

ARBITRATION PURSUANT TO APPOINTMENT BY  
FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration Between:

**THE BALTIMORE CITY POLICE DEPARTMENT**

and

**BALTIMORE CITY LODGE NO. 3, FRATERNAL  
ORDER OF POLICE, INC.**

FMCS Case No. 201003-00115

Before M. David Vaughn, Arbitrator

Denial of Article 22  
Administrative Leave  
For Lodge Representatives

**OPINION AND AWARD**

This proceeding takes place pursuant to Article 6 of the Memoranda of Understanding ("MOUs") in effect for Fiscal Years ("FY") 2019-2021 between The Baltimore City Police Department ("BCPD," the "Department" or the "Employer") and the Baltimore City Lodge No. 3, Fraternal Order of Police, Inc. ("FOP", the "Union" or the "Lodge") (together, BCPD and FOP are the "Parties" to the proceeding) covering bargaining Units I and II to resolve a Union grievance which protests the refusal of the Department to grant Article 22 Administrative Leave to active, identified bargaining unit members to allow them to attend the Union's 2019 National Convention as Lodge representatives<sup>1</sup>. The provisions of the MOUs covering the separate Units which are applicable to the instant dispute are identical. The Parties were unable to resolve the dispute through the steps of the negotiated procedure; and the Union invoked arbitration. From a list of arbitrators provided by the Federal Mediation and Conciliation Service, I was selected by the Parties to arbitrate the dispute.

A hearing was convened in Baltimore City at offices of Union Counsel on January 27, 2020. It continued and concluded on January 28, 2020. In the proceeding, the Union was represented by attorneys Kieran Dowdy and Adam Davey and the Employer by attorney Justin

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<sup>1</sup>Some Lodge representatives selected by the Union to attend the National Convention were active Department employees. Some were retired. This dispute affects only active employees. Some participants in the convention were delegates, some officers and committee members. While some classifications were put in for different amounts of leave, all are referred to as "representatives".

Conroy. The Labor Commissioner for the City of Baltimore, Deborah Moore-Carter was also present for the Employer as was Union Local President Michael T. Mancuso for the FOP. At the outset of the Proceeding, the Parties stipulated that the matter is properly in arbitration and before me. They were then afforded full opportunity to present evidence and documents in support of their respective cases and to cross-examine witnesses and challenge documents offered by the other.

Called to testify for the Union were Local President (and Detective Sergeant) Mancuso, Major Nateline Nicole Preston, Past Local President (and Criminal Investigations Division Officer) Robert F. Cherry, Jr., Local Labor Chairman (and Sergeant) William McDonald, Board Secretary (and Detective) Lisa Riha, Former National Delegate (and Sergeant) McKinley Smith, Former National Delegate (and Officer) Lawrence Fasano, Former National Delegate (and Officer) Jamall Johnson and Former Local President and National FOP Board Member (and former Officer) Gary W. McElhainney. For the Department testified Deputy Chief of Staff Andy Smullian, Lt. Col. K. A. Jones and Chief of Staff Eric Melancon. Witnesses were sworn and, except for Lodge President Mancuso (who testified as the first witness) sequestered.

A Joint Stipulation of Fact (paragraph references to which are denominated as "Jt. Stip. \_\_"), was offered and received into the record, as were Joint Exhibits 1-5 ("Jt. Exh.\_\_"), Union Exhibits 1-10 ("U. Exh.\_\_") and Employer Exhibits 1-6 (Er. Exh.\_\_").

At the conclusion of the hearing, the evidence was complete. The Parties each made oral closing statements, and the record of proceeding was complete. This Opinion and Award is based on the record herein, considers the arguments presented and interprets and applies the Memoranda of Understanding.

**ISSUES FOR DETERMINATION**

The Parties agreed that the issues for determination are:

Whether Article 22 B. of the MOUs apply to all unit employees or only a certain subset who are Officers of the Lodge?

Whether a past practice exists with respect to requesting Article 22 FOP leave for National Conventions or whether that procedure is inapplicable?

Whether Department properly or improperly denied Article 22 FOP administrative leave requests for bargaining unit employees to attend the FOP 2019 National Convention?

If leave denial was improper, what shall be the remedy?

**PROVISIONS OF THE MEMORANDA OF UNDERSTANDING**

The relevant provisions of the Memoranda of Understanding for Units I and II which are relevant to the instant dispute are identical. Jt. Exh. 2. They both provide, in relevant parts:

Article 4  
MANAGEMENT RIGHTS

Subject to the provisions of this Memorandum, the Employer shall have all of the rights set forth in Article 1, Section 123 of the Baltimore City Code (1983 Replacement Volume, as amended), Article II, Section 27 of the Baltimore City Charter (1996 Edition) and the Code of Public Local Laws of Baltimore City, Subtitle 16, Police Department, which provisions are incorporated herein by reference.

Article 6  
GRIEVANCE AND ARBITRATION PROCEDURE

- A. Subject to any limitation of existing law, any grievance, defined in the Municipal Employee Relations Ordinance at Section 120 (f) as a dispute concerning the application or interpretation of the terms of this Memorandum of Understanding or a claimed violation, misrepresentation or

misapplication of the rules or regulations of the Employer affecting the terms and conditions of employment may be settled in the following manner:

[grievance procedure and steps described]

\* \* \*

STEP 5:

\* \* \*

b) Within five (5) working days after receipt of the notice, the parties shall attempt to agree upon an arbitrator. If such attempts fail, within ten (10) working days after receipt of a panel of seven (7) names obtained from the Federal Mediation and Conciliation Service upon the request of either party, the parties shall alternately strike names from that panel until one (1) name remains. That person shall be the arbitrator.

c) Briefs shall be filed only if the arbitrator determines they are necessary.

d) The arbitrator's decision shall be final and binding on all parties.

e) The Employer cannot present a grievance to the arbitration step.

f) The cost of any arbitration proceedings under this Memorandum shall be equally divided between the Department and the Lodge.

