BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

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

and

CITY OF BELOIT

Case 160
No. 70675
MA-15017

Appearances:

Law Offices of John B. Kiel, LLC, by **Attorney John B. Kiel**, 3300 252nd Avenue, Salem, Wisconsin 53168, on behalf of the Union.

Buelow, Vetter, Buikema, Olson & Vliet, S.C., by **Attorney Nancy L. Pirkey**, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin 53186, on behalf of the City.

ARBITRATION AWARD

The International Association of Fire Fighters, Local 583, AFL-CIO (herein the Union) and the City of Beloit (herein the City) have been parties to a collective bargaining relationship for many years and at the time the chain of events pertinent hereto began, were operating under an agreement dated January 20, 2009, covering the period January 1, 2008 through December 31, 2010. However, the agreement had expired during the time the pertinent events were occurring. On March 22, 2011, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration regarding a decision by the Fire Chief to split a twenty-four hour hireback shift between two officers on December 11, 2010. The undersigned was selected by the parties from a panel of WERC staff to arbitrate the matter and a hearing was conducted on June 20, 2011. The proceedings were transcribed. The parties filed initial briefs August 26, 2011 and reply briefs by September 16, 2011, whereupon the record was closed.

ISSUES

The parties did not agree to a statement of the issues. The Union would frame the issues, as follows:

> Did Fire Chief Bradley Liggett violate the collective bargaining agreement when he unilaterally directed that the subsequent overtime offer provision of the first sentence of Appendix A, Section 20 was to apply to both second half 12-hour hirebacks and full 24-hour hirebacks?
>
> If so, what is the appropriate remedy?

The City would frame the issues, as follows:

> Was the initial grievance filed on a timely basis?
>
> If so, did the fire chief violate Appendix A of the collective bargaining agreement when he exercised his management right to split a 24-hour hireback into two 12-hour shifts?
>
> If so, what is the appropriate remedy?

The arbitrator frames the issues, as follows?

> Was the grievance timely?
>
> If so, did the fire chief violate Appendix A of the collective bargaining agreement when he directed that a 24-hour hireback be split into two 12-hour shifts?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE VIII – GRIEVANCE PROCEDURE

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

Only one subject matter shall be covered in any one grievance. A written grievance shall contain a clear and concise statement of the grievance and indicate the issue involved, the relief sought, the date of the incident or violation took place, and the specific section or sections of the Agreement involved. An employee may choose to have his/her appropriate Union representative represent him/her at any step of the grievance procedure. If any employee brings any grievance to management's attention without first having notified the Union, the management representative to whom such grievance is brought shall immediately notify the Union and no further discussion shall be had on the matter until the Union has been given notice and an opportunity to be present.

All grievances may be presented promptly and no later than twenty (20) calendar days from the date the grievant first became aware of, or should have become aware of with the exercise of reasonable diligence, the cause of such grievance.

Section 2 **Step One:** Any grievance which arises after the effective date of this Agreement shall first be discussed by the aggrieved employee and grievance representative with the Fire Chief or his/her designee. The grievance shall be presented to the Fire Chief or his/her designee in triplicate and signed and dated by the employee(s) and Union representative. A written decision will be placed on the grievance by the Fire Chief or his/her designee and returned to the employees and union representative within five (5) calendar days following its presentation to the Fire Chief or his/her designee.

. . .

Section 3 Grievances not appealed within the designated time limits in any step of the grievance procedure will be considered as having been terminated on the basis of the last preceding City answer. Grievances not answered by the City within the designated time limits in any step of the grievance procedure may be appealed by the employee to the next step within five (5) calendar days of the expiration of the designated time limits, in which the City is supposed to answer. The parties may, however, mutually agree in writing to extend the time limits in any step of the grievance procedure. Calendar days referred to in this Article, shall mean Monday through Friday, excluding Holidays.

. . .

Section 6 The grievance procedure set out above shall be exclusive and shall replace any other grievance procedure for adjustment of any disputes arising from the application and interpretation of this Agreement.

ARTICLE XXI – MANAGEMENT RIGHTS

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

The City and Union shall immediately enter into negotiations to replace any section of this Agreement if found to be in violation of the Wisconsin Statutes.

APPENDIX A

Purpose

The following procedure will be used to determine whether it is necessary to supplement staffing levels by hiring back Bargaining Unit Personnel who are off

duty. This procedure will also act as a guideline to determine who is entitled to the available overtime or hireback, as it is customarily called.

