

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

VILLAGE OF ASHWAUBENON

and

ASHWAUBENON PUBLIC SAFETY OFFICERS  
ASSOCIATION

Case 38  
No. 53319  
MA-9308

Appearances:

Mr. Aaron N. Halstead, Schneidman, Myers, Dowling & Blumenfeld, Attorneys at Law,  
P. O. Box 2155, Madison, Wisconsin 53701, on behalf of the Association.

Mr. James R. Korom, vonBriesen, Purtell & Roper, S.C., 411 East Wisconsin Avenue,  
Suite 700, Milwaukee, Wisconsin 53202-4470, on behalf of the Village.

ARBITRATION AWARD

According to the terms of the 1994-95 collective bargaining agreement between the Village of Ashwaubenon (hereafter Village) and Ashwaubenon Public Safety Officers Association (hereafter Association), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding the proper interpretation and application of the Village's light duty policy and Article VI, Section K of the collective bargaining agreement. The Commission designated Sharon A. Gallagher to hear and resolve the instant dispute. A hearing was originally scheduled for January 24, 1996, but was rescheduled with the agreement of the parties and held on February 15, 1996 at Ashwaubenon, Wisconsin. No stenographic transcript of the proceedings was made. The parties agreed to the following briefing schedule: The Association would postmark its initial brief to the Employer and the undersigned on March 15, 1996, the Employer would postmark its responsive brief on March 30, 1996 and on April 15, 1996 the Association would file a reply brief. The briefs were timely received by the undersigned and the record was thereupon closed.

Issue:

The parties were unable to stipulate to the issue to be determined in this case. The Association suggested the following issue for determination:

Whether the Village policy on light duty was unreasonably applied to Officer Magestro in violation of Article VI, Section K of the labor agreement? If so, what is the appropriate remedy?

The Village suggested the following issue for resolution:

Did the application of the Village's light duty policy to Officer Magestro violate the specific terms and conditions of the collective bargaining agreement? If so, what is the appropriate remedy?

Based upon the relevant evidence and argument in this case the undersigned concludes that the Association's issue shall be determined herein.

Relevant Contract Provision:

ARTICLE VI

MANAGEMENT RIGHTS

The Association recognizes that, except as otherwise provided in this Agreement or as may affect the wages, hours and working conditions of the members of the Association, the management of the Village and its business and the discretion of its work force is vested exclusively in the Village in that all powers, rights, authority, duties and responsibilities which the Village had prior to the execution of this Agreement customarily executed by management or conferred upon and vested in it by applicable rules, regulations and laws, and not the subject of collective bargaining under the Wisconsin law, are hereby retained. Such rights include, but are not limited to, the following:

- A. To direct and supervise the work of its employees;
- ...
- E. To plan, direct and control operations;
- ...
- J. To assign duties;
- K. To issue and amend reasonable work rules;
- ...

Relevant Village Policy

Procedures For Employee Return to Work

- I. RETURN TO WORK FROM PERIOD OF ABSENCE CAUSED BY A NON-WORK CONNECTED INJURY OR

## ILLNESS.

Employees returning to work from a period of absence caused by a non-work connected injury or illness shall provide the Village President/Administrator or his/her designee with a physician's statement indicating that the employee is able to perform his/her normal duties free from any restriction. The Village retains the right at its own expense to require the employee to be examined by a physician of the Village's choice prior to allowing the employee to return to his/her normal duties.

## II. RETURN TO WORK FROM PERIOD OF ABSENCE CAUSED BY AN INJURY OR ILLNESS ALLOWABLE IN ACCORDANCE WITH WISCONSIN STATE STATUTES GOVERNING WORKER'S COMPENSATION.

