IN RE ARBITRATION BETWEEN:

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, IAFF # 547

and

CITY OF KALISPELL, MONTANA.

DECISION AND AWARD OF ARBITRATOR
MONTANA BOPA

JEFFREY W. JACOBS

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June 28, 2019

IN RE ARBITRATION BETWEEN:

IAFF, #547,

and

DECISION AND AWARD OF ARBITRATOR
Scheduling grievance

City of Kalispell, MT

APPEARANCES:

FOR THE ASSOCIATION:

Karl Englund, Attorney for the Association
Doug Schwartz, Local Union president

FOR THE DISTRICT

Charles Harball Attorney for the City
Dave Dedman, Fire Chief
Denise Michel, Human Resources and Finance
Doug Russell, City Manager

PRELIMINARY STATEMENT

The matter was heard on May 6, 2019 at the City Offices in Kalispell MT. The parties' briefs were served on June 10, 2019 at which point the record closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement, CBA, for the period of July 1, 2016 to June 30, 2019. The grievance procedure is contained at Article 23. The arbitrator was selected from a list provided by the State of Montana Bureau of Personnel Appeals. The parties stipulated that the matter was properly before the arbitrator.

ISSUES

The Association stated the issue as follows: Whether the City violated the collective-bargaining agreement when it implemented a 12-hour per day firefighter/paramedic position and if so, what is the appropriate remedy?

The City did not submit a formal issue statement in its post hearing brief, but from the evidnece and argument it was apparent that the City saw the issue as follows: Did the City violate any provision of the CBA when it implemented a 12-hour per day firefighter/paramedic position? If so, what is the appropriate remedy?

The issues as determined by the arbitrator are as follows: Did the City violate the CBA when it implemented a 12-hour per day firefighter/paramedic position on the facts of this matter? If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

2 – RECOGNITION

c. Enumeration of Management Rights. Except as provided in this Agreement, management officials of the City retain the rights, in accordance with applicable laws, regulations, and provision of the Personnel Rules and Regulations which are not in conflict with this Agreement, which include, but are not limited to the following:

i. To manage and direct the employees of the City.

ii. To hire, promote, transfer, schedule, assign, and retain employees in positions with the City.

iii. To suspend, demote, discharge, or take other disciplinary action against employees for just cause.

iv. To relieve employees from duties because of lack of work, funds, or other legitimate reasons.

v. To maintain the efficiency of the operations of the City.

vi. To determine the methods, means, and personnel by which such operations are to be conducted.

vii. Organization of City government.

viii. The number of employees to be employed by the City.

ix. The number, types, and grades of positions or employees assigned to an organizational unit, department, or project; provided, however, that ranks and positions existing within the bargaining unit upon the effective date of this Agreement will remain in effect throughout the duration of this Agreement.

x. Internal security practices.

xi. Those matters covered by the Personnel Regulations not in conflict with this agreement.

6. PREVAILING RIGHTS

a. All rights and privileges enjoyed by the employees at the present time, even though not identified in this Agreement, shall remain in full force and effect unless changed within the provisions of 39-31-305 and using the following criteria.

b. Criteria to be used by all parties when evaluating prevailing rights (i.e. past practice):

i. That it is known by both parties as an accepted practice and;

ii. That it has occurred over a period of time and on more than one occasion and;

iii. It has occurred at least once within the preceding contract and;

iv. Readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

ARTICLE 29 DURATION AND TERMINATION

(b) The parties hereto acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter appropriate for collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the City of Kalispell and the International Association of Firefighters, Local #47, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargaining collectively with respect to any subject or matter, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement. All terms and conditions of employment not covered by this Agreement shall continue to be subject to the City direction and control.

APPLICABLE PROVISIONS OF MONTANA LAW

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.

39-31-305. Duty to bargain collectively -- good faith.

(1) The public employer and the exclusive representative, through appropriate officials or their representatives, have the authority and the duty to bargain collectively. This duty extends to the obligation to bargain collectively in good faith as set forth in subsection (2).

