

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the matter of a Grievance Arbitration  
between

**CITY OF ALBANY, NEW YORK**

- and -

**ALBANY PERMANENT PROFESSIONAL  
FIREFIGHTERS ASSOCIATION, LOCAL 2007**

**OPINION and AWARD**

PERB Case No. A2018-333  
ARB19-024

Hon. Bruce S. Trachtenberg, fJTC  
Arbitrator

(Personal leave—Brian Thorpe, Grievant)  
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Pursuant to the Collective Bargaining Agreement and the Voluntary Grievance Arbitration rules as administered by the Public Employment Relations Board (PERB) the parties appointed Bruce S. Trachtenberg, former Town Justice, arbitrator in the above-captioned matter as indicated in the Arbitrator Designation letter issued by PERB on the 26<sup>th</sup> day of 2019. By Stipulation of the parties the hearing commenced on the 19<sup>th</sup> day of March 2019 at the first floor classroom and the Chief's conference room at the Albany Fire Department Headquarters, 26 Broad Street, Albany, New York.

The arbitrator attempts to take testimony down verbatim, but may not be precise unless in quotation marks. In any event the following testimony is that which the arbitrator heard. All witnesses were sworn.

At approximately 11:00 a.m. the advocates discussed the issues proposed and arrived at the following STIPULATED ISSUES:

1. Did the City of Albany require Lieutenant Brian Thorpe to use compensatory time to take time off for a personal matter?
2. Was Lieutenant Brian Thorpe's matter an urgent personal matter?
3. If so, did the City of Albany violate Article 10 of the Collective Bargaining Agreement of the parties in requiring Lieutenant Brian Thorpe to use compensatory time in order to take time off for an urgent personal matter;
4. If so, what is the appropriate remedy?

Arbitrator: clearly impacts more than the individual grievant

**APPEARANCES**

City of Albany  
PEACHIE L. JONES, ESQUIRE  
Chief Joseph W. Gregory  
Deputy Chief Maria Walker

Albany Permanent Firefighters Association  
THOMAS J. JORDAN, ESQUIRE  
Lieutenant Robert Mengel, President  
Firefighter Edward Verhoff, Vice President  
Kevin McGear, Union Secretary  
Lieutenant Brian Thorpe, Grievant

Exhibits

- JOINT EXHIBIT 1 Collective Bargaining Agreement dated 2010-2011; Opinion and Award dated 2012-2013; Memorandum of Agreement 2014-2017; and Memorandum of Agreement dated 2018-2022  
JOINT EXHIBIT 2 Grievance (one page, January 18, 2019) Annexed hereto  
JOINT EXHIBIT 3 Letter declining restoration of compensatory time dated January 16, 2019

Personal time is in the discretion of the Chief so the firefighter must give a reason; some chiefs may not require a reason and some do.  
Sequestering witnesses: Union President and Grievant may be present notwithstanding that they will be witnesses; Firefighter Verhoff will be sequestered until such time as he testifies; The City may have both Chiefs present notwithstanding that they may testify.

City reserves right to make an opening statement for the start of the City defense.

OPENING STATEMENT

Thomas Jordan –represents union and all paid firefighters, all but the Assistant Chief, Deputy Chief and Chief, Grievance concerns granting of personal leave and whether the denial was arbitrary

Friday December 28<sup>th</sup> the grievant asked for personal leave for a Hudson Supreme Court appearance on the following Tuesday January 2, 2019. Made the request of DC Walker, who denied it ; may need to take more than four hours

Was told that he must use your comp time for 4 hours and I will grant you personal leave for any amount over 4 hours; he had used personal leave 2 times in October and another date in 2017

This was his fourth request in 18 months; none of the prior requests were denied due to having comp time

He gets to choose when to use the comp time as long as he gives more than 48 hours notice to the Chief or his designee, which ever chief is on duty at the time

When the union officials were told of it, they had never heard of it before

Remedy: wants his 4 hours of comp time restored

And if this is a new policy, must be negotiated

Violates past practice AND the contract

FIRST WITNESS CALLED

by the arbitrator: Edward Verhoff, Firefighter  
firefighter in the city of Albany  
12 years  
union officer–vice president; Two years

