

**STATE OF TEXAS
CHAPTER 143, TEXAS LOCAL GOVERNMENT CODE
THIRD PARTY HEARING EXAMINER PROCEEDING**

**In the Matter of the Grievance
Between**

Brownsville Fire Fighters Association,
Local 970

Grievant,

—and—

City of Brownsville,

Respondent.

AAA Number: 01-20-0015-1664¹

**SUBJECT: APPEAL OF HAZARD PAY
GRIEVANCE**

**BEFORE: DIEGO J. PEÑA
Arbitrator/Hearing Examiner**

APPEARANCES

FOR GRIEVANT, BROWNSVILLE FIRE FIGHTERS ASSOCIATION: Mr. Rafael Torres,
TSAFF Service Director, 1106 Lavaca Street, Suite 100, Austin, TX 78701

FOR RESPONDENT, CITY OF BROWNSVILLE : Ms. Rebecca S. Hayward, Denton Navarro
Rocha Bernal & Zech, A Professional Corporation, 701 E. Harrison, Suite 100, Harlingen, TX
78550

Place of Hearing: Brownsville, Texas

Date of Hearing: June 29, 2021

Date of Hearing Closed: September 20, 2021²

Date of Award: October 29, 2021

¹ The AAA case number is included for the limited purpose of identifying how this case came before the Arbitrator.

² The record was closed upon receipt of the parties' post-hearing briefs.

AWARD SUMMARY

This grievance concerns a contract dispute between The City of Brownsville (“City”) and the Brownsville Fire Fighters Association Local 970 (“BFFA” or “Union”). The City is a Civil Services City under Chapter 143 of the Texas Local Government Code and a Collective Bargaining City under Chapter 174 of the Texas Local Government Code. The BFFA grieves the City Fire Chief’s decision denying firefighters hazard duty pay in May 2020. The BFFA claims the City’s denial of hazard pay violates Article 22 of their collective bargaining agreement (“CBA”). The City maintains the BFFA’s grievance is not arbitrable pursuant to Article 8, the Management Rights Article, of the CBA. For the reasons stated below, the Arbitrator finds that the BFFA’s grievance is arbitrable. The Arbitrator also finds that the City has not violated Article 22 of the CBA. The BFFA’s grievance is denied.

STATEMENT OF PROCEEDINGS

The arbitration hearing commenced on June 29, 2021 in Brownsville, Texas. The parties appeared and were represented by counsel. The parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and present oral arguments. The hearing was transcribed by a court reporter, and a record of the exhibits was maintained.³ The Arbitrator closed the record on September 20, 2021, the date both parties submitted their post-hearing briefs.

³ Ms. Peggy Bryant, a certified court reporter in the State of Texas transcribed the testimony which is the official record of the hearing. References to the testimony will be identified as Tr. ____ Exhibits offered by the City will be identified as CX-____. Exhibits offered by the BFFA will be identified as UX-____.

ISSUES⁴

Issue 1 – Is the grievance filed by the BFFA claiming Fire Chief Jarrett Sheldon violated Article 22 of the CBA, the Hazardous Duty Pay article, arbitrable?

Issue 2 – Did the City violate Article 22, of the CBA when Chief Sheldon ended the state of emergency on May 1, 2020, and if so, what should be the remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT⁵

ARTICLE 1. PARTIES & PREAMBLE

Section 1. The parties to the following Labor Agreement are the CITY OF BROWNSVILLE, TEXAS (“CITY”) AND BROWNSVILLE FIRE FIGHTER’S ASSOCIATION, IAFF LOCAL #970, (“BFFA L-970” or “the ASSOCIATION” or “the UNION”).

Section 2. This Labor Agreement is recorded in written form to meet the requirements as set forth in the Fire and Police Employee Relations Act, Chapter 174, Texas Local Government Code (“TLGC”).

Section 3. This Labor Agreement is designed to provide for an equitable and peaceful procedure for the resolution of differences in accordance with the grievance procedure specified herein, with the intention of maintaining an effective fire department for the citizens of Brownsville, Texas.

...

ARTICLE 8. MANAGEMENT RIGHTS

Section 1. Except as otherwise specifically provided in this Agreement, the Association recognizes that the City has the sole and exclusive right to exercise all the rights and functions of management. The term “Rights of Management” shall be defined as:

- A. Directing the work of its employees to include the scheduling of overtime work.
- B. Hiring, promoting, demoting, transferring, assigning and retaining employees in positions within the City, subject to Civil Service regulations.

⁴ The parties did not agree to a joint submission of issues. The Arbitrator determined the issues based on their proposed statements of the issues.

⁵ Both parties offered the CBA: UX-1 and CX-1.

