BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

FIRE FIGHTERS LOCAL 257, IAFF

and

CITY OF APPLETON

Case 388
No. 57824
MA-10760

Appearances:

Davis & Kuelthau, S.C., by **Attorney James R. Macy,** 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of the City of Appleton.

Mr. Joe Conway, Jr., President, Fire Fighters Local 311, IAFF, 821 Williamson Street, Madison, Wisconsin 53703, appearing on behalf of the Union.

ARBITRATION AWARD

Appleton Firefighters Local 257, AFL-CIO-CLC, hereinafter Union, and the City of Appleton, hereinafter City, are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union by request to initiate grievance arbitration received by the Commission on July 28, 1999 requested that the Commission appoint either a staff member or a Commissioner to serve as Arbitrator. The Commission appointed Paul A. Hahn as Arbitrator on September 10, 1999. The hearing was scheduled for December 8, 1999 in the Mayor's conference room, Appleton City Hall, Appleton, Wisconsin. The hearing was transcribed. The parties filed post hearing briefs which were received by the Arbitrator on January 28, 2000. The parties were given the opportunity and filed reply briefs which were received by the Arbitrator on February 18, 2000 (City) and February 22, 2000 (Union). The record was closed on February 23, 2000.

ISSUE

Union

> Did the City violate the labor agreement when it added an additional requirement for employes to return to work from off-duty injury and illnesses? If so, what is the remedy?

City

> Did the City violate Article 12(A)(4)(c) of the collective bargaining agreement, when it sent Fire Fighter Linda Kornely to the City's physician for medical certification in order to obtain her release for full duty? If so, what is the appropriate remedy?

Arbitrator

I adopt the statement of the grievance as set forth by the City because it more closely presents the statement of the grievance in the grievance procedure form dated April 1, 1999. (Jt. 2)

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 – Recognition

This Agreement made and entered into at Appleton, Wisconsin, pursuant to the provisions of Chapter 111.70 and 62.13 of the Wisconsin Statutes by and between the CITY OF APPLETON, a municipal corporation, as municipal employer with the Fire Chief as its agent, hereinafter referred to as the CITY and APPLETON FIRE FIGHTERS, Local 257, AFL-CIO-CLC, as sole and exclusive bargaining agent for Appleton Fire Fighters, Municipal employees hereinafter referred to as the UNION.

. . .

ARTICLE 12 – Leaves of Absence

A. Sick Leave:

1. Employees shall be entitled to accumulate eight (8) hours sick leave per month to a maximum of 1080 hours.
    a) Fire Operations personnel shall be charged with one-half (1/2) hours of sick leave for each hour taken.
    b) Fire Support personnel shall be charged on hours scheduled for each day of absence. Partial days shall be charged according to the hours absent.
    c) Probationary employees shall accumulate, but shall not be paid sick leave until they have completed six (6) months of service.
    d) Employees shall accumulate sick leave as long as they remain on the payroll.

2. An employee may use and be paid sick leave for absences required by his off duty injury, illness or required dental care, or serious illness or injury at home, (including, but not limited to, the hospitalization of his wife for birth of child.)

3. Sick leave may also be used by employees for non-medical emergencies at the employee's home. An emergency shall be defined for purposes of this paragraph as a situation where the employee's presence at home is required to protect or maintain the health or safety of his family or to prevent serious property damage. Paid leave for emergencies shall not exceed six hours per incident.

4. In order to be granted sick leave with pay, an employee must:
   a) Report immediately to the Chief or his designee the reason for his absence and the expected duration of such absence.
   b) Keep the Chief or his designee informed of the circumstances if absence is of more than two working days duration.
   c) Submit a medical certificate for any absence of more than two (2) working days, if required by the City.
   d) The City may make such medical examinations or nursing visits as it deems desirable. All costs associated with the medical examination shall be borne solely by the employer.

      The medical examination may be outside the residence, provided that:
      1) Costs of transportation are paid by the City; and
      2) The examination is conducted at a medical facility, including by way of example but not limitation, a hospital or physician's office, reasonably near the employee; and
      3) The employee's illness or injury is one which reasonably permits travel; and
      4) The employee is not required to drive unless the illness, injury or medications for same do not impair the employee's ability to drive.

. . .

