IN THE ARBITRATION BETWEEN

AUSTIN-TRAVIS COUNTY EMS EMPLOYEE'S ASSOCIATION, ATCEMSEA OR ASSOCIATION

AND

CITY OF AUSTIN, CITY

OPINION AND AWARD

CONTRACT GRIEVANCE

ISSUE: LEAVE BENEFITS

Arbitrator:	William E. Hartsfield
Hearing Site:	Austin, Texas
Hearing Dates:	January 9, 2019
Date of Award:	March 18, 2019
Meet and Confer Agreement (Agreement or MCA):	Effective October 1, 2013
Representing the Association:	Michael Rickman, Corporate Counsel Kathleen Reyes, Staff Attorney Carol Gustin, Staff Attorney CLEAT 1204 San Antonio Street, Suite 100 Austin, TX 78701
Also present for the Association:	Selena Xie, President ATCEMSEA Captain Lee Nudelman, V.P. ATCEMSEA Anthony Marquardt, past Pres. ATCEMSEA
Representing the City:	Michael Cronig, Assistant City Attorney City of Austin Law Department 301 W. 2nd Street 4th Floor Austin, Texas 78701
Also present for the City:	Assistant Chief Jasper Brown Anthony Marquardt
Witnesses called by the Association:	Anthony Marquardt Captain Lee Nudelman
Witnesses called by the City:	Chief Jasper Brown
Decision:	The Grievance is upheld in part and denied in part.

OPINION AND AWARD

ISSUES

1. The parties did not agree upon the issues at the hearing. The parties agreed that the Arbitrator had the authority to frame the issues. However, the parties' post-hearing briefs submitted the same four issues. Accordingly, the Arbitrator framed the issues based on those submissions and addresses them in the following order:

> Pursuant to Article 19, Section 2 of the Agreement, does the Grievance involve a dispute, claim or complaint involving the interpretation, application, or alleged violation of any provision of the Agreement that confers jurisdiction upon the Arbitrator?
>
> If the Arbitrator has jurisdiction, considering the City's past practice, has the Association waived the right to grieve the issue of leave conversion?
>
> In October 2016, did the City of Austin (City) violate Article 8 and/or Article 9 of the 2013-2017 Meet and Confer Agreement (Agreement or MCA) between the City and the Austin-Travis County EMS Employees' Association (Association) when it converted the accrued leave balances of exception vacation, personal holiday, and pre-civil service sick leave (MSCK) for Field Medics whose workweeks were changed from 48 to 42 hours?[1]
>
> If the City did violate the Agreement, what is the appropriate remedy?

2. The issue of jurisdiction includes the subtopics of scope of the Grievance and a past practice, and the issue of waiver includes the subtopics of a past practice and timeliness.

PROCEDURE

3. The parties selected the Arbitrator through the American Arbitration Association. At the hearing, parties made opening statements. The parties submitted and the Arbitrator admitted Joint Exhibits 1-16 (JX), City Exhibit 1 (CX), and Association Exhibits 1-3 (AX). A Certified Shorthand Reporter provided a transcript (Tr.). Both parties submitted post-hearing briefs.

4. The parties had a full opportunity to examine and cross-examine witnesses under oath, to offer exhibits, to object, and to urge their positions.

5. The parties agreed the Award is due 30 days after the close of the hearing and that the hearing is closed upon the receipt of the post-hearing briefs. The Award is due March 18, 2019.

6. All counsel are commended for their zealous, thoughtful, and courteous advocacy at the hearing, as well as the quality of the arguments and materials submitted.

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[1] Exhibits and post-hearing briefs interchangeably use "workweek" and "work week" as does the Award particularly when quoting. The transcript consistently using "workweek."

JURISDICTION

7. Other than the issue of waiver or timeliness, the parties agreed all conditions of the MCA (AX1 and JX1)[2] have been met. Also, the parties agreed the Arbitrator had jurisdiction and the authority to determine the issues, to issue a final and binding Award, and to fashion an appropriate remedy.

RELIEF SOUGHT BY THE ASSOCIATION AND GRIEVANTS

8. Each Medic covered by the Grievance should receive the hours that the City wrongfully converted, to their own benefit, and have them placed into their respective individual leave time accounts from which they were removed.

KEY PROVISIONS OF MCA

9. **ARTICLE 2**
DEFINITIONS

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(5) Days" means calendar days unless a provision specifies otherwise.

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10. **ARTICLE 6**
WAGES AND BENEFITS

Section 1. Base Wages

a) For Fiscal Year 2013-2014

Effective October 1, 2013, the pay scale attached as Appendix A-1, and all other fiscal benefits, shall apply to all Medics covered by this Agreement. Due to the changes to pay and benefits implemented by this Agreement, the first pay period after the effective date of this Agreement shall reflect pre Agreement pay and benefit amounts. The second pay period after the effective date of this Agreement shall reflect the amounts in this Agreement for that pay period plus the amounts accrued during the first pay period. Thereafter, each pay period shall reflect the proper pay and benefit amounts.

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Section 11. Preemption

Pay provisions in this Article shall not be changed during the term of this Agreement, and shall totally supplant any provisions in Chapters 141, 142, and 143 of the Local Government Code.

11. **ARTICLE 8**
SPECIAL LEAVE

Section 1. Emergency Leave

Each Medic may utilize up to three days of paid emergency leave for a death in the immediate family as defined in the City of Austin Personnel Policies. For purposes of this Article, for a 40 hour a week employee, a day means 8 hours. For employees who work either a 42 or 48 work week, a day means 12 hours.

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[2] AX1 contains the full text of the MCA and JX1 contains key excerpts. For ease of reference, the Award refers to MCA Articles rather than exhibit and page numbers.

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Section 3. Separation Pay for Sick Leave Hours

a) Separation pay for accrued sick leave will be paid only to Medics with at least twelve (12) years of actual service who separate in good standing. Subject to Subsections (b) and (c) only hours accrued after October 1, 2013 are eligible for payment on separation.

b) Sick leave hours accrued prior to October 1, 2013 will also be eligible for payment, as set forth below, to Medics who retire in good standing with the following years of service with the Department as of October 01, 2013:

(1) 17-18 Years of Service – 1/4 of pre October 1, 2013 accrued sick leave hours;

(2) 19-20 Years of Service – 1/2 of pre October 1, 2013 accrued sick leave hours; or

(3) 21 Years of Service and above – 3/4 of pre October 1, 2013 accrued sick leave hours.

c) A Medic hired by the CITY prior to October 1, 1986, and continuously employed since, shall be entitled to the sick leave buy back dictated by the City Personnel Policies. However, the accrued sick leave payable on separation will be a maximum of 90 days regardless of when accrued.

d) The maximum accrued sick leave payable on separation will be 90 days regardless of any other provision in this Article.

e) Employees who utilize sick leave will utilize hours in the following basis:

(1) Hours earned prior to October 1, 2013 shall be used to account for 3/4 of the hours used and hours accrued after October 1, 2013 shall be used for the remaining 1/4.

(2) Increments of less than 1 hour shall be taken from the bank comprising of the hours earned prior to October 1, 2013.

(3) Once all hours accrued prior to October 1, 2013 are utilized then hours accrued after October 1, 2013 will be utilized.

