

IN THE MATTER OF ARBITRATION)	GRIEVANCE ARBITRATION
)	
between)	
)	Joshua Johnholtz - Denial
City of Red Wing, Minnesota)	of Shift Trade
)	
-and-)	BMS Case No. 12-PA-0309
)	
International Association)	
of Fire Fighters, Local 2078)	February 9, 2012
)))	

APPEARANCES

For City of Red Wing, Minnesota

Amy E. Mace, Attorney, Ratwik, Roszak & Maloney, Minneapolis,
Minnesota
Kay Kuhlmann, Council Administrator
Stacie Hawkins, Employee Services Generalist
Tom Schneider, Fire Chief
Roger Seymour, Employee Services Director
Kevin Smith, Firefighter/Paramedic
Dan Simonson, Fire Captain/Paramedic

For International Association of Fire Fighters, Local 2078

James P. Michels, Attorney, Rice, Michels & Walther, Minneapolis,
Minnesota
Jim Eppen, President
Corey Ahern, Firefighter/Paramedic
Josh Johnholtz, Vice President and Grievant

JURISDICTION OF ARBITRATOR

Article VIII, Grievance and Disputes, Section 8.1,
Procedure, Step 4 of the 2010 Labor Agreement (Joint Exhibit #1)
between City of Red Wing, Minnesota (hereinafter "Employer" or
"City") and International Association of Fire Fighters, Local No.
2078 (hereinafter "Union") provides for an appeal to arbitration

of disputes that are properly processed through the grievance procedure.

The Arbitrator, Richard John Miller, was selected by the Employer and Union (collectively referred to as the "Parties") from a panel submitted by the Minnesota Bureau of Mediation Services ("BMS"). A hearing in the matter convened on December 20, 2011, at 9:00 a.m. at the Red Wing City Hall, Red Wing, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his personal records. The Parties were afforded full and ample opportunity to present evidence and arguments in support of their respective positions.

The Parties elected to file post hearing briefs with an agreed-upon submission date of January 16, 2012. The post hearing briefs were submitted in accordance with those timelines and received by the Arbitrator by e-mail attachment. The Arbitrator then exchanged the briefs by e-mail attachment on that same day to the respective representatives, after which the record was considered closed.

ISSUES AS DETERMINED BY THE ARBITRATOR

1. Is the grievance arbitrable?
2. If arbitrable, did the Employer violate Section 11.2 of the Labor Agreement when it denied the Grievant's request to trade shifts with another employee on December 20, 2010?

STATEMENT OF THE FACTS

The facts are not in serious dispute. The Parties are signatories to a Labor Agreement ("Contract") dated January 1, 2010 to December 31, 2010. (Joint Exhibit #1).

The Labor Agreement in Article XI, Work Schedule, provides as follows with regard to shift exchanges ("trades"):

11.2 Each employee shall have the right to exchange shifts when the change does not interfere with the operation of the Fire Department, provided that the shift-change does not result in or increase the payment of overtime. It is the responsibility of the employee assuming the regularly scheduled employee's shift to be on duty on the exchanged hours. If a position is not properly filled as a result of an exchange, the employee who had agreed to the exchange shall be subject to disciplinary action. All exchanges must be approved by the EMPLOYER.

This shift exchange Contract language also appears in the current Labor Agreement (January 1, 2011 to December 31, 2012). (Joint Exhibit #2). Similar or identical shift exchange Contract language has been in existence since the Parties' 1975 Contract, and has appeared in all successor Labor Agreements. (Union Exhibits #1-2). In fact, since the 1996-1998 Labor Agreement the current shift exchange language has remained unchanged in the successor Labor Agreements. (Union Exhibit #2).

During collective bargaining negotiations of the 2010 Contract, the City proposed to "clarify the intent of the negotiation language in section 11.2" through a Memorandum of

Understanding ("MOU"), which would serve as an addendum to the Contract. (Union Exhibit #3).

