BEFORE THE ARBITRATOR

| In the Matter of the Arbitration of a Dispute Between LOCAL NO. 316 I.A.F.F. and CITY OF OSHKOSH | Case 138<br>No. 43777<br>MA-6071 |
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Appearances:

Lawton & Cates, S.C., Attorneys at Law, by Mr. Richard V. Graylow, appearing on behalf of the Union.

Mr. Warren P. Kraft, Assistant City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

Local No. 316 I.A.F.F., hereinafter referred to as the Union, and the City of Oshkosh, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The Commission designated Karen Mawhinney, as arbitrator, but due to her unavailability, the undersigned was substituted as arbitrator. Hearing was held in Oshkosh, Wisconsin on June 21, 1990. The hearing was not transcribed and the parties filed posthearing briefs and reply briefs, the last of which were exchanged on September 21, 1990.

BACKGROUND

The basic facts underlying the grievance are not in dispute. On or about December 1, 1989, Fire Lieutenant Steve Sitter injured his knee while fighting a house fire and had to have orthoscopic surgery. After a period of time, Sitter's physician released him for light duty. Thereafter, the City ordered Sitter to report to the Central Fire Station to perform "light duties" 8 hours a day, 5 days a week. Sitter reported as ordered but requested he be returned to worker's compensation status which the City denied. Sitter was paid his regular rate of pay and was taken off worker's compensation. Sitter was later released to full duty status and resumed his normal hours of work.

On or about March 27, 1990, Fire Lieutenant Eugene Werner injured his ankle and could not perform his normal duties. Werner took sick leave and after a period of time was released to light duty. Werner was ordered to report to work on April 6, 1990 on light duty, 8 hours a day, 5 days a week. Werner requested that he be allowed to remain on sick leave until he recovered fully but the City denied his request and he reported to work as ordered and received his normal rate of pay. After Werner fully recovered, he assumed his regular hours.

The Union filed grievances on behalf of Sitter and Werner asserting that the City violated the parties' agreement by creating light duty status and ordering employes to perform light duty contrary to a past practice of permitting employes to utilize worker's compensation or sick leave to recuperate at home until they were fully recovered. The City denied the grievances which were appealed to the instant arbitration.

## ISSUES

The parties were unable to agree on a statement of the issues. The Union phrases the issue as follows:

> Did the City violate Articles 4, 13 and 26 when it assigned or attempted to assign Fire Lieutenants Steve Sitter and Gene Werner to light duty?
>
> If so, what remedy is appropriate?

The City states the issues as follows:

> Did the City of Oshkosh violate the collective bargaining agreement with Local 316 I.A.F.F. when it required Fire Lieutenant Sitter to return to work from worker's compensation and perform duties consistent with restrictions set forth by his treating physician, and if so, what is the remedy?
>
> Did the City of Oshkosh violate the collective bargaining agreement with Local 316 I.A.F.F. when it required Fire Lieutenant Werner to return to work from sick leave and perform duties consistent with restrictions set forth by his treating physician, and if so, what is the remedy?

The undersigned frames the issues as follows:

> Did the City violate the collective bargaining agreement when it required Fire Lieutenant Sitter to return to work from

worker's compensation and Fire Lieutenant Werner to return from sick leave to perform light duties for which they had been released by their physicians until they fully recovered from their injuries and could perform their regular duties.?

If so, what remedy is appropriate?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE II

MANAGEMENT RIGHTS

The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this agreement.

The powers, rights and/or authority herein claimed by the City are not to be exercised in a manner that will undermine the union or as an attempt to evade the provisions of this agreement or to violate the spirit, intent or purposes of this agreement.

