BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**JANESVILLE FIRE FIGHTERS, LOCAL 580, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, CLC**

and

**CITY OF JANESVILLE**

Case 79
No. 64669
MA-12969

**Appearances:**

**Patrick Kilbane**, Field Services Representative, IAFF Fifth District, appeared on behalf of the Union.

**Wald Klimczyk**, City Attorney, City of Janesville, appeared on behalf of the City.

## ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and City or Employer, respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the above-captioned grievance. A hearing was held on September 29, 2005, in Janesville, Wisconsin at which time the parties presented testimony, exhibits and other evidence that was relevant to the grievance. The hearing was not transcribed. The parties filed briefs by October 28, 2005, whereupon the record was closed. Having considered the evidence, the arguments of the parties, the applicable provisions of the agreement and the record as a whole, the undersigned issues the following Award.

## ISSUE

The parties stipulated to the following issue:

> Did the Employer violate the collective bargaining agreement between the City of Janesville and International Association of Fire Fighters Local 580, 2005-2007, when the fire chief failed to approve a work day substitution submitted by Matt Diehls on January 3, 2005, and if so, what is the appropriate remedy?

## PERTINENT CONTRACT PROVISIONS

The parties' 2005-07 collective bargaining agreement contains the following pertinent provisions:

### ARTICLE VI
### HOURS OF WORK

. . .

C. Work Day Change.

. . .

2. Substituting for one of the members of the bargaining unit may occur only under all of the following conditions:

a. It is voluntary, and

b. It is at the employee's request, not the employer's, and

c. It is not because of the employer's business operation but because of the employee's desire or need to attend to personal matters, and

d. Such substitutions are approved by the Chief or the Shift Commander considering the staffing needs of the department. The Chief or the Shift Commander shall have the right to disapprove trades if the effectiveness of the Department will be hampered, and

e. When substituting work days, a substitution slip will be filled out and returned to the Chief or Shift Commander for approval, and

f. Work day substitutions shall not run more than three (3) consecutive work days unless approved by the Chief, and

g. Work day substitutions shall result in no more than 72 consecutive hours of work.

. . .

## ARTICLE XXIII
## MUNICIPAL AUTHORITY

The City and the Fire Chief have the right to plan, direct, and control the work force; to schedule and assign employees to determine the means, methods, and schedules of operations; to establish standards; to sub-contract, and to maintain efficiency of employees.

. . .

. . .Personal amenities known to the City and currently practiced by bargaining unit personnel, shall not be changed except by written agreement of the parties.

. . .

## PERTINENT INTERNAL PROCEDURE

The Janesville Fire Department has an internal procedure book. It contains the following provision dealing with work day substitutions:

PROCEDURE Title: Work Day Substitution

I. General guidelines for approval

- All workday substitutions are controlled by Article VI, Paragraph C of the agreement between the City of Janesville and Local 580.

- The person requesting to be released from duty using workday substitution must make all necessary arrangements prior to requesting approval from their Shift Commander.

- A workday substitution cannot have a negative cost impact to the City of Janesville.

- Department activities take precedence over the employee's request for workday substitution.

- Station officers are responsible for completion of all nine-week plan activities affecting their crew.

- The person requesting the substitution must submit a workday form. All blanks, i.e. names, dates and signatures, must be filled in. No open-ended trades will be accepted.

- Workday substitutions shall not occur on more than three (3) consecutive duty days unless the Fire Chief grants prior approval.

- Workday substitutions shall not result in more than forty-eight (48) consecutive duty hours being scheduled (for either individual) unless the Fire Chief grants prior approval.

- Workday substitutions are accepted only for the current calendar year.

II. Substitutions of less than 24 hours

- A workday substitution form is not required for substitutions less than twenty-four (24) hours.

- The person scheduled to work is liable for the work time until the substituting person reports for duty. Usually this presents no problem, as the person scheduled for work doesn't leave until their relief reports for duty. The exception occurs when a less than twenty-four (24) hour substitution is scheduled for 0700 hours and no paperwork is on file. The person scheduled for work is liable for discipline if the person substituting for him does not report for duty for <u>any</u> reason. If a signed substitution slip is on file, the provisions of Articles XIII, XIV, XV, and XVI cover the parties involved.

