

**BEFORE  
PATRICK HALTER  
ARBITRATOR**

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*In the Matter of Controversy Between*  
**Local #8  
International Association of Fire Fighters**  
**&**  
**City of Great Falls  
Montana**

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Appearances

For the Local:

Tim Hoover  
IAFF Field Representative

For the City:

Sara Sexe  
City Attorney

Jeffrey Hindoien  
Deputy City Attorney

Hearing  
May 11, 2021

Briefs  
June 17, 2021

Issue  
Contract Interpretation

Award  
July 13, 2021

Summary  
Grievance Denied

## BACKGROUND

There is a collective bargaining agreement (“Agreement” - “CBA”) between the International Association of Fire Fighters, Local #8 (“Union”) and the City of Great Falls (“City”) effective July 1, 2019 - June 30, 2021, and a Memorandum of Understanding (“MOU”) effective February 25, 2020. Uniformed positions, such as Firefighter and Captain among others, are the bargaining unit covered by the CBA and MOU. Jay P. Kromarek occupies the bargaining-unit position Firefighter-Engineer. He is a permanent, fulltime employee with twenty or more years of service.

On October 19, 2019, Kromarek and other fire personnel responded to a call wherein he sustained injuries caused by the operator of a motor vehicle driving under the influence. After enduring surgeries, physical therapy and vocational rehabilitation, Kromarek has not been cleared or released for any work.

MCA § 7-33-4133, Payment of Partial Salary Paid to Firefighter Injured in Performance of Duty, required the City to compensate Kromarek for “the difference between [his] net salary . . . and the amount [he] received from workers’ compensation” up to one year (October 2019 - October 2020) or until no longer disabled whichever occurred first.

Article 14, Injury on Duty, states that an injured-on-duty employee “shall be granted leaves of absence with pay” with “such injury leave . . . not . . . charged against the employee’s sick leave or vacation” and “the City shall pay the employee the amount over the Workers’ Compensation insurance benefits he is eligible to receive, not to exceed his total regular salary.”

During the year October 2019 - October 2020, Kromarek’s receipt of workers’ compensation wage-loss benefits (MCA § 7-33-4133) and the paid leave of absence (Article 14) maintained him in fulltime pay status with net salary and accruing sick leave and vacation leave credits.

After the year passed Kromarek continued on workers’ compensation but without the City paid leave of absence. For year two Kromarek used sick leave in an amount equal to one-third net salary to cover the difference between his workers’ compensation and full net salary. The City placed him in partial pay status and pro-rated his accrual of sick leave and vacation time tied to his one-third sick leave conversion.

On December 22, 2020, the Union filed a timely grievance at Step 3 alleging that pro-rating Kromarek’s accrual of sick leave and vacation time based on a partial pay status violated the Agreement. Specifically - -

Article 1.4: Purpose of Agreement (IAFF MOU Biweekly Pay change 2020)

Article 2.1: Recognition

Article 3.1: Non-Discrimination Policy

Article 13.1: Sick Leave (IAFF MOU Biweekly Pay change 2020)

Article 22.3: Vacations (IAFF MOU Biweekly Pay change 2020)

On January 6, 2021, Fire Chief Jones denied the grievance whereupon the Union advanced it to Step 4 with a request to present the grievance to City Manager Doyon. The City Manager directed Deputy City Manager Anderson to meet with the Union. Following the Step 4 presentation and meeting, Deputy Anderson issued findings and a recommendation to Manager Doyon.

On February 16, 2021, Manager Doyon notified the Union that he concurred with Deputy Anderson’s findings and recommendation to deny the grievance.

On February 24, 2021, the Union advanced the grievance to Step 5 and requested a list of arbitrators from the Montana Board of Personnel Appeals. From that list the parties selected the undersigned and agreed to an in-person hearing which convened on May 11, 2021, and afforded each party an opportunity to present evidence, to examine and cross-examine witnesses, and to argue its contentions.

On June 17, 2021, the record in this proceeding closed with the Arbitrator's receipt of post-hearing briefs. Aside from the post-hearing briefs and hearing transcript, the record consists of stipulated facts, joint exhibits, Union exhibits and City exhibit.

