

BEFORE THE ARBITRATOR

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In the Matter of a Dispute Between

CITY OF MANITOWOC FIREFIGHTERS, INTERNATIONAL  
ASSOCIATION OF FIRE FIGHTERS, LOCAL 368, AFL-CIO

and

CITY OF MANITOWOC

Case ID: 285.0006  
(Acting Pay Grievance)

AWARD NO. 7934

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**Appearances:**

Timothy E. Hawks and B. Michele Sumara, Hawks Quindel, S.C., 222 East Erie Street, Suite 210, P.O. Box 442, Milwaukee, Wisconsin, appearing on behalf of the Union.

Kyle J. Gulya, von Briesen & Roper, S.C., 10 East Doty Street, Suite 900, Madison, Wisconsin, appearing on behalf of the City.

**ARBITRATION AWARD**

The International Association of Fire Fighters, Local 368, AFL-CIO (the “Union”), and the City of Manitowoc, Wisconsin (the “City”), requested that the Wisconsin Employment Relations Commission provide a panel from which I was selected by the parties as the arbitrator to hear and decide this grievance brought by the Union. This matter was heard in accordance with the grievance and arbitration provisions of the parties’ 2015 – 2018 collective bargaining agreement (the “CBA”). Hearing was held in Manitowoc, Wisconsin, on July 18, 2016. A transcript of the hearing was created. The parties submitted briefs, the last of which were received on October 3, 2016, whereupon the record was closed. Based upon the evidence received at hearing and arguments of the parties, the arbitrator makes and issues the following award.

**ISSUES**

The parties were unable to agree on a statement of the issues. The Union would frame the issues as follows:

Did the City violate the collective bargaining agreement with the Union when it ceased paying acting captains pay, effective January 1, 2016?

If so, what is the appropriate remedy?

The City would frame the issues as follows:

1. Did the City of Manitowoc violate Article 9 Compensation, Section 1 Compensation Schedule, Subsection (c) Acting Pay of the 2015 – 2018 Collective Bargaining Agreement when the City refused to pay Acting Captain pay to bargaining unit members since January 1, 2016 as identified in the grievance dated January 18, 2016?
2. If so, then what is the appropriate remedy?

The parties agreed that I had authority to frame the issues after giving consideration to their respective positions. Having done so, I conclude the issues are as follows:

Did the City violate the parties' 2015 – 2018 collective bargaining agreement when, beginning on January 1, 2016, it refused to pay as acting captains the employees who do not hold the substantive rank of captain and are assigned as the officers supervising and managing the companies at the City's three outlying fire stations?

If so, what is the appropriate remedy?

**RELEVANT CONTRACT LANGUAGE**

**ARTICLE 9**  
**COMPENSATION**

**Section 1. Compensation Schedule.**

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(c) Acting Pay. In the event an employee at a lower classification is qualified for and is temporarily required to serve and accept full responsibility for work as an MPO, Lieutenant, Captain such employee shall receive the pay for the higher classification if so assigned for one continuous tour of duty of

eight (8) hours or more. Acting pay will be based on the number of hours worked. No acting pay will be applied for a two person ambulance.

In order to receive acting pay for the rank of Captain or Lieutenant, the employee must have participated in and passed the promotional procedure for the rank just below the acting position, as outlined in Article 6, Section 1(a). Acting Captains must have passed the Lieutenants [sic] procedure, and Acting Lieutenants must have passed the MPO state certification exam. In order to receive acting pay for the MPO position, the employee must have passed the MPO state certification exam.

[sic] In the event of trades, only the employee who actually works shall receive any additional compensation under this provision.

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## ARTICLE 22 MAINTENANCE OF EMPLOYMENT CONDITIONS

All conditions of employment relating to wages, hours of work differentials, general working conditions and practices which are not specifically provided for in this Agreement and which are mandatory subjects of bargaining shall be maintained at not less than the highest minimum standard in effect at the time of signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvements are made in this Agreement.

### BACKGROUND

The command structure of the City of Manitowoc Fire Department has changed over the past two decades. Throughout that time, the position description for a lieutenant has generally provided that a lieutenant supervise and manage the operations of a fire company and may serve as an acting captain. Despite this general statement, from 2007 through the end of 2015, lieutenants supervised and managed the operations of a fire company only at Station 1, under the supervision of the battalion chief assigned to Station 1, or when serving as an acting captain at the City's outlying Stations 2, 3, or 4.