Scope

. . .

20. If Bargaining Unit Personnel have accepted or is working a 12 hour hireback and a subsequent need for a second half hireback has arisen, if the person is qualified, the person who accepted or is working overtime will be offered the adjacent overtime first. The employee does have the right to turn this second half offer down without penalty unless his/her name comes up through the normal hireback procedure. In the event that two or more employees have accepted or are working a 12 hour hireback the person qualified for the position and with the least amount of hours in the hireback book will be offered the hireback first. This continuation does not apply to personnel working the second half of one shift and the vacancy occurs in the first half of the next shift.

BACKGROUND

The Beloit Fire Department is comprised of 56 bargaining unit employees and 4 administrative employees, who operate out of three fire stations in the City of Beloit. The Union represents employees in the classifications of Firefighter, Paramedic, Motor Pump Operator, Lieutenant and Captain. The employees are organized into three shifts, which work on rotating 24-hour schedules commencing at 7:00 a.m. each day, so that each shift is on a 24 hours on - 48 hours off schedule. Frequently, a shift will be short-handed due to vacations, sick leave, training, etc., resulting in a need to call in an off-duty officer on overtime to fill the shift. The parties refer to calling in an off-duty officer to fill a vacant shift as a hireback. Officers can take time off in 12-hour or 24-hour increments, so a hireback may be for a full 24 hour shift, or the first or second half of a shift.

For many years, the City and the Union have had language in Appendix A of their collective bargaining agreement regulating the process of allocating hirebacks among available off-duty officers. This language includes provisions for the order in which off-duty officers must be offered hireback opportunities, and which employees may be hired back to fill particular vacancies, depending on the classification needed. The Department keeps a record of overtime worked in a Hireback Book. As hireback opportunities arise, they are to be offered to

the employee who has the least amount of overtime, as long as he or she is qualified to fill the vacant position. The Captain or Lieutenant calls the first eligible employee on the list, who may accept or decline the hireback. If an employee does not answer or declines, he is charged with the overtime as if it had been accepted and the Captain or Lieutenant then calls the next name on the list, and so forth.

In 2005, the parties added what is now paragraph 20 of Appendix A to address situations where consecutive 12-hour hirebacks occur. Occasionally, a situation will occur where a 12-hour hireback will arise on the second half of a shift while an employee is already working a 12-hour hireback on the first half of that shift. Under paragraph 20, when this occurs the second 12-hour hireback must be offered to the employee already working the first 12 hour hireback, as long as he is qualified for the position and as long as the subsequent 12-hour hireback is for the second half of the shift. Ostensibly, this saves the scheduling officer from having to find another employee to fill the second vacancy. If an employee is working a second half hireback, however, and a hireback occurs for the first half of the next shift, the employee is not entitled to it. Paragraph 20 is silent, however, as to under what circumstances, if any, a 24-hour hireback may be split into two 12-hour segments.

On December 08, 2010, Lieutenant Jason Griffin was offered a 12-hour hireback for the first half of the shift on December 11, which he accepted. On December 10, Captain Armstrong called in sick for his shift on December 11, creating a 24-hour hireback opportunity. Captain Ferger, who was responsible for the scheduling for December 11, decided to offer a full 24-hour hireback to another officer, but was overruled by Deputy Chief Northrop, who decided the 24-hour hireback should be split, with the second half being offered to Griffin, who was already working a first half hireback and the first half being offered to Acting Lieutenant Jim Churchill. Accordingly, Ferger offered the second half hireback to Griffin and the first half hireback to Churchill.

The Union disagreed with Northrop's decision and Union President Steve Warn met with the Fire Chief on December 15 to discuss the situation. After the discussion Chief Liggett issued a directive later on December 15 specifying that in the future where an officer is working a first half 12-hour hireback and a 24-hour hireback occurs on the same shift, the officer working the first half hireback will be offered the second half of the 24-hour hireback and the first half will then be offered to another employee. On the other hand, an officer working a second half hireback would not be offered the first half of a subsequent 24-hour hireback. The Union did not immediately grieve the December 11 hireback assignment or the Cbief's December 15 directive, but entered into discussions with Chief Liggett about the issue instead. A series of conversations and exchange of emails took place between Liggett and

