BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS**
**LOCAL NO. 1848**

and

**CITY OF OAK CREEK**
**(FIRE DEPARTMENT)**

Case 129
No. 60451
MA-11619

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Appearances:

**Mr. Joseph M. Conway, Jr.**, Vice-President, Fifth District, International Association of Fire Fighters, AFL-CIO-CLC, 821 Williamson Street, Madison, Wisconsin 53703-3547, appearing on behalf of the Union.

Davis and Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, by **Mr. Robert H. Buikema**, appearing on behalf of the City.

## ARBITRATION AWARD

The City of Oak Creek, hereafter City or Employer, and International Association of Fire Fighters Local No. 1848, hereafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide the instant grievance. Coleen A. Burns was so designated on January 7, 2002. A hearing was held in Oak Creek, Wisconsin on August 22, 2002. The hearing was not transcribed and the record was closed on October 15, 2002, upon receipt of post-hearing written arguments.

## ISSUE

The parties were unable to stipulate to a statement of the issues.

The Union frames the issues as follows:

Did the Employer violate Article 21(C) of the collective bargaining agreement when it denied Steve Jendusa's previously approved request for "compelling sick leave" on April 23 and 24, 2001?

If so, what is the appropriate remedy?

The City frames the issues as follows:

Did the City violate the collective bargaining agreement when a firefighter's request for "compelling sick leave" on April 23 and 24, 2001 was denied?

If so, what is the appropriate remedy?

The undersigned deems the following statement of the issues to be appropriate:

Did the City violate the collective bargaining agreement when the Fire Chief denied Steve Jendusa the use of "compelling sick leave" for his absence from work on April 23 and 24, 2001?

If so, what is the appropriate remedy?

## RELEVANT CONTRACT LANGUAGE

**Article 3 Management Rights**
The City reserves the sole right to operate the Fire Department and all management rights repose in the City except as such rights may be modified by the Agreement and Wisconsin Statutes. These rights include, but are not limited to, the direction of all operations of the Department, including the right to make reasonable work rules.

The City reserves total discretion with respect to the function and mission of the Department including the budget, organization and technology of performing its function or mission, except as may be modified by State law.

These rights shall not be exercised to undermine this Agreement and shall be exercised in a reasonable manner consistent with the traditional manner that they have been exercised. A past practice "traditional manner" shall be defined as 1) not ambiguous; 2) clearly articulated and acted upon; 3) readily ascertainable over a reasonable period of time as established practice accepted by both parties.

If the language in a section of the contract is changed by bargaining, then past practices for that change start from the date the contract change was last negotiated. (Modified March 10, 1998)

. . .

**Article 21 Sick Leave**
A. Employees shall be eligible for sick leave upon the completion of one (1) month's employment with the City, but any accumulation shall be retroactive to the first day of employment. Should the employee leave the employ of the City during the first six (6) months of his/her probationary period, the employee shall reimburse the City for sick leave used during the first six (6) months of employment.

B. Employees shall accumulate one-half (1/2) day of sick leave per month and may thereafter accumulate such sick leave to a maximum of one hundred thirty (130) days. Each day of sick leave shall consist of one (1) 24-hour workday. Any employee taking sick leave which, due to illness or injury is of a duration of three (3) or more consecutive workdays shall produce a doctor's certificate indicating his/her ability to return to work and perform the duties of his/her job.

C. Employees shall be permitted to use sick leave on an hourly basis for reasons, which are of a reasonably compelling nature and for which the shift officer may approve. Illness in the family, medical appointments, emergencies at home, and similar contingencies shall be deemed as compelling reasons. If an employee calls in sick before his/her duty day starts, he/she may report to work later that day if he/she is no longer sick and will have deducted the number of hours of work missed. If a stand-in has reported to fill the sick employee's position, such stand-in will be relieved at the time the absent employee reports. The City agrees it will post a list of all employees and their accumulated sick leave between May 1st and May 15th of each year.

