AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration

between

PROFESSIONAL FIREFIGHTERS ASSOCIATION
OF NASSAU COUNTY, LOCAL 1588, IAFF

and

VILLAGE OF GARDEN CITY

Case No. 01-17-0000-4034
(Lt. Frank Roca - change in tour hours)

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## OPINION AND AWARD

Pursuant to the terms of a collective bargaining agreement, the undersigned Arbitrator was selected in accordance with the rules of the American Arbitration Association to hear and decide a dispute between the parties. A hearing was held on June 15, 2017, at the offices of the Village in Garden City, New York, at which both parties appeared through counsel who submitted evidence and made arguments. The Union was represented by Richard Corenthal, Esq., and the Village was represented by Terry O'Neil, Esq., and Emily Iannucci, Esq. The parties also submitted post-hearing briefs. Based on the evidence presented and arguments made, the Arbitrator renders this Opinion and Award.

## Issue

The parties were unable to agree to a statement of the issues, so the Arbitrator states the issues as follows:

> (1) Is the Union barred from re-litigating the issue of whether assigning employees to work tours different from the normal tours violates Article III of the collective bargaining agreement?
>
> (2) If not, did the Village violate Article III or Article V of the collective bargaining agreement by assigning Lt. Frank Roca to twelve-hour day tours from 7:30 a.m. to 7:30 p.m. each day he worked? If so, what shall be the remedy?

## Facts

The facts, almost all of which the parties stipulated, are not in dispute. The Village Fire Department is a combined department comprised of paid and volunteer members. In 1974, the Department was made up of 27 firefighters, five lieutenants and one captain. In 1989, the Department was made up of 28 firefighters, five lieutenants and one captain. From 2005 to 2006, the Department was made up of 29 firefighters, five lieutenants and one captain. In 2006, the Village instituted a hiring freeze, and the size of the Department began to decrease through attrition. In 2013, the Village laid off six firefighters, and the Department continued to decrease through attrition. In January of 2017, Lt. Lou Mira retired, giving rise to this grievance. As of Lt. Mira's retirement, there have been 12 paid firefighters and three paid lieutenants in the Department.

Since on or about January 1, 1974, paid firefighters and paid lieutenants have been scheduled to work a regular schedule of

two 10-hour day tours, followed by two 14-hour night tours, followed by four days off. Prior to the 2000-2004 Agreement, the "normal day tour" was from 8 a.m. to 6 p.m., and the "normal night tour" was from 6 p.m. to 8 a.m., but since the 2000-2004 Agreement, when the parties negotiated a half hour change, the "normal day tour" has been from 7:30 a.m. to 5:30 p.m., and the "normal night tour" has been from 5:30 p.m. to 7:30 a.m. However, there were times when the most junior firefighters and the most junior lieutenants served as day firefighters and day lieutenants, and did not work the regular schedule, but on these occasions, their day tours were ten hours, and their night tours were 14 hours.

Prior to in or around 2013, the Village filled vacancies on both the day and night tours when a lieutenant was absent. In or around July 2013, in order to reduce expenses, the Village stopped filling vacancies when a lieutenant was absent on a night tour, but when a lieutenant was absent on a day tour, the Village filled these vacancies and covered the tour with overtime. In or around December 2013, the Village stopped filling lieutenants' vacancies for absences that fell on a holiday or a weekend, and only filled lieutenants' vacancies for absences that occurred on the day tour, Monday through Friday, excluding holidays. In or around June 2014, the Village stopped filling all lieutenants' vacancies. Since on or about February 16, 2016, when a lieutenant is out on an extended sick leave or on vacation, and the absent lieutenant is scheduled to work a day tour, the schedule of the lieutenant scheduled to work that night tour is changed to 7 p.m. to 9 a.m. Since July 15, 2016, the Village

has not assigned lieutenants to modified 14-hour day tours if doing so would incur overtime.

As noted above, in January of 2017, Lt. Mira retired, at the mandatory retirement age of 62. The Village did not replace Lt. Mira, or indicate that it planned to hire a replacement for him, and the number of paid lieutenants decreased from four to three. At this time, effective January 8, 2017, the Village assigned Lt. Frank Roca, the least senior of the three remaining paid lieutenants, to four consecutive 12-hour day tours, from 7:30 a.m. to 7:30 p.m., followed by four days off. All of the other unit members covered by the Agreement continued to work two 10-hour day tours, followed by two 14-hour night tours, followed by four days off. The Union promptly filed a grievance challenging the Village's right to unilaterally eliminate the night tour worked by Lt. Roca, and to change the hours worked by Lt. Roca, and also challenging the Village's failure to pay Lt. Roca for two hours of overtime for each 14-hour tour. The Union asserted that the Village's actions violated the Agreement, and also resulted in personal hardship for Lt. Roca. The Village denied the grievance, leading to this hearing.

At the hearing, in addition to stipulating to the facts set forth above, the parties introduced an Opinion and Award rendered by Arbitrator Jay Nadelbach, dated January 8, 2016, which relates to the issues in this case. In that case, when one of the lieutenants had thumb surgery, and was out for two months, the Village assigned the lieutenant who was scheduled to work the normal night tour opposite the absent lieutenant to work a 7 a.m. to 9 p.m. tour. Arbitrator

Nadelbach upheld the Village's right to change the schedule in these circumstances. In addition, the Village introduced an exhibit of call-in alarms in the Village from 2005 through 2016, showing that 82% of the Village's fire alarms occurred between 7 a.m. and 9 p.m., the Union introduced two exhibits which, among other things, discuss the times when residential building fires are likely to occur, and note that they peak between 5 p.m. and 8 p.m., and the Union made an offer of proof, to which the Village did not object, regarding the extent to which the assignment of four consecutive day tours has adversely affected various aspects of Lt. Roca's personal life.

The pertinent provisions of the Agreement, in relevant part, state as follows:

> Article I - RECOGNITION
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> The Village recognizes the (Union) as the exclusive bargaining agent for all uniformed employees of the Garden City Fire Department ("Department") in the position classification of Firefighter and Fire Lieutenant ("Employees").
>
> Article III - HOURS OF WORK
>
> The workweek shall average forty (40) working hours. The normal day tour shall be from 7:30 a.m. to 5:30 p.m. and the normal night tour shall be from 5:30 p.m. to 7:30 a.m. Employees may be assigned to different tours as required.
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> Article V - OVERTIME
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> Overtime means hours worked in addition to the hours of work provided in ARTICLE III of this agreement. Overtime in excess of an average of forty-two (42) hours a week (tour assigned in addition to those regularly scheduled) shall be paid time and one half the regular rate.
>
> Article XVII - MANAGEMENT RIGHTS
>
> The Village has the exclusive right to manage its

affairs, to direct and control its operations, and independently to make, carry out and execute all plans and decisions deemed necessary in its judgment for its welfare, advancement or best interests. Such management prerogatives shall include but not be limited to the following rights:

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(c) To maintain ... the efficiency of employees.
(d) To determine schedules of work including overtime.

Positions of the Parties

The Union argues that the Village violated the express language of Article III of the Agreement, and a longstanding past practice, by unilaterally changing Lt. Roca's day tours to end at 7:30 p.m. instead of 5:30 p.m. as set forth in the Agreement, and by completely eliminating his night tours as set forth in the Agreement. The Union contends that the parties, by using the phrase "hours of work," and expressly defining the hours for the day and night tours in Article 3, rather than using the phrase "schedules of work" as they did in the management rights provision, confirmed the parties' intention to permit the Village to prepare "schedules of work," but requiring these schedules to adhere to the "hours of work" set forth in Article III. The Union asserts that the Village's interpretation of Article III which would allow the Village to make these unilateral changes in schedules would render Article III meaningless. The Union also asserts that the Village violated Article V of the Agreement by failing to pay Lt. Roca overtime for the two additional hours, i.e., for working 12-hour day tours rather than 10-hour tours, for each day tour he is required to work.

The Union urges the Arbitrator to reject the Village's expansive interpretation of the word "normal" in Article III, which, according to the Village, gives it the right to change hours of tours and eliminate the night tour when a lieutenant retires upon reaching the mandatory retirement age. The Union argues that to accept this argument would give the Village the right to ignore the negotiated 10-hour day tours and 14-hour night tours. The Union contends that the word "normal" should be interpreted consistent with the past practice of the parties that permits limited exceptions for abnormal and unforeseeable situations such as storms or other emergencies, but not for normal, foreseeable situations such as mandatory retirements. In addition, the Union argues that the last sentence of Article III, which states that, "Employees may be assigned to different tours as required," does not permit the Village to eliminate night tours or to change tour hours unilaterally, but only permits the Village to fill in for temporary vacancies.