### **ISSUES**

The Union's proposed issues follow:

The issue before you is a unilateral change to accrual rates for sick and vacation. It is also allowing the Local 8 to be the exclusive bargaining agent for the members of the Great Falls Fire Department and discrimination against a member.

[Tr. 4-5]

The City's proposed issue follows:

Whether the City's administration of Fire Fighter Engineer ("FFE") Kromarek's statutory sick leave and vacation leave accruals following the expiration of his one-year injured-in-performance-of-duty status violated the terms of the Collective Bargaining Agreement?

[Tr. 5; Br. 1]

### **COLLECTIVE BARGAINING AGREEMENT**

Article 1: Purpose of Agreement  
Article 2: Recognition  
Article 3: Non-Discrimination Policy  
Article 10: Grievance Procedure  
Article 13: Sick Leave  
Article 14: Injury on Duty  
Article 19: Leave of Absence  
Article 22: Vacations

### **MONTANA CODE ANNOTATED**

Title 2, Chapter 18  
Title 7, Chapter 33  
Title 39, Chapter 31  
Title 39, Chapter 71

## SUMMARY OF UNION'S POSITION AND ARGUMENT

The Union's position and argument are set forth in its opening statement, examination and cross-examination of witnesses, exhibits and post-hearing brief.

Called to testify by the Union were the following persons: David Van Son, retired Battalion Chief and former Local 8 President; Jay Jarrett, Captain and Local 8 President. Present during the hearing but not testifying were David Maslowski, District 2 Representative, Montana State Council of Professional Firefighters, and Bruce Perry, Battalion Chief and Local 8 Vice President.

According to the Union, the City violated the CBA when it reduced Kromarek's accrual rates for sick leave and vacation leave and failed to negotiate this unilateral change with the Union. The CBA and MOU specify the accrual rates - - 3.93 hours of sick leave each pay period and 7.71 hours of vacation leave each pay period based on years of service. No provision in the CBA states that an employee's use of sick leave authorizes the City to reduce that employee's accrual rates for leave. Employees are credited for leave at the rates in Article 13 - Sick Leave and Article 22 - Vacations regardless of work status. In this regard, Kromarek receives workers' compensation but remains in fulltime pay status for accruing leave. As for the MOU, it codified the transition from a monthly pay cycle to a biweekly pay cycle. In other words, accrual rates remained unchanged but the pay system adjusted from hours per month to hours per pay period.

Article 2 - Recognition states that "the UNION is the sole and exclusive bargaining agent for the purpose of establishing wages, hours and other conditions of employment for all uniformed members beginning when assigned to a platoon[.]" Kromarek is assigned to "C" Platoon and remains on the Fire Department's roster as a full-time employee. "The City has the obligation to . . . contact the sole and exclusive bargaining agent to change any provision within our collective bargaining agreement that affects any members that is covered under that collective bargaining agreement. . . . the City did not contact us as local representatives to negotiate those changes." [Tr. 63-64]. Should the City seek to change accrual rates for a fulltime employee, MCA § 39-31-305 requires it to bargain collectively in good faith with the Union.

Article 3 - Non-Discrimination Policy states there will be no discrimination against an employee "with respect to compensation, hours or conditions of employment . . . because of characteristics protected by law." The City discriminated against Kromarek by treating him differently than other fulltime firefighters with respect to accruing leave due to his work-related injury. The Union continues to request that the City return Kromarek to duty in a light or modified capacity but the City refuses to authorize a functional capacity evaluation and has not created a job description for Kromarek's physician to review.

Article 13 - Sick Leave states that an employee "shall earn 8.5 hours of sick leave for each month of service" and the transition to a biweekly pay cycle in the MOU shows that an employee "shall earn 3.93 hours of sick leave every pay period[.]" There is no leeway in the CBA or MOU which allows a change to the rates for a fulltime firefighter. The City unilaterally changed Kromarek's accrual rate based on its determination that he is in partial pay status equivalent to part-time employment but there are no part-time positions in the Fire Department. The City's payroll shows Kromarek assigned to a 24-hour shift. Under City policy he is a fulltime employee, that is, assigned 40 hours a week.

MCA § 7-33-4133, Payment of Partial Salary Paid to Firefighter Injured in Performance of Duty is the floor, not the ceiling, for benefits. It states that during year one of injury the City must maintain the injured firefighter in a whole status - - full net salary. The Union states that after year one the firefighter maintains his whole status by using accrued leave (one-third net salary) with workers' compensation (two-thirds net salary).

