BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 400	Case 103 No. 44735 MA-6402
and	
CITY OF FOND DU LAC (FIRE DEPARTMENT)	

Appearances:

Mr. Bruce K. Patterson, Consultant, 3685 South Oakdale Drive, New Berlin, Wisconsin, 53151, appearing on behalf of the City.

Mr. Charles S. Buss, and Mr. Thomas Kania, International Association of Fire Fighters, Local 400, 346 North Main Street, Fond du Lac, Wisconsin, 54935, appearing on behalf of the Union.

ARBITRATION AWARD

International Association of Fire Fighters, Local 400, hereinafter the Union, and the City of Fond du Lac (Fire Department), hereinafter City or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder.

The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint a staff member as single, impartial arbitrator to resolve the instant grievance. On November 16, 1990, the Commission designated Coleen A. Burns, a member of its staff, as Arbitrator. Hearing was held on May 8, 1991, in Fond du Lac, Wisconsin. The hearing was not transcribed and the record was closed on June 18, 1991, upon receipt of post hearing written argument.

ISSUE:

The parties presented the following issue:

> When, on June 20, 1990, the City directed Fire Fighter Patrick Feiereisen to perform normal duties of a fire fighter, was Article XXXVI of the Collective Bargaining Agreement violated?
>
> If so, what should the remedy be?

RELEVANT CONTRACT PROVISIONS:

ARTICLE XXXVI

FIRE FIGHTER SAFETY

> In an effort to provide a minimum amount of safety to Fire Fighters of the Fond du Lac Fire Department, the Union and City agree that no Fire Fighter shall be required to violate the Fire Department's policy regarding the "buddy system" which for the purpose of this Article shall mean that no Fire

> Fighter shall be required to enter a burning building, explosive or poisonous atmosphere without being accompanied by at least one (1) additional Fire Fighter.
>
> It is further agreed that all Fond du Lac Fire Department aerials and pumpers shall be tested to assure compliance with N.F.P.A. standards which primarily relate to employee safety. All other equipment shall be maintained in such a manner as to provide for the Fire Fighter's safety.

BACKGROUND

On June 14, 1990, Fire Chief David Flagstad issued the following letter to Fire Fighter Patrick Feiereisen, hereafter the Grievant:

> Dear Pat:
>
> I have received a communication from Wausau Insurance that originated with Dr. Anderson from Theda Clark Hospital. It is their opinion that you have a 5% partial disability in your right shoulder; however, in his letter, he stated "After 15 June 1990 he can work at regular work capacity at his normal job. There is no need for any restriction in his work hours, either at this time when he is on lighter duty nor after 15 June, when he returns to normal regular duty."
>
> I have reviewed this letter with Personnel Director Rick Brewer and it is our decision to have you comply with the doctor's recommendation and have you return to full duty on Saturday, June 16, 1990.
>
> I will refrain from using you as a Motor Pump Operator until after July 15, 1990 so that you may work into the MPO position again. I would encourage you to apply yourself so you may re-establish yourself quickly as a productive MPO.

The Grievant returned to work on June 16, 1990. At approximately 10:00 a.m. on June 16, 1990, the Grievant responded to an ambulance call and, upon his return to the station, reported that he had reinjured his shoulder and back while pulling himself onto Engine 5 and that the injury was aggravated when he and another employe carried the empty stretcher from the back of the ambulance. Around noon, the Grievant advised Acting Shift Commander David Liebelt that he could not do his job unless he was permitted to take his pain medication which, as stated on the medication bottle, could cause drowsiness. Liebelt told the Grievant that he could not use the medication and be relied upon for firefighting if the medication caused drowsiness.

At approximately 3:00 p.m., Acting Captain Schuh advised Liebelt that the Grievant had requested to use his medication, stating that unless he used his medication he could not do his job. Liebelt then talked with the Grievant. When the Grievant restated that he could not be relied upon because of the pain, Liebelt responded that due to the fact that the Grievant could not be relied upon to do his job, the Grievant should check onto sick leave.

On June 18, 1990, the Grievant was examined by the Employer's physician,

Dr. Gay. R. Anderson. On that same date, the Grievant received a note from his personal physician, Dr. Bowman, which stated as follows:

> I would recommend light duty until evaluation by Dr. Meyer, Neurosurgeon, on 7/9/90.

Dr. Bowman did not examine the Grievant at the time that he issued the note.