Employees returning to work from a period of absence caused by an injury or illness allowable in accordance with Wisconsin State Statutes governing Worker's Compensation shall provide the Village President/Administrator or his/her designee with a physician statement indicating the terms and conditions under which he/she may return to work. If the statement places restrictions relative to performance of the employee's normal duties, the Village President/Administrator or his/her designee shall evaluate each instance to determine whether or not it is appropriate to allow the employee to return to work. This procedure shall be administered in accordance with Wisconsin State Statutes governing Worker's Compensation.

### Background:

In 1991, the Village adopted the above-quoted light duty policy and has applied it to all Village employes since that time. Also since 1991, the Association has filed no grievances and made no complaints regarding the light duty policy or its application.

During the negotiation of the 1994-95 collective bargaining agreement between the Village and the Association, the parties discussed the applicability of the light duty policy to both

non-work and work connected injuries. In a memo dated January 18, 1994, Village representative, Bruce Patterson advised both the Village President and Public Safety Department Chief Konopacki as follows:

Pursuant to discussions with representatives of the Ashwaubenon Public Safety Officers Association and myself in the process of bargaining a 1994 contract, the issue of light duty assignments has been resolved as follows. The Village agrees that it will not use "light duty" assignments for either work connected or non-work connected injuries.

This Agreement is to be effective immediately and, by copy of this memo to Chief John Konopacki, I would request that the policy be communicated to the shift commanders. . . .

Facts:

The Grievant, James Magestro, has been employed by the Village's Public Safety Department for more than fifteen years. Magestro is currently an Investigator in the Department and has been for approximately the past two and one-half years. The Department also employs approximately twenty-seven Public Safety Officers, one full-time liaison officer and two Investigators including Magestro. The Department is managed by Chief John Konopacki. The Department generally answers all police, fire and rescue calls on a twenty-four hour, seven days per week basis.

In July, 1995, Magestro suffered an off-duty injury when he injured his right index finger at a softball game. The finger was not only dislocated but also had sustained a small break at the joint. Magestro went to the emergency room at St. Vincent's Hospital where his hand was placed in a cast. Approximately three days later, Magestro saw his personal physician who removed the cast and placed a bandage on the index finger and second finger of Magestro's right hand, tying both fingers together and immobilizing them. It is undisputed that at no time did Magestro seek a doctor's certification from either the emergency room physician or his personal physician, stating that he (Magestro) was able to do all of the functions of his Investigator position. Magestro stated that he did not try to get a "no restrictions" doctor's slip from his doctor and admitted that he did not know why he did not attempt to do so.

After Magestro saw his personal physician, he went to the Department and requested to return to work with his two fingers bandaged together. Captain Maloy told Magestro that there was a Village policy against employees returning to work under these conditions but that he would ask the Chief about Magestro's request. Shortly thereafter, the Captain returned and told Magestro that Chief Konopacki had decided that Magestro could not return to work in his condition. Magestro was then off work for approximately five weeks between July 20 and August 28, 1995. During this time, Magestro used his accumulated sick leave and therefore

received his normal pay.

Magestro asserted both in his grievance and at the instant hearing that he could have performed all the duties of his Investigator's position during the period July 20 through August 28, 1995. 1/ On cross-examination, Magestro admitted that he is a sworn officer of the Village and

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1/ As of March 8, 1993 and effective through the instant hearing, the Village of Ashwaubenon Public Safety Department Investigator job description read in relevant part as follows:

. . .

1. Definition and Nature:

The assignment of Investigator is a specialized non-supervisory position in nature. Assignment will be made by the Director of Public Safety.

2. General Duties and Responsibility:

Investigators may be assigned to various general investigations within the department.