The Employer's proposed MOU language states the following in relevant part:

Shift Exchanges

- a) Shift exchanges must have prior approval by the employer.
- b) The employee's immediate supervisor will typically be the approving authority.
 - In the event the immediate supervisor is not available and no other practical means of prior approval existed, the on-duty Captain or Fire Chief can approve such requests when the urgency of the leave request dictates immediate approval.
- (c) Shift exchanges are intended as a last resort for leave. When available, accrued vacation, compensatory time off, sick leave or emergency leave shall be utilized, as appropriate, in lieu of requesting a shift exchange.
 - A maximum of two individuals shall be permitted to be on shift exchange simultaneously at any time. Exceptions may be approved on a case-by-case basis upon prior approval from the Fire Chief.
 - Employees may request a shift exchange to attend voluntary, non-mandatory training that is job relevant without utilizing accrued leave, provided the shift exchange does not create overtime or impact the operation of the department.
 - Payback of accumulated shift exchange time may be requested throughout the year prior to utilizing accumulated vacation leave or compensatory time off provided the shift exchange does not create overtime or impact the operation of the department.
 - A detailed description of the purpose for the shift exchange shall be included on the leave application form. Shift exchanges requested for pay back of accumulated time shall indicate "Payback" and list the number of banked hours remaining with the individual filling in.

- d) Shift exchanges shall not be permitted for fulfilling approved vacation leave.
- e) It is the responsibility of the employee assuming the regularly scheduled employee's shift to be on duty on the exchanged hours. If a position is not properly filled as a result of an exchange, the employee who had agreed to the exchange shall be subject to disciplinary action.

(Union Exhibit #3).

The Union membership rejected the City's proposed MOU at their September and October 2009 meetings. (Union Exhibit #4).

On November 30, 2009, City Fire Chief Tom Schneider sent an e-mail to the City Fire Department Captains explaining that "in the interest of consistency among shifts and in keeping with traditional use of shift exchange, please adopt the following procedure from this point forward when considering shift exchange requests. Shift exchange requests that interfere with department operations or cause overtime shall be denied. Unless for payback of a previous shift exchange, shift exchange requests submitted for date/times when other leave is available shall be denied."

(Employer Exhibit #1).

On November 30, 2009, the Union and Firefighter Travis Goodman submitted a grievance asserting that two of Mr. Goodman's requests for shift exchanges were wrongfully denied by the Employer. (Employer Exhibit #2, p. 1). The requests were denied

because Mr. Goodman had vacation time available. Id. The grievance was appealed by the Union to Steps 1, 2, and 3 of the contractual grievance procedure and denied at each step. Id. at 1-12.

On March 1, 2010, Roger Seymour, the City's Employee Services Director, sent the Union a letter, stating that "[i]t is now over 35 days past the arbitration deadline. The City considers the grievance closed." In accordance with the applicable Labor Agreement, the Union did not timely request a list of arbitrators from the BMS, which resulted in the City refusing to arbitrate the grievance. Id. at 13. As a result, the grievance was ultimately dropped by the Union because the Union President, who was facing his own disciplinary matter, which ultimately led to his departure from the Fire department, failed to request arbitration in a timely manner.

Meanwhile, on February 10, 2010, the City unilaterally adopted Red Wing Fire Department Policy #33 ("Policy #33"), which contained identical shift exchange language rejected by the Union in the City's MOU proposal. The relevant language in Policy #33 reads:

Shift exchanges are intended as a last resort for leave. When available, accrued vacation, compensatory time off, sick leave, or emergency leave shall be utilized, as appropriate, in lieu of requesting a shift exchange.

On December 17, 2010, the Grievant, Joshua Johnholtz, a Firefighter/Paramedic and Union Vice President, requested a shift exchange for December 20, 2010. (Joint Exhibit #3, p. 2).

On December 18, 2010, Fire Captain Scott Will denied the Grievant's request for a shift exchange for December 20, 2010. (Joint Exhibit #3, p. 2).

On December 29, 2010, the Union and the Grievant filed a grievance claiming that the City violated Section 11.2 of the Contract when it denied his request for a shift exchange on December 20, 2010, because the Grievant had vacation available on that date. In addition, the grievance notes the existence of Policy #33, and it is the Union's "belief that this policy violates current contract language or statutes." (Joint Exhibit #3, p. 1).

On January 5, 2011, Captain Will denied the grievance. (Joint Exhibit #4). Captain Will relied on Article V, Employer Authority, Section 5.1 of the Labor Agreement and Policy #33 in his denial of the grievance. Id. Section 5.1 of the Labor Agreement reads as follows:

The EMPLOYER retains the full and unrestricted right to operate and manage all manpower, facilities and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to

select, direct and determine the number of personnel; to perform any inherent managerial functions not specifically limited by this Agreement.

