
IN THE MATTER OF THE INTEREST ARBITRATION

By And Between

EMPLOYER

The City of Kalispell
Kalispell, Montana

And

UNION

The International Association of FireFighters, AFL-CIO;
Local 547

Montana Board of Personnel Appeals

IMPASSE ISSUES

Wages

- a) Rates
- b) Appendix A

Management Rights

Article 2cii

D – Shift – 2 Issues

- a) Include in CBA
- b) Implementation

Salaries – Section 8a

Language Change

Personal Days

Article 14f

Shift Trades

Article 13a

Compensatory Time

Article 10biii

OPINION & AWARD

PRELIMINARY INFORMATION

REPRESENTATION APPEARANCES

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LOCATION OF HEARING

Hearing Conducted Virtually by Video Conference

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AUTHORITY TO ARBITRATE

Montana Code Annotated 2019

Title 39. Labor

Chapter 34. Arbitration For Firefighters

Part 1. General Provisions

Arbitration Between Firefighters And Public Employers

39-34-101. Arbitration between firefighters and public employers. (1) This section applies only to firefighters and their public employers

(2) If an impasse is reached in the course of collective bargaining between a public employer and a firefighters' organization or its exclusive representative and if the procedures for mediation and factfinding in **39-31-307** through **39-31-310** have been exhausted, either party or both jointly may petition the board of personnel appeals for final and binding arbitration. ¹

Other Applicable Sections of Title 39, Chapter 34, Part 1 Pertaining to Arbitration:

39-34-102. Designation of Arbitrator

39-34-103 Powers And Duties Of Arbitrator For Fighters And Public Employers

39-34-106 Cost of Arbitration

¹ The Arbitrator notes that pursuant to Title 39, Chapter 31 – Collective Bargaining for Public Employees, Part 3 Bargaining, **39-31-310** of the Montana Code Annotated 2019, by having voluntarily agreed to submit any or all of the issues to final and binding arbitration, the Parties also agreed the arbitration would supersede the factfinding procedure (Jt.Ex.2).

WITNESSES (in order of respective appearance) ²**FOR THE EMPLOYER**

DAVE DEDMAN
Fire Chief

DOUG RUSSELL
City Manager

DENISE MICHEL
Human Resources Director

FOR THE UNION

GREG DAENZER ³
Lieutenant

DOUG SCHWARTZ
Fire Engineer

ANDREW (ANDY) ZIMMERMAN
Firefighter Advanced EMT

CHRONOLOGY OF RELEVANT EVENTS

Date, Parties Convened First Negotiation Session June 6, 2019
For the Successor Collective Bargaining Agreement
To the Expiring 2016-2019 Agreement (Jt.Ex.1),
Wherein, the City Advanced its First Proposal

Date, Parties Convened Second Negotiation Session July 26, 2019
Wherein, the Union Advanced its First Proposals Relative
To the Impasse Issues in Contention in this Arbitration ⁴

² Prior to the hearing, the Parties forwarded to the Arbitrator a list of witnesses that might be called or might not be called to testify. On the witness list submitted by the Employer (City), Charles Harball, City Attorney was not called to testify. On the witness list submitted by the Union, Mike Chappius, Fire Captain and Tim Soule, Firefighter were not called to testify.

³ Testified at the December 15, 2020 hearing and recalled to testify at the December 16, 2020 hearing.

⁴ Relevant to the circumstances of this interest arbitration, at this negotiation session, the Union put forth its first proposal including a proposed new Article 18 pertaining to the D-Shift, a new shift the City/Fire Department had unilaterally created and implemented in and around mid-September, 2018 and filled by hiring Andrew Zimmerman, a firefighter/paramedic. The unilateral implementation of this twelve (12) hour position became the subject of a grievance filed by the Union resulting in an arbitration decision rendered by Arbitrator Jeffrey W. Jacobs on June 28, 2019, just two (2) days prior to the expiration of the predecessor 2016-2019 Collective Bargaining Agreement (Jt.Ex.1). In pertinent part, Jacobs concurred with the City's position it was within its contractual Management Right to unilaterally create the D-Shift position, but due to the fact it was being filled by a bargaining unit firefighter, the City was contractually obligated to bargain the details of the position with respect to wages, hours and other working conditions (Jacobs' Decision & Award, Jt.Ex.3). In conjunction with its D-Shift proposal, it also introduced a Wage Rate Schedule for the D-Shift for rates applicable to Probationary firefighters and for the Classifications of Firefighter 1 and Firefighter 2. Additionally, the Union put forth a proposal on wages and to change the monthly wage calculation to hourly, to strike language from Article 13, Section a) and to add language to Article 14, Section f).

