

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**KAUKAUNA FIRE FIGHTERS, LOCAL 1594, INTERNATIONAL  
ASSOCIATION OF FIREFIGHTERS, AFL-CIO**  
and  
**CITY OF KAUKAUNA**

Case 119  
No. 68242  
MA-14169

(Staffing Grievance)

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**Appearances:**

**John B. Kiel**, Attorney, Law Office of John B. Kiel, 3300-252<sup>nd</sup> Avenue, Salem, Wisconsin 53168, appearing on behalf of the Union.

**James Macy**, Attorney, Davis & Kuelthau, S.C., 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54902-1278, appearing on behalf of the City.

**ARBITRATION AWARD**

The above-captioned parties, hereinafter the Union and City or Employer, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Following notification from the parties that they had selected the undersigned from a panel of staff arbitrators, the Wisconsin Employment Relations Commission appointed the undersigned to hear and decide this grievance. A hearing, which was transcribed, was held on January 22 and February 25, 2009 in Kaukauna, Wisconsin. The record was closed on May 14, 2009 following receipt of post-hearing written argument. 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.

**ISSUES**

The parties were unable to stipulate to a statement of the issues. The Union frames the issues as follows:

Did the City of Kaukauna violate the collective bargaining agreement when it failed to use the overtime seniority lists to fill staffing shortages on June 3, 2008 and again on June 5, 2008?

If so, what is the appropriate remedy?

The Employer frames the issues as follows:

Did the City violate Article III, or other applicable provisions of the collective bargaining agreement, when Assistant Chief Grindheim worked as Assistant Chief on June 3, 2008 and when Assistant Chief Prellwitz worked as Assistant Chief on June 5, 2008?

If so, what is the appropriate remedy?

### **CONTRACT PROVISIONS**

This grievance arose during a contract hiatus period; at a time in which the parties were operating under the language of their 2005-2007 collective bargaining agreement. The parties' 2005-2007 agreement includes the following: <sup>1</sup>

### **ARTICLE III HOURS OF WORK**

A. All Fire Fighters shall be assigned to one of three Platoons of equal strength. Each Platoon shall work a different 24-hour shift, each beginning at 7:15 a.m. and ending at 7:15 a.m. the following morning. This plan, commonly referred to as the "California Plan" with an average work week of 56 hours, shall consist of 24 hour shifts scheduled in nine-day cycles as follows: First day, on duty; second day, off duty; third day, on duty; fourth day, off duty; fifth day, on duty; sixth day through ninth day, off duty.

B. A Fire Fighter of one Platoon may change his working day or part thereof with a fellow Fire Fighter on another Platoon for adequate reason, provided he has consent of his fellow Fire Fighter and the consent of his Fire Chief or the officer in charge of his Platoon. Should the Fire Fighters who have agreed to work as a result of a change in work day as provided above be absent on said day for purposes allowed in Article XVI, Sick Leave, of this Agreement, shall be charged the required amount of sick leave (i.e., Employees A agrees to work for Employee B. Employee A is sick and cannot work for B on the agreed day, then only Employee A is charged sick leave).

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<sup>1</sup> The parties' successor 2008 agreement did not contain any language changes that are material to the determination of this grievance.

C. It is understood that if and when a Fire Fighter exchanges a working day or part thereof or who leaves work during his duty day, and is replaced by a fellow Fire Fighter, the replacement Fire Fighter shall not be paid overtime as a result of such exchange or replacement.

D. In the event that emergencies, vacation, sickness, or other unforeseen conditions in the judgment of the Chief require additional personnel, all off duty bargaining personnel shall receive call in notice given non-bargaining unit personnel.

1. All overtime worked shall be recorded on the posted seniority list. This shall allow for the qualified employee, next on the seniority list, to be called in first.

2. When, in the judgment of the Chief or his designated representative, conditions exist that require additional personnel for purposes of paramedic or ambulance service, said qualified off duty bargaining unit personnel shall be called in accordance with the posted seniority list. Qualified employee next in line on the call list shall be called first.

3. In the event that all available employees are called and such vacancy cannot be filled as a result of employees refusing same, such vacancies shall be filled by assigning the same to the employees with the least seniority. Employees who refuse overtime shall forfeit overtime for that cycle and will not be eligible again until that cycle has been completed. In cases where contact cannot be made with an employee, he will be bypassed for that day but will again be eligible for the next vacancy or emergency.

#### **ARTICLE IV OVERTIME**

A. All time worked in excess of 72 hours in a nine-day schedule as set forth in Article III above, shall be considered overtime and be paid for at the rate of time and one-half such employee's base rate. For the purposes of computing overtime pay an employee's base rate shall be computed by dividing the biweekly rate by 80 hours to obtain the "base rate".