(2) For the purpose of this chapter, to bargain collectively is the performance of the mutual obligation of the public employer or the public employer's designated representatives and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising under an agreement and the execution of a written contract incorporating any agreement reached. The obligation does not compel either party to agree to a proposal or require the making of a concession.

ASSOCIATION'S POSITION:

The Association took the position that the City violated Article 6 of the parties' CBA when it unilaterally implemented a 12-hour position without negotiating with the Association over this change. In support of this the Association made the following contentions:

1. The Association noted that the City has two fire stations staffed around the clock providing fire safety and paramedic services to Kalispell and the surrounding area. There are 3 shifts at each station, one of which is on duty at all times.

2. The Association noted that the longstanding scheduling practice has been to have firefighters on duty 24 hours followed by 48 hours off duty with 20 so-called "Kelly days," per year; Kelly days are days off without pay what would otherwise be worked and is generally used to control overtime. Kelly days are also referenced in the CBA of this contract. The firefighters work approximately 46.77 hours per week.

3. The Association also asserted that for literally as long as anyone now in the department could recall, the shifts have always been 24-hour shifts. There have never been 12-hour shifts in this department as long as any can recall. Until 2004 however, there were 4 shifts with a schedule of 24 hours on and 72 hours off. That was changed through bargaining and has been in place until the City's unilateral implementation of the new 12-hour day shift position at issue in this case.

4. The Association also asserted that the shifts in place are more predictable and safer for the firefighters, in that they work with the same people almost all the time and thus know them and are able to trust them in the dangerous situations in which firefighters frequently find themselves. Thus, the shift schedule is of particular benefit to the employees and that they regard their shifts as a term and condition of employment.

5. The Association acknowledged that there are occasionally overtime shifts where a firefighter can work less than 24 hours on overtime. The Association also acknowledged that there are other employees who do not work the 24-hour shifts but noted that the employees are not firefighter sand do not respond to fire or medical emergency calls. They are inspectors who conduct fire prevention inspections and do not work on fire fighting equipment or ambulances as the regular firefighters do.

6. The Association also noted the 24-hour shifts is now something that has become part of the employee's' lives and schedule and allows them to undertake other activities on their days off with some predictability. The 24-hour shifts are thus an "industry standard" worked by most fire departments in the State of Montana and indeed around the country.

7. In 2014 there was an exploration of the concept of dynamic staffing that would have allowed the allocation of staff based on predicted and historical volumes and types of calls in order to better respond to them with the appropriate number of employees without having to call in others for overtime or to call in other departments. The group involved in investigating this issued a report that recommended that the City attempt a mill increase in property taxes but recognized that if the vote failed it would likely result in reduced staffing. The levy increase failed at election and the matter was tabled until 2016 when it was brought up again in the negotiations for the current labor agreement.

8. The Association pointed to this bargaining session and asserted that the City proposed a day shift position, or power shift, as it was termed. And proposed that the City would have the authority to implement a 10- or 12-hour shift for that position. See union exhibit 3, setting forth the City's proposal in relevant part as follows:

> Employees working a day shift will work either 4 12-hour days or 5 10-hour days. The Employer will employ a power shift (i.e. less than 24 hours), pending operational needs. The Employer and the Union recognize a 28-day FLSA cycle. Kelly Days will not be assigned to day shift employee. Employees in service as of July 1, 2016 will not be required to work a day shift though may voluntarily elect to move to day shift based on seniority. New employees may be hired into this shift. Employees on the day shift positions shall not be filled by personnel holding a promotional rank and will not be officers.

9. The Association pointed out that there were many questions asked by Association negotiators at the bargaining session but the City was not able to give clear or definitive answers and that this proposal was specifically rejected and did not find its way into the current CBA. The Association argued that the City is trying to to gain through arbitration what it was not able to gain through negotiation.