MCA § 2-18-618 Sick Leave - Death Benefit Payout states that each permanent fulltime employee "shall earn sick leave credits at the end of each pay period." It does not specify the number of hours credited for sick leave; those hours are set forth in the CBA, e.g., 3.93 hours per pay period. Collective bargaining supersedes state law. In this situation the Union negotiated a benefit that is better than the statutory benefit.

Article 22 - Vacations states an employee "shall" receive credits based on years of service and the MOU reflects the same. MCA § 2-18-611 Annual vacation leave states that each permanent fulltime employee shall earn annual vacation leave credits from the first day of employment. The Union negotiated benefits which exceed state law. Kromarek receives 7.71 hours per pay period for his years of service.

In September 2020 Union officials met with City officials. The Union understood that with year one passing the City no longer was obligated to continue Kromarek's paid leave of absence at one-third net salary. To maintain his fulltime pay status in year two, the Union requested that the City allow Kromarek to use sick leave, vacation time, and compensatory time under Article 13.2. The City agreed with the request to use sick leave; however, it placed Kromarek in partial pay status and pro-rated his leave accruals. Kromarek remains in a permanent fulltime position on leave with pay including all benefits and rights under the CBA for a fulltime firefighter.

As for the City's reliance on 56 Att'y Gen. Op. No. 1 (2016), the collective bargaining agreement between Butte-Silver Bow County and LIUNA Laborers Local No. 1686 is not cited in the Opinion or attached to it. The Opinion binds the party that requested it - - Butte-Silver Bow County - - municipalities have not relied on it. The Opinion describes the County as claiming that the contract language conflicted with MCA § 2-18-611(4) ("an employee may not accrue annual vacation leave credits while in a leave-without-pay status") and MCA § 2-18-618(2) ("an employee may not accrue sick leave credits while in a leave-without-pay status"). Kromarek is in a leave with pay status and accrues leave as a fulltime firefighter.

The Union questions the relevance of the Opinion to this grievance since the contract wording is unknown and the cited statutory provisions address part-time employees in leave-without-pay status whereas Kromarek is a permanent fulltime employee in leave-with-pay status. The Opinion states that County policy prohibited an employee from accruing sick leave and vacation credits when receiving workers compensation benefits; however, the policy's text is not cited and City of Great Falls policy does not prohibit leave accrual by an employee receiving workers' compensation benefits. The Opinion shows that an employee on workers' compensation and using sick leave is in a fulltime pay status as this makes an injured employee whole.

Negotiating a contract provision that provides an enhanced benefit does not conflict with the law. This CBA authorizes a change in accrual rates only when the employee is in leave without pay status. An employee on military leave receiving less than fulltime pay status accrual rates, as the City asserts is its policy and practice, never has been disclosed to the Union otherwise a grievance would have been filed.

To cure the City's violations of Article 2 - Recognition, Article 3 - Non-Discrimination Policy, Article 13 - Sick Leave and Article 22 - Vacations, the Union requests the following remedy:

1. IAFF Local 8 requests that FF/Engineer Kromarek be immediately brought up to his contractually obligated rate of 3.93 hours per pay period of sick leave and 7.71 hours per pay period of vacation and have it be retroactive to the first date of change.
2. Find IAFF Local 8 as the sole and exclusive bargaining agent for all uniform members.
3. Immediately cease discriminating against FF/E Kromarek with regards to his disability while performing his duties as a Firefighter Engineer for the Great Falls Fire and Rescue.

[Br. at 15]

### **SUMMARY OF CITY'S POSITION AND ARGUMENT**

The City's position and argument are set forth in its opening statement, examination and cross-examination of witnesses, exhibits and post-hearing brief.

Called to testify by the City were the following persons: Jeremy Jones, Chief, Fire Department; Melissa Kinzler, Finance Director; Gaye McInerney, Human Resources Director; Gregory Doyon, City Manager. Also present during the hearing but not testifying was Charles Anderson, Deputy City Manager.