## RELEVANT BACKGROUND

Steve Jendusa, hereafter the Grievant, is a ten-year veteran firefighter of the Oak Creek Fire Department (Department) and is a member of Local 1848. In April of 2001, the Grievant worked as a Fire Inspector. In that position, the Grievant worked a 40-hour workweek consisting of four (4) ten (10) hour days.

During the week of April 15, 2001, the Grievant was on vacation in Florida. His scheduled return to work day was Monday, April 23, 2001. On Friday, April 20, 2001, as the Grievant was driving home from vacation, his automobile broke down in Atlanta, Georgia. At approximately 5:00 p.m. on April 20, 2001, the Grievant's automobile was towed to a local dealership. The mechanic at the dealership was unable to diagnose the reason for the breakdown on Friday, April 20, 2001. During the evening of April 20, 2001, the Grievant contacted the Department to report his car problems.

On Saturday, April 21, 2001, the mechanic told the Grievant that his automobile needed a replacement part and that the part would not be available until Monday, April 23, 2001. At 2:30 p.m. on Saturday, April 21, 2001, the Grievant telephoned the Department and spoke with officer in charge, Commander Charles Liebl. During this telephone conversation, the Grievant explained the problems that he was having with his automobile and advised Liebl that he was taking "compelling sick leave" for Monday (April 23) and Tuesday (April 24). Thereafter, Liebl wrote the following in the Department "yellow pad:"

> F.F. JENDUSA WILL BE LOGGED AS SICK ON MON. AND TUES. APRIL 23 AND APRIL 24. HE IS IN ATLANTA, GEORGIA WITH CAR TROUBLE.

The "yellow pad" is used by duty officers to pass information from one duty officer to another. Duty officers are also known as shift officers.

At 2:56 p.m. on Saturday, April 21, Liebl sent the following e-mail:

> **From:** Charles Liebl
> **Sent:** Saturday, April 21, 2001 2:56 PM
> **To:** Fire Chiefs
> **Subject:** F.F. Jendusa
>
> I received a call from Steve at 14:30 today. He is in Atlanta, Georgia and has car trouble. They will not be able to get the part that is needed until late Monday afternoon. He advised me to log him as sick for Monday and Tuesday. He will be in on Wednesday the 25th of April.

The Grievant's automobile was repaired on the afternoon of April 23, 2001. The Grievant then drove straight through from Atlanta, arriving home Tuesday morning between 4 and 5 a.m.

The Grievant reported back to work on Wednesday, April 25, 2001. At some point on Wednesday, Department Fire Chief Hammernik called the Grievant in; denied the Grievant the use of "compelling sick leave;" and told the Grievant that he could use vacation or work two other days. The Grievant replied that he would discuss the situation with the Union because the Chief's denial of the use of "compelling sick leave" was contrary to the Grievant's understanding of such usage.

The Grievant conferred with the Union and a grievance was filed on May 1, 2001. This grievance alleges that the City violated Article 3, Paragraph 3; Article 21, Paragraph (C); and any and all articles not mentioned which pertain to this grievance.

The language of Article 21(C) has been in the parties' collective bargaining agreement since 1975. On January 29, 1979, City Personnel and Budget Director Harry Eberle sent a memo to Alan Downs that includes the following:

. . .

SUBJECTS: 1) Leaving Duty for Compelling Reason
2) Reporting for Duty – General Alarm

DATE: January 29, 1979

1) Leaving Duty for Compelling Reason

What is a compelling reason for which an on-duty firefighter can receive permission to leave his position? Rather than listing a series of reasons applicable to this provision that would never be all engulfing, Chief Manderle (in his Officer's Meeting of November 29, 1978 – minutes attached), has established a procedure that should resolve this issue.

A. Personnel will request of the officer to leave work, stating "compelling reason" for this necessity for leaving duty.

B. If the officer concurs that it is a compelling reason, personnel will be excused from duty and sick leave will be granted during the absence period.