CHRONOLOGY OF RELEVANT EVENTS (continued)

<p>Date, Parties Convened Third Negotiation Session Wherein the City, Among the Impasse Issues in Contention in this Arbitration, Rejected the Union's Proposed Language Change to Article 13, Shift Trades, Section a); Did Not Address the Union's Proposed Additional Language to Article 14, Section f); Did Not Counter-propose Union's D-Shift Proposal and Its Attendant Wage Rate Schedule; and Re-offered Its Wage Rate Proposal Made at the June 6, 2019 First Negotiation Session</p>	<p>September 3, 2019</p>
<p>Date, Parties Convened Fourth Negotiation Session Wherein the Union, Among the Impasse Issues in Contention in this Arbitration, Counter-proposed the City's Proposal on Wages; Re-offered its Proposal Pertaining to the D-Shift and Attendant Wage Rate Schedule; Did Not Re-offer its Language Change to Article 13, Section a); Re-offered Its Additional Language Change to Article 14, Section f)</p>	<p>September 17, 2019</p>
<p>Date, Parties Convened Fifth Negotiation Session Wherein the City, Among the Impasse Issues in Contention in this Arbitration, Increased Its Wage Rates Proposal; Rejected the Union's Change in Language to Article 13, Section a); Counter-proposed Language Change to Article 14, Section f); Made No Counter-Proposal to the Union's D-Shift Proposal</p>	<p>October 22, 2019</p>
<p>Date, Parties Convened Sixth Negotiation Session Wherein the Union, Among the Impasse Issues in Contention in this Arbitration, Counter-Proposed the City's Wage Offer; Reintroduced Change to the Language in Article 13, Shift Trades, Section a); Re-offered Change to the Language in Article 14, Personal Days, Section f), and Re-offered its D-Shift Proposal Unchanged Along With Its Attendant Wage Rate Schedule</p>	<p>October 30, 2019</p>

CHRONOLOGY OF RELEVANT EVENTS (continued)

<p>Date, Parties Convened Seventh Negotiation Session Wherein the City, Among the Impasse Issues in Contention in this Arbitration, Held to Its Wage Rates Offer For the First and Second Year of the Proposed Successor Three (3) Year Agreement, 2019, 2021, and 2022, and Increased Its Wage Rates Offer For the Third Year, 2022; Rejected the Union's Language Change to Article 13, Section a); Counter-proposed Change in Language to Article 14, Section f); and Made No Counter-proposal to the Union's Proposal Pertaining to The D-Shift and Its Attendant Wage Rate Schedule</p>	<p>November 26, 2019</p>
<p>Date, Parties Convened Eighth Negotiation Session Wherein the Union, Among the Impasse Issues in Contention in this Arbitration Introduced a New Proposal, To Strike the Term, "schedule" From Article 2, Section c, Enumeration of Management Rights, Sub-section ii; Re-offered Proposals to Change Language to Article 13, Section a) and to Article 14, Section f); Made New Proposal Pertaining to the D-Shift Provisions and Added a Sub-section, Addressing Implementation of the D-Shift; and Reduced Its Wage Proposal Starting With the Base Wage Classification, Firefighter 1; For 2019, From Previous Hourly Rate of \$22.26 to \$22.22; For 2020, From Previous Hourly Rate of \$23.09 to \$22.81; and For 2021, From Previous Hourly Rate of \$23.94 to \$23.92</p>	<p>December 19, 2019</p>
<p>Date, Parties Convened Ninth Negotiation Session Wherein The City, Among the Impasse Issues in Contention in this Arbitration Actually Increased the Base Hourly Wage Rates Proposed by the Union at the December 19, 2019 Negotiation Session For the First and Second Year of the Contract and Proposed a Decrease in the Hourly Rate for the Third Year, For 2019 the Union Proposed Rate Was \$22.22 and the City's Offered Rate Was \$22.92; For 2020, the Union Proposed Rate Was \$22.81 and the City's Offered Rate Was \$23.33; For 2021 the Union Proposed Rate Was \$23.92 and the City's Offered Rate Was \$23.75; The Union Then Counter-proposed</p>	<p>January 3, 2020</p>

CHRONOLOGY OF RELEVANT EVENTS (continued)

The City's Offered Increased Wage Rates by Increasing Its Proposal Above the City's Offered Wage Rates For All Three Years; For 2019 \$23.08, For 2020 \$23.50, For 2021 \$23.92; The Union Maintained Its Position on All Other of the Issues It Specified at the December 19, 2019 Bargaining Session; Prior to Presenting Its Counter-Proposal on Wage Rates, the Union Indicated It Perceived Negotiations Was at an Impasse But, at the Same Time Expressed It Wanted to Continue Bargaining

