

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CUDAHY PROFESSIONAL FIREFIGHTERS ASSOCIATION LOCAL 1801

and

CITY OF CUDAHY

Case 117
No. 69041
MA-14453

(Rynders Vacation Pick Grievance)

Appearances:

John Kiel, The Law Office of John B. Kiel, LLC., 3300-252nd Avenue, Salem, Wisconsin 53168, appearing on behalf of Cudahy Professional Firefighters Association Local 1801.

Robert Mulcahy, Michael Best & Friedrich LLP., 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202-4108, appearing on behalf of the City of Cudahy.

ARBITRATION AWARD

The City of Cudahy, hereinafter the City or Employer, and the Cudahy Professional Firefighters Association Local 1801, hereinafter the Union, were parties to a collective bargaining agreement that provided for the 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 February 16, 2010, in Cudahy, Wisconsin, at which time the parties presented testimony, exhibits and other evidence that was relevant to the grievance. The hearing was transcribed. The parties filed briefs and reply briefs, whereupon the record was closed April 26, 2010. 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 the issue(s) to be decided in this case. The Association framed the issue as follows:

Did the City violate Article 27 of the collective bargaining agreement when, on January 9, 2009, it refused to approve the first vacation pick of Brian Rynders? If so, what is the appropriate remedy?

The Employer framed the issues as follows:

1. Was the grievance timely filed under Article 12, grievance procedure subsection H of the contract, which requires grievances to be filed no later than 14 calendar days from the date the employee knew or should have been aware of the cause of such grievance?
2. Did the Union comply with Article 12 grievance procedures H requirement to meet with the grievance committee of the Association and determine whether the subject matter is a proper grievance?
3. Is the grievance substantively arbitrable under Article 12(A) of the grievance procedure which requires that the grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, et cetera?
4. Did the City violate Article 12, Vacations, in the contract when it enforced the contract language which states, "Only one man per platoon shall be allowed on vacation during any specific period of time?"

I have not adopted either side's proposed issue(s). Based on the entire record, I find that the issues which are going to be decided herein are as follows:

1. Did the City's decision to let the (supervisory) battalion chiefs choose their vacations before bargaining unit employees violate the collective bargaining agreement?
2. Did the City violate the collective bargaining agreement when it denied MPO Rynders' request for vacation July 5, 8 and 11, 2009? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

The parties' 2007-09 collective bargaining agreement contained the following pertinent provisions:

ARTICLE 1 – RECOGNITION

The City continues to recognize the Local #1801, IAFF, AFL-CIO, as the sole and exclusive bargaining agent for the purposes of engaging in conferences and

negotiations establishing wages, hours and conditions of employment for the following employees: Motor Pump Operators, Lieutenants, and Shift Commanders.

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Wherever the term “EMPLOYEE” is used in the Memorandum of Agreement, it shall mean and include only those employees covered under the terms and conditions of this agreement.

ARTICLE 2 – DEFINITIONS

These definitions shall apply to all sections of this contract except as otherwise provided in this contract.

- A. **SHIFT** – Shall be defined as one (1) twenty-four (24) hour tour of duty at both stations.
- B. **PLATOON** – Shall be defined as a group of employees assigned to a specific station on a shift.
- C. **WORKDAY** – One (1) twenty-four (24) hour tour of duty shall be counted as one (1) workday.

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ARTICLE 4 – MANAGEMENT RIGHTS

The City possesses the sole right to operate City government and all management rights shall be vested in it, but such rights must be exercised consistently with the other provisions of this contract. These rights which are normally exercised by the Fire Chief include, but are not limited to, the following:

- A. To direct all operations of the City Government.
- B. To hire, promote, transfer, assign and retain employees in positions with the City and to suspend, demote, discharge and take other disciplinary action against employees pursuant to the reasonable rules and regulations of the Cudahy Fire and Police Commission and the Cudahy Fire Department.

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- D. To maintain efficiency of City Government operations entrusted to it.

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

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- K. To establish reasonable work rules and daily schedules of work.
- L. The City agrees to its obligations under Wisconsin Law to bargain with the Association relating to the "IMPACT" of any decisions on the wages, hours or working conditions of the employees. This does not impose any obligation upon the City relating to any decisions which they are empowered to make without bargaining with the Association.

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ARTICLE 10 – SENIORITY

Seniority shall be defined as the length of service as a "full-time" employee of the City of Cudahy Fire Department. The employee with the longest continuous full-time service shall have the most seniority.

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ARTICLE 12 – GRIEVANCE PROCEDURE

A. *Definitions of Grievance:* A grievance shall mean any controversy which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or dispute of any employee or group of employees concerning this contract. The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits and position classifications established by ordinance and rules which are matters processed under existing procedures.

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H. *Procedure:* All grievances must be presented promptly to the Chief, and no later than fourteen (14) calendar days from the date the employee knew or should have been aware of the cause of such grievance. In the event of a grievance, the employee shall perform assigned tasks and grieve said complaint later. The employee shall meet with the Grievance Committee of the Association and determine whether the subject matter is a proper grievance. Providing the Association Grievance Committee concurs, the employee in

conjunction with the Grievance Committee, shall write up the Grievance Initiation Form and present a copy to the Chief. From this point, a separate procedure shall be followed for all grievances involving an interpretation of the terms and conditions of this contract, and those involving discipline, suspension and dismissals.

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ARTICLE 28 – VACATIONS

Each employee shall receive an earned vacation leave, with pay, from anniversary date of hire as follows:

- A. After one (1) year of service – six (6) work days.
- B. After eight (8) years of service – nine (9) work days.
- C. After fourteen (14) years of service – twelve (12) work days.
- D. After twenty (20) years of service – fifteen (15) work days.