ARTICLE 15 – Duty Incurred Disability Pay

A. An employee, while performing within the scope of his employment as provided by Chapter 102 of the Wisconsin Statutes (Worker's Compensation Act), shall receive the difference between his prevailing straight time salary and his Worker's Compensation Benefits described herein as "Injury Pay" for the period of time he may be temporarily totally or temporarily partially disabled because of said injury, not to exceed thirty (30) weeks from date of injury.

. . .

ARTICLE 23 – Grievance Procedure

. . .

C. Any difference of opinion, misunderstanding, complaint or grievance which may arise shall be processed as follows:

. . .

Step 5: If the grievance is not settled in the third or fourth step, arbitration is the next and final step, but must be requested in writing within seven (7) days of the receipt of the Director of Human Resources' decision as in Step 3 or mediation as in Step 4. The decision of the arbitrator is to be final and binding upon both parties to the grievance.

. . .

ARTICLE 30 - Function of Management

Except as herein otherwise provided, the Management of the Department and the direction of the working forces, including the right to hire, promote, demote, layoff, suspend without pay, discharge for proper cause, transfer, determine the number of employees to be assigned to any job classification, and to determine the job classifications needed to operate the Employer's jurisdiction is vested exclusively in the Employer.

It is further agreed, except as herein otherwise provided, that the responsibilities of management include, but are not limited to those outlined in this Agreement. In addition to any specified herein, the Employer shall be responsible for fulfilling all normal managerial obligations, such as planning, changing or developing new methods of work performance, establishing necessary policies, organizations and procedures, assigning work and establishing work schedules

and of applying appropriate means of administration and control. Provided however, that the exercise of the foregoing rights by the City will not be used for the purpose of discrimination against any member of the Union or be contrary to any other specific provisions of this Agreement, and provided that nothing herein shall be construed to abrogate the provisions of the grievance procedure contained in Article 23.

ARTICLE 31 - Amendment

This Agreement is subject to amendment, alteration or addition only by a subsequent written agreement between and executed by the City and the Union when mutually agreeable.

. . .

ARTICLE 34 – Physical Fitness

The Physical Fitness Standards and the assessment there-of are designed to individually assess the Fire Department's state of physical readiness. The ability of a Fire Fighter to adequately perform the tasks of his profession, necessitates the possession of strength, endurance, flexibility, and a strong cardiopulmonary system. Any complete physical fitness program should include evaluation and testing to gauge maintenance of these factors at an acceptable level.

. . .

7. Any employee who is certified by a physician as being unable to perform any of the aspects of this program, due to a temporary physical condition, shall be excused from the testing process until he is able to participate fully. Employees shall suffer no loss of pay under this provision for a period not to exceed 120 days from the date of the testing process.

STATEMENT OF THE CASE

This grievance involves the International Association of Fire Fighters Local 257, AFL-CIO, CLC and the City of Appleton as set forth in Article 2 – Recognition. (Jt. 1) The Union alleges that the City violated the parties' collective bargaining agreement when the City sent the Grievant to Occupational Health (the City's physician) for an exam before letting her return to duty as a fire fighter. (Jt. 2)

The Grievant is a fire fighter with the City of Appleton. In 1997, the Grievant sustained a shoulder injury playing volley ball, a non-work related incident. Grievant underwent surgery for her shoulder injury in February of 1998. She underwent continuous rehabilitative care from February of 1998 through July of 1998, but was never fully released to return to her job without restrictions. Grievant underwent a second surgery to her shoulder in September of 1998. Following this surgery, the Grievant continued her rehabilitative care then was released to full, unrestricted duty by her personal physician on March 17, 1999. (U. 6) However the Grievant was unable to return to work on March 17, 1999 because of medication usage for migraine headaches. As the Grievant was out of sick leave after March 17, 1999, she was placed on family medical leave. The Grievant was placed on paid administrative leave on March 28, 1999 pending the successful completion of a fitness for duty examination conducted by the City's physician, Dr. Steven Alt. (U. 7) The City has contracted with Dr. Alt since 1987 or 1989 to provide the City (and in particular the fire department) with medical consultations regarding its fire fighters' fitness for duty. Dr. Alt does not act as a personal physician for any fire fighter. The Grievant had an appointment scheduled for a fitness for duty exam with Dr. Alt for April 1, 1999 at Occupational Health in the City of Appleton. (U. 7 and U. 8) On April 1, 1999, Dr. Alt, in a letter to Deputy Fire Chief Reece, stated that the Grievant, to a reasonable degree of certainty, was fit to return to full, unrestricted duty as a fire fighter with the City of Appleton. (U. 9)

