BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS (IAFF) 1021, AFL-CIO

and

CITY OF MARSHFIELD

Case 136
No. 59435
MA-11297

Appearances:

Mr. Joseph Conway, Jr., District Vice-President, IAFF, appearing on behalf of the Union.

vonBriesen, Purtell & Roper, Attorneys at Law, by **Mr. James Korom**, appearing on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter referred to as the Union and the City respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed a member of its staff, David E. Shaw, to decide the grievance. A hearing, which was not transcribed, was held before the undersigned on April 5, 2001, in Marshfield, Wisconsin. The parties filed post-hearing briefs which were received by May 29, 2001. Based on the entire record, the undersigned issues the following Award.

ISSUES

At the hearing, the parties agreed on the substantive issue to be decided. In their brief, though, the Union worded it differently than the City did. The undersigned believes that the wording contained in the City's brief accurately reflects the agreed-upon issue. Hence, the substantive issue which will be decided herein is:

Did the Employer violate the interpretation or application of the provisions of the collective bargaining agreement when it ordered the grievant to work on two separate occasions while he was on authorized sick leave? If so, what is the remedy?

In addition to the substantive issue just noted, the City has also raised an arbitrability issue questioning "whether the Arbitrator has substantive jurisdiction over this case in light of the definition of the grievance?" This threshold issue will be addressed first.

PERTINENT CONTRACT PROVISIONS

The parties' 1998-2000 collective bargaining agreement contained the following pertinent provisions:

ARTICLE IV – GRIEVANCE PROCEDURE

Section 1: Definition of Grievance: Any difference of opinion or misunderstanding which may arise between the City and the Union or a member of the Union, involving the interpretation or application of the provisions of this Agreement, shall be handled as follows:

. . .

ARTICLE IX – SICK LEAVE

. . .

Section 3: In order to be granted sick leave with pay, an employee must call the fire department prior to 0700 hours and give the reason for his absence. The employee must keep the Chief or duty officer informed of his condition, for an extended illness, by submitting a medical certificate for all absences of more than two (2) consecutive scheduled work days.

. . .

ARTICLE XI – ADDITIONAL COMPENSATION

. . .

Section 5: Wages of employees who are Wisconsin State licensed paramedics shall be increased by an additional three percent (3%) of a top step fire fighter's base rate as compensation for obtaining the paramedic license. The increase shall be effective upon certification. If the employee loses such certification, the employee shall not continue to receive this additional payment.

. . .

ARTICLE XXV – RESERVATION OF RIGHTS

Section 1: The City retains all of the rights, powers and the authority exercised or had by it prior to the time the Union became the collective bargaining representative of the employees here represented, except as specifically limited by express provision of this agreement.

ARTICLE XXVI – AMENDMENT AND RENEWAL PROVISION

Section 1: This agreement is subject to amendment, alteration or addition only by a subsequent written agreement between and executed by the City and the Union, where mutually agreeable. The waiver of any breach, term or condition of this agreement by either party shall not constitute a precedent in the future enforcement of all of its terms and conditions.

BACKGROUND

The City maintains and operates the Marshfield Fire Department. The Union is the collective bargaining representative for most of the Department's employees. Roy Dolens is a City Firefighter/Paramedic and is a member of that bargaining unit.

The Union and the City have been parties to a series of collective bargaining agreements. The parties' most recent collective bargaining agreement contains a sick leave provision. That provision, which is found in Article IX, specifies that unit members who are on approved sick leave receive sick leave pay.

In mid-February, 2000, Dolens injured his knee off-duty, preventing him from performing his normal job duties as a Firefighter/Paramedic. Dolens then went on approved sick leave. In early March, Dolens was diagnosed by an orthopedic surgeon as having an ACL (anterior cruciate ligament) tear. The surgeon directed Dolens to stay off work until he had knee surgery. The knee surgery was performed on March 27, 2000. Following the surgery, he had an extended recovery period. During this time, he remained on sick leave since he was unable to perform his normal job duties as a Firefighter/Paramedic. Dolens went off sick leave and returned to work in June, 2000 (the exact date is not contained in the record).