- C. Suspending or discharging employees for just cause, subject to Civil Service regulations.
- D. Maintaining the efficiency of governmental operations.
- E. Relieving employees from duties because of lack of work, subject to Civil Service regulations.
- F. Utilizing the fire Department in emergency situations to protect life and property.
- G. Determining the methods, processes, means and personnel by which operations are to be carried out.
- H. The determination of the safety, health and property protection measures for the Fire Department.
- I. The selection, promotion, or transfer of firefighters to supervisory or other managerial positions subject to the provisions of the Texas Local Government Code Chapter 143.
- J. The determination of policy affecting the selection and training of fire fighters.
- K. The establishment, modification and enforcement of Fire Department rules, regulations, and orders.
- L. The transfer of work from one position to another within the Fire Department subject to the provisions of the Texas Local Government Code Chapter 143.
- M. The determination of the number of ranks and number of firefighters within each rank in accordance with the provisions of Texas Local Government Code Chapter 143.
- N. The transfer of firefighters from one house, district, or subdivision to another.
- O. The scheduling of operations and the determination of the number and duration of hours of assigned duty per week except as specified in Article 11 – Hours of Work; Work Shifts.

Section 2. Notwithstanding the specification of Management Rights above, the City agrees that it will not challenge the grievability of a transfer under Section 1.N. under the following circumstances:

- A. The transfer is grieved on the basis of being arbitrary or capricious;
- B. No more than three such grievances may be filed in a one-month period ending September 30 of each year; and
- C. "Chain reaction transfers" where one transfer cause another transfer will be considered one grievance if grievances by all affected employees are filed at the same time.

Section 3. No management right as herein referred shall be exercised in an arbitrary or capricious manner.

...

ARTICLE 22. HAZARDOUS DUTY PAY

Section 1. All firefighters on or called to duty, and who in fact report for active duty, during a state of emergency (hurricane, flood, tornado, or other emergency), as declared by the Fire Chief, shall be paid at a negotiated rate of one and one-half times the firefighter's regular rate of pay as defined by Article 21, Section 1, regardless of whether an overtime rate is required by state or federal law.

...

ARTICLE 43. GRIEVANCE PROCEDURES

Section 1. A grievance is a claim that an express provision of this Agreement has been violated but does not include any discharge or disciplinary matter. Furthermore, matters subject to Fire and Police Civil Statutes and Regulations are not subject to this grievance procedure.

Section 2. A firefighter may discuss any alleged grievance with the firefighter's supervisor up to and including the Fire Chief without invoking the formal grievance procedure called for in this article. If the alleged grievance cannot be resolved informally within seven (7) business days, the formal grievance procedure may be invoked.

Section 3. Failure to file a written grievance within fifteen (15) business days of the event giving rise to the grievance shall preclude the grievance from further consideration by the City.

Section 4. In the event that more than one procedure (i.e., agreement, grievance procedure or appeal under Civil Service procedures) is available for resolution of a grievance the firefighter shall be limited to one procedure through which remedy may be sought. The aggrieved firefighter shall indicate, in writing, which procedure is to be utilized and shall sign a statement to the effect subsequent appeal under any other procedure. Failure to elect in writing as provided in this section shall preclude any further processing of the grievance up to and including arbitration.

Section 5. **STEP 1:** A formal grievance must be initiated solely by a single firefighter through the Association Grievance Committee. If any employee believes there is cause for the filing of a grievance, the firefighter shall file a written statement of the grievance with the Association Grievance Committee within fifteen (15) business days following the incident which gives rise to the grievance. The written grievance shall be submitted on a form like the ones attached to this agreement, and shall include the following:

- A. A statement of the grievance and the facts on which it is based;
- B. The provision of the agreement which has been violated;
- C. The remedy of adjustment sought;
- D. The grievant's signature and date; and
- E. Statement that no other procedure, appeal or any other remedy may be sought once a written grievance has been made.

Section 6. **STEP 2:** If the Association Grievance Committee, after meeting and evaluating the grievance, determines to advance the grievance, it must, within seven (7) business days from receipt thereof, submit the grievance to the Shift Commander. The Shift Commander shall forward the grievance to the Fire Chief.

- A. The Fire Chief may meet with the grievant and the Association Grievance Committee within fifteen (15) business days of the receipt of the appeal of the Step 2 Grievance.
- B. The Fire Chief will render a decision no later than (10) business days after meeting with the grievant and the Association Grievance Committee or within 15 business days of receiving the grievance if there is no meeting.
- C. If the Fire Chief does not render a decision in writing within the period stated above, then the grievance shall be deemed to be denied.

Section 7. **STEP 3:** If the grievance is denied or otherwise not settled satisfactorily at Step 2, the grievance shall then be submitted in writing to the City Manager no later than seven (7) business days from the date the Step 2 answer was received or due, whichever is later.

- A. The City Manager may meet with the grievant and the Association Grievance Committee within fifteen (15) business days of the receipt of the appeal of the Step 2 Grievance.