The Union filed a grievance on April 8, 1999, alleging that by sending the Grievant to Dr. Alt for a fitness for duty exam before letting her return to work as a fire fighter, the City had violated the collective bargaining agreement, in particular Article 12 – Leaves of Absence, Section 4 c). (Jt. 2) The City denied the grievance on April 20, 1999 in a letter from fire chief Neil Cameron to Michael Woodzicka, President of Local 257, stating in particular that there is nothing in Article 12 – Leaves of Absence, under the sick leave provisions, that limits the right of the City to ensure that employes are fit for duty by requiring an examination by the City's own physician. (Jt. 2)

The parties processed the grievance through the contractual grievance procedure and were unable to settle the grievance; the grievance was appealed to arbitration. No issue was raised as to the arbitrability of the grievance. The hearing in this matter was held by the Arbitrator on December 8, 1999 in the City of Appleton in the Offices of the Mayor. The hearing concluded at 2:21 p.m.

POSITION OF THE PARTIES

Union Position

The Union's initial argument is that Article 12 – Leaves of Absence, A – Sick Leave, Subsection 4) c) that requires an employe to submit a medical certificate for any absence of more than two working days should be interpreted that it is sufficient under the contractual

provision for an employe to provide a fit for duty medical certification from their own physician to return to work. The Union submits that any change of that intent or meaning would be subject to Article 31 of the collective bargaining agreement. The Union next argues that by proposing in consensus bargaining negotiations for the current collective bargaining agreement that the parties discuss a policy for return to work exams the City has agreed that such an exam is a mandatory subject of bargaining. By doing so, the Union submits, the City acknowledged that it did not have the unilateral right to require a fit for duty exam by its own physician, contrary to the sick leave provision. The Union points out that there is no dispute that the parties did not either reach impasse or go to arbitration on return to work requirements and that the City simply pulled their concept from the bargaining table. The Union summarizes this argument by stating that a mandatory subject of bargaining cannot be implemented without agreement by the other side.

The Union goes on to argue that contractual and legal requirements for determining fitness for duty after a work related injury or illness are different from those that are required for a non-work related injury or illness. Citing the Federal Family Medical Leave Act and the Wisconsin Statute regarding Workers' Compensation, the Union argues that there is a distinct difference in how an employer can determine fitness for duty depending on whether the injury or illness was work related or non-work related. These statutes, the Union submits, allow an employe to return to work on the basis of a medical certificate from the employe's own physician. The Union attempts to bolster this latter argument by submitting that the City failed to comply with the Federal Family Medical Leave Act when it required the Grievant to be examined by Dr. Alt, the City's physician, for a fitness for duty examination before the Grievant returned to work. Citing 29 CFR Section 825.310.c the Union submits that:

> A health care provider employed by the employer may contact the employe's health care provider with the employe's permission for purposes of clarification of the employe's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which the FMLA leave was taken.

The Union notes that this subsection of the code of Federal Regulations does not allow the City to send the Grievant for a return-to-work exam or a fitness-for-duty exam, arguing that the regulation only allows for clarification by the City's health care provider and only with the permission of the employe.

The Union next argues that the record fails to show that the Grievant was unfit for duty after receiving her fitness for duty medical certifications from her physicians and that the City's own physician agreed with the Grievant's physician that the Grievant could take part in the Fire Department's annual fitness exam. In other words, the Union argues, there was no reasonable reason on behalf of the City to believe that the Grievant was unfit to return to work in March of 1999.

The Union submits that Wisconsin Administrative Code, Department of Commerce Chapter 30, which requires the Fire Chief to the best of his or her ability to assure that fire fighters are capable of performing duties does not require a return to work examination by the employer's own physician, and that even this Administrative Code responsibility does not require the Chief to have an annual physical for each fire fighter. The Union submits that the labor agreement, which requires a mandatory annual physical exam, goes further than Chapter 30 and is a sufficient way to ensure the fitness for duty of the City of Appleton fire fighters, something to which the Union has agreed in the parties' collective bargaining agreement. These contractual provisions requiring a semi-annual fitness test, along with Dr. Alt's consultation as they relate to fire fighters, ensures the Appleton Fire Chief's compliance with Commerce Chapter 30 without the need to provide for a return to duty fitness exam by the City's physician.