Direct examination

prior to vice president he was secretary for one year  
back ground on Albany F.D.  
260 FF at full staff, now 255

each shift works 24 hours—A,B,C and D shifts—four shifts  
Joint 2 shown to the w, who is the one who signed the grievance  
LT Thorpe had called and requested the leave; he was told to use Comp Time by the  
Deputy Chief Walker since he had comp time  
felt it was a violation of Article 10—Chief has the discretion but cannot unreasonably  
deny, if it is an urgent need  
Lt. Thorpe spoke with w.; he has requested time before, and had never been told to use  
comp time first  
Section 10.1 speaks to personal time  
3.2.1 speaks to compensatory time  
person accrues it by working overtime; person can take the pay at 1 ½ times his pay  
and cannot use it on Christmas Eve or Christmas Day; As long as you give 48  
hours notice you can use your comp time  
Has w. has any experience with respect to time off  
W's wife had to have unexpected but routine surgery  
Battalion chief told him it was less than 48 hours and therefore he could  
not use the comp time; Deputy Chief said he could use personal leave time  
What remedy is the union looking for  
wants to see the 4 hours of comp time returned  
AND want the command staff to not ask union members to use comp time when  
requesting leave time

Cross examination

do you know how Lt. Thorpe submitted his request?  
Made it by telephone call  
w was not on the phone call  
all of w's information came from grievant  
Who was the chief before Chief Gregory? Chief Abriel  
Is w. aware of all of the leave time requests made to Chief Abriel? No  
Not aware of how many requests were made of Chief Gregory for leave time  
by the arbitrator: July 27, 2018—Chief Gregory was made acting chief when Chief  
Abriel retired

August 2018 Chief Gregory made Chief

back to cross examination

Are you aware of all the requests made for comp time by ffs? No  
when were you made aware of the surgery your wife needed? The day before

By the Arbitrator: ffs only complain to w as VP when there is a denial  
As VP he is chairman of the grievance committee  
Committee decides as a group whether to file  
How many grievances have been filed over leave time during w's tenure?  
Believes that this is the only one

Re-direct

How long after the conversation between Lt Thorpe and DC Walker Lt Thorpe called the  
w.? Does not recall

Re-Cross

when the arbitrator asked you how many grievances were filed over leave? Would  
include all types of leave  
this is the only grievance the w can recall being filed over any type of leave  
Has a ff in your time as Vice President, has a union member brought a grievance to the

committee that the Committee has chosen not to file? Probably two or three  
one was about denial of bereavement time—it is not covered in the contract for the person  
requested for (person for whom he wanted to go for was not in the contract)  
cannot recall the others

How many grievances filed during his tenure—maybe eight or ten  
two this year and this is one of them  
does not recall any in 2017

Re-Redirect some of those were resolved without proceeding to arbitration.  
No re-recross—witness excused

Second Witness

Robert Mengel, Union President

By the arbitrator: also an active FF

twenty years  
has been Lt for a little over one year  
there is not a rank between ff and Lt.

DIRECT by Mr. Jordan

prior to president of the union, vice president for one year; secretary for nine years  
basis for filing the grievance was that Lt Thorpe was told to use comp time as opposed to  
personal leave time; this has never been done before

Did the City prior to denying his personal leave request contact the union in any way to  
change the agreement/for the denial

13 years as an officer of the union—how has “shall not be arbitrarily denied” been used?

Has NEVER been denied and never required to use comp time

under chief Forressi, Chief Abriel and the present chief

since 2006 he has been an officer and never seen a requirement to use comp time

w serves on the Grievance committee; and usually when a ff has an issue they tend to call

the w

Has never had to deal with this issue before

has the personal leave language remained the same over these past 13 years? Yes

w. met with the Albany (brass) after the grievance

there was comp time balance available and should be used for this  
and this was not urgent

has never seen court time denied when asked two or three days in advance

Lt Thorpe has asked in the past, has had comp time available in the past, and never

required to use the comp time

brief break (union request)

Cross Examination

Lt do you know what a mutual is? That is when two people exchange shifts

any limits or criteria when making a mutual? Only up to 144 hours per year – up to 6 24  
shifts, but they can be broken up into shorter shifts

does not believe there are any other limitations other than the same rank  
officer for officer; ff for ff

not sure if there is a notice time requirement—maybe 48 hours is in the contract

Albany fire Dept is a 24/7 operation; there is always someone working

not sure when Lt. Thorpe’s other requests for time off were, although there were a couple  
in October

by the Arbitrator: is there a requirement to use a mutual first NO

w has been a ff for the City of Albany for 20 years, on the ff union since 2004, and a  
union officer for 13 years

in that 20 years, what if any grievances with respect to leave time? Not in his 13 years as

an officer, and no direct knowledge of any during his 20 years as a ff

Re-direct how long has the 144 hour limit on mutuals been in the contract? For as long as the w can remember