- B. The City Manager will render a decision no later than ten (10) business days after meeting with the grievant and the Association Grievance Committee or within 15 business days of receiving the grievance if there is no meeting.
- C. If the City Manager does not render a decision in writing within the period stated above, then the grievance shall be deemed to be denied.

Section 8. **STEP 4:** If the Grievance is not settled satisfactorily in Step 3, the Association Grievance Committee shall give written notice, not later than seven (7) business days from transmittal from the City Manager of the Step 3 answer, of its intent to request the grievance be submitted to arbitration. The parties may agree to grievance mediation to attempt to resolve the grievance prior to the formal filing for arbitration.

Section 9. If arbitration is invoked pursuant to the grievance procedure, the parties may agree upon an arbitrator. If the City and the Association fail to agree on an arbitrator within seven (7) business days from date of submittal of the request for arbitration by the Association, the Association shall have an additional seven (7) business days to request a list of seven (7) qualified neutrals from the Federal Mediation and Conciliation Service (FMCS) or the American Arbitration Association (AAA) each of whom shall be members in good standing of the National Academy of Arbitrators. Upon receipt of the list, the city and the Association shall have seven (7) business days to meet and alternatively strike the names on the list, and the remaining name shall be the arbitrator. The party requesting arbitration shall strike first.

Section 10. The arbitrator's decision must be directly related to the specifically cited language of this Agreement, excluding management's rights of any sort. The arbitrator shall not have the power to add to, amend, modify, or subtract from the provisions of the Agreement in deciding the grievance being presented nor shall an arbitrator have authority to decide issues involving the exercise of management rights, otherwise the finding of the arbitrator shall be binding.

Section 11. Any costs of said proceeding shall be borne equally by the City and the Association.

Section 12. Any and all time limits imposed in this grievance process may be extended only by agreement of both parties in writing.

Section 13. Anything in this Agreement to the contrary notwithstanding, the following matters are not subject to the grievance procedure of this Agreement:

- A. Any grievance which is not filed in accordance with the provisions set forth above or does not meet the definition of a grievance as set forth in this Labor Agreement; or

- B. Any matter which would request a change from the wages, rate of pay, hours of work, grievance procedures, working conditions and all other terms and conditions of employment as set forth in this Agreement; or
- C. Any matter which is not covered by this Agreement or
- D. Any matter covered by City Charter, City of Brownsville Ordinances, Statutes and Constitutional provisions.
- E. Any matter excluded from the arbitration process as specified in this labor agreement.

Section 14. It is understood and agreed by all parties that “business days” do not include Saturday, Sunday, or holidays.

...

BACKGROUND SUMMARY⁶

1. Brownsville is in deep South Texas along the Gulf Coast and border with Mexico.

The City has a population of approximately 183,000.

2. In December 2019, COVID-19, a highly contagious virus, spread quickly from Wuhan City in China to regions around the world. UX-1 at p. 1. Infected persons have experienced outcomes ranging from mild to severe illness to death. By the end of January 2020, the United States Center for Disease Control (“CDC”) was reporting cases of COVID-19 in the United States.

3. Anticipating COVID-19 coming to Brownsville, City leaders began developing a continuity plan. CX-2. As part of that effort, Fire Chief Sheldon and his leadership team prepared a continuity plan for the Fire Department. *Id.* In putting the plan together, Chief Sheldon and his staff reached out to various federal and state officials as well as other firefighting professionals from other cities to share information and best practices. Tr. 133-35. They also

⁶ This is a summary of the credible evidence offered by the parties and admitted by the Arbitrator. Only details relevant to the issuance of this award are included in this summary.

moved quickly to order personal protective equipment (“PPE”) and other supplemental protective equipment and gear. Tr. 136-37. Due to high demand, PPE was not immediately available. *Id.* Nonetheless, the Department obtained as much PPE and equipment as possible and began implementing their continuity plan. *Id.* As they implemented the plan, they continued to dialogue with City and Union leaders, Brownsville firefighters, outside officials and others on how to provide firefighting and emergency services to the community safely and efficiently.

4. In March 2020, the first case of COVID-19 was reported in Brownsville. City Mayor Juan Mendez III issued a Declaration of Emergency, closing non-essential retail establishments and schools. UX-3. Essential businesses such as grocery stores and pharmacies remained open. All in-person events on City owned facilities were canceled, and restaurants and bars were closed to in-person dining. *Id.* Non-essential city workers were directed to work remotely if possible. Elective medical and dental procedures were prohibited. In-person religious and worship services were closed. Interestingly, Mayor Mendez did not mandate the wearing of masks in this first declaration.