Warn during January 2011, culminating in an email from Liggett to Warn on January 25 indicating that the December 15 directive would stand as issued. On January 26, 2011, the Union filed a grievance over the Chief's directive, seeking to have it rescinded. The City denied the grievance, both on the merits and on the basis of untimeliness. The matter was processed according to the contractual procedure resulting in this arbitration. Additional facts will be referenced in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Union

Timeliness

The Union maintains that the grievance was timely. The Chief initially issued his directive on December 15, 2010, but then entered into discussions with the Union, which terminated on January 25. The Chief's directive is in direct conflict with the collective bargaining agreement and, as such, represents an ongoing and continuing violation of the contract. This gives rise to continuing grievances on each occasion that a violation occurs. It is also clear that the events of December 10 led to the Chief's directive of December 15. this, in turn, led to a series of discussions between the Chief and the Union that only ended when the Chief terminated them by reaffirming his directive on January 25. The Union filed its grievance the next day.

The arbitrator must determine what was the event or occurrence giving rise to the grievance and whether the grievance was filed within 20 calendar days after the event. The City contends that the occurrence giving rise to the grievance was the Chief's initial December 15 directive, but the Union maintains that the triggering event was the Chief's January 25 email reaffirming the directive and terminating discussions with the Union. Significantly, the Chief testified that he encourages discussions of disputes before grievances are filed and that this often results in settlement of them. Here, the Chief encouraged the discussions and participated in them. The grievance only became ripe when those discussions broke down. The Chief's testimony indicates that the City has been lax in the past in enforcing grievance timelines in order to encourage settlement discussions. Under the circumstances, therefore, the City should be required to give the Union of notice of intent to adhere to the contractual guidelines before it can enforce them. Otherwise, the Union will be denied the opportunity to have the case decided on the merits because it acted in good faith by attempting to settle the dispute after being encouraged to do so by the Chief. Since the Union acted diligently in bringing the matter to the Chief's attention for discussion in advance of filing a grievance, as he encourages, forfeiture should be avoided.

Merits

The Union asserts that the plain language of the agreement supports the grievance. The City drafted the language contained in the first sentence of paragraph 20 of Appendix A. It specifically provides that in a situation where an employee is working a first half hireback and a second half hireback opportunity becomes available, the officer working the first half hireback is entitled to the second half opportunity if he is qualified. This unambiguously indicates the parties' intent to address the specific circumstances set forth and cannot be interpreted to apply to 24-hour hirebacks. The City seeks to reinterpret paragraph 20 to add that in the event an employee is working a first half hireback and a 24-hour hireback opportunity arises, the shift will be split and the second half of the hireback will be offered to the employee already working the first half hireback and the first half of the 24-hour hireback will be offered to another employee. If the City had wanted that language in the provision, it could have, and should have added it.

There is no dispute that Appendix A was never intended to allow for the splitting of 24-hour hirebacks. The Chief testified that where a single 24-hour hireback becomes available, the Captains do not have discretion to split them, but they must be offered intact. Splitting of 24-hour hirebacks is only permitted pursuant to the Chief's December 15 directive. Prior to that time, there was no basis for splitting hirebacks. The City will probably argue that the management rights clause can be applied to permit splitting of hirebacks. This is too broad an interpretation of the City's authority under the management rights clause, which expressly limits the City's authority to the extent restricted by other provisions of the contract. Here, the City's ability to distribute overtime is set forth in, and limited by, Article XV and Appendix A, not the management rights clause, and they must control.

The City

Timeliness

The City contends that the grievance is not arbitrable because it was not filed timely at Step 1. Article VIII specifies that a grievance must be presented "promptly and no later than twenty (20) calendar days from the date the grievant first became aware of, or should have become aware of with the exercise of reasonable diligence, the cause of such grievance." Calendar days are defined as Monday through Friday, excluding holidays, which for the purpose of this grievance, would include Christmas Eve, Christmas Day, New Year's Eve and New Year's Day. The grievance indicates that the date of the violation was December 10, 2010. Using the contract formula, therefore, the grievance would have to have been filed by

January 11, 2011 in order to be timely. Instead, the grievance was filed on January 26, thirty-one calendar days after the event giving rise to the grievance. What is more, even if one assumes that the operative date was December 11, the date the overtime was worked, or December 15, the date the Chief issued his directive, the grievance is still untimely.