3. Analysis of Tasks:

a. Investigative Responsibilities

1. Thoroughly investigate all incidents assigned.
2. Properly execute search and arrest warrants.
3. Execute any arrest warranted as a result of an investigation.
4. Collect, mark, secure, and maintain inventorial control of all evidence collected.
5. Effectively interview victims, witnesses and suspects.
6. Develop a professional working relationship with the district attorney's office, department

must remain so in order to retain his Investigator position. Magestro also stated that he normally carries a gun, and is expected to be prepared to use it when he is executing standing warrants and arresting suspects. Magestro also stated that he normally writes with his right hand, printing in large capital letters any witness statements he takes as Investigator. Magestro admitted that while he had his right index finger and second finger taped together, he could not have written as well or as quickly when taking witness statements. Nonetheless, Magestro asserted that he could perform the writing portion of his normal duties. Magestro also stated that part of his Investigator job is to dust and take finger prints and collect evidence. Magestro stated that he can perform these duties with either hand and that he could have done so during the period following his injury.

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of social services, any other law enforcement agencies.

(Footnote continued on page 6)

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7. Testify in court truthfully, impartially, and convincingly.
  8. Keep confidential investigative matters within the unit.
  9. Assist and cooperate with officers in the department when they need investigative assistance.
- b. Fire fighting Responsibilities:
1. Effectively maintain fire fighting skills according to department standards.
- c. EMT Responsibilities:
1. Effectively maintain EMT skills according to departments standards.
- d. Administrative Responsibilities:
1. Efficiently maintain all records and prepare reports completely, promptly, and in a format that can easily be understood.

. . .

Magestro admitted, however, that with his fingers taped together during the latter part of July and the month of August, 1995, he could not have wrestled with suspects or used his service revolver. Magestro indicated, however, that in the past two and one-half years since he has been an Investigator, Magestro has not wrestled with any suspects or drawn his service weapon while executing a warrant or arresting a suspect.

Magestro also stated that although he does not normally respond to rescue and fire calls in his job as Investigator, the Chief has the authority to require Magestro to be counted as manpower under the Village's informal minimum manning policy and to perform fire and rescue calls. 2/ In the past two and one-half years since Magestro has been in the Investigator position, he has never been ordered to make himself available for police, fire or rescue calls under the Village's minimum manning policy. Magestro stated that as a general rule, if his Captain has asked him whether he is available to respond regarding public safety incidents when the Department has been short of employees, Magestro has had the right to indicate that he is not available due to his other work responsibilities. However, Magestro also stated that if a large fire occurred in the Village or some other disaster, that he could be expected to respond to fire and rescue calls. As an Investigator, Magestro is a salaried employe but he is paid overtime when he works overtime according to the terms of the collective bargaining agreement which covers his position. During the past two and one-half years, Magestro stated that as Investigator, he has responded to no fire calls, but he has responded to a few police calls and a few rescue calls.

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2/ The Village's minimum manning policy, generally requires that a certain number of Department employees be available to work at all times and that if the number of available employees falls below a certain number, then the Chief must either order Magestro and the other Investigator to make themselves available, or call in employees on overtime to cover the possible work involved.

The parties offered the following evidence at hearing regarding the application of the Village's light duty policy. 3/ During the Summer of 1995, Chief Konopacki broke three toes while on vacation. The Chief went to the emergency room immediately and emerged with a post-operative shoe (a light weight shoe with no toe). The Chief was off work for four days, as he had to stay off his feet for that period of time. During those four days, Chief Konopacki was still on vacation. Thereafter, the Chief spoke to the Village Administrator as well as the Village President regarding his injury and offered them a copy of the emergency room treatment sheet which indicated there were no restrictions on his return to work. The Village Administrator and Village President did not object to granting Konopacki's request to return to work at that time.

At the instant hearing, Chief Konopacki stated that upon his return to work following his injury, he never performed light duty; that he was capable of doing everything that he had done previously, pursuant to his job description. 4/ The Chief stated that his responsibility to respond

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3/ In his grievance, Magestro indicated that he had been treated differently for purposes of light duty than had Chief Konopacki and Captain Chris Madson. I note, that neither the Chief nor Captain Madson is included in the Association's collective bargaining unit.

4/ The Village of Ashwaubenon position description for the Director of Public Safety, effective August 1, 1988 and thereafter, reads in relevant part as follows:

. . .

