BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL UNION 583, AFL-CIO and CITY OF BELOIT	Case 125 No. 51309 MA-8566

Appearances:

Lawton & Cates, S.C. 214 West Mifflin Street, P.O. Box 2965 Madison, Wisconsin 53701-2965, by Mr Richard V. Graylow and Mr. John C. Talis, for the Association.

Mr. Bruce K. Patterson, Employee Relations Consultant, P.O. Box 51048, New Berlin, Wisconsin 53151-0048, for the City.

ARBITRATION AWARD

International Association of Fire Fighters, Local Union 583 (the Association or the Union), and the City of Beloit (the City), are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission, on January 23, 1995, appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in Beloit, Wisconsin on March 29, 1995, in conjunction with the hearing on a related complaint of prohibited practices filed with the Wisconsin Employment Relations Commission. A transcript was taken and received on April 23, 1995. The parties filed briefs, and reply briefs, the last of which was received July 12, 1995.

ISSUE

Since the parties were unable to agree to a statement of the issue, the Arbitrator states the issue as follows:

> Did the City violate the collective bargaining agreement when it ordered Shift Commander Brian Brown to light duty on June 6, 1994? If so, what is the appropriate remedy?

BACKGROUND

During the time immediately preceding the events of this case, Shift Commander Brian Brown was on worker's compensation leave as a result of an injury he suffered while he was on duty. On June 1, 1994, his doctor released him to return to work with a restriction that he not lift more than 15 pounds. On June 2, 1994 Fire Chief Gerald Buckley ordered him to perform light duty on a forty-hour week basis in the Inspection Bureau, beginning on June 6. The Association objected to the assignment, filing several grievances that asserted that the City had violated the contract. Grievance No. 1994-15 asserts that there was no light duty policy and therefore Grievant should be placed on sick leave until a light duty policy can be negotiated. Grievance No. 1994-16 asserts that the light duty order was a work rule that must be withheld until the grievance is withheld. Grievance No. 1994-17 complains that Grievant was forced to use compensatory time for time off he needed on June 10, 1994 and demands that he be reimbursed for such time. Grievance No. 1994-19 asserts that the assignment violated the overtime provision of the contract. These grievances remain unresolved and are the subject of this award.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

ARTICLE IV

APPLICATION AND INTERPRETATION OF WORK RULES

Section 1	For purposes of this Article, work rules are defined as and limited to: Rules promulgated by the City within its discretion which regulate the personal conduct of employees during the hours of their employment.
Section 2	The Union recognizes the right of the City to establish reasonable work rules. Copies of newly established work rules or amendments to existing work rules will be furnished to the Union at least ten (10) days prior to the effective date of the rule.
Section 3	The City agrees that established work rules shall not conflict with any provisions of this Agreement.
Section 4	The Union reserves the right to grieve the

reasonableness of a work rule. Anytime a work rule is grieved, said work rule shall be withheld until such grievance is resolved.

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ARTICLE XIV

SICK LEAVE

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Section 2 The condition in granting sick leave requires that the employee be ill or injured to a degree that prevents him/her from performing his/her regularly assigned duty, and the employee shall call the officer in charge at headquarters at least one-half hour (1/2) before his/her regularly scheduled starting time for work unless the condition of his/her illness or injury prevents him/her from so doing, provided that he/she will comply with this provision at the earliest time possible. An employee shall call each day he/she is absent in all cases. In any case where an employee shall be absent for two (2) working days or more in succession he/she shall, as a condition of receiving sick leave benefits, be required to provide a doctor's certificate of illness upon the request of his/her Shift Commander.

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ARTICLE XVI

DUTY INCURRED INJURY PAY

Section 1 If an employee is off three (3) calendar days or less because of occupational injury or disease, the City will pay the established

wages for the said time. If the employee is off more than three (3) calendar days for the above reasons, the City will pay the difference between established wages and the Worker's Compensation Insurance payment for a period of ninety (90) calendar days. After said ninety (90) day period the only compensation received by said employee will be solely from the insurance company. The ninety (90) day period as listed above may be extended at the discretion of the City Manager.

Section 2 When a compensation insurance check is received normal earnings due for the period covered by the check will be calculated. From these earnings, the amount of the compensation insurance check is to be deducted and the balance paid to the employee on the next regular payroll. The compensation insurance check is to be given to the employee after this calculation is made.