10. The Association candidly admitted that its negotiators apparently acknowledged at the bargaining table for the current CBA that the City had the managerial right to propose a day shift,[1] but that the proposal must include specifics on wages hours and other terms of employment, none of which could be provided at the time this proposal was made. There were representations at the bargaining table that if and when the City was prepared to make such a proposal, the local would be more than willing to negotiate the details of the position. The Association though asserted that the local made it clear that it would not accept a unilateral implementation without such negotiation of the new position.

11. The next time there was any discussion of the new day shift position was in 2018 when it became apparent that the City was considering implementation of the new day shift position. This was casually mentioned at a labor management committee meeting but again there were no details on the position provided. The City in fact did exactly what the Association informed the City not to do and unilaterally implemented the new day shift position without discussion or negotiation with the local regarding the wages, hours of other terms of the new day shift position.

[1] See Association brief at page 7 where the Association acknowledged that "Local 547's bargainers informed the City that they understood it was within the City's 'management rights' to propose a day shift position but such a proposal should include specific proposals on the wages, hours and working conditions for the position."

12. The Association noted that it has a very strongly worded maintenance of benefits clause at article 6 of the CBA that requires that all rights enjoyed by employees at the present time "shall" remain in effect unless changes through 39-31-305 – the Montana statute calling for collective bargaining of wages, hours and other conditions of employment. The City failed to comply with that provision of the CBA and with the provisions of Montana law.

13. The Association noted that the 24-hour shifts have been in place for as long as anyone can remember and that the City was without authority to suddenly change that without negotiation.

14. Further, the Association asserted that under Montana law there is a duty to bargain in good faith over the implementation of this new position – at the very least the wages, hours and conditions of employment for that position.

15. Further the Association pointed to the clear past practice in place and argued that the shifts have traditionally been 24-hour shifts and that the City was without authority to implement a new position with a different shift. The 24-hour shifts met all of the criteria set forth in the CBA; it was known, longstanding, readily ascertainable and has occurred without exception for years since at least 1998. The Association cited a long line of cases, commencing with one of the famous Steelworkers trilogy cases, i.e. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960)as well as others from the Courts from around the country in support of the notion that past practice is as much a part of the CBA as any written provision. Here, the language of Article 6 is clear and incorporates the 24-hour shifts as part of the CBA as if it were written into a specific provision. The Association also cited *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974), the contract here incorporates the law into its provisions and asserted that it is clear here that the past practice has effectively been incorporated into the CBA.

16. The Association argued that there is nothing in the CBA that allows the unilateral alteration of that practice and that the 24-hour shifts are essentially sacrosanct and cannot be unliterally changed without negotiation with the union. Citing, *NRLB v Katz*, 369 U.S. 736 (21962) for the proposition that a past practice is a term of employment and cannot be unilaterally changed. It is also a mandatory subject of bargaining. See also, *Milwaukee Spring Division*, 268 NLRB 601, 602 (1984) affirmed 765 F.2d 175 (D.C. Cir. 1985); *Communications Workers*, 280 NLRB 78, 82 (1986), *enforced*, 818 F.2d 29 (4th Cir. 1987); *Chemical Workers*, 228 NLRB 1101 (1977).

17. The basis of much of the Association's argument is that there is a binding past practice that has now effectively created a mandatory subject of bargaining and cannot be unilaterally changed or eliminated without negotiation despite the management rights clause. The language of Article 6 is quite specific and thus overrides the more general language of Article 2 and the management rights provisions of this CBA.

18. The CBA also contains a strongly worded "zipper clause" that protects a party from any claim of refusal to bargaining, but that language does not allow one party to unilaterally alter a clear past practice during the life of the CBA.

19. The Association asserted that even if the City had no obligation to bargaining over the *decision* to implement the new position it clearly had the obligation to bargain the *effects* of that decision as well as to give the Association appropriate notice of the decision and an opportunity to bargain in a meaningful manner and at a meaningful time. See, *First National Maintenance v. NLRB, 452 U.S. 666 (1981)*. The Association made numerous requests to bargain this matter and the City flatly refused. The Association argued that there is no question that the City violated the terms and the spirit of the language of Article 6 as well as failed to uphold its duty to bargain in good faith over the decision and the effects of the new position. The Association reiterated its stance that it is ready and willing to meet with the City to negotiate this issue.