C. If the officer feels it is not a compelling reason, personnel requesting will be informed at the time of request, and personnel involved will be allowed to leave.

D. Whenever the officer informs personnel that reason for leaving duty is not a "compelling reason," he will meet with the Chief and a decision will be rendered as to whether the reason was or was not a compelling reason. If it is the decision that it was not a compelling reason, the individual involved will have time-taken deducted from his pay rather than sick leave hours.

E. Individuals that abuse the privilege of leaving duty for "compelling reasons" that in the Chief and officer's view point are not, subjects himself to disciplinary action.

F. Green slips shall be filled out for all use of sick leave. All sick leave is used to the closest hour and logged as such.

2) <u>Reporting for Duty – General Alarm</u>

The Rules and Regulations of the Police and Fire Commission establish the responsibility and the authority, as well as the duties of the Fire Department personnel. Attached is the page that outlines the duties of the fire fighters.

"Fire Fighters

Section 2. Duties. They shall respond on all alarms from hotels, theatres, hospitals, institutions, as well as Special or Greater Alarms. Upon receipt of report of the extent of any other emergency which in their opinion warrants their service, they shall respond to such alarms."

Comment: The Fire and Police Departments are the emergency protective arms of the City, responsible for the safety of the citizens. In times of emergency, it is therefore imperative that all available personnel respond.

CC Chief Manderle

In early May, 2001, the Chief responded to the grievance of the Grievant as follows:

## GRIEVANCE ANSWER FORM

NAME OF EMPLOYEE: Steve Jendusa

POSITION: Fire Fighter

DEPARTMENT: Fire

1. FACTS AND ISSUES INVOLVED: FF Jendusa called in from out of town on vacation and informed the FD that he had car trouble and would be unable to return to work as scheduled. He requested compelling sick leave. He returned to work after missing two of his scheduled 10 hr. days.

2. DECISION: Denied.

3. REASON FOR DECISION: The contract in Article 21 (C) provides for compelling sick leave on an hourly basis for compelling reasons. I was present at the negotiations when this paragraph was created. The paragraph was in response to an original proposal by the union to use holiday time on an hourly basis for compelling reasons. The contract then gives examples of compelling reasons, none of which are all day or multi day events. It was not the intent of the parties for compelling sick to be used for days at a time. To allow this creates the potential for any employee out of town on vacation to use sick time to extend the vacation for virtually any reason. FF Jendusa was given the option to either take additional vacation or holiday time, or to pay back the missed days by working other days. This was offered without penalty for the missed days.

The City's Personnel Committee denied the grievance as follows:

To: Steve Wilding, President, Local 1848

From: Robert L. Kufrin, City Administrator

Subject: Personnel Committee's Grievance Decision

Date: July 27, 2001

The Personnel Committee carefully reviewed the issues behind the Jendusa sick time grievance. The issue hinged upon whether or not failing to return to work on time due to a car malfunction was a compelling use of sick time. Since the

> Personnel Committee now consists of two members, both members would have to agree with the Union's position in order for the grievance request to be upheld.
>
> Alderman Lampe felt the grievance should be denied because it was not compelling since the employee had other options on how to make up the time and the decision of Commander Liebl should be subject to review and approval by the Chief. Alderman Kopplin supported the grievance because she felt the compelling sick leave request had been approved by Liebl and that the decision to deny similar requests had not been made in the past.
>
> Since the grievance was not approved, the Union may elect to take it to arbitration.

Thereafter, the matter was submitted to grievance arbitration.

## POSITIONS OF THE PARTIES

### Union

Commander Liebl clearly concurred with the Grievant's request for "compelling sick leave" in that he wrote in the logbook that the Grievant would be off sick and he sent an e-mail to the Chief Officer explaining that the Grievant would be off sick. The Employer did not provide any witness or evidence to refute the Union's assertion that the Grievant's sick leave was approved.