Re-Cross are you aware of the circumstances behind all of the personal leave requests made to Chief Gregory? No

are you aware of the circumstances behind all of the personal leave time requests made to Chief Abriel

w was a ff under Chief Ferruzzi  
witness excused

LT. BRIAN THORPE

By the arbitrator: Lt. With the Albany fire department  
has been a lt. For a little over two years

ff before that for ten years—Albany fire department for a total of 12 years  
does not hold a union officer and not on the executive board

Direct by Mr. Jordan works the B shift

by the arbitrator: one day on, three days off—a, b, c d shifts

Direct continued shift starts at 8:00 a.m.

Familiar with the grievance

asked Ed to file the grievance—December 28<sup>th</sup> he asked DC Walker for personal time  
because I had a family Court appearance in Hudson on January 2<sup>nd</sup>

you have comp time to use

whatever the overage is will be covered by personal time

has requested personal leave in the past and never had that as an answer

Chief Walker is his superior office

believes the 28<sup>th</sup> was a Friday

Saturday, Sunday, New Years Day was Monday

did the chiefs work those days? They are on call—does not believe they work holidays

called on Friday for the day after New Years

w considered it an urgent personal matter

family court appearance re: 9 year old Connor, his son

shortly after he was born we had to ask Family Court to determine custody,

visitation and support

had a number of days that he asked for personal time \

worked until he started school

when he was five or six, parties came to an equal time agreement (around your ff  
schedule) and he continued to pay child support

during that time there were a couple days when court appearances were on b shift, and he  
asked for and got personal time

November 2017—his mother was arrested for endangering the welfare of a child and abuse  
and neglect

then in October 2018 her criminal trial started in Hudson NY and he had to be there as a  
witness

the dates of the criminal trial were Oct 22 and Oct 30<sup>th</sup>; both of those days requested were  
approved for personal time

shortly after the trial ended we had a Family Court appearance

on the morning of December 28<sup>th</sup> Connor's mother was asking for expanded  
visitation and her family would supervise

was the application made by Order to Show Cause

Not sure why he got notice on the 28<sup>th</sup> to be there the 2<sup>nd</sup> of January  
issues with the Columbia county Family Court—lack of notice and short notice  
would use personal leave for court in the past

at least 10 times in the past 9 years since Connor was born, and never denied  
personal leave until the instant time

had Comp time available at those times, but never required to use comp time 1<sup>st</sup>

Prior to January 2<sup>nd</sup> what dates did he ask for personal leave? Oct 22, & 30<sup>th</sup> in 2018  
December 6<sup>th</sup> 2017

in the instant case he called on a Friday and the next scheduled shift was a Tuesday

he has called from the regular shift at the firehouse for his next regular work day

October 22<sup>nd</sup> he called 4 days prior—(arbitrator's note: shifts a, b, c and d have a 4 day rotation)

Cross examination by Ms. Jones

Had some issues with Columbia county Court; often gave short notice or no notice at all  
half a dozen times they probably gave short notice

10 times when he had to ask for time off; was in court many more times that did not  
occur on B shift

total he got short notice ~6 times; not all occurred on B shift, so he did not have to ask  
for time off

Did you explain the circumstances requiring your appearance in Court to Chief Walker?

Did explain he had to

Could not change shifts with other ffs since he has other children, including a one year  
old, and it is hard to find a sitter on short notice

Was given some personal time for his January 2<sup>nd</sup> court appearance

was notified of the Oct 22 and 30<sup>th</sup> criminal trial—doesn't recall how much notice he had

How many times have you been in Family Court regarding his son Connor—probably over 40  
times

How many times have you requested personal time under Chief Gregory? Believes it was  
3 times; did not ask Chief Gregory directly; Chief Walker twice, and cannot recall the other time  
was probably chief Toomey but cannot be sure

Sitter or fiancé cares for kids when he works overtime

neither were available January 2<sup>nd</sup>—sitter was lined up for January 2<sup>nd</sup> since it was his  
regular work day—sitter would not have been available for a mutual

baby sitter works on his B shift that is on a weekday

overtime – has worked on O.T. when it is not B shift

works O.T. on the weekends for night shift when his fiancé is available

Aware of any other requests for personal leave requested by other ffs

not aware of the reasons for the requests

By the arbitrator: when Ms. Jones asked about your reason for leave, you said you told D.C.  
Walker Family Court, and did not go into specifics

did you tell D.C. Walker that you had just gotten word you had to be  
there—probably did tell her that his attorney just notified me