The Union further contends that any ambiguity in the word "normal" should be resolved by looking at the parties' past practice, which establishes that for over 40 years there have been schedules of 10-hour day tours and 14-hour night tours, unchanged by the previous retirement of lieutenants. The Union also argues that the Village's failure to negotiate these changes is a violation of the Recognition clause of the Agreement which requires the Village to negotiate with the Union changes in the times of the day and night tours. The Union also points out that the Village's reason for making this change is economic, not due to the alleged higher volume of calls during the

day, and, in any event, the evidence shows that there is a greater statistical risk of death to civilians in fires that occur at night, undermining the Village's claim that lieutenants are not needed on the night tours.

Finally, the Union argues that although it disagrees with Arbitrator Nadelbach's Award, the Award supports the Union's position based on the different facts of this case. The Union points out that Arbitrator Nadelbach limited his Award to "unusual, irregular or non-customary situations" that applied to the extended, temporary leave of the lieutenant in that case. The Union maintains that the loss of a unit member due to mandatory retirement does not constitute an "unusual, irregular or non-customary" situation so as to justify "the unprecedented unilateral change of Lt. Roca's schedule to (four) consecutive twelve (12) hour day tours." The Union asserts that any attempt by the Village to disregard the limiting language of the Nadelbach Award should be rejected. For all of these reasons, the Union submits that the grievance should be sustained in its entirety, that the Village's order changing Lt. Roca's tour hours violated the Agreement, that the Village should cease and desist from implementing this order, that Lt. Roca should be paid overtime for the extra hours he worked, and that the Arbitrator should retain jurisdiction of this case to resolve any issues arising under his Award.

At the hearing, during the parties' openings on the arbitrability issue, the Arbitrator stated that the grievance was arbitrable, and that he would follow the reasoning of the Nadelbach Award unless he thought it was "totally wrong." As a result, the

Village did not brief the arbitrability issue. On the merits, the Village argues that it did not violate Article III of the Agreement by assigning Lt. Roca hours of work that are different than the normal day and night tours set forth in Article III, that nothing in Article III suggests or requires that employees work a certain number of normal days tours, followed by a certain number of normal night tours, followed by a certain number of days off, and, as Arbitrator Nadelbach has held, Article III clearly allows the Village to assign employees different tours other than a 10-hour day tour or a 14-hour night tour. The Village notes that although Article III does not require the Village to have a reason for the assignment, the Village assigned Lt. Roca to 12-hour day tours to assure that a lieutenant would be on duty during peak hours. The Village adds that the Union, which has the burden of persuasion, failed to meet its burden.

In addition, the Village argues that a fundamental rule of contract interpretation requires an arbitrator to enforce the clear and unambiguous language of an agreement as written, that the words "normal" and "different" in Article III must be given their ordinary meaning, and that the ordinary definition of "normal," i.e., "usual," "typical," "expected," "standard," are consistent with the Village's position that the language of Article III permits the Village to assign Lt. Roca to day tours as it did. The Village acknowledges that the "normal" day tour, 7:30 a.m. to 5:30 p.m., is the usual day tour, and that the "normal" night tour, 5:30 p.m. to 7:30 a.m., is the usual night tour, but it contends that the word "normal" acts as a modifier to "day" and "night" tour, and implies that there may be

other, different tours that are exceptions to the "normal" day or night tour. The Village points out that Arbitrator Nadelbach agreed with this interpretation of Article III, and that since the Village's interpretation of the word "normal" is consistent with the ordinary meaning of the word, the Village's interpretation should prevail.

The Village further argues that even if the sentence of Article III which uses the word "normal" is unclear and/or ambiguous, the parties' intent is made clear by the last sentence of Article III which states, "Employees may be assigned to work different tours as required." The Village cites Arbitrator Nadelbach's Opinion which states that this language in Article III "recognized the possibility of ... exceptions to the normal tours," and the "flexibility granted to the Village to implement other tours." Accordingly, the Village maintains that it has the contractual right to assign employees to different tours, tours other than the normal tours, as long as doing so is required, i.e., "needed" or "desired," by the Village, and that since the Village reasonably determined, consistent with management's right to maintain efficiency, that it was more critical to have a lieutenant working during peak daytime hours than at night, the Village's interpretation should prevail.