Commander Liebl, an appropriate authority, approved the Grievant's request for "compelling sick leave". The Chief's subsequent withdrawal of this approval is inconsistent with past practice. This conclusion is supported by the "Eberle" memo of January 29, 1979, which clearly establishes that once the Officer concurs, the sick leave is granted and that, if the Officer does not concur, then the Officer will meet with the Chief and a decision will be rendered as to whether their was a compelling reason. The "Eberle" memo establishes that the Chief has delegated the authority to approve "compelling sick leave" to the Officer and that the Chief will review the request for "compelling sick leave" only if the Officer denies the request.

The "Eberle" memo provides:

> "E. Individuals that abuse the privilege of (D) 4 "compelling reasons" that the Chief and Officer's viewpoint are not, subject themselves to disciplinary action."

There is, however, no evidence of abuse of "compelling sick leave".

The Employer's claim that "compelling sick" is only appropriate on an hourly basis and not for days at a time is unsupported by the facts. Not only does the collective bargaining agreement not limit the number of hours that are available for use as "compelling sick leave", but also, as Union Exhibit 1 clearly establishes, employees of the Department have used "compelling sick leave" "for days at a time". This use of "compelling sick leave" is (1) not ambiguous; (2) clearly articulated and acted upon; (3) readily ascertainable over a reasonable period of time as an established past practice accepted by both parties. The Chief's testimony that "compelling sick leave" was meant for employees who were already at work and needed to take care of a short-term emergency, thus limiting the number of hours to less than 24, is contrary to contract language and binding past practice.

Notwithstanding the Chief's opinion to the contrary, the "compelling reasons" listed in Article 21, Section C, of the collective bargaining agreement is not all-inclusive, but rather, is extremely open-ended. The Employer's construction of the term "similar contingencies" is a hyper-technical and tortuous reading of the sentence. Moreover, it is clearly contrary to the intent illustrated in the "Eberle" memo and inconsistent with the Union's witness' testimony that "compelling sick leave" has been granted for a myriad of circumstances that are not specifically illness in the family, a medical appointment or an emergency at home, e.g., fight at school, problem at rental property, missed flight, etc.

The Grievant's car breakdown was an unanticipated event; was away from home; and was an emergency for the Grievant. It is inconceivable that an emergency while away from home is not a similar contingency to an emergency at home. In fact, it is more of a hardship because one does not have the typical resources available to them if they were at home.

The Grievant's reasons for "compelling sick leave" are clearly in concert with the language of the collective bargaining agreement and the "Eberle" memo. The Personnel Committee inappropriately denied the grievance for an invalid reason. Nothing in the collective bargaining agreement states that other avenues of leave must be exhausted prior to, or in lieu of, using "compelling sick leave".

The bargaining history shows that the Union attempted to obtain personal days through negotiation and that "compelling sick leave" was a compromise that produced the same effect. The original language was negotiated in the 1975 collective bargaining agreement and the Chief was not on the bargaining committee at that time. The Chief's recollection of the intent and meaning of the "compelling sick leave" language is without foundation and should be disregarded.

There is no pecking order in the use of approved time off. There is no provision in the policy to submit another type of leave for unapproved "compelling sick leave". If "compelling sick leave" is not approved, the individual will have time taken deducted from his pay rather than the sick leave hours.

Alderman Kopplin's rationale for supporting the grievance based on the fact that "the "compelling sick leave" request had been approved by Liebl and that the decision to deny similar requests had not been made in the past" is correct. The grievance must be sustained.

**Employer**

An "Assistant Chief" supervises the Grievant. He requested, and was granted, vacation time from April 11 to April 19, 2001 (with one paid holiday on April 12). On Friday, April 20, 2001, he claims his car broke down in Atlanta. He did not call his supervisor and report the problem on Friday.