Each year, the Department conducts training sessions for those facets of the Department's operations that require yearly recertification or refresher training. Two examples of the latter are hazardous materials (hereinafter HAZ-MAT) and paramedic refresher training. This type of training is generally offered in-house, and is done so as to minimize the Department's overtime, training costs and travel expenditures. While employees are sometimes sent to training programs outside the Department, this causes replacement and coverage problems for management. The training programs which occur outside the Department are usually more generic than the training programs which occur in-house. The

Department's in-house training is usually scheduled months in advance so that it can be approved by the Wisconsin Division of Emergency Management and so class schedules can be coordinated with teaching agencies such as Mid-State Technical College.

On March 9, 2000, the Department conducted a one-day HAZ-MAT refresher training session in-house. This training consisted of four hours of classroom training in the morning and four hours of hands-on application of the training in the afternoon.

In the spring of 2000, the Department, in conjunction with Mid-State Technical College, offered a paramedic refresher course to its paramedics. Paramedics have to take this refresher course every two years to maintain their paramedic license with the State. If they do not, their paramedic certification lapses. Roy Dolens was one of the paramedics who took the course. While he was on sick leave due to his knee injury, he missed some of the classwork and final exam in the course.

FACTS

While Dolens was on sick leave because of his knee injury, two "training opportunities" occurred in the Department. Dolens' supervisor, Deputy Chief Bob Haight, decided that Dolens was medically capable of coming into work for them. Haight made this decision on his own without any input from Dolens' medical providers. Haight felt that Dolens was, in his words, "fit to come in for training based on what he saw". He therefore directed Dolens to come in for training on those two days. When he received this directive, although he questioned why, Dolens did not challenge it or say he would not comply. Dolens did, in fact, come in to work on those two days. The first time occurred while he (Dolens) was waiting for surgery, and the second time occurred after he had the surgery. The details of each one follow.

On March 8, 2000, Haight directed Dolens to come into the fire station the next day (March 9) for the HAZ-MAT refresher training which was going to be conducted that day. Dolens did as he was directed and attended same. Specifically, he sat in the room (with his leg raised) during the classroom portion of the training which occurred in the morning. Nothing physical occurred during that portion of the training. His sick leave account was not charged for the four hours he was at the fire station on March 9, 2000. He was paid four hours at regular pay for attending the training session, and had 20 hours of sick leave deducted for the day, rather than 24 hours.

In early June, 2000, Haight saw Dolens when the latter came into the fire station to get his paycheck and talked to him about finishing the paramedic refresher course by making up the classwork he had missed while on sick leave and taking the course's final exam. Haight told Dolens that the local technical college representative had told the Department that, consistent with its practice, it would give Dolens a temporary passing grade of "C", but if he did not complete the make-up and final exams before the end of June, that (temporary) grade would be rescinded. Haight further told Dolens that he had the option of taking the classwork

(study guide) home, but that he was required to take the proctored final exam at the fire station. Dolens chose to do it all at the fire station on June 9, 2000. Had he not been on sick leave, that day (June 9) would have been a regularly-scheduled work day for Dolens. Dolens' sick leave account was not charged for the four hours he was at the fire station on June 9 taking the exams. He was paid four hours at regular pay and had 20 hours of sick leave deducted for the day rather than 24 hours.

The Union subsequently filed two separate grievances concerning the matters of March 9 and June 9, 2000 referenced above. The grievances contend that management should not have ordered Dolens in on those days because he was on approved sick leave. The two grievances were processed through the contractual grievance procedure and were appealed to arbitration. At the arbitration, the two grievances were treated as one because they concern the same issue.

POSITIONS OF THE PARTIES

Union

The Union disputes the City's contention that the instant grievance is not subject to the grievance procedure. The Union relies on Sec. 1 of the Grievance Procedure (Article IV) which defines a grievance as "any difference of opinion involving the interpretation or application of the provisions of this Agreement." The Union avers that the instant issue involves "the interpretation or application of . . .this Agreement", so it should be subject to the grievance procedure. The Union asks the arbitrator to so find, and reject the City's contention to the contrary.