(Footnote continued on page 8 and 9)

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**REPORTS TO:** Village President/Administrator

**JOB PURPOSE:** Responsible for planning, organizing and directing the activities of the police, fire and rescue services for the Village.

**DUTIES & RESPONSIBILITIES:** The following duties are normal for this position. These are not to be construed as exclusive or all-inclusive and other duties may be required and assigned.

Responsible for the operation of the Public Safety department.

Participates in the selection, promotion, evaluation, scheduling and discipline of the sworn and civilian employees.

Attends Board and committee meetings.

Maintains productive relationships with other Village

to major incidents (police, fire and emergency) is entirely within his discretion. The Chief stated that he alone decides whether he will respond and attend the scene of a major incident; that he (the Chief) does not relieve the officer-in-charge of the scene; that he (the Chief) normally speaks to the

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departments, other government agencies, news media and private organizations concerned with public safety.

Establishes department goals, policies and procedures.

Administers Labor Agreements.

Maintains overtime and daily attendance records.

Responds to major incidents.

Assists with patrol, fire and rescue calls as needed.

Responsible for the maintenance of department equipment and makes purchase recommendations.

Makes recommendations for new ordinances.

Prepares reports and maintains records.

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Approves permits and licenses and oversees fire inspections.

Responsible for the training and approval of equipment for Fire volunteers.

Conducts staff meetings.

Represents the department at various professional and community group meetings.

Prepares, and presents the department budget.

Develops bid specifications and advertises for new equipment.

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media and may give suggestions regarding the management of the scene but that he does not normally become more deeply involved than this. In addition, the Chief stated that he can take police, fire and rescue calls out of the station if the department is short on minimum manning. Again, the Chief stated that it is within his discretion to decide not to perform or to perform these duties. Finally, the Chief stated that as Chief, he has made traffic stops during his tenure with the Department and that again, this work is within his discretion to perform or not perform. The Chief also stated that during the period he was recuperating from his injury during the Summer of 1995, he could not wear a regular shoe on his injured foot until approximately two or three weeks after the injury had occurred.

In regard to Captain Madson, the Chief stated that during the Summer of 1995, Madson suffered an off-work injury. Thereafter, Madson had to have knee surgery which required Madson to be off work for approximately six to eight weeks. The Chief stated that Madson presented a doctor's slip when he returned to work that indicated that Madson could return to work without restrictions. During the six to eight week period when Madson was on sick leave, the Chief found out (after the fact) that Madson had come into work on two occasions. On one occasion, Madson came in to perform payroll duties for approximately one hour. The Chief explained that as there had been a split shift during the pay period, Madson came in while on sick leave to complete payroll duties so that employees would be paid appropriately. The Chief explained that the duty officer-in-charge can sometimes perform payroll duties on behalf of the Captains but that (after the fact) Madson had explained to the Chief that he (Madson) felt that the payroll for the period involved was too complex for the duty officer to handle. The Chief stated that he also learned later that Madson had returned to work a second time in order to supervise two relatively new officers who were conducting a neighborhood watch meeting. Madson told the Chief after this occurred that he did this in order to make sure that the information given to members of the public was appropriate and that the new officers had conducted the meeting properly. The Chief stated that he was not sure how much time Madson spent attending this meeting, however the Chief indicated that Madson was on sick leave when these two occasions occurred. 5/

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5/ Captain Madson attended the instant hearing but upon agreement of the parties was released as a witness and never testified. After Captain Madson left, it became clear that the Association wished to continue to raise Madson as an example of disparate treatment, despite the Association's agreement previously that it would not do so. Therefore, the undersigned has accepted and credited Chief Konopacki's statements regarding all circumstances surrounding Captain Madson's sick leave.

