

IN ARBITRATION PROCEEDINGS PURSUANT TO THE  
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

INTERNATIONAL ASSOCIATION OF	]	
FIRE FIGHTERS, LOCAL 230,	]	OPINION and DECISION
	]	
	Union, ]	of
and	]	
	]	JOHN KAGEL
	]	Arbitrator
CITY OF SAN JOSE, CALIFORNIA,	]	
	]	
	]	
	Employer. ]	August 11, 2008
	]	
	]	Palo Alto, California
Re: Union time off	]	

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APPEARANCES:

For the Union: Christopher Platten, Esq., Wylie, McBride, Jesinger, Platten &  
Renner, San Jose, CA

For the Employer: Brian Hopper, Esq., Office of the City Attorney, San Jose, CA

ISSUE:

The issue as stated by the Union is: Did the City violate the Memorandum of Agreement by prohibiting or interfering with the Union's exercise of its rights to time off; and if so, what should be the remedy?

The issue as stated by the Employer is: Does Article 33 of the Memorandum of Agreement, Minimum Staffing, entitle Local 230's Executive Board members or

designees unlimited City-paid release time for whatever Local 230 claims is Union business. And, if so, then what is the remedy?

**BACKGROUND:**

1987-1996:

Given the issues in this case a lengthy rendition of the background is necessary. In 1987 the Parties agreed to Department-wide minimum staffing in a mediated arbitration award. (Tr. 34, Un. Ex. 1 p. 25) In 1990 interest arbitration a panel chaired by Arbitrator Brand determined minimum staffing was prescribed for each type of fire apparatus. (Un. Ex. 1, p. 18) Five persons could be off without backfilling for minimum staffing for up to four-and-half-hours and five for nine hours. The City in that proceeding also sought to restrict City-paid Union time off (hereafter “UTO”). The 1990 award provided:

“UNION ISSUE NO. 38; CITY ISSUE NO. 40: RELEASE TIME FOR UNION REPRESENTATIVES.

Proposal:

Union: Reject City proposal; maintain status quo.

City:

32.2 – Union’s principal authorized agent(s) shall be allowed release time from usual and customary duties to conduct Union business as provided in Section 9 of the Employer-Employee Relations Resolution #39367. In addition, representatives shall be entitled to release time for Civil Service Commission, City Council and Police and Fire Retirement Board meetings and to attend meetings to which representatives are called by the City or Fire Administration regarding IAFF matters. Additional release time must be approved in advance by the Fire Chief or designee.

Positions of the Parties:

The City proposes permitting release time for the 'principal authorized agent(s)' of the Union in accordance with the Employer-Employee Relations ordinance and for certain other limited purposes. All other release time is to be approved, in advance, by the Chief. The principal reason for the proposal, according to Chief Osby, was a need for greater 'accountability.' He cited no problems that had occurred in the past which the proposal was meant to address.

The Union asserts that 'the City seeks to restrict the activities of Union representatives for reasons unknown, problems not identified and harms unexplained.' It goes on to assert that the City has failed to make any case for this proposal on the basis of a specific problem or comparable jurisdictions.

If the City's proposal is to increase accountability, it fails to do that in any limited way. Rather, it represents a fundamental change in the relationship between the Union and the Fire Chief. In effect, it makes the Union a mendicant, dependent upon the Chief for almost any time to properly represent bargaining unit members. Indeed, if the Chief were to deny the time, the Union would not even be guaranteed time to process a grievance about that denial. The proposal represents a fundamental and sweeping change in the relationship between the parties, for which no justification has been provided. Therefore, the City's position must be rejected." (Un. Ex. 1, pps. 16-17)

In 1996 minimum staffing and UTO were subjects of negotiations raised by the City. (Tr. 37) According to Randy Sekany, Local 230 President negotiating for the Union, the City sought more flexibility in terms of minimum staffing to avoid paying overtime. According to his notes dated August 13, 1996 it was proposed that ten persons be allowed off for nine hours and three Union representatives for nine hours. (Un. Ex. 1, p. 64) Ultimately the Parties agreed to ten persons off for 12 hours to accommodate Paramedic training and three persons off for 12 hours for Union business. (Un. Ex. 1 p. 66)

According to Sekany the Department would use what he described as “their time” for training; the Union would do Union business. Lynn Boland, the City’s lead negotiator, “was explicitly in one caveat and only one caveat [to what could be done as Union business]: That we do not do illegal political activity.” (Tr. 44) As 1996 negotiations continued on September 4 when the agreed-upon language emerged Sekany noted: “Boland – No political activity campaigning etc.” (Un. Ex. 1, p. 79) “It was crystal-clear that that was the one exception, that she said we could not participate in any illegal political activity....‘I can’t and I don’t want to see you out in the park campaigning for a city council member for election in the city.’” (Tr. 46)

The agreed-upon language then is still in the current Memorandum of Agreement, and all Agreements from 1996, as exceptions to mandatory minimum staffing. It reads (renumbered only):

33.2.6 At the discretion of the Fire Chief or designee, and notwithstanding the above provisions, the following vacancies need not be filled:

33.2.6.1 A total of ten (10) employees, absent for twelve (12) hours or less, for reasons related to duties or training within their scope of work, however, no more than two (2) employees may be absent from the same battalion at one time.

33.2.6.2 In addition to section 33.2.6.1, a total of three (3) employees, absent for twelve (12) hours or less, who are Executive Board members or designees, for union business.

33.2.6.3 In addition to sections 33.2.6.1 and 33.2.6.2 no more than one (1) employee may be absent from the same battalion at one time for the following employee initiated absences if less than four and one-half (4.5) hours in duration: medical/dental appointments, family illness, and prescribed therapy; compensatory time off, or vacation.