The grievance was denied by the City throughout the processing of the grievance through the steps contained in the contractual grievance procedure. (Joint Exhibits #5-9). This resulted in the Union appealing the grievance to final and binding arbitration, which is the last step in the contractual grievance procedure.

UNION POSITION

The grievance is both procedurally and substantively arbitrable.

This case is relatively simple. The Employer agreed nearly 40 years ago that employees have the right to exchange shifts so long as the exchange does not impair operations or create overtime. There is no evidence that the shift exchange requested by the Grievant would have done either. The Employer has repudiated the Labor Agreement and is attempting to unilaterally change language which it could not change at the bargaining table. It cannot be allowed to do so. There is no binding past practice.

Therefore, based on the evidence, testimony, applicable law, and arguments presented herein, the Union respectfully requests that the grievance be sustained and that the Employer be ordered

to cease and desist from denying a shift exchange solely on the basis of the employee having the ability to use vacation.

CITY POSITION

The grievance was not timely submitted in accordance with the contractual grievance procedure. The grievance is also substantively non-arbitrable.

The Labor Agreement requires that shift exchanges are to be approved by the Employer. The City, as the Employer, gets to determine what interferes with the operations of the Fire Department. The Labor Agreement provides for vacation leave, which should be used when an employee wants vacation.

The City introduced the testimony of four current and former employees who testified that their understanding of the shift exchange language was to allow a Firefighter to be able to take time off when no other means of taking leave was available.

The Union did not establish a past practice. Indeed, the practice since at least November of 2009 has been to deny requests for shift exchanges if other leave is available. The evidence demonstrates that the City did just that when it denied a Firefighter's application to use a shift exchange when he had vacation leave available.

The City is not attempting to obtain something that it could not achieve through negotiations; rather, it is the Union that is

attempting to do that by their position. The City can implement Policy #33 because the Union agreed to the 2010 Labor Agreement, which did not modify Policy #33 or Section 11.2 of the Contract. The contents of Policy #33 remained solely "within the discretion of the EMPLOYER to modify, establish, or eliminate."

The Union has oversimplified the City's position that shift exchanges interfere with the operation of the Fire Department. The City is not concerned about monitoring paybacks. The use of shift exchange in lieu of vacation is affecting employees' accumulation of vacation. Finally, the Union is ignoring the fact that the custom within the Fire Department is that employees do payback employees for shift exchanges.

Based on the arguments presented by the City, the grievance and all requested remedies should be denied.

ANALYSIS OF THE EVIDENCE

The City alleges that the grievance is not procedurally or substantively arbitrable.

In raising an objection to arbitrability, the challenging party bears the burden of proof. "It is fundamental that the burden to establish a lack of [jurisdiction] is most often placed upon the party raising the issue; i.e., since a grievance dismissal, not based upon the merits, is generally viewed in disfavor." Summit County Engineering and American Federation of

State Employees, Local No. 1032, 93-1 CCH Lab. Arb. ¶ 3142 (1992); Missouri Valley, Inc. and International Brotherhood of Boilermakers, Local 531, 82 LA 1018 (1984); Weil-McClain and International Molders Union, Local 316, 81 LA 941, 942 (1983). Thus, in this case the burden is on the Employer to prove that the grievance is not arbitrable.

Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute of which it has not agreed to submit. Steelworkers v. Warrior Gulf & Navigation Co., 363 U.S. 574, 582 (1960). This principle recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration. Gateway Coal Co. v. Mine Workers, 414 U.S. 368 (1974). Therefore, in determining whether a dispute is arbitrable or not, the arbitrator must review the specific language of the parties' collective bargaining agreement. City of Duluth v. AFSCME Council 96, Local 66, 1999 WL232708 (Minn. App. 1999); County of Hennepin v. Law Enforcement Labor Services, Inc., Local #19, 527 N.W.2d 821, 824 (Minn. 1995) (citing Ramsey County v. AFSCME Local 8, 309 N.W.2d 785, 789-90 (Minn. 1981); Independent School District No. 279 v. Winkelman Building Corp., 530 N.W.2d 583, 586 (Minn. App. 1995) (quoting Michael-Curry Co.

v. Knutson Shareholders Liquidation Trust, 449 N.W.2d 139, 141
(Minn. 1989).