The Association seeks an award sustaining the grievance, informing the City that it did not properly create a day-shift position without first bargaining with Local 547. Further, that the City of Kalispell be ordered to cease and desist from employing a fire fighter in or assigning any fire fighter to a day-shift position and ordered to change the schedule of the recently hired employee to a 24-hour workday.

CITY'S POSITION:

The City took the position that there was no contractual violation that occurred here and that the decision to hire a 12-hour position was within management's rights under the applicable provisions of the CBA. In support of this the City made the following contentions:

1. The City asserted that the decision to implement a new 12-hour position was well within its managerial rights under both the provisions of the CBA and Montana law as well as general labor relations principles. The City cited Article 2 that enumerates specifically that the City has the retained right to determine the number of employees and the types and grades of employees to be hired. There is no limitation on that right other than that the ranks and positions must remain in effect for the life of the Agreement – which they have. See Article 2.c.ix. There is nothing there that requires that employees be hired to the same shift as other employees.

2. Further the City noted that none of the 24-hour shift employees' shifts were affected or changed by the implementation of the new 12-hour shift employee. Thus, there was no violation of the provision of Article 6 nor of any past practice to which the Association continually referred during the hearing.

3. The City noted that the fire department is a 24-7-365 operation and that it must be staffed to meet the needs of the public – sometimes in very fast moving and often dangerous situations where time is crucial to save lives and property. The City maintained that it must have the flexibility to meet those needs when they are most likely to arise in the cost effective, efficient and safe manner.

4. The City noted that the notion of dynamic staffing has been a topic of discussion for several years, having first been brought up as early as 2014. The City noted that this was discussed in order to better meet the needs of the public at an efficient cost while maintaining safe and effective operations for both fire prevention, suppression and emergency medical services.

5. The City noted that after the attempt at increasing the levy was voted down, the department had to make difficult choices about staffing and how to conduct its operations. The City also asserted that in fact there was discussion on multiple occasions with the Association regarding the possibility of a 12-hour shift position as early as 2016 and that the Association was well aware that the City was considering implementing a new position on that basis.

6. The City offered contract language that would have clarified many of the Association's questions – such as whether this would be for new employees only – which the proposal clarified that it would be. Whether it would be offered to officers or promoted position – which the City asserted it would not be. There were also discussions about the wages and hours and how the new 12-hour position would coordinate with existing 24-hour positions.

7. The Association rejected the offer to put this in the contract but acknowledged at the bargaining table that the decision to implement the new position was a management right. The City argued most adamantly that the Association cannot agree during negotiations that the City had the right to schedule members of the bargaining unit as it felt necessary and now claim that the City does not have that right.

8. In 2018, during the budgetary process, the City determined that it would need to implement the 12-hour position and notified the Association of that decision and the City began testing and accepting applicants for the new position. There was nothing hidden about that and the Association was aware of this decision.

9. The City noted too that the 12-hour position is a bargaining unit employee, with the same wages and benefits at those of the 24-hour shift employees. It is simply almost the identical position but with a different shift schedule. The City further asserted that it is needed as a "power shift" to add extra staffing during those times when it is generally needed.

10. The City asserted that the Association could not clearly articulate the provisions of the CBA were allegedly violated nor could it explain at all how the implementation of a 12-hour employee would have impact or effect at all on the existing 24-hour shift employees. The City argued that it is simply clear that it has no effect at all on the 24-hour shift employees' wage hours or conditions of employment. Thus, the specific provisions of Article 6 do not apply – there is no change to any of the existing practice with respect to the employees who were present" at the time the CBA was executed.

11. The 12-hour position is staffed by an entirely new employee whose presence has no effect at all on the 24-our employees other than to benefit them by adding extra help when it is most likely needed. The City noted too that on cross examination, the Association's witness acknowledged too that the new 12-hour employee has "worked well" with the 24-hour employees and is an accepted member of the team.