- Personnel desiring substitutions during regular activity hours (0700 – 1700) should schedule substitutions for the entire period from 0700 – 1200 or 1300 – 1700. Substitutions for periods shorter than this are too disruptive. Exceptions can be made when unusual circumstances warrant them.

- All less than twenty-four (24) hour substitutions are subject to the approval of the station officer. If the work substitution request interferes with the station officer's activities, the officer can deny it.

III. Reporting substitutions

- Station officers will notify the Shift Commander of any personnel trades at the start of the duty day.

## BACKGROUND

Among its many governmental functions, the City operates a fire department. The Union is the collective bargaining representative for most of the department's employees. The Union and the City have been parties to a series of collective bargaining agreements.

The fire department operates out of five firehouses with a variety of equipment and provides a number of services including fire fighting, rescue operations, emergency medical, fire prevention/education and fire inspections. With the exception of a handful of employees who work 40 hours per week, the firehouses and equipment are staffed by approximately 84 employees who work 24 hour duty days beginning and ending at 7:00 a.m. These employees, called shift employees, are divided equally among three shifts designated A, B and C. Of the shift employees, three are administrative (the Shift Commanders), while the remainder are represented. The represented employees serve in the following classifications: Captains, Lieutenants, Motor Pump Operators, Fire Fighter/Paramedics and Fire Fighters. The employees within each of these classifications may also hold additional certifications which designate them as Divers, Hazardous Materials Technicians, Engine Paramedics and Preceptors.

The Fire Department currently has a daily minimum staffing requirement of 24 personnel per day. Thus, a total of 24 personnel are to be on duty each day. The 24 personnel are made up of a combination of officers (Shift Commanders, Captains and Lieutenants), Motor Pump Operators, Firefighter/Paramedics and Firefighters. The daily minimum staffing requirement also involves the minimum number of personnel within a given classification. For example, a minimum of nine Paramedics are to be on duty each day. The nine Paramedics can be a combination of Firefighter/Paramedics, and/or Captains, Lieutenants or Motor Pump Operators assigned to a fire engine and designated as engine paramedics. A Shift Commander (or a captain acting in the Shift Commander's absence) is also to be on duty each day. For the remainder of the classifications, there are no required minimums. The department sometimes falls below the minimum staffing level.

. . .

Bargaining unit employees have a number of ways to get time off from work. Specifically, they can get time off via vacations, holiday compensatory days, personal days, sick leave, funeral leave and work day substitutions.

There are occasions when employees want to take a day off to attend to personal matters, but cannot use the contractual time off benefits just referenced. As an example, it may be that the day in question already has four bargaining unit employees scheduled for vacation which is the contractual limit. When this happens, employees oftentimes resort to making work day substitutions.

Work day substitutions are also known as substituting shifts or trades. As the name implies, a trade is when one individual trades a shift/duty time with another and fills in for them. Trades are commonly made in the department, are voluntary and are worked out by mutual agreement. Trades do not affect the total number of people working on a shift or leave the department short-staffed. Employees have long been allowed to make trades. This case involves a trade which the fire chief initially failed to approve. The trade was ultimately approved though.

The record indicates that trades involving 24 hour work days have historically worked as follows. The individual wanting a trade finds a willing co-worker. The co-worker does not normally have to be of the same rank or classification. As it relates to this case, a Paramedic does not have to get another Paramedic as his/her replacement; a Fire Fighter will do. Thus, employees can normally trade across classification lines. After the employees agree upon the trade, they (i.e. the affected employees) complete a form entitled "Work Day Substitution Slip", which is informally known as a trade slip, and submit it for approval. The record indicates that trade requests are sometimes submitted far in advance of the actual trade date. For example, some trade requests are submitted almost a year in advance. After a trade request is submitted, a management official (either the Station Captain, Shift Commander or Fire Chief) decides whether to grant or deny it (i.e. the trade request). In making this decision, the management official is contractually obligated to consider the "staffing needs of the department" and whether the proposed trade will hamper "the effectiveness of the department." The factors which management has traditionally considered in making this determination are the department's staffing needs, overtime costs, FMLA and sick leave usage, and absences such as training, personal days and other days off. Trades are normally approved. The record contains about three dozen trade slips documenting out-of-class trades that were approved in late 2003 and 2004. In the majority of these cases, a management official approved the trade request within several days or weeks of the time it was submitted. In a few cases though, approval took several months. Whether approval of the trade request was granted quickly or not, it often was for a trade date months in advance.