In its reply brief, the Union argues that past practice supports its interpretation of the sick leave provisions. It submits that past practice does not demonstrate that the City under Article 30 has retained a right to require a return-to-work exam. The Union also argues that no evidence was submitted by the City to show that public safety would be jeopardized if employes are not sent to the City's physician for an exam. The Union lastly argues the City is trying to achieve through this arbitration what it could not achieve through negotiations.

It is the Union position that the City should cease its practice of requiring fitness for duty examinations for off duty injuries when there is not a compelling reason to suspect the validity of the fitness for duty medical certification from the employe's attending physician. The Union submits that the Grievant should be made whole for any lost time and expense in complying with the Department's new directive to require fitness for duty examinations by the City's physician. The Union asks that the grievance, for the reasons stated, be sustained.

City Position

The initial thrust of the City's arguments to support denial of the grievance is that Article 12(A)(4)(c) was not violated because the sections of the agreement concerning sick leave by their own terms are only concerned with the granting of sick leave pay. These provisions, the City submits, do not concern the requirement of an employe to see the City's physician for a full release to return to duty after a long period of absence. The City argues that the clear and unambiguous language of Article 12 A 4) c) discusses only the granting of sick leave pay and not the return to work of an employe after an extended illness. Citing arbitral authority, the City argues that when confronted with clear and unambiguous language arbitrators will not give it a meaning other than expressed in the labor agreement and that here the language is clear and therefore may not be ignored. The current requirement of submitting a medical certificate "for any absence of more than two working days" only applies to the initial granting of sick leave pay.

The City takes the position that the only provision in the labor agreement to govern what an employe must submit upon her/his return to work from an extended leave of absence is Article 30 – Management Rights. In that provision, the City argues that it has retained the right to establish necessary policies to administer and control the Fire Department and that in accordance with this provision the City implemented a policy with respect to requiring employes to receive a full return to duty release from the City's physician. Therefore, the City avers that at all times it has abided by the language of the collective bargaining agreement.

The City notes that the only requirement made of the Grievant was that she see the City's own physician, Dr. Alt, who is knowledgeable about the demands of a structural fire fighter and therefore is in the best position to determine whether the Grievant was physically capable of performing her job after a year off from service. Therefore, the City in requiring the exam by Dr. Alt, is in compliance with its management rights in Article 30 of the labor agreement, and, in doing so, did not violate Article 12 A 4) c) which, the City summarizes, deals solely with the initial request for sick leave with pay.

The City further submits that the Management Rights clause and Department of Commerce Fire Department Safety and Health Chapter 30 of the Wisconsin Administrative Code allow for and require the Fire Chief to be responsible for and establish policies which will allow the Fire Chief to administer and control the safety of fire fighters working within his department. Citing testimony from the record, the City argues that the past practice of the parties demonstrates that the City has retained its right under the Management Rights article to require the employes to see the City's physician prior to returning them to work without restriction. The City attempts to bolster its past practice argument by noting testimony from Dr. Alt and other witnesses that employes other than the Grievant have been required to consult with Dr. Alt before they return to work after an extended absence. The fire fighter, the City notes, may or may not be required to be examined by Dr. Alt. It may be enough, as it has been in the past, for Dr. Alt to consult with the employe's personal physician and their medical records.

The City submits that public safety concerns support the City's management right to require its employes to see its own physician prior to returning to work after a lengthy absence and that such concern has become a responsibility through Wisconsin Administrative Code Chapter 30.15 which states:

> A fire chief to the best of his or her ability shall assure that fire fighters who are expected to do structural fire fighting are physically capable of performing duties which may be assigned to them during emergencies. (C. 16)

Citing the testimony of Dr. Alt, who is knowledgeable about the physical fitness required of fire fighters and the duties of fire fighting, the City argues that the City is responsible to ensure that fire fighters are 100 percent fit. The City has contracted with Dr. Alt to ensure this safety

standard is met. The City also enlisted testimony, and argues, that in the past employes' own doctors have misdiagnosed an injury, for example, in the case of the Grievant in this matter.

The City argues that the Union's attempt to draw a distinction between on-duty injuries and off-duty injuries, with respect to whether or not a fire fighter can be required to see the City's physician before returning to work, is a distinction that fails from both a public safety standpoint and from a contractual one. The City argues that it should not be required to allow an employe to return to work with the City assuming all liability that results without the right to have the employe seen by the City's physician.

The City submits that no language in the contract supports the position of the Union to permit a distinction between off duty illnesses and injuries and on duty illnesses or injuries, particularly as there is no contractual differentiation and more particularly given the City's and the Chief's obligation to ensure public safety and safety of fire fighters by having them fit for duty.