The Parties Convened a Negotiations Session Whereat, By Memorandum, the City Submitted Its Response to the Union's Position on Wage Rates Proposed at the January 3, 2020 Bargaining Session and Its Proposal to Strike the Term "schedule" From the Management's Rights Clause Indicating The Union's Actions of Moving Backwards From Its Prior Offers Had the Appearance of Not Bargaining in Good Faith; The City Related It Had No Intention to Bargain Against Itself and Reasserted the Proposal It Offered at the January 3, 2020 Negotiations; Additionally, the City Requested the Union to Provide the Rationale for Having Increased Its Wage Rate Proposal Over the City's Offered Increases and Over Its Own Previous Offer of a Reduction in Wage Rates; In Conjunction With This Request, the City Asked the Union to Include the Methodology It Utilized to Arrive at Its Proposed Wage Rates; The City also Requested the Union to Provide an Explanation As to the Rationale For Having Proposed to Strike the term "schedule" From the Management Rights Clause and Explain Why This Proposal Was Not Raised Prior to the December 19, 2019 Negotiation Session; Date of Bargaining Session and Memorandum Dated (CityEx.1)

January 27, 2020

By Memorandum From the Union to City Manager Doug Russell, The Union Addressed the City's Request for Information Wherein It Stated in Pertinent Part the Following: *"The rationale for striking The word "schedule" and premise for the wage proposal were Given at the time it was presented to management at a regularly Scheduled negotiations meeting. Ample time was given for*

January 27, 2020

CHRONOLOGY OF RELEVANT EVENTS (continued)

discussion and any clarifying questions at the time each of these proposals were presented as well as at the meeting on January 27. Local 547 looks forward to the next regularly scheduled negotiations meeting to move toward resolution” (CityEx.2) ⁵

Date the Parties Convened Their Last Negotiation Session	February 3, 2020
By Email, With Attached Letter From Union Counsel Karl J. Englund, this Arbitrator Was Informed of His Joint Selection by the Parties to Preside Over This Subject Interest Arbitration From a List of Arbitrators Provided by the Montana Board of Personnel Appeals; Date of Email and Letter Dated	April 22, 2020
Following the Selection of this Arbitrator, There Ensued a Number of Email Exchanges Regarding the Setting of a In-Person Hearing Date or Dates Taking Into Account the Estimated Length of Time Necessary for the Parties to Make Their Respective Presentations; It Was Decided to Schedule A One Day Hearing Which Was Set for September 22, 2020; That Date Was Canceled Due to the Continuing Pandemic and The Changing Restrictions Associated With Travel and Convening an In-Person Hearing; Thereafter, Communications Between the Parties and the Arbitrator Centered on the Question of Whether to Hold an In-Person Hearing as Opposed To Scheduling a Virtual Hearing; The Union Was Open to Holding a Virtual Hearing Whereas, the City’s Preference Was To Hold an In-Person Hearing. In Order to Better Facilitate Communications Between the Parties and the Arbitrator on How to Proceed on the Matter of Setting Another Hearing Date Into the Future and Whether to Continue Seeking	August 14, 2020 September 1, 2020 November 13, 2020 December 11, 2020

⁵ In its post-hearing brief, the City related that the Parties met briefly in negotiations after January 27, 2020 but did not identify the date of this bargaining session. The date was later identified in the record evidence as February 3, 2020. At this session, the City related the Union did not provide any rationale for its proposals and the Parties discussed proceeding to mediation pursuant to Montana Code Annotated 2019, Title 39, Chapter 34, Part 1, specifically 39-34-101 (2). The City related that the Parties engaged in mediation but did not disclose the dates mediation commenced and ended. By mutual agreement, the Parties opted not to proceed to factfinding after participating in a mediation effort to resolve the issues at impasse. By so agreeing to bypass factfinding, the Parties jointly petitioned the Montana Board of Personnel Appeals for final and binding arbitration. The record evidence is devoid of the date the Parties filed this petition.