\* \* \*

Article 8

VACATIONS, HOLIDAYS, DAYS OFF AND SPECIAL LEAVE

\* \* \*

H. REQUEST FOR LEAVE

- 1. **Leave requested prior to February 10 for the calendar year.** Employees requesting leave at the beginning of the calendar year shall designate all Vacation (V Days), and Holiday

Leave (P Days) to be taken. All leave requests shall not be unreasonably denied. Leave requests submitted prior to February 10 as part of the calendar year leave request process shall be granted on the basis of seniority within rank. Any leave requests submitted pursuant to this Section which have not been approved or denied as of February 20 shall be deemed approved. All H Days connected to leave submitted and approved pursuant to this Section shall receive the same protections from cancellation as said leave.

2. **Leave requested after February 10 and leave requested before February 10 to be taken on or before February 20.** An employee's request for Vacation, Holiday or Personal Leave submitted after February 10 of any year, or requested before February 10 to be used on or before February 20 (to include a block of leave that begins on or before February 20), shall be granted on a first come, first served basis. Such leave shall be approved or denied by the member's immediate supervisor, or by the person filling that position during the supervisor's absence, within ten (10) days of submission. Any written requests for Vacation, Holiday or Personal Leave which has not been approved or denied within 10 days of the submission shall be deemed approved.
3. In those instances where a senior police officer puts in for vacation leave and subsequently withdraws same and then decides to resubmit a request for the same leave days on or before February 10<sup>th</sup>, said leave shall be granted unless another police officer has already submitted a leave request for the same dates, regardless of the officer's seniority.

#### I. VACATION LEAVE (V DAYS)

1. Employees shall be granted the same number of vacation days as in the past and consistent with the schedule which is set forth in the Administrative Manual. The rate of vacation leave accrual is based upon the eligible employee's length of continuous service and is earned at a set rate for each completed month of service.

\* \* \*

Article 22  
ADMINISTRATIVE LEAVE FOR LODGE REPRESENTATIVES

A. During the term of this Memorandum, the President of Baltimore City Lodge No. 3, Fraternal Order of Police, Inc., shall be granted a full-time leave of absence from his duties for the Police Department, mandated in-service training expected, but shall remain on the payroll of the Police Department for the purpose of performing full-time duties on behalf of the Lodge. During such leave, the President shall continue to accumulate seniority and shall receive all benefits as if he were fully on duty including, but not limited to, pension accruals and fringe benefits.

B. A paid leave bank of 300 days per year shall be created for employees of the Lodge to use to attend scheduled conferences, seminars, Board and Committee meetings and conventions. The bank may be used interchangeably with Unit II. Each use shall be requested in advance by the President of the Lodge (or his designee) in writing, specifying the person or persons using such leave, the hours requested, and the purpose for the leave. The request shall be granted, subject to the needs of the Department. Each Unit employee permitted to be absent pursuant to this provision shall be responsible for giving his supervisor advance notice of absence from work for Lodge business.

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**FACTUAL BACKGROUND AND FINDINGS**

The essential facts are not disputed.

**The Department**

The Department provides police services to the City of Baltimore. The City suffers from elevated rates of crime and has had, in recent years high profile incidents implicating police-community relations. The Department has also had internal difficulties and leadership turnover.

Police Commissioner Michael Harrison came on the job in February of 2019. He served previously as Chief of the New Orleans Police Department. Commissioner Harrison brought with him as Chief of Staff Mr. Eric Melancon, who held a similar position under Commissioner Harrison in New Orleans.

### **Staffing**

Department staffing is set at approximately 4700<sup>2</sup>, but at times relevant to the dispute at issue, its actual on board staffing was approximately 500 officers short. Er. Exh. 4 The Department calculates projected minimum staffing levels called "Constants", which vary depending on factors including anticipated levels of criminal activity and special events. Constants are used for a number of purposes, including setting caps on the numbers of officers allowed off on leave at any specific time. Additional operational needs, scheduled or unscheduled may alter the number of officers allowed off. Indeed, the Commissioner has broad authority to deny leave or even rescind leave already granted.

### **The Union**

The Union serves as the exclusive bargaining representative for two units of Department employees: Unit I represents bargaining unit members with the rank of officer or police agent. Unit II covers bargaining unit members ranked sergeant and lieutenant. For ease of reference, all members of the two bargaining units, comprised of sworn officers, are referred to as "officers," except when rank-specific descriptions are necessary.

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<sup>2</sup>Numbers are pieced together from testimony and documents and are approximations, as no comprehensive staffing history or breakdown was submitted. It is clear that Department staffing has fallen in recent years and that the Department is significantly below authorized strength.

The Union is a local Lodge of the Fraternal Order of Police. FOP holds conferences, conventions and other events to which the Lodge sends participants.

### **The MOUs**

The terms and conditions of employment for bargaining unit employees in each of the two units are set forth in separate Memoranda of Understanding ("MOU"s) between the Department and Union. Jt. Stip. 1.

The MOUs provide for various types of time off leave. Article 8 of each MOU provides for vacation, holidays, regularly scheduled days off and compensatory leave. Section G provides procedures for employees to request leave. Article 22 of each MOU provides for administrative leave for Union purposes. The terms of the MOUs for Units I and II are identical with respect to relevant provisions of Articles 8 and 22. Jt. Stip 4.

### **Article 22 Leave for Lodge Representatives**

Article 22 establishes a leave bank of 300 days of Union administrative for each of Units I and II. The Parties have stipulated that the administrative leave bank can be used interchangeably between Units I and II, making a total of 600 days in the leave bank Jt. Stip. 6, which is filled on or just after July 1, the beginning of each Fiscal Year. Article 22 leave cannot be used retroactively before the beginning of a FY and does not carry forward beyond the end of each FY.

### **Union Use of Article 22 Leave**

The Union characterized the purpose of Article 22 leave as ensuring that the Union is able to perform its mission to represent its Members of the nation's eighth largest department free from interference. The Union has used Article 22 leave for a variety of purposes, including such activities as participation in Union

training and attending funerals for deceased colleagues. However, much of the leave is used to provide paid time off to allow Union members to attend State and National conferences of the parent FOP. Every other year, there is a National FOP Convention. On non-National Convention years FOP conducts a State Convention in Maryland. In 2019, the FOP held its National Convention in New Orleans, between August 12 and 15.

All leave usage is subject to the needs of the Department, which, as indicated, conducts an ongoing operational needs analysis and sets Constants to ensure that capabilities are maintained sufficient to meet Departmental needs.

### **Leave Procedures**

Article 8 Vacation Leave can be requested by employees on a seniority basis during a designated period at the start of each calendar year. Leave books are circulated during that period and leave selected by officers in seniority order within units. Leave requests for popular periods (e.g., summer and holidays) may exceed the number of leave slots available. When slots are filled, no more leave is granted. Certain periods of the year, including August and September, are high-crime months and leave slots may be further restricted. Leave taken after the end of the bid period is available on a first come-first served basis and only from leave slots still available. Article 8.G.3. allows officers to withdraw leave requests and prescribes the consequences of such withdrawal.

Unlike Article 8 leave procedures, which allow officers to request time off in excess of accrued days under some circumstances, Article 22 leave is not and cannot be requested until the Union leave bank is filled shortly after July 1, the beginning of the FY. The long-standing practice is that, after the bank is filled, the Union President prepares memoranda requesting Article 22 leave, as such leave is needed, and submits the requests to the Department - to a designated person in the Commissioner's office - who approves the requests and prepares detail orders. The

practice has been that such requests are routinely granted. U. Exh. 4-10.

### **National FOP Conventions**

National FOP Conventions, held every other year in odd years, allow one delegate per 50 represented officers. The conferences are generally held in the summer, at times of peak leave usage and when the Department is in need of heavier officer presence to address crime. The uniform practice has been for Lodge representatives seeking to attend the National Convention to use the Article 22 leave bank. Such activity uses a significant percentage of Article 22 leave. State FOP conferences, held on even years, also use Article 22 leave to authorize their time off work, but may involve smaller numbers of representatives and reduced numbers of requests and days.

Because of the nature of the national conventions and the advance travel and other arrangements which must be made, there is a particular need for certainty by representatives as to the availability of leave. Advance planning is needed. Requests for Article 8 summer leave made after July 1 - a necessity for Article 22 leave because the bank list is not filled until that time - are unlikely to be filled.

The 2019 FOP National Convention was scheduled and held in New Orleans on August 11`- 15th. Some participants had additional FOP business (e.g. meetings) on additional dates, and all needed time to travel to and from the Convention.

### **The NOBLE Conference**

During the same time period as the FOP Convention was held, the National Conference of Black Law Enforcement Managers was held, also in New Orleans. The Department sent six representatives, including two sergeants. All requested personal leave for the dates and canceled the leave following approval of detail leave, a form

of administrative leave provided in Department policy. The personal leave which had held the dates was then returned to the representatives for later use.

### **Leave Swap Out**

The procedure consistently utilized by Union representatives and administratively recognized by the Department is for officers who will or may participate in FOP national conferences to put in for Article 8 leave during the advance bidding period on the basis of their seniority, carry that leave on the books and use it as a "place holder," with little or no intention of using the Article 8 leave. The Union conducts its screening process to identify its representatives and delegates early in the year, so the list is available in final form by March. For the 2019 National Conference, 80% of the 74 Union-requested attendees had requested Article 8 G.1. or 8 G.2. leave, almost all early in the year; and, by the time of the Conference, all but one had their Article 8 leave request approved.

The long-standing practice between the Parties has been that, when the Article 22 bank is filled in early July, the Union President or a delegate makes a written request to the Department for Article 22 leave for a list of bargaining unit members specifying the number of days and purpose. The list has routinely been approved. When it is approved, the representatives holding Article 8 leave substitute the Article 22 leave and withdraw their Article 8 leave requests. The Article 8 leave is then returned to their leave account, available for later use. The total number of officers on leave for the period is not changed by the switch.

### **The Union's Article 22 Leave Request and the Department's Denial**

As indicated, the 2019 FOP National Convention was to be held August 11`-15th. Although the Lodge's selection process was complete in March, the Article 22 leave bank was not filled until

the beginning of the Fiscal Year, on or about July 1. On July 3, Lodge President Mancuso submitted a written Article 22 leave request for 74 representatives to attend. U. Exh. 1; Jt. Exh. 5.

For the first time, the Department, on July 11<sup>th</sup>, denied the Union's leave request. Jt. Exh. 5; Er. Exh. 1. It stated that Article 22 leave was only available to employees of Lodge, which it interpreted as elected officers and committee chairs<sup>3</sup>. Such a position had never been taken previously; and in later granting a partial request for 34 representatives, the Administration did not follow that rule.

In denying the Article 22 leave requests, the Administration stated that a request to have 74 additional officers off on pre-approved vacation leave would be excessive. The new Commissioner and staff were initially unaware that the officers already had approved leave under Article 8 procedures. The Department's understanding that the Union was requesting to have 74 *more* officers off on leave was in error: personal leave slots for the 74 officers (and others) had previously been requested and approved, consistent with operational needs, a decision clear from the record and not disputed.