With regard to the merits, the Union argues that the City violated the collective bargaining agreement when it ordered Dolens in to work on March 9 and June 9. The Union notes that Dolens went on sick leave for his knee injury in February, 2000. He complied with all the provisions of the sick leave clause, such as keeping management apprised of his condition, and submitting the pertinent medical certification. Dolens supplied all the necessary documentation and information about his injury to management, whereupon management approved his sick leave which ran from mid-February to sometime in June, 2000.

It is against this backdrop that management decided to deny Dolens sick leave for two mornings, March 9 and June 9. On those two dates, Deputy Chief Haight ordered Dolens into the fire station for training events. Thus, the basic question to be answered is whether the City can call an employee into work when the employee is already on approved sick leave. The Union answers that question in the negative.

First, the Union argues that Deputy Chief Haight, who decided that Dolens was medically fit to come into work on those two dates, was not trained, qualified or competent to make medical decisions. That being the case, Haight should not have disregarded Dolens' existing (valid) medical releases and made a determination that was in conflict with the

decision of Dolens' medical providers. The Union calls specific attention to the fact that before Haight decided that Dolens was fit to come into work on those two dates, he did not medically examine Dolens, nor did he contact Dolens' physician, nor did he consult with the City's physician in determining Dolens' ability to come into work. The Union questions why Haight would open himself to such liability and make a decision that was contrary to trained medical professionals. It then avers that the reasons Haight stated at hearing for his decision (that Dolens was fit to come into work) were as follows: "training is different than work"; "training is not part of their job"; "he seemed okay to me"; "sitting is lighter than sedentary work and was not on the chart" and "return to work forms are haphazardly filled out by clinic personnel." According to the Union, these reasons are subjective in nature, and should not be sufficient to override trained medical opinions as to Dolens' ability to be at work.

Regarding the training which was at issue on March 9, i.e., the HAZ-MAT training, the Union asserts that notwithstanding the City's assertion to the contrary, such training is not mandatory. Other employees have missed that training and still been able to perform their duties. The City did not establish that the Department would be in violation of any laws or statutes if an individual went without the annual HAZ-MAT refresher. Thus, the City failed to provide any overriding reason why Dolens had to be at that training session.

The Union next asserts that the Department's existing Rules and Regulations relieve an employee on sick leave from duty, e.g., the Excused Absence From Duty regulation. Thus, the City violated its own Departmental regulation when it had Dolens come in to work on the two dates.

The Union takes issue with certain statements Deputy Chief Haight made during the hearing about training, i.e. that "training is different from work" and "training is not part of their job." Seemingly, these statements were made to create a difference that would negate a "medical release from work". This argument is based on the premise that training is not work or part of an employee's job, so a medical release from work would not excuse an employee from being called into the station for training exercises. The Union characterizes the argument "as a feeble attempt to distort the facts." Moreover, the Department's training calendar "could readily be adjusted to account for absences."

As to the tests which Dolens took on June 9, the Union notes that Dolens got a "C" in the course before he even took the final exam. In the Union's view, something is amiss about a course where someone gets a grade before even taking the final exam. Aside from that, the Union contends that the City failed to provide any overriding reason why Dolens had to come into the station on June 9 to take the tests. As the Union sees it, "the Employer's explanation of the events are suspect, and tears at the overall credibility of their actions and testimony with regard to the reasons for ordering Dolens in for the training."

Finally, the Union argues that if the grievance is denied, "a slippery slope is created for denial of contractual time off." The Union contends that the real danger associated with the City's actions is that henceforth, the Department will believe that it can order employees on

authorized leave to come into work for almost any reason. As the Union sees it, "this action erodes the negotiated benefit of leave time and violates the concept of being on authorized leave." The Union avers that if the City prevails, "any future authorized leave may be modified at the Employer's discretion."