## FACTS

Matt Diehl is a Firefighter/Paramedic in the department. Like other bargaining unit employees, he has made numerous work day substitutions. Some of his past trades have been with employees in the same classification and some have been with employees of a different classification. All these trades were approved.

In December, 2004, Diehl and Firefighter Shawn Merath worked out a trade so that Diehl could be off work on September 30, 2005. This particular trade was to be an out-of-classification trade because Diehl is a Firefighter/Paramedic and Merath is a Fire Fighter.

After the trade was worked out, Diehl and Merath submitted a completed Work Day Substitution Slip on December 19, 2004. After it was submitted, Shift Commander Steve Ballou told Diehl to resubmit it after the first of the year. Diehl did as directed, and resubmitted the completed trade form on January 3, 2005.

After Fire Chief Larry Grorud received the trade request, he decided it was too early to either approve or deny it. Thus, he did neither. Instead, he had the trade form returned to Diehl along with a post-it note signed by Ballou that said "resubmit no more than 30 days prior to trade date." Grorud felt that by waiting until close to the September 30, 2005 requested trade date – namely 30 days prior to that date – he would have more information then (than he did in January, 2005) on the factors which management traditionally considers when reviewing

trade requests. This was the first time Chief Grorud told an employee to submit a trade request for an out-of-class trade 30 days prior to the requested trade date.

On January 10, 2005, Diehl filed a grievance concerning the matter just referenced. The grievance alleged that the "Fire Chief has unilaterally changed the method for approving trades, and in doing so is in violation of long standing past practice of approving trades up to almost an entire year in advance." After the grievance was denied, it was processed through the contractual grievance procedure. When the grievance was appealed to Fire Chief Grorud, his written response included the following statement: "In this particular situation, I do not feel comfortable in projecting the Department's staffing needs, or effectiveness, with an out-of-classification trade being approved ten (10) months in advance. . .Therefore, I must stand by the Shift Commander's decision to not consider any out-of-classification trade more than thirty days in advance of the trade." When the grievance was appealed to City Manager Steve Sheiffer, he denied the grievance, but opined as follows: "However, I do agree with you that the 30 day rule should have been discussed with the Union. Therefore, I direct the Chief and Union to meet and discuss this matter." The parties then bargained over the 30 day rule (i.e., the Chief's decision to have out-of-classification trade requests submitted 30 days prior to the trade date). This bargaining did not resolve the grievance, and the grievance was ultimately appealed to arbitration.

After the grievance was appealed to arbitration, Diehl resubmitted the trade request. This time, Grorud decided that the September 30, 2005 trade date could be granted without hampering the effectiveness of the department, so he approved Diehl's trade request. Thus, Diehl ultimately received the requested trade date. Grorud acknowledged at the hearing that since he ultimately approved Diehl's September 30, 2005 trade request, in hindsight he could have approved it in January, 2005. He emphasized that he did not know that at the time, though. Grorud testified that the 30 day requirement he applied herein did not apply to in-class trade requests – just out-of-class trade requests. He also testified that if Diehl had traded with someone in his classification, he (Grorud) would have granted the requested trade at the time it was submitted (January, 2005).

## POSITIONS OF THE PARTIES

### Union

The Union contends that the chief's failure to approve the work day substitution request in question violated the collective bargaining agreement. As the Union sees it, the chief's failure to approve that request, and his unilateral imposition of a 30 day restriction for the approval of work day substitutions by Paramedics with employees of different classifications, changed the existing method for approval of work day substitutions. This violated the collective bargaining agreement for the following reasons.

First, the Union addresses the contract language contained in Article VI, C, 2. According to the Union, that provision gives employees a right to make work day

substitutions. While the language also gives the Employer the right to disapprove work day substitutions, the Employer's right (to disapprove) is conditioned upon the Employer's showing that the effectiveness of the department will be hampered. Thus, when the Employer denies a substitution request, it must demonstrate that the proposed trade hampers the effectiveness of the department. The Union contends that the Employer did not demonstrate that here. The Union interprets the phrase "effectiveness of the department" to refer to dropping the department below the daily required minimums or incurring additional costs to the department. The Union argues that the work day substitution request involved here did neither, so the request should have been granted. The Union maintains that the fire chief's decision that some event might occur between the time of approval and the time of substitution that would cause the number of Paramedics to fall below the minimum does not meet the test for disapproval.

As part of its argument concerning the contract language, the Union avers that while that provision addresses some aspects of work day substitutions (i.e. trades), it is silent on/does not address the following three topics: 1) whether employees must substitute with employees in the same classification; 2) whether employees must submit their work day substitution requests within a certain time frame; and 3) whether there is a time frame for approval of those trades by the chief. As the Union sees it, Article VI, C, 2 is silent/does not address those three topics which are involved herein. Additionally, the Union notes that Article VI, C, 2, d, contains the phrase "staffing needs" and "effectiveness", which are not defined. The Union contends those phrases are ambiguous.

The Union avers that when contract language is silent and/or ambiguous, as it is here, it is common for arbitrators to look at the parties' past practice to see if it provides guidance concerning how the parties have previously interpreted that language. According to the Union, there is a past practice dealing with the approval of work day substitutions, and the practice is this: 1) that employees have long been allowed to make work day substitutions with employees in different classifications; 2) that employees have not had to submit their work day substitution requests within a certain time frame; and 3) that employees have long had their work day substitution requests approved by management in a timely fashion. To support the first point, the Union asserts that the record evidence shows that numerous trades have been made by employees in different classifications. To support the second point, the Union submits that the record evidence shows that when employees previously traded, they did not submit their work day requests 30 days before the requested trade. Instead, they did so months in advance; sometimes a year in advance. To support the third point, the Union maintains that the record evidence shows that employees have had their trade requests approved by management in a timely fashion – meaning within several days or weeks.

Building on the premise that a past practice exists, the Union argues that that practice is binding and entitled to contractual enforcement because it meets the traditional criteria for a past practice (i.e. that it is unequivocal, clearly enunciated and readily ascertainable over a reasonable period of time). The Union asks the arbitrator to apply that practice here. The Union contends that if the Employer wants to change that practice, the way to do so is through bargaining.

Next, the Union relies on the contract provision dealing with personal amenities (Article XXIII). According to the Union, the past practice of approving work day substitution requests at the time of submission or shortly thereafter constitutes a "personal amenity" within the meaning of that article. Building on that premise, the Union asserts that the chief's changing of that personal amenity violated that article.

Finally, the Union argues that the chief's 30 day restriction for the approval of work day substitutions by Paramedics with employees of different classifications is discriminatory because it applies to just one classification – Paramedics – and thus is arbitrary and capricious. According to the Union, employees in other classifications are still free to make work day substitutions that comply with the minimums without having to wait, sometimes for months, for approval of their requests by the chief.

The Union therefore asks that the grievance be sustained and an appropriate remedy issued.

**Employer**

The Employer contends that no contract violation occurred when the chief did not approve the work day substitution request which was submitted on January 3, 2005. The Employer emphasizes that the trade request was ultimately approved by the chief, but it acknowledges that Diehl wanted the trade request to be approved sooner than it was (so that he knew whether he was going to be off on the date he wanted to be off). According to the Employer, the "minor inconvenience" this caused Diehl should not constitute a contract violation. Here's why. First, the Employer asserts there is nothing in the collective bargaining agreement that requires the chief to approve a trade request "immediately" or "right away", or for that matter, to make a decision at all on a trade request. Second, the Employer argues there is no past practice that requires it either. The Employer elaborates on these contentions as follows.

The Employer begins its contract analysis by addressing the Management Rights clause (Article XXIII). The Employer maintains that that provision gives the chief the right to make all "management decisions." As the Employer sees it, granting or denying trade requests qualifies as a management decision covered by that article. Building on that premise, the Employer avers that the chief acted within the scope of his express authority when he did not approve the trade request which was submitted January 3, 2005.

Next, the Employer addresses the contract language contained in Article VI, C, 2. The Employer avers that that language (which governs trade requests) clearly and unambiguously gives the chief the right to deny trade requests. The Employer reasons that since the chief can deny a trade request, he can also postpone making a decision about a trade request until additional information is available. It notes in this regard that Article VI, C, 2 does not contain any time frame or timetable for when the chief must decide whether to grant or deny a trade request, nor does it specify that the Employer's decision (on a trade request) must be

made "right away" or "immediately". Applying that language here, the Employer avers that just because Diehl did not receive approval for his trade request when he would have liked does not mean that a contract violation occurred. The Employer asserts that in order for a contract violation to occur, there must be contract language on point, and here, no such language exists.