The Department also took the position that the approval of Article 22 leave and the withdrawal and crediting of Article 8 leave to employees would improperly give employees five additional personal days; so even the leave were deemed consistent with operational needs at the time of the FOP Conference, restoration of the additional leave would result in short staffing at a later time. The Department conceded that the use of those future leave requests could be denied at any time based on operational needs.

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<sup>3</sup>The consequence of such interpretation if accepted, would mean that the 600 days of leave would be available only to approximately 14 people.

## **The Department's Compromise Response**

Following denial of the Union's request for 74 officers to be off for the Conference, the Department made a determination as to a reasonable number of officers who could be off. It picked the Union's 14 officers and committee chairs and, in addition, one officer (not picked by name) from each command and district, mostly from the list provided by the Union in its leave request, and approved Article 22 leave for a total of 34 representatives. Er. Exh. 6. Lt. Col Jones conducted the survey and picked the commands and districts. Chief of Staff Melancon provided approval of the list, based on the Commissioner's determination that the numbers and distribution were a fair compromise.

## **The Grievance**

The Union rejected the compromise offer, specifically disclaiming the Commissioner's chosen and reduced list. Er. Exh. 3. It filed a July 19<sup>th</sup> grievance (Jt. Exh. 5), which stated, in part:

The FOP formally grieves this decision as a violation of Article 22, Section B of the MOU. Past practice clearly shows that union detail days have been granted to all members of the FOP, not only those members who serve on the Board of Directors and/or, a committee of the Lodge. To suddenly restrict the availability of union detail days to FOP employees constitutes an unwarranted and unjustified reinterpretation of the contract's terms.

Furthermore, Article 22, Section B states that the requests for union leave [shall be granted subject to the needs of the Department] (Emphasis added). Although the Department states its concerns about its operational capacity, it ignores that almost all of the 73 individuals had previously informed their supervisor of their intent to attend the conference, requested leave for those dates, and had that leave request approved by a supervisor. This means that the Department, through its supervisors, had already determined that no operational needs warranted a denial of the FOP's request. Nor has there been a significant change in the Department's operational posture or staffing that would suggest that

the Department has new operational needs warranting the denial of union leave at this time.

Past practice for conferences, including the National FOP Conference, has been the same: members request personal leave in accordance with the MOU, which is reviewed by supervisors, and approved or denied in accordance with the MOU. The FOP, upon receiving the FOP leave bank on July 1, designates the employees to be detailed for the conference, and the Department has always granted that time because it knows that its operational needs were reviewed by supervisory staff prior to granting the leave time. Because the leave days were already approved, the detail days must be granted per President Mancuso's request.

Finally, to the extent that Mr. Smullian's letter serves as an announcement to pre-set restrictions or conditions on union leave, the contract does not provide for such restrictions. The Department had the opportunity to bargain for such conditions during negotiations and did not exercise its right or opportunity to do so.

FOP urged, by way of remedy, that the Department grant 379 Union detail days, as requested, to officers designated in the Union's July 3<sup>rd</sup> Memorandum,

The Department denied the grievance. Jt. Exh. 5. It stated:

The unambiguous language of the MOU clearly states that the leave bank is for employees of the Lodge, only. The Department also has the right to end a past practice that is in direct contradiction to the unambiguous language of the contract. If previous administrations allowed this practice to go on as you state in your grievance, that decision is no longer acceptable with the current administration. It is both fiscally and morally irresponsible and amounts to waste, and abuse, which this administration doesn't condone. Given the current state of the Department, the lack of resources, the need to restore accountability and trust in this Department, and the need to be fiscally responsible, this administration cannot condone this.

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The needs of the Department support the denial of this leave request. Seventy-three individuals had previously informed their supervisor of their intent to attend the conference, requested leave for those dates, and had that leave request approved by a supervisor. The FOP's conclusion that allowing them to swap out their leave for the FOP leave would not have any operation impact is incorrect. Once the swap occurs, those seventy-three members will have a combined additional leave of 379 days to take this year. This is leave time the Department had been assuming, based on their request, was already allocated and accounted for. Given our workforce shortages, of which the FOP is well aware puts the Department in an untenable position of either denying the future use of the same leave or granting to the operational detriment of the Department.

The Union appealed. A Step 4 hearing was held and, on September 23, 2019 the Department issued its Step 4 response, stating:

### **1. Lodge Employees**

...[T]he use of Lodge administrative leave is limited to employees of the Lodge. III The Department construe the term "employee of the Lodge" to mean any elected official or appointed Lodge official. III Accordingly, ... any member who is not an employee of the Lodge cannot use the Lodge leave bank. The Lodge website ...identifies Lodge elected officials and Board chairs, all of whom the Department agrees would qualify as a Lodge employee. \*\*\*

### **2. Operational Need and Swap Practice**

\*\*\* Article 8(G)(1) does not allow members to reserve FOP administrative leave time. It allows members, on the basis of seniority, to select all of their Vacation (V days), Holiday leave (P days), and accrued compensatory leave for the following calendar. \*\*\* It does not allow members to reserve vacation and then swap it for FOP administrative leave. \*\*\* Pursuant to Article 8(G)(2), Vacation leave, Holiday leave and accrued compensatory leave requests are required to be granted on a first come first serve basis, not on the basis of seniority. Thus, when a member chooses not to use their vacation leave for their designated dates, any subsequent leave request or swap would have to be evaluated on a case by case basis under Article 8(G)(2). If any other leave requests were

pending prior to the request, the Department would have to consider those requests first. Moreover, the Department would have to reevaluate each leave request to determine whether or not it could be reasonably denied, ...