On Saturday, April 21, 2001, when his supervisor was not at the station, he called the station's Duty Officer to report that he would not be back to work as scheduled on Monday, April 23, 2001. He did not speak with his supervisor or the Chief.

The Grievant told the Duty Officer, another Union employee, that he would be taking sick leave to cover all missed 10-hour days. The Duty Officer, Charles Liebl, made an entry in the log that the Grievant would be logged as sick for Monday and Tuesday, April 23 and 24. Liebl notified the Chief that the Grievant called at 2:30 p.m. on Saturday to report car trouble and informed the Chief that the Grievant told him to log in sick.

When the Grievant returned to work on Wednesday, April 25, 2001, he was called in to speak with the Chief. At that time, he was informed that the Chief would not approve "compelling sick leave" for his absences.

The language of Articles 3 and 21 of the collective bargaining agreement is clear and unambiguous. Article 3 contains a non-exclusive, illustrative list of the powers and authority retained solely by the Fire Department as Management Rights, including the exclusive right "to operate the Fire Department except as such rights have been modified by the Agreement."

Article 21 (C) states that the employee will be permitted to use sick leave on an hourly basis for reasons which are of a "reasonably compelling nature and which the shift officer may approve." Thus, by contract, the City has specifically reserved the right to approve or deny leave.

The contract provides unambiguous guidance on the type of reasons that qualify as "compelling". These reasons include illness in the family, a medical appointment, emergencies at home and similar contingencies. All of the leaves listed are of a similar nature.

The contract has recognized the use of sick leave for compelling reasons since 1975. "Compelling sick leave" has been approved for primarily illness-related reasons. In addition, leave has been approved for emergencies at home, including a child in a fight at school and burst water pipes. Each case of approved leave involves a personal or family illness or an emergency at home. This is not the case here.

Article 21 (C) was not intended to extend to every conceivable event, such as a broken-down car. Employees have other leaves for those purposes.

One must assume that at least one employee has missed work due to car trouble in the past 25 years. If there had been approval of "compelling sick leave" for car trouble, the Union would have produced the evidence. Absent evidence that an employee has used "compelling sick leave" for such a purpose, one must conclude that employees have used other approved leaves or unpaid time.

Article 21 contains no guarantee of approval for every request. The contract language is clear. The City determines whether to approve leave and leaves are limited to actions that the City determines are "compelling".

Testimony from the Union President, as well as the Chief, establishes that the Department has denied the use of "compelling sick leave" in the past. The Union has known about and accepted these denials.

The Chief has always retained the authority to make the ultimate determination of whether leave is granted. Each case has been evaluated on its own merits. The Chief must have this flexibility in order to exercise the City's Article 3, Management Rights; to maintain order; and to ensure that sick leave is not abused.

The Chief offered to allow the Grievant to use other accrued leave or to make up the hours by working additional hours. The Grievant declined the Chief's offer. He was compensated for the time, but charged with vacation time.

The Chief clearly has authority to review decisions of a shift officer, who is a Union member. The Union's objection to the Chief's exercise of his management right, in determining whether there was a compelling reason to grant the use of sick leave for a non-sick purpose, is without merit.

Article 3 of the collective bargaining agreement defines a past practice as: 1) not ambiguous; 2) clearly articulated and acted upon; 3) readily ascertainable over a reasonable period of time as established practice accepted by both parties. The Union has not met its burden to demonstrate such a past practice.

The Union had a duty to demand bargaining in order to stop the Chief's exercise of discretion in denying "compelling sick leave". The Union has failed to make any timely demand. Assuming *arguendo* that there was an established past practice, the Union has waived any such past practice by inaction.

Contrary to the argument of the Union, the Grievant's leave was not approved by Liebl. Rather, the Grievant advised Liebl to log him as sick. There is nothing in the record to support the conclusion that Liebl granted permission. Liebl's e-mail to the Chief, the Chief's testimony, and the Grievant's testimony all support a conclusion that his leave was not approved by Liebl.