12. The City claimed that it bargained good faith, provided more than adequate notice to the Association of its intent to implement the new 12-hour position, violated no provision of the CBA, changed nothing with regard to the existing employees and has acted in accordance with both the law and the Agreement throughout this process. It took great care not to impair the rights of any of the existing bargaining unit members and has acted at all times in good faith.

The City seeks an award denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

FACTUAL BACKGROUND

There were few if any factual disputes in this matter. The City's fire department is a 24-7-365 operation and has two fire stations that are staffed full time all the time. There are 3 shifts and it was clear that for many years the affected bargaining employees have worked 24 hours on and 48 hours off shifts with 20 so-called Kelly days. There was evidence that many years ago, there were 4 shifts but since at least 1998 there have been 3 shifts with the above shift schedule.

In 2014, the City and the Association cooperated in an analysis to determine the best way to provide the City's fire protection and EMS services. The group eventually settled on an attempt to raise additional funds by putting a tax levy increase on the ballot before the public. The tax levy increase was voted down.

There was evidence that the group had also discussed a second proposed alternative if the tax levy was voted down. That second option was to increase manpower by establishing a 12-hour shift to be staffed during the peak hours.

There was very little additional discussion of this until 2016 during the bargaining sessions that gave rise to the current CBA. During the negotiations, the City proposed new language that would have created the 12-hour position, as set forth above in the Association's contentions. The Association inquired as to the details of how this new position would work. The overall record showed that while some of the Association's questions were answered at the negotiation session, many were not. As a result, the language did not find its way into the Agreement and the City took no further action to create the 12-hour position until 2018. That language did not find its way into the CBA.

Significantly, there was evidence that the Association's negotiators acknowledged at the bargaining session for the current labor agreement that the City had the managerial authority to implement the new position but the Association balked at the lack of details about how it would work.

This was a major factor in the decision here in that the main issue appeared to be whether the City had the authority to unilaterally decide to implement the new position in light of the provisions of the CBA set forth above.

In 2018 the City began testing for the new position and eventually hired a person for the 12-hour shift. On this record, it was clear that the 12-hour employee is working out well and is an accepted member of the firefighter/EMS team. There was no evidence of any adverse impact that new position has had on any of the 24-hour shift employees.

The union filed this grievance claiming that the City had failed to adhere to various provisions of the CBA and had failed to negotiate the decision to implement the new position. As noted, there were no procedural arbitrability issues and the matter is properly before the arbitrator. It is against that general factual backdrop that the analysis of the matter proceeds.

THE PROVISIONS OF ARTICLE 6

The basis of the Association's claim is that there was a past practice of having 24-hour shifts for the existing employees that was protected from unilateral change, by the provisions of Article 6. It was clear that the practice met the requirements of Article 6 in that it was well known, longstanding, was certainly in place during the requisite periods as set forth in Article 6.

However, the language of Article 6 does not prohibit the City from creating a new position, even with a 12-hour shift. A careful reading of that language reveals that it protects the existing employees, but says nothing about a new employee or a new position. The language says that "[a]ll rights and privileges enjoyed by the employees at the present time, even though not identified in this Agreement, shall remain in full force and effect unless changed within the provisions of 39-31-305." It is specifically designed to protect the existing employees from unilateral changes. On this record, there was no evidence that anything changed with respect to the existing employees, i.e. those who were in place at the time of the execution of the CBA.

The general management rights clause is broad enough to encompass the creation of a new position. This is especially true in light of the acknowledgment by the negotiators at the bargaining table, that the City had the right to implement the new position, but that the details had to be discussed.

On this record, the City's position has merit that the provision of Article 6 calls for "all rights and privileges enjoyed by the employees *at the present time*" (emphasis added), implies that it applies to those employees in place at the time of the signing of the CBA. It does not apply to new employees. Further, and more importantly, no rights of the employees were changed or reduced as the result of the City's decision to implement the 12-hour position. Thus, there was no violation of the provisions of Article 6 of the CBA in that there was no reduction or alteration of the existing benefits enjoyed by the employees in place at the time of the signing of the current Agreement.