Generally, from 2007 to 2013, the Department was organized with a chief and two deputy chiefs commanding firefighters divided among three shifts. A battalion chief led each shift from Station 1. A lieutenant was also assigned to Station 1. Three captains were assigned

to lead the firefighters at each of the outlying Stations 2, 3, and 4. On a regular basis – as much as half the time – the lieutenant assigned to Station 1 moved to one of the outlying stations and served as the acting captain in charge of that station, replacing an absent captain. When in charge of an outlying station, the lieutenant was paid as an acting captain.

In 2011 and 2013, then-Department Chief William Manis revised the lieutenant's job description. He did so to reflect the reality that lieutenants spent a substantial portion of their time as acting captains, supervising and managing the companies at the outlying stations. By 2013, the job description for a lieutenant was nearly identical to that for a captain. The only substantive difference was that, unlike captains, lieutenants did not participate in the evaluation of staff.

By 2013, the position description for a lieutenant provided in part:

This person supervises and manages the operations of his/her company and other companies assigned to him/her. In addition, this person will assist in the supervision and management of other on-duty companies and, if so assigned, serves as an Acting Captain.

Despite the fact that it was contemplated within the lieutenant's position description, a lieutenant was never required to take charge of an outlying station as a lieutenant. During Chief Manis' tenure, whenever a lieutenant served at outlying Stations 2, 3, or 4, the lieutenant was paid as an acting captain. This practice continued after Manis' retirement and the appointment of Department Chief Todd Blaser in March, 2014.

Throughout 2014, the employee, if not a captain by substantive rank, assigned to lead a company at an outlying fire station was paid as an acting captain. Motor Pump Operator ("MPO") Dan Gripentrog, who had passed the captain's test, sometimes served as an acting captain when a captain was absent and was paid accordingly. This continued in 2015 whenever Gripentrog replaced an absent captain at an outlying station.

In 2014, the Department suffered from significant financial constraints. As a result, Chief Blaser and the City's mayor, council, and police and fire commission sought to reorganize the Department to achieve cost savings. At its core, this reorganization led to the elimination of the battalion chief positions and devolution of leadership duties by one rank. As battalion chiefs and captains left the department or were promoted, Blaser and the City's leadership moved the Department to a new leadership structure. The Department was still led by a chief and two deputy chiefs commanding three shifts. Each shift, however, would now be led by a captain assigned to Station 1 (called an officer-in-charge captain) instead of by a battalion chief. Each company at outlying Stations 2, 3, and 4 would now be led by a lieutenant instead of by a captain. Captains then serving would continue to lead a company at each outlying station in that rank, but through attrition, they would be replaced by lieutenants. No lieutenant (or MPO as an acting lieutenant) would be assigned to Station 1.

Changes to the Department's Standard Operating Guidelines ("SOGs") somewhat reflected this intent. Blaser began using the generic term "company officer" to refer to either a captain or lieutenant assigned to lead a company. As battalion chiefs left their positions, they were not replaced. Captains began working as shift commanders. As captains left their positions, those positions were not filled. Instead, additional lieutenant positions were created and filled. Despite these changes, which must have been readily apparent within the Department, Blaser's intent was never effectively communicated throughout the Department.

Blaser intended for the reorganization incorporating the devolution of leadership responsibility to be effective in 2015. Instead, whenever a lieutenant or MPO served as the senior firefighter at outlying Station 2, 3, or 4 each put in for acting captain's pay and was paid accordingly. Lieutenant Kerry Peck served throughout 2015 as the "company officer" in charge of the company working the C Shift at outlying Station 2. That entire period he was paid as an acting captain. It was not until sometime<sup>1</sup> into 2015 that Blaser and the other chiefs realized that firefighters who did not hold the substantive rank of captain were being paid as acting captains when in charge of the company at an outlying station. Karl Koch, who was then a battalion chief and responsible for reviewing timecards, did not know the change had been implemented.

