BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SUPERIOR FIRE FIGHTERS LOCAL 74, I.A.F.F.	Case 99 No. 42006 MA-5527
and	
CITY OF SUPERIOR (FIRE DEPARTMENT)	

Appearances:
Lawton & Cates, S.C., by Mr. Richard V. Graylow, on behalf of the Union.
Mr. Steven H. Schweppe, City Attorney, on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the City respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to said agreement, the parties requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear the instant dispute. The undersigned was appointed by the Commission. Hearing was held on June 14, 1989, in Superior, Wisconsin. No stenographic transcript was made. The parties concluded their briefing schedule on August 21, 1989. Based upon the record herein, and the arguments of the parties, the undersigned issues the following Award.

ISSUE:

The parties were unable to stipulate to the issue at hearing.

The Union proposed the following:

> Whether or no the City violated any or all of the following Articles of the labor agreement, Articles 1, 2, 3, 6, 7, 22 or Appendix A? If so, what is the appropriate remedy?

The City framed the issue as follows:

> Is the City's return to work policy a reasonable work rule implemented under Article 7 of the labor agreement?

The parties have stipulated that this Arbitrator may select either or both questions or frame the issue in a different way.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 1
RECOGNITION CLAUSE

> This Agreement is entered into by and between City of Superior, Wisconsin, hereinafter referred to as the Employer, and Local N(o). 74 of the International Association of Firefighters, hereinafter referred to as the Union. For the purpose of this Agreement, the term members of the bargaining unit shall hereinafter refer to persons who are employed as firefighters by the City of Superior Fire Department with the exception of Fire

Chief and Assistant Fire Chiefs and Fire Marshal. The City recognizes (the Union) as the sole and exclusive bargaining representative for all members of the bargaining unit.

It is the purpose of this Agreement to achieve and maintain harmonious relations between the Employer and the Union; to provide for equitable and peaceful adjustment of differences which may arise; to establish proper standards of wages, hours and other conditions of employment; and to provide for a high level of protection of persons and property . . .

. . .

ARTICLE 2
SALARY SCHEDULE

a) As of the effective date of this Agreement, members of the bargaining unit shall be paid the salaries set forth in Appendix "A".

. . .

ARTICLE 3
PROMOTIONS

a) Whenever a vacancy occurs in the bargaining unit, the City will post the position for a period of fifteen (15) days during which time written applications will be received by the Chief.

b) The positions of Engine and/or Truck Captain shall be filled with the applicant with the greatest seniority as Motor Pump Operator.

c) The position of Motor Pump Operator shall be filled with the applicant with the greatest seniority as Firefighter.

d) The position of Captain Inspector will be filled on the basis of ability. In the event of equal ability, the most senior man will be selected. The position of Mechanic-firefighter will be filled by the employee with the greatest departmental seniority who can qualify for the position. The position of Lead Mechanic shall be filled by the Mechanic-firefighter with the greatest seniority in rank. Posted vacancies for the position of Captain Inspector, Mechanic-firefighter and Lead Mechanic shall include a summary of qualifications.

e) When a member is promoted to the position of Captain Inspector, Lead Mechanic, or Mechanic-firefighter, he shall retain his seniority for the rank of Captain or Motor Pump Operator.

f) When an employee is involuntarily demoted by the Department for other than disciplinary reasons, he shall retain his seniority in rank for the position from which he was demoted. In the event an employee refuses a promotion or voluntarily returns to a lower rank, he shall forfeit all rights to any seniority in rank he may have earlier accumulated in the higher rank.

g) All promotions are subject to a one (1) year probationary period. During this probationary period it shall be the responsibility of the Fire

Chief to rate the individual quarterly, on the efficiency rating schedule, and to inform the individual of his rating. By the end of the one (1) year probationary period, a letter of confirmation or denial shall be submitted to the individual. A letter of denial shall cite any deficiencies indicated by the efficiency rating schedules. Upon successful completion of the probationary period, the employee's seniority in rank shall accrue to the original date of promotion.

. . .