5. Not long after Mayor Mendez issued his emergency proclamation, Fire Fighter Jorge Lerma, President of the BFFA, sent the following email to City Fire Chief Jarrett Sheldon on March 20, 2020:

On behalf of [BFFA] we wish you a successful attempt to manage this very serious State of Emergency with the COVID-19 Virus Pandemic. As you are aware, the State of Emergency has been declared by Federal, State and even our local municipal Mayor Trey Mendez. As this time, we are requesting that you declare a State of Emergency for the Fire Department in order to comply with:

ARTICLE 22. HAZARDOUS PAY Section 1. All firefighters on or called to duty, and who in fact report for active duty, during a state of emergency

(hurricane, flood, tornado, or other emergency), as declared by the Fire Chief, shall be paid at a negotiated rate of one and one-half times the firefighters regular rate of pay as defined by Article 21, Section 1, regardless of whether an overtime rate is required by state or federal law.

Before we approach City Hall, our members need to be properly informed as to why compliance to this contract article is being delayed or ignored. Over the years of CBA negotiations, this article has been revised a number of times. The purpose of this article remains the same. The adjustment in pay is to allow the Firefighters to attend to the needs and expenses for the protection of their own family members as they continue to place themselves at serious risk of harm or illness as a result of the selfless commitment to their careers and community.

Currently, we are already facing tough choices and additional stress in dealing with this State of Emergency. We have children remaining at home that need to be cared for. We have to consider moving the most vulnerable family members such as the elderly, ill, and our youngest children away from ourselves due to the likelihood we will be exposed to the virus as we face patients on the front line of emergency services. All this creates a burden on our daily lives as we continue to report to duty.

Your compliance with our contract article is critical to the well being of all first responders.

CX-3.

6. The following day, on March 19, 2020, Fire Chief Sheldon declared a State of

Emergency:

This email serves as my official notice to all the members of the fire department that I, Jarrett Sheldon Fire Chief am declaring a State of Emergency effective today at 2000 hours and until further notice. This evening we were notified that our response area has a confirmed COVID-19 case...Please understand that our protocols for PPE have not changed. Refer to CDC Guidelines. I ask that in this stressful time that we all stand together and take care of each other. The Brownsville Fire Department will continue to provide up to date information as it becomes available. Prayers to all the Brownsville Fire Department.

CX-4. As a result of this directive, Brownsville firefighters began receiving hazard pay.

Tr. 184. The firefighters continued to serve the fire and emergency needs of the community. Demand for ambulance and firefighting services increased. Chief Sheldon

and his leadership team continued to share information he learned from fire department officials from other parts of the country. Tr. 134-36. He also continued to acquire PPE and other safety equipment to supplement what they had ordered and already acquired.

Id. He also continued to update and modify prior directives regarding safety practices.

7. On April 7, 2020, Mayor Mendez issued his Second Amended Declaration of Local Disaster. UX-2. He declared that effective April 13, 2020, all individuals over the age of five would be required to wear masks in all public settings such as grocery stores and pharmacies.

Id. Many of the establishments and services described in the prior disaster declaration remained closed.

8. On April 16, 2020, City Financial Services Director Guadalupe Granado, delivered a report to Mayor Mendez and the City Commission outlining the pandemic's projected impact to the City's revenue and expenditure streams. CX-5. Mr. Granado's report highlighted concerns regarding the pandemic's negative impact on the sales tax, one of the City's major revenue streams. *Id.*, Tr. 186-88. According to Mr. Granado's estimates, revenues for fiscal year 2020 could be expected to decrease between \$640,000 and \$2,000,000 for the months of March, April and May 2020. CX-5 at p. 5. This reduction in sales tax revenue would also require City leaders to closely monitor and reduce their budgeted expenditures. Tr. 188.

9. On April 21, 2020, Mayor Mendez issued his Third Amended Disaster Declaration. UX-2. This declaration allowed non-essential retail establishments to reopen so long as they complied with CDC and state hygiene rules and guidelines. *Id.* Religious and worship services that could not be conducted virtually were given limited permission to meet in-person. Schools were opened for the limited purpose of conducting meals and facilitating remote

or online classes. This declaration signaled that the City was moving in a direction anticipating re-opening. *Id.*

10. Chief Sheldon and his leadership team continued to monitor the impact of the pandemic on the department as they worked to implement their continuity plan. Tr. 137. They worked with local health officials in monitoring the infection rate and implementing safety practices. Tr. 153. They also continued to share information and best practices with other fire departments. *Id.* Although the continuity plan anticipated increased absenteeism, despite increased infection rates in the community and increased patient demand for fire and EMS services, the Department incurred no significant reduction in on-duty personnel. Tr. 138-40. They did not cancel any scheduled leaves.