B. Overtime shall be computed to the next one-quarter hour. The officer in charge shall be responsible for overtime reporting.

C. Call Time. Employees recalled to duty shall receive not less than three (3) hours pay at overtime rates. All time worked in excess of three (3) hours shall be compensated for at overtime rates as set forth in Paragraph A of this article.

D. All overtime shall be subject to seniority lists and shortages shall be filled in accordance with Paragraph D of Article III. An overtime seniority list shall be posted at all times and shall be updated at least every three (3) months.

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### **ARTICLE XXX RIGHTS OF THE EMPLOYER**

Subject to other provisions of this contract, it is agreed that the rights, function and authority to manage all operations and functions are vested in the employer and include, but are not limited to the following:

A. To prescribe and administer rules and regulations essential to the accomplishment of the services desired by the City Council.

B. To manage and otherwise supervise all employees in the bargaining unit.

C. To hire, promote, transfer, assign and retain employees and suspend, demote, dismiss or take other disciplinary action against employees as circumstances warrant.

D. To relieve employees of duties because of lack of work or for other legitimate reasons.

E. To maintain the efficiency and economy of the City operations entrusted to the administration.

F. To determine the methods, means and personnel by which such operations are to be conducted.

G. To take whatever action may be necessary to carry out the objectives of the City Council in emergency situations.

H. To exercise discretion in the operation of the City, the budget, organization, assignment of personnel and the technology of work performance.

### FACTS

At all times relevant hereto, the City of Kaukauna operated a Fire Department that included five non-bargaining unit managers/supervisors, *i.e.*, a Chief and 4 Assistant Chiefs; approximately thirteen regular full-time Fire Fighters who were members of the Union's bargaining unit; and a number of paid on-call Fire Fighters. Among the services provided by this Department are fire suppression, paramedic ambulance, confined space rescue, cold water rescue, swift water rescue, public education, and inspection.

Chief Hirte and Assistant Chief Grindheim typically work days on a forty-hour per week, Monday through Friday, schedule. Each of the remaining three Assistant Chiefs is assigned to one of three platoons, *i.e.*, A platoon, B platoon or C platoon, and works the same 24-hours shift schedule as the bargaining unit members assigned to these platoons.

On or about June 24, 2008, the Union filed a grievance form which included the following:

STATEMENT OF GRIEVANCE: Chief Paul Hirte and the City of Kaukauna violated Article III of the collective bargaining agreement and any other applicable articles when he assigned Assistant Chief Dan Grindheim to work as a replacement on June 3, 2008 and again when he assigned Assistant Chief Gene Prellwitz to work as a replacement on June 5, 2008

CONTENTION: The Fire Chief should have called off-duty bargaining unit members for replacements before assigning non bargaining unit members as replacement

SETTLMENT OR CORRECTIVE ACTION DESIRED: The City and Fire Chief should follow the practices used in the past and outlined in the collective bargaining agreement for filling vacant shift assignments. The City should also pay the Union for any lost overtime as result of Assistant Chief Don Grindheim and Assistant Chief Gene Prellwitz working as replacements.

By letter dated August 13, 2008, City Attorney Van Berkel provided the Union with a "Grievance No. 08-3 Determination" that includes the following:

. . .

The grievance alleges that Chief Hirte violated Article III along with any other applicable article(s) of the Agreement by replacing an absent Assistant Chief with another Assistant Chief. Since this position is a non- represented position the Agreement appears to have no bearing on such an action and a denial to this grievance would seem to be a no brainer. As a remedy, it requests that the Chief "Follow the practices used in the past and outlined in the collective bargaining

Agreement for filling shift assignments”. It also requests the City pay the Union any lost overtime due to Assistant Chiefs being called in, rather than bargaining unit members.

In the course of the hearing, Local 1594 explained that their actual grievance was that on the days in question there were two vacant positions. An Assistant Chief a non-represented position, and a Driven Engineer, a union position, were missing. The Union’s contention is that in those circumstances, if the Chief decides not to operate with only 3 persons on a shift, then he is obligated to call in a represented member of the department, rather than an Assistant Chief.

Local 1594 alleges that the contract language, past practice and bargaining history support their position. Further, their President suggests that retaliation is motivating this alleged change in the alleged past practice.

This motivation allegation I find to be irrelevant and the other union arguments unpersuasive.

If there had been two absent Driver/Engineers, or two absences in any represented positions, there would be merit to this grievance. The Chief would be required by the terms of the Agreement, once he decided to call another person, to call in a Union member according to seniority in compliance with Article III paragraph D of the Agreement. However, that is not the situation here.