As a result of the failed 2015 implementation of the company level reorganization, Blaser decided to establish January 1, 2016, as the new implementation date for lieutenants to lead companies at outlying stations as lieutenants and not as acting captains. Blaser determined that the new date was appropriate in light of the shift commander restructuring, layoffs then occurring, and ongoing contract negotiations. The City did not tell the Union in the context of negotiations or otherwise that it would discontinue paying lieutenants and MPOs assigned to supervise and manage a company at an outlying station as acting captains or when such policy would become effective.

Although the City left its employees and the Union to guess what would happen with pay as a result of the reorganization, the City did propose changes to the 2015 – 2018 CBA, then under negotiation, that signaled the City's desire to stop paying lieutenants and MPOs serving as the senior firefighter at an outlying station as an acting captain. On September 22, 2015, the City proposed to modify the language in Section 9.1(c), entitled "Acting Pay," as follows (changes proposed by the City are shown by strikethrough):

In the event an employee at a lower classification is qualified for and is temporarily required to serve and accept full responsibility for work as a ~~MPO, Lieutenant, Captain, or Battalion Chief~~ such employee shall receive the pay for the higher classification if so assigned for one continuous tour of duty of eight hours or more.

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<sup>1</sup> The record is unclear as to when precisely in 2015 this was discovered.

In order to receive acting pay for the rank of ~~Battalion Chief, Captain or~~ Lieutenant, the employee must have participated in and passed the promotional procedure for the rank just below the acting position ... .

In providing its justification for these changes, the City stated:

We will continue to recognize the importance of the company officer and their responsibilities. When a Captain is off, the City will expect a Lieutenant to fill the role of the Captain, when a Lieutenant is absent or unable to fill a position, the MPO acting as Lieutenant will assume the responsibility and receive acting pay as a Lieutenant.

Although the City's justification was not unequivocally clear that lieutenants would no longer receive acting captain's pay when assigned to lead a company at an outlying station, the implication exists in its proposal. The Union understood the meaning at this point and refused to accept this language in the 2015 – 2018 CBA. The City attempted to modify the language of Section 9.1(c) two additional times before signing the CBA with the current language that did not incorporate its desired changes.

With no further discussion of the language in Section 9.1(c) or Blaser's intent, and with no communication to its employees, on January 1, 2016, the Department stopped paying as acting captains the lieutenants who were permanently or temporarily assigned to lead the company at an outlying station. Lieutenants working at the outlying stations were now paid as lieutenants. MPOs working as the acting "company officer" at the outlying stations were paid as acting lieutenants. Peck continued to work as the company officer in charge of the C Shift at outlying Station 2. His duties remained the same. The only difference is that in 2016 he was paid as a lieutenant whereas in 2015 he had been paid more money as an acting captain. The Union filed the instant grievance.

## **POSITIONS OF THE PARTIES**

### **The Union**

The Union argues that the City has created a latent ambiguity in the CBA by creating job descriptions for lieutenants and captains that are nearly identical. Specifically, the Union asserts that the otherwise clear language of Section 9.1(c) is nonetheless ambiguous because the City has defined the duties of two distinct ranks almost identically although the ranks are accorded materially different salaries.

A lieutenant is a lower rank than a captain in the City's Fire Department. The CBA provides that when a firefighter of a lower rank must perform the duties of a higher rank, he is to be compensated with the pay of the higher rank. Because the job descriptions for the

lieutenant and captain ranks are so nearly identical, it is not clear how a lieutenant is to be paid when replacing a captain or performing duties that have historically been performed by those paid as captains.

In light of this hanging question (which the Union refers to as a conundrum), the Union turns to the past practice of the parties. The past practice is that the officer in charge of the company at an outlying station is paid as an acting captain, if not a captain by substantive rank. This was true throughout 2015 when no captain was assigned to Station 2's C Shift, which was led by Peck who held the substantive rank of lieutenant.

The Union argues that if the past practice of the parties does not resolve the ambiguity created by the job description conundrum, then the CBA's maintenance of standards clause, provided in Article 22, resolves this dispute in the Union's favor. The rate of pay for the performance of a duty is a mandatory subject of bargaining. On July 22, 2015, when the present CBA was signed, any lieutenant in charge of the company at an outlying station was paid as an acting captain, regardless of whether or not a captain was assigned to the station. This was a condition of employment in effect at the time the CBA was signed. It continued for over five months. Termination of acting captain's pay to the officer in charge at each outlying station was a violation of Article 22.