Selection of vacations shall be based on seniority per platoon. Only one man per station, per platoon, shall be allowed on vacation during any specific period of time. Vacations shall be selected in rotation in multiples of any three (3) consecutive work days, and a maximum of any six (6) consecutive workdays, in any one selection. All Officers will choose vacations to insure that only one Officer per shift is on vacation at the same time. Selection of vacation shall be as follows:

- 1st pick by – January 1
- 2nd pick by – January 10
- 3rd pick by – January 20
- 4th pick by – January 30
- 5th pick by – February 7

In the event an employee does not schedule a vacation within these prescribed limits, the employee shall lose the right to select by seniority for that particular vacation choice and shall not be able to cancel a holiday of another employee (with a vacation selection) if the other employee's holiday had been reserved and approved according to the rules governing holiday selection.

BACKGROUND

The City of Cudahy operates a Fire Department. The Union is the exclusive collective bargaining representative for certain employees in the Fire Department. (Note: The employees in the bargaining unit will be identified in the following paragraph). Brian Rynders is in the bargaining unit.

The Cudahy Fire Department provides emergency medical services and fire suppression services to the residents of the City of Cudahy 24 hours a day, seven days a week, 365 days a year. The Department has two stations: Station 1 is located on the north side and Station 2 covers the southern part of the City. The Department has 25 members, headed by the fire chief. There are three individuals who hold the rank of battalion chief, and three who are lieutenants. (Note: Additional information about the battalion chiefs is found later in this section). The remaining members of the Department are motor pump operators (MPOs). The MPOs and the lieutenants are included in the bargaining unit represented by the Union; the battalion chiefs and fire chief are excluded from the bargaining unit. Lieutenants and battalion chiefs are considered officers for the purpose of having at least one officer on duty at all times.

The members of the Department, other than the chief, work a 24-hour rotating schedule. They are on duty for a period of 24 hours, followed by 48 hours off duty, after which the cycle repeats itself. These individuals are assigned to one of three shifts which have been color coded as the red, black, and gold shifts. A platoon is a group of employees assigned to a specific station on a shift. There are four employees assigned to each platoon, for a total of eight each shift. The battalion chief counts as a member of the platoon. Three MPOs and a lieutenant are assigned to Station 1, and three MPOs and a battalion chief are assigned to Station 2. The chief, who is not assigned to any of the three shifts, works a five day, 40 hour work week. The Department has adopted a minimum staffing level of three persons per station on each shift, one of whom must be an officer (i.e. either a lieutenant or battalion chief).

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The collective bargaining agreement contains a vacation provision. That provision provides, among other things, that vacation selection "shall be based on seniority per platoon." It further provides that "only one man per station, per platoon, shall be allowed on vacation during any specific period of time." It further provides that employees are to pick their vacation days in a series of either three or six consecutive work days. It also includes a time for making such selections and ramifications for deferring selections.

The timeline for bargaining unit employees making vacation selections starts January 1 and ends on February 7. Here's how that process works. The key document in that process is the vacation schedule. It is placed in a folder at each station. All employees have access to that folder. The employee checks the vacation schedule to verify that no one else is off and enters the dates on the calendar. That lets other employees know which dates are taken. Later, the employee fills out an "Employee Report" form and takes it to an officer (i.e. a lieutenant or battalion chief) for approval. That officer, as part of the checks and balances within the Department, ensures that not more than two men are off on a shift nor more than one man per platoon on the same day. The officer will then sign or initial the Employee Report indicating that the days are available. Officers who can sign off on vacation requests are either a lieutenant or a battalion chief. The Employee Report is then sent to the Department secretary, who stamps the chief's name on the first and last copy. The first copy

stays with Departmental records, one copy is returned to the employee, and the yellow copy is sent to City Hall.

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In 2006, the position above the rank of lieutenant was known as shift commander. At the time, there were three shift commanders and the position was included in the bargaining unit. As a result, the only person excluded from the bargaining unit at the time was the fire chief. That year, two of the shift commanders retired, and the fire chief decided to modify the Fire Department's management structure. Specifically, it was decided that three new supervisory positions would be created in lieu of the three shift commander positions. The new position was designated as a battalion chief. This new position was given certain confidential labor relations duties. Additionally, each position was given one of the following responsibilities: 1) administrative functions; 2) operational functions; and 3) executive functions.

On December 17, 2006, Fire Chief Richard Demien met with Union President Robert Shimeta and two members of the Union Executive Committee, Mark Siggelkow and Michael Robinson, and briefed them on a pending change in the Department's organization, the creation of the three battalion chief positions and the rationale for it. His briefing included the following points. First, Demien gave the Union officers a copy of the City's (anticipated) battalion chief ordinance and the job description for the new battalion chief position. Second, Demien said that the crews and shifts operating in the stations would remain as currently defined. Third, Demien said that even though the battalion chief position would be out of the bargaining unit, they would remain on the crews and in the platoons for virtually all working operations and for purposes of minimum manning. Fourth, Demien said that pay and benefits for the new battalion chiefs would be equal to or greater than what they currently had. Finally, with regard to vacation scheduling, Demien said that the new battalion chiefs would be able to select vacation first.

On December 19, 2006, the Cudahy City Council passed an ordinance setting the 2007 salary and fringe benefits for the position of battalion chief. In the section dealing with vacation, the ordinance provided thus: "A Battalion Chief will have first choice of vacation weeks on his/her shift."

The Union responded to Chief Demien via a letter dated December 22, 2006. This letter, which was signed by Union President Shimeta, was copied to the entire Local 1801 Executive Board, the Mayor, all of the Common Council members and the Police and Fire Commission members. In that letter, Shimeta indicated it was the Union's position that it was the bargaining agent for the positions at issue, "whether they are referred to as Shift Commanders or Battalion Chiefs." The letter asked the Chief to "refrain from bargaining directly with Local 1801 members regarding the wages, hours and conditions of these positions and make the appropriate proposals in bargaining with Local 1801."