CHRONOLOGY OF RELEVANT EVENTS (continued)

An In-Person Hearing, The Arbitrator Conducted Several Video Meetings With the Advocates, Dates Virtual Meetings Were Held

Date, the City and the Union Exchanged Their Respective Pre-Hearing Offers on the Issues at Impasse	December 1, 2020
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Date, Virtual Arbitration Hearings Convened ⁶	December 15, 2020 December 16, 2020
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Date, the City and the Union Exchanged Post-Hearing Offers Also Referenced as Their Final-Final Offers on the Issues at Impasse and Submitted to the Arbitrator	December 23, 2020
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Date, Arbitrator Received Transcript in Two Volumes, First Volume Covering the First Day of Hearing, 324 Pages; and Second Volume Covering the Second Day of Hearing, 199 Pages	January 2, 2021
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Date, the City and the Union Timely Submitted Electronically Their Respective Post-Hearing Briefs to the Arbitrator	January 29, 2021
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Upon Receipt of the Parties' Respective Post-Hearing Briefs, the Arbitrator Deemed the Case Record in These Proceedings to be Officially Closed; Date Record Closed	January 29, 2021
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⁶ Initially, as late as November 12, 2020, the Hearing date of December 15, 2020 was scheduled to convene as an in-person hearing. At the November 13, 2020 video meeting, the Parties and the Arbitrator in recognition of worsening Pandemic conditions, agreed to keep the December 15th hearing date but to change it from an in-person hearing to a virtual hearing to be conducted by video conference.

APPLICABLE MONTANA CODE ANNOTATED 2019⁷

Title 39. Labor

Chapter 31. Collective Bargaining For Public Employees

Part 3. Bargaining

SUBMISSION OF ISSUES TO ARBITRATION

39-31-310. Submission of issues to arbitration. Nothing in **39-31-307** through **39-31-310** prohibits the parties from voluntarily agreeing to submit any or all of the issues to final and binding arbitration, and if such agreement is reached, the arbitration shall supersede the factfinding procedures set forth in those sections. An agreement to arbitrate and the award issued in accordance with such agreement shall be enforceable in the same manner as is provided in this chapter for enforcement of collective bargaining agreements (Jt.Ex.2).

Title 39. Labor

Chapter 34. Arbitration For Firefighters

Part 1. General Provisions

POWERS AND DUTIES OF ARBITRATOR FOR FIREFIGHTERS AND PUBLIC EMPLOYERS (Jt.Ex.2)

39-34-103. Powers and duties of arbitrator for firefighters and public employers. (1) The arbitrator shall establish dates and a place for hearings and may subpoena witnesses and require the submission of evidence necessary to resolve the impasse.

(2) Prior to making a determination on any issue relating to the impasse, the arbitrator may refer the issues back to the parties for further negotiation.

(3) At the conclusion of the hearings, the arbitrator shall require the parties to submit their respective final position on matters in dispute.

(4) The arbitrator shall make a just and reasonable determination of which final position on matters in dispute will be adopted within 30 days of the commencement

⁷ Montana Code cited here specifically applicable to the submission and conduct of an interest arbitration in addition to Montana Code cited on page 2 of this Opinion and Award pertaining to the section, Authority to Arbitrate.

of the arbitration proceedings. The arbitrator shall notify the board of personnel appeals and the parties, in writing, of the determination.

(5) In arriving at a determination, the arbitrator shall consider any relevant circumstances, including:

- (a) comparison of hours, wages, and conditions of employment of the employees involved with employees performing similar services and with other services generally;
- (b) the interests and welfare of the public and the financial ability of the public employer to pay;
- (c) appropriate cost-of-living indices;
- (d) any other factors traditionally considered in the determination of hours, wages, and conditions of employment;

(6) The determination of the arbitrator is final and binding and is not subject to the approval of any governing body.

Title 7. Local Government
Chapter 1. General Provisions
Part 41. Municipalities

CLASSIFICATION OF MUNICIPALITIES (Un.Ex.2)

7-1-4111. Classification of municipalities. (1) Every city having a population of 10,000 or more is a city of the first class.

(2) Every city having a population of less than 10,000 and more than 5,000 is a city of the second class.

(3) Every city having a population of less than 5,000 and more than a 1,000 is a city of the third class.

(4) Every municipal corporation having a population of less than 1,000 and more than 300 is a town.

EXCEPTIONS FROM CLASSIFICATION SYSTEM (Un.Ex.2)

7-1-4112. Exceptions from classification system. Notwithstanding the provisions of 7-1-4111:

- (1) every municipal corporation having a population of more than 9,000 and less than 10,000 may, by resolution adopted by the city council pursuant to **7-1-4114** through **7-1-4118**, be either a first-class city or a second-class city;
- (2) every municipal corporation having a population of more than 5,000 and less than 7,500 may, by resolution adopted by the city council pursuant to **7-1-4114** Through **7-1-4118**, be either a second-class city or a third-class city; and
- (3) every municipal corporation having a population of more than 1,000 and less than 2,500 may, by resolution adopted by the city or town council pursuant to **7-1-4114** through **7-1-4118**, be either a city or town.