Vacation and compensatory time off shall be provided, if approved, on a first-come first-served basis, in the event of a tie, seniority shall be the determining factor....” (Jt. Ex. 1)

Sekany testified that the agreement reached in 1996 represented a *quid pro quo*:

“Again, both parties recognized the discussions revolved around the fact that both of us had work to do, whether it was training for the City or Union work that had to be done by the Union, there was a recognition that we both had an exposure to pay.

In the case of the City, it was the time and a half that they would otherwise have to pay if there wasn't this exception to minimum staffing. On the Union side, it was for extended periods of time used to do union business, we would pay shift trades, we would pay somebody to work for us. So there was an economic component that was --- both parties had concerns about.

The Union offered, as a *quid pro quo* compromise, that we would take --- we actually wanted five positions but we were dealt down to three so we had the flexibility to get business done, as well as the City.

Furthermore, we wanted to make sure that this agreement was memorialized because we had reflected back and knew and remembered what the City had attempted to do in 1990. Prior to this agreement, Union business was taken, time off for union business was taken on an as-needed basis and, as far as I know, was not problematic, but given the City's attempt to constrain it back in 1990, we knew we had a gap that we wanted to take care of here and protect and ensure by virtue of having it in writing that we had the right to take this time off and do union business.” (Tr. 48-49)

On cross examination Sekany testified:

“Q. [by Mr. Hopper, City counsel]: I believe you testified on direct that the Union had a right to take leave based on the language in 33.2.6, correct?

A. Correct.

Q. And that the chief would have basically not been able to deny union paid leave, correct?

A. Correct.

Q. Why in the world would that have been under the section with discretion of fire chief?

A. As I said before, the issue was trying to save money. Without these exceptions, the City would have to pay an additional time and a half overtime paid to somebody to replace the person who would be gone, for example, any of these one, any amount. In the first provision, they would have to pay overtime.

Q. If your intent was to provide the Union with a right to leave, why wasn't that more clearly expressed in this language?

A. The parties, as I said earlier, both understood that they both had business to do and the place that was chosen to put it to capture the issue of savings was minimum staffing.

Q. So it was understood but not stated?

A. No, it was stated as well, and understood." (Tr. 83-84)

In her testimony Boland stated with reference to 1996 she had "a vague memory that we had some discussions on minimum staffing, but very vague." (Tr. 73) A memo authored by her to the City Council noted in summary on the status of 1996 negotiations that "added flexibility to minimum staffing requirements." (Tr. 74)

"...I have a vague recollection that we talked about having some flexibility and the ability for --- to not have to replace every time a union officer had to not be on shift. I have a vague memory at that. That's as far as I can go....as I said, I have a vague recollection that we had discussions about not having to replace folks on minimum staffing for attending to certain union business, I have a vague memory of that." (Tr. 76, 80)

When the 1996 Agreement was adopted the Department's language of what is now the Department's Routine Operations Policies and Procedures Section No. 4210 was in the Department's regulations. (Tr. 130, Un. Ex. 1, p. 154) City Resolution No. 39367

“relative to Employee-Employer Relations” were also in effect. (Tr. 131, Un. Ex. 1, p. 182 *et seq.*)

1996-2008:

According to Sekany, and agreed to by the City (Tr. 136), during the years between 1996 and 2008 UTO has, without being questioned (Tr. 32, 95), been used in a variety of ways. Prior to January 2008 the City had no procedure in place with respect to requesting UTO. (Tr. 99) While according to Sekany it is not required to notify the Department of the use of UTO such notification is made by telephone or e-mail for purposes of the payroll system. (Tr. 51-52)

UTO has been used to attend California Professional Firefighters conventions, the CPF being primarily a legislative advocacy group working for the health and welfare of paid professional Firefighters. (Tr. 26, 58, 87-88) Included in that activity is a membership on the Joint Apprenticeship Committee which facilitates and advocates training “for more safe and productive work environments.” (Tr. 27) UTO has also been used for attendees at IAFF national conventions. (Tr. 94)

UTO had been used for Union involvement in community groups such as the East Valley YMCA, and IAFF Burn Foundation raising funds for burn camps and the Valley Medical Center burn center, and a Toys-for-Tots programs including wrapping gifts alongside the Fire Chief. (Tr. 29-30) UTO was used to participate in a charitable golf tournament co-chaired by a city council member or the mayor (Tr. 31) as well as other charitable events. (Tr. 89-90) UTO had been used to release members to do Firefighter training in South America. (Tr. 30) Volunteers have been solicited by the Department for

some of these kinds of events for, according to it, personnel are expected to serve on their own time. (Tr. 104)

UTO was used to advocate, in conjunction with the Chief's office and the City Manager's office, the passage of Proposition A in 2005 or 2006. (Tr. 31) UTO has been used for the San Jose Firefighters Political Action Committee which makes recommendations to the Local's executive officers concerning local candidates and initiatives. (Tr. 85-87)

According to Sekany it is his belief that the Union could use UTO for any purpose that is not precluded by law. No one has brought to his attention that the law has been broken by the use of UTO. (Tr. 85) UTO is not used to engage in electoral campaigning activities supporting specific candidates. (Tr. 94)

The current Fire Chief, when he was a Union member, took UTO when serving as a member of the Local's Executive Board. (Tr. 133-134)