11. From his discussions with fire officials outside of Brownsville, Chief Sheldon learned that fire departments in other communities that were providing hazard pay were having to cutback working hours and furloughing firefighters. Tr. 151-57. Having recently added 15 new firefighters before the pandemic, he did not want to furlough any Brownsville firefighters or reduce hours. Tr. 157-58. Needing firefighters to meet the increased demand for services, Chief Sheldon considered lifting the state of emergency and ending hazard pay. The Chief wanted the Department to be fully staffed and he wanted to provide steady income for his firefighters. Tr. 158. Many of his firefighters were now the primary source of income for their families.

12. In late April 2020, Union President Lerma learned that Chief Sheldon was considering ending the state of emergency and hazard pay. He sent Fire Chief Sheldon the following email message:

It is my understanding that you are considering a date for when the members of the Brownsville Firefighters Association will no longer be paid the COVID-19 Hazard

Pay as stipulated in our contract. The need for Hazard Pay is no different TODAY as it was when we first began. Cameron County, with the largest number of pandemic cases, continues to get positive COVID-19 patients and we are far from returning to normal. ALL First Responders should be tested for Corona Virus at the very least once and then every two weeks to follow up and ensure that we are not exposing each other or the community with this virus. In addition, as we continue to serve the community and risk placing our own families in danger, some of our spouses are not allowed to work and have to care for the kids that are not in school. All scientific indications are that the COVID-19 Virus may be spread by individuals that have no symptoms of the flu.

We believe that a reasonable time to consider lifting the Hazard Pay would be when it is SAFE enough for ALL Fire Administrative personnel and City Employees to return to work in their appropriate offices. In addition, it is critical that our members have access to regular testing for COVID-19 in order to justify lifting the Hazard Pay as stipulated in our CBA with the City of Brownsville.

With this letter, we respectfully ask that you establish legitimate criteria that would reasonably justify removing Hazard Pay including building up our inventory of Personal Protective Equipment, disinfectants such as Lysol and bleach, and hand sanitizers to prepare for the next flu season. Thank you in advance for prioritizing the needs and well being of our Brownsville Firefighter Paramedics. [Emphasis in original.]

CX-4.

13. On May 1, 2020, Chief Sheldon ended the State of Emergency:

On May 1st at 12:00 a.m., I will be ending the Fire Department State of Emergency. All of the safety measures that we have in place will remain in place as this will continue as our new normal operations.

CX-6.

14. On May 14, 2020, Union President Lerma submitted a formal grievance with the

BFFA Grievance Committee:

A. **Factual Basis of the Grievance.** ... On May 1, 2020 at midnight, Fire Chief Jarrett Sheldon terminated hazard pay as stipulated in CBA to all on duty firefighters during COVID-19. Emergency.

B. **Contract Articles, Terms, Etc., Believed to be Violated.** ... Article 22 Hazardous Pay of the Collective Bargaining Agreement with City of Brownsville and BFFA Local 970.

C. **Remedy or Adjustment Sought.** ... Continue with the hazard pay starting on May 1, 2020 for all firefighters that report to duty during this COVID-19 state of emergency and the threat to first responders is eliminated.

UX-2, Tr. 27-28. Union President Lerma filed this grievance because he believed it was too early for Chief Sheldon to lift the state of emergency. Tr. 28.

15. The Union forwarded the grievance to Chief Sheldon, and after a brief meeting with Union President Lerma, Chief Sheldon denied the grievance. Tr. 48. This was Step 2 in the CBA grievance process. The next step was to submit the grievance to the City Manager.

16. On June 7, 2020, the Union submitted the grievance to Brownsville City Manager Noel Bernal. CX-7. Not long after receiving the grievance, City Manager Bernal called a meeting to discuss the grievance with Union leaders. Tr. 49. He informed the Union officials present that (1) Chief Sheldon had the authority to determine whether a state of emergency existed, (2) he did not believe that this issue could be grieved, and (3) that the City could not afford their request for hazard pay. *Id.*, Tr. 236-37. He followed up the meeting with a written denial of the grievance, dated June 19, 2020:

On March 23, 2020, due to the COVID-19 pandemic, the Fire Chief, per the contract, declared a state of emergency for the Fire Department. All Fire Department employees who qualified received the rate of pay on one and one-half times their regular rate of pay also known as Hazard Duty Pay.

On May 1, 2020, as the State of Texas and Governor Abbot began the transition into opening up services, stores, parks, and various other facilities, the Chief then cancelled the declaration of the state of emergency for the Department on May 1, 2020 thus also ending Hazardous Duty Pay. This is his right under the contract as is explicitly worded in Article 22.

Based on the grievance, I am unable to tell whether the grievance is that employees were not paid hazardous duty pay during the period of the disaster declaration or if the grievance is the fact that the Chief cancelled the disaster declaration on May 1, 2020.

In any event, I have confirmed that all qualified Fire employees who worked during the period in which the Chief declared a state of disaster were paid hazardous duty pay in accordance with the contract. The cost to the City was \$1,926,617 between the dates March 19th to May 1st 2020.