\*\*\* Article 22(B) does not support the practice of FOP employees submitting FOP Lodge leave during the vacation leave bidding period. Instead, FOP lodge leave must "be requested in advance by the Lodge President (or his designees) in writing ...

Thus, the swap practice is designed to subvert both Article 22(B) and Article 8(G)(1) and (2). \*\*\*

It also nullifies the Police Commissioner's bargained for ability to deny administrative leave for Departmental need. This swap process also prevents the Department from adequately assessing the paid time off usage of its members and forecasting the appropriate staffing relief needed for the end of this calendar year. For instance, in this case the Department had assumed, after the vacation bidding period had closed, that the collective members would be using 376 vacation days (over a years' worth of leave) during the week of August 11 through 16. Instead, some 4 months later the calculation is changed- 71 members that the Department had assumed were using their paid time off would have to be re credited their vacation time to take at a later date. While the Department was aware that these members would be on paid time off for the same period of time, the paid time off calculation is substantially changed, with more than a years' worth of paid time off being readjusted back to the collective employees (through a work around of the contract provisions cited above). Accordingly, the Department cannot condone the swap practice, regardless of whether it was the way things were always done.

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The Union invoked arbitration. This proceeding followed.

### **Reconciliation After the Convention**

All, or almost all, of the officers on the Union's original leave request list attended the Conference, most using Article 8

leave. One employee did not attend conference based on the denial because he did not wish to use his Article 8 leave for the Convention. None of the employees who were denied Article 22 leave but attended the Convention suffered any economic loss, since all were on paid leave; but all participants lost the Article 8 leave used to cover their absences to participate in the Conference and did not, therefore, have that leave on any day available for later use.

### **POSITIONS OF THE PARTIES**

The positions of the Parties were presented during the course of the hearing and in oral closing statements. They are summarized as follows:

**The Union** points out that, at the outset, it submitted two questions: First, whether Article 22 leave is restricted only to employees of Lodge or if the language should be interpreted to cover all bargaining unit members employed by the Department; And second, whether the Department's July denial of leave to all employees requested by the Union was proper. The Union submits that both the first and second questions must be answered in the negative, the grievance sustained and appropriate remedy awarded.

The Union points out that no Department witness denied that a grant of Article 22 leave means anything other than that the Department had sufficient manning to meet its staffing needs. It urges that the Department did not assert, let alone prove, that it was short-staffed for August so as to require denial of leave; indeed, maintains FOP, none of the witnesses testified that there was insufficient staffing, either at the unit level or at a Department-wide level. If so, argues the Union, the Department could and would have denied leave requested at the time of bidding or after. FOP contends that, at the end of the day, the Department acknowledged that granting FOP all requested Article 22 leave and returning the switched out Article 8 leave would not have changed

the number of officers off on leave and would not have violated its staffing needs.

The Union argues that Article 22 requires Department approval of the leave as requested unless there is a valid and proper reason. It asserts that the Department had previously granted leave for all, or almost all, of the officers on whose behalf the Union requested leave in July. Indeed, points out FOP, Lt. Col. Jones admitted that, when he received the Union's July request, he did not even look at the leave books to determine how many officers were scheduled off on the days requested by the Union. The Union contends that no operational analysis was conducted until after Jones looked at the grievance. FOP argues that, if the Department's task was to determine if staffing would be short by granting the leave, inspecting the leave books would have been its first act. But, it maintains, the evidence is that no one in Departmental management even asked how many officers would be off or whether there would be overlap between Article 8 and 22 leave. Instead, contends FOP, Management simply said that the Union's request looks like too large a group and denied the request on that basis.

The Union points out that all but one of the officers whose Article 22 leave was requested had preapproved leave prior to the July 3rd request. It contends, therefore, that there is no operational reason for the Department to deny the Union's requested leave.

The Union posits that the Department's underlying concern is that the swaps from Article 8 leave to Article 22 leave would result in additional Article 8 leave, resulting in a staffing insufficient to meet future needs. However, points out FOP, the Department has the absolute right to deny such leave, based on operational needs. It asserts that, although Mr. Melancon "danced around the issue," Lt. Col. Jones admitted that to be the case. FOP asserts that Mr. Melancon presented the problem as procedural, but asserts that, in the end, employees will have the same amount

of leave and the same rights and obligations with respect to its use.

The Union argues that the Agreement is silent as to how the Union and its members are supposed to balance their contractual Article 22 leave with operational needs; and so the Parties and I can fill the gaps by looking to past practice. It concedes that the practice has required the Union to submit requests for Article 22 leave in advance, but points out that the requests and the switch to get there has always been done that way, and has never been an issue. That is particularly so because the practice is the same as Mr. Melancon was requesting. It points out that he had an advance "heads up" from the Union and was not blind-sided. FOP disputes Mr. Melancon's characterization of the Article 22 leave as a "gift", pointing out that the benefit was negotiated and is a part of the binding contract.

The Union complains that Management seeks authority to control the process and tell FOP how many delegates, who and from which departments and units can attend the Union's convention. But that, argues the Union, is not allowed under the MOUs and has never been the accepted practice. Ultimately, maintains the Union, what is at issue is the right of the Union to use its leave as negotiated. FOP argues that the Department's denial of the Union's request for Article 22 leave was improper, in violation of the MOUs.