2007 Interest Arbitration:

Interest arbitration was invoked for a successor to the 2003 Agreement before a panel chaired by Arbitrator Jerilou Cossack which rendered its decision in August 2007. The City's last offer with respect to UTO was summarized by it as allowing paid release time for meet and confer sessions with the City or scheduled meetings with Management. "Any other release time must receive prior approval by the Fire Chief and the Office of Employee Relations, via the chain of command of the individual concerned." (Un. Ex. 1, p. 209) The City's brief to the Cossack arbitration panel read:

**"ISSUE 28. UNION RELEASE TIME**

## Argument

### A. Introduction

#### 1. The Department's Policy With Regard To Release Time Should Be Clarified In The MOA

The purpose of 'paid release time' is to allow Union representatives a reasonable opportunity to meet with management during normal working hours on a variety of issues, including grievances, negotiations, and other labor management issues. (Vol. 8 [Gurza] at 1197:8-13.) Although the current MOA references release time in regard to whether members on release time must be backfilled, there are no provisions that explicitly set forth the Department's policies on when and under what circumstances members are allowed paid release time for union activities. (Vol. 8 [Gurza] at 1196:2-8.) This lack of clarity needs to be fixed.

The current practice regarding release time stems from a variety of sources, including the City-wide Employer/Employee Relations Resolution (C-X-35-C), the Routine Operations Policies and Procedures of the Department's policy manual (C-X-34-C), and past practices. The risk of having such divergent sources in determining the application of a release time policy is that the policy has great potential to be administered inconsistently or, possibly, inappropriately.

For example, there is evidence that some Union representatives receive 30 to 40 percent of their compensation in the form of release time. (Vol. 8 [Gurza] at 1199:1-17.) Concerns have also been raised regarding whether members have been using release time for what actually amounts to political activity. (Vol. 8 [Gurza] at 1301:11-15.) Whether this volume and type of release time is appropriate can be better gauged through the establishment of clear policies in the MOA. Because the policies proposed by the City do not substantially alter the policies set forth from other sources, but rather just consolidate and clarify them, there should be no significant change to what is currently allowed as release time.

### Comparability

Having a clear release time policy would also be consistent with the practice of other comparable jurisdictions. It is very typical for labor contracts to contain specific provisions regarding release time, and all large jurisdictions in the Bay Area have terms

dedicated to explaining their particular practice. (Gurza TR Vol. 8 at 1196:5-8 and 1200:15-1201:12; C-X-36-C) The City merely proposes that the MOA with IAFF similarly clarify the release time policy.

The implication by the Union's counsel that some jurisdictions have unwritten 'practices or understandings' regarding release time merely reinforces the need hours [sic] on a variety of issues, including grievances, negotiations, and other labor management issues. (Vol 8 [Gurza] at 1197:8-13.)

- The City recognizes that this provision will be read in accordance with California law to provide release time for purposes such as the investigation of grievances, and that release time under the catchall provisions will not be unreasonably denied.

#### Comparability

- It is very typical for labor contracts to contain specific provisions regarding release time, and all large jurisdictions in the Bay Area have terms dedicated to explaining their particular practice. (Vol. 8 [Gurza] at 1196:5-8 and 1200:15-1201:12; City Exh. 36)” (Un. Ex. 1 pps. 210-211)

In the testimony before the 2007 panel the City's witness, Alex Gurza, Director of Employee Relations, who recognized that the provision relating to minimum staffing in the Agreement provided for UTO (Un. Ex. 1, p. 137), stated that it was necessary to have a policy concerning ...UTO, in addition to the amount of time Union officials may be off on UTO (Un. Ex. 1, p. 140):

“We want to make sure that we stay in line with any issues that could be arised [sic] – that could arise if we don't have clarity on what kinds of issues paid release time can be for.

“For example, we need to be very careful, as an employer, not to have things like political activity, campaigning, things like that, not be really considered paid release time. There are legal issues that come up when you allow that.

“Without any kind of clarity on that, we may have – we may get ourselves, inadvertently, into some issues there.” (Un. Ex. 1, p. 139)

On cross-examination before that panel Gurza testified:

“Q. [By Mr. Platten, Union counsel]: Had you ever had a problem with employees engaging in unlawful political activity on the job?

A. Well, there has been concerns raised, as to whether or not some of the release time, whether it may cross over into political activity.

Q. Have you ever conducted an investigation of any union representative of local 230, on that basis?

A. No. What we’re actually trying to do here is actually prevent an issue and have clear guidance that really provides the road map for the City and the union, to make sure that there really isn’t a problem....” (Un. Ex. 1, p. 144)

According to Gurza,

“We had, in our view, no contract provision that covered release time and the reason for our proposal was to add a section of the contract that would provide clarity on when city-paid time off would be approved or not approved and therefore our goal was to avoid situations like we have today....we were adding a new section...because it is our position that the minimum staffing provision doesn’t give the right to time off, it provides the staffing flexibility.

We were proposing to add a brand new section that would have added, again, clarity as to when it would be approved or not approved.” (Tr. 126-127)

The 2007 panel’s decision stated:

“ISSUE 28: UNION RELEASE TIME, (Articles 49 and 33)

**City Proposal**

ARTICLE 49 UNION RIGHTS

Release Time

Employees of the San Jose Fire Department are not permitted to attend employee organization/Union meetings during working hours.

Paid Release Time is permitted under the following circumstances:

- Attendance at Meet and Confer sessions between the employee organization/Union and the City. The number of such employees is limited by the provisions of the Employee-Employer Resolution #39637 (City Policy Manual, Section 2.1.1).
- Attendance at scheduled meetings with management, such as scheduled grievance meetings by a designated representative of the employee organization/Union.
- Any other release time must receive prior approval by the Fire Chief and the Office of Employee Relations, via the chain of command of the individual concerned.