The City claims that the Union waived the instant grievance by failing to timely appeal a former grievance on the exact same issue to arbitration. The evidence establishes that on November 30, 2009, the Union and Firefighter Goodman submitted a grievance asserting that two of Mr. Goodman's requests for shift exchanges were wrongfully denied by the Employer. The requests were denied because Mr. Goodman had vacation time available. The grievance was appealed by the Union to Steps 1, 2, and 3 of the contractual grievance procedure and denied at each step. The grievance, however, was dropped by the Union because the Union President did not timely request a list of arbitrators from the BMS, pursuant to the contractual grievance procedure, which resulted in the City refusing to arbitrate the grievance.

Res Judicata applies when there is 1) a final judgment on the merits in an earlier case, 2) an identity of event, incident or dispute in both the earlier and later cases, and 3) identity of the parties in the two cases. While the dispute between the Parties in the Firefighter Goodman case is the same as in the instant case as to whether a Firefighter must use vacation rather than exchange shifts, and the Parties are the same, the missing element is that there was no decision on the merits of the

Firefighter Goodman case. Since there was no previous determination on the merits of the issue in the Firefighter Goodman case, the prior grievance does not serve to bar the present grievance under the legal doctrine of *res judicata*.

The City also claims that the Union and the Grievant waived the instant grievance involving the interpretation of Section 11.2 by failing to timely grieve the City's interpretation of that Contract provision through Policy #33. In addition, the City contends that the Union waived the grievance by ratifying the 2010 Labor Agreement after it had clear notice that the City was implementing Policy #33.

Article 8, Grievance and Disputes, Section 8.1 defines a grievance as "a dispute or disagreement raised by an employee against the City involving the interpretation or application of the specific provisions of this agreement." Article VIII, Section 8.1, Step 1 requires "{a}n employee who has a grievance shall submit it in writing to the employee's immediate supervisor within ten (10) calendar days after knowledge of its occurrence and shall be signed by both the employee and a representative of the Union Grievance Committee." The Union alleges that the City violated Section 11.2 of the Labor Agreement when it denied the Grievant's shift exchange for December 20, 2010. The Union also alleges that Policy #33, which was unilaterally promulgated by

the City, contains language that is contrary to the clear and unambiguous Contract language in Section 11.2. Thus, the City's assertion that a grievance should have been filed within ten calendar days of the adoption of Policy #33 effective February 10, 2010, presumes the validity of the Policy, which has not yet been determined on its merits, since the Union dropped the Firefighter Goodman grievance.

The law is well established that a union does not waive its right to grieve contract violations simply because it failed to grieve similar violations in the past, and the party asserting a claim of waiver has the burden of proving waiver by clear and unmistakable evidence. Weinstein Wholesale Meat, Inc., 98 LA 636 (1992); Excel Corp., 106 LA 1069, 1071-21 (1996).

The City failed to prove by clear and unmistakable evidence that the Union waived its right to challenge the validity of Policy #33. In fact, it was a contractual requirement that the Union wait until there was a specific example of a Firefighter who was denied a shift exchange once Policy #33 was unilaterally promulgated by the City, since a grievance is defined as a dispute or disagreement raised by an employee against the City involving the interpretation or application of the specific provisions of the Labor Agreement. It would have been premature for the Union to file a grievance before an alleged Contract

violation actually occurred with respect to a shift trade under Policy #33.

The City also claims that the Grievant waived the grievance by failing to file the grievance within ten calendar days as required by the Labor Agreement. On December 17, 2010, the Grievant requested a shift exchange for December 20, 2010. This request was denied on December 18, 2010, by Captain Will. On December 29, 2010, the Grievant filed a grievance claiming the City violated Section 11.2 when it denied his request for a shift exchange on December 20, 2010, because the Grievant had vacation available on that date.

Article VIII, Section 8.1, Step 1 requires that a grievance is to be submitted "in writing to the employee's immediate supervisor within ten (10) calendar days after knowledge of its occurrence..." The City's arbitrability claim that the grievance was not timely filed would have some merit if the "trigger" date to file a grievance was December 18, 2010, the date of the shift trade denial, since ten calendar days from December 18, 2010 is December 28, 2010, and the grievance was one day late as it was not filed until the next day. It is also reasonable that the "trigger" date could be December 20, 2010, the actual date that the Grievant requested a shift trade. The denial of the actual date of the requested shift exchange should start the "clock"

running for the ten-day period in which to file a grievance. The grievance was filed on December 29, 2010, which is within this ten-day window period starting on December 20, 2010, to file a timely grievance.

