focus now turns to the Union's past practice argument. According to the Union, a past practice requires that when a deputy chief is absent, a captain must be rolled up to that position.

Before addressing the threshold question of whether there is or is not an applicable past practice, it is noted at the outset that past practice is primarily used or applied in the following circumstances: (1) to clarify ambiguous language in the parties' agreement; (2) to implement general contract language; (3) to modify or amend apparently ambiguous language in the agreement; or (4) to establish an enforceable condition of employment where the contract is silent on the matter. In this CBA, there is no reference anywhere to the position of deputy chief and who fills in for an absent deputy chief. That being so, circumstances (1), (2) and (3) are inapplicable here. This is because there is no contract provision that the alleged "practice" is suggested as clarifying (#1), implementing (#2), or modifying (#3). Consequently, this is a category (4) case since the Union seeks to have the alleged "practice" concerning who fills in for an absent deputy chief supplement the contract so as to be binding on the parties and become an enforceable condition of employment. In situations such as this where a party wishes to clothe a course of conduct with contractual status, that practice must reflect as many elements of the contract as possible. Simply put, the practice must be the understood and accepted way of doing things over an extended period of time. Additionally, it must be understood by the parties that there is an obligation to continue doing things this way in the future. This means that a "practice" known to just one side and not the other will not normally be considered as the type of mutually agreeable item that is entitled to arbitral enforcement.

That said, the focus turns to whether the Union established the existence of a practice governing who fills in for an absent deputy chief. To support its contention that a practice exists, the Union relies on the following points. First, it notes that for 20 years prior to the 1994 departmental reorganization, when a shift commander was absent a captain rolled up to replace him and was paid at the shift commander rate. Second, it notes that after the 1994 reorganization, when a deputy chief was absent a captain rolled up to replace him and was paid at the shift commander rate. In the opinion of the undersigned, the first point is not germane here while the second point is. The reason the first point is not germane is because it deals with the shift commander position which has been eliminated. No one officially rolls up into that position anymore. The second point is germane because it deals with the position of deputy chief. The City does not dispute that following the reorganization, captains were used to replace absent deputy chiefs. That being so, the question is whether this established a binding past practice which the City was obligated to continue. The Union answers in the affirmative while the City obviously answers in the negative.

Based on the rationale which follows, I find that the City's previous use of captains to fill in for absent deputy chiefs is not sufficient to establish a binding past practice which is entitled to contractual enforcement. The Union's underlying theory that this is a past practice case overlooks the fact that not every pattern of conduct amounts to a binding past practice, particularly when the pattern of conduct arises from the exercise of a management right. That is precisely the case here. What happened previously was not the result of bargaining with the Union but rather the City's unilateral act. The City had previously decided that captains would fill in for absent deputy chiefs. In October, 1998, the City changed its position on this matter and decided that henceforth captains would not fill in for absent deputy chiefs unless no deputy chief was available. That was their right. The City had the right to make this decision because it reserved to itself, via the Management Rights clause, the right to manage and control the City's business and operations. Aside from that, management gets to decide who fills non-bargaining unit (i.e. management) positions such as the deputy chief position, even on a temporary basis. This means that previous decisions concerning who fills in for an absent deputy chief were the product of management prerogatives. Said another way, they arose from the exercise of a management right.

Since the previous instances of captains filling in for absent deputy chiefs were the product of the City exercising its management function, the Union had the burden of showing that the City knowingly waived its management rights and agreed to be bound in the future by a practice concerning same which restricted its management rights. There is no proof in the record of same. It is therefore held that the Union did not prove that the City waived its management right to change who filled in for an absent deputy chief. Since the City never waived its right to change who filled in for an absent deputy chief, it follows that it could change same.

Having just held that the City could change who filled in for an absent deputy chief, the remaining question is whether the City acted in an arbitrary or capricious manner when the Chief decided on October 2, 1998 that henceforth another deputy chief would fill in for an absent deputy chief, rather than a captain. I find it did not. The Chief testified that he made this change because he felt it was in the best interest of the City to replace an administrative officer with an administrative officer. He also testified that deputy chiefs, when on duty, perform those duties described in the shift commander's job description as well as a host of additional specialized duties normally performed by deputy chiefs. The undersigned is hard pressed to find this decision arbitrary or capricious. The City's exercise of its management rights therefore passes muster.

The focus now turns to the procedural provisions which the Union relies on, namely Article IV (the provision dealing with work rules). The Union contends that the Chief's directive/memo was procedurally flawed, and violated that article because 1) the City did not give the Union ten days notice as required by Article IV, Section 2; and 2) the City did not hold the "new work rule" in abeyance as required by Article IV, Section 4. This contention is obviously premised on the Chief's directive/memo being considered a work rule. The undersigned does not accept that premise for the following reasons. Article IV, Section 1 defines a work rule as "rules. . .which regulate the personal conduct of employes during the hours of their employment." Some common examples of work rules which regulate the "personal conduct" of individuals are rules prohibiting stealing, insubordination, tardiness and horseplay, to name just a few. The Chief's October, 1998 directive/memo did not regulate the personal conduct of employes, or regulate their conduct during the hours of their employment. With regard to the Union's argument that if an employe can be disciplined for not following a directive then a directive must be a work rule, it is simply noted that the Union made a similar argument to Arbitrator Honeyman, and he rejected it. The undersigned sees no compelling reason to find otherwise. It is therefore concluded that the Chief's directive/memo was not a work rule within the meaning of Article IV, Section 1. Given that finding, the City did not have an obligation under Article IV, Section 2 to notify the Union ten days prior to its effective date. Similarly, the City did not have an obligation under Article IV, Section 4 to hold the Chief's directive in abeyance during the pendency of this grievance, but instead could implement the directive as it did. That being so, the City did not violate Article IV by its actions herein.

In so finding, the undersigned is well aware that the City's decision to use deputy chiefs to fill in for absent deputy chiefs has caused a financial loss to the bargaining unit as a whole because the number of hireback and rollup opportunities that employes get has been reduced. Be that as it may, the employment opportunities which the captains seek (i.e. the deputy chief positions) are outside the bargaining unit, and thus management's to control. Accordingly, no contract violation has been found.

Any matter which has not been addressed in this decision has been deemed to lack sufficient merit to warrant individual attention.

In light of the above, it is my

AWARD

That the City's decision to have a deputy chief replace an absent deputy chief and the change which accompanied this decision did not violate the collective bargaining agreement. The grievance is therefore denied.

Dated at Madison, Wisconsin this 5th day of January, 2000.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

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