Section 3 If there are two compensation insurance checks in one pay period, the total of the balance is to be paid on the next regular payroll.

Section 4 When a dispute arises as to whether an injury or sickness was duty incurred and Worker's Compensation Insurance is not being received, the employee may use available sick leave until the dispute is resolved or sick leave is exhausted, whichever comes first. Should it be resolved that the injury or sickness was duty incurred, the employee's sick leave account shall be credited for sick leave used and any Worker's Compensation checks paid for the period during which sick leave was used shall be deducted from future paychecks from the City until the balance

owed the City is paid back.

Section 5 The City shall allow employees to use 100% of their accumulated sick leave, who are forced to retire by virtue of a duty incurred injury or disease, and retire under the disability provisions of the Wisconsin Retirement Fund.

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ARTICLE XX

MANAGEMENT RIGHTS

The Union recognizes and agrees that, except as expressly limited by the provisions of this Agreement, the supervision, management, and control of the City's business and operations are exclusively the functions of the City. 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 purpose of this Agreement.

The City and the Union shall immediately enter into negotiations to replace any action of this Agreement if found to be in violation of the Wisconsin Statutes.

POSITIONS OF THE PARTIES

The Association

The Union argues that the City violated ARTICLE IV-INTERPRETATION AND APPLICATION OF WORK RULES when it did not withhold the assignment of light duty until the grievance had been resolved. It argues the City also violated ARTICLE XII-OVERTIME, ARTICLE XIV-SICK LEAVE, and ARTICLE XX-MANAGEMENT RIGHTS. According to the Union, the City had no right to order Grievant to light duty, while, according to the Union, he was on sick leave, therefore all the time he worked on light duty was overtime and should be compensated at the overtime rate. The Union concludes that all of the City's actions were taken in order to evade the contract or undermine the Union and therefore violated that prohibition in the Management Rights Article.

The City

The City asserts the record shows that Grievant was on worker's compensation leave as a result of a duty-incurred injury. It asserts it has a long-standing history of assigning light duty to employes on worker's compensation leave who were, like Grievant, released for work with medical restrictions.

ADDITIONAL FACTS AND DISCUSSION

The Union does not dispute that the light duty assignment was consistent with the medical restrictions prescribed by Grievant's physician. Rather, the Union asserts the City lacked the authority to make such an assignment. The Union does not point to any contract provision, but argues that since there is no explicit contract authority, the City is prohibited from assigning light duty under these circumstances.

A preliminary factual question must be resolved. In its brief, the Union asserts that Grievant was on sick leave during the period of the disputed events. The record shows, however, that the injury occurred while Grievant was on duty and the City did not contest Grievant's entitlement to worker's compensation leave. The Union itself refers to actions of the worker's compensation carrier in suggesting that Grievant be assigned light duty. There is no question that Grievant was on worker's compensation leave, not sick leave.

A. The City's alleged violation by assigning light duty to Grievant

A review of ARTICLE XVI-DUTY INCURRED INJURY PAY reveals that there is no reference to light duty. The only other documents introduced at the hearing relating to duty-incurred injury or light duty were the Union bargaining proposals and General Order 7, an order issued by the City on June 26, 1992 which detailed steps to be taken at the time of an occupational injury. Since the Union's proposals represented only one party's proposals that were not incorporated into the bargaining agreement and did not in any other way represent a mutual understanding between the parties, they cannot be used to represent the parties' rights and responsibilities as regards light duty. Similarly unhelpful is General Order 7 which does not relate to light duty and does not clarify this matter. Finally, there are no verbal understandings regarding assignments for such employes.

Finding no contract limitation, either explicit or implied, on the City's right to assign light duty employes who have suffered duty-incurred injuries and who have been released to return to work with medical restrictions, this Arbitrator concludes that the City's traditional management rights, expressed in ARTICLE XX, give the City the right to make this assignment as part of its right to supervise, manage and control its operations.

This conclusion is supported by the City's practice as regards light duty. Since April,

1987, six employes who suffered duty-incurred injuries or illnesses have been assigned light duty and a forty-hour week. The length of these assignments varied from two to eleven weeks. The Union did not dispute the fact of these assignments nor did it allege to have been unaware of the assignments. With one exception, only two categories of employes on worker's compensation leave did not receive light duty assignments: those employes who did not receive a medical release for restricted duty, and those employes whose injuries were disputed by the worker's compensation carrier. The one exception was an employe who was available for light duty only over a weekend when Chief Buckley was unavailable to assign him light duty. That narrow exception does not belie the existence of the practice.