12. ARTICLE 9

HOLIDAYS, VACATION AND SICK LEAVE

Section 1. Holiday Pay

All Medics shall receive exception vacation time and December 25 Holiday pay as provided by CITY policy on the effective date of this Agreement.

Section 2. Vacation Accrual Rate

All Medics shall accrue regular vacation leave at the following rates per each of the twenty-four (24) annual pay periods:

a) 48 and 42 hour Medics: 7.50 hours

b) 40 hour Medics: 5.00 hours

Section 3. Accrual Caps and Separation Pay for Vacation and Exception Vacation

a) Vacation Accrual Caps

(1) All Medics assigned to a forty-eight (48) hour work week may accrue up to five hundred and fifteen (515) hours of vacation.

(2) All Medics assigned to a forty-two (42) hour work week may accrue up to four hundred and forty-five (445) hours of vacation;

(3) And all Medics assigned to a forty (40) hour work week may accrue up to four hundred (400) hours of vacation.

b) Exception Vacation Accrual Caps

(1) All Medics may accrue up to two hundred and six (206) hours of exception vacation.

c) Vacation Separation Pay

(1) The maximum hours of vacation payable upon separation for a 48 hour a week employee shall be three hundred and nine (309) hours of vacation. Beginning the last pay period of fiscal year 2016 – 2017, the maximum hours of vacation payable upon separation shall be two hundred and forty (240).

(2) The maximum hours of vacation payable upon separation for a 42 hour a week employee shall be two hundred and seventy (270). Beginning the last pay period of fiscal year 2016 – 2017, the maximum hours of vacation payable upon separation shall be two hundred and forty (240).

(3) The maximum hours of vacation payable upon separation for a 40 hour a week employee shall be two hundred and forty (240).

d) Exception Vacation Separation Pay

(1) Prior to the last pay period of fiscal year 2016 – 2017, the maximum number of hours of exception vacation payable upon separation shall be equal to the maximum number of hours accruable.

(2) Beginning the last pay period of fiscal year 2016 – 2017, the maximum payable hours shall be 240 hours for vacation and 160 for exception vacation.

e) Throughout the life of this Agreement, there shall be no payment of money for any hours of vacation or exception vacation above the cap.

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Section 5. Sick Leave Accrual Rate

a) Medics on either a 42 or a 48 hour work week shall accrue sick leave at the rate of 7.16 hours for each pay period in which benefits accrue.

b) Medics on a 40-hour work week shall accrue sick leave at the rate of 4.66 hours for each pay period in which benefits accrue.

13. ARTICLE 16
DISCIPLINARY ACTIONS AND APPEALS

Section 1. Suspensions of Three (3) Days or Less

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a) Appealable and Non-Appealable Suspensions

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(1) **Suspensions that may not be appealed.** The Medic may choose to use vacation or holiday time to serve the suspension with no loss of paid salary and no break in service

for purposes of seniority, retirement, promotion, or any other purpose. The Medic must agree that there is no right to appeal if this method of suspension is chosen.

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Section 14. Definition of Day

In this Article "day" means normally scheduled work day. For example, for a 40-hour employee, a day means 8 hours. For a 42 or 48 hour employee, a day means 12 hours. ***

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14. ARTICLE 19
AGREEMENT GRIEVANCE PROCEDURE

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Section 2. Nature of Grievances

As used in this Article, a "grievance" is defined as any dispute, claim, or complaint involving the interpretation, application, or alleged violation of any provision of this Agreement. A grievance may be filed under this procedure by the ASSOCIATION or by any individual Medic to whom this Agreement applies. A grievance which does not relate to the application and/or interpretation of any provision of this Agreement shall be processed in accordance with a procedure to be established in writing by the Chief. Grievances pending as of the effective date of this Agreement shall be processed under procedures in effect prior to the Agreement. Pending shall mean that the written grievance has been filed.

Section 3. Timelines

Any timeline or deadline provided in this Article may be extended by mutual written agreement of the parties involved at the particular step of the process where the timeline applies. If any timeline or deadline for a decision is missed by the CITY, the grievance automatically proceeds to the next step in the process. If any timeline or deadline for a decision is missed by the ASSOCIATION, the grievance is considered to be resolved and dismissed.

Section 4. Steps of Grievance Procedure

The steps of this grievance procedure are as follows:

Step 1

a) Filing of Grievance

As used in this Article, a "grievant" means the ASSOCIATION President or an aggrieved Medic to whom this Agreement applies. A grievant who desires to file a grievance under this procedure must file his/her grievance with the Association Grievance Committee. A copy of the grievance shall be forwarded to the Chief, or designee, by the Association Grievance Committee within three (3) business days after receipt of the grievance.

b) Response by Association Grievance Committee

The Association Grievance Committee shall determine, in its sole discretion, if a valid grievance exists. If the Association Grievance Committee determines that the grievance is valid, the grievance shall proceed to Step 2 of this procedure. If the Association Grievance

Committee determines that the grievance is not valid, the ASSOCIATION President will notify the Chief that no further proceedings are necessary.

Step 2

Any grievance found to be valid by the Association Grievance Committee shall be submitted to the Chief within forty-five (45) business days after the grievant knew of or should have known of the facts or event(s) giving rise to the grievance. ***

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Step 4

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The hearing shall be held at a location which is convenient for all parties and the arbitrator and shall be conducted informally, without strict evidentiary or procedural rules. Unless otherwise mutually agreed, the submission to the arbitrator shall be based on the written grievance statement submitted by the Association Grievance Committee at Step 2. The arbitrator shall consider and decide only the issue(s) in the grievance statement or submitted in writing by agreement of the parties. The hearing shall be concluded as expeditiously as possible and the arbitrator's written decision shall be provided to both parties within thirty (30) calendar days after close of the hearing, unless the parties mutually agree otherwise

The parties specifically agree that the arbitrator's authority shall be strictly limited to interpreting and applying the explicit provisions of this Agreement. The arbitrator shall not have authority to modify the agreement or create additional provisions not included in the Agreement. The parties agree that neither the CITY nor the ASSOCIATION shall have *ex parte* communications with the arbitrator concerning any matter involved in the grievance submitted to the arbitrator.

Each party shall be responsible for its own expenses in preparing for and representing itself at arbitration. The fees of the arbitrator shall be borne by the losing party. In the event of a composite decision, the arbitrator shall determine the portion of such cost to be borne by each party. The written decision of the arbitrator may be appealed only on the grounds that the arbitrator was without jurisdiction or exceeded his jurisdiction; that the decision was procured by fraud, collusion, or other unlawful means; or that the arbitrator’s decision is based upon a clear and manifest error of law.

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15. ARTICLE 20
MANAGEMENT RIGHTS

Subject to the terms and conditions of this Agreement, the CITY retains all inherent rights to manage the Department and its work force which it presently enjoys, subject to applicable federal and state statutes and local ordinances, resolutions, and rules, except as specifically provided in this Agreement. These rights include, but are not limited to: direction of the work force, including but not limited to, the right to hire; the right to discipline or discharge; the right to decide job qualifications for hiring; the right to lay-off or abolish positions; the right to make rules and regulations governing conduct and safety;

the right to determine schedules of work together with the right to determine the methods, processes and manner of performing work; the determination of the size of the work force, and the assignment of work to employees within the Department, including the right to transfer employees; the determination of policy affecting the selection of new employees; the right to establish the services and programs provided by the Department, including the nature and level of such services and programs, as well as the type and quantity of resources allocated; the right to establish work performance measurement and standards; and the right to implement programs to increase the cost effectiveness of departmental operations.