The Village also argues that Article III is not rendered meaningless by its interpretation, that 14 of the 15 unit members continue to work the normal day and night tours, and that the Village has not changed the normal day and night tours, but exercised its right to create an exception to the normal day and night tours "as required." Moreover, the Village argues that the facts of this case

do not warrant a departure from Arbitrator Nadelbach's Award since Arbitrator Nadelbach's language limiting the Village's ability to make assignments to work tours other than the "normal" day or night tours to "unusual, irregular or non-customary situations" is *dicta*, and should not be given any weight. The Village asserts that there was no basis for Arbitrator Nadelbach to conclude that the Village may only assign employees to work different tours under "unusual, irregular or non-customary" circumstances, and that, in any event, the assignment to Lt. Roca was reasonable, and the normal 10-hour day tour for 14 of the 15 unit members remains unchanged.

The Village makes several other arguments, that nothing in the Agreement prevents the Village from assigning members to work steady day tours and/or steady night tours, that the management rights clause gives the Village the right to determine schedules of work, that the parties' past practice and bargaining history are irrelevant, especially since the language of Article III is clear and unambiguous, that when the parties wanted to change the tour hours, they negotiated the change, and that the management rights clause gives the Village "the exclusive right to manage its affairs," including, among others, the right "To maintain ... efficiency of employees," and "To determine schedules of work including overtime." The Village also points out that if the Union wanted the right to negotiate changes to all tours, it should not have agreed to the language in Article III and in Article XVII which give the Village the unilateral right to determine schedules of work and to assign employees to work different tours as required.

Finally, the Village argues that even if the grievance is sustained, there is no suitable remedy. The Village states that it is sympathetic to the hardships that Lt. Roca has experienced, but maintains that its actions are permissible under the Agreement, and the Village notes that the total number of hours Lt. Roca has worked are unchanged, and he is not entitled to overtime under Article V because he did not work any hours in addition to the hours provided by Article III. The Village submits that for all the reasons set forth, the Village did not violate the terms of the Agreement, and that the Union's grievance should be denied.

## Discussion

Although the parties did not brief the arbitrability issue, the Village because the Arbitrator stated at the hearing that, in his view, the issue clearly was arbitrable, the Arbitrator will address it since it is stated as an issue in this case. Even if the facts here were identical to the facts in Arbitrator Nadelbach's case, the Union would have the right, unless there is language in the Agreement to the contrary, and none was cited, to arbitrate the identical issue again. However, as the Arbitrator noted, unless the first arbitrator is totally wrong, i.e., unless there is no rational basis for the first arbitrator's decision, succeeding arbitrators will follow the earlier ruling in an effort to maintain the stability of the parties' relationship. Furthermore, as the Union has pointed out, there are factual differences between this case and the case before Arbitrator Nadelbach which, in any event, would permit the Union to arbitrate

the issues presented in this case.

As to the merits, the language of Article III states that, "The normal day tour shall be from 7:30 a.m. to 5:30 p.m. and the normal night tour shall be from 5:30 p.m. to 7:30 a.m." There is no dispute that for more than 40 years, the regular normal schedule of employees in the Department was two 10-hour day tours, followed by two 14-hour night tours, followed by four days off, and there is no dispute that until the assignments that led to Arbitrator Nadelbach's Award, there were times when the most junior paid firefighters and most junior paid lieutenants were assigned to other than the regular schedule, but their day tours were 10 hours and their night tours were 14 hours. There is also no dispute that Arbitrator Nadelbach held that the word "normal" in Article III permitted the Village to assign employees to tours that were different than the "normal" tours set forth in Article III.

As the Village points out, there is no language in the Agreement which requires the Village to assign employees to a certain number of day tours, followed by a certain number of night tours, followed by a certain number of days off. Although the Village has, for more than 40 years, almost uniformly assigned employees a regular schedule of tours of two 10-hour day tours, followed by two 14-hour night tours, followed by four days off, this is not a binding past practice, i.e., as Arbitrator Harry Shulman explained years ago, it is the "present" practice, not a "prescribed" practice. In other words, although the Village has followed a scheduling practice for many years that has suited the existing circumstances, nothing in the

Agreement prevents the Village from changing employees' schedule of day tours, night tours, and days off. Article III of the Agreement simply sets forth the hours of the normal day and night tours, but it does not require the Village to assign any specific schedule. In fact, Article III states that "employees may be assigned to different tours as required." Thus, the Village did not violate Article III by assigning Lt. Roca to four day tours and no night tours.