Moreover, arbitrators routinely hold that arbitrability claims must be raised early in the grievance procedure and cannot be raised for the first time at arbitration. Crestline Exempted Village School, 111 LA 114 (1998); Liquid Transporters and IBT, 99 LA 217 (1992); Fort Frye School District and Teachers' Association, 91 LA 1140 (1988). In this case, the City did not raise any arbitrability claims during the three grievance steps and two days of mediation until the arbitration hearing. It is clear that arbitrability motions must be announced during the processing of the grievance, and that a party who waits until the arbitration hearing to raise them for the first time has essentially waived its right to do so before an arbitrator, which is the case here with the Employer.

Arbitrators require a showing of prejudice to the complaining party before a grievance will be dismissed on arbitrability grounds. International Paper Company and United Paperworkers International Union, Local 723, 82 LA 306, 308 (1984). The Employer did not produce any compelling or convincing evidence that they were prejudiced by the filing of

the instant grievance on December 29, 2010. Therefore, the grievance was properly filed in accordance with the contractual timelines.

Finally, when reasonable doubts exist with respect to either procedure or substantive arbitrability questions, the courts and arbitrators usually resolve them in favor of finding jurisdiction upon the theory that the long-term interests of the parties are better served by resolving the merits of the case, rather than upon technical grounds. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960); Reserve Mining Company v. Mesabi Iron Co., 172 F. Supp. 1, Aff'd, 270 F.2d 567 (8th Cir. 959), Layne-Minnesota Company v. Regents of the University of Minnesota, 123 N.W.2d at 371, 374-375 (1963); Ingram Manufacturing Company, 75 LA 113, 116 (1980); University of Dubuque, 75 LA 620, 626 (1980); Alliance Machine Company, 76 LA 1058 (1980). Indeed, because of the strong arbitral and legal policy in favor of arbitration, "an order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. The doubt should be resolved in favor of coverage." AT & T Technologies v. Communications Workers of America, 675

U.S. 63 (1986), quoting Warrior & Gulf Navigation Co., 363 U.S. 576 at 82-83 (1960).

In the instant case, the contractual grievance and arbitration clause is quite obviously "susceptible to an interpretation that covers the asserted disputes" raised by the Union. Thus, the asserted dispute is a grievable matter under the Contract, which by its nature is subject to arbitration and, therefore, constitutes an arbitrable matter properly before the Arbitrator for final determination on its merits.

A collective bargaining agreement is not ambiguous if the arbitrator can determine its meaning without any other guide than a knowledge of the facts of which, from the nature of language in general, its meaning depends. 13 *Corpus Juris*, SEC. 481 p. 520. When interpreting contract language, arbitrators have long held that parties to an agreement are charged with full knowledge of its provisions and of the significance of its language. McCabe-Powers Body Co., 76 LA 457, 461 (1981). If the language of an agreement is clear and unequivocal, an arbitrator shall not give it meaning other than that expressed. National Linen Service, 95 LA 829, 834 (1990); Potlatch Corp., 95 LA 737, 742-743 (1990); Metro Transit Authority, 94 LA 349, 352 (1990). Accordingly, clear and unambiguous language must be enforced, even if the results are contrary to the expectations of one of the parties,

as it represents, at the very least, what the parties should have understood to be the obligations and the benefits arising out of the agreement. Heublein Wines, 93 LA 400, 406-407 (1988); Texas Utility Generating Division, 92 LA 1308, 1312 (1989); City of Meriden, 87 LA 163, 164 (1986).

Because arbitration is a creature of contract, an arbitrator's authority stems entirely from the express grant of power given by the parties themselves. Neppl v. Signature Flight Support Corp., 234 F.Supp.2d 1016 (D.Minn, 2002). Arbitrators are not empowered to "impose" or "create" contractual obligations that are not set forth in the parties' collective bargaining agreement. Dalfort Aviation Services, 94 LA 1136, 1144 (1992). Here, the Parties have clearly defined the scope of the Arbitrator's authority in that he "...shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement." (Joint Exhibit #1, Article VIII, Section 8.3).

These principles are important to the resolution of the instant grievance, since the Parties agree that the issue before the Arbitrator is whether the Employer violated Section 11.2 of the Labor Agreement when it denied the Grievant's request to exchange shifts with another Firefighter/Paramedic on December 20, 2010.

It is a well-established arbitration doctrine in contract interpretation cases that the party alleging the breach of the collective bargaining agreement must bear the burden of proof. Plymouth Locomotive Works, 90 LA 409 (1988); PUD No. 1 of Clark County, 107 LA 713, 720 (1996). Thus, the Union must prove that the City violated Section 11.2 of the Labor Agreement when it denied the Grievant's request to trade shifts with another Firefighter/Paramedic on December 20, 2010.

In negotiating a collective bargaining agreement, it is a well-established principle that the basic and inherent rights of management to operate its business and direct the work force in the interest of and to achieve the maximum efficiency is undisputed and is recognized except as specifically limited or restricted by the agreement of the parties. United Steel Workers v. Warrior & Gulf Navigation Company, 363 U.S. 95 (1960); Fairway Foods, Inc., 44 LA 161 (1965). The Parties in their own Collective Bargaining Agreement adhere to this principle. Section 5.2 states that "any terms and conditions of employment not specifically established or modified by this Agreement shall remain solely within the discretion of the Employer to modify, establish, or eliminate." Similar Contract language appears in Section 5.1 where "[t]he Employer retains the full and restricted right to operate and manage all manpower...and to perform any

inherent managerial functions not specifically limited by this Agreement." Simply stated, the rights, power and authority not specifically delegated away, shared or otherwise relinquished in whole or in part by the City in the specific provisions of the Labor Agreement continue to reside in the Employer.

Section 11.2 provides in relevant part that "[e]ach employee shall have the right to exchange shifts when the change does not interfere with the operation of the Fire Department provided that the shift-change does not result in or increase the payment of overtime...All exchanges must be approved by the EMPLOYER."

It is clear from this language that the City has the authority to approve or deny a shift exchange, and there are no limitations on the City's right to deny a shift exchange when it determines that the shift exchange interferes with the operation of the Fire Department or results in or increase the payment of overtime.

It is undisputed that the Grievant's request for shift exchange on December 20, 2010, would not have resulted in or increase the payment of overtime to the City. Thus, the remaining issue is whether the Grievant's request for shift exchange on December 20, 2010, interferes "with the operation of the Fire Department."

The City claims that the use of shift exchanges interferes with the operation of the Fire Department in that they negatively

impact the operations of the Fire Department in a number of ways, such as affecting shift cohesiveness, levels of experience, distribution of skill sets, budgeting, and processing payroll. The City also claims that the use of vacation leave rather than allowing a shift trade is less disruptive to the Fire Department. The City's arguments are without merit.

The Fire Department staffs its operations by scheduling seven fire suppression personnel to work each 24-hour shift. It is the practice of the Fire department to not hire back personnel to fill a temporary vacancy unless the number of employees in attendance drops below five fire suppression personnel. As such, since vacation can only be used when the full compliment of seven is expected to be in attendance - a circumstance in which the employer does not hire back personnel - the use of vacation results in the Employer paying for seven personnel but only having the services of six employees. However, when a Firefighter trades shifts rather than uses vacation, the Employer still only pays for the services of seven employees but has the services of seven employees. The Fire Department concedes that the Department works more efficiently and effectively when seven Firefighters are working as opposed to when only six are working.

On December 20, 2010, the full compliment of seven Firefighters was expected to work. The Employer would have

permitted the Grievant to use his accrued vacation bank to take the day off. If the Grievant had used vacation, only six would have been working. However, if he had been allowed to trade with Firefighter Dutton, seven would have been working. Nevertheless, the Employer denied the request on the grounds that the Grievant could have used vacation. Thus, the Employer's position is without merit, since the operations of the Fire Department could not have been impaired by the shift exchange requested by the Grievant.

There was no convincing evidence presented by the City that Firefighter Dutton, who was willing to work for the Grievant on December 20, 2010, would have impaired operations by adversely affecting shift cohesiveness or lacked levels of experience or distribution of skill sets. Further, the shift exchange requested by the Grievant would not have impaired operations by creating an administrative burden with respect to budgeting and processing payroll. There are no time or payroll records that need be changed when a shift trade occurs. Further, to allow "payback" exchanges does not create a "multiplier effect." There is no such requirement that a shift exchange must be repaid that would create a multiplier effect. To the contrary, once approved, a shift exchange creates a private arrangement between the two employees as to how or if the employee who has agreed to

work will be compensated by the employee who was scheduled to work.

The Employer unilaterally adopted Policy #33 based on the arguments that (1) it has an unfettered right to determine what interferes with the operation of the Fire Department; (2) it has determined, pursuant to Policy #33, that using a shift trade when the employee could use vacation interferes with the operation of the Fire Department; and (3) the Union has no right to challenge the City's determination.

The Employer's arguments are contrary to well-established principles of arbitration. Clearly, under the Management Right clause contained in Article 5 of the Labor Agreement the City has a right to establish work rules. However, the right to promulgate work rules is not unfettered. An Employer's policies and rules can be challenged on the ground that they are contrary to law or the collective bargaining agreement, unreasonable or arbitrary. Elkouri and Elkouri, How Arbitration Works, 6th Ed., p. 767.

In this case, since 1975 the Employer agreed to Contract language giving employees the right to exchange shifts subject to two specific limitations - impairment of operations and no increase in overtime. This language has remained in the Labor Agreements to date. On its face, Policy #33 violates the

specific Contract language in Section 11.2 of the Labor Agreement because it adds a third limitation in which the shift exchange may be denied - when the employee can use vacation instead. This is evidenced by the fact that there is no language in Policy #33 that addresses or references the impairment of the operations of the Fire Department. Thus, Policy #33 is clearly intended to unilaterally add a new limitation and not interpret the ones established by the Labor Agreement.

The Employer's actions in unilaterally promulgating Policy #33 was out of frustration in light of the fact that the language of the Policy is basically identical to the negotiated language rejected by a vote of the Union members when such language was presented to them for ratification. Most certainly, the Union members had the right to reject the City's proposed MOU. This rejection, however, does not mean that the City had the unfettered right to then unilaterally promulgate Policy #33, which is contrary to the clear and unambiguous Contract language in Section 11.2.

It is well established in arbitration that no party to a collective bargaining agreement may obtain through grievance arbitration what it could not achieve at the bargaining table. Yet, that is precisely what the Employer seeks from the Arbitrator in this case. Policy #33 is not only contrary to the

expressed Contract language in Section 11.2, but also materially changes the vacation language of the Labor Agreement by forcing a reduction of the amount of vacation time an employee may bank and receive payment for upon separation from service. (Joint Exhibit #1, Article XVI, Vacation, Sections 16.5 and 16.7).

The Employer introduced evidence in an attempt to assert that the intent of the Contract language in Section 11.2 was that shift exchanges be used only "as a last resort" if employees could not use vacation. In fact, the City alleges that it has created a past practice when it denied Firefighter Goodman's shift exchange requests because he had vacation available and the Union dropped his grievance.

The rule primarily to be observed in the construction of written agreements is that the interpreter must, if possible, ascertain and give effect to the mutual intent of the parties. If the language of the parties' collective bargaining agreement is clear and unequivocal, an arbitrator generally will not give it meaning other than that expressed. Plain and unambiguous words are undisputed facts. Prior acts cannot be used to change the explicit terms of a contract. The intent of the parties is to be found in the words which they, themselves, employed to express their intent. An arbitrator cannot ignore clear and unambiguous contract language.

There is no ambiguity as to the meaning of the Contract language in Section 11.2. The Employer attempts to use "intent" in the same manner as it tries to use Policy #33 - to create a another limitation to deny a shift exchange request (availability of vacation) rather than to "interpret" the existing limitations under Section 11.2.

Nevertheless, even if "intent" was considered, the Employer failed to demonstrate a mutual intent. It is clear from the Union's actions that there was no meeting of the minds on intent or any alleged past practice. If, as the Employer asserts, the mutually accepted intent of the language in Section 11.2 was for a shift exchange to be available only as a last resort, there would have been no need for the Employer to seek to amend the Labor Agreement by adding the language set forth in Policy #33.

AWARD

Based upon the foregoing and the entire record, the grievance is sustained. The Employer is ordered to cease and desist from denying a shift exchange solely on the basis of the employee having the ability to use vacation.



Richard John Miller

Dated February 9, 2012, at Maple Grove, Minnesota.