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ARTICLE IV

NORMAL WORK WEEK - NORMAL WORK DAY - NORMAL WORK SCHEDULE

The average normal work week for the Fire Department shall be fifty-six (56) hours to be worked on a three (3) platoon system, utilizing a duty system of twentyfour (24) hours on and a forty-eight (48) hours off duty, with the exception of the following classifications:

A. Captain of Instruction
B. Captain of Inspection
C. Lieutenant of Instruction
D. Lieutenant of Inspection

The work week for the following classifications shall be forty (40) hours to be worked in five (5) consecutive eight (8) hour days, Monday through Friday:

A. Captain of Instruction
B. Captain of Inspection
C. Lieutenant of Instruction
D. Lieutenant of Inspection

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ARTICLE V

PAY POLICY

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The employer shall determine the table of organization or position count, that is, the number of employees to be assigned to any job classification and the job classification needed to operate the employer's facilities. The Union shall be notified of any change in the Table of organization.

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ARTICLE XIII

PRESENT BENEFITS

The parties agree to maintain the present level of benefits and policies that primarily relate to mandatory subject of bargaining, not specifically referred to in this agreement. This provision is expressly limited to mandatory subjects of bargaining.

UNION'S POSITION

The Union contends that the City violated Articles IV, XIII and XXVI of the parties' collective bargaining agreement by requiring Fire Lieutenants Sitter and Werner to perform "light duty" work instead of allowing them to remain at home to convalesce from their injuries until they were fully recovered to return to regular line fire fighter duties. It asserts the City violated Article IV because that provision provides that employes in the grievants' classification work 24 hours on and 48 hours off, averaging 56 hours/week and only certain classifications work 8 hours a day, 5 days a week averaging 40 hours a week and the grievants' "light duty" assignment of 8 hours a day, 5 days a week did not come within these certain classifications.

The Union claims that the City violated Article XIII which requires the City to maintain all benefits in effect at the time the contract was signed until the contract terminates. It points out that when the contract went into effect, no light duty program existed in the fire department, it being admitted that the two prior fire chiefs ignored the City's policy on light duty assignments. The Union also argues that if there was any practice in the past, it was voluntary and applied only to dispatch, which is no longer part of the Fire Department, and this practice has since been abandoned. The Union posits that the "light duty" program is a mandatory subject of bargaining and could not be implemented because it was prohibited by the express language of Article XIII. The Union asserts that the City's reliance on the Management Rights clause is misplaced because these rights are subject to the express limiting terms of the agreement, i.e. Articles IV, XIII and XXVI. It insists that the light duty program is a condition of employment, a mandatory subject of bargaining, and could not be implemented without the Union's consent. it notes that the City unilaterally implemented it and thereby violated Article XIII.

The Union contends that the City violated Article XXVI, the wage schedule, because this schedule has no reference to the pay for a recovering or convalescing firefighter and the amount paid by the City was unilaterally determined.

The Union notes that the City has raised an issue of arbitrability with respect to Werner's grievance because he failed to utilize a new form developed unilaterally by the City. It submits that the agreement does not require use of this particular form and that Werner followed the exact letter of the express contractual grievance procedure, and with pun intended, it asserts that this exalts "Form" over Substance. It asks that the grievances be upheld and appropriate remedial orders issued.

CITY'S POSITION

The City contends that the Werner grievance is procedurally defective because the Union refused to submit this grievance on a form specified in a policy instituted by the fire chief. It submits that the Union was obligated to follow the rule and grieve the policy under the general rule of "obey first, grieve later."

With respect to the merits, the City contends that there has been no violation of Article XXVI which specifies the rates for certain classifications. The City maintains that it has not created any new classifications by returning employes to "light duty" status and no evidence was offered that Sitter and Werner performed duties inconsistent with their positions of fire lieutenants. It claims that they performed job related duties consistent with their job classifications and they were compensated at their regular rates of pay. The City insists that a position description broadly defines job duties and the "light duty" tasks fell with the position descriptions, so the City was not obliged to negotiate a new wage rate for "light duty" and it never created a new job classification. Its position is that the right to assign duties within a job classification is

permissive and the evidence failed to show that the City erroneously exercised this right.