On January 1, 2007, the City officially implemented the organizational change referenced above and created three new battalion chief positions. Three existing employees of high seniority were promoted to the vacancies from within. They were Gary Posda, Robert Schmidt and Dale Kolosovsky. Posda was formerly a shift commander.

This change in the Department's management structure did not change the number of sworn personnel in the Department, or the number of personnel assigned to a 24 hour shift, or the number of personnel in a platoon, or the number of personnel necessary for minimum manning, or the number of personnel requesting vacations. There were no layoffs as a result of the organizational change.

This change in the Department's management structure did result in the following operational changes. First, as a result of the written ordinance passed by the Council on December 19, 2006, battalion chiefs were offered the opportunity to have "first choice of vacation weeks on his/her shift." Said another way, battalion chiefs were offered the opportunity to select vacation each year in advance of bargaining unit members. Second, as non-bargaining unit personnel, the battalion chiefs were no longer eligible to assume overtime work within the bargaining unit. Third, in order to create more time for administrative functions to be performed, the chief removed lieutenants and any acting officer from ambulance duty for the first twelve hours of every shift.

On January 5, 2007, Chief Demien responded to the Union's letter of December 22, 2006. In his letter, Demien stated that the battalion chief was a management position and, as such, outside of the Union's bargaining unit. He then went on to say that he was "willing to meet with you and the union leadership to discuss your concerns and to bargain as required."

Thereafter, the Union did not file any kind of legal action challenging any of the matters referenced above (i.e. the removal of the battalion chief position from the bargaining unit, the vacation selection change for the battalion chiefs, or the reassignment of lieutenants and acting officers off the ambulance for the first 12 hours of the work shift). Additionally, the Union never requested bargaining over any of those same matters. Union President Shimeta subsequently told Battalion Chief Posda that the Union would not be challenging any of those changes.

About the same time, negotiations ensued for a new collective bargaining agreement between the parties. Those negotiations continued through 2007, 2008 and into 2009. Neither the Union nor the City made any proposal in bargaining to change the vacation scheduling language in Article 28. In 2009, the final offers of the parties were certified and the parties went to interest arbitration for their 2007-2009 collective bargaining agreement. The certified final offers did not contain a proposal by either side to modify the vacation scheduling language in Article 28.

In the interim, the battalion chief ordinance for 2008 and 2009 was adopted by the Common Council on December 16, 2008. The same vacation selection language was included as in the original battalion chief ordinance for 2007.

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The record indicates that after Posda, Schmidt and Kolosovsky became battalion chiefs in January, 2007, they had the opportunity to select all of their vacation time first and ahead of bargaining unit members. The battalion chiefs were not required to select all their vacation prior to January 1 (the date when bargaining unit members start making their vacation picks on a seniority rotation basis) but could, at their option, select time before that date. To ensure a selection, the battalion chiefs would record their (vacation) date selection on the vacation schedule before January 1. If a battalion chief did not choose vacation before the vacation pick seniority rotation began, he could still select vacation days that were available, but he could not bump any bargaining unit employee's vacation selection after it was entered on the vacation schedule.

The record further indicates that Battalion Chief Schmidt took a portion of his vacation around the July 4 holiday in 2007 and 2008. Specifically, he took vacation days on July 5, 8 and 11 in 2007 and July 3, 6 and 9 in 2008.

FACTS

Until the instant case arose, no one in the department had tried to select a vacation date that had already been selected by a battalion chief. Said another way, no bargaining unit employee had tried to select a vacation day that a battalion chief had already selected.

On December 5, 2008, Battalion Chief Schmidt made his vacation selections for 2009. He put his vacation dates on the vacation schedule and completed the Employee Report forms. Among the dates he selected for vacation were July 5, 8 and 11, 2009.

MPO Brian Rynders is in the same platoon as Schmidt. At the time, he was the least senior employee in the department.

Rynders was aware that Schmidt had selected July 5, 8 and 11, 2009 for vacation because Schmidt had blocked off those days on the vacation schedule which was being circulated at the station. Rynders wanted to take those same days off. Rynders subsequently submitted a request to Battalion Chief Schmidt to take July 5, 8 and 11, 2009 as vacation days. Battalion Chief Schmidt denied Rynders request, telling him that he (Schmidt) had already selected those same days.

On January 12, 2009, the Union filed a grievance which averred that "Union members who submit vacation requests according to Article 27 of the contract, shall be approved regardless of requested vacation of non-union fire department supervisors." Although he is not named in the grievance, the employee involved in the grievance is Rynders. The City denied the grievance. In its denial, the City maintained that the grievance was untimely filed. The grievance was subsequently appealed to arbitration.

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Sometime after the grievance was filed, MPO Ken Kubitz requested vacation for a date in 2009 that Battalion Chief Schmidt had already selected for his vacation. Schmidt denied Kubitz's vacation request, telling him that he (Schmidt) had already signed up for the same date (that Kubitz was requesting). No grievance was filed with respect to Schmidt's failure to approve Kubitz's vacation selection date.

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Although Rynders was unable to use vacation on the three days he requested (i.e. July 5, 8 and 11, 2009), he did arrange trades with other employees for July 5 and 11, 2009. As a result, Rynders ended up being off work on those two days. Rynders was unable to secure a trade for July 8, 2009. As a result, he worked that day (as scheduled).

POSITIONS OF THE PARTIES

Union

The Union contends that the City violated the collective bargaining agreement by its actions here. It elaborates as follows.