Assistant Chiefs and Driver/Engineers have different job duties. It seems obvious that an Assistant Chief was, at an earlier time in his career, a Driver/Engineer and is therefore familiar with the duties of that position. A Driver/Engineer is still two steps away from ever becoming an Assistant Chief and has not necessarily established or proven his or her knowledge of the skills and duties required of either a Lieutenant or an Assistant Chief. The Chief might well decide that he preferred or needed the Assistant Chief rather than the Driver/Engineer to come in.

Article XXX of the Agreement recognizes the rights vested in the employer to manage all operations and functions subject to other provisions of the contract. These management rights as articulated include:

- “C. To . . . assign. . . employees. . . as circumstances warrant.
- E. To maintain the efficiency and economy of the City operations....
- F. To determine the . . . personnel by which such operations are to be conducted.
- H. To exercise discretion in the . . . assignment of personnel....”

There was discussion during the hearing of the language in the Agreement at Article IV paragraph D which states that “. . . shortages shall be filled in accordance with paragraph D of Article III.” That paragraph, in turn, states “D. In the event that emergencies, vacation, sickness, or other unforeseen conditions in the judgment of the Chief require additional personnel all off duty bargaining personnel shall receive call in notice given non-bargaining unit personnel” The Agreement language recognizes that the judgment as to needed personnel is the Chief’s.

Union representatives admitted that there were times when staffing consisted of only 3 on duty personnel. Further, they explained that the call-in notice provision was a development in response to the addition of paid on-call firefighters many years ago. This language was intended to protect full-time firefighters’ call-in and overtime opportunities versus paid on-call firefighters, not to address the decision to call in an Assistant Chief rather than bargaining unit personnel.

I find nothing in the Agreement language nor in the bargaining history to support the union’s position.

Further, there was not established, by the evidence presented at the hearing, a past practice warranting protection or continuation.

A management right, specifically articulated in the Agreement, cannot be abridged or altered by choices made by the Chief, acting within his lawful management authority. The exercising of management rights, on one or more occasions in a certain fashion, does not give the bargaining unit the right to insist or depend upon the Chief always deciding in that fashion.

The grievance as written and as expanded by explanation at the hearing is denied.

Subsequently, the grievance was submitted to grievance arbitration under the parties’ contractual grievance arbitration procedure.

### **POSITIONS OF THE PARTIES**

#### **Union**

This grievance involves a dispute over whether the City violated the collective bargaining agreement when it failed to use the overtime seniority lists to fill staffing shortages on June 3<sup>rd</sup> and June 5<sup>th</sup>, 2008. The language of Article III and Article IV of the collective bargaining agreement plainly, clearly and unambiguously sets forth the Union’s rights and the City’s obligations.

On June 2, 2008, Chief Hirte became aware of an unforeseen condition – a death in the family of Fire Fighter-Paramedic Hunke; resulting in Hunke’s unforeseen absence on both June 3<sup>rd</sup> and June 5<sup>th</sup>. Given this unforeseen absence, the Chief decided that he needed additional personnel and contacted the Assistant Chiefs, who are non-bargaining unit personnel, because he wanted to assign one of them to staff the platoon in the place of Hunke.

Chief Hirte did not give off-duty bargaining unit personnel the call in notice that he gave non-bargaining unit personnel. By calling in non-bargaining unit personnel rather than bargaining unit personnel to fill the June 3<sup>rd</sup> and June 5<sup>th</sup> shortages, the Chief has violated the first paragraph of Article III, Section D, of the parties’ collective bargaining agreement.

The plain language of Article III, Section D(2), makes it clear that, where there is a need for additional personnel to staff an ambulance, off duty bargaining unit personnel shall be called from the seniority list with the next qualified employee called first. This language was triggered by the fact that, after Paramedic Hunke was given funeral leave on June 3<sup>rd</sup> and 5<sup>th</sup>, the Chief determined that additional personnel were needed for – and did in fact provide – paramedic or ambulance service.

The City’s claim that the term “personnel,” as used in the phrase “non-bargaining unit personnel,” was intended to refer to paid, on-call firefighters and not to Assistant Chiefs is inconsistent with the plain language of the contract, including Article III, Section D. Additionally, it is inconsistent with the City’s historical use of the term “personnel,” as is reflected in the Chief’s testimony and his written communications.

Acceptance of the City’s argument that Assistant Chiefs are not “personnel” leads to an absurd result. For example, they would be excluded from “personnel” under Department policies, such as the evacuation and Mayday policies.

When proposing changes to Article III, the Union was concerned about paid on call fire fighters; as evidenced by the Union’s initial proposal. However, in negotiations, the parties arrived at plain language that goes beyond protecting the bargaining unit members from encroachment on their work opportunities by paid-on-call fire fighters. The Union obtained plain language that protects their work opportunities from encroachment by all non-bargaining unit personnel – including management personnel.