However, Article III clearly and unambiguously states that, "The normal day tour shall be from 7:30 a.m. to 5:30 p.m. and the normal night tour shall be from 5:30 p.m. to 7:30 a.m." As noted, the language of Article III was interpreted by Arbitrator Nadelbach. In doing so, Arbitrator Nadelbach found that the parties intended for the word "normal" to have meaning, that there was no other reason for the parties to use the word. As Arbitrator Nadelbach stated, the parties use of "normal" in Article III was a "clear intention to describe what the normal -- the usual, regular, or customary -- tours shall be. By definition, there may be occasions -- in unusual, irregular, or non-customary situations -- that a different tour could be scheduled and assigned." Arbitrator Nadelbach then held that the word "normal," and the sentence, "Employees may be assigned different tours as required," in Article III, gave the District the right to schedule a lieutenant to work day tours from 7 a.m. to 9 p.m. instead of the normal night tour from 5:30 p.m. to 7:30 a.m. during the time that another lieutenant was out on extended leave or on vacation.

The parties, while not necessarily agreeing with everything Arbitrator Nadelbach said, considered his decision a reasonable one,

and this Arbitrator agrees that Arbitrator Nadelbach's interpretation of Article III is rational, and should be followed. The Village contends that Arbitrator Nadelbach's definition of "normal" is *dicta*, that it goes beyond the facts of that case, but this Arbitrator finds that Arbitrator Nadelbach's definition of "normal" is not *dicta*, but a direct application of the contract language to the facts, and that his definition of "normal," and his interpretation of Article III, should be, and will be followed by the Arbitrator in this case. As a result, and notwithstanding the management right of the Village to set work schedules, this Arbitrator has concluded that by assigning Lt. Roca to a "normal" tour from 7:30 a.m. to 7:30 p.m., the Village has violated Article III of the Agreement.

The Village suggests that it has complied with the plain language of Article III, which states that the hours of a normal day tour are from 7:30 a.m. to 5:30 p.m., by scheduling the other 14 paid firefighters and lieutenants to work the normal tour hours, but the ordinary reading of Article III requires that each employee "shall be" assigned to the normal day and night tours. Here, the Village scheduled Lt. Roca a normal day tour of 7:30 a.m. to 7:30 p.m. on a regular basis, which appears to be a violation of Article III on its face. Thus, the burden shifts to the Village to show that the tour hours it assigned to Lt. Roca was "required," that, as Arbitrator Nadelbach held, the situation is one of the "occasions -- in unusual, irregular, or non-customary situations -- that a different tour could be scheduled and assigned."

However, the Village has shown nothing unusual, no

emergency, no lieutenant who is out on a temporary leave or vacation, no event other than the Village's decision to not replace a retiring lieutenant, that required the Village to assign Lt. Roca to a normal tour outside the normal tour hours set forth in Article III. In sum, this Arbitrator agrees with Arbitrator Nadelbach's decision, which gives meaning both to the clear and unambiguous normal day tour and night tour hours language, and to the language of the last sentence of Article III which permits the Village to assign different tours as required "in unusual, irregular, or non-customary situations."

As to remedy, since the Village violated Article III by its assignment of a 12-hour day tour to Lt. Roca, the Village shall be required to cease and desist from assigning Lt. Roca a normal tour outside the tour hours set forth in Article III, i.e., the Village shall cease and desist from assigning Lt. Roca tours other than the normal day tour from 7:30 a.m. to 5:30 p.m. and the normal night tour from 7:30 a.m. to 5:30 p.m. However, the Union has not established that the Village violated the overtime provisions of Article V since there is no evidence that Lt. Roca's assignment required him to work "in excess of an average of forty-two (42) hours a week." Therefore, based on the facts and circumstances of this case, and for the reasons explained, the Arbitrator issues the following

## Award

The Union is not barred from re-litigating the issue of whether assigning employees to work tours different from the normal tours violates Article III of the Agreement. The Village violated

Article III, but not Article V, of the Agreement by assigning Lt. Frank Roca to a regular tour of 12-hours from 7:30 a.m. to 7:30 p.m. each day he worked. The District shall cease and desist from assigning Lt. Roca to 12-hour tours from 7:30 a.m. to 7:30 p.m., and shall assign him to the normal day and normal night tour hours as set forth in Article III.

It is so ordered.

Richard Adelman
RICHARD ADELMAN

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK)

I, RICHARD ADELMAN, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is my Award.

Dated: August 17, 2017

Richard Adelman
RICHARD ADELMAN