In sum, the Union believes that the City inappropriately denied Dolens' contractual right to use sick leave, and asks that the grievance be sustained.

City

The City initially contends that the Arbitrator has no substantive jurisdiction over this case because there is no applicable contract language. This contention is based on two contract provisions: the Reservation of Rights clause (Article XXV) and the Sick Leave clause (Article IX). The former clause provides that the City retains all the rights and powers it had "prior to the time the Union became the collective bargaining representative." The City maintains that prior to the Union arriving on the scene, the City had the inherent right to grant or deny sick leave, and to direct employees to perform certain work functions within their physical capabilities. The City submits that given this grant of authority to management, the question is whether there are any contractual limits on this pre-existing management right. It avers there are not. The City submits that a careful reading of the Sick Leave clause (the only contractual provision relied on by the Union) reveals that it contains no language which limits or constrains the City in its right to direct employees to perform duties within their physical restrictions. The City therefore maintains that the collective bargaining agreement is silent on this particular point. It cites several arbitrators for the proposition that when the contract does not contain specific contract language prohibiting management from doing something, the management rights clause applies, and management has the inherent right to exercise its authority in that area. Building on that premise, the City reasons that since the Sick Leave clause does not explicitly prohibit management from directing an employee on sick leave from performing limited functions within their physical abilities, and is silent on the subject of light duty, it had the right to direct Dolens to perform the two limited functions involved in this case. The City cautions the Arbitrator that should he find otherwise, the decision risks reversal on appeal.

Next, the City disputes the Union's contention that the Department's Rules and Regulations support their position. The Union's reliance is misplaced, as using the Rules and Regulations in this fashion runs counter to the language contained in the Amendment and Renewal Provision (Article XXVI) of the Agreement. That provision provides that the collective bargaining agreement is subject to "amendment, alteration or addition only by a subsequent written agreement, between and executed by the Union and the City." The Department's Rules and Regulations have not been "executed" by both parties, and thus, are not enforceable in this proceeding. Moreover, while the rule regarding "Excused Absence From Duty" says that employees may not be returned to "regular duty" without a medical release, nothing therein prohibits the City from assigning an employee to limited or special duty functions outside the full performance of "regular duties".

Next, the City notes that when a party has no contractual support by their theory, they often rely on an alleged past practice. However, there is no evidence of any practice one way or the other. The City extrapolates from this lack of evidence that there are no past cases where employees were physically capable of performing limited duties, and not that the parties agreed that the City was prohibited from assigning such duties under the collective bargaining agreement.

Should it be decided that the grievance is substantively arbitrable, the City believes that it had good reasons to deny Dolens' request for sick leave on the mornings of March 9 and June 9, and to direct him to come into the fire station. First, the City asserts that when Dolens went on sick leave for his knee injury in February, 2000, his request for sick leave was an on-going one which was subject to on-going review by management. Just because Dolens was on approved sick leave on the days before and after March 9 and June 9 does not mean that sick leave had to be approved for those two days as well. Second, it avers that if Dolens had not been directed to attend work on March 9, a valuable training opportunity would have been wasted, resulting in substantial administrative burdens on the Department to reschedule it when Dolens was able to return to full duty. With regard to June 9, the City notes that Dolens had to renew his paramedic certification, and that he had to complete the written tests by the end of June to finish the refresher course. Third, the City maintains that Dolens had the opportunity to object to any medical risks he believed he might face by coming into work on those two dates, and to secure medical evidence showing a physical inability to perform those simple tasks. He did neither. Fourth, while Dolens could not physically perform all of his regular job duties on the two dates in question, he could physically do all the "work" he was asked to do on March 9 and June 9, i.e. sit in a classroom with his leg up on March 9, and take written tests on June 9.

