BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 400	Case 104 No. 44736 MA-6403
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 11, 1991, upon receipt of post hearing written argument.

ISSUE:

The parties presented the following issue:

> When the City issued the Grievant a letter relative to the use of sick leave dated June 20, 1990, did it violate the collective bargaining agreement?
>
> If so, what should the remedy be?

RELEVANT CONTRACT LANGUAGE:

ARTICLE XIII

SICK LEAVE

> Sick leave will be administered by the Chief or such Assistant Fire Chief as may be designated by the Chief.

All permanent full-time and probationary Fire Fighters of the City working a fifty-six (56) hour work week shall accumulate sick leave with pay at the rate of twelve (12) working hours for each month of service. Unused sick leave credits shall accumulate to a maximum of six (6) working days per year at the above rate. Total sick leave accumulation shall not exceed sixty (60) working days.

All permanent full-time and probationary employees working a forty (40) hour work week shall accumulate sick leave with pay at the rate of eight (8) working hours for each month of service. Unused sick leave credits may accumulate to a maximum of twelve (12) working days per year at the above rate. Total sick leave accumulation shall not exceed one hundred (100) working days. Employees transferring from positions assigned to work a fifty-six (56) hour work week to positions assigned to work a forty (40) hour work week or employees transferring from a position assigned to work a forty (40) hour work week to a position assigned to work a fifty-six (56) hour work week shall have their total hours of accumulated sick leave converted to a factor of .5556.

Employees who retire in accordance with the provisions of the Wisconsin Retirement System, or who are forced to retire due to a duty disability, shall be entitled to a cash payment of $10.00 for each day of unused sick leave in their sick leave bank at the time of their retirement. Employees may not receive payment for more than sixty (60) days of accumulated sick leave, or a total cash payment of no more than Six Hundred Dollars ($600.00) under this provision.

A Fire Fighter may use sick leave with pay for absence necessitated by injury or illness. In the event a Fire Fighter's wife, children or other members of his family living at his residence are injured or ill in such manner as to require the Fire Fighter's presence, such Fire Fighter may use up to one (1) day of his accumulated sick leave credits per incident. The latter provision is to allow the Fire Fighter time to make arrangements for the care of the injured or ill person or for the care of his children in case his wife is injured or ill and therefore is to be used only when such injury or illness occurs just prior to or during a Fire Fighter's work day.

In order to qualify for sick leave payments, a Fire Fighter must:

1) Report his absence to the Chief or his designated representative prior to the start of his work day.

2) Keep the Chief or his designated representative informed or his condition.

3) Submit a doctor's certificate for such absence

if it is in excess of three (3) working days. The certificate must state the kind and nature of the sickness or injury and whether the Fire Fighter has been incapacitated for said period of absence.

4) Apply for and report such leave according to the procedure established by the City.

Sick leave should be regarded by all as a valuable free health and welfare insurance which, in the best interest of the Fire Fighter, should not be used unless really needed. Sick leave is not "a right" like vacation; it is a privilege to be used carefully.

All sick leave shall be subject to administration by the Chief or such Assistant Fire Chief as may be designated by the Chief. Serious cases of excessive abuse, as determined by the Chief and City Manager, will be grounds for disciplinary action or dismissal of the Fire Fighter concerned.

In the event a Fire Fighter has exhausted his accumulated sick leave, other Fire Fighters of equal or higher rank may work for the Fire Fighter up to a maximum of ten (10) days.

Medical examinations by a physician of the City's choosing may be required after prolonged, serious or repetitious illness, major surgery, or injury not incurred on the job. Return to duty after such illness depends on the decision of the Fire Chief and the City Manager, based on advice of the supervisor, medical information supplied by the Fire Fighter's physician and the physician of the City's choosing.

ARTICLE XXIX

MAINTENANCE OF BENEFITS

The City agrees that, as a result of this contract, no benefits previously granted employees by the City shall be either withdrawn or reduced unless specifically stated in the collective bargaining agreement.

BACKGROUND

On May 3, 1990, Fire Chief David Flagstad issued the following letter to Fire Fighter Patrick Feiereisen, hereafter the Grievant:

Dear Pat:

As you know, Assistant Chief Wayne D. Parker and I attended a meeting with yourself and the medical staff at Theda Clark Hospital on May 2, 1990 at which the attending physicians explained their diagnosis of your injury. I am told we will be receiving a detailed report in several days.