The City's only motivation for not paying acting captain's pay to lieutenants or MPOs in charge at outlying stations is financial – it wants to save money by paying less for the same work. The City's financial position is irrelevant to resolution of this grievance. The City was not able to obtain this savings at the bargaining table and has now unilaterally imposed it. The Union could not negotiate for the assignment of particular ranks at any station, but if the City had been upfront in its intentions, particularly after withdrawing its proposed changes to Section 9.1(c), then the Union could have negotiated wages, which are a mandatory subject of bargaining. The City should not be rewarded through arbitration with what it could not achieve at the bargaining table.

### **The City**

The City argues that its management rights are not abridged by the CBA such that it must provide acting captain's pay to firefighters in charge of a company who are not captains by substantive rank. Specifically, the City has the right to: organize the Fire Department; decide the number of ranks in the command structure; how many positions will be filled at each rank; establish job descriptions for each rank; assign employees to perform work within each employee's job description; and decide whether to fill vacancies and how.

The provisions of Section 9.1(c) are only effective when the City decides that a temporary vacancy exists and that a qualified employee must be assigned to a higher classification. When a lieutenant or captain is serving at an outlying station, no vacancy exists. Acting captain's pay is not necessary for a lieutenant serving at an outlying station because the lieutenant, in performing his duties, is operating fully within the parameters of the lieutenant's

job description. The language of Section 9.1(c) is plain and clearly reserves to the City the right to decide whether a captain's vacancy exists.

At no time in 2016 did the City determine that a captain's position was vacant and that it must be temporarily filled by a lieutenant. The City has the right to decide the methods of operation and control of the workforce, including the need to replace absent employees.

The language of Section 9.1(c) establishes specific criteria which must be met before an employee is eligible for acting pay. Among such criteria, an employee is only entitled to acting pay if assigned by the City to serve in an acting capacity. No lieutenant was assigned to serve as a captain in 2016 and none performed duties exclusively reserved to captains.

The City is following a longstanding understanding with the Union that acting captain's pay is only available when the City believes a vacancy exists and authorizes someone to temporarily serve as a captain. The City does not ask a lieutenant to perform any duties outside of the lieutenant's job description or that are exclusively reserved to captains. Witness testimony supports the understanding of the parties that a vacancy must exist for acting pay to be available. The City has the right to determine if a vacancy exists and if it will be filled. Here, the City made no such determination. Until 2015, no employee received acting pay unless the employee was filling a vacant position. In 2015, lieutenants received acting captain's pay by mistake. The City is not required to assign a captain to each station. No employee was told they could put in for acting pay.

Positions formerly occupied by captains have been reassigned as positions that may be occupied by lieutenants or captains. The City has the right to make such reallocation. When he took over the Department, Blaser identified the large number of middle managers as redundant. At the same time, the Department was faced with significant financial hardship. He therefore reorganized the Department to streamline management and cut costs. The City council authorized the restructure of the Department as proposed by Blaser. Nothing in the CBA requires the City to have a captain lead the company at a station.

Blaser implemented SOGs addressing the reorganization plan and expected that the plan would be implemented in 2015. As part of the reorganization, each lieutenant serving as the company officer at an outlying station would be paid as a lieutenant. Blaser and the other chiefs were surprised to discover later in 2015 that, contrary to the SOGs and despite not being assigned to temporarily act as a captain, lieutenants were putting in for acting captain's pay and being paid such.

This was a mistake and resulted in a windfall in pay that was not deserved based upon the plain language of Section 9.1(c). Blaser concluded that his reorganization plan was not fully implemented due to significant transition in the Department. He therefore determined that on January 1, 2016, the new pay plan for lieutenants would be effective. He decided on that date due to other matters then going on in the Fire Department, including settling in from the battalion chief restructuring, layoffs, and negotiations in 2015.

In 2016, lieutenants are assigned to perform the duties of a lieutenant according to that position's job description. When work falls within the scope of two job descriptions, management has the right to assign the work between the classifications.

The parties' bargaining history shows that no proposals were made to change the eligibility criteria of Section 9.1(c). The Union did not produce any witnesses who testified that the City ever said it wanted to eliminate acting captain's pay. The opportunity for acting captain's pay continues to exist for lieutenants (if they serve as a shift commander, which is now a captain's role).