In regards to the cancellation of the disaster declaration, this falls under the Chief's authority as per the current CBA and there is no violation of Article 22.

As emergency responders, you are called to duty at times most trying. It is my hope, that during the period in which the hazardous pay was allotted, it has assisted you and your families but there is no feasible way the City can continue with that expense. As you know, we are currently in unprecedented times and I commend you all for the continued service you provide to the citizens of Brownsville on a daily basis. Thank you for your service.

In summary and for all the reasons noted above, the grievance is DENIED.

CX-8. On June 26, 2020, Union President Lerma sent a letter to City Manager Bernal, asking that he reconsider his decision denying the grievance. UX-2. The letter also notified the City Manager that the Union intended to arbitrate the grievance. *Id.*

17. After filing for arbitration, the Union and the City continued discussing the grievance, negotiating hazard pay, working conditions, and other situations resulting from the pandemic. Tr. 93-103; *see also* UX-4.⁷ The City also decided to give firefighters a \$500 stipend for a period of 60 days effective August 2020. *Id.*

⁷ The emails dated July 1, 2020 and beyond describe work condition situations and other negotiations between the Union and the City. A July 20, 2020 email from Union President Lerma memorializes an exchange between the parties negotiating a possible monthly hazard pay differential. There was no evidence that these negotiations resulted in an agreement.

THE UNION'S POSITION

18. The Union maintains that while Article 22 may give the Chief the authority to declare a state of emergency, he does not have the authority to unilaterally end an emergency. The Union argues that the nature of an emergency should dictate when that emergency ends. In the case of hurricanes, floods or tornadoes, these disasters end naturally. The Union argues that the COVID-19 pandemic did not end on May 1, 2020 when Chief Sheldon ended the state of emergency. The Union points out, that the pandemic continued after Chief Sheldon's declaration to end the pandemic, and that Brownsville firefighters—and their families—continue to be exposed to possible infection. They point to a series of directives issued by the Chief and the Department after May 1, 2020 requiring PPE and implementing additional safety measures. The BFFA asks the Arbitrator to find that Chief Sheldon lacked the contractual authority to end the state of emergency and that the Arbitrator award hazard pay. The Union believes firefighters are entitled to hazard pay from March 23, 2020 forward for being on the frontline of a “medical warzone” that is severely impacting them and their families. Business closures, layoffs, and higher prices for commodities have placed an unprecedented economic and financial burden on their families. They ask that hazard pay be reinstated from May 1, 2020 to a date forward.

THE CITY'S POSITION

19. The City maintains this grievance is not arbitrable. The City argues that under Article 8, the Management Rights Article of the CBA, the Union is precluded from grieving any violation of Article 22. According to the City, the decision to grant or deny hazard pay under Article 22 is a discretionary management right which the Union has agreed not to grieve or arbitrate. This provision also prevents the Arbitrator from reviewing and deciding this grievance.

20. Alternatively, the City maintains Chief Sheldon did not violate Article 22 when he ended the state of emergency on May 1, 2020. The City believes Article 22 gives the Fire Chief the discretion to determine when an emergency exists and when an emergency ends. The City claims Article 43, Section 10 prevents the Arbitrator from making any decision or ruling or decision adding or modifying Article 22. The City asks that the Arbitrator deny the grievance.

DISCUSSION & ANALYSIS

THE UNION'S GRIEVANCE IS ARBITRABLE

21. The City has the burden of persuasion on the arbitrability issue. This Arbitrator, like most arbitrators, is reluctant to find a grievance not arbitrable. Generally, a grievance should be presumed arbitrable since it is usually in the parties' best interest to allow a dispute to be decided on the merits. To decide arbitrability, the arbitrator must measure the Union's stated grievance against the actual arbitrability language contained in the CBA.

22. The Union's grievance alleges the City violated Article 22, the Hazard Pay article, when Chief Sheldon terminated the state of emergency on May 1, 2020. UX-2. The Union seeks to continue the state of emergency and receive hazard pay for as long as the emergency continues. *Id.* The City maintains this grievance is not arbitrable because it challenges several discretionary management rights recognized in the contract. The Union, however, maintains its grievance does not challenge the Chief's discretion to issue a state of emergency; rather, they believe that Article 22 does not give the Chief the authority to end a declared state of emergency.

23. Article 43, Section 1 states:

A grievance is a claim that an express provision of this Agreement has been violated but does not include any discharge or disciplinary matter. [Emphasis added.]

CX-1 at p. 22. The Union's grievance expressly states that the Chief violated Article 22 when he terminated the state of emergency and hazard pay. UX-2. The grievance as written does not challenge the Chief's discretion to make the decision. There is nothing in the Union's grievance seeking to change, alter or amend Articles 8 or 22. *Id.* The grievance claims the City violated a specific article of the CBA—Article 22. While the City may claim that the Chief retains the contractual management right to decide when to declare a state of emergency and authorize hazard pay, this intended defense does not preclude the Union from grieving and arbitrating their good faith belief that the Chief violated Article 22.