To buttress that point, the Employer emphasizes that the only contractual limitation on the chief's authority (to deny trade requests) is the statement in paragraph d that the chief has to decide whether the proposed trade hampers "the effectiveness of the department". According to the Employer, this language means that if the chief decides that the proposed trade does hamper "the effectiveness of the department", then the chief can deny the trade request. The Employer avers that when the chief initially reviewed the January 3, 2005 trade request, he considered the factors traditionally considered by management when reviewing trade requests – specifically, the department's staffing needs, overtime costs, open unfilled positions, other trades, FMLA and sick leave usage, and absences such as training, personal days and other days off. The Employer submits that after the chief considered those factors, he concluded it was too early to approve or deny an out-of-class trade request for a date ten months hence, so he decided to wait until close to the September 30, 2005 requested trade date, when he would have more information about the factors just referenced. The Employer argues that the time frame which the chief selected (namely, 30 days prior to the requested trade date) was reasonable and prudent, and did not violate anything in Article VI, C, 2.

As part of its discussion on Article VI, C, 2, the Employer addresses the Union's past practice contention. It avers that since the contract language is clear and unambiguous, and does not preclude what happened here, the arbitrator need not rely on any alleged past practice to reach a decision here. However, if the arbitrator decides that the contract language is ambiguous, and that the parties' past practice will help clarify its meaning, the Employer contends that the practice is not what the Union claims it to be (i.e. that trades are approved a year in advance). Here's why. First, the Employer maintains that not all trade requests have been granted; some have been denied. Second, with regard to those trade requests that have been granted, the Employer acknowledges that it tried to respond as swiftly as possible to same. That said, it is the Employer's position that just because it did that (i.e. respond as swiftly as possible to trade requests) does not mean that there is a practice that management has to grant trade requests "right away". The Employer interprets the Union's own evidence concerning past trade requests which were granted to show that the time involved varied widely. Sometimes management made a decision within days, while sometimes it took months for a decision to be rendered. Given those varying times, it is the Employer's view that there is no practice that previous trade requests have always been granted "quickly", "immediately" or "right away". Aside from that, the Employer submits that, as a practical matter, that could not be the practice because such a standard would be impossible and unworkable to continually meet. The Employer argues that if the arbitrator finds that there is such a practice, he will be amending the contract and inserting a timeline requirement into the contract that all trade requests be made "quickly", "immediately", or "right away", and limiting the chief's authority, when the contract clearly does not say that. The Employer submits that this type of

change should come through bargaining – not through the arbitration process. The Employer sees this grievance as another Union attempt to amend the agreement without bargaining.

Next, the Employer addresses the Union's contention that it violated Article XXIII – the personal amenities clause. The Employer argues at the outset that the arbitrator need not address this contention because the Union did not raise this contention in the original grievance, but rather raised it at the hearing for the first time. According to the Employer, that is too late, and it therefore should be barred. If the arbitrator finds otherwise and does address this contention, the Employer contends it did not violate that article. It asserts that "knowing right away" whether a trade request is granted does not constitute a "personal amenity" within the meaning of Article XXIII. Aside from that, the Employer cites Chief Grorud's testimony that the Union is always trying to convert the personal amenities clause into a past practice clause, but has not yet been successful in doing so.

In sum then, it is the Employer's position that the chief's actions relative to this matter did not violate the collective bargaining agreement. The Employer therefore asks that the grievance be denied. If it is not denied, the Employer believes no remedy should be awarded because Diehl ultimately received his requested trade date.

## DISCUSSION

This case involves an out-of-class trade request which was not initially approved when it was submitted. After the trade request was submitted, the chief decided it was too early to either approve or deny it because the trade date involved was about ten months away. The chief had the trade form returned to the employee along with a note that said "resubmit no more than 30 days prior to trade date." The instant grievance followed. Months later, the chief approved the trade request.

The parties stipulated that the question to be answered is whether the chief's failure to approve the trade request when it was initially submitted in January, 2005 violated the collective bargaining agreement. The Union contends that it did, while the City disputes that contention. I answer that question in the negative, meaning that the City did not violate the collective bargaining agreement when the chief failed to approve the trade request when it was initially submitted in January, 2005. My rationale follows.