The Union cannot effectively argue that it was not aware of the events because the grievance admits that Captain Ferger contacted two Union officers to discuss Deputy Chief Northrop's order. Further, Ferger told Northrop that he believed the order violated the contract. Also, on December 15, the Union President spoke to the Chief and asked him to provide a consistent basis for future application of the policy. Another Union officer, Scott Smith, spoke to the Chief on January 7 about the Union's concerns regarding the Chief's directive. Thus, the Union was aware of the initial order on December 10, was aware of the Chief's directive on December 15, and had decided that the Chief's action was a violation of the contract by January 7, within the twenty day filing period. Nonetheless, the Union failed to file the grievance within the twenty day period.

Arbitrators will enforce the timelines of a grievance procedure to prevent disputes from festering and poisoning the labor relations environment. Untimely grievances are not arbitrable and must be dismissed, therefore, to avoid hearings on stale evidence. *citations omitted* The Union will doubtless argue that it did not file because it was trying to settle the dispute. Settlement discussions, however, do not toll contractual timelines unless the parties mutually agree to do so. In this case, however, there was no request for such an extension, nor was there any agreement to waive the timelines. The grievance was, therefore, untimely and should be dismissed.

Merits

The arbitrator must interpret the contract as it is written, not as the Union would like it to read. If it is clear and unambiguous, the arbitrator must apply it according to its terms. If it is ambiguous, the arbitrator must construe it using tools of construction, such as context of usage, the purpose of the provision, usage of similar phrase in the agreement, bargaining history and past practice. Also, interpretations on ambiguous terms that give meaning to the language should be preferred over those that give the language no meaning.

Here, the contract is silent on the issue raised by this grievance. The grievance asserts that the Chief's directive was in direct violation of paragraph 20 of Appendix A. That language states that if an employee is working a 12-hour hireback and a subsequent 12-hour hireback becomes available, it is to be offered first to the employee already working the first hireback.

The Union contends that this provision prohibits the splitting of a 24-hour hireback into two segments and offering one segment to an employee already working a 12-hour hireback. This position is arbitrary and unreasonable. The City asserts that the contract is silent on this point and, therefore, is a matter of management rights.

The contract contains a broad management rights clause, which gives the Fire Chief the contractual right to determine the "supervision, management and control of the City's business and operations" as it pertains to the Fire Department. This includes determining staffing levels and the assigning of overtime. Exercising that right, the Chief reasonably determined that when an employee is working a 12-hour hireback it makes sense to an available split 24-hour hireback shift and offer the second half of it to the employee already working, rather than offer the entire 24-hour hireback to another employee. The Union contends that the language in question was intended to make scheduling easier for the Captains and Lieutenants and that the splitting of 24-hour hirebacks would make the process more complicated and difficult, but offered no evidence supporting this argument. Even if the directive would result in a Captain or Lieutenant having to make an additional phone call, however, does not make the Chief's action unreasonable. The test of reasonableness is not whether someone else would have made another choice, but, rather, is whether no one else could have reasonably made the same decision. Here, the Chief's decision was not arbitrary or capricious and, in issuing his directive, the Chief properly exercised his management rights. Further, the Chief only issued his directive after having been asked for clarification from the Union, which indicated it didn't care what decision was made. Also, no bargaining unit member has lost overtime as a result of the decision. The City further submits that granting the grievance would nullify the management rights clause, and should be denied for that reason, as well.

The language in question is known as the "Dvorak" rule, named for an employee who had a practice of taking vacation for the first 12 hours of his shift and then, at the end of the 12 hours, taking vacation for the remaining 12 hours. Under such circumstances, the parties agreed that the employee working the first 12-hour hireback should be offered the second 12-hour hireback, as well. The parties did not consider the issue raised here – a 24-hour hireback occurring while an employee was already working a first half 12-hour hireback. There is, therefore, no bargaining history supporting the Union's position. There is also no past practice supporting the Union's position. The Union may point to rare occasions when the City has offered a full 24-hour hireback to an employee rather than splitting it and offering the second half to an employee already working a 12-hour hireback. The City offered evidence, however, of two instances where a 24-hour hireback was split under the same circumstances presented here. To be binding, a past practice must be 1) unequivocal, 2) clearly enunciated and acted

upon and 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties. There is evidence of four past cases arising under these circumstances with different decisions being made as to how to assign the available hours. This history does not meet the standard for a binding past practice. Thus, the grievance must be dismissed.