On June 20, 1990, Fire Chief David Flagstad issued the following:

> Dear Pat:
>
> On June 16, 1990, you filed an accident report claiming re-injury of a previous work related injury. At this time, you felt you were unable to perform your duties as a firefighter and placed yourself on the sick list at 1608 and remained on the sick list for the next work day. It was requested that you visit Dr. Gay Anderson who had issued an opinion on your previous injury, and he has filed his results on his examination. It is his professional opinion that you did not sustain any physical disability but the problem was attributable to your behavior.
>
> After discussing this with Personnel Director Richard Brewer and Wausau Insurance, it is my decision to dock you pay for the amount of time you missed while on sick leave.

> As a further result of the doctor's opinion, I am placing you back on full duty immediately and would hope that you would correct your behavioral problem and perform your duties in a most capable manner. An EAP brochure is also enclosed for your information.

At the time that the Chief issued the letter of June 20, 1990, he understood that Dr. Anderson had stated that the Grievant was capable of full-duty. At that time, however, the Chief had not received a copy of Dr. Anderson's written report. The cover letter of this written report, issued on June 26, 1990, stated as follows:

> Enclosed is a work capacity classification for Pat Feiereisen. This is what we developed at the Industrial Injury Clinic after evaluating him and I confirmed this on my report of 18 June 1990, when I re-examined him and found no objective evidence to support his subjective complaints. I believe this patient is manipulating the system with complaints and that, in fact, he can and was as of 15 June 1990, to do his regular job activities at his work site consistent with the work capacity classification enclosed with this letter".

The enclosed work capacity classification, which is dated May 2, 1990, indicated, inter alia, that the Grievant was capable of " Med. Heavy Work - Lifting 75-80 lbs. max. with frequent lifting and/or carrying of objects weighing up to 40 lbs."

On July 3, 1990, Chief Flagstad issued the following letter addressed to Charles Buss, President of the Union:

> Dear Charlie:
>
> I have received your letter concerning the grievance pertaining to ordering Pat Feiereisen to return to full duty. At the time I had ordered him back on full duty, I was in receipt of a medical analysis by specialists who had been working with Pat for several months and had found him to be able to return to full duty. Pat Feiereisen did furnish me with a light duty slip from his doctor. However, after making contact with the doctor, it was found that the light duty slip was issued as a preventative measure until he could see a specialist for the claimed injury.
>
> It is our opinion and the opinion of Dr. Anderson and his medical staff from Theda Clark that Pat is capable of returning to full duty if he applies himself. Based on this opinion, Pat Feiereisen would not have jeopardized the safety to other firefighters because of any physical injury. The buddy system that you refer to in the contract addresses the need for two firefighters acting together during emergency situations but does not force anyone to act alone should another firefighter be unable to carry out his role as a viable member of that team. Pat Feiereisen was not impaired at the time he was assigned to full duty, therefore, the buddy system was not jeopardized.
>
> This grievance is hereby denied and can be forwarded to its next step if you so desire.

POSITIONS OF THE PARTIES

Union

When the Fire Chief ordered the Grievant back to full duty status on June 20, 1990, the Grievant's treating physician orders were that the Grievant was to remain on light duty until he could be evaluated by a neurosurgeon. When the neurosurgeon evaluated the Grievant, he also gave orders for continued light duty. On two occasions, at the City's request, the Grievant was seen by the City's doctor for independent medical examinations. Although it was the City's doctor's opinion that the Grievant could return to full duty, he ordered a maximum lifting restriction of 75 to 80 pounds.

The Fond du Lac Fire Department position description for the position of Fire Fighter states that the physical requirements for a fire fighter "...requires the capability to lift heavy objects (75 to 125 pounds) unassisted and heavier objects (more than 125 pounds) with assistance." At hearing, the Chief acknowledged that there was a conflict between the City's physicians lifting restrictions and the City's own lifting requirements for a fire fighter.

Article XXXVI provides for the use of the "buddy system." The primary responsibility of a fire fighter operating under the "buddy system" is to remove his partner from a hazardous situation should that partner become incapacitated. As the testimony establishes, a typical fire fighter weighs between 175 to 200 pounds. With protective clothing and self contained breathing apparatus, a 180 pound fire fighter would weigh in access of 200 pounds. As the testimony further demonstrates, it would be impossible for a fire fighter with a lifting restriction of 75 to 80 pounds, as the City's own doctor ordered, to carry out his primary responsibility under the "buddy system."

Although the Grievant did not actually respond to a fire during the period of time he was assigned, the City's conduct placed him in a situation where minutes after responding to an alarm, he would have been operating as a member of a "buddy team." Only the most outdated view of the employe/employer relationship would contend that employes must wait until serious injury or death occurs before they can address a concern over their safety. The City violated Article XXXVI when, on June 20, 1990, an impaired fire fighter was assigned to a position that required him to serve as a member of the "buddy system."