BACKGROUND

16. The City provides emergency medical services through the Medics of the Austin-Travis County Emergency Medical Services Department (ATCEMS Department or Department).

17. MCA Article 2 defines "Medic" as all sworn Department personnel that are part of the bargaining unit and covered by the MCA, including those holding the civil service ranks of Medic I, Medic II, and Commander. The parties used the terms "Medic" and "Field Medic" interchangeably and so does this Award. In some contexts, the parties and the Award used "Medics" to refer to those below the rank of Commander.

18. A City memorandum dated July 2006 to "Uniformed Personnel" described a benefit accrual change for exception vacation hours due to a change from a 56-hour workweek to a 48-hour workweek. Based on this record, "Uniformed Personnel" included Medics. The maximum balance for exception vacation hours changed from 240 hours to 206 hours. The City paid Medics for exception vacation hours over the new threshold. (JX15). This memorandum did not describe converting, i.e., reducing, the exception vacation hours for Medics with hours fewer than 206.

19. A City memorandum dated August 2006 to "Uniformed Personnel" told Medics that the change from a 56-hour workweek to a 48-hour workweek converted the threshold for personal holiday hours from 24 hours to 19.20 hours. The City paid Medics for the personal holiday hours over the new threshold of 19.20. Again, the memorandum did not describe converting, i.e., reducing, the personal holiday hours for Medics with hours fewer than 19.20.

20. Testimony suggested that the City "converted" 24 hours to 19.20, i.e., reduced accrued personal holiday hours on a ratio of 24 to 19.20. When read in context, including Joint Exhibit 14, the Arbitrator interpreted Joint Exhibit 15 to mean that the City only "converted" the threshold or maximum accrual from 24 to 19.20, i.e., if the Medic had accrued 18 hours of personal holiday time it was not reduced, but if the Medic had accrued the maximum of 24 hours, it was reduced to 19.20 hours but the City paid the Medic for the 4.8 hour reduction.

21. The City recognized the Austin-Travis County EMS Employee' Association as the bargaining agent for the Medics and bargained with it per Texas Local Government Code Chapter 142. Effective October 1, 2013, the City and the Association entered into the MCA.

22. The MCA contains Article 2 (Definitions), Article 6 (Wages and Benefits), Article 8 (Special Leave), Article 9 (Holidays, Vacations and Sick Leave), Article 16 (has a definition of day), Article 19 (Agreement Grievance Procedure), and Article 20 (Management Rights).

23. Based on this record, Medics accrued leave balances of exception vacation and personal holidays and as described in the MCA retained pre-civil service unused sick leave accrued prior to October 1, 2013 (labeled by the parties as MSCK leave).

24. Also based on this record, Joint Exhibit 2 contains the City's policies for personal holidays and exception vacation effective October 1, 2013, incorporated by reference into the MCA. (MCA Art. 9 Section 1). Those policies do not provide for the conversion of such leaves based on the conversion of a workweek from 48 to 42 hours.

25. In April 2014, the Department unequivocally told all EMS Commanders that it changed them from exempt to non-exempt employees with a 42-hour workweek instead of a 48-hour workweek. (JX12). As part of that change, the City unequivocally converted EMS Commanders' MSCK, personal holiday, and exception vacation leave from a 48-hour workweek to a 42-hour workweek, i.e., reduced them. Based on the record, EMS Commanders are part of the Association's bargaining unit. No grievance was filed regarding this conversion for the EMS Commanders within the 45-business-day limit of MCA Article 19.

26. In June 2014, the Department notified its workforce through two notices, one dated June 20, 2014, and one dated June 30, 2014, of a voluntary pilot program for Field Medics to work 42 rather than 48 hours per week (JX7 and JX8 respectively). The June 20 notice told Field Medics that if they chose to participate, there could be changes to their hourly rate of pay and accrued leave balances. The June 30 notice specifically stated pay and accrued leave would be adjusted and included examples.

27. The Department changed the volunteers' workweek from 48 to 42 hours and the resulting leave adjustments went into effect in the fall of 2014.

28. The conversion reduced the monetary value of leave. For example, exception vacation time appears under holiday pay. (MCA Art. 9 Section 1). MCA Article 16, Disciplinary Actions and Appeals, permits a Medic to use holiday time to serve certain suspensions with no loss of paid salary (MCA Art. 16 Section 1.a)) and defines a "day" for a 42 or 48-hour employee as 12 hours (MCA Art. 16 Section 14). As a result, Medics who took part in the pilot program had fewer hours to apply to any 12-hour day of suspension. Similarly, the City paid Medics who separated from employment for fewer MSCK hours and possible exception vacation hours due to the conversion. Also, when the Medic separated, the City paid the hours at the Medic's then hourly rate, not the rate when the hour was accrued. (Tr. 157).

29. A 2018 email described this 2014 schedule as a voluntary pilot program and expressly stated the pilot schedule was not a conversion. (JX10, p.10, City email dated Oct. 26, 2018, "Attached is a memo when we asked personnel to participate in a pilot schedule (the schedule was a pilot not conversions) this was vetted by [Human Resources Department (HRD)] and we have consistently done these conversions ever since.").

30. No grievance was filed by the Association or any Medic within 45 business days of the start of the pilot program alleging that the program violated the MCA.

31. Changes from 48 to 42 hours, with an accompanying leave conversion, continued without a single grievance until the Association filed the Grievance in 2016.

32. A City budget passed in September 2016 funded the completion of the work week change from 48 to 42 hours for the fiscal year 2016-2017, October 1, 2016 to September 30, 2017. (AX3; City 2016-17 Budget, Volume I, p. 409 "Increase funding for 52 sworn positions and associated equipment costs to complete [implementation] of the 42-hour work week.").

33. Then Association President, Mr. Marquardt, (now past President) filed this Grievance with the Association Grievance Committee on November 4, 2016. (JX3). Any grievance found to be valid by the Association Grievance Committee must be submitted to the Chief within 45 business days after the grievant knew of or should have known of the facts or event(s) giving rise to the grievance. (MCA Article 19). After that Committee approved the Grievance, the Association submitted it to the Chief on November 9, 2016. (JX4). September 7, 2016 is the 45th business day prior to the filing of the Grievance with the Chief.

34. The Grievance contested leave balance conversions, i.e., reductions, made to exception vacation (EVC2), personal holidays (P Holiday), and MSCK for Medics whose workweek was changed from 48 to 42-hours after September 7, 2018. (JX11 pp. 105-201 and Tr. P. 45). The Association urged that leave hours earned are based upon the Medic's workweek at the time the leave was accrued and cannot be converted, i.e., reduced, even if the workweek changed. For example, if the Medic earned 10 hours of exception vacation, the Medic is entitled to 10 hours of exception vacation regardless of the workweek when the leave is taken. Also, the Association claimed that per MCA Article 8, Section 3, the MSCK leave must be based on the hours accrued prior to the MCA's effective date and Medics are entitled to be paid for MSCK accrued leave balance regardless of their workweek at the time they use it or on their date of separation of employment.