At the hearing, the Association called Walter Brzoza as a witness. Prior to Mr. Brzoza's testifying, the Village raised an objection to any evidence Brzoza would offer, on the ground that the events to which Brzoza would testify occurred after the filing and processing of the instant grievance. The Village's objection was sustained. However the Association was given an opportunity to make an offer of proof regarding what Brzoza would have testified to had he been allowed to do so. That offer indicated that Brzoza suffered an injury to his shoulder after the instant grievance had been filed and processed. That injury was not held allowable as a Workers' Compensation injury. During the first week of February, 1996, Brzoza was ordered to report to work by his Captain on two occasions specifically to testify in court regarding two of Brzoza's cases. The issue whether, by ordering Brzoza to report to testify, the Captain was granting Brzoza light duty was raised to the Captain at the time Brzoza was ordered in. The Captain nonetheless ordered Brzoza to testify in court on these two occasions. 6/

#### Positions of the Parties:

##### Association:

The Association urged that the Department's refusal to allow Investigator Magestro to return to work after the injury to his finger was an unreasonable application of the Village's 1991 policy and therefore also violated Article VI(K) of the labor agreement. The Association noted that in determining whether an employer has exercised reasonable discretion in promulgating and enforcing rules/regulations, arbitrators ask (1) whether the rule is reasonably related to the business, (2) whether employees were properly informed of the rule and the consequences of violating it, (3) whether the rule has been applied uniformly and consistently to all, and (4) whether the rule was applied in an arbitrary, discriminatory or capricious manner.

The Association opined that the purpose of the Village's 1991 policy is to prevent non-work injuries from becoming Worker's Compensation claims through on-the-job aggravation. In the instant case, there was only a very remote possibility that Magestro's injury would be aggravated on the job due to the mainly sedentary nature of the duties and responsibilities of his position as Investigator. The Association argued that Magestro could perform his regular duties despite the injury to his finger and that the execution of search and arrest warrants was insufficient basis to support the reasonableness of the 1994 agreement prohibiting all light duty. In the Association's view, the fact that Magestro's work was not done by anyone else in his absence, demonstrated the unreasonableness of the Village's policy and that no legitimate objective was furthered by Magestro's being required to be off work.

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6/ Had the District Attorney subpoenaed Brzoza, he would have had no choice but to attend the hearings involved. It is unremarkable that, in the circumstances Brzoza's Captain ordered him in to testify so that Brzoza would receive his regular pay, not just a witness fee.

The Association contended that the Village's 1991 policy was inconsistently and discriminatorily applied to Magestro because the Director of the PSD was allowed to return to work while Magestro was not, even though both injuries were non-work related and the 1991 policy, by its terms, should be applied all Village employees. The Association noted that the Village failed to put the Director's return to work slip without restrictions into the record, making the Director's testimony thereon questionable. In any event, the nature of Director's regular duties for the Department showed that he could not have performed those duties while wearing a cast covering several broken toes. The Association also noted that the Director's doctor never reviewed the Director's position description before issuing the Director an unrestricted return to work slip. The fact that the Director could choose not to "assign" himself to some of his regular duties during his convalescence, in the Association's opinion, renders the clear terms of the Village policy null and void as to the Director and therefore demonstrated the discriminatory application of the policy to Magestro.

Village:

The Village argued that because Magestro failed to follow the 1991 policy by not submitting a doctor's unrestricted return to work slip, the undersigned may deny and dismiss this grievance without reaching the Association's other arguments. The Village argued that in any event, the Association failed to prove that the 1991 policy had been unequally applied to Magestro. In this regard, the Village noted, grievant Magestro admitted that the Village's 1991 policy has been uniformly and consistently applied to all members of the bargaining units prior to July, 1995. The fact that one management employe, Director Konopacki, was treated differently from Magestro in July, 1995, does not require a conclusion that the Village's 1991 policy is unreasonable, that it has been applied unfairly, or that the policy should be invalidated.