The Chief testified that the receipt of the e-mail from Liebl was unusual and that it was an indication that there was an open question on whether or not the leave was to be approved. The Chief also testified that he received the e-mail and reviewed the situation because Liebl did not indicate that he had approved the leave and because Liebl was seeking guidance from the Chief on how to proceed.

Given the fact that the Grievant did not have approval from Liebl, the denial of leave by the Chief did not overrule Liebl. However, assuming Liebl had given approval, there is no contractual limitation on the Chief's right to correct errors by his subordinate.

The Union relies on the "Eberle" memo, which outlines the manner in which the then Chief intended to administer "compelling sick leave." The Union's reliance on the memo is misplaced. Not only does the memo not limit the Chief's right to overturn the erroneous decision of a supervisor, but also a memo that delegates the authority of one Chief is not binding upon another Chief.

This memo was not negotiated. The memo was not incorporated into the collective bargaining agreement or attached as a "Memorandum of Understanding". The memo, quite simply, was an exercise of the right of management to determine the method of handling leave approval in 1979.

The City does not dispute that "compelling sick leave" may be approved by the City on an hourly basis and that such leave is not limited to a few hours at a time. Thus, the Union's argument regarding the hourly use of "compelling sick leave" is irrelevant. The denial of the sick leave request was based on the Chief's view that the request for car trouble did not meet the contractual definition for "compelling sick leave".

The grievance answer of the Personnel Committee does not form the basis for the grievance. Rather, the actions of the Chief in denying the leave do so. The Alderman's individual opinions regarding the merits of the grievance are not relevant.

Due to the passage of time since the "compelling sick leave" language was first negotiated, neither party was able to definitively establish any bargaining history intent beyond the language itself. Moreover, bargaining history is irrelevant when the language is quite clear. Should the arbitrator find any ambiguity in the contract language, the lack of established past practice clearly supports the Department's interpretation of the contract language in this case.

Although the Union would like to have the absolute right to use sick leave whenever its members choose, with the approval of another member of the Union, that is not what the Union negotiated. The Union cannot modify the contract through the grievance process. To adopt the Union's interpretation, would be to totally disregard the discretionary nature of the language.

The Arbitrator should find that the Chief properly exercised his authority when he denied the request by the Grievant to use sick leave to extend his vacation. The grievance should be dismissed with prejudice in its entirety.

## DISCUSSION

The Union, contrary to the City, argues that the Grievant has a contractual right to take "compelling sick leave" for his absence from work on April 23 and 24, 2001. As the parties each recognize, the relevant provisions of the collective bargaining agreement are Article 3, Management Rights, and Article 21, Sick Leave.

The rights reserved to the City under Article 3 are sufficiently broad to encompass the right to approve and deny sick leave requests. However, as Article 3 expressly recognizes, the rights granted to the City under Article 3 are not without restriction. Specifically, the City is prohibited from exercising its Article 3 rights "to undermine this Agreement" and is required to exercise these rights "in a reasonable manner consistent with the traditional manner that they have been exercised." Under Article 3, 'A past practice "traditional manner" shall be defined as 1) not ambiguous; 2) clearly articulated and acted upon; and 3) readily ascertainable over a reasonable period of time as established practice accepted by both parties.'

"Compelling sick leave" is provided for in Article 21(C) of the Agreement. The question to be determined is whether or not the City undermined this section of the Agreement when its representative, Fire Chief Hammernik, denied the Grievant the use of "compelling sick leave" for his absence on April 23 and 24, 2001.