24. The City has failed to persuade the Arbitrator that the Union's grievance is not arbitrable. The Arbitrator finds the Union's May 14, 2020 grievance is arbitrable.

THE FIRE CHIEF DID NOT VIOLATE ARTICLE 22

25. The BFFA's grievance asserts the Chief violated Article 22 when he ended the State of Emergency on May 1, 2021. UX-2. The burden of proof and persuasion rests with the BFFA to establish by a preponderance of the evidence that the City, acting through the Chief, violated Article 22. To establish its burden of proof and persuasion, the BFFA must provide a sufficient quantum of facts proving that the Chief's action violated the express language of Article 22.

26. Article 22, Section 1 of the CBA states:

Section 1. *All firefighters on or called to duty, and who in fact report for active duty, during a state of emergency (hurricane, flood, tornado, or other emergency), as declared by the Fire Chief, shall be paid at a negotiated rate of one and one-half times the firefighter's regular rate of pay as defined by Article 21, Section 1, regardless of whether an overtime rate is required by state or federal law. [Emphasis added.]*

UX-1. This Arbitrator has great respect for the collective bargaining process and pays great deference to contract language mutually agreed to by the parties and memorialized in their CBA. In this regard, this Arbitrator works to discern the parties' mutual intent expressed by the wording contained in the CBA, and to interpret the agreement within the parameters of that wording. Article 22 expressly states that the Fire Chief declares the existence of a state of emergency. *Id.* Article 22 identifies three types of calamities that are common to South Texas and Brownsville: hurricanes, floods and tornadoes. *Id.* The parties have agreed to have the Fire Chief determine when a state of emergency exists for these three specific calamities, even though other governmental authorities and agencies forecast and issue emergency warnings for these calamities. The Fire Chief's declaration has the effect of obligating the City to compensate firefighters at a higher rate which the parties have negotiated. *Id.*

27. In addition to hurricanes, tornadoes, and floods, the parties have agreed to give the Fire Chief the discretion to declare other unspecified situations as an emergency for purposes of hazard pay. *See* UX-2 (Article 22, Section 1: "...hurricane, flood, tornado, *or other emergency*, as declared by the Fire Chief...[Emphasis added.]"). The parties' use of the phrase "other emergency" anticipated the possibility of other calamities or situations that would, in the opinion and discretion of the Fire Chief, justify hazard pay. This additional discretionary grant is clear and unambiguous. The Fire Chief's discretion to declare a state of emergency is further reinforced by the language contained in Article 8, Section 1 of the CBA. *See* UX-1 at p. 3.⁸

28. The Chief was within his discretion in declaring a state of emergency on March

⁸ "Except as otherwise specifically provided in this Agreement, the [BFFA] recognizes that *the City has the sole and exclusive right* to exercise all the rights and functions of management. [Emphasis added.]

23, 2020. UX-1, at pp. 3-4, 12, Articles 8 and 22. Additionally, he was also within his discretion on May 1, 2020, when he decided that conditions no longer warranted continuing the state of emergency he had previously declared on March 23, 2020. *Id.*

29. BFFA argues that while Article 22 allows the Fire Chief to declare an emergency, there is no language in Article 22 that allows him to end an emergency. The BFFA believes an emergency continues until it expires of its own accord—e.g., hurricanes and tornadoes pass and leave the area, floods recede. In effect, the BFFA maintains that once the Chief declares an emergency, he cannot “undo” the emergency until it expires on its own accord. In this regard, the Union argues that the pandemic has not subsided since it first infected residents of Brownsville in March 2020 and that the Chief should continue to maintain the state of emergency and hazard pay until the pandemic no longer poses a threat. This argument lacks contractual support.

30. Article 22 gives the Fire Chief unfettered discretion to declare whether conditions exist justifying hazard pay. While the express wording of Article 22 says nothing about “ending” an emergency, the discretion contained within the express wording of Article 22 allows him to determine when a state of emergency exists and whether that state of emergency justifies hazard pay. Looked at from this perspective, Article 22 gives the Chief the discretion to discontinue a declared state of emergency when he determines that a calamity no longer justifies the need for hazard pay. In this case, the Chief declared that effective May 1, 2020, conditions no longer warranted the continued existence of a state of emergency justifying hazard pay. He did not declare the COVID-19 pandemic “ended.” Rather, he declared that current conditions no longer justified the need for hazard pay. In his May 1, 2020 declaration, he stated going forward, dealing

with the pandemic would be the “new normal.” *See* CX-6.⁹ This new normal, in his opinion, did not justify the continued payment of hazard pay after May 1, 2020.¹⁰ The Chief acted within the discretion given to him by Article 22 when he ended the state of emergency.