The City’s claim that Article III, Section D, is inapplicable to the City’s initial staffing decision and only applies after a shift begins is not supported by the record. The City’s own documents establish that off duty bargaining unit members who are called – in advance – to staff the Department to its minimum staffing level are called from a document entitled the “Kaukauna Fire Department 24 hour Call In.” As the Union President testified at hearing, this procedure is used to call somebody back, when somebody is on vacation or sick and they want to call somebody in for the entire shift.

Article XXX, Management Rights, recognizes that it is subject to the other provisions of the contract and, therefore, cannot provide the City with any right to avoid its obligations under Article III, Section D, and Article IV, Section D. The analysis that the City Attorney applied to his August 13, 2008 response to the grievance lends support to the Union's claim and reveals an understanding that the City cannot "willy-nilly" avoid its obligations under Article III, Section D.

Nowhere in the contract is the City's obligation to fill shortages with bargaining unit members conditioned on the absence of two bargaining unit members. Nor does the contract excuse the City from its obligations to fill shortages with bargaining unit members where a shortage is caused by an Assistant Chief.

The testimony of Union President Teesch supports the Union's argument that shortages have been filled by the recall of bargaining unit personnel. Kaukauna Fire Department Policy 514.04 supports the claim that bargaining unit members have a recognized and accepted right to fill shortages ahead of non-bargaining unit members.

The City relies on what it calls "fifty-two instances" over the last "three and a half years" where Assistant Chiefs have been assigned by the Chief to fill in for an absent Assistant Chief or to respond to emergency calls without calling in off duty line staff. The past practices relied upon by the City are not relevant to this case. The reason no prior grievance was filed is because, previously, the City never failed to give bargaining unit members the call in notice that it gave Assistant Chiefs. As the Union President testified, the procedure that was followed was summarized in July 14, 1988, by former Union President Nack.

The proponent of a past practice has the burden to establish its existence. The City has not met this burden.

This is not a dispute about whether management employees are restricted from performing unit work. Nor is this a dispute about whether or not the City has the right or the discretion to determine how many employees will start a work shift each day particular day. It is not even a case about whether the City has the right to determine if and when overtime is to be worked. Once the City determines that additional personnel are required and/or determines overtime is to be worked, the City is obligated to follow the collective bargaining agreement by giving notice to bargaining unit members and filling vacancies from the ranks of the bargaining unit as required by Article III, Section D, and Article IV, Section D.

The Arbitrator should apply the clear and unambiguous contract language and sustain the grievance. The Arbitrator should also include the remedy of back pay to the bargaining unit members adversely affected by the City's decision to avoid its contractual obligation and retain jurisdiction over this matter for remedial purposes.

## City

The parties' collective bargaining agreements have never contained any language that restricts management employees from performing unit work. Historically, the City has always maintained the right to determine staffing levels; as well as to determine if and when overtime will be worked. If the City determines that it wants overtime to be worked, then there is a provision of the contract that sets forth a procedure for calling-in employees.

In approximately 1991, the Union, during bargaining, raised a concern regarding the City's intended use of paid, on-call firefighters. Within these discussions, there was no intent between the parties to limit or control the degree to which the City would utilize or call-in management employees. The language ultimately agreed upon was limited to, and only pertained to, the relationship between bargaining unit employees and the paid, on-call firefighters.

If the provision were applicable to initial staffing, the term "personnel" in Article III, Section D, does not include Assistant Chiefs. To conclude otherwise would be to ignore the fact that the recognition clause explicitly excludes Assistant Chiefs from the bargaining unit.

In 2005, the City reorganized positions with the Fire Department; eliminating a past Captain position and creating three additional positions of Assistant Chief. One Assistant Chief was assigned to work a 40-hour week, generally Monday through Friday during the day. The remaining three Assistant Chiefs were assigned 24-hour shifts so as to supervise the three different platoons within the Fire Department.

The Union requested to bargain the impact of this reorganization and the parties met to negotiate impact. Although the Union was concerned about the assignment of the Assistant Chiefs, including the manner in which the Assistant Chiefs would select vacation, the Union did not gain any language which limited the City's right to assign its management staff.

On June 3 and 5, 2008, the Assistant Fire Chief regularly assigned to one of the platoons was sent to training. In that Assistant Chief's absence, the Chief reassigned one of the other two Assistant Chiefs to supervise that platoon on the two days. This staffing decision was made on June 2, 2008. Firefighter Hunke's absence was not "unforeseen."

Article XXX, Management Rights, clearly and unambiguously, reserves to the City the right to manage and supervise bargaining unit employees and to determine the personnel by which operations are to be conducted. There is no contract language which clearly limits the City's discretion in exercising these rights with respect to the Assistant Chiefs. The Chief and the Assistant Chiefs regularly engage in the same work as bargaining unit members.