As to the first question raised - whether leave is contractually limited to officers of the Lodge or whether it is available to all members - the Union points out that introduced into the record is a decade of leave requests made by the Union and uniformly granted by the Department, many of which were granted to officers other than Lodge employees. It points also to the testimony of three prior Union Presidents with a total of 20 years in the job, all of whom testified that Union leave has always been available to all members. It points out that the 2012 change in language removing the term "member" and replacing it with term "employee" was the result of a post- negotiation clean up (rather

than in bargaining). However, argues the Union, it makes no sense for the Article to cover only employees of the Union; if that were the case, the 600 days would be available to no more than 14 employees. Indeed, points out FOP, even after denying the Union leave for most of its requested representatives, Chief of Staff Melancon approved requests for Officers Fasano and Johnson, notwithstanding the Department's position that such leave was restricted to FOP officers, and continued to approve Union leave to officers not employed by the Lodge even after he denied Article 22 leave for the Convention. It points out that Union Exhibits 1-10 contain hundreds of pages of approved requests.

FOP maintains that Management's rationale for denying the Union's July 3<sup>rd</sup> request was an after the fact effort to find a reason not to allow the representatives to use Union leave. It contends that there is no evidence to support the restricted view of Article 22 advanced by Department. The Union points out that the Section uses different terms including the term "unit" employees. FOP contends that no practice - and no fair reading of the MOUs - support a restriction of Article 22 leave to employees of the Lodge.

The Union argues that the dispute is ultimately about the Union's right to carry out its business without interference. It contends that the testimony shows that the Department's denial of the Union's July 3<sup>rd</sup> request substantially interfered with that right; It urges that I sustain the grievance and award relief which will put the Parties back on course as they bargained for and as contract allows. The Union urges, by way of relief, that the Department be ordered to retroactively grant Article 22 FOP leave for all Union members who attended the conference in New Orleans in accordance with the Union's original July 3<sup>rd</sup> request. It urges that, to the extent officers took personal leave and would be capped by its return, the Department should pay the value of that leave in cash. FOP urges that I declare that Article 22 B. applies to all members of the Lodge. It asks that I find a binding past

practice to exist with respect to swaps for Article 8 to Article 22 leave and permit it to continue.

**The Department** argues that the Union's intent was to deceive it by having FOP members selected as representatives to its convention apply for and accept Article 8 leave with no intent to so use it, but instead to switch to Article 22 leave. It asserts that such switch is not provided for or allowed under the MOUs. BCPD points out that the Union acknowledged that it selects people by March to serve as representatives to the Convention, but did not provide notice to the Department of the numbers or identities at that time. The Department asserts that the Union did not submit its request for administrative leave because it understands that to grant so much leave would put the Department in operational jeopardy and because FOP feared that the leave would not be granted. BCPD contends that its opposition to the practice is not a result of lack of respect for Article 22 leave or even to allow it to limit the number of people receiving such leave.

BCPD argues that the review standard for Articles 8 and 22 leave is the same, so it makes no sense for the Union to be "hiding the ball". It concedes that the Union had provided some limited notice earlier than July, but points out that both Management witnesses testified that the number of officers involved was not communicated and that it would be useful to know earlier. The Department points out that the request for Article 22 leave was submitted six months after expiration of the bidding period; it asserts that the delay deprived the Department of the ability to assess the impact on operational needs of the large numbers of officers taking Article 22 leave. The Department urges that the clear intent of the Union was to have representatives swap the leave, using the Article 8 leave only as a place holder, but to conceal that intent from the Department.

The Department points out that there was further discussion after its initial rejection of the Union's July 3<sup>rd</sup> request during which FOP acknowledged - but only then - that it already had the

leave and was simply intending to swap categories. It protests that to grant the grievance and allow the past practice would be to endorse a practice intended to deceive. It maintains that swapping is improper; otherwise, it asks, why have different leave categories? BCPD points out that there are a number of different leave categories in Article 8, but no provision for swaps between them. It disputes that leave requests are not made in advance for purposes other than those for which they are applied and maintains that there is no provision to do so, either internal or external to the Article.

The Department urges that the grievance be denied as without merit and, to the extent that the Union relies on past practice to support its position, that the past practices be rejected as contrary to the terms of the Agreement and intentionally deceptive.

**The Union**, in response to the Department's closing argument, rejects the Department's argument that Lodge representatives, for 30 years, have been engaging in a deception. FOP points out that the open, consistent practice has been to make Article 22 leave requests right after July 1, when the bank is filled. It contends that, to act otherwise would risk non-availability of time off, so it puts in leave and swaps when Article 22 leave becomes available.

## **DISCUSSION AND ANALYSIS**

### **Burden**

It was the burden of the Union to establish that the action of the Administration refusing the Union's advance written request and denying Article 22 leave for representatives seeking to attend the 2019 FOP National Convention was in violation of the MOUs and/or of binding past practices. For the reasons which follow, I hold that the Union met its burden, that the reasons used by the Department to justify its denial are not valid, and that the grievance must be sustained and relief awarded.

## **Leave Types and Procedures**

The entitlements of bargaining unit members to be off duty in paid status are set forth in the MOUs, which provide for several types of paid leave. Article 8 G. provides for annual leave or vacation. It describes how such leave is accrued and how it is to be scheduled and used. Article 22 B provides for paid administrative leave to attend Union conferences, seminars, meetings and other Union activities. It requires advance, written request, which "shall be granted, subject to the needs of the Department." Indeed, *all* grants of leave are subject to the needs of the Department.

### **Department Determinations of Operational Needs**

The record establishes that the Department projects staffing needs, sets a Constant and imposes a ceiling on the number of leave slots allowed for particular dates. The evidence is that, when officers put in for Article 8 leave during the designated bid period, they do so on the basis of seniority, using leave books. When the leave slots for a particular day are full, no more bids will be approved. Thus, when the 74 (or so) anticipated Union representatives to the FOP National Convention who bid for Article 8 slots during the period of the Convention were approved for that leave, the slots were - by definition - consistent with the Department's projected operational needs. I note, in this regard, that operational needs might change, and approved leave rescinded for such reason; but that is not the situation here.