The City argues that it properly returned the employes to work as soon as they were physically able for sound policy reasons because payments for worker's compensation and sick leave effectively reward employes for not working. The City asserts that there is evidence of a past practice supporting its position. It admits that in one situation in the past, it denied the request of an employe to work on "light duty". It points out that during the tenure of two fire chiefs, the City's policy of "light duty" assignments was not followed within their discretion but prior to that "light duty" was assigned to recuperating employes as it is at the present time. It insists that the past practice on "light duty" is not the result of a joint determination but rather the product of the exercise of managerial discretion in assigning work which the City was free to change in its discretion. The City submits that the cases relied on by the Union are distinguishable based on their underlying facts. It submits that in Jones Dairy Farm, 295 NLRB No. 20, 131 LRRM 1497 (1989), a light duty program was found to be a mandatory subject of bargaining because the employer attempted to take the employes out of the bargaining unit during the period of disability by assigning them to an off-site, unrelated non-profit facility. It further argues that there was an actual "program" of "light duty" work assignments in that case. It claims that none of these distinguishing features appear in this case and the Union's attempt to label the City's policy a "program" does not make the case applicable to the present dispute and does not settle the matter. The City also distinguishes another case cited by the Union, City of Superior (Fire Department), Case 99, No. 42006, MA-5527 (Schiavoni, 1989) on the basis of different contract language and the past history of "light duty" status in the City. It claims that, unlike Superior, the City's firefighters cannot assert the right to recuperate at home supported by established past practice and do not enjoy full pay while on worker's compensation as they must use 1/3 of a day of sick leave. The City also insists that the prevailing rights clause relied on by the arbitrator in Superior, supra, does not parallel the City's management rights Article. It states that the City did not eliminate a substantial employe benefit or a condition of employment by returning to the City's policy of "light duty" assignments. It concludes that its return to the past practice in the Fire Department which is consistent with the other City's departments was not a violation of the collective bargaining agreement. It asks that the grievances be denied.

## DISCUSSION

The City has raised a procedural objection to Werner's grievance on the grounds that he failed to submit his grievance on the form unilaterally developed by the City. Article II, Step 2 simply requires that a grievance be presented in writing to the department head. This section does not specify any type of form or format other than that it be in writing. The requirements for a grievance are created by the agreement of the parties and one party cannot unilaterally create additional requirements for use of the procedure because these must be mutually agreed to. Otherwise, one party could place obstacles to the use of the grievance procedure contrary to the parties' agreement. It appears that Werner put his grievance in writing and thus complied with the grievance procedure. The failure to put the writing on the City's form does not violate the

agreement and cannot be a basis to find the grievance procedurally defective. The writing complied with Article XV whether or not the form was in accord with the City's unilateral determination. 1/ Therefore, the grievance is properly before the Arbitrator.

Turning to the merits of this dispute, Article XIII, Present Benefits, provides that "the parties agree to maintain the present level of benefits and policies that primarily relate to mandatory subjects of bargaining, not specifically referred to in this Agreement." No provision of the agreement specifically refers to "light duty" assignments and, therefore, two requirements of Article XIII must be examined. The first is what is the meaning of "present level of benefits". Both parties have argued that the "past practice" supports their respective positions, however, Article XIII speaks in terms of "the present level" of benefits. It is undisputed that prior to the present fire chief and the implementation or reimplementation of the "light duty" assignment, such assignments were not being made but requests for light duty assignments were denied. Present refers to the current benefits in effect at the time the parties entered into the agreement and at that time the present policy or level of benefits was that no "light duty" assignments were being made. It was the benefit level in effect at the time the contract was entered into and not past practice that controls, hence a determination of the past practice is unnecessary. Therefore, "present level of benefits" meant no "light duty" assignments.