Criminal trial was scheduled in advance, but I was not notified until 4 days prior when the  
D.A.'s office called him and told him he was to be subpoenaed and they wanted to go over his  
testimony

did you get a subpoena; at the time of your request for leave time for the criminal court  
appearances did you advise your superior that you had been subpoenaed? Does not recall

Re-direct in your prior requests for personal leave for family court matters did you go into  
detail as to why you had to go to family court? NO, I just told them I just got  
notice of the need to appear, and leave was granted

Re-Cross did not tell D.C. Walker additional detail  
when he had called in the past he simply said he had to be in Family Court; did  
not give details

by the arbitrator: the brass knew it was about his son Connor

no further re-cross  
w excused

brief break

#### CITY OPENING STATEMENT

Article 10 is the provision of the contract that is operative  
Chief may grant personal leave IN HIS DISCRETION for urgent personal matters  
brought to him by employees  
while Lt. Thorpe has stated that he has been granted personal leave in the past  
we do not know why  
what is relevant is what was told to the chief in this case  
this was not an urgent personal matter and therefore not necessary to grant him  
personal leave, and he had other options available—mutual swap of time and comp time  
and Lt. Thorpe used comp time, and as a courtesy personal leave was granted to him for  
any time not covered by comp time  
Chief did not violate article 10; there is no appropriate remedy because there was not a  
violation  
wants Arbitrator to take judicial notice: December 28<sup>th</sup> 2018 was a Friday  
December 31 was a Monday  
January 1 was a Tuesday and January 2 was a Wednesday—Union accepts that stipulation  
New Year's day is a holiday; December 31<sup>st</sup> is not, it is a regular business day  
[An employee working from 8 a.m. on December 31<sup>st</sup> to 8 a.m. on January 1<sup>st</sup> does not get  
holiday pay for the 8 hours during the holiday—for holidays, we are really talking about brass and  
civilian employees]

#### CHIEF WALKER CALLED AS FIRST WITNESS

By the arbitrator: first female Deputy Chief  
Deputy Chief—since August 2016  
prior to that captain for about 5 years  
Lt. Since 2007, for about 4 years  
ff for 17 years—October 26, 1989—30 years on the job as of this coming October

Direct by Ms. Jones

Did Lt. Walker request the personal time from you? Yes, by telephone  
he stated the reasons as he had to go to Family Court and he wanted to use personal time  
does not recall him saying he just got notice that day or the day before  
did not know until today that it involved his son Connor  
after Lt. Thorpe asked for the personal time, w put him on hold  
when to chief Gregory's office  
Did discuss whether he had other time and w did not know if he had comp time  
resumed conversation with Lt. Thorpe  
Asked him if he had comp time  
He said he had 4 hours  
He was clearly unhappy; if I had to he would take the comp time  
the Chief would prefer if you would take that first

He had 4 hours, and he would take 11 to 3 or 1500  
he had to be in court at 1 p.m.

I didn't want him rushing, so would being off until 1700, so I granted him  
two hours of personal time

He was going to leave the firehouse at 11 a.m. and start his comp time then; w then said  
she did not want him to rush, so take 2 hours of personal time for being off until 1700 hours

he did say Columbia county of Hudson, and it would take 45 minutes

Chief Abriel was the chief before Chief Gregory

only case she is aware of is when w was denied time off  
was working and gave 4 days in advance notice

May have had comp time at that time in history, and Chief Abriel told her  
to use comp time or mutual time

cannot speak for anyone else, but w was denied personal time

grandmother was having issues in Buffalo and w wanted to help her mother

a mutual is when you swap shifts with someone of same rank, and a limit for 144 hours

could change officer for officer, and thinks that I was a Lt she could trade with a captain

could trade 6 hours, for example

could not trade shifts with a B shift, since B shift has to work also

would have to trade with an A, C or D as long as there is 12 hours off between the  
end of the mutual and your own shift

Management is on call by phone or radio 24/7 for the time I am on call

does have to answer even on a holiday; any member of management would have to

Do you remember the specific circumstances when Lt. Thorpe was granted personal leave by w?