ARTICLE 6
PREVAILING RIGHTS

a) All rights, privileges, and working conditions enjoyed by the employees at the present time, which have not been included in this Agreement, shall remain in full force, unchanged and unaffected in any way, during the term of this Agreement, unless they are changed in mutual consent.

b) A full crew shall consist of three bargaining unit members for each company. Change in full crew shall be handled as set forth in the following sentence: With regard to changes in the current practice of crew size o(r) the introduction of new equipment, methods or facilities, the City agrees to inform the Union of said proposed changes and, upon request, bargain in good faith with the Union prior to the implementation concerning adverse health and safety factors which impact upon firefighters covered by this Agreement as a result of said proposed changes . . . .

c) The City possesses the sole right to operate the City Government and all management rights reside in it, subject only to the provisions of this Contract and applicable law. These rights include:

A. To direct all operations of the Fire Department.

B. To establish work rules and schedules of work.

C. To hire, promote, transfer, schedule, and assign employees to positions with the Fire Department.

D. To suspend, demote, discharge and take other disciplinary action against employees.

E. To determine the order of layoff pursuant to 62.13 Wis. St. (1979).

F. To maintain efficiency of Fire Department operations.

G. To take whatever action is necessary to comply with State or Federal law.

H. To introduce new or improved methods or facilities.

I. To determine the methods, means and personnel by which Fire Department operations are to be conducted.

J. To take whatever action is necessary to carry out the functions of the City in situations of emergency.

. . .

ARTICLE 7
RULES AND REGULATIONS

The City retains the right to establish reasonable work rules and rules of conduct. The Union agrees that its members shall comply with all Fire Department rules and regulations including those relating to conduct and work performance. The Employer() agrees that depart-mental rules and regulations which affect working conditions (or) performance shall be subject to the grievance procedure.

. . .

ARTICLE 22
ENTIRE AGREEMENT

All appendices and amendments to this Agreement shall be lettered, dated, and signed by the responsible parties and shall be subject to all provisions of this Agreement. All such appendices and amendments during the life of the Contract must be mutually agreeable to both parties.

This Agreement constitutes the entire Agreement between the parties and no verbal statements shall supersede any of its provisions. Any amendments supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto.

. . .

APPENDIX "A"

The salaries of the members of the bargaining unit according to their respective positions are hereby established for the complete years of 1988, 1989, and 1990.

. . .

Captain	. . .
Fire Industrial Insp. Capt.	. . .
Lead Mechanic	. . .
Mechanic Firefighter	. . .
Motor Pump Operator	. . .
Firefighter()	. . .

. . .

APPLICABLE STATUTES:

Sec. 111.70(a)(a), Stats. 3/ --
"Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in

good faith, with respect to wages, hours and conditions of employment . . . with the intention of reaching an agreement, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes . . . . (emphasis supplied)

Sec. 111.70(3)(a), Stats. --
It is a prohibited practice for a municipal employer individually or in concert with others:
. . .
4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit . . . .
. . .

FACTS:

Prior to March 29, 1989, bargaining unit employes off of work due to job-related temporary disability were not required to report to work for light duty even if they were capable of performing light duty tasks.

Fire Chief John Raaflaub testified that prior to September 20, 1988, the City allowed firefighters who incurred on-the-job injuries to return to work when their treating physician indicated that they could return to full duty. With the singular exception of a 1970 injury of one employe, Art Dolberg, who did report for light duty and accompanied the fire inspector, the Department has not required or expected employes to return when they became capable of performing light duty tasks.

From September 20, 1988 through March 29, 1989, the City commenced discussions about the implementation of a "return-to-work policy", hereinafter referred to as "the policy", with various bargaining units, including the Union. The City sought to implement the policy as a result of being informed by its previous insurance carrier that its worker's compensation insurance was being terminated, largely due to the absence of such a policy.

The parties met at least four times and the City incorporated various suggestions made by the Union into the policy in several respects. Nevertheless, the Union did not agree to the implementation of the policy and on October 4, 1988 filed the instant grievance.

POSITION OF THE PARTIES:

Union

The essence of the Union's position is that the City violated established past practice, specific contractual provisions, and the contractual and statutory duty to bargain over wages, hours and conditions of employment.

It contends that an arbitrator may consider past practice in the interpretation and construction of a labor agreement if the agreement is silent or ambiguous on the point in question. It further notes that the agreement, especially the recognition clause, mandates that the City engage in good faith bargaining over wages, hours and conditions of employment. In this vein, the Union claims that this proposed policy is a mandatory subject of bargaining.

The City argues that the policy violates Article 6(a) which bars the City from altering existing conditions of employment. Pointing to other cases where arbitrators have ruled that attendance policies create a binding condition of employment, the Union maintains that general management rights or work rule language in a contract does not give the employer the right to change a past practice unilaterally.

Carrying this argument forward, it also claims that the City's unilateral imposition of the policy violated Articles 1 and 6(b) because a sick or injured firefighter may now be required to work "light duty". According to the Union, the workload and safety of this employe as well as other firefighters are affected.