According to the City, Dolens owed the Department his "best efforts to fulfill those aspects of [his] job responsibilities that are within [his] physical ability." Citing, INDIANA STATE TEACHERS ASSOCIATION, 104 LA 737 (Pavlucci, 1995); CITY OF MENTOR, 88 LA 890 (Dworkin, 1987). The City avers that it would be one thing if it had directed Dolens to go beyond his physical abilities on those dates, but it did not. The City asserts that Dolens has never claimed that he was asked to do anything on those dates that he could not physically perform. The City concludes that the foregoing points establish the reasonableness of its decision denying Dolens' sick leave requests for those dates and directing him to perform limited training duties that were within his (then) physical ability, and that its decision was not arbitrary, discriminatory or capricious.

In sum then, the City submits that no contract violation has been established, and therefore requests that the grievances be denied.

DISCUSSION

Substantive Arbitrability

Arbitrators have authority to decide only those issues which, by agreement of the parties, are ceded to them. When, as here, there is a dispute over jurisdiction, an initial inquiry must be made into the scope of the matters that may be properly grieved. Accordingly, attention is focused first on the question of whether the Arbitrator has jurisdiction over this case.

The contractual grievance procedure defines which grievances are subject to that procedure, and by inference, which grievances are in turn subject to grievance arbitration. Article IV, Section 1 specifies that a grievance is:

> Any difference of opinion or misunderstanding which may arise between the City and the Union or a member of the Union, involving the interpretation or application of the provisions of this Agreement.

While some labor agreements define a grievance and the scope of the grievance procedure very narrowly, the above definition is fairly broad and covers any dispute "involving the interpretation or application of the provisions of this Agreement." On its face, this contractual definition of a grievance does not exclude a certain class or type of dispute from being grieved and/or arbitrated. That being so, the presumption is that any grievance which arguably falls into this category can be grieved and/or arbitrated.

The City's contention that the instant grievance is not substantively arbitrable is based on the language of the Reservation of Rights and Sick Leave articles in the Agreement, language which has yet to be reviewed as it involves the merits of the dispute. This argument misses the mark. While it may ultimately be found that the City's interpretation of those contract provisions is correct, that determination can only be made upon the interpretation of the parties' rights under the contract language. In other words, this dispute involves the interpretation and application of those provisions, and therefore, meets the contractual definition of a grievance set forth in Article IV, Section 1. That being so, it is held that the instant grievance is substantively arbitrable. Thus, the focus now turns to the merits of the grievance.

Merits

At issue here is whether the City violated the collective bargaining agreement when it ordered the grievant to come in to work on two separate occasions while he was on sick leave. For the following reasons, it is concluded the City's actions did not violate the collective bargaining agreement.

As this case involves sick leave, the logical starting point for purposes of discussion is the contract provision which deals with that subject. A review of Article IX, Sick Leave, shows that Section 1 defines how sick leave is accumulated, Section 2 clarifies the method of accumulation and creates a cap, Section 3 establishes certain procedural steps for an employee to follow when they want to take sick leave, and Section 4 defines how accumulated sick leave may be lost. The parties agree that in the context of this case, the section which is most applicable is Section 3. That section provides:

> In order to be granted sick leave with pay, an employee must call the fire department prior to 0700 hours and give the reason for his absence. The employee must keep the Chief or Duty Officer informed of his condition, for an extended illness, by submitting a medical certificate for all absences of more than two (2) consecutive scheduled work days.

This section establishes procedural steps an employee must follow in order to be granted sick leave. This section does not guarantee that the sick leave will be granted automatically as long as the procedures are followed. Management has the right to evaluate the sufficiency of the "reason" given by the employee for his impending absence and then decide whether to grant or deny the employee's request for sick leave. The granting or denying of sick leave is generally recognized as a management prerogative, but one that must exercised in a reasonable and nondiscriminatory fashion. In this case, the City granted Dolens sick leave following his knee injury. He was on sick leave from mid-February to sometime in June, 2000, inclusive, during which time he was twice directed to attend training sessions of a half-day each.

In Article XXV – Reservation of Rights, the City has retained "all rights, powers and authority" it possessed prior to the Union's becoming the collective bargaining representative of the City's firefighters, "except as specifically limited by express provisions of this agreement." Among such rights would be the authority to direct its work forces and to assign work. Article IX, Sick Leave, does not contain such an express limitation on management's rights in those regards.