[Note: This language replaces the language currently in the ROPP]

#### ARTICLE 33 MINIMUM STAFFING

33.2.6 At the discretion of the Fire Chief or designee, and notwithstanding the above provisions, the following vacancies need not be filled:

33.2.6.2 In addition to section 33.2.6.1, a total of three (3) employees, absent for twelve (12) hours or less, who are Executive Board members or designees, for union release time as identified in Article 49.

#### **Union Proposal**

No change. Status quo.

#### **Positions of the Parties**

**The City.** The MOA does not currently set forth City policies on release time, resulting in inconsistent application. In fact, some executive board members spend an average of 12 hours per shift on release time.

The purpose of paid release time is to allow Union representative a reasonable opportunity to meet with management during normal working hours on a variety of issues, including grievances, negotiations, and other labor management issues. The current practice stems from a variety of sources. Because the policies proposed by the City do not substantially alter the policies

set forth from other sources, but rather just consolidate and clarify them, there should be no significant change to what is currently allowed as release time.

Having a clear release time policy would also be consistent with the practice of other comparable jurisdictions. It is typical for labor contracts to contain specific provisions regarding release time, and all large jurisdictions in the Bay Area have terms dedicated to explaining their particular practice.

While the provisions of the proposal contain specific circumstances under which release time will be permitted without prior approval, there is a 'catchall' provisions allowing for release time for other purposes without approval by administration. The City recognizes that this provision will be read in accordance with California law to provide release time for purposes such as the investigation of grievances and that release time under the catchall provisions will not be unreasonably denied. Should the Union ever dispute whether the City is acting reasonably, either PERB or an arbitrator will ultimately have authority to determine whether the City's decision was reasonable.

**The Union.** This, too, was an issued confronted by Arbitrator Brand 16 years ago. The City has failed to make any case in support of this proposal on the basis of a specific problem or concern.

If the City's proposal is intended to increase accountability, it fails to do that in any meaningful way. As Arbitrator Brand held when faced with virtually the identical demand by the City in 1991: 'Rather, [the proposal] represents a fundamental change in the relationship between the Union and the Fire Chief. In effect, it makes the Union a mendicant, dependent upon the Chief for almost any time to properly represent bargaining unit members. Indeed, if the Chief were to deny the time, the Union would not even be guaranteed time to process a grievance about that denial. The proposal represents a fundamental and sweeping change in the relationship between the parties, for which no justification has been provided. Therefore, the City's position must be rejected.'

### **Discussion**

As Arbitrator Brand opined, the City's proposal would profoundly alter the relationship between the parties and would deprive the Union of necessary ability to perform functions within

its obligations of representation. The City has not shown the hours spent on release time by any Union official were improper.

The Union's proposal is adopted." (Un. Ex. 1, pps. 126-128)

January 2008 letter:

On January 9, 2008 Gurza wrote to Sekany:

"Re: City-Paid Release Time

Dear Randy:

This letter is to follow-up with you on the issues of City-paid release time for Local 230 representatives. I would like to assure you that the City has, and will continue to, comply with all applicable laws, regulations and policies regarding paid time off. The City must ensure that City-paid release time away from an employee's normal job duties is being approved in appropriate circumstances.

There are certain types of activities that are clearly important union work, but it may not be appropriate or legal to approve use of City-paid time to participate in these activities. Ensuring that we approve paid time off appropriately is important to avoid any issues regarding the use of City funds.

Under the Meyers-Milias Brown Act (MMBA), the City is required to allow a reasonable number of employee representatives reasonable time off without loss of compensation when formally meeting and conferring with City representatives on matters within the scope of representation. (The relevant sections are attached.)

In addition to the requirements under the MMBA, the City's Employer-Employee Relations Resolution (City Resolution #39367) also provides for reasonable time off to meet-and-confer. The applicable section is as follows:

Section 9. Reasonable Time Off to Meet and Confer. A formally recognized employee organization may select a reasonable number, not to exceed three (3) City employees as representatives of such employee organization to attend scheduled meetings with the Municipal Employee Relations Officers or other management officials authorized by her/him on subjects within the scope of

representation during regular work hours without loss of compensation or other benefits. Where in her/his opinion circumstances so warrant, the Municipal Employee Relations Officer may approve the attendance at such meetings of additional employee representatives with or without loss of compensation or other benefits. The employee organization shall, whenever practicable, submit the names of all such employee representatives to the Municipal Employee Relations Officer at least two working days in advance of such meetings. Provided further that any such meeting is subject to scheduling by City management in a manner consistent with operating needs and work schedules.

Nothing provided herein, however, shall limit or restrict City management from scheduling such meetings before or after regular work hours under appropriate circumstances.

The Department also has a relevant section in the ROPP. Section 4.210 B states:

**Union Meetings:** Employees of the SJFD are not permitted to attend employee organization/Union meetings during working hours.

Exceptions to this policy are:

1. Employees selected to represent the employee organization/Union during the Meet and Confer process. The number of such employees is limited by the provisions of the Employee/Employer Resolution #39367.
2. Designated representatives of the employee organization/Union who represent their respective organization in scheduled meetings with management, such as scheduled grievance meetings.
3. Any other exception must receive prior approval by the Fire Chief, via the chain of command, of the individual concerned.