Title 39. Labor

Chapter 31. Collective Bargaining For Public Employees

Part 3. Bargaining

MANAGEMENT RIGHTS OF PUBLIC EMPLOYERS (CityEx.17)

39-31-303. Management rights of public employers. Public employees and their representatives shall recognize the prerogatives of public employers to operate and manage their affairs in such areas as, but not limited to:

- (1) direct employees;
- (2) hire, promote, transfer, assign, and retain employees;
- (3) relieve employees from duties because of lack of work or funds or under conditions where continuation of such work be inefficient and nonproductive;
- (4) maintain the efficiency of government operations;
- (5) determine the methods, means, job classifications, and personnel by which government operations are to be conducted;

- (6) take whatever actions may be necessary to carry out the missions of the agency in situations of emergency;
- (7) establish the methods and processes by which work is performed.

OPINION

THRESHOLD ISSUE

In its post-hearing brief following timely submission of its Post Arbitration Final Offer, the Union raised concern regarding the City's predicating its Post Arbitration Final Offer on the condition precedent that the Union agrees to dropping the following proposals from its Pre-Arbitration Final Offer:

- Change to Section 2(c)(ii) – removal of the word “schedule” from the Enumeration of Management Rights clause;
- Addition of language in Section 8(a) – after the word “in” and before the word “Appendix A”, insertion of the words, “this Agreement and in”;
- All language and provisions comprising the addition of new Sections 18 and 19 pertaining to the D-Shift and D-Shift wages into the 2020-2022 Collective Bargaining Agreement.

The Union submits that since it has made no such agreement and therefore the condition precedent has not occurred, the question before the Arbitrator that must be resolved is whether the City's Post-Arbitration Final Offer is off the table and thus, the City essentially proposes absolutely no changes to the contract other than those agreed to in advance of the arbitration.

Noting the history of interest arbitration pertaining specifically to Firefighters and Public Employers under Montana law dating back to the first interest arbitration decision rendered by Arbitrator Carlton Snow in 1981, and continuing through the present time, with apparently no deviation from the methodology applied by arbitrators in adjudicating interest arbitration cases including this Arbitrator in a 2015 case, those cases have always been decided on an issue-by-issue basis.⁸ In this instant case, the City's Post Arbitration Final Offer is not only unique and novel, but also runs counter to the way in which the

⁸ As cited by the Union in its Post-Hearing Brief at p.12, footnote 14, In the Matter of Interest Arbitration between the City of Havre and IAFF 601 (Larney, 2015).

impasse issues are framed, actually preventing the Arbitrator from addressing and ruling on each individual issue at impasse. Specifically, if the Arbitrator were to address the issues as framed by the City in its Post Arbitration Final Offer, the Arbitrator would be barred from ruling on any of the impasse issues pertaining to the D-Shift. This simply is not possible in light of Arbitrator Jeffrey W. Jacobs decision regarding the grievance issue as to whether the City violated the 2016-2019 Collective Bargaining Agreement (Jt.Ex.1) when it implemented a 12-hour per day firefighter/paramedic position here known as the D-Shift. Arbitrator Jacobs ruled it was within the City's Management Rights to implement the new 12-hour per day firefighter/paramedic position but because the new position would be staffed by a bargaining unit member once hired by the Fire Department to fill the position, the City was obligated to enter into negotiations over the wages, hours and terms/conditions of employment for that position (Jt.Ex.3). A review of the bargaining history of negotiations for the successor 2019-2022 Collective Bargaining Agreement as documented in the preceding Chronology of Relevant Events section of this Opinion and Award (see pp. 3-6), reflects that at the second negotiation session held on July 26, 2019, the Union presented its first proposals to the City which included proposals pertaining to the D-Shift including a Wage Rate Schedule for the Shift. While the Union continued to make proposals related to the D-Shift throughout the period of negotiations starting on June 6, 2019 and effectively ending on January 27, 2020, which consisted of nine (9) to ten (10) bargaining sessions, the City never made any counter-proposal pertaining to the Union's proposals for the D-Shift. This resistance on the City's part not to engage in negotiations over proposals by the Union pertaining to the D-Shift must be recognized as not being in compliance with Arbitrator Jacobs' decision and award.

Additionally, seemingly the way in which the City has framed its Post Arbitration Final Offer conflicts with Montana Code Annotated 2019, 39-34-103 Powers and Duties of Arbitrator For Firefighters and Public Employers, sub-point (2) which provides that, "Prior to making a determination on any issue relating to the impasse, the arbitrator may refer the issues back to the parties for further negotiation" (emphasis the Arbitrator). In effect, basing its Post Arbitration Final Offer on the condition precedent the Union drop some of its proposals contained in its Pre-Arbitration Final Offer strikes the Arbitrator as more apropos of a continuation of negotiations as opposed to seeking a final resolution of the impasse issues by decisions rendered in this interest arbitration.