I begin with an overview of how this discussion is structured. Attention will be focused initially on the contract language cited by the parties. They relied on two contract provisions: Article VI, C, 2 and Article XXIII. Those provisions will be addressed in inverse order. After that contract language has been reviewed, attention will be given to certain evidence external to the agreement. The evidence I am referring to involves an alleged past practice.

The first contract provision relied on by the City is the Management Rights clause which is found in Article XXIII. That clause provides, in pertinent part, that the City has the right to direct the work force and schedule employees. This language establishes, as a general

principle, that the City has the right to direct the work force and schedule employees. However, those general principles are not really at issue in this case. As previously noted, this is a trade request case. That being so, it certainly would be noteworthy if trades were specifically enumerated in Article XXIII. It is not. The word "trade" is not found anywhere in the Management Rights clause. Thus, the Management Rights clause does not say anything explicitly about trades. While it is possible to infer a management right to make trade decisions based on the phrase "schedule employees", I decline to make such an inference in this case. Here's why. The collective bargaining agreement is not silent on the matter of work day substitutions and shift trades. I am referring, of course, to the language contained in Article VI, C, 2. Since this case involves a shift trade dispute, it logically follows that the contract language most applicable to such a case would be found in the shift trade language and not in the Management Rights clause. Consequently, this decision will not be based on the contract language contained in the Management Rights clause.

The focus now turns to an examination of the language which governs work day substitutions. As referenced above, that language is found in Article VI, C, 2. In sub 2, it provides as follows: "Substituting. . .may occur only under the following conditions. . ." The provision then goes on to list numerous conditions. The condition relevant to this case is the one found in paragraph d. It provides thus:

> d. Such substitutions are approved by the Chief or the Shift Commander considering the staffing needs of the department. The Chief or the Shift Commander shall have the right to disapprove trades if the effectiveness of the Department will be hampered. . .

Paragraph (d) expressly gives the chief the right to approve or disapprove trade requests. Said another way, the chief can grant or deny trade requests. In doing so, the chief or the shift commander has to consider "the staffing needs of the department" and whether the proposed trade would hamper "the effectiveness of the department." If the chief decides that the proposed trade would hamper "the effectiveness of the department", then the chief can deny the trade request.

Given the language just quoted, one would think that the focus of this contract dispute would be whether the proposed trade hampers "the effectiveness of the department." However, I find it is not. Here's why. The record indicates that when management officials receive a trade request, they have traditionally considered the following factors in making their decision: the department's staffing needs, overtime costs, FMLA and sick leave usage, and absences such as training, personal days and other days off. Those factors, and their legitimacy, were not contested by the Union at the hearing. That being so, I assumed that those factors, and their legitimacy, were not going to be disputed herein. In its brief though, the Union made the contention that the phrase "the effectiveness of the department" refers to dropping the department below the daily required minimums or incurring additional costs to the department. If the Union is attempting with this argument to have me hold that the phrase "the effectiveness of the department" means just those two factors, rather than the broader list

of factors which the chief referenced, I decline to do that. As I see it, notwithstanding the contention just referenced, this case does not really involve the various factors covered by the phrase "the effectiveness of the department". Instead, as has already been noted, this case involves the chief's decision to wait until close to the requested trade date – namely 30 days prior to that date – before he decided on the trade request. Thus, the focus of this case is on the timing of the chief's decision on the trade request.

Article VI, C, 2 does not say anything about the timing of the chief's decision on trade requests. Thus, there is no language in that provision, or elsewhere in the collective bargaining agreement for that matter, that says that the chief's decision on trade requests has to be made within a certain time frame. That being so, there is nothing in that provision that requires the chief to make a decision on trade requests immediately or right away. Additionally, there is nothing in the department's internal procedure book concerning the timing of the chief's decision on trade requests.

Knowing that there is no language in the work day substitution provision about the timing of the chief's decision on substitution requests, the Union takes a non-contractual approach to try to prove a contract violation herein. Specifically, it relies on an alleged past practice concerning the timing of the chief's decision on work day substitution requests. According to the Union, the practice is two-fold: 1) that trades are approved by the chief in a timely fashion (which the Union characterizes as meaning within several days or weeks); and 2) that trade requests have been approved up to a year in advance. Building on that premise, the Union argues that the chief did not follow that practice when he failed to approve Diehl's trade request when it was submitted in January, 2005.