Employer

Article XXXVI was included in the agreement following a declaratory ruling by the Wisconsin Employment Relations Commission. As set forth in the Commission's decision, the language in the first paragraph of Article XXXVI is designed to cover safety concerns at a fire scene. In the case before the Arbitrator, there was no fire. Engine 5 was responding as a first responder to an emergency ambulance call. The language is clear and unambiguous relative to the types of situation to which the "buddy system" is applicable. Those conditions were not present for the date of this grievance.

After examining the Grievant, the City's physician reported that he was fit for duty. The City's physician was the only medical doctor that examined the Grievant in the time immediate to the grieved incident. The Union's exhibits showing other examinations at time frames distant from June 20, 1990 are simply not relevant to the Grievant's physical status on the date cited in the grievance. Chief Flagstad made a decision on the most current medical information available and, the decision, was appropriate.

Clearly the language of Article XXXVI was not applicable on the date cited in the grievance. On that basis alone, the grievance should be denied.

DISCUSSION

The Grievant's normal job classification is Motor Pump Operator. When the Grievant returned to work on June 16, 1990, he was returned to work as a Fire Fighter. The Employer's position description for Fire Fighter contains a section entitled Physical Requirements In Performing Tasks. This section contains the following paragraph:

> Performance of tasks associated with responding to emergency alarms (fire, EMS, assistance) requires the capability to lift heavy objects (75 - 125 pounds) unassisted and heavier objects (more than 125 pounds) with assistance. See Note 1.
>
> Note 1 states as follows:
>
> NOTE 1: APPROXIMATE WEIGHTS OF VARIOUS PIECES OF EQUIPMENT, TOOLS AND TURNOUT GEAR USED IN FIRE FIGHTING:
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> 15# CO 2 Extinguisher = 45#
> K-12 saw with case = 96#
> 1 50' Section of rolled 2 1/2" hose = 40#
> Jaws Tool = 70#
> Portable Generator = 150#
> Positive Pressure Ventilating Fan = 100#
> Additional weight carried by a Fire Fighter in full turnout gear wearing SCBA = 55#

At hearing, the Chief agreed that a Fire Fighter returned to full duty status should be able to lift 125 pounds.

In his written report of June 26, 1990, Dr. Anderson confirmed that, on June 18, 1990, he had examined the Grievant and found that the Grievant could perform job activities consistent with the work capacity classification which Dr. Anderson had attached to his report. This work capacity classification stated, inter alia, that the Grievant was capable of performing "Med. Heavy Work - Lifting 75-80 lbs. max. with frequent lifting and/or carrying of objects weighing up to 40 lbs." Given the Chief's testimony, as well as the Physical Requirements set forth in the position description, the undersigned is

persuaded that a Fire Fighter with the "Med. Heavy Work" classification assigned to the Grievant in Dr. Anderson's written report of June 26, 1990 is not able to perform the normal work of a Fire Fighter.

Richard Berndt has been a Fire Fighter for twenty-four years. The testimony of Berndt, which was not contradicted at hearing, establishes that the primary function of a "buddy", as that term is used in Article XXXVI, is to remove his/her "buddy" to a place of safety should the "buddy" become incapacitated. According to Berndt, a Fire Fighter with the "Med. Heavy Work" classification referenced in Dr. Anderson's written report of June 26, 1990, would not be able to remove an incapacitated "buddy" to safety. The record does not demonstrate otherwise.

While Article XXXVI does not expressly provide that each "buddy" must be physically capable of performing the work of a "buddy", such a requirement must be implied. To conclude otherwise, would be to disregard the stated intent of the provision, i.e., "to provide a minimum amount of safety to Fire Fighters of the Fond du Lac Fire Department...".

For the reasons discussed above, the undersigned is persuaded that, at the time that the Chief issued his letter of June 20, 1990, the Grievant was not physically capable of performing the work of a "buddy". However, as the City argues, the "buddy system" requirements of Article XXXVI are applicable when a " ... Fire Fighter shall be required to enter a burning building, explosive or poisonous atmosphere without being accompanied by at least one (1) additional Fire Fighter". The record fails to demonstrate that the Grievant and a "buddy" were required to " enter a burning building, explosive or poisonous atmosphere" at anytime when the Greivant was physically incapable of performing the work of a "buddy". Accordingly, there has been no violation of Article XXXVI.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The City did not violate Article XXXVI of the Collective Bargaining Agreement when, on June 20, 1990, the City directed Fire Fighter Patrick Feiereisen to perform the normal duties of a fire fighter.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 14th day of August, 1991.

By _____
Coleen A. Burns, Arbitrator