31. When the Chief declares a state of emergency under Article 22, he is in effect making two discretionary decisions. The first concerns the severity of the situation or calamity. Is the situation or calamity sufficiently dangerous to warrant being classified as an emergency? The Chief makes this decision using his judgment and experience as a firefighting professional. The second decision concerns the potential financial and economic impact of the situation or calamity. Does the situation or calamity justify the economic cost of providing firefighters hazard pay? In making this decision, the Chief is exercising his role as the executive officer of the Fire Department and requires careful managerial judgment and prudence. His discretion to make both these decisions comes from his authority as Fire Chief and the Management Rights Article contained in the CBA.

32. The BFFA believes that in determining whether a state of emergency exists, the Chief should not consider cost or financial impact, but rather the specifics of the emergency. There is nothing in Article 8 or Article 22 that prohibits the Chief from considering costs or financial or economic impact to the City in declaring a state of emergency. Contrary to the BFFA’s argument, the Chief’s responsibilities require him to consider costs and economic

⁹ “On May 1st at 12:00 a.m., I will be ending the Fire Department State of Emergency. All of the safety measures that we have in place will remain in place *as this will continue as our new normal operations.*” [Emphasis added.]

¹⁰ Union President Lerma testified that in his opinion, the Chief should not be the person to declare an emergency ended, but rather it should be the CDC. Tr. 66-67. As previously indicated, the parties in the CBA have agreed to give the Fire Chief the discretion to declare a state of emergency—and by extension—when a state of emergency no longer exists. If the Union believes that this discretion should be placed with the CDC or any other agency, organization or person, then they will need to bargain this proposal.

impact. As the Fire Chief, he is required to monitor, estimate and budget the operating costs for the Fire Department. *See* UX-1, “Chief of Fire Department” Job Description and Authority.¹¹

If the Union believes that financial costs or economic impact should not be considered in declaring a state of emergency, then it will need to bargain that change with the City.

33. The Arbitrator respects and admires the Brownsville firefighters and EMS personnel for their commitment and sacrifices during the COVID-19 pandemic. These men and women are truly on the frontline of an unprecedented “medical warzone” and have endured much. Tr. 75; *see also* UX-4, *The Brownsville Herald*, newspaper article entitled “Under Pressure: EMS Units Step Up During Crisis,” August 5, 2020, by Steve Clark.¹² They have legitimate concerns regarding their personal safety and that of their families and the community. They truly believe that the City should recognize their concerns by providing additional compensation or a special hazard differential. The Arbitrator applauds the City for recognizing the firefighters with a \$500 hazard stipend. UX-4, August 5, 2020, Collective Bargaining Agreement – Hazard Pay Stipend. If the BFFA believes they are entitled to more compensation or consideration from the City, then they will need to discuss and bargain these concerns with the City. Also, if the BFFA

¹¹ “1.1 EXECUTIVE HEAD: The chief of the Fire Department is appointed by the City Manager and shall be the executive head of the department. He shall have the power and authority to organize, manage and control all activities and divisions of the Fire Department.

...
^{1.6} ANNUAL ESTIMATES: He shall, as often as may be consistent with the duties of the office, examine the condition of all buildings, apparatus and equipment. *He shall prepare and submit to the City Manager an estimate of the cost of operating the Fire Department during the fiscal year.* [Emphasis added.]

¹² “Hero is a word that gets tossed around a lot these days, but when it comes to the EMS teams risking their health and even their lives as the pandemic rages, it totally fits

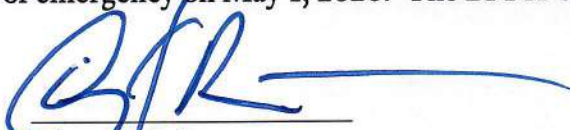
Like the doctors, nurses and other caregivers grappling with COVID-19, Emergency Medical Services personnel are under a great deal of stress as they do their jobs while also worrying about their loved ones.” ...

believes that Article 22 gives the Fire Chief too much discretion in declaring a state of emergency for hazard pay, then the BFFA will have to negotiate that concern.

34. For the reasons stated above, the Fire Chief acted within his discretion in denying hazard pay on May 1, 2020. The Union has failed to prove or persuade the Arbitrator that the Fire Chief violated Article 22.

AWARD

The Arbitrator finds that the grievance filed by the BFFA claiming that Fire Chief Jarrett Sheldon violated Article 22 of the CBA, the Hazardous Duty Pay article, is arbitrable. The Arbitrator also finds that the City did not violate Article 22 when Fire Chief Sheldon ended the state of emergency on May 1, 2020. The BFFA's grievance is denied.



Diego J. Peña
Arbitrator

Signed this 29th day of October 2021.