Article IX, as noted above, sets forth in Section 3 the procedures to be followed to obtain approval to be on paid sick leave, but such approval is not guaranteed. The underlying purpose of a sick leave provision is to protect the employee from loss of pay when he/she is unable to perform their regular duties due to illness or injury. Management determines whether or not an employee is unable to perform his duties and may, as is the case here, require medical verification of the employee's condition to assist in making that determination. Elkouri and Elkouri, *How Arbitration Works* (5th Edition), pp. 1025-1029. Also as stated above, management's determination in that regard is subject to a reasonableness standard. Whether the determination is reasonable will depend on the facts in each case.

It is undisputed in this case that Dolens was not able to perform all of his normal day-to-day duties as a result of the knee injury he sustained on February 19, 2000. Dolens in fact submitted a "Return to Work/Physical Capability Form" that indicated "Is to remain off work

four weeks until surgery." However, Dolens did not submit this form until after he had attended training on March 9th. Dolens also conceded that if he had thought attending the training would endanger his well-being, he would have objected and he would have sought a statement from his physician to that effect.

On March 8th, Deputy Chief Haight contacted Dolens at home and directed him to come in for HAZ-MAT training the next morning. The training the morning of March 9th was strictly classroom instruction and Dolens sat with his leg up and could get up and move around during breaks if he needed to do so. Dolens did not dispute that he was able to do this and did not claim to be in pain because of it.

Dolens had surgery on his knee on March 27, 2000, and 2-3 weeks later submitted another form that indicated he was to be off work for another 3 weeks. In May, Dolens submitted another form indicating he was to be off work another 6 weeks. On June 8th, he came into the Department to get his paycheck, having driven there himself. Deputy Chief Haight gave Dolens study guides to be completed for the Paramedic Refresher course he had been taking and advised him that he could complete them at home, but had to come in to the Department the next day to complete the final exam in a proctored setting. Dolens came in the next day and completed the study guides and took the final exam. Again, there is no claim that doing so caused Dolens pain or endangered his well-being.

While Dolens' injury to his knee was serious, the aspects of such an injury are fairly well known and definite, as opposed to internal injuries or brain injuries where the extent of the injury and concomitant dangers are not as clear. Dolens had been taking pain medication after the surgery and wearing a knee brace, as well as using crutches. However, it does not appear he was on pain medication on either March 9 or June 9, and he never told Haight he would not be able to come in or sought an excuse from his physician. As he came into the Department on June 8th to get his paycheck, he could not reasonably claim he could not come in on June 9th to take the test. Seemingly, his argument has been that since he was on authorized sick leave, he could not be called in to perform work that falls within his normal duties (attend training), 1/ even though he was capable of doing so.

1/ Contrary to the City's claim that attending training is not "work", it is within their firefighter's expected normal duties.

While it does not appear that the training in question was as critical as the City would make it out to be, it was sufficiently established that having in-house training for the HAZ-MAT better served the Department in terms of the substance of the training and efficient use of manpower. It also seems reasonable to want Dolens to complete the paramedic refresher course he had started and retain his certification.

Under the circumstances in this case, it is concluded that it was not unreasonable for the City to conclude that Dolens was capable of attending non-physical training at the Department while otherwise on authorized sick leave due to his injury, 2/ and to direct him to do so pursuant to its rights under Article XXV. Thus, it is further concluded that the City did not violate the parties' Agreement by its actions.

_____

2/ In that regard, the undersigned does not believe these two instances equate to a "return to duty" as referenced by the Department's "Rules and Regulations", as Dolens was not asked or required to perform his normal duties beyond the classroom training of a half-day each.

_____

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned issues the following

AWARD

The grievances are denied.

Dated at Madison, Wisconsin this 2nd day of November, 2001.

David E. Shaw /s/
David E. Shaw, Arbitrator

DES/gjc
6290.doc