Article 21(C), in relevant part, states "Employees shall be permitted to use sick leave on an hourly basis for reasons, which are of a reasonably compelling nature and for which the shift officer may approve. Illness in the family, medical appointments, emergencies at home, and similar contingencies shall be deemed as compelling reasons." Under the plain language of this section of the Agreement, the City has delegated to the shift officer the City's Article 3, Management Rights, authority to approve the use of sick leave for reasons that the shift officer deems to be "compelling." Inasmuch as the parties have agreed to delegate such authority to the shift officer, it would not be reasonable to distrust the decision of the shift officer on the basis that the shift officer is a member of the Union's collective bargaining unit.

As the City argues, the testimony of the witnesses was not sufficient to demonstrate any bargaining history intent other than that reflected in the plain language of Article 21(C). There is, however, reliable evidence regarding the historical application of Article 21(C).

The 1979 memo issued by City Personnel and Budget Director Harry Eberle expressly recognizes that requests for "compelling sick leave" are made to the "officer" and that, if the "officer" concurs that there is a compelling reason, then the employee will be excused from duty. Under this memo, if the "officer feels it is not a compelling reason," he has a duty to notify the employee of this fact at the time of the request. Upon receiving such notice, the employee has the right to leave, but the issue of whether or not the employee has a "compelling reason" and, therefore, is entitled to sick leave is subsequently decided in a meeting between the "officer" and the Chief. The "Eberle" memo, which was issued to then President of the Union Alan Downs, provides evidence of a historical application of the "compelling sick leave" provision that is consistent with the plain language Article 21(C), i.e., that the City has delegated to the shift officer the authority to approve the use of sick leave for reasons that the shift officer deems to be "compelling."

At the time of hearing, Gerard Hammernik, who began employment with the Department in 1974, had been the Chief for a little over four years. The Chief testified that the majority of "compelling sick leave" requests did not come to him; that most of the "compelling sick leave" requests are left to the discretion of the shift officer; and that he does not get involved in "compelling sick leave" requests unless the shift officer comes to the Chief for an interpretation. The Chief also testified that, prior to becoming Chief, he granted "compelling sick leave" requests; at times he sought advice from others with more experience; and that his decision to approve "compelling sick leave" was never overruled by prior Chiefs. This testimony of the Chief provides evidence of a historical application of the "compelling sick leave" provision that is consistent with the plain language Article 21(C), i.e., that the City has delegated to the shift officer the authority to approve the use of sick leave for reasons that the shift officer deems to be "compelling."

Alan Downs was hired into the Department in 1970 and retired as an Assistant Chief in 2000. According to Downs, prior to and after the "Eberle" memo, the shift officer had authority to approve "compelling sick leave" requests. Steven Wilding, a Lieutenant for approximately two years, has been employed in the Department for over fourteen years. According to Wilding, during his tenure as Lieutenant, he has approved and denied "compelling sick leave" without seeking, or receiving, the approval of a superior officer. The testimony of these witnesses is consistent with that of the Chief and provides evidence of a historical application of the "compelling sick leave" provision that is consistent with the plain language Article 21(C), i.e., that the City has delegated to the shift officer the authority to approve the use of sick leave for reasons that the shift officer deems to be "compelling."

As the Chief's testimony demonstrates, he interpreted Liebl's e-mail of April 21, 2001 to mean that Liebl had not made a decision to grant "compelling sick leave" to the Grievant and that the issue of whether or not the Grievant was eligible for "compelling sick leave" was an open issue to be addressed by the Chiefs. The Chief's interpretation was based upon the language of the e-mail, as well as the fact that officers in charge do not normally contact the Chief about "compelling sick leave" requests unless they are seeking his advice.

Inasmuch as Liebl did not testify at hearing, the best evidence of Liebl's intent in sending the e-mail is that which is reflected in the plain language of the e-mail. Liebl's e-mail reports only the Grievant's side of the conversation; is silent with respect to Liebl's side of the conversation; and does not seek any advice as to whether or not the Grievant should receive "compelling sick leave". Thus, the most reasonable construction of the Liebl e-mail is that Liebl was simply reporting what the Grievant stated to Liebl during the conversation of April 21, 2001.