Blaser stated that the City's September 22, 2014 proposal served only to clarify the parties' understanding that acting pay only applies when an employee is assigned to fill a vacancy at a higher classification. There was no nefarious intent in the City's attempt to clarify the language of Section 9.1(c) by changing it to refer to company officers. If the Union wanted to ensure that lieutenants were paid as acting captains for serving in phantom positions – those positions once occupied by captains, but now assigned permanently to lieutenants – the Union should have bargained that into the CBA.

Article 22, which contains the maintenance of standards provisions of the CBA, does not apply to this matter. Although the City anticipates that the Union will raise this issue, the original grievance in this matter is only in regard to whether a violation of Section 9.1(c) occurred. The Union did not grieve any violation of Article 22. Even if Article 22 was at issue, the past practice of the parties is not relevant because the language of Section 9.1(c) is clear and unambiguous. Therefore, any argument based on past practice should be rejected.

This dispute exists because of a mistake and breakdown in communication in 2015, which resulted in employees, without authorization, receiving acting captain's pay when not filling a vacant position. Those employees were never entitled to acting captain's pay.

The City's decision to lead outlying stations with lieutenants and not captains is a permissive subject of bargaining. Assigning lieutenants to perform the work specified in their position description is a management right. The Union has never grieved the revisions to the lieutenant's position description. Similarly, the Union never grieved the City's decision to create and fill new lieutenant positions and eliminate captain positions as incumbent employees retired.

### **The Union in Reply**

The Union does not dispute the City's right to determine the Department's command structure or to assign employees to perform work within the employee's job description. The Union reiterates that it grieves the City's arbitrary and bad faith refusal, since January 1, 2016, to comply with Section 9.1(c). Specifically, the Union argues that Section 9.1(c) was reaffirmed by the parties when they signed the 2015 – 2018 CBA. The City's attempt to amend that provision during negotiations was unsuccessful and it cannot evade its duty to pay acting

captains on the fiction that captains are now phantoms in the organizational structure. Section 9.1(c) does not require that a vacancy exist in order for acting pay to be earned.

The City is attempting to accomplish through unilateral action that which it could not accomplish at the bargaining table. The City must bargain in good faith over effects of unilateral action taken by the City for economic reasons. Changes to acting pay provisions were proposed during negotiations over the 2015 – 2018 CBA. The Union rejected any attempt by the City to modify the provisions.

### **The City in Reply**

The Union suggests that the language of Section 9.1(c) is unclear and that a latent ambiguity exists, but it fails to develop this argument. The Union's interpretation of Section 9.1(c) ignores core terms and disregards management rights reserved to the City. There is no explicit mutual agreement between the parties to pay acting captains for filling phantom positions.

The evolution of the lieutenant's position description shows a twenty year understanding that lieutenants are fully capable of supervising the company at a station. While that has not changed, as of 2013, a captain had additional supervisory duties: perform evaluations and serve as an acting shift commander. In 2016, each outlying station may be led by a lieutenant, and there are no responsibilities of a captain that must be performed.

The simple and unambiguous language of Section 9.1(c) controls this dispute. The clear language requires that management must assign a lieutenant to perform a captain's duties for him to be eligible for acting captain's pay. The City has not assigned any lieutenant to perform a captain's duties. The Union fails to identify what latent ambiguity exists to challenge this clear language. The fact that a lieutenant can perform all the duties stated in the lieutenant's job description and supervise a company at a station does not create a latent ambiguity. The Union's interpretation changes the meaning of Section 9.1(c) to automatically transform any lieutenant leading a company at a station into a captain.

The parties' history shows that an understanding existed that the City would fill a vacant captain's position when it chose to do so. Nothing more. The City is now choosing to have lieutenants perform duties consistent with their job descriptions. There is no contract violation. Just because the City was motivated by cost savings does not mean that it acted in bad faith. Lieutenants who serve as lieutenants should be paid as lieutenants.