Thinks this was the first time, but since then she has granted him personal time

Did you think his reason for requesting personal leave was an urgent personal matter? No, I did  
not

Cross examination

Did you say that you did not recall Lt. Thorpe approaching w for personal leave for  
personal leave prior to December 28<sup>th</sup>? W does not recall

Do you know why he would have been granted personal leave time although he had comp  
time available

Was there a change in policy during this period? Not that w is aware of

Not aware of any policy change that required comp time had to be used instead of paying  
it out

Allowed him to use personal leave AFTER he burned his comp time

matter wasn't urgent for the first 4 hours but it was for the next two hours?

W reasoned it that she did not want him to rush back, and w was trying to be  
helpful

Chief Abriel denied her time – did not raise the issue with the union

w looked at the contract and determined that it was in the Chief's discretion and did not  
look further to see "urgent personal matter."

Comp time is earned by the ff

they actually work to get it

48 hours notice they can take it any time they want except for holidays 7 days' notice and  
not on Christmas and New Years

if they choose not to use the comp time they get paid out at the end of the years

by requiring grievant to use his comp time first, it took away his option to take the time  
off and his option to get paid for it was gone

prior to denying him personal leave December 28<sup>th</sup>, he had comp time available and was not required to use it first in his other requests

w knows nothing about those requests

Would agree that the denial of personal leave when he has comp time available, or to use a mutual, was not a discussion with the union? W was not part of any conversation; the union speaks with the chief many times when she is not involved in the conversation

The Chief and I did not deny it; the Chief would prefer it if you would use your comp time first

he was reluctant to use it first; did not deny it because he would not use his comp time first

when you had the conversations with the union you decided not to restore his comp time—w was not part of that discussion, I was not here

Has seen Exhibit 3 before, but w was not in the meeting with the union

In your conversation with Lt. Thorpe, did you state that he use his comp time first, did NOT indicated that it was not an urgent matter; did not discuss the details about Family Court

brief break for union

cross continued—is there a policy that the Dept has that states when personal leave will be granted or when it is to be denied and what is acceptable? Not that the w is aware of

By the Arbitrator: Lt. Thorpe called on December 28<sup>th</sup> to request personal time for a Family Court appearance in Hudson or Columbia County on January 2<sup>nd</sup> 2019. W knew it was for family Court, but did not inquire of any particulars and Lt. Thorpe did not offer any particulars.

W put Lt Thorpe on hold —noon time maybe—

w works 8-4 Monday through Friday AND have on call one per week every third week w was in her office

W put him on hold, and went to speak with Chief Gregory

Chief Gregory preferred it if he would use comp time first

Does not recall Chief Gregory telling her that he must use comp time first

Re-direct-no

Re-cross based solely on what I asked

Chief Gregory would PREFER it if Lt. Thorpe first used comp time

would not surprise her if he took it as an order, and no it would not surprise her if he took it as an order

City rests

No rebuttal witnesses

Testimony closed

Union wants closing briefs; therefore both to submit

Arbitrator: Please address the question of “past practice” versus we just happened to do it that way

simultaneous submissions of closing briefs to be mailed April 18<sup>th</sup>; Extended by stipulation of the parties to May 2, 2019.

Closing briefs/arguments were received May 6, 2019, which becomes the closing date.

## POSITIONS OF THE PARTIES

City of Albany

Citing the operable section of the Collective Bargaining Agreement, Article 10, the City

of Albany noted that “personal leave time...granted at the discretion of the Chief...The leave shall be used for urgent personal matters that cannot be attended outside of the employee’s work schedule.” The Chief, through Deputy Chief Walker, did not abuse his discretion. The grievant did not indicate the urgent nature of his need, particularly since simply said “court” and did not indicate that this was a very important personal matter involving the custody of his son. That the Department offered four hours of personal time in addition to the use of compensatory time was not an admission that the event was an urgent personal matter...but, rather, was simply an accommodation so that the Grievant did not have to rush back from a southern county.

Grievant had other options available to him, including switching shifts (known as a “mutual”) with an officer of equal or greater rank. There are few limitations on the firefighter swapping shifts with other firefighters; exchanges must be of equal or greater rank; are limited to 144 hours per year; and can be of full or partial shifts.

The Union failed to sustain its burden of proof to establish that granting personal leave time for court or other personal matters that are not expounded is a past practice. A number of examples without demonstrating does not demonstrate that the practice “was unequivocal and continued uninterrupted for a period of time sufficient to create a reasonable expectation ...that the practice would continue.” *CSEA, Local 1000 v. County of Nassau, 24 PERB 3029 (1991)* and *Chenango Forks Teachers Association v. Chenango Forks Central School District, 43 PERB 3017 (2010)*.