Based on their diagnosis, Wausau Insurance has informed the City that after 1200 noon on May 2, 1990, they will no longer be liable for any of your time off under Workmen's Compensation concerning this claim. This will require us to consider all time absent from work from here on to be considered use of your sick leave privilege.

As Dr. Anderson recommended, you are to contact Jim Hebel of the YMCA to enroll in a program that will rebuild and recondition your physical areas that have been weakened through the past months. This is to take place for two (2) hours per day on Monday through Friday. The suggested exercises of Dr. Anderson are swimming, sauna, and work on a Nautilus type exercise machine. This can be better determined and defined by Jim Hebel. This is to continue for a minimum of four (4) weeks and a maximum of six (6) weeks. During this time, I will check with Jim as to your progress and, depending on your improvement, you will be expected to return to full duty between four (4) and six (6) weeks.

For the next four (4) weeks, you will be considered on light duty and will report to Central Station Monday

> through Friday from 0800 hours until 1600 hours. You will be excused from light duty work to attend your physical therapy sessions.
>
> Your cooperation is appreciated and your recovery is expected.

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

> 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, complained of shoulder and back pain. The Grievant 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.

After Dr. Anderson had examined the Grievant on June 18, 1990, but before the Chief issued the letter of June 20, 1990, the Chief discussed the results of the examination with Dr. Anderson.

On June 26, 1990, Dr. Anderson provided the City with a written report of his June 18, 1990 examination of the Grievant. The cover letter of this written report 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 June 26, 1990, Charles Buss, President of the Union, sent the following letter to Chief Flagstad:

> On June 16, 1990 Fire Fighter Pat Feiereisen returned to work on a full duty status after having been on light duty as a result of a work related injury. At

1000 hours on that date his work related injury was aggravated while responding to an emergency call. At 1545 on that date Feiereisen informed Acting Shift Commander Liebelt that the pain he was experiencing was sufficient enough to require him to take his prescribed pain medication, which tends to make him sleepy. Feiereisen was told by Liebelt that he could not perform his duties under those circumstances and Feiereisen then put himself on the sick list and went off duty.

On June 18th the City informed Feiereisen that they wanted him to be seen by Dr. Anderson (city doctor) and Feiereisen complied with that request. After seeing Dr. Anderson he also saw his physician, Dr. Bowman, who issued Feiereisen a light duty slip.

On June 20th Feiereisen returned to work on a light duty status. He presented you with a light duty slip from his doctor which stated that Feiereisen should be on light duty until July 7th when he would be evaluated by a neurosurgeon. At 1610 you gave Feiereisen a letter which informed him that based on Dr. Anderson's opinion he was being put back on full duty and he would be docked pay for sick time taken as a result of the injury incurred on June 16th.

Contractual Violations

1. Article XIII-Sick Leave: You violated Article XIII when on June 20th you reduced Feiereisen's wages for the amount of time he was off on sick leave for the injury he received on June 16th. Once earned sick leave belongs to the fire fighter, to be used as he requires time off for injury or illness. Eventhough the union has argued in a separate grievance that the time off should have been under workmans compensation provisions, as it was necessitated by a work related injury, the grievant, absent a granting of workmans compensation benefits by management has a right to utilize earned sick leave under Article XIII.

2. Article XXXIX-Maintenance of Benefits: When on June 20th you notified Feiereisen that he would be docked in pay for the period of time he was absent from duty on sick time, you did so based on Dr. Anderson's opinion that Feiereisen was able to return to full duty. The time Feiereisen was off began accumulating on June 16th, prior to the time he saw Dr. Anderson. It is not possible for Dr. Anderson to give an opinion of Feiereisen's condition on June 16th when he left duty, based on an examination performed two days later on June 18th. It is a violation of Article XXIX for management to reduce the wages of the grievant by retroactively applying Dr. Anderson's opinion to sick time taken prior to the date of the

examination.

As a resolution to this grievance Local 400 proposes that Feiereisen be granted sick time for the period of time he was absent from duty, until such time that a related grievance arguing that the time off should have been covered under workmans compensation is resolved. In addition, the Union proposes that any wages withheld from the grievant be refunded in full.

On October 2, 1990, City Manager Jack Howley sent the following letter to Union President Buss:

I have received your grievance dated June 26, 1990 pertaining to the docking of Pat Feiereisen's wages when he was absent from work without authorized leave. I have also read the response from Chief Dave Flagstad.

1. Article XIII - Sick Leave states the following: "A firefighter may use sick leave without pay for absence necessitated by injury or illness. ...sick leave should be regarded by all as valuable free health and welfare insurance which, in the best interest of the firefighter, should not be used unless really needed. Sick leave is not "a right" like vacation; it is privilege to be used carefully." There is not a contractual violation because Mr. Feiereisen reported that the only reason he was staying away from work was due to an injury in question that according to Dr. Anderson's opinion, did not exist. Sick leave is to be used for an illness and/or an injury and in this case neither item existed.

2. Article XXIX - Maintenance of Benefits: On June 20th, 1990 when Mr. Feiereisen was notified that he would be docked in pay for the time that he was absent from duty, it was done so with the knowledge of Dr. Anderson's findings that no injury had taken place on June 16th. Had Dr. Anderson's opinion included any basis for a workmen;s compensation claim or sick leave usage, the appropriate leave of absence would have been approved. Since the criteria for either form of absence was non-existent, the employe was considered absent without authorized leave and therefore docked in wages.

This grievance is hereby denied.

POSITIONS OF THE PARTIES

Union

Under the provision of Article XIII, a Fire Fighter may use sick leave with pay for absence necessitated by injury or illness. In the present case, the employe and his physician determined that he was incapable of carrying out

the duties of a fire fighter. Under such circumstances, the Grievant is entitled to receive sick leave.

The Chief exercised his rights to deny Workmen's Compensation benefits based on advice from the City doctor. If the Chief has the right to withhold Workmen's Compensation benefits because he feels no injury exists, the employe should be able to utilize earned sick leave because he feels the injury does exist. An employe has the right to follow the advice of a physician of his own choosing. (Cite submitted.) It is improper for management to take action that prevents an employe from exercising his right to follow the advice of the physician of his choice.

During the period of time in which the City had the two conflicting medical opinions regarding the Grievant's condition, management was inconsistent in the direction they gave to the Grievant with regard to his use of sick leave. In a letter dated May 3, 1990, the Chief informed the Grievant that he was no longer liable for time off under Workmen's Compensation. The Chief further stated "this will require us to consider all time absent from work from here on to be considered use of your sick leave privilege." Clearly, the Chief is telling the Grievant to use his sick leave to cover absences from duty.

In another instance, a member of the Department's management team, Captain David Liebelt, who was acting shift commander on June 16, 1990, gave instructions to the Grievant to use sick leave to go off duty. On June 20, 1990, the Grievant, after having been told by two members of the fire department's management team to use sick leave to cover absence from duty necessitated by the Grievant's duty related injury, received a letter from the Chief. In this letter, the Chief, relying on the opinion of the City's doctor, stated that it was his decision to dock the Grievant pay for the amount of time the Grievant missed while on sick leave. Management's positions regarding the Grievant's use of sick leave have been inconsistent and conflicting.

The Grievant had earned sick days on the books and, as established by the Chief's testimony, the Grievant had applied for these sick leave days in accordance with the contractual procedure. At the time that the Chief informed the Grievant that he would be docked in pay for sick time taken, the City violated Article XIII. The fact that the City did not carry through with the threat to deny the Grievant's use of sick leave, does not negate the fact that a violation did occur.

The Union respectfully requests that the grievance be granted by ruling that Article XIII of the agreement was violated when the Chief informed the Grievant, Patrick Feiereisen, that he would be denied the use of sick time earned.

Employer

The Chief has an obligation to ensure that employes on duty are properly fit for their assignment. The Chief met this obligation when he directed the Grievant to be examined by physician Gay R. Anderson. Article XIII clearly provides the City with the right to select a physician to determine an employe's fitness for duty. Doctor Anderson's medical report clearly states that the Grievant was capable of working. The Fire Chief's decision that the Grievant was able to work was based on competent medical advice.

Anderson was the only medical doctor to examine the Grievant during the period of June 16 through June 20, 1990. The numerous physician statements submitted by the Union lack relevance in this matter.