There are a variety of circumstances where City-paid release time can be approved. Reasonable paid release time can be approved for the following activities:

- Participating in Meet-and-Confer sessions between the Union and the City
- Grievance handling/processing
- Representing employees during investigative interviews, Skelly Conferences, and appeal hearings
- Representing employees during other appeal processes, such as before the Civil Service Commission
- Attending City Labor/Management committees
- Attending City Council meetings when matters affecting the Union are considered
- Attending Police and Fire Department Retirement Board meetings
- Attending Benefits Review Forum (BRF) meetings
- Attending City Labor Alliance (CLA) meetings held with the City Manager or Employee Relations
- Attending meetings scheduled by City or Fire Administration when attendance is requested.
- Attending other approved meetings between labor and City management

The issue of City-paid release time only arises when a union representative is on-duty. (Release time is only granted when the employee is normally scheduled to work.) In these situations, if the designated Union representative finds it necessary to leave assigned duties, the representative must inform the shift's Deputy Fire Chief of the general nature for the release time and receive authorization prior to leaving assigned duties. In urgent situations, approval to leave assigned duties should be requested from the Duty Chief.

The Deputy Chief or the Duty Chief are authorized as representatives of the fire Chief and can approve absences. The Deputy or Duty Chief will provide the authorization to the appropriate Battalion Chief to ensure that the absence from normal duties is properly coded. Upon return to assigned duties, the representative must report back to the immediate supervisor.

Some situations may arise on short notice, such as representing an employee during an investigative interview. However, for pre-scheduled meetings, whenever possible the request for release time should be made 24-48 hours in advance. In all cases, however, the approval must be requested before leaving normal duties.

The number of employees who are granted City-paid release time vary depending on the particular issue. For example, for negotiations, the City's Employer-Employee Relations Resolution (City Resolution #39367) provides for up to three City employees to be granted paid release time. However, the Municipal Employee Relations Officer may approve more than three in particular circumstances, as was done during the last arbitration hearing process.

For attendance at grievance hearings, the MOA has specific provisions regarding paid release time:

20.5.9 Individual grievants shall be released from duty without loss of pay for the time of the arbitration hearing. One (1) spokesperson shall be permitted to be present without loss of compensation for grievances filed by the Union.

20.5.10 Arrangements for release time for grievant's witnesses shall, wherever possible, be made with the Municipal Employee Relations Officer no later than twenty-four (24) hours in advance of the scheduled hearing.

20.9.1 Although grievances may be processed during normally scheduled working hours, the Union agrees that the time spent by its designated representatives shall be kept to a reasonable minimum and that no Union representative shall be entitled to any additional compensation or premium pay for any time spent in processing grievances outside such representative's regularly scheduled hours. The Union also agrees that it will not process grievances during periods of overtime.

For CLA meetings, the City provides release time for up to two City employee representatives per bargaining unit. In most of the situations involving representing an employee, such as grievances and disciplinary matters, normally one City employee representative will be approved for City-paid release time.

Please note that the issues in this letter relate to paid time off granted to union representatives when the union representative is on-duty and the City is providing the paid release time for union business. A Local 230 representative can also arrange for a shift trade or request paid time off such as vacation or comp time to perform union business or participate in other activities that are not covered by City-paid release time. However, even if using comp time or off-duty, City employees should not participate in political activities, such as campaigning, while in uniform.

As you know, Minimum Staffing article of the MOA has a section (33.2.6.2) that provides the Fire Chief with the discretion not to fill vacancies for a total of three union Executive Board members or designees for union business when the absence is 12 hours or less. Although this section provides the Chief with the flexibility not to fill certain vacancies; it is not an automatic approval for 12 hours of City-paid release time per shift.

Since paid release time involves the use of City funds, we must ensure that the release time is only approved in appropriate circumstances. Accordingly, the Union Time Off (UTO) code should only be used in the situations where City-paid release time has been approved. For example, during any particular shift, the time spent on UTO should only be for the duration of the particular meeting (including reasonable travel time) and not for a set period of time. For example, a Skelly Conference may be only an hour, whereas a contract negotiation session may be 4 hours or longer.

We appreciate your cooperation in working with the City on this issue to ensure that City-paid release time is approved in appropriate circumstances. As issues arise about the approval of City-paid release time, please do not hesitate to let me know so that we can work together to resolve them.” (Un. Ex. 1, pps. 213-216)

While Gurza stated that he did not have the *Cossack* panel proposal of the City in mind when he wrote that letter (Tr. 138), Deputy Chief Carter, who was present throughout those proceedings, stated, “I think Mr. Gurza was trying to re-emphasize what was said in the arbitration.” Asked whether the letter was the same in substance to the City’s presentation, Carter stated, “Yes, sir.” (Tr. 107-108) According to Carter the

reason for the letter was that the Fire Chief wanted to be accountable for the actions of the Fire Department members based on City policy:

“I think the fire chief just became more aware of Union Time Off being taken and requests by members to have Union Time Off.”  
(Tr. 100)

Gurza testified that the purpose of sending the letter was to communicate the approval process for UTO paid by the City and the situations under which such paid UTO was allowable. (Tr. 110)

After a meeting on January 22, the Fire Chief wrote Sekany that,

“As in the case of any absence, I hope you understand that the Fire Administration needs to ensure that any time away from normal duties is appropriately approved.” (Un. Ex. 1, p. 217)

On February 12, Gurza wrote Sekany that:

“Please let all Local 230 designated representatives know that the city-paid release time (the ‘UTO’ code) will be approved only in circumstances in which requests for City-paid release time are made in advance to a Deputy Chief or Duty Chief.” (Un. Ex. 1, p. 218)

According to Sekany between January 9 and May 13, 2008 nothing changed with respect to UTO. A series of e-mails from Union members to Management shows notification that UTO was being taken and in some, but not all, such instances the purpose of the UTO was listed. (Er. Er. Exs. 1-3)

On May 13 the Chief denied authorization for Sekany to attend the CPF 2008 convention:

“Since this is not a convention that the City is requiring or approving any employee to attend, the City will not be authorizing an employee to attend the convention at City expense....” (Un. Ex. 1, p. 219)

According to Sekany he authorizes UTO as Union president and until that date no one from the City sought clarification or questioned him regarding any UTO he authorized. There were discussions between the Parties after the January letter seeking to resolve any issues. (Tr. 57, 68)

Grievance and Other Denials:

The denial of UTO for the CPF convention led to the Union filing the grievance in this matter. (Un. Ex. 1, p. 231) The Union sought “immediate arbitration” under the Agreement.