Neither the City nor the Albany Fire Department violated Article 10 of the Collective Bargaining Agreement.

No one ordered Grievant to use compensatory time first but, rather, it was recommended and Grievant voluntarily took that recommendation.

Since the Department did not violate the Collective Bargaining Agreement, no remedy is required or appropriate.

The Union

Grievant was required to use his compensatory time first, before any personal leave time was permitted.

The required appearance in court during his normal work shift, whether or not Grievant enunciated that his appearance was in Family Court and involved the custody of his son, was an

“urgent personal matter which (could not) be attended outside (his) work schedule.” The fact that the Department offered an additional four hours of personal time underscores that the event was urgent.

Article 10 prohibits the arbitrary denial of use of personal time. The Union Vice President and President, with a combined service of over twenty years, testified that in their years of service no one had ever been denied the use of personal time for court appearances.

The Department first told the Union that the appearance was not urgent. Here Grievant was told to use his compensatory time first. Then the Department offered personal time in addition to the use of compensatory (comp) time is an acknowledgment that the appearance in court was, in fact, urgent.

Compensatory time is an earned benefit, can be used upon notice of forty eight hours, and can be saved and cashed in at the rate of time and a half at the end of the year.

Deputy Chief Walker testified that she knew that the appearance was in Columbia Family Court. She did not inquire further.

There was no notice that compensatory time had to be used prior to the granting of personal leave time.<sup>1</sup>

It is now an established past practice that personal leave time must be granted when there is an urgent personal matter to attend to during a firefighter’s normal work time, having been granted for at least thirteen years; firefighters have come to expect the grant of personal time for such things as court appearances, the urgent medical needs of family members, and similar events. Past practice is used to resolve an ambiguity in contract language. *Adjutant Genil v. Penn. State Council Association of Civilian Technicians, Inc. 80-2 Lab. Arb. Awards (CCH) Section 859, 5636 (1980)*. The granting of personal leave time for family court matter is a past practice.

The Albany Fire Department violated Article 10 of the Collective Bargaining Agreement by arbitrarily denying the use of personal time for Grievant’s urgent Family Court appearance in Columbia County; by requiring the use of compensatory time before personal leave time would be granted. The necessary remedy is restoration of the four hours of compensatory time.

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<sup>1</sup> Arbitrator note: Prior notice is insufficient for a mandatory subject of bargaining.

## FACTS

The city of Albany Fire Department is a twenty four hour, seven day per week fire service, using four shifts, A, B, C and D. Members of each shift work one twenty four hour shift and then have three days off. Grievant is a lieutenant in the City of Albany Fire Department with a total of twelve years on the job, serving on the B shift. On December 28, 2018 Grievant asked for personal leave time because he had an appearance in Court in Hudson, New York, Columbia County, on January 2, 2019, a day that he was scheduled to work. The Deputy Chief, after consultation with the Chief, suggested that he use his banked four hours of compensatory time prior to any personal leave time, but that since his appearance was in Columbia County he could use up to four hours of personal leave time so that he need not rush back.

Grievant had been granted personal leave time for ten prior Family Court appearances, and that the Department must have know, given his history, that the Family Court appearance was with respect to custody and support of his son. On December 28, 2018 Grievant did not give specifics to the Deputy Chief, and the Deputy Chief did not inquire further.

Compensatory time is earned for overtime work, may be used upon notice of at least forty eight hours, and, if banked through the end of the year, can be paid at the rate of time and one half.

The instant Grievance alleges that the use of compensatory time first was a directive, not a suggestion that could not be declined, that the refusal to simply grant the personal leave time was arbitrary in violation of Collective Bargaining Agreement Article 10; the Union goes further and contends that the use of personal leave time under this and similar circumstances is a past practice.

Collective Bargaining Agreement, Article 10

Each firefighter shall be entitled to personal leave time to be granted at the discretion of the Chief. Request for personal leave time shall not be arbitrarily denied. The leave shall be used for urgent personal matters which cannot be attended outside of the employee's work schedule. Firefighters granted personal leave for a complete shift, regardless of their schedule, will not be eligible to work overtime until they return to their next scheduled shift. A Kelly Day shall count as a scheduled work shift. There Collective Bargaining Agreement, Article 10, does not contain a cap on personal leave time, but limits that leave time to "urgent personal matters which cannot be attended outside the

employee's work schedule" with the Chief having discretion, limited to leave time not being arbitrarily denied.