The record shows that trade requests are sometimes submitted far in advance of the trade date. As an example, some trade requests are submitted a year in advance. The record further shows that after a trade request is submitted, a management official decides whether to grant or deny it based on the factors previously referenced. The length of time that it takes management to decide whether to grant or deny the requested trade varies from case to case. In those instances documented in the record, the length of time varied from days to months. Usually though, employees had their trade requests acted upon by management within several days or weeks of the time the trade request was made.

Having just found that management officials have historically acted on trade requests within several days or weeks of their submission, the next question is whether that establishes the existence of a binding past practice which is entitled to contractual enforcement. I find it does not. Here's why. The Union's underlying theory that this is a past practice case overlooks the fact that not every pattern of conduct amounts to a past practice, particularly where the pattern of conduct results from management exercising its discretion under the contract. That is precisely what happened here. As was noted earlier in the discussion on Article VI, C, 2, d, trades are not automatic; they have to be approved by management. While management officials have historically acted on trade requests within several days or weeks of their submission, they did not do so because of a contractual obligation that they decide trade

requests within a certain time frame. Additionally, while management officials have often granted trade requests far in advance of the actual trade date, sometimes almost a year in advance, they did not do so because of a contractual obligation that they had to do that. Instead, management officials were simply exercising the discretion granted to them under Article VI, C, 2, d to approve or deny trade requests. Thus, what happened previously relative to the timing of management acting on trade requests, or management granting trade requests far in advance, was the product of management officials exercising their discretion under the contract.

Since what happened previously relative to the two topics just mentioned was the product of management officials exercising their discretion under Article VI, C, 2, d, the Union had the burden of showing that the City knowingly waived its discretion in that regard. What I mean is this: by its conduct, did the City agree that in the future, it would always act on trade requests within several days or weeks of their submission, and would always grant trade requests far in advance of the actual trade date –even up to a year in advance. There is no proof in the record that the City ever agreed to be bound in the future by a "practice" which restricted its discretion to grant or deny trade requests. That being so, I find that the City did not waive its managerial discretion to change how it dealt with trade requests. It follows from that finding that the City could change same.

Having just held that the City could change how it dealt with trade requests, the next question is whether the chief acted in an arbitrary or capricious manner when he decided that he would not act on Diehl's trade request until 30 days prior to the requested trade date. I find he did not. The chief testified that by waiting until close to the September 30, 2005 requested trade date – namely 30 days prior to that date – he would have more information then (than he did in January, 2005) on the factors which management considers when reviewing trade requests. The undersigned is hard pressed to find this decision arbitrary or capricious given the discretion granted to the chief under Article VI, C, 2, d. The chief's exercise of discretion under that section therefore passes muster.

The focus now turns to the Union's contention that the chief's actions herein violated the personal amenities clause. In my view, the finding reached above also disposes of this argument. Here's why. The Union's argument relative to the personal amenities clause is based on the premise that there is a past practice of management officials acting on work day substitution requests at the time of submission or shortly thereafter. Although that is what has historically happened, I found, for the reasons noted above, that that does not mean that it was a binding past practice entitled to contractual enforcement. Accordingly, no violation of the personal amenities clause is found either.

In my view, this case can be summarized as follows. There is nothing in the work day substitution provision (Article VI, C, 2) that says that the chief's decision on trade requests has to be made within a certain time frame. While management officials have historically acted on trade requests within several days or weeks of their submission, that did not create a binding past practice that management was obligated to always do it within that time frame because of

the discretion granted to management officials by Article VI, C, 2, d. That discretion permitted the chief in this instance to wait until close to the requested trade date – namely 30 days prior to that date – before he decided on the trade request. Thus, no contract violation occurred.

Those arguments not addressed in my discussion were considered, but were deemed unnecessary to decide this matter.

In light of the above, it is my

**AWARD**

That the Employer did not violate the collective bargaining agreement between the City of Janesville and International Association of Fire Fighters Local 580, 2005-2007, when the fire chief failed to approve a work day substitution submitted by Matt Diehls on January 3, 2005. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 4th day of January, 2006.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

REJ/gjc
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