Since that denial other denials have occurred such as to help with the Northern California Jr. Sports Camp, “assisting physically handicapped children to enjoy water sports and cooking a meal for them...” (Er. Ex. 11) and a Lance Armstrong Challenge, another charitable event. (Er. Ex. 12)

POSITION OF THE PARTIES:

Position of the Union:

That the Union did not agree to the terms of the Gurza letter; that it would have

been premature for the Union to file a grievance where the Employer sought a consensus in that letter and the Union did not waive its right to file a grievance; that the Employer cannot unilaterally impose terms and conditions that it sought but was unsuccessful in achieving in interest arbitration; that the City has demonstrated no example of improper or unlawful use of UTO; that the Government Code proscribes the use of public resources for a personal purpose or campaign activity, activities defined in the Code; that it is not a violation to use public resources for informational activities that constitute a fair and impartial presentation of relevant facts to aid the electorate to reach an informed judgment concerning a ballot measure; that attendance at Union conferences and conventions has been recognized as *bona fide* collective bargaining activities under agency fee shop dues collection arrangements as are social activities.

Position of the Employer:

That grievances and arbitrations under the Agreement are limited to its interpretation or application and does not make the Parties' past practice a grievable subject so that an alleged violation of past practice does not support a grievance; that the *Cossack* decision left the Parties to their current practice, did not change the language or interpretation of the Agreement and did not address the issues involved in this arbitration; that the Arbitrator cannot add to the Agreement as shown by Section 20.5.11; that the grievance in this case was not filed within 14 days of the Gurza letter so that it is untimely under the Agreement; that the Agreement provides no process for approving release time and the Arbitrator cannot rely on past practice; that the case is premised almost exclusively on allegations that such practice was violated and past practice claims

are subject to the exclusive jurisdiction of the PERB; that the Parties have agreed to abide by the terms of the Gurza letter; that the Agreement lacks any language for an unfettered right of the Union to take paid release time; that Article 33 refers solely to the Fire Chief's discretion and prerogative to meet minimum staffing; that that discretion is not unlimited because minimum staffing cannot fall below the agreed upon deviations; that that discretion not to fill vacancies created no affirmative right to City-paid release time for Union officials so the City cannot violate the Agreement by denying City-paid time because there is no language that provides the Agreement with such a benefit; that there is no release time provision covering 40-hour employees at all; that the Union admitted that the Chief has discretion regarding whether to grant City-paid release time for such employees and he also has such discretion for 24-hour shift employees; that with respect to bargaining history, while minimum staffing was discussed City-paid release time was not and there was no specific recall of discussions that Article 33 was meant to provide City-paid release time and if the City wanted to do so it clearly would have done so in the Agreement; that extrinsic evidence cannot be introduced to alter or add to the terms of the Agreement; that the City's ROPP and EERR are incorporated into the Parties' Agreement and they provide the circumstances in which City-paid release time is allowed; that the Union's interpretation of the Agreement would render it unlawful so that any non-collective bargaining activity paid for by the City would be a gift of public funds if not authorized by clear and unmistakable statutory language; that the Union has sought City-paid time off without any public purpose and as is expenditure of public

money for political purposes; that City lobbying activities are expressly authorized by law.

#### DISCUSSION:

##### No Waiver:

The City contends that the Union, not filing a grievance when the Gurza letter was sent in January, waived any right to grieve its application in May. The City in its answers to the grievance did not assert that such waiver applied. (*E.g.* Un. Ex. 1, pps. 275-278) Under commonly-understood arbitration procedure the failure to assert procedural claims throughout the grievance procedure does not allow a Party to then successfully assert one for the first time at the ultimate arbitration hearing.

Moreover, the evidence is convincing that the taking of UTO did not change from the pre-January process even after the letter was sent. It was not until the May 13 denial of UTO that the letter was utilized to deny UTO and it was at that point that a grievance concerning it was timely.

Similarly, the contention of the Employer that the Union between January and May agreed with the City to allow the latter to approve or disallow UTO is not found to have merit.

##### Agreement Requirements:

There are two essential elements to the January 13 letter. One is notification that UTO was to be taken. As the record indicated, such notification was routine, although not

as formal as specified. The other element was new: That approval had to be granted either by what the letter itself allowed or, if not specified therein, by the Department on a case-by-case basis.

The Union maintains UTO, allowing for “union business”, is taken as authorized by the Union’s President pursuant to Section 33.2.6.2:

“In addition to section 33.2.6.1, a total of three (3) employees, absent for twelve (12) hours or less, who are Executive Board members or designees, for union business.”

The Employer maintains this provision in the context of Section 33.2.6 concerning minimum staffing is clear in that it provides exceptions to backfilling for up to three 24-hour shift employees at the Fire Chief’s discretion. The Employer also maintains that extrinsic evidence is not relevant to interpret the provision given its view of the clarity of the language of the Agreement section.

The admissibility of extrinsic evidence to interpret contract language is most clearly stated in *PG&E v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33 (1968):

“The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.

A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.

Some courts have expressed the opinion that contractual obligations are created by the mere use of certain words, whether or not there was any intention to incur such obligations. Under this

view, contractual obligations flow, not from the intention of the parties but from the fact that they used certain magic words. Evidence of the parties' intention therefore becomes irrelevant.