A comprehensive reading of the City's Post-Arbitration Hearing Brief makes crystal clear the myriad objections the City has with regard to any of the checks and balances the Union's proposals are anticipated to have on the flexibility it claims it needs to retain in order to make the D-Shift achieve the goal of having a sufficient level of staffing to meet peak periods for service, mostly ambulance service and to prevent having to temporarily close down Station No. 2, and to drop down to a level of staffing during non-peak periods;

all of which are aimed at operating the Department as economically and efficiently as possible. Such objections articulated by the City with such clarity should have been advanced during collective bargaining in the form of counter-proposals rather than voiced simply in the form of numerous reasons in its Post-Hearing Brief in support of its resistance to any constraints placed on it in implementing and operating the D-Shift. Without specific counter-proposals put forth by the City in its Post-Arbitration Final Offer, the Arbitrator is left no other option than to award the Union's position on each and every issue pertaining to the D-Shift as well as the D-Shift Wage Schedule.

IMPASSE ISSUES AGREED TO SUBSEQUENT TO ARBITRATION HEARING

SECTION 10 – COMPENSATORY TIME

Sub-section b. FLSA STANDARDS

(biii). Firefighters required to work **hours outside** their normal shift will be paid at the rate of time-and-one half **for those hours**, even if they have worked less than 212 hours in the 28 day FLSA period.

- * All other Section 10 provisions remain the same as those appearing in the predecessor 2016-2019 Collective Bargaining Agreement (Jt.Ex.1).

SECTION 13 – SHIFT TRADES

Sub-section a. Shift trades between **shift** employees may be allowed by the employer for either partial or full shifts, provided the trade will not adversely affect the operations of the department

- * All other Section 13 provisions remain the same as those appearing in the predecessor 2016-2019 Collective Bargaining Agreement (Jt.Ex.1).

SECTION 14 – VACATIONS, SICK LEAVE & PERSONAL DAYS

Sub-section f. **forty-eight (48) hours of personal time off** shall be scheduled and approved in advance by the Fire Chief or designee and shall be taken or paid out per calendar year.

- * All other Section 14 provisions remain the same as those appearing in the predecessor 2016-2019 Collective Bargaining Agreement (Jt.Ex.1).

IMPASSE ISSUES REMAINING TO BE RESOLVED IN ARBITRATION

WAGE RATES – APPENDIX A

As indicated in its Post-Hearing Brief, the Union candidly acknowledged the Parties were almost in agreement during bargaining pertaining to proposed increases in base wage rates for the six (6) ranks of Firefighters comprising the bargaining unit. A cursory examination of the wage offers proposed by the Union and the City confirms the Parties' perception that when negotiations concluded they were, and still remain during presentation of their respective Final Offers, pennies apart from each other for all six (6) ranks of Firefighters over all three (3) years of the successor 2019-2022 Collective Bargaining Agreement. As evidenced by the testimony of Union witnesses at the arbitration hearing, the Union was willing during negotiations to accept the City's wage rate offer for all three (3) years of the Contract and remains willing to do so as part of this arbitration but, it is not willing to agree to the City's conditioning acceptance of its wage rate proposal on agreement to also accept the City's methodology for calculating wage rates and incorporating that methodology as part of Appendix A in the Agreement. The Union explained its unwillingness to accept the condition to agree to the methodology on two (2) grounds, to wit: 1) the methodology is both unusual and complex and has not been accepted by other interest arbitrators in fire fighter cases; and 2) the methodology is not solely based on a comparison of actual wage rate data for First Class cities in Montana comparable to Kalispell but rather involves manipulation of wage rate data gleaned from Second Class cities not comparable to Kalispell based on size of population resulting in fictitious rather than actual wage rates.

Based on many years of experience in deciding interest arbitration cases both for firefighters and other bargaining units, the Arbitrator is of the view that wage rate calculations should be based on actual prevailing wage rate data gleaned from cities deemed to be comparable on the basis of population size as well as other factors such as, valuation of property, property taxes, number of employees in the department, services provided to the community such as here, both fire suppression service and ambulance service, and geographic area covered by service provided, to identify just a few. Accordingly, given the Union's willingness to accept the City's wage offer over all three years and rejection by the Arbitrator to adopt that, that acceptance be conditioned on accepting the City's methodology of calculating wage rates and inclusion of that methodology in Appendix A, the Arbitrator awards the City's final wage offer for all three (3) years over the Union's final wage offer; as follows below.