35. The Grievance does not assert that the City did not have the Management Right to change the workweek to meet service needs. Also, the Grievance does not assert a claim for Medics whose leave hours were converted, i.e., increased, due to a change from a 40-hour workweek to a 42-hour workweek. Based on MCA Article 19, Section 4, Step 4, the issue of conversion of hours that increased them is not part of the Grievance, and the Award does not address that issue.

36. The City's response to the Grievance included the assertion that the issues raised did not involve a dispute, claim, or complaint involving the interpretation or application of an MCA provision. The response also stated that if the Association sought arbitration under MCA Article 19 the City would not participate as it claimed the arbitrator would have no jurisdiction/authority to hear the Grievance.

37. The Association applied for an order to compel arbitration in the District Court of Travis County, Texas. After considering the Association's application to compel arbitration, the response, and counsel's arguments, and after a hearing, the Court granted the

application and ordered the parties to arbitrate the Grievance under the MCA. The Court abated its proceedings pending the outcome of the arbitration. (AX2).

SUMMARY OF ASSOCIATION'S POSITION

JURISDICTION

38. The parties agreed the Arbitrator had jurisdiction to rule on whether the act(s) complained of involved a dispute, claim, or complaint involving the interpretation, application, or alleged violation of the MCA and if the City violate the MCA to decide the remedy.

39. The City's conversion of the leave for Medics changed from a 40-hour to a 42-hour workweek added hours to those Medics' leave accounts. Those Medics are not part of the Grievance.

Issue 1: In October 2016, did the City of Austin (The City) violate Article 8 and/or Article 9 of the 2013-2017 Meet and Confer Agreement (The Agreement) between the City and the Austin-Travis County EMS Employees' Association (The Association) when it converted the accrued leave balances of exception vacation, personal holiday, and pre-civil service sick leave (MSCK) for Field Medics whose workweeks were changed from 48 to 42 hours?

40. In 2013, the parties bargained for the rights, privileges, and benefits in the MCA. The Medics detrimentally relied that these benefits would not change or be diminished in value without bargaining.

41. MCA Article 2 defines a day as a calendar day. Article 8, Special Leave, defines a day as 12 hours for 48- and 42-hour work weeks. Medics need not be concerned with their rate of pay when using leave. The Medic merely uses leave hours to replace work hours.

42. The MCA is specific and contract law requires the use of its definition in Article 8 for the leave benefits in Articles 8 and 9. The parties bargained for accrual of leave hours for the Medics' use and benefit, i.e., to take time off work without losing pay, for a 12-hour day for both 48-hour and 42-hour workweeks. The MCA treats those two workweeks the same and does not allow a conversion between those two workweeks.

43. As in Article 8, the parties bargained for Article 9 to allow accrual of holiday hours and exception vacation hours "as provided for by CITY policy". (MCA Article 9, Section 1. Holiday Pay). This leave accrued in hours regardless of the hourly rate. The Article is specific as to accrual and does not allow for a reduction by the City's conversion process.

44. As to personal holidays, the MCA grants leave; it does not take it away. (MCA Article 8, Section 1).

Issue 2: Pursuant to Article 19, Section 2 of the Agreement, does the grievance involve a dispute, claim or complaint involving the interpretation, application, or alleged violation of any provision of the Agreement that confers jurisdiction upon the Arbitrator?

45. The Arbitrator has jurisdiction to interpret whether the MCA allows the City to convert or take contractually awarded leave from the Medics.

46. The MCA does not permit the City to unilaterally take contractually bargained hours of accumulated leave hours from the Medics' leave accounts. Rather, the City must bargain with the Association over such changes. Changing the members' accumulated hours granted by the Agreement violates the Agreement and falls squarely into the Arbitrator's jurisdiction.

47. The City illogically and wrongly argued the conversion of hours is monetarily equivalent. The MCA awards the same leave hours for each member working the 42-hour and 48-hour workweeks. The City may not reduce this benefit except through bargaining.

Issue 3: If the Arbitrator has jurisdiction, considering the City's past practice, has the Association waived the right to grieve the issue of leave conversion?

48. No waiver exists. The MCA's language is clear and unambiguous on the accrual of leave time for Medics. It does not provide for any conversion for moving from a 48 to 42-hour workweek. Instead, it defines a day of leave as the same for both workweeks.

49. The members earned the leave time. That accrued time remains available in the form and quantity it was earned.

50. Medics use their leave as needed. When the City reduce the hours unilaterally, the Medic loses money. Each hour will either be used to take hours off of work, hour for hour, OR the employee will one day be paid cash for the hours.

51. When Medics use the leave hours, they use them regardless of when it was earned. Medics may use accrued hours regardless of the hourly rate the Medic earned. When Medics cash out upon separation, the accrued hours are paid at the Medic's rate at the time of departure NOT when the hour was earned.

52. When the City converted hours using the Medic's rate of pay at the time of the workweek change, it devalued the accrued value bargained for in the MCA.

53. The Association did not waive a right by not complaining. The "past practice" of reducing Medic's hours is civil conversion that is not allowed under any concept.

54. The Association filed the Grievance on behalf of all EMS personnel in the ATCEMS Department. (Association Brief p. 1). The Grievance includes Medics negatively impacted by the conversion due to the change to a 42-hour work week from a 48-hour work week in Joint Ex. 11, pp. 57 through 201. (Tr. 45-46 and Association Brief pp. 1 and 6). Waiver does not apply when the contract language is clear and unambiguous and when the City is basically taking or converting the Medics' property.

Issue 4: If the City did violate the Agreement, what is the appropriate remedy?

55. This "conversion" scheme violated the Agreement. Each Medic covered by this Grievance should receive the hours that the City wrongfully converted, to their own benefit, and have them placed into their respective individual leave time accounts from which they were removed.

SUMMARY OF CITY'S POSITION

Jurisdictional Objection: The City's response to the Grievance raised and preserved a jurisdictional and waiver challenge (JX5).

56. The Association submitted the Court Order ordering arbitration. (AX2). That Order does not address the City's jurisdictional or waiver arguments: it simply ordered the parties to arbitrate the Grievance. There is no evidence that the Court's Order prohibited the City from reasserting either argument in this proceeding and both arguments are properly before the Arbitrator.

57. Mr. Marquardt agreed that MCA Article 20, Management Rights, specifically reserved to the City "the right to determine schedules of work," which allowed the City to change from a 48- to 42-hour workweek. (Marquardt Tr. p. 51 l. 15-25; p. 56 l. 18-25).

58. MCA Articles 6, 8 and 9 reflect different pay rates, leave accrual rates, leave accrual caps, and leave payouts based upon the Medic's workweek. However, that was the extent of the discussion about changes in a workweek.

59. The parties agreed that there were no discussions or proposals about leave conversions when the workweek changes. As Chief Brown testified, the City did not incorporate into the Agreement an Article about leave conversions as that has been the City's practice as far back as 1999. Chief Brown testified that the City did not incorporate into its Agreements its current or past practice since the Association did not assert the City could/would not continue its leave conversion practice under the MCA. (Brown Tr. p. 155 l. 3-21).

60. Also, Chief Brown's October 26, 2016 email to Mr. Marquardt stated (JX10, page 10 of 11): "Attached is a memo when we asked personnel to participate in a pilot schedule (the schedule was a pilot not conversion)." Chief Brown testified the change from 48 to 42 hours is the pilot program he was referring to, not the leave conversions that the City had been doing for years (Brown Tr. p. 138 l. 21 - p. 139 l. 13).