Union Reply

Timeliness

On December 15, well within the 20 calendar day timeline, the Union president met with the Chief to discuss the grievance before it was reduced to writing, as required by the contract. The discussions led to talk of settlement, although the City now denies these were settlement discussions. This contradicts the language of the contract, which calls for such discussions, and the past practice of the parties, to which the Chief testified. The discussions, and exchanges of emails, continued until the Chief terminated the discussions on January 25. The City appears to believe that the grievance was untimely because it was not reduced to writing before January 26, although the contract does not specify that grievances must be in writing when presented. The Union approached the Chief within five days of the precipitating event and instituted discussions, as the contract required. When the discussions failed, the written grievance was promptly filed. The City would have the arbitrator rewrite the contract to require the Union to reduce grievances to writing before seeking to discuss them with the Chief and ignore the language calling for initial discussions. Rather, the arbitrator should interpret the contract as it is written, as the City argues in its principal brief. The City cannot argue that settlement discussions were not occurring before January 26. Thus, the Union complied with the contract and the grievance was timely filed.

Merits

The City's reliance on management rights is misplaced. The City asserts that the issue is whether it has the management right to schedule and assign work to bargaining unit employees. The Union asserts, however, that the assignment of overtime is a matter primarily related to wages, hours and conditions of employment, and is a mandatory subject of bargaining. The parties negotiated a detailed general order establishing a procedure for assigning overtime shifts, known as hirebacks. The hireback agreement addresses the order in which overtime is to be allocated among off-duty employees. The parties agree that if an employee is working a first half hireback and a second half hireback becomes available, the second half shift is to be offered to the employee already working the first half. If, however,

an employee is working a second half hireback and a first half hireback becomes available on the next shift, the employee working the second half is not eligible for the shift. It is also undisputed that the parties never intended for Captains to be able to split a single 24-hour hireback into two 12-hour shifts. The first time splitting of 24-hour hirebacks was authorized was in December of 2010, when the Chief issued his directive. The City argues that the contract is silent on the issue of splitting 24-hour hirebacks, but it is not. Paragraph 20 of Appendix A creates only one exception to the use of the hireback book to determine who is eligible for overtime, which is the circumstance where an employee is working a first half hireback and a second half hireback on the same shift becomes available. In all other cases, the Captain is to refer to the hireback book and offer the hireback to the qualified employee with the least amount of overtime. A 24-hour hireback is not a second half hireback and is not adjacent, but is parallel to, a first half hireback. Thus, the plain language of the contract supports the Union.

It should also be noted that the past cases cited by the City are not supportive of the City's position. The February 19, 2010 instance supports the Union's position and the February 1, 2009 instance does not support either party. The City also contends that a July 5, 2010 incident supports its position, but this is inaccurate. On that occasion, there was a 12-hour and a 24-hour hireback opportunity available. Lieutenant Smith consulted the hireback book and first tried to offer a hireback to Michael Agate, who did not answer. He then offered a hireback to Michael Rosario, who initially agreed to work the 12-hour hireback. Agate then responded and indicated he wanted to work a 12-hour hireback, as well. Rosario ultimately agreed to work the 24-hour hireback, but there was no splitting of the 24-hour hireback. That leaves the May 5, 2009 instance as the only prior occasion of splitting. In an environment where hirebacks occur on a nearly daily basis, this one instance is insufficient to set a precedent for ignoring the plain language of the contract.

City Reply

Timeliness

The City asserts that the facts of the grievance do not support the continuing violation theory. The continuing violation theory requires that the alleged violation be repeated from day to day, with each event treated as a new occurrence. It does not apply to a single isolated and completed transaction, which this was. The single incident occurred on December 11, when Captain Ferger split a 24-hour hireback and was not repeated. Likewise, if the Chief's

directive on December 15 is treated as the precipitating event, the continuing violation theory does not apply. The Union offered no evidence of any other occurrences after December 11, or of any other grievances having been filed. This is a rare set of circumstances which has only arisen on four occasions over a period of two years, so it hardly constitutes a continuing violation.

The Union also argues that the fact that it contacted the Chief for alleged settlement discussions had the effect of extending or tolling the timelines for filing the grievance. The City disputes whether there were, in fact, settlement discussions, or whether the Union was simply trying to convince the Chief to rescind his December 15 directive. Nonetheless, the Chief does encourage discussions with the Union before grievances are filed and the City admits that such discussions can and should occur. The issue, however, is whether these discussions automatically toll or extend grievance timelines. The contract is clear that extensions of grievance timelines are to be by mutual agreement. The Union did not request an extension of the 20-day timeline for filing a grievance. Further, since the contract requires that agreed extensions be in writing, the Union cannot argue that settlement talks automatically extend the timelines. Since the Union failed to request an extension, it cannot rely on alleged settlement talks, which it hoped would obviate the need for filing the grievance, as meeting the requirements of the grievance procedure.