Lastly, the City submits that in the alternative, if the City did not exercise its right under Article 30 to establish the medical exam policy, that the mere non-usage of such a right does not result in the loss of it, nor does it allow the Union to gain through arbitration that which it could not gain in negotiations. The City argues that mere non usage of a management right in the past does not amount to a binding past practice. The City submits that the Union has on at least two occasions in the past, during the course of contract negotiations, attempted to insert in the collective bargaining agreement a maintenance of standard provision which would have codified any practice or non-practice of the parties but this was rejected on both occasions by the City. In sum, the City argues, that even if the City had never previously required fire fighters to see its doctor prior to a return to work, the City has reserved the right to do so.

In its reply brief the City reiterates its argument regarding the sick leave language. The City also argues that the Union violates the ground rules of consensus bargaining by trying to say the City proposed and pulled a proposal to require return-to-work exams and therefore did not attain the right to do so. The City submits that the Union's FMLA and Worker's Compensation arguments have no relevance to the issue before the arbitrator. The City submits, therefore, that the grievance should be denied.

DISCUSSION

This is a contract interpretation case. The Union alleges a contract violation by the City, and more particularly by the Fire Department, because it required the Grievant to obtain a fitness-for-duty exam before returning to duty as a fire fighter in March/April of 1999. (Jt.2) The City required the Grievant to see the City's consulting physician, Dr. Alt, to have him determine if the Grievant could perform her fire fighting duties at 100 percent. (U. 7, 8 & 9)

The Union alleges that no employe has ever been required to have a fitness-for-duty exam by the City's physician for an off duty injury or illness before returning to work; a medical certificate from the employe's own physician was, and under the labor agreement, is, enough.

The Union relies on Article 12 - Leaves of Absence, Section 4) c), the sick leave provision of the Article, to argue that the subsection only requires a fire fighter to submit a medical certificate from the employe's own physician in order to receive sick leave pay and to return to work. Nowhere, the Union submits, is there any requirement in this sick leave provision that the employe must receive approval from the City's physician before the employe can return to work. (Jt.1) Nor, the Union submits, is the City required to have a fitness-for-duty exam performed by the City's doctor. The City responds to this Union position by arguing that the sick leave provision has nothing to do with whether an employe can be required to be examined by the City's doctor before returning to work from an injury or illness, work related or non-work related. The City argues that the sick leave language is unambiguous and relates only to receipt of paid sick leave, nothing more.

I believe the City is correct and I find the sick leave language to be unambiguous. The medical certificate that may be required by the City under Section 4) c) relates only to proof that the employe is ill or injured and whether the employe will receive paid sick leave. I believe this is the interpretation given this and similar contractual language by arbitrators who have addressed issues involving sick leave pay. 1/ I believe that is the plain meaning of the language, and because I believe it is unambiguous, I do not need to resort to bargaining history and past practice to determine the meaning of the contract language. Therefore, I find that the sick leave provision has nothing to do with the contractual right of the City to require the Grievant to be examined by Dr. Alt before she was cleared to return to duty on April 1, 1999.

1/ CONSOLIDATION COAL CO. 83 LA 927, 928 (DUFF, 1984)

> ***Section (a) The general purpose of the Sickness and Accident Benefits Plan established by this Article is to protect employees against financial hardship resulting from sickness or accident suffered on or off the job, by providing compensation for earnings lost.***
>
> ***Section (b)***
> ***Any employee . . . who becomes disabled as a result of sickness or accident (including pregnancy-related disability), so as to be prevented from performing his regular classified job, and whose disability is certified by a physician legally licensed to practice medicine, shall be eligible to receive Sickness and Accident Benefits under this plan.***

The dispute in this case was whether a chiropractor's medical certification met the legally licensed physician requirement.

WESTERN MICHIGAN UNIVERSITY, 83 LA 93, 94 (KAHN, 1984)

In this case, the dispute was over whether absences requiring a physician's statement were "wiped clean" under new contract language where the language under the sick leave provision no longer contained the "wiped clean" language.

(b) If an employee is absent on sick leave four (4) occurrences in any twelve (12) month period, subsequent absence will require a written physician's statement attesting to the necessity thereof in order to qualify for use of accrued sick leave pay.

See also: MEDICAL CONTAINER CORPORATION, 86 LA 636 (HIGH, 1985)

In none of these cases was the sick leave language interpreted to involve back-to-work or fitness-for-duty exams.