Kromarek encumbered fulltime pay status for a year (October 2019 - October 2020). During that year he received hourly credits for sick leave and vacation leave at the statutory rate for an employee in fulltime pay status. When he started to use his accrued sick leave, he transitioned from fulltime pay status to partial pay status and the City pro-rated his accrual of sick leave and vacation leave to one-third pay status based on his one-third sick leave usage. The City's actions comport with the law in 56 Att'y Gen. Op. No. 1 (2016):

[Butte-Silver Bow] contends that employees supplementing their workers' compensation benefits as described are entitled to only a prorated accrual of sick and vacation benefits to the extent that the employee is 'in pay status' by virtue of spending accrued sick leave. The Union contends, on the other hand, that the employee is entitled to full accrual of sick and vacation leave benefits during the period of supplementation because the CBA provides that '[d]uring this period of sick leave supplementation, the employee's other benefits will be maintained for the period that sick leave supplementation is available to the employee.'

However, BSB Policy 323 prohibits an employee from accruing sick and vacation leave credits while on workers compensation leave. This conforms with Montana law, which defines 'wages' as not including 'sickness or accident disability under a workers' compensation policy.'

Mont. Code Ann. § 39-71-123(2)(b)(ii); see also Mont. Code Ann. §§ 2-18-611(4) and 618(2) (prohibiting accrual of leave when employee is in 'leave-without-pay' status.) *The employee, therefore, is entitled to leave accrual for the hours of sick leave converted, but is not entitled to leave accrual for workers' compensation benefits received.*

This situation is analogous to a part-time employee. Mont. Code Ann. §§ 2-18-611(3) and 2-18-618(3) both provide that a permanent part-time employee is entitled to prorated leave benefits. *Therefore, it is my opinion that an employee supplementing workers' compensation benefits with sick leave is entitled to accrue vacation and sick leave on a prorated basis for the sick leave hours converted.*

[Emphasis added.]

The City denies violating the CBA because state law governs accrual rates for sick leave and vacation time and not the Agreement. The accrual rates in Article 13 - Sick Leave and Article 22 - Vacations are the statutory rates for sick leave (§ 2-18-618) and vacation (§ 2-18-612). Since sick leave and vacation leave are provided by statute, such leave cannot, as a matter of law, be altered by collective bargaining according to 38 Att'y Gen. Op. No. 116 (1980) ("where benefits are set by statute, the board may not vary them by collective bargaining").

For the year that Kromarek was in the injured-in-the-performance-of-duty status, he accrued sick leave and vacation time at the rate of a fulltime employee as required by law and contract (Article 14.1 - Injury on Duty). After that year passed Kromarek's status for purposes of payroll changed as he no longer received paid leave without any charges against his sick and vacation leave.

In year two the City pro-rated his accrual rates as he used sick leave to supplement workers' compensation wage-loss benefits; pro-ration comports with the law in 56 Att'y Gen. Op. No. 1 (2016) whereas the Union's position ignores Article 22.1 ("[v]acation accumulation and usage will be in accordance with State law and department policy") and Article 13.5.F. ("[a]ll other provisions pertaining to sick leave shall be in accord with applicable federal, state and local law").

The Union maintains that a firefighter accrues sick leave and vacation leave at statutory rates without regard to pay status or service hours. Article 13.1 and Article 22.3 are the statutory rates for sick leave (§ 2-18-618) and vacation leave (§ 2-18-612) when calculated using the 24-48-24-96 hourly work schedules for firefighters in full-time pay status. These rates are not subject to collective bargaining (38 Att'y Gen. Op. No. 20 (1979)). In other words, the City cannot negotiate a provision allowing a firefighter in partial pay status to accrue leave at the statutory rate set for an employee in fulltime pay status. In this situation, accruing leave is pro-rated from the statutory rates and tied to hours of sick leave converted. There is no statutory right to full leave benefits because time receiving workers' compensation is not pay status time as workers' compensation wage loss benefits are not "wages" - - MCA § 38-71-123(2)(b)(ii) - - and not credited for leave accrual. Should Kromarek not use sick leave to augment workers' compensation, he would not receive any accrued leave.

The City did not violate Article 2.1 - - recognition of the Union as exclusive bargaining agent. All communications with Kromarek were copied to the Union or issued directly to Union officials. Since statutory leave is not negotiable, the City did not violate the "unit recognition" clause.