In this state, however, the intention of the parties as expressed in the contract is the source of contractual rights and duties. A court must ascertain and give effect to this intention by determining what the parties meant by the words they used. Accordingly, the exclusion of relevant, extrinsic, evidence to explain the meaning of a written instrument could be justified only if it were feasible to determine the meaning the parties gave to the words from the instrument alone.

If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents. 'A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry',...The meaning of particular words or groups of words varies with the '...verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges)... A word has no meaning apart from these factors; much less does it have an meaning, one true meaning.' Accordingly, the meaning of a writing '... can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended.'

Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose. The fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms. That possibility is not limited to contracts whose terms have acquired a particular meaning by trade usage, but exists whenever the parties' understanding of the words used may have differed from the judge's understanding.

Accordingly, rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties. Such evidence includes testimony as to the 'circumstances surrounding the making of the agreement . . .

including the object, nature and subject matter of the writing . . .’ so that the court can ‘place itself in the same situation in which the parties found themselves at the time of contracting.’ If the court decides, after considering this evidence, that the language of a contract, in the light of all the circumstances, ‘is fairly susceptible of either one of the two interpretations contended for . . .’ extrinsic evidence relevant to prove either of such meanings is admissible.” (69 Cal.2d at 37-40, footnotes and citations omitted)

Section 33.6.2 is a provision which refers to “Union business” and its limitation of the number of hours and number of personnel entitled to take it. It is a provision which was specifically negotiated, according to this record, for the purpose of providing UTO. Its bargaining history was uncontradicted as was the bargain which sealed it; not having to backfill on overtime to accommodate UTO. The Employer is incorrect that in the 1996 negotiations there was no negotiation of City-paid release time shown in this record. That Union business was allowed for persons on shift resulted in their being relieved from their regular duties while on the clock and there was no need to backfill for them. There was no mention shown that such relief was without pay.

With respect to practice there was no disagreement that since that Agreement in 1996 there was no challenge to this interpretation of Section 33.6.2 nor how the Parties have applied it until the January 2008 letter. This included attendance at CPF and IAFF conventions and at charitable events that included City sponsorship.

Contrary to a major contention of the Employer this determination is not based solely on practice for UTO is not a Union benefit said to be created solely by or out of practice. The evidence is clear that not only that the language of Section 33.2.6.2 requires the interpretation of “Union business” as the Parties mutually agreed to in 1996 but that

practice under that provision was clear, well known to the Parties and mutually tolerated by them. How the Parties apply an Agreement provision over a long period of time is striking evidence as to how they both mutually interpret what they agreed to, and, as noted there, is no issue here as to how they did so.

A City assertion that Section 33.2.6.2 is incomplete because it does not mention 40-hour Department members as opposed to those on 24-hour shifts has no merit. Section 33.2.6.2 was a well-understood provision, as shown by the Parties' bargaining history and practice for a dozen years, that applies to all UTO. And that practice is as the Union asserts: As long as the activity for which the UTO is used is not illegal it is taken at the discretion of the Union without Department veto with the exception that for 40-hour employees UTO could be denied based on a compelling reason to do so. (Er. Ex. 13) Except on that limited basis the Chief's discretion in Section 33.2.6.2 is whether or not to backfill for the vacancies caused by the Union authorizing UTO to the number of persons specified for the number of hours up to 12.

Contrary to another major Employer assertion in this case, the City, before the *Cossack* panel, admitted that Section 33.2.6.2 was the UTO language on which UTO practice hinged and that that practice was well known to the City. The very Employer effort to have the panel award different language acknowledged these facts in addition to the content of the City's testimony before that panel and that panel dealt directly with the same issue that the City now is seeking to have determined in this case—City preapproval of UTO. There is no question that the Agreement provision in question

encompasses all of the Parties' agreement concerning UTO as they have mutually bargained, mutually understood and mutually applied it.

Seeking in Arbitration What the City Failed to Get in Negotiations:

It is axiomatic that a party cannot gain in arbitration that which it failed to achieve in negotiations. The interest arbitration process of the City is an extension of contract negotiations, bringing to a conclusion that which the Parties themselves could not agree upon as a substitute for economic action by either Party to force an agreement. To suggest that any provision put before an interest arbitration panel is somehow part of a stand-alone legislative process misunderstands its functions; it is the conclusion of the ongoing negotiating process that ultimately defines the Parties' collective bargaining relationship. The considerations of the *Cossack* panel dealing with the same issues that the January letter dealt with has been discussed above and the contention of the City concerning controlling improper use of UTO was specifically considered by it: "The City has not shown the hours spent on release time by any Union official were improper."

Here, as its own witness recognized, the City in January 2008 sought to impose by fiat that which it not only did not get in 1990 in interest arbitration, what it did not seek in 1996 but negotiated away, and what it again did not get in 2007 in interest arbitration. It sought the precise limitations on UTO that its January letter mandates in 1990 and 2007—Department approval for UTO—and lost both times.

The City's attempt to distinguish what it sought but failed to gain in 2007 from what it sought to impose in 2008 fails, and having not gained it in interest arbitration the City cannot gain it through this Contract arbitration. The following colloquy from the

transcript, where the Arbitrator was trying to gain an understanding of the City's position, so illustrates:

“Why did you send the letter at that particular time as opposed to any other time you could have done it?”

THE WITNESS [Mr. Gurza]: There wasn't a magic date about January 9th. We knew that it was something that we needed to address, to put into place, you know, an approval process that went outside the bargaining unit and to get agreement. But why January versus December versus February? There wasn't any necessary magic to that.