Assuming arguendo that the Union was correct that Section 4) c) did apply to a fitness-for-duty exam, then all the language of the sick leave provision would be applicable to the issue of the City's right to require a fitness-for-duty exam. In that case, Section 4) d) would be applicable. Under that section the City has the right to ". . . make such medical examinations . . . as it deems desirable." (Jt.1) As an arbitrator, I am required to consider all the appropriate contract language that may affect the particular contract language at issue, in this case 4) d), which is as much a part of the sick leave provision as 4) c). If the Union were right in its argument, then it would lose under the agreement's sick leave provision regarding the City's right to require a return-to-work exam, as 4) d) gives the City the right to require any exam it deems desirable.

The City takes the position that the Management Rights clause gives it the right to make policies and that it was within the City's right to create and administer a policy that allows it to require the fitness-for-duty exam at the heart of the grievance before me. That policy is not in writing.

I believe the weight of arbitral precedent supports an employer's right generally to establish policies and in particular, as it relates to this case, to require a physical examination of the Grievant by its own physician. 2/ I note here that the Union does not challenge the City's right for a fitness-for-duty exam for a work related injury or illness, only such an exam related to a non-work related illness or injury. There is no dispute, as I have stated in the statement of the case, that Grievant's injury to her shoulder and her subsequent problem with migraines were not related to her work. The City, on the other hand, takes the position that whether the injury to an employe is related to work or not related to work makes no difference.

2/

It is clear from reported arbitration decisions that management has the right, unless restricted by the agreement, to require employees to have physical examinations where the right is reasonably exercised under proper circumstances, such as where an employee desires to return to work following an accident or sick leave . . .

However, it has been emphasized that "this right is not an absolute one exercisable at the whim of management, and that it cannot be arbitrarily insisted upon without reasonable grounds.

Elkouri & Elkouri, How Arbitration Works, Fifth edition, Voltz & Goggin, co-editors. 1997, pgs. 798 & 799.

> ***In administering sickness, accident and health benefits, the employer has the right to require reasonable proof of disability and certification of treatment. The employer also generally has the right to have the employee examined by its physician.***

Common Law of the Workplace, National Academy of Arbitrators, St. Antoine editor, 1998, page 324 sec. 9.18.

In a dispute whether the Company could require medical proof of illness under the following contract language, the arbitrator ruled that requiring proof of illness was a reasonable exercise of management prerogative.

b) Any employee entitled to sickness benefits shall be allowed three single day sick leave days per year. . .

RUDIN MANAGEMENT COMPANY, INC., 74 LA 189, 190-191 (TALMADGE, 1979).

Both parties submit a past practice argument and submitted testimony and documents on the record to show from the Union's perspective that such a policy has never been exercised and from the City's perspective that the Grievant is not the first fire fighter to be subjected to a fitness-for-duty exam for a non-work related injury. I do not believe the past practice evidence of either party meets the definition of past practice well enough to convince me either way on the basis of past practice alone. 3/

3/ While there are several definitions of a past practice, there is no real dispute that a past practice includes: clarity and consistency of the pattern of conduct; longevity and repetition of the activity; acceptability of the pattern of conduct and mutual acknowledgement of the parttern of conduct by the parties.

See generally: Common Law of the Workplace, Chapter 2, Contract Interpretation, National Academy of Arbitrators, Theodore J. St. Antoine, editor, Bureau of National Affairs, Inc. (1998).

Union President Woodzicka testified that to his knowledge this was the first time that any employe had been required to see Dr. Alt for an exam for an off duty injury and before returning to work. (Tr.70) The Union tried to bolster its argument by the introduction of an exhibit that purported to show a number of employes of the Fire Department who had been off on non-work related injuries or illnesses and had not been required to see Dr. Alt for a return to work exam. (U. 15) The problem that I have with this exhibit evidence is that without knowing the specific circumstances of each of the cases it is difficult to know whether Dr. Alt was or was not involved and whether the circumstances could have reasonably given rise to the

City directing an employe on the list to see Dr. Alt for an exam.