### DISCUSSION

When a supervisor "suggests" that compensatory time be used prior to the grant of personal leave time it cannot be said to be a voluntary use of that time. Here the Deputy Chief put the Grievant on hold (in their telephone conversation), consulted the Fire Chief, and then noted that the Grievant had four hours of compensatory time that could be used first. And rather than rush back from Family Court in Columbia County, up to four hours of personal leave time could immediately succeed the compensatory time. Accession to the "suggestion" cannot be deemed voluntary. It is clear that the Department *required* Grievant's use of compensatory time before granting personal leave time for what may well have been an event that exceeded the four hours of compensatory time that the Grievant had in his bank.

Whether or not the Grievant had other options available to him is inapposite: The issue is whether requiring the use of compensatory time prior to the grant of personal leave time violates the Article 10 of the Collective Bargaining Agreement. There was a significant amount of testimony that the firefighters have the benefit of "mutuals," swapping shifts with other firefighters as long as the firefighter being swapped with are of equal or greater rank, and no more than one hundred forty four hours of switching shifts can be used in any calendar year.

It is unrefuted that the Grievant had a Family Court appearance in Columbia County. That, in and of itself, is an "urgent personal need" that could not be attended outside Grievant's normal working hours. The Court sets the date and time for appearance, not the party to the proceeding. The unrefuted testimony was that this particular court often gives short notice.<sup>2</sup> As a party to the proceeding the Grievant is stuck. A subpoenaed witness might be able to demonstrate a conflict, but the Courts, especially Family Courts, do not want to hear that a party must work that day.<sup>3</sup>

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<sup>2</sup> Notice too short to request an adjournment, and too short for a motion to change the date. Here it appears to have been an initial appearance fixed by the Court.

<sup>3</sup> This is not to say that many Family Court judges refuse to take work schedules into consideration, but that requires an earlier appearance wherein the party has an opportunity to indicate his or her work schedule and implore the Court for a different appearance date.

It being an urgent personal matter that could not be handled outside the firefighter's ordinary work schedule, requiring the use of compensatory time prior to granting personal leave time, was arbitrary. Nothing in the contract language requires the use of other options first, whether it be the use of compensatory time or mutuals.

**(CUSTOM and) PAST PRACTICE**

Joint Exhibit 2, the Grievance itself, includes the "past practice" issue by stating "Cease and desist any denial or personal leave based solely on the fact that the FF has comp. time available." The issue was briefed by each party and must be considered herein.

Strong proof is required to establish that a past practice implies a term and condition of the contract. To be binding it must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties." *Elkouri & Elkouri*, eighth edition, Chapter 12-4, May 2016, citing *Celanese Corp or Amer*, 24 LA 168, 172 (Justin 1953) and other cases through 1995.

When an employer responds the same way to a recurring situation over an extended period of time and its response is mutually accepted by labor and management, explicitly or implicitly, as the appropriate response, then an enforceable practice is established. *Elkouri & Elkouri, ibid at 12-5*. Sporadic occurrences do not rise to the level of past practice. And the party alleging the past practice bears the burden of proving its existence. *Ibid*.

Mutuality requires understanding of the parties. Of course mere denial does not in and of itself rebut that mutuality. The employer is generally given the benefit of the doubt. *Ibid at 12-7*.

Here we have Union officials with as much as thirteen years experience who testified that they had never seen the personal leave time denied under the three prior Fired Department Chiefs. Similar but different circumstances were cited, including personal leave for emergency surgery of a spouse of a firefighter. The Grievant himself testified that at least ten times prior to the instant event he had never been denied personal leave time, but in those instances management was made aware that he had custody issues. In contrast to the Grievant's testimony, Deputy Chief Walker testified that she had been denied personal leave time earlier in her career when a family member in Buffalo, New York was in extremis.

The problem here is that there was no direct testimony from anyone other than the Grievant that each and every time a firefighter had a court appearance personal leave time was

granted. While that may indeed have been the case, to establish custom and past practice the proof must be strong, and must demonstrate that it has been done the same way for each such instance over a long period of time; on this record, as shown in detail above, we cannot say *unequivocally* that personal leave time has been granted each time a firefighter has to appear in court.