The Village contended, contrary to the Association's arguments, that its 1991 policy is reasonably related to legitimate business interests such as (1) creating a financial incentive for unit employes to quickly achieve a full recovery, (2) avoiding potential liability to the public, (3) ensuring that essential functions of the Investigator and other Public Safety jobs are maintained and performed, (4) ensuring proper staffing by fully capable Public Safety Department employes as well as (5) avoiding the aggravation of both work-related and non-work related injuries of employes should they return to work prior to a full recovery.

The Village asserted that a finding in favor of the Association would require a ruling that would essentially abrogate the Village's reserved management rights to assign duties, and to make, amend and enforce rules for unit employes as well as its right to treat its non-union managers as it pleases. The Village urged that taking the Association's grievance and the remedy sought to their logical extreme, could result in destruction of the usefulness of contractual sick leave, such that all employes would come to work too sick to perform parts of their jobs. In the alternative, the Village could deny sick leave and insist that sick employes work on light duty. The Village

pointed out that if the Association wants a change in the 1991 policy and the 1994 agreement, the proper place to seek such a change is at the bargaining table. Therefore, the Village sought denial and dismissal of the grievance in its entirety.

Association's Reply:

The Association argued that the Village failed to prove that the 1991 policy has in fact been "uniformly and consistently applied" over the past five years. In addition, the Association noted that its grievance is not an attack on the 1991 policy/1994 agreement generally, but an attack on the reasonableness of the rule and on its unfair application to Magestro. In the Association's view, the Village's argument that managers can be treated differently from unit employees under the 1991 policy is contrary to the clear language of the policy which covers all Village employees. Furthermore, the Association urged that the proper focus in this case must be on the Investigator and Director position descriptions which clearly showed that Director Konopacki could not perform all of his duties. As such the Association could find no logical reason for the Village to treat Magestro differently than it treated Konopacki. The Association also noted that the evidence in this case demonstrated that the Village would have benefited equally from allowing Magestro to perform his duties, as the Village argued it benefited from Konopacki's return to work after his injury.

The Association observed that the Village only mentioned one purpose at the hearing as underlying the 1991 policy. Thus, there was no evidence to show that had Magestro been allowed to return to work, he would have had a greater risk of being reinjured while on duty than Konopacki had. In the Association's view, the Village's speculations regarding the affect of a remedy in favor of Magestro herein have no basis in fact, because the Association has merely asked for the return of Magestro's sick leave, not for invalidation of the 1991 policy or the invalidation of the 1994 agreement.

Discussion:

The Village's Light Duty policy was promulgated and has been in effect since 1991. By its terms, it applies to all Village employees, not just to members of the Association. In 1994, the Association and the Village agreed that no light duty would be used for either work or non-work related injuries. In this case, the Association has argued that its grievance was not intended to challenge the reasonableness of the 1991 policy itself, but rather the Association intended the grievance to challenge the Village's alleged inconsistent and discriminatory application of the policy to Magestro. I find the evidence in this case insufficient to demonstrate that the Village inconsistently, discriminatorily or arbitrarily applied the policy to Magestro.

In reaching this conclusion, I have assumed, arguendo that the Association's tests of reasonableness in determining whether a work rule has been enforced fairly (stated in its initial

brief) are applicable to this case. 7/ Under the facts proven in this case, there is no dispute that PSD employes, including Magestro, were fully aware of the 1991 policy, of the 1994 negotiated agreement and their consequences. There was no evidence proffered by the Association that the 1991 policy and the 1994 negotiated agreement had been applied inconsistently to PSD employes from 1991 until the Summer of 1995. The Association also failed to provide any evidence to prove it had objected to, complained about, or attempted to grieve or bargain regarding the 1991 policy or the 1994 negotiated agreement from 1991 to date. It was not until the Summer of 1995, when Chief Konopacki was allowed to return to work with an injury to his foot, while Magestro was denied the same opportunity following an injury to one of the fingers on his right hand, that a dispute arose regarding the 1991 policy for the first time. 8/