ARBITRATOR KAGEL: When did this need arise? Apparently, if what I hear is accurate and I haven't assessed it, for 12 years it went along fine without anybody saying 'boo' about it. Suddenly, now, we have this big issue.

THE WITNESS: I would not necessarily agree with that, that it was going along fine.

The issue was is that there wasn't an approval process that would have allowed the command staff of the Fire Department, including deputy chiefs, assistants to the chief, to know exactly what it was being used for, that it might be used for golf tournaments, charity events. So we knew it was an issue and the fire chief didn't want to simply start denying without having some communication with Local 230 about the situation.

ARBITRATOR KAGEL: There's two issues. One is notice, right, about what's being done?

THE WITNESS: Right.

ARBITRATOR KAGEL: Another is approval, isn't that correct?

In other words, if you really wanted to know what's going on, all you had to do was ask.

THE WITNESS: Correct. And from the City's perspective, it was always subject to approval, that the time off was not like any of the other time off. Whether you take vacation time or go to your children's event, there was an approval process.

ARBITRATOR KAGEL: Can you tell me any instance where there was a disapproval in 12 years?

THE WITNESS: No, because the approval process wasn't in place as it was starting in January.

ARBITRATOR KAGEL: How can you assert that there was an approval process if there was no approval process?

THE WITNESS: Meaning our position was, is that we don't agree that the --- that approval wasn't required. It was simply that it wasn't being administered in that fashion.

Local 230's position is that no approval was even needed.

ARBITRATOR KAGEL: My understanding is that you asked Ms. Cossack to include that in your MOU, is that correct?

THE WITNESS: Correct.

ARBITRATOR KAGEL: And that was not included, correct?

THE WITNESS: That's correct." (Tr. 135-136)

In addition, the contention that in January 2008 the Fire Chief wanted to account for UTO because he had become aware of its usage does not hold up given that the Chief himself used UTO when he was in the Bargaining Unit.

Finally, to the extent the City seeks to rely on its ROPP, the MMBA, and the City's Employer-Employee Relations Resolution, either because they are contended to be incorporated in the Agreement or otherwise, the contents of those documents were before the 1990 arbitration panel, were in effect during the 1996 negotiations, and were again before the 2007 arbitration panel. They, not applying in those instances, cannot be considered to apply to UTO in this case. Neither the Parties in 1996, with the single

caveat prohibiting individual campaigning being agreed to, nor the arbitration panels found the requirement for pre-approval of UTO was required by the Union.

Legality:

The Union acknowledges that UTO cannot be used for activity which would be illegal since UTO is paid for by the City. Except for the condition of campaigning for individual candidates agreed to be banned in 1996 the City, as before the *Cossack* panel, has pointed to no use of UTO that competent authority has determined is illegal activity, including attendance at charity events.

As to allegations that attendance at CPF or IAFF conventions would be illegal, as well as attendance at the charitable events, no such determinations were even expressed by the City when the City disapproved UTO under the Gurza letter (Un. Ex. 1, p. 219, Er. Exs. 11-12), let alone in the dozen years before that.

The City has cited several California Government Code provisions in support of its position that UTO may render any non-collective bargaining activity as a gift of public funds. It has cited no case law dealing with either Union conventions nor charitable event attendance. The Union has cited U.S. Supreme Court decisions that for the purposes of agency fee dues collection those activities are considered to be part of the collective bargaining activities of labor organizations. To the extent the Employer relies on the fact that City funds cannot be used except for a “public purpose,” its recognition that collective bargaining activities are permissible for City-paid release time is just such a purpose.

As in 1990, 1996 and 2007 the City has yet to identify with any specificity any illegal use of UTO. If and when it does it can raise such issues to seek to recoup funds if it successful in its assertions.

To the extent that the City is maintaining, if it does, that UTO might be used for what amounts to criminal activity, such determinations are for the police, District Attorney or other law enforcement agencies in the first instance.

As the record stands, notification of taking UTO is routine, and administratively the City can, provided it does not hamper UTO use, direct that notice to where it believes such notice should be given for its regular operations. And, as noted, the City can ask what the UTO is for after it is used, and, presumably, can challenge the legitimacy of the specific use after the fact if it has cause to do so. But, for all of the reasons outlined in detail above the City cannot prevent the taking of UTO by advanced disapproval, for to do so violates the obligations it has undertaken and the long-standing agreements it has reached with the Union, which it has tried, but failed, to amend.

Ultimately, under the Agreement, the Arbitrator has no authority “to add to, subtract from, change or modify any provision of the agreement.” Rather, as done here, he is “authorized only to apply existing provisions of this Agreement to the specific facts involved and to interpret only applicable provisions of this Agreement.” (Jt. Ex. 1, Section 20.5.11)

Remedy:

The Union, in invoking immediate arbitration of this issue, notes Section 20.6.6 allowing an equitable remedy in this case. Such is given as shown by the Decision below.

DECISION:

1. The letter of January 9, 2008 from Alex Gurza to Randy Sekany is hereby revoked. UTO shall be administered as it had been before that date.
2. UTO denied on and since May 13, 2008 is deemed granted and those denied UTO who used other forms of leave shall have those leaves forthwith restored to them, or if otherwise affected shall forthwith be made whole. The administration of this portion of the remedy is remanded to the Parties, the Arbitrator retaining jurisdiction in the event they cannot agree thereon.
3. The Arbitrator retains jurisdiction pursuant to Section 20.6.6 of the Agreement in the event either Party maintains there has been a violation of the pre-January 8, 2008 *status quo* concerning UTO.

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Arbitrator