### **Eligibility of Representatives for Article 22 Leave**

By its terms, Article 22 B. makes FOP leave available for use by "employees of the Lodge." The Department argues that eligibility for Article 22 leave is limited to Lodge employees. The MOUs are internally inconsistent in this regard, rendering the language cited by the Department at odds with the principles that contracts be read and construed as a whole and that Article titles describe

what is in them. The Article Title is "Administrative leave for Lodge Representatives," which is unchanged from before the change to "employees of the Lodge". If the eligibility changed from "member" to "employee" the title should have changed, but did not. Moreover, the last sentence of 22 B. still describes each *unit* employee - not Lodge employee. 22 B. as written is also inconsistent with 22 A., which makes clear that the President of the Lodge remains a *Department* employee, not a Lodge employee. Under a literal reading of the language, the Lodge President - should he or she need Union administrative leave, would not be eligible.

Neither does the explanation make sense for *how* and *why* the language changed: "in the course of post-bargaining clean up". According to the unrebutted testimony of Mr. McElhainney, the change came not as a result of bargaining at the table. The previous contractual language (MOUs for and prior to 2012, Jt. Exh. 4) provided that such leave would be available to all "members of the Lodge". The record establishes that the availability of leave to all members of the Lodge had been the practice between the Parties before the language change and that continued to be the case after the change.

Neither the quoted language nor the record reveal whether elected officers or committee chairs are "employees of the Lodge." Clearly, the Lodge President is an employee of the Department, not the Lodge. Article 22, A. I note, in this regard, that the Administration's July 11<sup>th</sup> assertion of a limitation on eligibility to "employees of the Lodge" was followed by its submission for approval of a shortened list of representatives, which was *not* limited to officers and committee chairs. There are many other instances of record where it did not apply its own such an interpretation.

The record persuades me that the language change was not the result of mutual bargaining intent and that neither Party has ever applied the language as it appears to read until the Departments

July 11<sup>th</sup> response. The record persuades me that the use of the term "employees of the Lodge" was a mutual mistake. The Article must operate as intended and as administered. The appropriate application of the MOUs in this regard is exactly as the Parties have applied it: Article 22 leave is available to all members of the Lodge upon advance, written application by the Union, subject to the needs of the Department.

### **Swap Out of Article 22 Leave for Article 8 Leave**

The Union does not contest that, when its projected representatives put in for Article 8 leave for the period of the FOP Convention, it was their intention to use the approved time off to attend the Convention, but to substitute Article 22 leave to cover their absences at such time as it was approved, then withdraw their requests for Article 8 leave and have those leave days credited back to their leave accounts for later use. Indeed, the record establishes that to have been the consistent, known and accepted practice between the Parties. Indeed, that is the way representatives to the NOBLE conference, held the same time as the FOP Convention, handled their leave.

I note, in this regard, that the leave swap out from Article 8 to Article 22 could not have taken place until July, after Article 22 leave was available and approved, and that the most desirable leave periods would likely be closed or restricted by then. I also note that leave carryover from year to year is capped, that all use of leave is still subject to operational needs and that leave requests are subject to denial for such reason.

The Department protests that the premeditated swap out from Article 8 leave to Article 22 leave violates the MOUs, there being no provision for such swaps. I am not persuaded. There is no contractual prohibition on officers requesting and receiving leave and then withdrawing the request and having the leave credited

back. It happens, as described at several points in the record<sup>4</sup>; and it happens for all kind of reasons, without any administrative declination or claims that such withdrawals are improper. Indeed, Article 8 G. 3. recognizes the right of officers to cancel approved leave and provides for the treatment of such cancellations. I conclude that such cancellations or withdrawals are not prohibited under the MOUs.

The planned substitution of Article 22 leave for Article 8 leave and the planned withdrawal of the Article 8 leave is likewise not prohibited by the MOUs. The fact that the leave categories are in two different articles does not create prohibition or inference that they cannot be swapped.

Article 22 leave is specifically to be made available for FOP conferences and conventions. The procedure must be construed to give effect to the clear intent of the Section. Given the limited number of leave slots available and the difficulty in obtaining leave in popular time periods (including the summer when FOP conventions are held) and the refilling of the Article 22 leave bank only in July, the inability of prospective representatives to hold leave slots from early in the leave year would almost certainly result in many, perhaps most or all, representatives losing their ability to use Union leave to attend these important functions, thereby frustrating the very purpose for which such leave is to be made available. I am not persuaded that the procedure advanced by the Department - that Article 22 leave requests must be made only for new leave slots after such leave is banked - was or could have been an intended result. That implies the legitimacy of the swap described.

More to the point, the record evidences a clear and consistent practice over an extended period of time of allowing prospective Union representatives to claim and hold leave in the exercise of

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<sup>4</sup>See testimony of Major Preston.

their seniority-based Article 8 bid rights, substitute Article 22 leave when it is approved and then withdraw and obtain credit for the placeholder Article 8 leave. The practice was consistent, extended, known and accepted. Contrary to the Department's assertions, I do not find that the Union concealed the practice. The binding practice filled a gap in the contractual language and constitutes the way the Parties intended the procedure to operate.

It may well be that Commissioner Harrison and his Chief of Staff were not personally aware of the swap out practice, but the administration certainly had been and was aware. It happened all the time. Practices are established based on relationships between parties, not individuals, so the practice survived the new administration.

#### **Downstream Impact of Recredited Article 8 Leave**

The Department expresses concern that the restoration of the Article 8 leave will result in a flood of extra days off. But the Parties explicitly negotiated extra paid time off for Union business and negotiated the amounts of Article 8 and 22 leave. I am not persuaded that they intended to have officers serving as Union representatives be deprived of their Article 8 leave in order to carry out their Union duties. If that were the case, there would be no need for Article 22 B. Leave.