61. Finally, Mr. Marquardt asked for clarification from the City regarding leave conversions. (JX10). The City confirmed that there was no specific City policy, but confirmed via email on October 28, 2016 that, "In instances where departments (EMS & Fire) have changing schedules, it has been practice to adjust leave balances. This has been consistently applied" (JX10, pp. 7-8). In addition, a City email dated October 31, 2016 responded to Mr. Marquardt stating (JX10, pp. 5-7):

> *I have checked with HRD and with the Fire Department regarding how accrual for exception vacation is treated when an employee's work week changes. Both Fire and HRD confirm that this method of adjusting the accrual balances used by ATCEMS is*

the same method they employ. This adjustment of hours is to ensure that an employee who was required to work on a holiday has the correct benefit time to take a "day" off on some future date. If their accrual hours were not adjusted, they would either not have enough time to take a full "day" (when their work week goes from 42 to 48) or more than the hours needed for a "day" (when their scheduled goes from 48 to 42). This adjustment is not provided for in the public safety contracts, but rather is controlled by City benefit practice.

(emphasis added by the City).

62. With respect to the accrued MSCK balance, the Association contended that the balance is absolute, and a Medic is entitled to be paid for the entire MSCK balance. Per MCA Article 8, Section 2, the payment of any amount of MSCK is not absolute but conditioned upon a Medic having 12 years of service and leaving in good standing.

63. Both the City's HRD and Labor Relations Office confirmed that the City's conversion of personal holidays and exception vacation when the workweek changes is not a contract issue, but rather, controlled by City benefits practice. Chief Brown testified leave conversions are not a subject of the Agreement (Brown Tr. p. 128 l. 14-17, p. 131 l. 9-13; p. 153 l. 13-15).

64. Leave conversions resulting from a change in workweek do not involve a dispute, claim or complaint involving the interpretation, application, or alleged violation of any provision of the MCA. The Arbitrator has no jurisdiction over this Grievance.

The City has the Right to Make Leave Conversions

65. The Association does not dispute that the City has "the right to determine schedules of work." or its leave conversion formula. The City was not required to negotiate to implement those conversions (Brown Tr. p. 128 l. 14-17, p. 131 l. 9-13). Since the Association never grieved workweek changes and the resulting leave conversions other than from 48 to 42 hours, the Association apparently does not contest the City's right to convert leave when a workweek is changed. Either leave conversions violate the MCA or they do not. It does not matter how the workweek changed or when it occurred and it does not matter whether the Medic gained or lost accrued leave.

66. If the Association intended to prohibit the City from continuing its practice dating back to 1999, there was no proposal or discussion to that effect. These leave conversions occurred for 2 ½ years (from April 11, 2014 to September 7, 2016) with the Association's full knowledge and acquiescence without a single grievance which proves the Association did not believe the City was prohibited from making these conversions. Mr. Marquardt admitted that leave conversions are a managerial right (Tr. p. 65 l. 21 - p. 66 l. 2).

Q: Okay. But the documents I just showed you for the Commanders proves that prior to October 2016 we did have members of your bargaining unit that have – went from 48 to 42 with the conversions made, right?

A: Yes. And that's a managerial right to make that conversion.

67. The Association also contended the conversion of personal holidays and exception vacation violated the City policy in effect on October 1, 2013, but does not cite that policy or how the City allegedly violated it. The emails from Ms. Kennedy and Mr. Stribling, cited above, confirmed that the City's conversion of exception vacation and personal holidays complied with the City personnel policies in effect on October 1, 2013.

Waiver

68. In order to interpret a contract when the terms are ambiguous, there is no meeting of the minds, or to fill in the gaps, Arbitrators look to the parties' relevant custom and past practice on that subject during the life of the contract pre-grievance.

69. According to *How Arbitration Works*, Elkouri v. Elkouri, "waiver is defined as the voluntary relinquishment or abandonment – expressed or implied – of a legal right and requires that the party alleged to have waived a right must have both knowledge of the existing right and the intention of foregoing it."

70. Common in arbitration is a species of waiver known as "acquiescence," which "denotes a waiver that arises by tacit consent or by failure of a person for an unreasonable length of time to act on rights of which the person has full knowledge."

71. The Department changed workweeks back to 2006. That practice continued for 2 ½ years under the MCA with the Association's knowledge, including its President Mr. Marquardt, its Association Vice President, Mr. Nudelman, members of the Association's bargaining team, and individual Medics, as noted below.

72. Mr. Marquardt testified that he was not aware there was an issue until someone was "wronged," which did not occur until the funding for the 42-hour workweek occurred in October 2016 (Tr. p. 34 l. 10-13). That assertion is belied by the fact he knew these conversions had been taking place for more than 2 ½ years under the 2013 Agreement. If someone was "wronged," the "wrong" occurred the first time a leave conversion was made on April 11, 2014 (Commander Fitzpatrick) and Mr. Marquardt was contractually required to file a grievance within 45 business days. The following testimony from Mr. Marquardt and Mr. Nudelman supported the City's waiver argument:

Marquardt Transcript:

- He saw the June 20 and June 30, 2014 memorandums when they were issued;
- He admitted the June 30, 2014 memorandum responded to questions about the leave conversions and provided him with that explanation;
- He admitted he knew some Medics had their leave converted years before November 2016;
- He admitted he knew these leave conversions had been made going back to 2006;
- He admitted he knew of the workweek and leave conversions for Commanders when they occurred in 2014;
- He admitted as far back as 2014 he knew leave accruals might be converted;

- He admitted that prior to October 2016, he knew Medics had their workweeks changed and their leave balances converted;
- He admitted that two members of his bargaining team had their leave balances converted and did not grieve;
- He admitted workweeks changed and the City converted leave balances before, during, and after the effective/expiration date of the MCA; and
- He admitted that prior to October 2016 the City converted leave when Commanders workweeks were changed from 48 to 42 hours, and **"That's a managerial right to make that conversion."** (p. 65 l. 21 - p. 66 l. 2).

73. A waiver is also demonstrated because the Department converted leave balances for two members of the Association's 2013 bargaining team--one converted on April 11, 2014, and the other on January 15, 2016. The fact two Association bargaining team members knew about the leave conversions and did not grieve also refutes the Association's contention that the MCA prohibited leave conversions.

74. The April 11, 2014 date is significant because the Association contended only changes in the workweek in October 2016 from 48 to 42 is the subject of the Grievance. However, changes from 48 to 42 hours began as early as April 11, 2014.

75. Mr. Marquardt knew of the events giving rise to a grievance and failed to grieve within the required 45 business days. The Grievance was untimely.

76. All of the leave conversions that occurred under the MCA prove a custom and practice that the Association was aware of and did not object to.

77. If the Arbitrator agrees with the Association that only leave conversion resulting from a change of 48 to 42-hours is to be considered, Joint Exhibits 11 and 12 proves that 33 Field Commanders and 47 other Medics for a total of 80 had their workweek changed from 48 to 42-hours and their leave balances converted. These conversions occurred from 2014 through September 2, 2016.

78. Between April 11, 2014 and September 7, 2016, 136 Medics had their workweeks changed and leave balances converted (33 Field Commanders and 103 Medics). 80 of those had their workweeks changed from 48 to 42-hours (33 Commanders and 47 Medic I and Medic II). Not a single grievance was filed despite Mr. Marquardt's admission that he received the June 20, 2014 pilot program memorandum regarding, the June 24 & 25, 2014 emails between Mr. Marquardt, his V.P., and Chief Brown, the June 24, 2014 HRD memorandum regarding the conversion, and a second conversion memorandum from HRD. Despite these communications, the Association never grieved the leave conversions.

79. Not only is Mr. Marquardt's testimony about the City Council's budget deliberations for the 2016-2017 budget irrelevant, but he is also factually wrong. Association Exhibit 3 from the Council 2016-2017 budget discussion refers to "Increase funding for 52 sworn positions and associated equipment costs to complete implementation of the 42-hour work week."

80. The keys words are "complete implementation." The budget did not impact

implementing the 42-hour workweek (Brown Tr. p. 134 ll. 6-9). Based on past practice, Medics whose workweek was changed knew their leave balances were converted (Brown Tr. p. 153 l. 16 - p. 154 l. 1). The Association's claim that there was not a ripe contractual violation until October 13, 2016 is disproven by known changes beginning in 2014.

81. The Association argued that even if the City violated the Agreement in the past with no grievance filed, that does not prevent grieving in the future when another violation occurs. That is an incorrect interpretation and application of the waiver principle. Once the Association knew or had reason to believe the City was violating the MCA in April 2014, and that alleged violation continued for the next 2 ½ years, the Association had to grieve within the MCA's prescribed time. The Grievance was untimely.

Those who Gained Time

82. The Association argued that the issue of those who gained time due to a changed workweek is not before the Arbitrator. While the Association did not grieve on behalf of those Medics who gained time, if leave conversions violate the Agreement, those Medics were unjustly enriched. If the Arbitrator rules that leave conversions violated the Agreement, then the City will determine the appropriate action to take for those whose leave balances increased due to their changed workweek.

Conclusion

83. The Arbitrator lacks jurisdiction over the Grievance, the City had the contractual right to convert leave when workweeks change, the Association waived its right to contest the City's action, and the Association's Grievance is untimely.

ANALYSIS

84. The Arbitrator gave full and careful consideration to the general principles of contract interpretation and the entire record, including the credibility of the witnesses, the MCA, the exhibits, and all arguments.

85. References to exhibits, testimony, arguments, or other material are not exhaustive.[3] Rather, references are representative samples. Similarly, references to treatises relied upon by the parties are not exhaustive but instead are representative samples. Not all contradictions in the evidence are recited, but all were considered. Implicit in every factual determination is an evaluation of the witnesses' credibility.

Contract Interpretation

86. In interpreting the MCA and related documents, e.g., the City's memorandums, the Arbitrator sought to ascertain the parties' intent and to construe it so as to reach a reasonable result based on that intent. *Temple-Eastex, Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984); *Maritime Service Committee, Inc.*, 49 LA 557, 562 (Scheiber, Arb.) (1967); *Accord*, Elkouri & Elkouri, *How Arbitration Works* at pp. 9-21 through 9-57

[3] Given the number of references to dates, transcript pages, MCA Articles and Sections, and exhibits, and cross references to paragraphs, an error may exist in the date or number cited. The parties may ask for a clarification or correction for any reference.

(Kenneth May, Editor-in-Chief, 8th ed., 2016). An interpretation which gives a reasonable, lawful, and effective meaning to the contract is preferred to an interpretation of the contract which is unreasonable, unlawful, oppressive, or of no effect. *Reilly v. Rangers Management, Inc.*, 727 S.W.2d 527, 530 (Tex. 1987); *Maritime* at 562.

87. This doctrine of reasonable interpretation prevents any party to the MCA from interpreting it so as to destroy or injure the right of the other party to receive the fruits of the MCA, and it applies equally to management and labor. *See, Reilly* at 530; *Accord*, Elkouri, at p. 9-49. Indeed, an arbitrator commissioned to interpret and apply the MCA is to bring the Arbitrator's informed judgment to bear to reach a fair solution. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 US 593, 597 (1960).

88. The Arbitrator considered the entire writing to harmonize and give effect to all provisions so that none is rendered meaningless and generally accorded the parties' words their plain, grammatical, and customary meaning.

89. Above all, the Arbitrator only considered and decided the issues in the Grievance and interpreted and applied the explicit MCA provisions and did not add to, subtract from, modify, or delete any of its provisions. (MCA Art. 19, Section 4, Step 4).

Past Practice Elements

90. Generally, a past practice is binding on both parties only if it is (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period, as a fixed and established practice accepted by both parties. *See, Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 228 (Tex.1986) (holding a contract modification must satisfy the elements of a contract: a meeting of the minds supported by consideration and whether a contract is modified depends on the parties' intentions and is a question of fact); *Accord*, Elkouri at p. 12-4.

Pursuant to Article 19, Section 2 of the Agreement, does the Grievance involve a dispute, claim or complaint involving the interpretation, application, or alleged violation of any provision of the Agreement that confers jurisdiction upon the Arbitrator?

91. This record, including the credibility of the witnesses and the MCA's language, proved that jurisdiction exists.

92. Based on the MCA's language, the Grievance's language (JX3), the City's response (JX5), and the Court's Order (AX3), the Court determined that the Arbitrator had jurisdiction of the Grievance. To illustrate, MCA Article 19 Section 2 states that "A grievance which does not relate to the application and/or interpretation of any provision of this Agreement shall be processed in accordance with a procedure to be established in writing by the Chief." Because the Court did not direct the parties to use a procedure established by the Chief but instead directed the parties to arbitration, the Court must have held the Arbitrator had jurisdiction of the Grievance under MCA Article 19 governing contract grievances.

93. Alternatively, the Arbitrator determined that based on the Grievance's language and the MCA's, he had jurisdiction of the Grievance. For example, the MCA defines "grievance"

as "any dispute, claim, or complaint involving the interpretation, application, or alleged violation of any provision of this Agreement." The Grievance asserted the conversion of accrued MSCK, exception vacation, and personal holiday leave violated MCA Articles, and 9. MCA Articles 8 and 9 describe accruing such leaves, caps on accrual of such leaves, the use of such leave, and paying out for such leaves upon departure. Further, with respect to 42-hour and 48-hour workweeks, the MCA provided that vacation and sick leave accrued at the same rate and that a day consists of 12 hours. To decide if the City violated the MCA when it made the conversion required an interpretation and application of the MCA.

94. City's Assertion of a City Benefit Practice outside the MCA. Relying upon what it labeled as a past practice, the City argued that its conversion of personal holidays and exception vacation when the workweek changes is not an MCA issue, but rather, a City benefits practice. As discussed in paragraphs 95 through 109, there is not a past practice or City benefit practice that governed the leave conversions.

95. To support its argument, the City noted that MCA Articles 6, 8, and 9 reflect different pay rates, leave accrual rates, leave accrual caps, and leave payouts based upon the Medic's workweek. Also, it noted the parties agreed that there were no discussions or proposals about leave conversions when the workweek changes. According to the City, it did not incorporate into the MCA its current or past practice for leave conversions since the Association did not assert that the City could/would not continue that leave conversion practice under the MCA. (Brown Tr. p. 155 ll. 3-21).

96. While MCA Article 6 distinguished among pay rates in Appendixes A-1 through A-4, it does not distinguish among benefits. Also, Article 8 states Medics working a 42- or 48-hour workweek have the same 12-hour workday (MCA Art. 8, Section 1). Article 9 Section 1 provides that all Medics receive exception vacation per City policy effective October 1, 2013. That policy does not provide for conversion and does not distinguish among workweeks for exception vacation. (JX2). Although not at issue, Article 9 also treats Medics on 42 or 48-hour workweeks the same for accrual of vacation time and sick time.

97. Because the MCA creates the exception vacation, the personal holiday and MSCK leaves, it governs these benefits, not any City policy post October 1, 2013. Thus, the Arbitrator has jurisdiction over the Grievance which requires an interpretation and application of the MCA to determine if the City violated the MCA.

98. Scope of Grievance. The Grievance does not assert that the City did not have the Management Right to change the workweek to meet service needs. Also, the Grievance does not assert a claim for Medics whose leaves hours were converted, i.e., increased, due to a change from a 40-hour workweek to a 42-hour workweek. Based on MCA Article 19, Section 4, Step 4, the issue of conversion of hours that increased them is not part of the Grievance, and the Award does not address that issue.

If the Arbitrator has jurisdiction, considering the City's past practice, has the Association waived the right to grieve the issue of leave conversion?

99. The City asserted the Association waived the right to grieve leave conversions by accepting a past practice and by waiting too long to grieve.

100. 2006 Memorandums. As noted in paragraph 90, to establish a binding past practice, the city must show a mutual acceptance of the past practice, i.e., a meeting of the minds. Here, prior to the MCA's effective date, the City was free to alter its practice and thus there would not be any mutuality, i.e., based on this record in 2006, the Association did not have the authority to bargain with the City or accept a practice on behalf of the Medics.[4]

101. Also, the City's 2006 memorandums address only exception vacation and personal holiday leave. Because they do not address MSCK leave, which did not exist until the MCA's effective date, they cannot serve as a past practice for MSCK leave.

102. As to the exception vacation and personal holiday leave, the 2006 memorandums only addressed changing a threshold or cap on the number of hours accrued, provided for paying out excess hours over the new caps, and did not convert existing accrued hours less than the caps based on working a 48-hour workweek instead of a 56-hour workweek. As discussed in paragraphs 18 through 20, these 2006 memorandums did not address conversion of leave in the context of a workweek change when Medics had hours less than the caps. Thus, there is not any mutual acceptance and not any unequivocal statement of a past practice to support the City's conversions of hours below the caps for exception and personal holiday leave.

103. These 2006 memorandums do not prove a past practice that supports the City's conversion of benefit hours for MSCK, exception vacation, or personal holidays that took place later.

104. 2014 Conversion. In 2014, the City unequivocally told EMS Commanders it changed them from exempt to non-exempt employees and changed them from 48-hour to 42-hour workweeks. The City also unequivocally converted their MSCK, exception vacation, and personal holiday hours. (JX12). Because the City did not unequivocally announce it would apply these conversions to all Medics who were changed from a 48-hour to a 42-hour workweek, and because it was a one-time event applicable only to EMS Commanders, it does not meet the past practice elements of an unequivocal, clearly enunciated and acted upon practice readily ascertainable over a reasonable period or a fixed and established practice accepted by both parties for all Medics.

105. 2014 Pilot Program. The 2014 City notices address only a voluntary pilot program, not a past practice. To illustrate, a 2018 email described this 2014 schedule as a voluntary pilot program and expressly stated the pilot schedule was not a conversion. (JX10, p.10,

[4] MCA Article 3 (AX1) recites that the City recognized the Association as the sole and exclusive bargaining agent for Medics per Tex. Loc. Govt Code §§143.304 and 143.311 effective October 1, 2013. The City's resolution ratifying the MCA recited that in 2007 the Texas Legislature amended Chapter 142 to allow negotiation with the Medics. (AX1).

City email dated Oct. 26, 2018, "Attached is a memo when we asked personnel to participate in a pilot schedule (the schedule was a pilot not conversions)…").

106. Also, the record contains documents (JX8, p. 3, JX9 p. 2, and JX10, p. 10) and credible testimony that the Medics could opt out of the pilot program and have their leave converted back to a 48-hour week. (Tr. 72-73). The 2014 notices do not establish a past practice of converting, i.e., reducing, Medics' MSCK, exception vacation, or personal holiday leave based on a change from a workweek of 48 hours to 42 hours.

107. 2016 City Emails. A City email dated October 31, 2016 relied on an HRD and a Fire Department practice to establish a past practice for conversion of hours in the EMS Department. What past practice may have been accepted by the associations representing other City employees does not establish a past practice binding on the Medics or their Association. The Arbitrator interpreted the City email dated October 28, 2016 referring to the conversion of hours for the EMS Department as referring to the practice described in paragraphs 95 through 106 which the Arbitrator rejected as establishing a past practice.

108. Management Rights. MCA Article 20 describes the City's management rights.

109. The City conflated its Management Right to schedule Medics for 42 instead of 48 hours with the right to convert, i.e., reduce, accrued leave based on that schedule change. For example, when read in context, the Association's past President's testimony about management rights referenced the Management Right "to determine schedules of work" (MCA Art. 20), i.e., a Management Right "to convert schedules" not a Management Right to "convert accrued leave."

110. Waiver. The City properly relied upon Elkouri for its discussion of waiver. In addition to the City's quoted material, that treatise noted that

> Arbitrators have held that the time for filing a Grievance does not begin to run until the affected employee was aware, or should have been aware, of the alleged violation giving rise to the grievance.

Elkouri at p. 5-35 and

> A party sometimes announces its intention to perform a given act but does not culminate the act until a later date. Similarly, a party may perform an act whose adverse effect on another does not result until a later date. In such situations, arbitrators have held that the 'occurrence' for purposes of applying time limits is at the later date.

Elkouri at p. 5-36 and

> The combined effect of these cases is that a time limit does not start to run until a party is actually informed as to the other party's position ….

Elkouri at 5-37. Elkouri's discussion is in accord with Texas law.

111. Indeed, applying Texas law, courts have consistently held that while the private employer may unilaterally alter its policies or compensation at any time, that private employer must still unequivocally convey the change to employees and its effective date. *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 299 (Tex.1986); *Murdock v. Trisun*

Healthcare, LLC, No. 03–10–00711–CV, 2013 WL 1955767, at *3 (Tex. App.-Austin, 2013, review denied Jun 06, 2014) ("In order to establish notice, an employer 'must prove that he unequivocally notified the employee of definite changes in employment terms.'" citing *Hathaway*); *Burns v. Air Liquide America, L.P.*, 2006 WL 305644, at *2 (S.D. Tex., Feb. 8, 2006) ("On this record, the Court cannot find that Defendant unequivocally notified Plaintiff that the terms of her at-will employment were going to be changed as of a date certain or that she would be deemed to agree to Defendant's ADR policy by continuing to work for Defendant after that date.").

112. Accordingly, to determine if any Medic waived the right to grieve, e.g., the Grievance is untimely as to that Medic, the Arbitrator examined the record for notice to the Medic and the date of the conversion.

113. EMS Commanders. As described in paragraphs 25 and 104, in 2014, the City gave unequivocal notice of converting accrued exception vacation, personal holiday, and MSCK leaves to EMS Commanders in Joint Exhibit 12. MCA Article 19 Section 3 states that "If any timeline or deadline for a decision is missed by the ASSOCIATION, the grievance is considered to be resolved and dismissed."

114. Given that notice and based on MCA Article 19, the Association and these EMS Commanders waived the right to grieve the conversion of their leaves in 2014. The Grievance is untimely as to them.

115. 47 Medics.[5] For the 47 Medics whose accrued leave was converted from a 48-hour to a 42-hour workweek prior to September 7, 2016, those Medics and the Association waived the right to grieve those conversions. The City gave unequivocal notice of converting accrued exception vacation, personal holiday, and MSCK leaves to these 47 Medics contained in Joint Exhibit 11, pp. 1-104. Given that notice and based on MCA Article 19, the Association and these Medics waived the right to grieve the issue of leave conversion as to conversions prior to September 7, 2016. The Grievance is untimely as to them.

116. Remaining Medics. Based on this record, the Association did not waive the right to grieve the conversion of accrued leave balances for exception vacation, personal holiday, or MSCK leaves that occurred on or after September 7, 2016 for the remaining Medics.

117. For example, the City did not give unequivocal notice to the remaining Medics of a date when the remaining Medics would be converted from a 48-hour workweek to a 42-hour workweek until after September 7, 2016.

118. Any Medic whose workweek the City converted from 42 hours to 48 hours and whose exception vacation, personal holiday, or MSCK leaves it also converted, i.e., reduced, after September 7, 2016, is entitled to the remedy described in paragraph 128.

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[5] If the Arbitrator miscounted the number of Medics contained in Joint Exhibit 11 from pages 1 through 104 whose leave was converted, i.e., reduced, as a result of a change from a 48- to 42-hour workweek, the parties may request a correction.

119. To illustrate, prior to September 7, 2016, the City changed some Medics from a 42-hour workweek to a 48-hour workweek. (e.g., JX11 pp. 45, 47, and 55). If the City changed such Medics from a 48-hour to a 42-hour workweek after September 7, 2016, and converted, i.e., reduced, their exception vacation, personal holiday, or MSCK leaves, such Medics are entitled to the remedy described in paragraph 128. Similarly, if the City converted Medics from a 48-hour workweek to a 42-hour workweek prior to September 7, 2016, then converted them from a 42-hour workweek to a 48-hour workweek prior to September 7, 2016, and then again converted them from a 48-hour workweek to a 42-hour workweek on or after September 7, 2016, and converted, i.e., reduced, their exception vacation, personal holiday, or MSCK leaves after September 7, 2016, such Medics are entitled to the remedy described in paragraph 128.

In October 2016, did the City of Austin (City) violate Article 8 and/or Article 9 of the 2013-2017 Meet and Confer Agreement (Agreement or MCA) between the City and the Austin-Travis County EMS Employees' Association (Association) when it converted the accrued leave balances of exception vacation, personal holiday, and pre-civil service sick leave (MSCK) for Field Medics whose workweeks were changed from 48 to 42 hours?

120. This record, including the credibility of the witnesses and the MCA's language, proved that the City violated MCA Article 8 and/or Article 9 when it converted the accrued leave balances of exception vacation, personal holiday, and pre-civil service sick leave (MSCK) for Field Medics whose workweeks were changed from 48 to 42 hours on or after September 7, 2016.

121. The MCA provides for the accrual of these leaves. It equates a 48-hour schedule to a 42-hour schedule, e.g., both workweeks have 12-hour days (MCA Art. 8 Section and Art. 16 Section 14) and both accrue vacation and sick leave at the same rate (MCA Art 9 Sections 2 and 5). MCA Article 20 states the City's Management Right is limited by the MCA's provisions. In the absence of either an MCA provision, a statement in the City policy incorporated into the MCA (JX2), or an unequivocal and accepted past practice that allowed a conversion, the City did not have the right to reduce these leaves based on a change in workweeks from 48 to 42 hours.

122. To illustrate, the record proved that Medics accrued exception vacation leave. For example, MCA Article 9 Section 1 states "All Medics shall receive exception vacation time and December 25 Holiday pay as provided by CITY policy on the effective date of this Agreement." Section 3 states "All Medics may accrue up to two hundred and six (206) hours of exception vacation." The MCA and the City policy effective October 1, 2013 incorporated into the MCA do not provide for conversion of exception vacation based upon a change from a 48-hour to a 42-hour workweek. (JX2 and Tr. 49).

123. As another illustration, the record proved that Medics accrued personal holiday leave. MCA Article 9 Section 1 incorporated by reference the personal holiday time provided by City policy effective October 1, 2013. Neither the MCA nor that policy provided for converting personal holiday leave based upon a change from a 48-hour to a 42-hour workweek. (JX2 and Tr. 49).

124. As a third illustration, the parties bargained over the continuation of the sick leave Medics accrued prior to the effective date of the MCA, October 1, 2013. (JX1 Art. 8). In turn, the MCA recognized the use of MSCK after October 1, 2013.

125. As noted by the City, the MCA placed conditions on MSCK. It placed a hire date restriction and a cap on the amount of MSCK payable upon separation of employment. It also dictated the use of MSCK. When Medics took sick leave, the City deducted ¾ of the hours from the bank of hours earned prior to October 1, 2013 and ¼ of the hours accrued after October 1, 2013.

126. Although the MCA Article 8 recognized that Medics worked 40, 42, or 48-hour workweeks, and MCA Article 20 recognized the City's right to determine schedules, the MCA does not provide for adjustments to MSCK for transfers from a 48-hour workweek to a 42-hour workweek.

127. As discussed in paragraphs 94 through 107, the City did not establish a past practice that allowed it to convert exception vacation, personal holiday, or MSCK leave.

If the City did violate the Agreement, what is the appropriate remedy?

128. The accrued exception vacation, personal holiday, and MSCK leave converted, i.e., reduced, by the City based upon the change from a 48-hour to a 42-hour workweek for Medics (except for the EMS Commanders described in paragraph 113 and the 47 Medics described in paragraph 115) are to be restored to the original number of accrued hours. The restoration is to account for any hours used since the conversion. For example, if a Medic had 100 MSCK hours converted to 87.36 (JX8 p.2) and after the conversion used 7.36 hours resulting in a current balance of 80 hours, then the 87.36 hours is to be restored to 100 hours and the used 7.36 hours are to be deducted leaving a current balance of 92.64 hours.

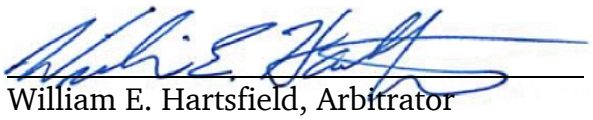
AWARD

129. Based on the evidence, including the credibility of the witnesses and including the Arbitrator's interpretation of the MCA, the Grievance is upheld in part and denied in part. The remedy is described in paragraph 128.

130. As provided in MCA Article 19, because of a composite decision, i.e., the Grievance was upheld in part and denied in part, the Arbitrator determines the portion of the Arbitrator's fees and costs borne by each party. The Association is to pay forty percent (40%) and the City is to pay sixty percent (60%) of the Arbitrator's fees and costs.

131. This Award is in full resolution of all matters submitted to this Arbitrator. All relief not expressly granted herein is denied.

March 18, 2019
Date


William E. Hartsfield, Arbitrator