First, the Union disputes the City's contention that the grievance was untimely filed. As the Union sees it, the "cause" of the instant grievance was not the Common Council's adoption of the battalion chief ordinance on December 19, 2006. Instead, it was the City's denial of Rynders' first 2009 vacation pick which happened January 9, 2009. According to the Union, that's "when the City's previously ambiguous desire to deny the seniority rotation vacation selection of bargaining unit members, in order to accommodate the vacation selections of battalion chiefs, ripened into a contract violation." Thus, the Union argues that the timeline for filing a grievance runs from that date – not from December 19, 2006. Addressing what happened in December, 2006, the Union maintains that after the Common Council adopted the battalion chief ordinance, the Union was left to speculate what would happen in the event a bargaining unit employee's vacation request was denied because it conflicted with a battalion chief's selection. Building on that premise (i.e. that it was speculative what would happen after the battalion chief ordinance was adopted), the Union avers that "speculation is a poor foundation on which to file a grievance." It also cites an arbitration award wherein the arbitrator held that the adoption of an ordinance was not the "event" which gave rise to the grievance. The Union argues in the alternative that if the arbitrator finds that the contractual grievance timelines started to run in December, 2006 (rather than in January, 2009), the grievance is still timely under the continuing violation theory. According to the Union, the City is engaging in a continuing violation of the collective bargaining agreement by its actions here relative to the vacation selection process. It cites several arbitration awards wherein the arbitrator applied the continuing violation theory to hold a grievance timely filed. The Union therefore asks the arbitrator "to decline the City's invitation to dismiss the grievance as

untimely.” It argues that “to hold otherwise would allow the City to erode the contract by sheltering its continuing and recurring violation behind a breach that occurred several years ago.”

Second, the Union disputes the City’s other procedural arbitrability contention that it did not follow the procedure specified in Article 12(H) for filing grievances. In its view, it complied with that contractual requirement because Union President Bloor met with Rynders and “discussed the grievance with his entire executive board and the membership as a whole.” The Union asserts that by these actions, “Bloor and the grievant satisfied the requirements of Article 12(H). Aside from that, the Union maintains that when the grievance was being processed, the City never raised this as an issue. Instead, this alleged procedural problem was raised for the first time at the hearing. The Union sees that as problematic. It argues that by waiting until the hearing to raise this alleged procedural problem, the City waived its opportunity to rely on Article 12(H) as a basis for denying the grievance.

Next, the Union responds to the City’s contention that the grievance is not substantively arbitrable. It disputes that contention. According to the Union, the grievance is substantively arbitrable. In this regard, the Union maintains that it is not trying to change a condition of employment (in violation of Article 12, A); instead, it is the City that is doing that. The Union contends that if the arbitrator were to deny the grievance, he would be granting the City something it had not obtained in the negotiating process, namely the right to deny a bargaining unit member their vacation selection in order to allow a battalion chief to pick his vacation out of rotation and on the basis of rank rather than seniority.

Next, with regard to the merits, the Union sees this as an uncomplicated case involving the straightforward application of clear and unambiguous contract language to the facts. The Union begins by reviewing the sentence in the vacation article which provides “selection of vacation shall be based on seniority per platoon.” It notes that the battalion chief counts as a member of the platoon. Putting the foregoing together, the Union maintains that this sentence “leaves the City with no room to argue that the contract allows battalion chiefs to select preferential vacations on the basis of rank.” Instead, since battalion chiefs are members of the platoon, this sentence “requires that they, like other members of their platoon, select vacation on the basis of seniority.” As the Union sees it, nothing in the vacation article allows battalion chiefs “by virtue of their rank, to trump the seniority picks of bargaining unit members”, or “suggests that battalion chiefs enjoy a right to pick vacations ahead of bargaining unit members on the platoon in a manner that denies bargaining unit members their selection rights under Article 27.” The Union argues that, to the contrary, as members of the platoon for the purposes of vacation selection, “battalion chiefs are subject to the same rules as everyone else on the platoon.” In the Union’s view, that’s what the contract means when it uses the non-discretionary term “shall” to describe the manner in which vacations are selected. The Union contends that when the City decided to allow the battalion chiefs to pick their vacations first, this “robbed” bargaining unit members of “the benefit of their bargain on the basis of unilateral commitments it made to non-represented battalion chiefs.” In making this argument, the “benefit” that the Union is referring to is the opportunity to pick their vacations in rotation, by seniority.

As part of its argument on the contract language, the Union anticipates that the City will argue that a past practice supports its interpretation of the contract language. The Union sees the following problems with that claim. First, the Union contends that resorting to past practice is unnecessary in this case because the contract language is clear and unambiguous. Building on that premise, the Union sees no need for the arbitrator to even consider past practice. Second, the Union asserts that there is no applicable past practice. The Union expects the City to argue that in the past, battalion chiefs picked out of the seniority rotation and ahead of bargaining unit members. The Union acknowledges that “in a couple of instances that might have been so.” However, as the Union sees it, “those few instances occurred over a short time frame and do not amount to a pattern of conduct that create a binding and enforceable past practice.” The Union maintains that those instances are “insufficient to deny bargaining unit members their right to select vacation in rotation, by seniority.” Third, the Union argues that prior to 2009, none of the vacation selections which the battalion chiefs made conflicted with the selections of other platoon members. According to the Union, January 9, 2009 marked the first time a bargaining unit member was denied the opportunity to pick vacation. Building on that point, the Union maintains that “it **has not** been mutually understood and accepted that the vacation selections of battalion chiefs would serve to deny bargaining unit members under Article 27.” Finally, the Union contends that even if a practice does exist, it cannot trump the clear and unambiguous contract language.