The City did not violate Article 3.1 - - anti-discrimination policy as that policy requires the Union to cooperate with the City to ensure no illegal discrimination occurs. Administration of statutory leave in accordance with law - - 56 Att’y Gen. Op. No. 1 (2016) - - is not discrimination based on a protected characteristic. Testimony of City officials demonstrated that pro-rating leave when an employee is not in a fulltime pay status is consistent with City policy and prior situations. Kromarek has been treated in the same manner as other employees in comparable or similar situations.

In assessing the grievance, Article 10 - Grievance Procedure states that an arbitrator is without authority to render a decision contrary to law. Opinions of the Attorney General are binding on the City and are law until a court of competent jurisdiction determines otherwise. State law entitles Kromarek to accrue statutory sick leave and vacation leave on a prorated basis only for the hours of accrued sick leave used and no accruals for workers’ compensation benefits.

The City “requests that the Arbitrator issue an *Award and Opinion* that SUSTAINS the City’s denial of the Grievance at Steps 3 and 4 and DENIES the Grievance on its merits at Step 5.” [Br. at 15]

### **FINDINGS AND CONCLUSIONS**

The parties agreed in the *Stipulated Facts* that the Arbitrator is to render a decision based on those facts along with applicable arbitral and Montana law as well as the testimony and exhibits in the record. The parties further agreed that the Arbitrator shall retain jurisdiction for ninety (90) days following issuance of an award should the grievance, or any part of it, be sustained.

The parties did not stipulate to an issue for arbitration; however, they authorized the Arbitrator to frame the issue and render a decision on the merits. [Tr. 5-6] After considering the testimony and evidence in the record, the Arbitrator frames the issue as proposed by the Union:

The issue before you is a unilateral change to accrual rates for sick and vacation. It is also allowing the Local 8 to be the exclusive bargaining agent for the members of the Great Falls Fire Department and discrimination against a member.

Labor arbitration is a matter of contract. The role of the parties to a collective bargaining agreement is to determine the value of their exchange and the arbitrator interprets the collective bargaining agreement consistent with the parties’ bargained-for exchange. In this grievance, the parties acknowledge that the bargained-for exchange is a matter of first impression as no injured-on-duty firefighter continued on workers’ compensation and paid leave beyond a year. Regardless of any disagreement over the bargained-for exchange, an arbitrator functions to ensure the primacy of the collective bargaining agreement as the arbitrator owes fidelity to that agreement which establishes the arbitrator’s jurisdiction and authority.

The parties positively affirmed the Arbitrator’s jurisdiction and authority under the CBA in Article 10 - Grievance Procedure, Step 5, ¶ D:

D. Arbitrator’s Authority: In any case where final and binding arbitration is utilized, the arbitrator shall have no right to amend, modify, nullify, ignore, add to or subtract from the terms and conditions of this AGREEMENT, unless those



terms and conditions are found to be contrary to applicable law. The Arbitrator shall consider and decide only the specific issue(s) submitted in writing by the CITY and the UNION and shall have no authority to make a decision on any other issue not so submitted. The Arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modify or vary in any way the application of rules, laws, and/or regulations having the force and effect of law.

The dispute invokes certain articles in the CBA. When interpretation and application of contract wording is at issue, the Union is the responsible party to establish facts supporting its alleged violations of the CBA. The alleged violations affect Firefighter - Engineer Kromarek, a permanent employee in a fulltime bargaining-unit position covered by the CBA. According to the Union, in or around October 2020, the City violated Article 1 - Purpose of the Agreement, Article 2 - Recognition, Article 3 - Anti-Discrimination Policy, Article 13 - Sick Leave and Article 22 - Vacations when it unilaterally decided to place Kromarek in partial pay status and pro-rate his accrual of sick leave and vacation leave. Altering Kromarek's fulltime pay status to partial pay status with pro-rated accruals occurred without notice to or negotiations with the Union.

The facts for year one (October 2019 - October 2020) are undisputed. On October 19, 2019, Kromarek suffered injuries in the performance of duty. Montana law at § 7-33-4133 is definite and mandatory in this situation. That is, a Firefighter - -

injured in the performance of duty must be paid by the municipality the difference between the member's net salary, following adjustments for income taxes and pension contributions, and the amount received from workers' compensation until the disability has ceased, as determined by workers' compensation, or for a period not to exceed one year, whichever occurs first.