### **DISCUSSION**

A latent ambiguity exists in Section 9.1(c). That section provides: "In the event an employee at a lower classification is qualified for and is temporarily required to serve and accept full responsibility for work as a[] ... Captain such employee shall receive the pay for the higher classification ... ." On its face, Section 9.1(c) is clear enough: if a lieutenant (or MPO)

is required to serve as a captain, that employee will be compensated with acting captain's pay. Ambiguity arises when reviewing the job descriptions for lieutenants and captains. They are nearly identical. They should be the clearest means of differentiating the work of the two classifications. The only substantive difference between the job descriptions, however, is with regard to captains evaluating staff.

The ambiguity created by the nearly identical job descriptions infects Section 9.1(c). The City seeks to resolve any ambiguity by fiat – declaring that it has the reserved management right to assign its employees to do work and can pick which job description is used to describe the work it has assigned. Given the nearly identical job descriptions, this is contrary to the idea that an employer cannot evade paying a higher classification's wage rate by creating a lower paid classification with the same duties. *See The Common Law of the Workplace: The Views of Arbitrators, 2d. Ed.*, ss. 4.6 – 4.7 (Theodore J. St. Antoine, Ed., 2005). More directly in the context of this dispute, Section 9.1(c) requires that an employee be compensated with higher pay if assigned to perform the work of a higher classification.

When a contract is ambiguous, the past practice of the parties is instructive to determine the intent of the parties. Since at least 2007, whenever a lieutenant or MPO was assigned to supervise and manage a company at an outlying station, he was compensated as an acting captain, regardless of whether a captain was absent or not. For the year of 2015, when Peck was assigned to supervise and manage the company on C Shift at outlying Station 2, he did so without replacing any temporarily absent captain. This renders hollow the City's argument that the parties understood a vacancy must exist in a captain's position as a prerequisite to an employee earning acting captain's pay. The practice of the parties brings clarity to their written agreement in Section 9.1(c). When a lieutenant (or MPO) is assigned to supervise and manage a company at an outlying station, he is fulfilling the duties of a captain.

The parties' conduct when negotiating the 2015 – 2018 CBA is also helpful to discern their intent in Section 9.1(c). The City's proposed modifications to Section 9.1(c) would do more than clarify its meaning. The City's proposal would change Section 9.1(c)'s meaning such that a lieutenant would not receive acting captain's pay when performing what has historically been captain's work, namely, leading a company at an outlying station. The Union rejected these proposed changes. The City did not achieve through negotiations the changes it desired. Nonetheless, it has implemented the changes that it sought.

The City's management right to determine the number of people to hire at any classification has not been abridged by my interpretation of Section 9.1(c). It is clearly not a violation of the CBA for the City to reorganize the Department's structure to change from once filling nine captain positions and three lieutenant positions to someday fill three captain positions and nine lieutenant positions. Similarly, it is not a violation of the CBA for the City to determine if a vacant position exists and whether such vacancy will be filled.

The City argues that in 2016 no lieutenant has been assigned to perform duties that are exclusively reserved to a captain. It points to the nearly identical position descriptions and states that, when in charge of a station, a lieutenant is functioning fully within the lieutenant's

position description because as part of such assignment no lieutenant is required to engage in evaluating staff (the substantive difference between the position descriptions of lieutenants and captains). This line of argument, however, still violates the interpretation of Section 9.1(c) discussed above. The past practice of the parties leads to the contrary conclusion than the one argued by the City. The management and supervision of a company at an outlying station are duties exclusively reserved to a captain. Therefore, when a lieutenant (or MPO) is required to manage or supervise a company at an outlying station, he is assigned to perform the duties of a captain (albeit without responsibility for the evaluation of staff).

As the instant grievance is decided under the provisions of Section 9.1(c), which was the basis for the Union's original grievance, it is unnecessary to address the parties' arguments regarding Article 22, the maintenance of standards clause.

On the basis of the foregoing, and the record as a whole, I make the following:

### **AWARD**

Yes, the City did violate Section 9.1(c) of the parties' 2015 - 2018 collective bargaining agreement when it stopped paying the officers supervising and managing the companies at its outlying stations as acting captains. The City shall make whole the employees denied acting captain's pay when each was assigned to supervise and manage a company at one of the Department's outlying stations since January 1, 2016.

Signed at the City of Madison, Wisconsin, this 15th day of December 2016.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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Karl R. Hanson, Arbitrator