The express terms of Article III, Section D, establish a procedure to call-in firefighters during a platoon's shift and are not applicable to initial staffing decisions. The two Assistant Chiefs were not called-in. Rather, each was assigned, in advance, to supervise the scheduled

platoon as part of the initial staffing. As the need for additional staffing arose during the shifts on June 3 and 5, bargaining unit staff was provided notice of call-in in accordance with Article III, Section D.

In negotiations for the 2008 labor contract, the Union proposed changes to Article III, Section D. During this discussion, as well as through the seventeen years of bargaining history, the Union never indicated that the provision applied to any Department personnel other than bargaining unit and non-bargaining unit line staff.

Over the past year and one-half there have been over fifty instances in which Assistant Chiefs were assigned to fill-in for absent Assistant Chiefs or to respond to emergency calls without having called in off-duty bargaining unit personnel. The Union's continued failure to grieve, or object, constitutes an acceptance of this practice.

The Union's arguments are based upon the false assumption that staffing of management and unit firefighters is somehow the same and that the City has minimum staffing. The distinctions among management staffing, line staffing and firefighter availability cause the Union to mischaracterize the City Attorney's response to the grievance

Article IV, Section D, is an overtime provision. Management has the exclusive right to determine whether overtime will be generated. Article IV, Section D, is inapplicable to this grievance because no overtime was generated.

If the Union's interpretation of Article III, Section D, is adopted, it would limit the City's ability to call in both Assistant Chiefs and the Fire Chief without first calling in bargaining unit members. This interpretation must not be adopted because it is absurd.

The City did not violate the collective bargaining agreement when Assistant Chief Grindheim worked as Assistant Chief on June 3, 2008 and Assistant Chief Prellwitz worked as Assistant Chief on June 5, 2008. Accordingly, the grievance should be denied.

## **DISCUSSION**

### **Issues**

The parties agree that there are no procedural issues. With respect to the merits of this grievance, each party has proposed a statement of the issues. Each of these proposed statements, assume a fact or facts that are in dispute in this case. Accordingly, neither party's statement of the issues is appropriate.

Upon consideration of the grievance, as filed and processed through the grievance procedure, the undersigned is persuaded that the issues are appropriately stated as follows:

Did the City violate the parties' collective bargaining agreement by assigning Assistant Chief Grindheim to work a portion of B Platoon's 24-hour shift on June 3, 2008 and Assistant Chief Prellwitz to work B Platoon's 24-hour shift on June 5, 2008?

If so, what is the appropriate remedy?

### Merits

The Union's bargaining unit employees are assigned to one of three platoons, *i.e.*, A, B or C. One Assistant Chief is assigned to each platoon and works the same schedule as the platoon. When working with his platoon, an Assistant Chief is the officer in charge of that platoon and performs duties as assigned by the Fire Chief or selected by that Assistant Chief.

All of the Assistant Chiefs, as well as the Union's bargaining unit members, are paramedics. According to Union President Teesch, the Assistant Chief is part of the "crew," works with the "crew" and that, while the Assistant Chief is capable of performing ambulance runs, they normally don't treat patients and take them to the hospital. Union President Teesch is not aware of any contractual provision that restricts an Assistant Chief from performing the work normally performed by bargaining unit members.

At the time of the grievance, Assistant Chief Mohr was the Assistant Chief who was regularly assigned to B Platoon. On June 3 and 5, 2008, B Platoon's full complement consisted of Assistant Chief Mohr; Lt. Bartlett; D.O. Hunke; D.O. Hamilton; and F.F. Sands.

On June 2, 2008, the Fire Chief was notified that, due to a death in the family, D.O. Hunke would be taking funeral leave on June 3 and 5, 2008. At the time that the Fire Chief received this notification, he was aware that Assistant Chief Mohr was not scheduled to work on either June 3 or 5, 2008 due to the fact that Assistant Chief Mohr was scheduled to be away at training.

It is undisputed that, on June 2, 2008, the Fire Chief had the right to decide to operate B Platoon with Lt. Bartlett; D.O. Hamilton, and F.F. Sands. According to the Fire Chief, his goal is to staff a regular 24-hour shift with a minimum of four employees (including management employees such as the Assistant Chiefs), but that the Fire Chief has always retained the right to determine staffing levels.

This assertion is consistent with the documentary evidence; as well as with the testimony of Union President Teesch. According to Union President Teesch, the Department has a minimum platoon staffing "goal" of four, including the Assistant Chief; staffing occasionally falls below four; and the collective bargaining agreement does not have any minimum staffing requirement.

On June 2, 2008, the Fire Chief did not decide to operate B Platoon with Lt. Bartlett; D.O. Hamilton, and F.F. Sands. Rather, the Fire Chief decided to assign Assistant Chief Grindheim to work a portion of the 24-hour shift on June 3, 2008 and to assign Assistant Chief Prellwitz to work the entire 24-hour shift on June 5, 2008.

The Union characterizes the Chief's conduct as assigning the Assistant Chiefs to staff the platoon in place of D.O. Hunke. The Union mischaracterizes the Chief's conduct. It may be that, until the Chief learned of D.O. Hunke's funeral leave, he did not intend to assign an Assistant Chief to work with B Platoon on June 3 and 5, 2008. However, the record reasonably establishes that the Chief assigned Assistant Chief's Grindheim and Prellwitz to work as Assistant Chiefs. Thus, Assistant Chief's Grindheim and Prellwitz did not work in place of absent B Platoon member D.O. Hunke, but rather, they worked in place of the other absent B Platoon member, *i.e.*, Assistant Chief Mohr.

Assistant Chiefs are supervisory employees. As the parties have recognized in Article II of their collective bargaining agreement, Assistant Chiefs are not members of the collective bargaining unit represented by the Union. Nonetheless, the parties have a right to negotiate limitations upon the right of the City to assign Assistant Chiefs.

The Union argues that the Fire Chief could not assign either Assistant Chief without first "calling-in" a bargaining unit employee to staff B Platoon's 24-hour shift on June 3 and 5, 2008. In making this argument, the Union relies upon the language of Article III, Paragraph D, and Article IV, Paragraph D, of the parties' collective bargaining agreement.

Article IV is entitled "Overtime." The first sentence of Article IV, Paragraph D, states that "all overtime" shall be subject to seniority lists and "shortages shall be filled in accordance with Paragraph D of Article III." Article IV, Paragraph D, does not describe how seniority lists are to be used for overtime. Article IV, Paragraph D, and Article III, Paragraph D, do not define the word "shortages." Indeed, Article III, Paragraph D, does not contain the word "shortages."

The first paragraph of Article III, Paragraph D, recognizes that a "call-in" procedure is to be used "In the event that emergencies, vacation, sickness, or other unforeseen conditions in the judgment of the Chief require additional personnel." According to the Union, D. O. Hunke's use of funeral leave on June 3 and 5, 2008 is an "unforeseen condition" and a "shortage" is evidenced by the fact that the Chief assigned "additional personnel;" *i.e.*, Assistant Chief's Grindheim and Prellwitz to work on June 3 and 5, 2008.

The most reasonable construction of the plain language of the first sentence of Article III, Paragraph D, is that the referenced "call-in" procedure does not provide bargaining unit members with a seniority right to be offered, or assigned, work before non-bargaining unit employees are offered, or assigned, work. Rather, this language obligates the Chief to provide the same "call-in notice" to "off duty bargaining unit personnel" that is "given non-bargaining unit personnel." "Seniority lists" are not referenced.

The language of the first paragraph of Article III, Paragraph D, was placed into the parties' collective bargaining agreement when the parties' negotiated their 1992-94 collective bargaining agreement. Article III, Paragraph D, of the predecessor agreement states as follows:

D. In the event that emergencies, vacation, sickness, or other unforeseen conditions in the judgment of Chief require that off-duty full-time personnel be called in, such requirements shall be filled in accordance with the posted seniority lists, the qualified employee next in line on the seniority list being called first.

...

A comparison of the language changes reasonably indicates that, after the change in the contract language, "seniority lists" were no longer a part of the "call-in" procedure referenced in the first paragraph of Article III, Paragraph D.

According to Fire Chief Hirte, he was a member of the Union bargaining team that negotiated the 1992-94 changes to the first paragraph of Article III, Paragraph D. Chief Hirte recalls that the referenced "call-in" procedure was negotiated into the contract in response to the City's decision to use paid on-call Fire Fighters; that the Union was concerned that the City would use paid on-call Fire Fighters in lieu of bargaining unit members; and that there was never any discussion that this "call-in" procedure would restrict the City's use of management employees. The Chief was the only witness to testify that he was present during the negotiation of the 1992-94 agreement.

Chief Hirte's testimony indicates that, from the time that the current language was negotiated into the parties' agreement, the Department has followed the same procedure with respect to the first paragraph of Article III, Paragraph D, *i.e.*, the Chief, or his designee, decides that there is a need for an "all call" and, after this decision has been made, then bargaining unit employees and paid on-call employees are given simultaneous notice of an "all call." According to the Chief, this type of "all call" is typically used in response to multiple alarm fires. The Chief's testimony regarding the "all call" procedure is not rebutted by any other record evidence.

In summary, the first paragraph of Article III, Paragraph D, provides a procedure for calling-in bargaining unit employees. However, under the most reasonable construction of the language of the first paragraph of Article III, Paragraph D, the referenced "call-in" procedure applies only to "all calls" and does not involve the use of "seniority lists." *Assuming arguendo*, that management employees are considered to be "non-bargaining unit personnel" within the meaning of the first paragraph of Article III, Paragraph D, the "call in notice" provided in this first paragraph would not be applicable to this dispute because it is not an "all call" situation.

“Seniority lists” are referenced in Article III, Paragraph D (1) and (2) expressly and, in Article III, Paragraph D (3) by implication. Article III, Paragraph D (1) identifies how overtime is to be recorded and apportioned by use of the “seniority lists.”

Article III, Paragraph D (2) identifies the manner in which off duty bargaining unit personnel are to be called in off a “seniority list” when “in the judgment of the Chief or his designated representative, conditions exist that require additional personnel for purposes of paramedic or ambulance service.” Given the absence of any reference to fire fighting duties, it is not reasonable to construe the plain language of Article III, Paragraph D(2), as providing any seniority right to staff a 24-hour shift. In reaching this conclusion, the undersigned is cognizant of the record evidence which indicates that a majority of the Department’s calls involve paramedic and ambulance services.

Article III, Paragraph D(3) identifies the procedure to be used when a vacancy “cannot be filled as a result of available employees declining the same;” as well as a procedure for recording employees who declined or were not available for overtime. Additionally, it identifies the consequences of declining or being unavailable for overtime.

Article III, Paragraph D(3) does not define a “vacancy.” However, given the clear evidence that this Department does not have any minimum staffing requirements, it would not be reasonable to conclude that the absence of D.O. Hunke, *per se*, was sufficient to create a “vacancy” within the meaning of Article III, Paragraph D(3).

As a review of Article III, Paragraph D, reveals, the referenced “seniority lists” are used to offer available overtime opportunities to “qualified employees.” Given the differences in rank, as well as the lack of evidence that any bargaining unit employee has exercised all the authority or performs all of the duties of an Assistant Chief, it would not be reasonable to conclude that any bargaining unit member, including a Lieutenant, is qualified to be an Assistant Chief. It follows, therefore, that an Assistant Chief’s position cannot be filled through use of the bargaining unit’s “seniority lists.” Inasmuch as Assistant Chief work cannot be “subject to seniority lists,” the reasonable conclusion is that Assistant Chief work does not provide an overtime opportunity for bargaining unit employees.

In summary, the plain language of Article III, Paragraph D, and Article IV, Paragraph D, does not clearly and unambiguously define the “shortages” required to be filled in accordance with Paragraph D of Article III or the “vacancies” which are subject to the overtime “seniority lists.” Given the lack of clarity in the contract language, it is appropriate to consider whether other evidence, such as bargaining history and the parties’ conduct, provides assistance in determining the parties’ mutual intent.

The most relevant evidence of bargaining history has been discussed above. The Union argues that the City Attorney’s grievance determination of August 13, 2008 provides support to the Union’s position. The undersigned disagrees. The most reasonable interpretation of the City Attorney’s written statements is that he viewed this grievance as involving a situation in

which the Chief substituted one non-represented position with another non-represented position and that such a substitution is not controlled by the collective bargaining agreement. The City Attorney's statements do not express, or reasonably imply, that the Union has any seniority right to the work claimed in this grievance.

It is evident that, in the past, the Assistant Chief who is regularly assigned to a platoon has been absent. These absences result from a variety of circumstances; including leave, training, and attendance at meetings. It is also evident that, at times, other Assistant Chiefs have worked as part of the platoon in the absence of the regularly assigned Assistant Chief and, at times, the platoon has operated without an Assistant Chief.

When an Assistant Chief is not assigned to the platoon, the Lieutenant assigned to that platoon, who is a bargaining unit member, will function as the officer in charge of the shift, if the Lieutenant is working. The Lieutenant, who does not receive any out-of-classification add-on when working as officer in charge of the shift, does not possess all of the authority of an Assistant Chief; nor does he perform all of the duties of an Assistant Chief. At times when platoons have worked without an Assistant Chief, bargaining unit employees have been called in on overtime through the use of a "seniority list" to staff a 24-hour shift, in whole or in part.

According to the Chief, the decision to assign, or to not assign, an Assistant Chief to staff all, or a portion of, a platoon's 24-hour shift has always involved the use of management discretion. The Chief asserts that "seniority lists" are used to staff a platoon's 24-hour shift, whole or in part; but only after the Fire Chief, or his designee, has decided that he/she needs additional bargaining unit personnel to staff the platoon's 24-hour shift. (Historically, there has not been one overtime "seniority list." Rather, there has been a 24-hour list; 12-hour list etc. For the purposes of this discussion, it is sufficient to refer to "seniority lists" and there is no need to distinguish among "seniority lists.")

Union President Teesch does not claim that any management representative has stated that Assistant Chiefs would not be assigned to a 24-hour shift unless bargaining unit employees have been offered open shifts through the use of the "seniority lists." Union President Teesch acknowledges that he is not privy to discussions that the Chief may have with his Assistant Chiefs regarding the assignment of Assistant Chiefs, or any other staffing decisions.