The Union avers that the policy has in fact created a new class of firefighter, which had not previously existed, whose duties are a small subset or completely outside of the duties of a "regular" firefighter. This, it stresses violates Article 2 and Appendix A.

In response to anticipated City arguments, the Union claims that unilateral imposition of the policy does not fall within the management rights provisions of Article 6(c) and 7. It asserts that the policy is not a work rule but rather a material change in the conditions of employment. Moreover, discussion does not constitute "agreement", which, it asserts, is necessary pursuant to Article 6(a).

Arguing in the alternative, the Union contends that even if the policy as a whole is considered a work rule, it is subject to challenge because it curtails an employe privilege, the right to recuperate at home, supported by established past practice. If further stresses that the return-to-work policy cannot be implemented as a new method either. According to the Union, the clear language of Article 6(a) should govern the more nebulous language permitting the establishment of work rules. It urges the Arbitrator to void the policy and order a return to the status quo prior to the unilateral imposition of the policy.

City

The City stresses that the record evidence clearly establishes that the policy is a reasonable work rule. It argues that Article 7 permits the City to establish reasonable work rules and regulations even when they will affect working conditions.

According to the City, if the Union's claim that it could not implement the policy were adopted, the City's rights under Article 7 and Article 6(c)(B) would be rendered meaningless. According to the City, the rights to "establish work rules", "schedule and assign employees", introduce "new methods" and to determine the "methods, means and personnel" as set forth in Article 6(c)(B), (C), (H) and (I) would all be nullified under the generalized language of Article 6(a).

It avers that the clear and repeated intent of the Labor Agreement is to preserve to management the right to set work rules even if working conditions are somewhat affected so long as the rule is reasonable.

The City makes numerous arguments in support of the reasonableness of the policy. It stresses that the policy is not only reasonable based upon the Union's concurrence, the commonness of the policy, and the policy's lack of safety or health effects, it is also reasonable because of the lack of effect it has on rights, privileges or working conditions. According to the City, the Arbitrator need not balance the policy's reasonableness against these effects because any effect has been removed during the process of meetings and changes in the negotiation process.

The City disputes the Union assertion that the back-to-work policy is a condition of employment which cannot be changed except by mutual consent. It points out that under the Union's interpretation the contract need only consist

of Article 6(a), a termination clause, and any changes negotiated during the period of collective bargaining. Said interpretation, it alleges repeals Article 6(c) and 7.

The City also argues that it may implement the policy as a new method under Article 6(B). Asserting that good faith bargaining has already occurred, it claims that the policy is a new method for dealing with temporary job related disabilities.

The right to refuse work for which one is capable of performing is, the City stresses, not a right, privilege or working condition. Rather, it falls within the basic direction of the work force, an obvious managerial prerogative under the contract. The mere lack of work in the past does not establish such a right, privilege or working condition. Clear consent to limit work must be established to create such a right or privilege.

The City claims that the Union's position that the policy creates a new position supports the City's actions in this case because the impact of such an action has already been thoroughly negotiated.

The City disputes any Union claims as to alleged violations of Articles 1, 2, 3, 7, 22 and Appendix A. It urges the arbitrator to find no change in the policy necessary, or in the alternative to focus on a particular aspect of the policy which requires changing. It requests that the grievance be denied.

DISCUSSION:

Resolution of the instant dispute rests with the interpretation and analysis of Articles 6 and 7 as they relate to the return-to-work policy. Other provisions of the agreement, in the opinion of the undersigned, are not determinative.

Article 6(a) provides for the maintenance of standards in strong, compelling language which extends broadly to any "right, privilege or working condition" which employes currently enjoy. This language prohibits the City from making any changes with respect to any "right, privilege or working condition" during the contract term unless said change has been expressly agreed to by mutual consent of the Union.

Article 6(b) deals with a few specific subjects; namely, crew size and the introduction of new equipment, methods or facilities. Under these circumstances, the City is obligated to inform the Union of the proposed changes and to bargain in good faith prior to implementation concerning adverse health and safety factors which may impact on employes as a result of the proposed changes.

Article 6(c) grants to the City all management rights. These rights are, however, subject to the provisions of the agreement and applicable law. The management rights clauses specifically cited by the City include the following: B. to establish work rules and schedules of work; F. to maintain efficiency of operations; and H. to introduce new and improved methods or facilities.

Article 7 specifically retains for the City the right to establish reasonable work rules and rules of conduct. It further provides that departmental rules and regulations which affect working conditions (or) performance shall be subject to the grievance procedure.