In support of the City's position, Chief Cameron and Human Resources Director Neisen testified about two other firefighters who had been required to have return-to-work exams for non-work injuries or illnesses. (Tr. 133 & 144) But this testimony is somewhat offset by the fact that it appears these employes were having problems on the job because of their non-work medical problems. The Union testified and agreed that if the Department notices a problem on the job related to a non-work medical situation, the City could have the fire fighter examined by the City's physician. (Tr.101)

Dr. Alt's testimony on this issue was not conclusive as he thought he had examined or been involved in determining fitness-for-duty exams for non-work injuries on five previous occasions. (Tr. 58&59) But Dr. Alt had not been asked to bring that information as part of his subpoena so understandably he could not offer specifics. I do credit his testimony though that it is more likely than not that he performed off duty injury return to work exams and consulted regarding same with Chief Cameron and previous Chiefs. (Tr. 58 & 59) I find therefore, under the facts of this case, that the City has the right to create policies and under general labor law has the right, as I have previously cited, to require physical exams. I also find that the City has not given up this right and to some degree has exercised it in the past.

The Union argued that the City violated the return-to-work exam requirements of the State of Wisconsin Worker's Compensation Statute and the Federal Family Medical Leave Act. I do not believe either of these statutes has a bearing on this case. There is no dispute in this case that Grievant's shoulder injury was not related to her work. Therefore I do not believe the Worker's Compensation statute can have any bearing on the resolution of this arbitration.

As for the FMLA, the Union argues that this statute was violated by the City. I note that no such allegation was made in the grievance and there is no record of such an allegation being brought to the City's attention prior to the hearing in this matter. (Jt. 2) While arbitrators may consider new allegations that are raised at the arbitration hearing if they are closely related to the underlying grievance, I do not find this FMLA violation allegation to fall into that category. I can make a decision in this case without considering whether the City violated this federal statute. Further, I believe the record establishes that the FMLA would not be applicable to the facts of this case. When the Grievant ran out of sick leave in March of 1999, she was allowed to go on FMLA leave to protect her employment status. (U. 23 & C. 24). At that time, Grievant, had she been working, would have been on the "B" shift. (Tr. 110) Grievant was put on administrative paid leave on March 28, 1999 in order for her to be examined by Dr. Alt. (U.7) This paid status is confirmed by the shift calendars which show that as of this time, Grievant was no longer on FMLA leave. (C. 18 & 19) Therefore, the FMLA had nothing to do with whether the City was within its right to have Grievant examined by Dr. Alt before she returned to duty.

The Union makes the argument that during bargaining for this labor agreement the City proposed a policy similar to the policy in effect for the City of Madison Fire Department to cover how and when exams would be required for fire fighters returning to work from an

illness or injury. (Tr.73) The Union further alleges that the City withdrew this proposal and therefore should be estopped from trying to gain something through arbitration that it could not gain at the bargaining table. (Tr. 72 & U. 13) It is clear from the record, and there is no dispute between the parties, that the parties were engaged in and settled the labor agreement, subject of this arbitration, through consensus bargaining. The whole idea of this type of bargaining is that specific proposals are not brought to the bargaining table, rather ideas and concerns are submitted by either party for discussion. In this type of bargaining, parties are not and cannot be penalized by withdrawing issues from the table as part of working out a settlement; this is arguably true only in traditional bargaining. It is clear both parties removed various issues from the table and, in the case of the exam policy, because the Union refused to even discuss it. (Tr. 90-95, 116, 117, 138 & 139)

The City creditably testified that it related to the Union bargaining team that it believed the Fire Department had the right to require a fitness-for-duty exam before a fire fighter returned to work and by the City's own physician. (Tr. 117, 118 & 139) Therefore, contrary to the Union's position, I do not find that the City lost their right to their return-to-work policy through the bargaining process for the labor agreement before me.

The Union also argues that the City has failed to bargain over a mandatory subject of bargaining. I find that the parties have not asked me to determine whether the City has met its statutory obligation to bargain in good faith. Further, the issue of bargaining over a mandatory subject of bargaining and a party's failure to do so is and can be enforced by statute not by arbitration. 4/

4/ While the union grievance alleges a violation by the employer of the agreements between the parties regarding applications of the contract, its main protest is that the employer unilaterally implemented the policy change without first bargaining on it with the Union, which is the essence of the NLRB refusal to bargain charge. The Union's request for remedy is an NLRB-type determination and order. There was no specific joint submission by the parties to the arbitrator for an NLRB determination.