Merits

The Chief had the authority to issue the December 15, 2010 directive and did so at the request of the Union. The Union asserts that the Chief issued a unilateral interpretation of the contract, but that is incorrect. The contract addresses only how to assign second half hirebacks when an employee is already working a first half hireback and is silent on the issue at hand – how to address the situation when an employee is working a first half hireback and a 24-hour hireback opportunity arises. The Union would have the arbitrator read into the contract words of limitation that do not exist to limit the City to only offering second half hirebacks to employees working first half hirebacks, but this was never discussed in bargaining. Secondly, it was the Union that went to the Chief and asked him to issue a directive clarifying how 24-hour hirebacks would be handled under these circumstances in the future. The Union president also indicated that the Union did not have a position on how the question should be resolved, but only sought consistency in the policy. The Chief acted in accordance with the Union's request, which resulted in this grievance. The Union cannot have it both ways. The grievance should be dismissed.

DISCUSSION

Timeliness

The initial point of inquiry is whether the grievance was filed in a timely manner and, if not, whether an untimely filing makes the grievance inarbitrable. Such a defense by the employer, if upheld, would have the effect of denying the Union consideration of the grievance on its merits, so it must not be considered lightly or granted casually. The launching point for any such inquiry is the language of the contract itself. First of all, the language of Article VIII, Section 1 specifies that grievances are to be presented "…no later than twenty (20) calendar days from the date the grievant first became aware of, or should have become aware of with reasonable diligence, the cause of such grievance." Section 3 then explains that for purposes of the contract, calendar days are Mondays through Fridays, exclusive of holidays.

The grievance itself identifies the event giving rise to the grievance as the directive from Deputy Chief Northrop to Captain Ferger on December 10, 2010, ordering him to split a 24-hour hireback on December 11 and offer the second half of it to Acting Lieutenant Griffin, who was already working a 12-hour first half hireback. The date stamp on the grievance reveals that it was filed with the City on January 26, 2011, which the Union does not dispute. Five days later, on January 31, 2011, Chief Liggett issued his Step One response, wherein he denied the grievance and stated *inter alia* that it was untimely. December 10, 2010 was a Friday. The next 20 calendar days following December 10, excluding Holidays, were December 13, 14, 15, 16, 17, 20, 21, 22, 23, 27, 28, 29, 30, January 3, 4, 5, 6, 7, 10 and 11. A strict reading and application of the language of the contract and the grievance, therefore, leads to a conclusion that the grievance was untimely by 11 days. The Union asserts, however, that for a number of reasons this analysis is inapt and should not control. It argues, variously, that the grievance was presented orally within the time limits, that the parties were engaged in settlement discussions throughout December and January, which suspended the contractual timelines until the Chief's email on January 25 affirming his directive, that the parties have been lax in enforcing strict adherence to the timelines in the past, such that the City should not be able to enforce them now without prior written notice of its intent to do so and that the City's actions constitute a series of continuing violations, which permit the filing of a grievance after any subsequent violation. I will address each of these arguments in turn.

The Union argues that it met its obligation of presenting the grievance within 20 calendar days when the Union President met with the Chief on December 15 to discuss the Union's concerns with Northrop's December 10 order. This led to the Chief issuing a directive on the splitting of 24-hour hirebacks later that day, which, in turn, engendered further

conversations and exchanges of correspondence over the course the following six weeks as the Union sought to get the Chief to rescind the directive. Only after this effort failed on January 25 did it reduce the grievance to writing. I am not persuaded that the Union's actions on December 15 and following, however, constituted the presentation of a grievance as that term is used in Article VIII. Section 2, Step One does, indeed, state that the grievance shall first be discussed with the Chief or designee, as the Union points out, but it also states that it must be presented in triplicate, signed and dated. The presentation, therefore, requires a written, signed and dated document. Under Section 1, furthermore, this presentation must occur within twenty calendar days of the precipitating event, which occurred on December 10. It is clear to me, therefore, that the contract required that the grievance be presented in writing within 20 calendar days of December 10 and that this was not done. Indeed, one of the principal reasons grievance procedures specify that grievances must be in writing is to avoid a situation such as this, where one party asserts that a grievance was presented orally and the other denies it and there is no paper trail to clarify the situation.