A substantial portion of the City 's case focuses upon its contentions that the return-to-work policy is reasonable under the circumstances and that the City has fulfilled any duty that it had to bargain with the Union prior to the implementation of the policy. These arguments are only relevant, however, if the return-to-work policy is determined to be a "new method" pursuant to Article 6(b) or a "work rule" pursuant to Article 7 as the City argues.

Thus, the real question presented to the undersigned is whether the return-to-work policy is to be considered a "new method" or "work rule"; or conversely, whether the previous policy permitting bargaining unit employes injured on the job to stay home until they were fully recovered is a "right", "privilege" or "condition of employment".

While the difference or distinction between a "work rule" or "new method" and a "right, privilege or condition of employment" may be difficult to discern under certain circumstances, such is not the case with the return-to-work policy. The ability to stay at home until one is fully-recovered from an on-the-job injury with full pay is, at the least, a very valuable privilege which was afforded to employes in the past. But it is more than a mere privilege, it is also a condition of employment. Employes received full pay and were permitted to remain off work if their injuries were work-related, even if they were not totally disabled but arguably capable of returning in a light duty capacity. The policy affects hours of work to be performed by a sick or injured employe, the conditions under which he will perform such work, and in a very real sense, the compensation package which the City previously offered to

bargaining unit employes.

The return-to-work policy is not a different way, manner, or method of achieving management objectives, the situation provided for pursuant to Article 6(b). It is not a new method of doing or performing fire fighter duties. Therefore bargaining the impact of the unilateral change does not suffice.

The City strenuously contends that the policy is a work-rule and not a condition of employment, maintaining that to conclude otherwise renders Article 6(c)B, C, F, H and I and Article 7 moot or null and void. It is clear that the return-to-work policy contains some elements that smack of a work rule, such as specifications of what forms and communications an employe is required to complete and fulfill, the type of release or assessment that an employe must procure from a physician and the type of light duties to which a returning employes will be assigned.

These elements, however, are not the primary thrust of the return-to-work policy. The crux of the policy is to require employes who previously enjoyed the privilege of staying home until fully recovered with full pay to now return to perform light duty as soon as possible. The policy involves cost saving on the City's part by the elimination of a benefit previously enjoyed by the employes. The undersigned does not doubt the "reasonableness" of such a policy but reasonableness is not the issue. Rather the issue involves the City's unilateral change involving the elimination of a substantial employe benefit or condition of employment.

This conclusion does not render Article 6(c) or 7 moot or void. Managerial rights enumerated in Article 6(c) are expressly subject to other provisions of the agreement so that no direct conflict exists.

With respect to Article 7, it is possible to give weight and meaning to both Articles 7 and 6(a). In their briefs, both parties acknowledged that a policy may encompass aspects of both work rules and conditions of employment but then went on to argue for their respective positions. In ascertaining whether the return-to-work policy most closely resembles a "work rule", or "right, privilege or condition of employment", it is fair to use the same standard applied to situations involving both management and employe rights by both the Wisconsin Employment Relations Commission and the courts. A case-by-case balancing test is applied to determine whether a subject, matter or policy is primarily related to wages, hours or conditions of employment or whether it is more directly related to the managerial function of the municipality or the formulation of public policy. This policy can be aptly applied to harmonize Article 6(a) and 7. Where, as here, a policy is primarily related to a right, privilege or condition of employment, enjoyed by employes, Article 6(a) applies. Where, however, a policy is primarily related to managerial functions enumerated in Article 6(b), either 6(b) or Article 7 applies, as is appropriate.

In the instant case involving the parties' return-to-work policy, one other factor convinces the undersigned that the policy primarily involves rights, privileges and conditions of employment. The bargaining that occurred between the parties makes it clear that both the City and the Union understood that employes were losing a valuable privilege. The City sought, albeit unsuccessfully, to bargain over the policy itself and not just its impact, while the Union resisted submitting to the loss of such a valuable privilege without

gaining some benefit just as tangible for its employes, namely the extension of the policy to all employes not just those on duty-incurred worker's compensation leave. It is the bargaining, along with the strong language of Article 6(a), which persuades the undersigned that the City may not unilaterally implement the return-to-work policy without the consent of the Union during the term of the agreement.

Accordingly, in light of the foregoing, it is my

AWARD

1. That the City violated Article 6(a) of the parties agreement.

2. That the return-to-work policy is not a work rule which may be implemented pursuant to Article 7.

3. That the City is directed to return to the status quo prior to its implementation of the return-to-work policy.

Dated at Madison, Wisconsin this 10th day of October, 1989.

By _____
Mary Jo Schiavoni, Arbitrator