The Chief's belief that sick leave was inappropriate is further supported by the contents of the accident report and the statements of the Grievant's co-workers. None of these co-workers saw anything happen to the employe. The issuance of the June 20, 1990 letter was totally appropriate and within the authority of Article XIII of the agreement. The City respectfully requests that the grievance be dismissed.

DISCUSSION

Article XIII, the sick leave provision, states, inter alia, as follows:

> Medical examinations by a physician of the City's choosing may be required after prolonged, serious or repetitious illness, major surgery, or injury not incurred on the job. Return to duty after such illness depends on the decision of the Fire Chief and the City Manager, based on advice of the supervisor, medical information supplied by the Fire Fighter's physician and the physician of the City's choosing.

On June 16, 1990, the Grievant complained of right shoulder and back pain. Inasmuch as the Grievant had complained of right shoulder and back pain for months prior to his return to work on June 16, 1990, the undersigned is persuaded that the Grievant's complaints involved a "prolonged, serious or repetitious illness". Given the above provisions, the Chief had the contractual
right to have the Grievant examined by Dr. Anderson on June 18, 1990.

The language of Article XIII provided the Fire Chief and the City Manager with the right to decide whether to return the Grievant to duty following the June 16, 1990 incident. The contract language expressly provides that such a decision is to be based upon the advice of the employe's supervisor and medical information supplied by the Fire Fighter's physician and the physician of the City's choosing. Given this contract language, the undersigned must reject the Union's argument that the Grievant was entitled to follow the advice of his own physician. While the City must consider the medical information supplied by the employe's physician, it need not act in accordance with this medical information if information supplied by the employe's supervisor and medical information supplied by the City's physician provides a reasonable basis for disagreement.

After Dr. Anderson's examination of the Grievant on June 18, 1990 and prior to the Chief's issuance of the letter of June 20, 1990, the Chief had a discussion with Dr. Anderson. As the Chief recalls the conversation, Dr. Anderson indicated that no injury had taken place and that the Grievant was eligible to be returned to full duty status.

At hearing, the Chief stated that when the City received the June 18, 1990 slip from Dr. Bowman, the Grievant's physician, a City representative called Dr. Bowman. According to the Chief, the City representative was told that Dr. Bowman had not seen the Grievant and that the order recommending light duty was a preventative measure until the Grievant could be seen by a neurosurgeon.

At the time that the Chief issued his letter of June 20, 1990, he had not received Dr. Anderson's written report of the June 18, 1990 examination. This written report, dated June 26, 1990, confirmed that, on June 18, 1990, Dr. Anderson had examined the Grievant and found that the Grievant could " ... do

his regular job activities at his work site consistent with the work capacity classification enclosed with this letter." The enclosed 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."

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. Given the Chief's testimony, as well as the Physical Requirements set forth in the Fire Fighter 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.

The undersigned is satisfied that, prior to issuing the letter of June 20, 1990, the Chief did consider the advice of the Grievant's physician, Dr. Bowman, but chose to rely upon the opinion of the City's physician, Dr. Anderson. The undersigned does not doubt the Chief's claim that, at the time that he issued the letter, the Chief believed that Dr. Anderson's examination of June 18, 1990 had established that the Grievant was able to return to full duty status. However, as demonstrated by his report of June 26, 1990, Dr. Anderson's examination of June 18, 1990 did not establish that the Grievant was fit to return to full duty status.

As set forth in the Chief's letter of June 20, 1990, the Chief understood that the Grievant had left work on June 16, 1990 and placed himself on the sick list because the Grievant felt that he was unable to perform his duties as a firefighter. Given the results of Dr. Anderson's examination of June 18, 1990, as contained in his written report of June 26, 1990, it must be concluded that the Grievant's conduct was reasonable. Inasmuch as the City relied upon erroneous medical advice, the decision to return the Grievant to work on full

duty status and to deny the Grievant the use of sick leave was not reasonable. As the Union argues, the City's conduct violated Article XIII. Inasmuch as the

City has paid the disputed sick leave, the appropriate remedy is to order the City to rescind the letter of June 20, 1990.

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

AWARD

1. The City violated the collective bargaining agreement when the City issued the Grievant a letter relative to the use of sick leave dated June 20, 1990.

2. The City is to immediately rescind the letter relative to the use of sick leave dated June 20, 1990.

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

By _____
Coleen A. Burns, Arbitrator

CAB/sh
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