The Union goes on to assert that it was engaged in settlement discussions with the City between December 10 and January 25 and that these discussions had the tacit effect of suspending the contractual timelines until the negotiations broke down on January 25. Again, I am forced to disagree. Referring again to the contract, Article VIII, Section 3, specifies that agreements to extend contractual time limits are to be in writing. There is no dispute that there was no oral or written request for an extension of the time lines for presenting the grievance, much less a written agreement to do so. Union President Warn even testified to that effect. Further, the Union offers no arbitral authority for the proposition that settlement discussions automatically toll grievance timelines. Even were there such authority, however, it would not, in my view, override clear contract language requiring an extension agreement to be in writing. Indeed, there would be no need for such a policy for there is no reason why settlement discussions cannot occur after the grievance has been presented, or why extensions may not be requested to facilitate such discussions.

The Union further asserts, however, that the settlement discussions were part and parcel of a practice engaged in by the parties over the years, and that the parties have, therefore, been habitually lax about enforcing the contractual time limits. Thus, the Union had a reasonable expectation that the City would not enforce the time limits here. The Union maintains, therefore, that the City should have given written notice in advance that it intended to enforce the time limits and should not be heard now to argue that they were violated. The problem here is that the Union's argument is not supported by the record. In support of its position, the Union relies on the following testimony by Chief Liggett on cross-examination:

Q: Chief, is it uncommon to discuss contract disputes with Local 583 prior to the filing of a grievance?

A: No. It's not uncommon.

Q: And is it uncommon to settle or resolve those disputes prior to the filing of a grievance?

A: No.

Q: Is that something that you encourage 583 to do?

A: Absolutely. I think I have an excellent working relationship.

TR, p. 146, ln 6-15.

The Union suggests that this exchange reflects a practice of negotiating disputes before grievances are filed with an accompanying understanding that the time limits for presenting the grievance will not apply while such discussions are being conducted. In my view, this reads too much into the Chief's testimony. While admitting that he encourages discussions of disputes before they are grieved, he says nothing about what, if any, effect those discussions have on the time limits. Furthermore, during his direct examination the Chief made it clear that there was no discussion of granting a time line extension during his talks with the Union in December and January and that, typically, where such extensions are requested, this occurs after the grievance has been presented. Finally, Union President Steve Warn, who engaged in the discussions with Chief Liggett, admitted that there was no request by the Union for an extension of the grievance time limits, nor was one received. He also did not testify as to any past understanding between the parties that grievance time limits have not been honored in the past or are to be suspended during pre-grievance settlement discussions, or that the Union operated under such an impression. There is also no evidence in the record of any past case where grievance time limits have been ignored by one party and not enforced by the other. On this record, therefore, I can find no basis for the existence of any past history of laxity in enforcing the grievance time limits, such that the City should be precluded from asserting them here.

The Union's final argument is that the City's action is in the nature of a series of continuing violations flowing out of the Chief's December 15 directive calling for the future splitting of 24-hour hirebacks, which the Union asserts changes the way hirebacks have been

allocated in the past and creates a new policy that contradicts the contract language. Continuing violations constitute an ongoing series of alleged violations, with each alleged violation being a separate grievable event, subject to a new set of time limits. The problem with this line of argument is twofold. First, the grievance is clear that it is based on Deputy Chief's order to Captain Ferger on December 10 to split the 24-hour hireback on December 11 and offer the second half to Lieutenant Griffin, not Chief Liggett's December 15, directive. Second, and more to the point, however, is the fact that there is no evidence in the record of any subsequent occasion of a 24-hour hireback being split after December 11, which is fatal to any claim of continuing violation. Even if the Chief's directive were taken into account, however, that, too, was a discrete event, not subsequently repeated, and starting the time clock on December 15 would still result in the grievance being untimely under the contractual language.

In sum, I can find no basis in the contract or in the record for finding that the contractual time limits for presenting the grievance were either complied with, waived, or otherwise inapplicable. Since the grievance was untimely, it is inarbitrable and it is, therefore, unnecessary to consider the merits. For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

The grievance was not timely and is inarbitrable. It is, therefore, denied.

Dated at Fond du Lac, Wisconsin, this 10th day of November, 2011.

John R. Emery /s/
John R. Emery, Arbitrator

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