What the City failed to do was to comply with the statutory obligation to bargain over the new position, which was both a violation of the Article 6 and of Article 2, the recognition clause, recognizing the Association as the exclusive bargaining representation of the employees covered by the CBA. There was clear evidence that the new position is in the bargaining unit and as such the details of the position, i.e. wages, hours and other conditions of employment must be negotiated with the Local.[2]

This scenario calls into question the age-old issue of "decisional bargaining versus effects bargaining" debate that has been a part of labor relations for many years. It can be summarized as follows: while the employer may have the right to make the decision without negotiation with the union, the effects of that decision well be subject to bargaining. This case presents an almost classic case where that principle applies.

[2] it was significant that there was no evidence that any of the existing employees covered but the CBA had their schedules changed. The new position is for a new employee. Had there been evidence that the City had changed the existing employee's schedule the result here would have been very different. Under such circumstances, the provisions of Article 6 would clearly apply. The difference here is that the existing employees were essentially unaffected by the new position., except as perhaps the availability of overtime or other matters. That is subject to this award and the negotiation process between the parties and will be ordered herein.

Arbitrators and courts have long grappled with this issue. In *First National Maintenance v. NLRB, 452 U.S. 666 (1981),* the Supreme Court held that an employer's decision to terminate a portion of its operations is not a mandatory subject of bargaining. The Court stated, however, that there was "no dispute" that the union representing the affected employees must be afforded "a significant opportunity" to bargain with the employer "over the effects of [such] a decision" and that this bargaining "must be conducted in a meaningful manner and at a meaningful time."

Without getting too deeply into the details of that whole issue, it was clear that the City's decision to implement the new position was within its management right - as the Local's negotiators acknowledged at the bargaining table when it was first proposed. However, it is also clear that the new position is covered by the CBA and that there must be negotiation over the wages, hours and terms of employment for that position. As Montana law discussed at 31-39-303 and .305, there is a duty to bargain in good faith over such matters.

Elkouri sets forth a list of possible topics, some of which may be applicable here, see Elkouri and Elkouri, *How Arbitration Works*, 8th Ed at 13.2.A.i.a, @ pages 13-10 and 13-11. It is left to the parties to determine what topics of negotiation are appropriate here. On this record, it cannot be determined what the topics of negotiation should be but it was clear that the City should have negotiated the details of the new position with the union prior to its implementation. Accordingly, that will be ordered.

The other requests by the Association cannot be granted. The Association requested that the City be ordered to cease and desist from employing a fire fighter in or assigning any fire fighter to a day-shift position and ordered to change the schedule of the recently hired employee to a 24-hour workday. There is no apparent justification for this request and no authority to order it. As noted, the decision to implement the new position, as long as it did not interfere, with the rights of the existing employees under Article 6, is within management's authority.

Moreover, to order such a request would be outside of the arbitrator's authority in light of the management rights clause of the CBA and of Montana statute. Further, the request to change the new employee's schedule would likewise be outside of the arbitrator's jurisdiction to order.

Accordingly, the award is to order that the City immediately negotiate with the Association over the wages, hours and other conditions of employment for the new position. The remainder of the Association's request is denied for the reasons set forth above.

AWARD

The grievance is SUSTAINED IN PART AND DENIED IN PART. The City is ordered to immediately negotiate with the Association over the wages, hours and terms of employment for the new 12-hour shift position at issue in this case. It is determined that the City had the managerial right to implement the new 12-hour day shift position and that the decision to create the new 12-hour position on the facts of this case was within the City's managerial right. Thus, the Association's requests that the day shift position be changed to a 24-hour position and that the City be ordered to cease and desist from employing a 12-hour position must be denied as outside of the Arbitrator's jurisdiction a well as within management's rights.

Dated: June 28, 2019

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Jeffrey W. Jacobs, arbitrator

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