Given the contractual reference to worker's compensation payments which provides for certain rights and responsibilities without prohibiting the assignment of light duty, and in light of a clear and long-standing practice of assigning light duty to employes on worker's compensation leave who have been released with medical restrictions, I conclude that the assignment of light duty under such circumstances does not violate the collective bargaining agreement.

B. The City's alleged violation by not withholding the application of the work rule.

Grievance No. 1994-16 alleges that, pursuant to ARTICLE IV-APPLICATION AND INTERPRETATION OF WORK RULES, the City should have withheld the light duty assignment once the grievance was filed. The City's argument did not address this particular grievance and the Union's argument ignored the questions of whether the City's policy of assigning light duty was a work rule. Consequently, for purpose of analysis, this Arbitrator will will assume, without deciding, that the policy under discussion is a work rule.

In support of its position, the Union's grievance cites ARTICLE IV-APPLICATION AND INTERPRETATION OF WORK RULES, Section 4 which provides:

> The Union reserves the right to grieve the reasonableness of a work rule. Anytime a work rule is grieved, said work rule shall be withheld until such grievance is resolved.

ARTICLE IV gives the City the right to establish reasonable work rules at the same time that it provides a procedure for the Union to challenge the reasonableness of those rules. Section 2 requires the City to give copies of a rule to the Union at least 10 days before its effective date. Section 3 prohibits rules that conflict with the collective bargaining agreement. In the context of these provisions that address the work rule itself, rather than the sanctions or limitation that a work rule might impose upon a particular employe, Section 4 then is seen as the means for giving the Union a window period to challenge the work rule before it is imposed on an individual employe.

This arbitration award does not explore the limits of the time for the Union to grieve a work rule, but where, as here, the assignment of light duty has gone on for at least six years, and

has been known to the Union, the Union has lost its opportunity to have the rule withheld while the reasonableness of the rule, as a question separate from its impact on an employe, is resolved. I conclude that the City was not obligated to withhold the assignment of the light duty to Grievant until the grievance was resolved.

C. The City's refusal to allow Grievant to use sick leave to cover his light duty assignment.

The Union asserts that once Grievant was ordered to light duty, the City violated the contract when it denied his request to use sick leave to absent himself from the worksite with pay. The Union bases its claim on the theory that Grievant was on sick leave at the time he was ordered to light duty, and that as long as he has sick leave accumulated in his sick leave bank, he has an absolute right to use it. The City disputed his right to the sick leave use but did not elaborate on that position.

As noted above, the record shows that Grievant was on worker's compensation and not sick leave at the time of the disputed events. While it may true that the City does not have the right to limit the use of sick leave for disciplinary purposes as discussed by the arbitrator in the case cited by the Union, 1/ the City's denial of sick leave was not disciplinary here.

Grievant could not receive sick leave for the disputed period because he did not meet the eligibility standards. At the time that he sought to take sick leave he had already been assigned to light duty. Sick leave insures against loss of income when the employe is ill or injured and physically unable to perform his regularly assigned duties. In this case, the employe was able to perform those duties as they had been tailored to meet his medical restrictions as ordered by his doctor. Consequently, he was not in danger of losing his income and he was not entitled to sick leave pay.

D. Summary

The Collective Bargaining Agreement does not prohibit the City from assigning light duty to employes who have been on duty-incurred injury pay and who have received a medical release to return to restricted duty. Furthermore, the City has a long-standing and clearly established practice of making such assignments. The contract provision for withholding work rules until disputes are resolved did not obligate the City to withhold the assignment, and the City did not violate the contract by denying Grievant the use of sick leave pay for the disputed period.

AWARD

1. The City did not violate the collective bargaining agreement when it ordered Shift

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1/ Brown County, (Bielarczyk, 1987).

Commander Brian Brown to light duty on June 6, 1994.

2. Grievances Nos. 1994-15, 1994-16, 1994-17 and 1994-19 are denied and dismissed in their entirety.

Dated at Madison, Wisconsin, this 17th day of November, 1995.

By Jane B. Buffett /s/
Jane B. Buffett, Arbitrator