> ***The arbitrator's authority flows from the contract and is limited to issues which relate to the interpretation and application of its provisions as recited in the contract.***

AMERICAN CRYSTAL SUGAR COMPANY. 99 LA 699, 704 (JACOBOWSKI, 1992)

In a dispute over discontinuation of a past practice, the arbitrator refused to rule on whether the practice was a permissive or mandatory subject of bargaining holding that there were statutory procedures available to the employer to determine whether the practice was permissive or mandatory.

EAU CLAIRE COUNTY 76 LA 333, 334 (MCCRARY, 1981).

Even, as I have found, if the City has the right to require a return-to-work exam, the exercise of that policy must be reasonable and that is determined on a case-by-case basis. Therefore, I must consider on the facts and record in this case whether the policy was reasonably exercised in the case of the Grievant. I note here that there is no argument that the Grievant did anything improper during her almost two years of being off duty due to her injury. Nor was there any allegation that up to the April 1, 1999 exam by Dr. Alt that put the Grievant back to work was there anything done by the City that was improper. [I have previously addressed the FMLA issue] I find that based on the record before me the City reasonably exercised its right to have the Grievant examined by Dr. Alt before allowing her to return to work from her off duty injury.

As set forth above, the Grievant had been off work, except for some light duty, for almost two years before even her own physicians approved her return to work by March 28, 1999. Grievant had two surgeries on her shoulder and had been under almost constant weight lifting restrictions and physical therapy during that period. (U. 5 & 6) Then, toward the end of her shoulder problems she was under a doctor's care for migraines. No one disputed the fact that a fire fighter needs to be in excellent physical condition to perform the duties required of that position. In fact, the labor agreement and job requirements make it clear that top physical conditioning is a requirement and that even a weight restriction of 150 pounds would prevent the proper functioning of duties. (U. 3 & 4) Further, no one challenged Dr. Alt's expertise in providing a fitness-for-work exam given his specific qualifications and knowledge of fire fighting work. Dr. Alt knew the Grievant's physician and there was no criticism of that doctor's capabilities, but as Alt testified, personal physicians are often advocates for their patients and, in the case of someone like Grievant, would not necessarily know the duties of a fire fighter. (Tr. 49 & 50)

Both parties take somewhat different positions as it regards the Fire Chief's responsibilities under Chapter 30 of the Wisconsin Administrative Code: Fire Department Safety and Health. Under section 30.15, the Chief is, as the Union points out, not obligated to have fire fighters in their Department examined by the Department's physician before returning to work, but nor does section 30.15 prevent it. The City argues that the Code clearly places a great deal of responsibility on the Chief to ensure safety to the public and to the fire fighter and that a fitness-for-duty exam is necessary for the reasons testified to by Dr. Alt. (Tr. 66 & 67)

I find the Union's differentiation between work related and non-work related exams to be tenuous. If, as the Union President testified, the City can examine a fire fighter for problems on the job that are caused by an off duty injury or illness (Tr. 101), it makes no sense that the City could not examine someone before they return to work from an off duty injury but would have to take a chance, as it were, and allow the employe to come back and see if the employe was fit to perform the duties required of him. As testified to by Chief Cameron, there has been at least one example of an employe's physician allowing an employe to return to work where after consultation with Dr. Alt, the employe's physician agreed the employe could not return to work. (Tr. 106 & C. 17)

There is little question that a policy of requiring fitness-for-duty exams at the discretion of the City could be abused or used to harass or discriminate against an employe. But there is no evidence of abuse of the City's policy in this case. Grievant fully cooperated with the City during the period she was off work; the Grievant even saw Dr. Alt on her own during the same period; and the exam by Dr. Alt was performed within three days of Grievant and Dr. Alt being notified that an exam was necessary. Nor do I find any evidence in the record that the policy has been abused in the past regardless of the circumstances or the lack of grievance filing. It is clear that Alt sometimes does nothing more than respond to the Fire Chief's inquiries and sometimes does nothing more than talk to the employe's personal physician. No evidence was offered to show an abuse of the policy which I have found reasonable and which in this case was exercised reasonably.

I therefore find that the City had a right to have the Grievant examined by its own physician before the Grievant was allowed to return to work as a fire fighter with the Appleton Fire Department.

Based on the foregoing and the record as a whole, I enter the following

AWARD

The City did not violate the collective bargaining agreement when it required the Grievant to have a fitness-for-duty exam before returning to work and did not violate Article 12, section A 4) c) of the Agreement.

The grievance is denied.

Dated at Madison, Wisconsin this 16th day of March, 2000.

Paul A. Hahn /s/

Paul A. Hahn, Arbitrator

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