In his e-mail, Liebl neither confirms, nor denies, that he approved "compelling sick leave" for "Monday and Tuesday." Thus, with respect to this issue, Liebl's e-mail is not determinative.

Notwithstanding the City's argument to the contrary, the Grievant's testimony does not demonstrate that the Grievant assumed that Liebl approved "compelling sick leave" for April 23 and 24, 2001. Rather, the Grievant testified that, during the telephone conversation of Saturday, April 21, 2000, Liebl approved the Grievant's usage of "compelling sick leave" on April 23 and 24, 2001. Inasmuch as Liebl did not testify at hearing, this testimony of the Grievant is not rebutted.

The "yellow pad "entry made by Liebl on Saturday, April 21, 2001 states: "F.F. JENDUSA WILL BE LOGGED AS SICK ON MON. AND TUES. APRIL 23 AND APRIL 24. HE IS IN ATLANTA, GEORGIA WITH CAR TROUBLE." The most reasonable construction of the plain language of this entry is that Liebl approved the Grievant's usage of "compelling sick leave" for April 23 and 24.

Such a construction is also supported by Steven Wilding's testimony that, as a Lieutenant with responsibility to enter and interpret information on the "yellow pad," he would interpret Liebl's entry to mean that Liebl had approved the Grievant's use of "compelling sick leave" on April 23 and 24, 2001. The fact that Wilding is a member of the Union's collective bargaining unit and a Union officer does not provide a reasonable basis to discount or discredit Wilding's testimony. Notwithstanding the City's argument to the contrary, the most reasonable construction of the record evidence is that, on April 21, 2001, Liebl approved the Grievant's usage of "compelling sick leave" for his absence on April 23 and 24, 2001.

In summary, Liebl was a shift officer on April 21, 2001. By the terms of Article 21(C) of the parties' collective bargaining agreement, Liebl had authority to approve the Grievant's request for "compelling sick leave." On April 21, 2001, Liebl exercised this authority by approving the Grievant's request for "compelling sick leave."

Liebl did not make a mistake that the Chief is entitled to correct. Rather, Liebl exercised the broad discretion delegated to Liebl by the terms of the parties' collective bargaining agreement. Liebl's approval conferred upon the Grievant a contractual right to use "compelling sick leave" on April 23 and 24, 2001.

While there may be instances in which a shift officer has acted so egregiously as to warrant the conclusion that the shift officer abused the discretion delegated to the shift officer by the terms of the parties' collective bargaining agreement, this is not such a case. By overturning Liebl's approval of the Grievant's request for "compelling sick leave," the Chief undermined the provisions of Article 21(C) and, thus, the City has violated Article 3, Management Rights, of the parties' collective bargaining agreement.

The appropriate grievance remedy is to make the Grievant whole for the losses that he suffered as a result of the City's contract violation. The City argues that the Grievant was paid vacation time for the twenty hours that he was scheduled to work on April 23 and 24, 2001. Such a fact, however, is not clearly established in the record.

If the Grievant received twenty hours paid vacation for his absence from work on April 23 and 24, 2001, as argued by the City, then the appropriate make whole remedy would be to immediately restore these vacation hours to the Grievant and to deduct those same hours from the Grievant's sick leave balance. If the Grievant was not paid for his absence from work on April 23 and 24, 2001, then the appropriate make whole remedy would be to immediately pay to the Grievant the twenty hours of sick leave pay that he should have received for this absence and to deduct those same hours from the Grievant's sick leave balance.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following:

## AWARD

1. The City violated the collective bargaining agreement when the Fire Chief denied Steve Jendusa the use of "compelling sick leave" for his absence from work on April 23 and 24, 2001.

2. The appropriate remedy is to immediately make Steve Jendusa whole for any loss suffered as a result of this contract violation.

Dated at Madison, Wisconsin, this 26th day of August, 2003.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

CAB/gjc
6567