APPENDIX A
WAGE RATES

TITLE	BASE WAGE RATE		
	2019-2020	2020-2021	2021-2022
Probationary	\$20.70	\$21.07	\$21.45
Firefighter 1	\$23.00	\$23.41.	\$23.83
Firefighter 2	\$23.69	\$24.11	\$24.54
Engineer	\$24.15	\$24.58.	\$25.02
Lieutenant	\$25.30	\$25.75	\$26.21
Captain	\$27.60	\$28.09.	\$28.60

For each year of the three (3) year agreement, the following calculations are to accompany the Base Wage Rate table:

Paramedic Pay = 7% of Firefighter 1 wage

EMT – Advanced = 3.5% of Firefighter 1 wage

Team Certification Pay = 2% of Firefighter 1

Longevity = 1.3% of Firefighter 1

* All other language that previously accompanied the Base Wage Rate table has been stricken.

* It has been agreed to that wages will be paid retroactively to each eligible firefighter.

MANAGEMENT RIGHTS

Union's proposal to strike from **Section 2. Recognition, sub-section c. Enumeration of Management Rights, ii** the word, **schedule**.

At the eighth session of bargaining convened on December 19, 2019, the Union presented for the first time its proposal to strike the word "schedule" from the enumeration of Management Rights clause. Unlike its failure to counter-propose the Union's proposals for the D-Shift, the City in the ninth session of bargaining convened on January 3, 2019 questioned the Union's first-time proposal to strike the word "schedule" from the enumeration of Management Rights clause and requested an explanation from the Union as to the reason for its proposal (CityEx.1). A review of the

record evidence reflects the Union's written response to the City's request amounted to a non-response in that, by Memorandum to City Manager Doug Russell dated January 27, 2020 (CityEx.2), the Union stated, "[T]he rationale for striking the word 'schedule' . . . was given at the time it was presented to management at a regularly scheduled negotiations meeting. Ample time was given for discussion and any clarifying questions at the time [the proposal] was presented as well as at the meeting on January 27." Contrary to the Union's position stated in its January 27, 2020 Memorandum that it had engaged in discussion at negotiations and provided a rationale for proposing to strike the word, "schedule" from the Management Rights clause, Fire Chief Dave Dedman testified he was surprised that the Union had made this proposal so late in negotiations as it had never been previously proposed or talked about and asserted the Union really didn't give the City its reasoning for proposing such a change (Tr.Vol.1,p95). Chief Dedman's testimony was corroborated by City Manager Russell's contemporaneously written notes of the January 3, 2020 negotiation session wherein in two separate notations, Russell stated the following: 1) nothing has been proposed that facilitates or warrants us giving up a management right; and 2) nothing has been presented to facilitate or warrant us from modifying our management rights currently in the contract (assignment, efficiency, schedule, etc.) (CityEx.18).

At the Arbitration hearing and as restated in its Post-hearing brief, the Union explained that the word, "schedule" was added to the enumeration of Management Rights at contract negotiations in 2005, and at that time it was the Union's understanding that the term "schedule" permitted Management to maintain the scheduling calendar, making clear the City could assign personnel to any of the then existing three (3) shifts, A, B, and C shifts. According to testimony rendered by Lieutenant Greg Daenzer, when during the 2005 negotiations the Union specifically asked the City if adding the term, "schedule" could be construed that Management would have the right to change shifts at will, the City's response was, that "any changes to our regular shift would require negotiations and to do so without negotiations would be against the law". The Union asserts it eventually dawned on its negotiators that the reason the City would not engage in any discussion of its D-Shift proposals nor make any counter-proposals pertaining to the D-Shift was because the City believed it had wide discretion to schedule employees, that it was not merely the right limited to scheduling the calendar but was now being interpreted by the City as a broad grant of management authority over anything having to do with the schedule. The Union asserted it has no objection to the term "schedule" as it was originally understood and intended and that its motivation for deleting the term from the Management Rights clause is simply to rid the source of the conflict that now exists due to the expanded meaning of the term as presently interpreted by the City.