The restored leave following the swap out simply places officers leave balances where they would be if Article 22 was available to cover leave. Indeed, officers may still be worse off, because the Article 8 leave on which they bid and were granted was locked in, whereas the Article 8 leave credited back to them was only available first-come, first-served on a leave schedule already full and subject to denial based on Department needs.

The Department complains that first line supervisors may be reluctant to deny officers requested leave, even when leave-caused absences might leave particular districts or divisions short-

handed. With due respect, any such grants of leave are an oversight and management issue within the control of the Department. The Department also complains that the grant of leave by first line supervisors may be made without sufficient knowledge of Department-wide operational needs. That too is an oversight and management issue subject to guidance and correction at the command or Departmental level.

### **Claim of Excessive FOP Leave**

It is certainly true that 600 days of Union leave per year (in addition to the contractual full-time position) sounds like a lot of leave, and must seem so to the new Commissioner, who comes from a department which lacks such leave. But that is the level of Union leave negotiated between the Parties which has been in effect - without efforts to change it - over an extended period of time. It is a negotiated benefit, not a gift. Any change in the number of days or restrictions on their use must be made at the bargaining table and not through managerial fiat.

Management may not pick and choose the binding practices it will continue. It is true that practices are a product of the circumstances giving rise to them and that change may be appropriate as circumstances change. However, the record provides no evidence of changes sufficient to warrant elimination of or change to the practice. The arrival of a new Commissioner or that Commissioner's determination that the practice is "bad" or contrary to the new way of operating are not circumstances allowing a change in the long-standing practice.

### **Management's Determination to Limit the Number, Distribution and Identities of FOP Representatives**

The record indicates that the Commissioner reviewed the Union's July 3<sup>rd</sup> request for Article 22 leave, made his determination as to the number of Union representatives he considered reasonable, determined from where in the Department they

would be drawn and determined, in the instances of officers and committee chairs, who they would be. None of the determinations described are within the purview of the Commissioner. The Union has the right to select its representatives. The Union has the right to determine from where within the Department they will be drawn.

As indicated, the Department has the right, for valid, non-pretextual reasons, to make leave determinations based on needs. It certainly has the right to cap the number of officers allowed on leave for any particular period and to limit leave for particular commands and districts or combinations of such organizational entities. However, the Department does not have the right to limit Article 22 swap outs for Article 8 placeholder leave does not have the right to deny leave credits resulting from the swap out, and does not have a right to otherwise treat Article 22 leave as inferior to or more restrictive than Article 8 leave. The Award so reflects.

### **Open Communications**

Each Party professes to want open communications, to establish a sound relationship and to build trust. There will certainly be future situations where such a relationship is important to the Parties and the City. Communications in advance of the incident at issue might have increased understanding, built the relationship and prevented or limited the dispute at issue. Both Parties had the ability to pick up the phone or otherwise reach out. Neither did so.

### **A W A R D**

The Union met its burden to prove that the Department's conduct in denying requested Article 22 leave for Union representatives to the 2019 FOP National Convention was in violation of the MOUs and binding past practices. The grievance is sustained.

Article 22 B. of the MOU applies to all Department employees covered by the Unit I and II MOUs. The

provision is not limited to a subset of such employees who are officers or committee chairs of the Lodge.

A binding past practice exists which allows Union representatives to FOP national conventions to receive Article 22 B. leave, to substitute such leave for previously-granted Article 8 G. leave and to have the Article 8 leave credited back to their leave accounts. That practice is applicable to the Union's requests for such leave for 74 representatives designated by it to attend the 2019 FOP National Convention.

The Department acted improperly and in violation of the MOUs when it denied Article 22 FOP administrative leave requests for bargaining unit employees to attend the FOP 2019 National Convention. That violation was not cured by the Department's subsequent grant of such leave to a more limited number of officers, committee chairs and members and/or representatives from districts and divisions designated by it.

The Department lacks authority to limit the number or organizational distribution of Union representatives receiving Article 22 B. leave for other than operational needs or to designate directly or indirectly who those representatives will be.

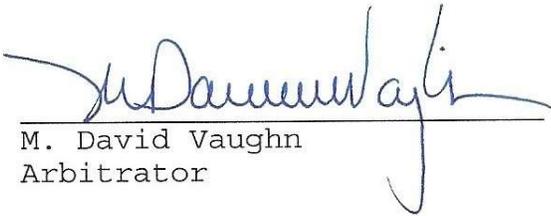
In remedy for the Department's improper denial of the Union's July 5, 2019 request for Article 22 B. leave, the Department shall credit to the leave account of each such officer the same number of Article 8 leave days as the officer used in connection with the Conference. There shall be no reduction in the amount of leave to be credited based on the Department's later, partial grant of Article 22 leave for the Convention, since the Union rejected the grant.

In further remedy, the Article 8 leave to be restored shall be returned and credited to each employee within 30 calendar days from the date of issuance of this Award. Employees who are placed above the leave cap as a result of the restoration of leave shall be, upon request, given a one-time increase in the amount of the cap in the amount of leave to be restored. If that cannot be done, then the officers receiving such leave shall be paid the cash value of the leave in excess of the cap, less appropriate deductions.

All requests for non-bid leave, including leave restored pursuant to this Award, shall be granted first-come first-served and subject to the needs of the Department. Such approval shall not be unreasonably, discriminatorily or pretextually withheld.

Jurisdiction is retained for a period of 90 calendar days from the date of issuance of the Award, and thereafter upon the written request of either Party for good cause shown, for the purpose of resolving disputes which may arise in the implementation of the Award.

Issued at Clarksville, Maryland this 18<sup>th</sup> day of February, 2020.



M. David Vaughn  
Arbitrator