Also as part of its argument on the contract language, the Union anticipates that the City will argue that the battalion chief ordinance (which the City adopted in December, 2006) allows it to ignore its obligations to bargaining unit employees under the collective bargaining agreement. The Union disputes that contention and argues the following points. First, it characterizes the ordinance as ambiguous. Second, it argues that the ordinance contradicts the Article 27 vacation selection procedure because the ordinance gives battalion chiefs preferential vacation selection rights and Article 27 does not. Thus, it’s the Union’s view that the ordinance cannot be harmonized with the contract language. Third, the Union notes that the ordinance was unilaterally adopted and not negotiated with the Union. In response to the City’s assertion that the Union never brought the matter to the bargaining table, the Union essentially concedes that point, but contends that the reason it didn’t go to the bargaining table after the ordinance was passed was because it saw no purpose for doing so. The Union maintains it was satisfied with the existing contract language and saw no need to propose language which specifically mentioned battalion chiefs. In its view, had it done so, it would only have bargained against itself. Fourth, the Union cites Article 50 (the Entire Memorandum of Agreement provision) for the proposition that the parties intended that the collective bargaining agreement would prevail over any conflicting ordinance or resolution. Putting all the foregoing together, the Union avers that the arbitrator should reject the City’s invitation to “rewrite” the contract language.

The Union’s last argument on the contract language is that, contrary to the City’s assertion, the management rights clause does not control this case. Here’s why. That language says in pertinent part: “but, such rights must be exercised consistently with the other provisions of this contract.” As the Union sees it, in making its management rights argument,

“the City ignores the rest of the contract.” With regard to the various arbitration awards which the City cited to support its (management rights) argument that management has the right to schedule vacations, the Union argues that all “these holdings are premised on the absence of specific contract language governing vacation selection.”

The Union therefore asks the arbitrator to issue an award in the Union’s favor. Additionally, it seeks the following remedies. First, it asks that the City be directed to henceforth honor the contractual vacation selection procedure. Second, it asks that Rynders be awarded three days of overtime pay since he “was required to secure trades or report to duty, rather than receive the disputed days as vacation time off.” If the arbitrator does not award that remedy, the Association asks in the alternative that Rynders be awarded “three additional days of vacation to be selected as an additional pick in accordance with Article 27.”

City

The City contends that the grievance should be denied for the following reasons.

First, the City argues that the grievance was untimely filed as the Union knew or should have been aware of the cause of such grievance long before January 2, 2009 (when the grievance was filed). For the purpose of context, the City notes that in December, 2006, the City gave the Union leadership notice of 1) a pending change in the Department organization; 2) the Personnel Committee consideration of the creation of the battalion chief’s position; 3) the changes that were pending, including the duties and responsibilities of the battalion chief position; 4) the status of the battalion chief as a non-bargaining unit position; and 5) the process whereby battalion chiefs would select vacation first. As the City sees it, the Union’s December 22, 2006 letter to the Chief shows that the Union understood the scope of the restructuring changes, including the change to the vacation selection process. The City points out that after the Union sent that letter, it took no further action, either in terms of a grievance or any other form of legal action to enforce their claim relative to the creation and filling of the battalion chief position. Additionally, the Union never requested bargaining over same. In the City’s view, the Union then sat on the issue for over two years until it filed the instant grievance. The City submits that the record is “thunderously silent” as to why the Union waited over two years to raise this issue as a grievance (wherein the least senior employee in the department essentially challenged the vacation selection system). The City also calls attention to the language in the contractual grievance procedure which states that grievances are to be filed no later than 14 days “from the date the employee knew or should have been aware of the cause of such grievance.” The City submits that the grievance procedure exists to ensure prompt resolution of disputes over application of the contract. The Employer contends that the Union cannot sit on its rights and, “when it chooses to ignite an issue, suddenly contest management’s legitimate actions over two years later.” The Employer further maintains that the Union knew how to comply with the timelines in the grievance process, but did not do so herein. The City also points out that the Union did not move the grievance to arbitration until July 3, 2009. According to the City, that was too late for arbitral resolution of the issue relative to Rynders’ request for time off on July 5, 8 and 11, 2009. The City cites numerous

arbitration awards wherein the arbitrator held that an untimely grievance was not procedurally arbitrable. The City asks this arbitrator to follow their lead and hold likewise.

The City's second procedural arbitrability contention is that prior to filing the instant grievance, the Union did not follow their own procedure specified in Article 12(H). What the City is referring to is that this provision says in pertinent part:

. . .The employee shall meet with the Grievance Committee of the Association and determine whether the subject matter is a proper grievance. Providing the Association Grievance Committee concurs, the employee in conjunction with the Grievance Committee, shall write up the Grievance Initiation Form and present a copy to the Chief. . .

According to the City, this provision was established to ferret out frivolous grievances. The City submits that while Rynders discussed his grievance with the union president before he filed it, the grievance was not discussed with the "Grievance Committee" (which the City takes to be the entire membership of the Union). Building on that premise, it's the City's view that the Union failed to follow the procedure specified in Article 12(H).

Next, the City contends that the grievance is not substantively arbitrable. It notes in this regard that Article 12(A) specifies that a grievance will not be used to change a condition of employment. According to the City, that's exactly what the Union is trying to do here (namely, get "the unfettered right to schedule vacation" without regard to the existing restriction that only one man can be on vacation per platoon at a time). The City submits that the Union is trying to gain something via arbitration which it is not entitled to under the contract and for which it has not affirmatively bargained.

Next, with regard to the merits, the City relies on the management rights clause for the proposition that it has retained the right to determine the number of employees who may select a specific day of vacation. Specifically, it cites the provisions in the management rights clause which gives the Employer the right to "direct all operations of the city government," "to assign employees in positions within the city," "to maintain the efficiency of city government operations," "to determine the personnel by which such operations are to be conducted," and "to establish reasonable work rules and schedules of work." The City extrapolates from the foregoing that "the Chief clearly has the right to determine vacation selection processes which are consistent with the contract and the Battalion Chief Ordinance." The City asserts that the instant collective bargaining agreement does not guarantee that employees will get to take their vacation on the days that they want. To support that premise, the City cites numerous arbitration awards wherein arbitrators held that management has the right to schedule vacations. As part of its management rights argument, the Employer contends that Rynders' vacation request was limited by the Employer's "business considerations". According to the Employer, "business considerations" include both shift operations and costs. The City maintains that it has the right to schedule vacation time so that it does not interfere with shift operations. It also avers that it has the right to schedule vacations cost-effectively. Building

on the foregoing, the Employer submits that a major factor in scheduling vacations in accordance with its operational and cost needs is how many employees take vacation at the same time. In this case, the parties have contractually agreed that just “one man” per station, per platoon can be on vacation at a time.

Next, the City contends it did not violate the collective bargaining agreement when it allowed the battalion chiefs to choose their vacations before the bargaining unit employees, and when it told MPO Rynders to select alternate dates for his vacation. Here’s why. First, the City submits that the Union contention that battalion chiefs must “pick” their vacations in the seniority rotation and are “subject to the same rules as everyone else in the platoon” is contrary to both the collective bargaining agreement as well as the Municipal Employment Relations Act. The City maintains that the battalion chiefs are statutory “supervisors”, and as such, they are excluded from the bargaining unit and coverage under the collective bargaining agreement. Additionally, their terms of conditions of employment are governed by the ordinance adopted by the Common Council. Second, the City notes that the vacation provision repeatedly uses the term “employee” (which is defined in Article 1) except that the sentence dealing with the number of personnel who can be on vacation at any time references the term “man” – not “employee”. The City further notes that this is the only time the term “man” is used in the contract. According to the City, the term “man” was specifically used in this single vacation clause to include non-bargaining unit personnel (i.e. supervisors) who serve on a platoon. The City argues that “the Union cannot mandate selection of vacation by a supervisor in ‘seniority rotation’ either by contract or by operation of law.” In response to the Union’s argument that bargaining unit employees were “robbed” and “denied the benefits of the bargain”, the City disputes that contention. As the City sees it, what happened here was that “the earlier ‘bargain’ which gave rise to the use of the term ‘man’ was simply adhered to and implemented.” Third, the City contends that the Union was given notice and ample opportunity over a long period of time to bargain the impact of the change (codified in the ordinance), but the Union declined to do so. In the City’s view, the Union now seeks in arbitration that which they did not pursue at the bargaining table for the period from the December 17, 2006 briefing of the Union leadership by Chief Demien to February 6, 2009, the date the final offers in the ongoing bargaining were certified to hearing in interest arbitration. It notes that this grievance was filed on January 2, 2009, before these final offers were certified, so the Union could have made a proposal but failed to do so. Fourth, the City avers that it has been “fair and reasonable” in administering the vacation selection process because the procedures which it followed “adequately consider and protects bargaining unit employees who timely make selections in the vacation pick rotation.” In making this contention, what the City is referencing is that if a battalion chief picks a vacation after the seniority rotation starts on January 1, the battalion chief cannot bump any vacation pick already made during the seniority rotation.

Finally, assuming for the sake of discussion that the arbitrator finds merit to the grievance, the Employer asks the arbitrator to take the following matters into account in formulating a remedy. First, the Employer notes that the record shows that Rynders did not lose any vacation in 2009 and he took two of the three requested July, 2009 days off as shift

trades. Second, it's the Employer's view that the remedy requested by the Union (i.e. "three additional days of vacation to be selected in the year following the issuance of the award") is beyond the arbitrator's authority to award. According to the City, the contract does not contemplate additional time off for an employee beyond that already afforded under Article 28, so the arbitrator has no authority to order such a remedy. As the Employer sees it, the sole conceivable remedy is a cease and desist order.

DISCUSSION

Procedural and Substantive Arbitrability

Inasmuch as the City has raised several arbitrability defenses to the grievance, they will be addressed first. The City's first procedural arbitrability defense is that the grievance was untimely filed. The City's second procedural arbitrability defense is that prior to filing the grievance, the Union did not follow their own procedure specified in Article 12, Sec. H. The City also contends that the grievance is not substantively arbitrable. As noted in the **POSITIONS OF THE PARTIES** section, both sides made numerous arguments about these contentions. However, I'm not going to address any of those arguments. The reason is this: I've decided to presume for the sake of discussion that the grievance is substantively arbitrable and that no procedural impediments exist. Thus, I'm presuming for the sake of discussion that the City's procedural and substantive arbitrability defenses are denied. My reason for making this call will become apparent at the end of my discussion.

Merits

The focus now turns to the merits of the grievance.

As I see it, there are two parts to this contract interpretation case. The first part is whether the City's decision to let the (supervisory) battalion chiefs choose their vacations before bargaining unit employees violated the collective bargaining agreement. The second part is whether the City's denial of Rynders' vacation request for July 5, 8 and 11, 2009 violated the collective bargaining agreement. These two points will be addressed in the order just listed.

I begin my discussion on the first part with a review of the pertinent contract language.

While the parties agree that Article 28 (the vacation article) is pertinent to the dispute, the City contends that Article 4 (the management rights clause) is also pertinent. I've decided to address Article 4 first.

Article 4 (the management rights clause) gives the City numerous management rights with the caveat that the City has to exercise its management rights "consistently with the other provisions of this contract." The management rights which the Employer cites to support its actions here are: the right to "direct all operations of the city government," "to assign

employees in positions within the city,” “to maintain the efficiency of city government operations,” “to determine the personnel by which such operations are to be conducted,” and “to establish reasonable work rules and daily schedules of work.” Having just noted those five management rights, it’s my view that they do not apply to this case. Here’s why. As previously noted, this case involves vacation selection. There is nothing in the management rights clause that explicitly deals with the topic of vacation selection. Since there is not, I could see hanging my hat, so to speak, on the above-referenced provisions in the management rights clause if the remainder of the collective bargaining agreement was silent on the topic of vacation selection. However, it is not (meaning the rest of the collective bargaining agreement is not silent on the topic of vacation selection). I’m referring, of course, to the language contained in the vacation article. While that language will be addressed next, it suffices to say here that that article does deal with the topic of vacation selection. That being so, I find that the contract language most applicable to this case is found in Article 28 (Vacation) and not in Article 4 (Management Rights). Consequently, the language quoted above from the management rights clause will not determine the outcome herein.

I begin my discussion of Article 28 with an overview of the entire article. The first sentence in that article uses the word “employee” in the phrase “each employee shall receive an earned vacation leave. . .” The word “employee” is defined in the contractual recognition clause (Article 1) to “mean and include only the employees covered under the terms and conditions of employment.” Thus, the word “employee” refers to those in the bargaining unit. The next section of Article 28 contains the vacation schedule. The sentence which follows the vacation schedule then states: “Selection of vacation shall be based on seniority per platoon.” The word “seniority” is defined in the first sentence of Article 10 “as the length of service as a ‘full-time’ employee of the Department.” Thus, this sentence, like the first sentence in Article 28, once again deals with bargaining unit employees. The next sentence, which starts out with the phrase “only one man. . .”, deals with the number of personnel that can be on vacation at a given time (namely, only one “man” at a time). A review of the collective bargaining agreement indicates that this is the only place where the word “man” is used in lieu of the word “employee”. While the word “man” is not defined in the contract, its meaning must be different from that of the word “employee”. Otherwise, the parties would have used the word “employee” in that phrase so that it said “only one employee. . .” Since the parties did not use the phrase “only one employee” but instead used the phrase “only one man”, it is necessary to define the word “man”. Given its context and usage, I interpret the word “man” to refer to anyone who works at the station whether they are a bargaining unit employee or not. The record reflects that three MPOs and a battalion chief work at Station 2. The former are bargaining unit members while the latter (i.e. the battalion chief) is not. As previously noted, the battalion chief is a supervisor. The term “man” ensures adequate manning within the department following vacation selections by all members of a platoon. The next part of the article then goes on to create a process whereby (bargaining unit) employees pick their vacation by seniority on a rotating basis. Under this seniority rotation system, employees are not guaranteed any particular vacation pick.

Having given that overview of Article 28, I'm now going to segue back to the facts and review how that provision was applied by the parties themselves prior to 2007. The record shows that prior to 2007, everyone at Stations 1 and 2 – including the shift commanders – picked their vacation per the seniority rotation process. That is, everyone at Stations 1 and 2 picked their vacation by seniority on a rotating basis - even the shift commanders. That changed in 2007 when the three shift commander positions were eliminated and replaced with battalion chiefs. After that happened, the City gave the battalion chiefs preferential vacation selection rights so they did not have to follow the vacation selection process identified in the latter part of Article 28. This changed the vacation selection process.

The first question to be answered here is whether this change in the vacation selection process, whereby the City lets the (supervisory) battalion chiefs choose their vacation before bargaining unit employees, violated the collective bargaining agreement. The Union contends that it did while the City disputes that contention. Based on the rationale which follows, I find that the City's giving preferential vacation selection rights to the battalion chiefs did not violate the collective bargaining agreement.

My analysis begins by emphasizing one very important distinction between the shift commanders and the battalion chiefs, namely that the shift commanders were bargaining unit employees whereas the battalion chiefs are not. The battalion chiefs are supervisors who are excluded from the bargaining unit.

While the shift commanders participated in the seniority rotation pick process (meaning they picked their vacation along with everybody else), there was a sound contractual basis for that. It was this: the vacation selection process referenced in the latter part of Article 28 applies to all bargaining unit employees. Since the shift commanders were included in the bargaining unit, they had to participate in that vacation selection process along with everyone else. They did not automatically get to pick first (meaning that shift commanders did not get any preferential treatment relative to vacation selection). Instead, they picked on the basis of seniority – just like everybody else.

Having given that factual context, the focus now turns to the Union's contention that the first sentence in Article 28 (i.e. the one which reads "selection of vacation shall be based on seniority per platoon") mandates that battalion chiefs – like everyone else – must select their vacations on the basis of seniority. The problem with the Union's contention is this: it completely ignores the critical fact that battalion chiefs are supervisors who are excluded from the bargaining unit. Supervisors are not covered by the vacation selection language contained in the latter part of Article 28. That system is limited to bargaining unit employees only. That being so, battalion chiefs do not have to "pick" their vacation in the seniority rotation. While their predecessors (i.e. shift commanders) did, once again that was because they were included in the bargaining unit. The battalion chiefs are not included and this critical fact means that the battalion chiefs do not have to pick their vacation per the seniority rotation process. A contrary finding (i.e. that the battalion chiefs do have to "pick" their vacation per the seniority rotation process), just like the shift commanders did, would be contrary to the contractual

recognition and seniority clauses which define an employee as a bargaining unit employee. Battalion chiefs are not employees within the meaning of the collective bargaining agreement.

For the most part, Article 28 is limited to bargaining unit employees. That's not surprising because the parties drafted their collective bargaining agreement to address the wages, hours and working conditions of bargaining unit members – not non-bargaining unit members. That said, Article 28 implicitly references non-bargaining unit members (i.e. supervisors) in two sentences in that article. One is the sentence which starts out “only one man. . .” As previously noted, the word “man” refers to both bargaining unit members and non-bargaining members. The second sentence is the one which references “All officers. . .” The record reflects that the word “officers” refers to lieutenants and battalion chiefs. The former are included in the bargaining unit whereas the latter are excluded. While these two sentences make implicit references to non-bargaining unit members, Article 28 does not say how the non-bargaining unit members (i.e. supervisors) select their vacations. That means that the collective bargaining agreement is silent on that point.

As was its management right, the Employer decided to fill that gap for supervisors via an ordinance which established, among other things, a vacation selection process for battalion chiefs. In pertinent part, that ordinance gave the battalion chiefs preferential vacation selection because it says that battalion chiefs get to pick their vacation first. Obviously, that ordinance is not dispositive of the outcome here because I'm interpreting and applying the collective bargaining agreement – not the ordinance. However, the ordinance is nonetheless noteworthy because notwithstanding the Union's contention, the ordinance does not contradict or conflict with the language in Article 28. To the contrary, the language in the ordinance (particularly the part which says that battalion chiefs get to pick their vacation first) can be harmonized with the vacation selection procedure for bargaining unit employees mandated in Article 28. After the two are harmonized, the result is this: while the battalion chiefs are part of a platoon, and count for minimum manning purposes, they get to pick their vacation first (so long as they do so by January 1). Then, bargaining unit employees pick their vacation dates by seniority rotation. To absolutely ensure a vacation selection, the battalion chiefs have to record their (vacation) selection on the vacation schedule before January 1. The fact that the battalion chiefs can pick their vacation days before bargaining unit employees pick theirs does not mean that bargaining unit employees have been “robbed” of, or been denied, a contractual right. As previously noted, Article 28 creates a process whereby they (i.e. bargaining unit employees) pick their vacation by seniority on a rotating basis. They still get to do that (albeit, after the supervisors go first). Nothing in Article 28 prohibits the Employer from letting supervisors (i.e. the battalion chiefs) pick their vacations ahead of bargaining unit members.

The focus now turns to the parties' bargaining history. The record shows that after the Employer adopted the battalion chief ordinance, the Union knew that the battalion chiefs would henceforth have the opportunity to select their vacations ahead of bargaining unit employees. The Union also knew that this change had a potential impact on bargaining unit employees. The Union did nothing to challenge this action until it filed the instant grievance in January, 2009. Additionally, during that same time period, the Union never sought to bargain over the

matter. Instead, the Union chose, for a variety of reasons, to not bring a proposal to the bargaining table. That was its call to make. However, by doing that, the Union never obtained contract language which requires the result it seeks herein (namely, that supervisory battalion chiefs pick their vacation per the seniority rotation process).

My contract interpretation is also consistent with what has happened in the department concerning vacation selections since the shift commander position was eliminated and the battalion chief ordinance was adopted. The record shows in this regard that since December, 2006, the three battalion chiefs have not selected their vacation per the contractual seniority rotation process which occurs between January 1 and February 7. Instead, the battalion chiefs have picked virtually all their vacation in December, ahead of bargaining unit employees, for calendar years 2007, 2008 and 2009. When this happened, the battalion chiefs put the vacation dates they selected on the vacation schedule which all bargaining unit employees can review. As a practical matter, this gave notice to everyone in the bargaining unit that the battalion chiefs were picking their vacation first and were not picking per the seniority rotation process. This establishes that the battalion chiefs have selected their vacation dates first, consistent with the battalion chief ordinance, since that ordinance was adopted in December, 2006.

. . .

Having so found, the focus now turns to the second question to be answered here (i.e. whether the City's denial of Rynders' vacation request for July 5, 8 and 11, 2009 violated the collective bargaining agreement). As previously noted, Battalion Chief Schmidt made his 2009 vacation selections in December, 2008 and then wrote them on the vacation schedule prior to the start of the bargaining unit vacation pick process (which begins January 1). One of the weeks he selected was the week of July 5, 8 and 11, 2009. At the time, MPO Rynders worked at the same station and was in the same platoon as Schmidt. When Rynders made his vacation request in the seniority pick rotation, he also requested vacation on July 5, 8 and 11, 2009. In doing so, Rynders was well aware that Schmidt had already selected those same dates because they were blocked off as unavailable. Schmidt denied Rynders' vacation request because the days Rynders requested had already been selected by someone else (namely, Schmidt). I find that Schmidt had a sound contractual basis for denying Rynders' vacation request (namely, the sentence in Article 28 which says that "only one man per station, per platoon shall be allowed on vacation during any specified period of time.") As already noted, the term "man" in that sentence covers both bargaining unit members and non-bargaining unit members (i.e. supervisors). The usage of the term "man", rather than the term "employee" (which only covers bargaining unit members) means that a battalion chief would count in terms of the number of "men" who could be off on vacation on a platoon in a station on any given day. Since Battalion Chief Schmidt was already signed up for vacation on July 5, 8 and 11, 2009, this language specifically precluded a second man (i.e. Rynders) from scheduling vacation on those same days. Had Rynders' vacation request been granted, that would have resulted in two men from the same station and platoon being on vacation at the same time. Article 28, specifically the sentence which starts "only one man. . ." expressly precludes that from occurring, so the Employer's denial of Rynders' vacation request for July 5, 8 and 11, 2009 did not violate the collective bargaining agreement.

In light of the above, it is my

AWARD

1. That the City's decision to let the (supervisory) battalion chiefs choose their vacations before bargaining unit employees did not violate the collective bargaining agreement; and

2. That the City's denial of MPO Rynders' request for vacation on July 5, 8 and 11, 2009 did not violate the collective bargaining agreement. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 25th day of June, 2010.

Raleigh Jones /s/

Raleigh Jones, Arbitrator