In its post-hearing brief the City asserted the Union failed to provide any evidence that striking the word “schedule” from the Management Rights clause would in any way be in the public’s interests or welfare. On the other hand, the City maintained it provided ample evidence that retaining the management right to schedule is in the best interests of the public and public welfare, as well as conducting government operations efficiently. With respect to the latter point, Chief Dedman testified that maintaining flexibility in scheduling is in the public’s interest as it allows the City to adequately staff to address call volume and changes in populace, in light of dealing with limited resources. Aside from the many more reasons the City specified in its post-hearing brief for retaining the right to schedule, is the rationale that was provided by Arbitrator Jacobs which rejects the Union’s view that the City exceeded what it understood to be the original and limited right ceded to the City in the 2005 negotiations to schedule the calendar and not to be used for changing shifts. Even if this limited view and interpretation of the management right to schedule once existed, that view and interpretation no longer exists given Arbitrator Jacobs’ decision that supported the right of the City to establish the D-Shift, a shift of twelve (12) hours duration as opposed to the historic shifts of twenty-four (24) hours duration.

Based on the foregoing analysis, the Arbitrator rules to reject the Union’s proposal to delete the term “schedule” from the Enumeration of Management Rights clause of the Collective Bargaining Agreement.

D-SHIFT PROPOSALS

As previously stated on pages 12 to 14 of this Opinion and Award, in addressing the threshold issue raised by the Union, due to the fact the City flouted the decision rendered by Arbitrator Jacobs (JT.Ex.3), by deliberately failing to negotiate wages, hours, and working conditions for the D-Shift position at all times during bargaining for the successor collective bargaining agreement and persisting in its resistance to address all issues pertaining to the D-Shift proposed by the Union by not advancing any counter-proposals in its Post-Arbitration Final Offer, the Arbitrator is left with no other option but to accept the Union’s Post-Arbitration Final offer on all D-Shift proposals. For the purpose of officially recording the Union’s Post-Arbitration Final Offer and the ruling by the Arbitrator to adopt this offer in toto, the following is adopted verbatim:

The following shall constitute a **NEW SECTION 18** Titled, **D-Shift**

- a. Firefighters assigned to D Shift shall be assigned a schedule of any of the following:

- i. Four (4) consecutive ten (10) hour days on duty followed by three (3) consecutive days off;
 - ii. Three (3) consecutive twelve (12) hour days on duty followed by three (3) consecutive days off;
 - iii. Two (2) consecutive twelve (12) hour days on duty followed by two (2) consecutive days off;
 - iv. Two (2) consecutive twelve (12) hour days on duty followed by two (2) consecutive days off followed by three (3) consecutive twelve (12) hour days on duty followed by two (2) consecutive days off followed by two (2) consecutive twelve (12) hour days on duty followed by three (3) consecutive days off; or
 - v. Any other schedule of twelve (12) hour work days as agreed to by the Fire Chief and the Local that does not exceed 43 hours of regularly scheduled work per week
- b. D-Shift start times will coincide with the 24 hour shift start time.
- c. The hourly base wage for D-Shift employees shall be determined according to the following formula: (24 hour employee of the same rank base hourly wage) x 2432 (annual regularly scheduled hours of 24-hour employees) divided by (the number of annual regularly scheduled hours of the D-Shift employee, excluding any overtime or shift trades) = D shift employee's hourly base wage.

In conjunction with the proposal for a new Section 18, **SECTION 8(a)** is amended as follows:

- a. Salaries to be paid by the Employer are set forth in **this Agreement and in Appendix A**, attached hereto and by this reference made a part hereof.

The following shall constitute a **NEW SECTION 19** Titled **D SHIFT IMPLEMENTATION**

Firefighters on D Shift are intended to augment staffing during peak times and not to replace necessary 24 hour shift employees.

A W A R D

<u>Wages – Rates</u>	<u>Adopt City Proposal</u>
<u>Wages – Appendix A</u>	<u>Adopt Union Proposal</u>
<u>Management Rights</u>	<u>Adopt City Proposal</u>
<u>D-Shift Add New Sections 18 & 19</u>	<u>Adopt Union Proposal</u>
<u>D-Shift Implementation</u>	<u>Adopt Union Proposal</u>
<u>Salaries – Section 8(a)</u>	<u>Adopt Union Proposal</u>
<u>Shift Trades</u>	<u>As Agreed to by the Parties</u>
<u>Personal Days</u>	<u>As Agreed to by the Parties</u>
<u>Compensatory Time</u>	<u>As Agreed to by the Parties</u>

* In accord with Section 23. Grievance Procedure, sub-section (a)(iv), the cost for service of the arbitrator shall be shared equally by both parties.

and

* In accord with Montana Code Annotated 2019, Title 39 Labor, Chapter 34. Arbitration For Firefighters, Part 1. General Provisions

39-34-106. Cost of arbitration. The cost of arbitration shall be shared equally by the public employer and the firefighters' organization or its exclusive representative.

George Edward Larney
Arbitrator

March 13, 2021