The second issue is whether the "light duty" assignment is a benefit or policy that relates to a mandatory subject of bargaining. The City, citing How Arbitration Works, 2/ asserts a distinction between practices considered binding and those that are not and concludes the "light duty" assignment is a proper exercise of management rights and not a mandatory subject of bargaining. on the other hand, the treatise states as follows: "In the final analysis, management in most cases is not really oppressed when it is required to continue customary benefits for the remainder of the contract term. 3/ The undersigned finds that the "light duty" assignment is a mandatory subject of bargaining. The NLRB held that a light duty assignment program was a mandatory subject of bargaining in Jones Dairy Farm. 4/ The City contends that the Board ruled the way it did in Jones Dairy Farm, supra, because the employer there attempted to take employes out of the bargaining unit. The City has misread the Board's decision. It stated the following in its decision:

> In finding that the program is a mandatory bargaining

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1/ See Pilgrim Liquor, Inc., 66 LA 19 (Fleischli, 1975) where a letter to the Company's lawyer met the requirement of a "written grievance" under the grievance procedure.

2/ Elkouri & Elkouri, How Arbitration Works (4th Ed., 1985) at 440.

3/ Id, at 445.

4/ 131 LRRM 1497 (1989).

> subject, we do not reject as irrelevant the judge's inquiry into whether implementation of this program would be in derogation of the bargaining unit and would consequently constitute merely a permissive subject of bargaining. That argument has at least surface appeal; for it is true that assigning employees to Opportunities, Inc. in effect removes them from the aegis of the collective bargaining agreement and therefore might, at least on its face, be characterized as an "attack on the integrity of the established bargaining unit" as the phrase is used in Shell Oil Co., 194 NLRB 988, 995 [79 LRRM 1130] (1972). Nevertheless, we find that such a finding is inappropriate under the circumstances presented here. As a general rule employees who are out of work owing to a temporary ccmpensable disability remain unit employees. Though they are inactive because of injury, they are expected to return to active status. See Atlanta Dairies Cooperative, 283 NLRB No. 51 [124 LRRM 1360] (Mar. 25, 1987). (Emphasis added)

Light duty assignment is a mandatory subject of bargaining because it primarily relates to wages, hours and working conditions. Thus, the City's arguments that Jones Dairy Farm, supra, is distinguishable on the facts from the instant case is not persuasive because the "light duty" assignment is a mandatory subject of bargaining under the facts of both cases even though these facts are quite different. Similarly, in City of Superior (Fire Department), 5/ the arbitrator found the return to work policy on "light duty" was a mandatory subject of bargaining. The arbitrator stated the ability to stay at home until fully recovered was a privilege and then stated; "But it is more that a mere privilege, it is also a condition of employment." 6/ The contractual language in City of Superior supra, Prevailing Rights, is much more inclusive that the "Present Benefits" language of Article XIII; however, each provision requires that the present benefits which are mandatory subjects of bargaining be maintained. As noted above, present benefits are those that are in effect at the time the contract was entered into. At that time there were no light duty assignments, and the "light duty" policy is a mandatory subject of bargaining. Therefore, the City could not institute its present policy of requiring employes to perform "light duty" work absent consent from the Union. The City is obligated by the language of the agreement to maintain the status quo until changes are bargained with the Union. Inasmuch as the change in "light duty" assignments was not agreed to by the Union, the City violated Article XIII when it instituted or reinstated its "light duty" policy. In light of the conclusion that the City violated Article XIII, it is

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5/ Case 99, No. 42006, MA-5527 (Schiavoni, 1989).

6/ Id, at 8.

unnecessary to consider whether there was any violation of Article IV or XXVI.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

## AWARD

The City violated Article XIII of the parties' collective bargaining agreement by requiring Fire Lieutenants Sitter and Werner to return to work for "light duty" while they were recuperating from injuries which prevented them from performing their regular duties. The City shall cease its light duty policy during the term of the agreement without obtaining the Union's consent to the "light duty" policy.

Dated at Madison, Wisconsin this 16th day of October, 1990.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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