Thus, the central inquiry in this case must be whether the Village violated Article VI Section K of the labor agreement by its treatment of Magestro under the 1991 policy as modified by the 1994 agreement. Initially, I note that the 1991 policy clearly requires that an employe who wishes to return to work from an absence caused by a non-work related injury "shall provide" the

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7/ I note that the first test used by the Association, the business-relatedness of the work rule, is one which is normally used to determine whether the rule itself is reasonable. As the Association has asserted that it does not intend to challenge the 1991 policy itself herein, I find the Association's arguments on this point irrelevant and I have not considered them herein.

8/ The evidence regarding Captain Madson's return to the Department on two occasions while Madson was on sick leave for a non-work related injury does not support the Association's argument that Magestro was treated unfairly. Rather, this evidence showed that because Madson did not offer the Village a doctor's slip stating he could return to work without restriction which the Village accepted, the Village required Madson to remain on sick leave until he presented such a doctor's slip. The fact that Madson chose (without notice to the Chief or permission) to return to the Department on two occasions while he was on sick leave does not require a different conclusion.

Village "with a physician's statement indicating that the employee is able to perform his/her normal duties free from any restriction."

The evidence herein is undisputed that Magestro never provided the Village with any physician's statement. In addition, the 1994 agreement makes clear that if the doctor's slip states that an employe cannot return to work without restrictions, the employe shall not be offered any light duty. In this case, even if Magestro had presented the Village with a doctor's slip stating he (Magestro) could return to work without restrictions, under the 1991 policy, the Village could have questioned this and sent Magestro to its own doctor. If the Village's doctor had found that Magestro could not return to work without restrictions, the Village could have properly denied Magestro's request to return to work, pursuant to the 1994 agreement.

Because Magestro did not seek or offer the Village such a physician's statement his treatment by the Village cannot be compared to the Village's treatment of Chief Konopacki, who did in fact provide the Village with the physician's statement required by the 1991 policy before Konopacki sought to return to work. 9/ Whether Konopacki could in fact perform his normal duties was for his physician to determine and for the Village to question under the 1991 policy by asserting the Village's right to seek a second physician's opinion regarding Konopacki's fitness to return to work after Konopacki gave the Village his physician's statement. The facts of this case show that the Village chose to accept, without question, Konopacki's physician's statement. On this point, it would be wholly inappropriate for the undersigned to second-guess the Village or to substitute her opinion for that of the Village Administrator regarding the validity of the physician's statement Konopacki produced. 10/

Given the above analysis, the remaining issues in this case may not be addressed, as they go to the merits of this dispute. Whether Magestro could have performed all of his normal duties had he returned to work with an injured finger, whether the Village would have benefited by Magestro's earlier return to work, whether Magestro would have had a greater or lesser risk of further injury to his finger had he returned to work before that finger was healed, and whether the Village might have treated Magestro differently from others had he provided a physician's statement are all speculative questions that cannot be reached. By failing to properly follow the 1991 policy procedures, Magestro has lost the ability to receive a decision on the merits of this case. Based upon the relevant evidence and arguments in this case, I issue the following

#### AWARD

The Village's policy on light duty was not unreasonably applied to Officer Magestro in violation of Article VI, Section K of the labor agreement. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 10th day of June, 1996.

By Sharon A. Gallagher /s/

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9/ The Association requested no subpoenas in this case. Therefore, the fact that Konopacki and the Village did not bring copies of Konopacki's physician's statement to the instant hearing can have no bearing on the outcome of this case. I also note that Konopacki's credibility was not successfully attacked by the Association.

10/ I note that the labor agreement does not appear to address the subject of the propriety of the Director performing unit work. It is clear from his job description that the Village has given the Director of the Public Safety Department great discretion regarding the level of his involvement in bargaining unit work. As a member of the bargaining unit, Magestro possesses no such discretion.

Sharon A. Gallagher, Arbitrator