As Union President Teesch testified at hearing, 24-hour shift staffing is affected by vacations and leaves, such as sick, family medical and funeral. Union President Teesch described the use of the 24-hour "seniority list" as follows:

This is the 24-hour call-in list. It's used to call somebody back for a 24-hour call in. That's - - typically, when we're not starting the day with three people, when somebody is on vacation, somebody is sick and they - they want to call somebody in for the entire shift from that 7:15 time to 7:15 the next morning, they would use the 24-hour call-in list to determine who to call in. (T. at 40)

In this testimony, Union President Teesch recognizes that the "seniority list" is used when "they want to call somebody in." Union President Teesch's testimony with respect to the usage of "seniority lists," including the Union's "right of refusal," describes a process that occurs after management has made the decision to offer bargaining unit employees an opportunity to staff a 24-hour shift.

According to Union President Teesch, the Union's files contained a grievance form dated June 15, 1988, that includes the following:

STATEMENT OF GRIEVANCE: Violation of Contract Article 3 paragraph D (Hour's of Work) also Article 4 paragraph D.

(CIRCUMSTANCES OF FACTS): That A shift was short one man due to his termination and also one man called in sick so the vacancy was filled by the Assistant Chief Fire Inspector.

CONTENTION: That non union personnel are being used to fill line personnel positions.

SETTLEMENT OR CORRECTIVE ACTION DESIRED: In the event that a vacancy occurs that a union member be called in to fill that vacancy according to appropriate call in seniority list as stated in Article 3 paragraph D. and Article 4 paragraph D.

We will waive this situation until a replacement man is hired or until mid July, 1988, whichever ever is first. After that time we will hold the City to this agreement.

Attached to this document is a letter dated July 14, 1988 that includes the following:

Dear Chief Roberts

This letter is in regards to the grievance filed by Local 1594 on June 15, 1988. The union did not receive any response to differ with the settlement or corrective action within the allotted time.

Now that a new employee has been hired and started working July 9, 1988 the vacancy has been filled. The contract will be followed and any vacancies will be filled with union members according to the appropriate call in seniority list as stated in Article 3 paragraph D and article 4 paragraph D.

Sincerely Yours,  
Union President  
Robert F. Nack

As the City argues, these documents do not establish that the City received or agreed with the Union's stated position. Additionally, after the date of this grievance form, the parties not only negotiated changes to Article 3, Paragraph D; but also the Department was reorganized. One effect of the reorganization was that an Assistant Chief was regularly assigned to work the 24-hour shift of a platoon.

The evidence of the 1988 grievance form is not material to the determination of the Union's current bargaining agreement rights. In reaching this conclusion, the undersigned is cognizant of the fact that, at the time that Union President Teesch was hired in 1999, Union President Nack had become Fire Chief Nack.

The Union argues that its position is supported by Fire Department Policy 514. Assuming *arguendo*, that Department Policy 514 is susceptible to an interpretation that supports the Union's position, it would not be reasonable to conclude that this is the interpretation intended by management. Not only has the Fire Chief, the individual with the responsibility for implementing Department policies, denied that this policy limits the assignment of management staff; but also it is not evident that this policy has been implemented in a manner that limits the assignment of management staff.

As Union President Teesch testified at hearing, in his research, he found a number of instances in which a platoon member was absent at the same time that an Assistant Chief was absent and a bargaining unit employee or employees were called in to staff the platoon. Under the facts of this case, however, this evidence is indicative of nothing more than the exercise of management discretion, *i.e.*, the Chief, or his designee, had decided to not replace an absent Assistant Chief and had decided to offer an overtime opportunity to bargaining unit employees.

### **Conclusion**

Neither the contract language relied upon by the Union, nor the other record evidence, reasonably establishes that the parties have negotiated any limitation upon the right of the Fire Chief to assign Assistant Chief's Grindheim and Prellwitz to work in place of Assistant Chief Mohr on June 3 and 5, 2008. The absence of D.O. Hunke, in and of itself or in conjunction with the assignments of Assistant Chief's Grindheim and Prellwitz, did not create any "shortage" required to be filled in accordance with Paragraph D of Article III or "overtime" subject to "seniority lists." This grievance is without merit.

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

**AWARD**

1). The City did not violate the parties' collective bargaining agreement by assigning Assistant Chief Grindheim to work a portion of B Platoon's 24-hour shift on June 3, 2008 and Assistant Chief Prellwitz to work B Platoon's 24-hour shift on June 5, 2008.

2). The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 24th day of August, 2009.

Coleen A. Burns /s/

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Coleen A. Burns, Arbitrator

CAB/gjc

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