In addition to the statutory benefits, the City and the Union agreed in Article 14 - Injury on Duty to an enhanced or increased job protection benefit of a paid leave of absence. Article 14 states that an injured-on-duty employee "shall be granted leaves of absence with pay" with "such injury leave . . . not . . . charged against the employee's sick leave or vacation" and "the City shall pay the employee the amount over the Workers' Compensation insurance benefits he is eligible to receive, not to exceed his total regular salary."

Thus, for the yearly interval October 2019 - October 2020 ("year one") Kromarek was in fulltime pay status and, with fulltime pay status, he accrued sick leave and vacation leave credits at the rates in Article 13 - Sick Leave and Article 22 - Vacations which replicate statutory rates (MCA § 2-18-611 and § 2-18-618). As stated in Article 14.2, the injured-in-the-performance-of-duty fulltime pay status for Kromarek is a "maximum of one year as provided in 7-33-4133 MCA[.]"

By operation of Article 14.2 and its incorporation of § 7-33-4133, effective year two Kromarek was no longer in fulltime pay status because that status was defined by a finite period ("maximum of one year") which had passed. In year two Kromarek used sick leave to cover the difference between workers' compensation wage-loss benefits - - an amount approximating two-thirds of his salary - - and his full salary. Kromarek's conversion of sick leave in an amount equal to one-third of his salary was credited for accruing sick leave and vacation time at one-third of the rates for those benefits. His two-thirds salary in the form of workers' compensation wage-loss benefits was not credited for accruing leave accruals because wage-loss benefits pursuant to a sickness or

accident disability insurance policy are not “wages” (MCA § 39-71-123(2)(b)(ii)). For purposes of payroll administration in year two, Kromarek was in a less than fulltime pay status, e.g., partial pay status, because his fulltime pay status in year one expired and his only creditable hours for accruing sick leave and vacation time were the accumulated hours of sick leave he converted.

Given these findings regarding Article 14 and its linkage to Title 7, the City’s administration of Kromarek’s pay and leave for year two does not violate the CBA. Sick leave accumulated by Kromarek represents paid hours of service. Credited hours of service accessed at a rate of one-third of salary results in pro-rated accruals at one-third of the statutory rates in the CBA. Notwithstanding Kromarek’s partial pay status, the statutory rates and the CBA remain unchanged by the City’s payroll actions. That is, Kromarek remains a permanent employee in a fulltime bargaining-unit position but not assigned to hours of service due to his injury-on-duty.

The Union asserts that leave accrual for Kromarek in year two must be at the rates in the CBA and not pro-rated because receiving those rates occurs without regard to a member’s pay status. Without considering pay status, a member would be credited with accruing leave when in a leave without pay status. This conflicts with Article 19 - Leave of Absence where the Union and City agreed that an “employee shall not accrue any benefits, including, but not limited to, sick leave, vacation, and compensatory time during such approved leave of absence[.]” Arbitral standards of contract interpretation provide that a collective bargaining agreement is construed as a whole, giving effect to all terms with those terms considered in the context from which they have been arise. The Union’s position is assessed under that standard with an unfavorable outcome. A member must be in pay status to accrue leave.

Receiving leave accruals without regard to pay status also collides with the Union’s position expressed in email correspondence that members understand hours in a pay status are compensated and hours not worked are not compensated. In this regard, compensated hours link to earned and accumulated accrual of leave. Firefighters assigned to the scheduled hours receive the statutory rates for leave without pro-ration on a 26-biweekly pay period basis. Also on the 26-biweekly pay period basis is Kromarek but he is unassigned with his leave pro-rated based on his one-third earned and accumulated sick leave conversation.

The parties agree this grievance is a first impression under the CBA. The CBA addresses year one but year two is not addressed. In this situation, the City followed its policy in the absence of contract wording addressing year two. In following its policy, the City did not violate Article 1 - Purpose of Agreement, Article 2 - Recognition, Article 3 - Non-Discrimination Policy, Article 13 - Sick Leave or Article 22 - Vacation. Since the Union has not established the facts to support is alleged contract violations, the grievance will be denied.

### **AWARD**

The grievance is denied.

Patrick Halter /s/  
Patrick Halter

Signed on this 13<sup>th</sup> day  
of July 2021