### AWARD

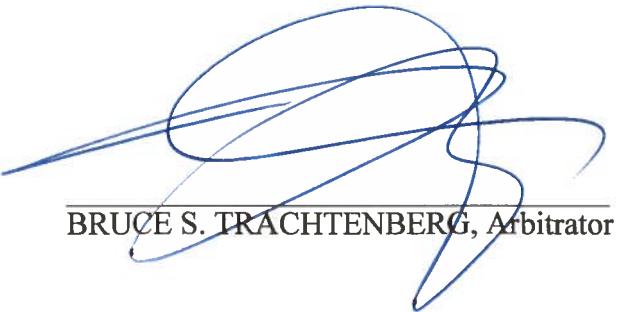
The City of Albany required Lieutenant Brian Thorpe to use compensatory time to take time off for a personal matter.

Lieutenant Brian Thorpe's matter was an urgent personal matter that had to be dealt with during his regular work hours.

The City of Albany violated Article 10 of the Collective Bargaining Agreement of the parties in requiring Lieutenant Brian Thorpe to use compensatory time in order to take time off for an urgent personal matter;

The appropriate remedy is restoration of four (4) hours of compensatory time in Lieutenant Brian Thorpe's comp. time bank.

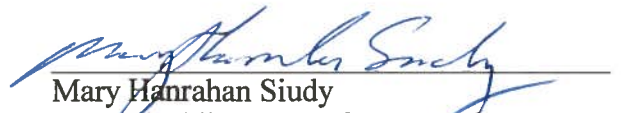
Dated at Niskayuna, New York  
this 7th day of May 2019



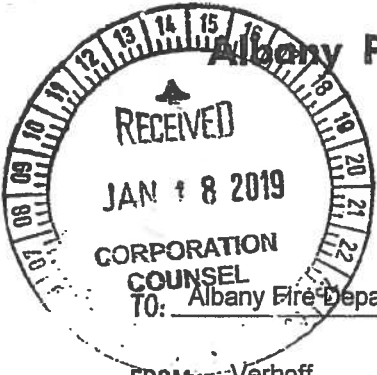
BRUCE S. TRACHTENBERG, Arbitrator

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

On this 7th day of May 2019 before me, the undersigned, came Bruce S. Trachtenberg, to me known personally and known to me to be the individual whose name is subscribed to the within Arbitration Opinion and Award, who acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument the individual executed the same.



Mary Hanrahan Siudy  
Notary Public--State of New York  
Qualified in Schenectady County  
My Commission Expires April 27, 2022



**Albany Permanent Professional Firefighters Association**

Local No. 2007 I.A.F.F.-N.Y.S.P.F.F. AFFILIATED WITH AFL-CIO-CLC

*JOINT EXHIBIT 2*

**GRIEVANCE FORM**

FILE NO. 19-1

CORPORATION COUNSEL

TO: Albany Fire Department -- Chief Gregory

(Name of Organization)

FROM: Verhoff

Ed

(V.P. of APPFA)

(Last Name)

(First Name)

(Middle Name)

FIRE DEPARTMENT ASSIGNMENT: Lieutenant (Submitted on behalf of APPFA)

SUBMIT THE FOLLOWING GRIEVANCE WHICH OCCURRED ON: 12/28/18

(Date)

AGAINST: City of Albany (Deputy Chief Walker)

AS A VIOLATION OF AGREEMENT BETWEEN THE CITY OF ALBANY AND THE A.P.P.F.A. INCLUDING, BUT NOT LIMITED TO STATEMENT OF PURPOSE AND ARTICLE.

THE FACTS PERTAINING TO SAID GRIEVANCE ARE AS FOLLOWS: On December 28, 2018, Lieutenant Brian Thorpe requested personal leave to attend an urgent personal matter (family court) scheduled for January 2, 2019. Deputy Chief Walker arbitrarily denied the request stating that Lieutenant Thorpe must use his compensatory time to attend court. This violates the contract, Article 10, Personal Leave, and longstanding past practice. (The APPFA reserves the right to allege additional violations should they occur.)

SUGGESTED CORRECTION: Restore 4 hours comp. time taken from Lt. Thorpe. Cease and desist any denial of personal leave based solely on the fact that the FF has comp. time available.

*[Signature]*  
(Signature of Station Steward or Union Official)

*[Signature]*  
(Signature of Employee)

(Date)

**ACTION TAKEN**

By the Union: (Approval to Process)

Date:

Submitted to Step 1—(Date)

FIRST STEP: (No Satisfaction)

Date:

Submitted to Step 2—(Date)

SECOND STEP: (No Satisfaction)

Date:

Submitted to Step 3—(Date)

THIRD STEP: (No Satisfaction)

Date:

Submitted to Step 4—(Date)

FOURTH STEP: AWARD OF ARBITRATION

Date:

