BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF WAUSAU

and

WAUSAU FIREFIGHTER ASSOCIATION LOCAL 415, IAFF, AFL-CIO and CLC

Case 107
No. 63348
MA-12556

(Chad Eberle Grievance)

Appearances:

John B. Kiel, Shneidman, Hawks & Ehlke, S.C., appearing on behalf of Wausau Firefighter Association Local 415, IAFF, AFL-CIO and CLC.

Dean R. Deitrich, Ruder Ware, Attorneys at Law, appearing on behalf of the City of Wausau.

ARBITRATION AWARD

The City of Wausau, hereinafter City or Employer, and Wausau Firefighter Association Local 415, IAFF, AFL-CIO and CLC, hereinafter Union, are parties to a collective bargaining agreement covering the period January 1, 2003 through December 31, 2004 that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to appoint a Commissioner or member of the Commission staff to hear and decide the instant grievance. Susan J.M. Bauman was so appointed. Mediation was unsuccessful, resulting in a hearing on August 11, 2004, in Wausau, Wisconsin. The hearing was not transcribed. The record was closed on November 4, 2004 upon receipt of all post-hearing written argument.

ISSUES

The parties were unable to stipulate to an issue or issues for resolution in this case. However, they agreed that the Arbitrator could frame the issues based upon the relevant evidence and argument, as well as the parties' suggested issues. The Union frames the issue as:

> Did the City of Wausau violate the collective bargaining agreement and the Temporary Duty Agreement when it unilaterally required Chad Eberle to perform temporary duty in March 2003? If so, what is the appropriate remedy?

The Employer frames the issue as:

Whether the City violated the labor agreement when it required employees to report to work for restricted duty? If so, what is the appropriate remedy?

Based upon the relevant evidence and argument in this case, the undersigned adopts the following statement of the issue:

Did the Employer violate the labor agreement or the Temporary Duty Agreement when it required Chad Eberle to report for work after sustaining an on-the-job injury that limited his ability to fully perform all of the duties of his position as a firefighter? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Article 4 – MANAGEMENT RIGHTS

The City possess the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract. These rights include, but are not limited to, the following:

A. To direct all operations of city government.
B. To hire, promote, transfer, assign and retain employees in position with the City.

. . .

E. To maintain efficiency of City government operation entrusted to it.

. . .

G. To introduce new or improved methods or facilities.
H. To change existing methods or facilities.

. . .

J. To determine the methods, means and personnel by which such operations are to be conducted.

. . .

L. To establish reasonable rules and regulations. The Union acknowledges that the establishment and modification of rules and regulations of the Wausau Fire Department are within the sole and exclusive power of the

Chief and that he may establish, modify and repeal rules or regulations.

The Chief will submit any new rule or regulation to the bargaining committee of the Union in advance of the effective date of the new rule or regulation, whenever possible, and the Union will be provided the opportunity of discussing the new rule or regulation with the Chief. However, the City agrees that such rules or regulations will be reasonable with the reasonableness of the rules subject to the grievance procedure.

. . .

Article 13 – WORKWEEK

A. Normal On-duty Week for Firefighting Employees: The on-duty week of all employees who perform firefighting duties shall be an average of not more than fifty-six hours. The platooning of all employees shall be established by the Chief of the Fire Department. The normal schedule for each platoon shall be as follows: On duty one 24-hour period, have one 24-hour period off, on duty one 24-hour period, have one 24-hour period off, on duty one 24-hour period, and have four (4) 24-hour periods off. This sequence may be altered to permit changes in an individual's duty cycle.

. . .

C. Normal Work Week of Fire Inspection Employees and Temporary Duty Employees: The normal work week of the fire inspection employees shall average forty (40) hours per week. Fire inspection employees shall work eight (8) hours each day, Monday through Friday.

D. Normal Work Day for Fire Inspection Employees and Temporary Duty Employees: A work day for all fire inspection employees shall begin at 7:30 A.M. and end at 4:30 P.M. on the same day. The work day shall include one (1) hour for lunch without pay. All references to work days for fire inspection employees shall be defined as an eight (8) hour work day and shall not be construed to include any normal off-duty time.

E. Change in Schedule: The normal schedule of the least senior Firefighter/Inspector on duty and temporary duty employees may be changed by the Chief, when the need arises, with reasonable notice.

. . .

Article 18 – SICK LEAVE

. . .

F. Worker's Compensation: Employees eligible for worker's compensation benefits shall endorse their check for worker's compensation benefits to the City and receive in exchange their normal paycheck based upon the normal work week with no loss of sick leave during the first ninety (90) working days of benefits. Thereafter, the employee must exercise one of the following options:

1. Receive the worker's compensation benefit with no deduction from accumulated sick leave; or

2. Receive the worker's compensation benefit and be paid the difference between the regular pay based upon a normal work week (excluding overtime and premium pay) and the worker's compensation benefit with the City charging the employee's sick leave account with the number of hours that equal the cash differential between the worker's compensation and regular pay.

. . .

Article 31 – PAST PRACTICES

The City will not unilaterally change any benefit, practice or condition of employment which is mandatorily bargainable.

TEMPORARY DUTY AGREEMENT

Effective this date, the following agreement on temporary duty shall be implemented:

1. Temporary duty will be made available to employees only at the request of the employee.

2. The Chief will assign temporary duty in accordance with the limitations of the employee (as defined by the employee's physician) and the needs of the Department. Up to two (2) employees will be allowed on temporary duty at any one time except upon the permission of the Chief, and at his sole discretion additional employees may be accommodated.

3. No employee will be allowed to be on temporary duty for more than forty-five (45) consecutive calendar days or ninety (90) days within a one year period commencing with the first day of temporary duty.

4. Employees assigned to temporary duty may be assigned by the Chief to work hours and/or shifts pursuant to Article 13. The work week is

defined in Article 13.

5. Employees assigned to temporary duty on a schedule less than the normal fifty-six (56) hour work week will not have their wages reduced. Those employees who work less than 40 hours per week will have the difference between the hours actually worked and the 56 hour work week deducted from their sick leave accrual. In the case of holidays, as defined in Article 16, the difference between actual hours worked and 40 hours shall be deducted from their sick leave accrual.

6. This provision shall only be utilized in the event the employee is unable to fully perform the function of their job due to medical reasons.

Revise Article 13 as attached.

In consideration of this agreement, the Union withdraws its grievance on light duty filed on February 10, 1995.

Agreed to this 25th day of July, 1995.

For the City:	For the Union:
/s/	/s/
Nancy M. Hackett	David Sanft

RELEVANT BACKGROUND

In March 2003, Firefighter Chad Eberle was injured on the job. He was seen by a physician who limited him to a twenty (20) pound lifting restriction. Eberle reported to his shift commander at the fire station on March 20, 2003 and advised him of the restriction and provided a copy of the doctor's orders. Eberle was about to leave the station to go home when he was requested to further discuss work that was possible within this restriction. Eberle was directed to report to work in accordance with his regular schedule and to perform work that was within his restrictions that was part of his regular work assignment.

A grievance was filed on Eberle's behalf on March 20, 2003 that stated as follows:

ORDER REQUIRING CHAD EBERLE TO REPORT FOR LIMITED DUTY IS IN VIOLATION OF THE TEMPORARY DUTY AGREEMENT BETWEEN THE CITY AND L-415. L-415 RESERVES THE RIGHT TO AMEND THE STATEMENT OF GRIEVANCE AFTER CONSULTATION WITH LEGAL COUNSEL.

Prior to this occurrence, employees injured on the job were not required to work until such time as they had been released to work without restriction by the attending physician. In July 1995, the Union and the City entered into an agreement to resolve a "light duty" 1/ grievance by the creation of a Side Agreement entitled "Temporary Duty". The agreement provides that "temporary duty" is to be made available only at the request of the employee; that the period of "temporary duty" is limited to forty-five (45) consecutive calendar days or ninety (90) days within a one year period; that employees assigned to "temporary duty" may be assigned work hours and/or shifts pursuant to Article 13; that employees assigned to "temporary duty" who work less than the normal fifty-six (56) hour work week would not have their wages reduced; and that the "Temporary Agreement" provision was only to be utilized in the event "the employee is unable to fully perform the function of their job due to medical reasons."

1/ As this grievance involves the question of whether restricted duty, light duty, and temporary duty are interchangeable terms, the words are in quotations.

Beginning with Chad Eberle's injury, the City has required employees injured on the job to report for "restricted duty", working the same shift and hours as his or her regular assignment, and doing that portion of their regular assignment as they could within medical restrictions as determined by medical personnel. In 2003, there were nine (9) instances of "restricted duty" for fire department personnel who had been injured in the course of employment in addition to Mr. Eberle. As of the time of the hearing on this grievance, four (4) individuals who had been injured during the course of their employment were assigned to "restricted duty" in 2004.

Additional facts will be included in the discussion, below.

POSITIONS OF THE PARTIES

Union

The Union contends that there is no difference between "restricted duty", "light duty" and "temporary duty." All three are governed by the Side Agreement that was entered into by the parties in 1995. That agreement makes clear that the decision to perform work for the City of Wausau when injured and unable to work without restrictions is entirely up to the employee. If an employee is injured on the job, he or she may be off on worker's compensation or may request "temporary duty" in accordance with the Side Agreement. An employee who is

injured off the job has the option of using sick leave, vacation or s/he may request "temporary duty" under the terms of the Side Agreement. No matter how an injury may have occurred, on or off the job, it is the employee's choice as to whether s/he requests "temporary duty."

The past practice of the City has been to allow these options to employees, wherever they are injured. It is a violation of Article 31 Past Practices for the City to now require employees who are injured on-the-job to report for duty and to work their regular shift when their medical provider has indicated that there are restrictions on their ability to work.

The Union further points to the bargaining proposals that the City presented in bargaining the current labor agreement wherein the City listed

> Article 18 – Sick Leave: F.) Worker's Compensation; discuss the work plan when on worker's compensation.

as evidence that the Employer attempted to bargain the change, was unsuccessful in this effort, and has now attempted to obtain a modification in the Agreement by unilaterally implementing it, rather than bargaining a mandatory subject of bargaining.

City

The City argues that the Management Rights clause of the labor agreement is the basis for the change it initiated in March 2003 that gave rise to this grievance. Although the City had never before required employees on worker's compensation to report to work and to do that part of their jobs that they were physically able to do ("restricted duty"), the City did not forfeit its right to so order the employees as management retains all rights that are not expressly waived or limited by the labor agreement.

Further, the City contends that the Side Agreement is not controlling as that agreement applies to "temporary duty" which is applicable to employees who were injured off the job. The Side Agreement was the result of a grievance settlement in 1995. Prior to that time, firefighters who were injured off the job were able to work in dispatch. In 1995 that option was no longer available to injured employees who risked separation from service due to lack of sick leave or vacation. The resulting grievance was settled by the Side Agreement.

According to the Employer, "temporary duty" is work outside the job classification, with different than usually assigned shifts and hours, provided upon the employee's request when s/he is unable to fully perform the duties of a firefighter. "Restricted duty" that the City is requiring of employees injured on the job requires that the employee work his/her normal shift when s/he is restricted as to some portions of the job responsibilities.

DISCUSSION

In its initial statement of the grievance, the Union contended that the assignment of firefighter Eberle to "restricted duty" was a violation of the Side Agreement between the parties regarding "temporary duty." The Union reserved the right to modify the statement of the grievance and, at hearing, posed the issue to be resolved by the undersigned as "Did the City of Wausau violate the collective bargaining agreement and the Temporary Duty Agreement when it unilaterally required Chad Eberle to perform temporary duty in March 2003?" In particular, the Union points to Article 31, Past Practices, as having been violated by the Employer's decision to require individuals who are injured on the job to report for "restricted duty" when such a requirement had never been imposed in the past.

As noted by the Employer's statement of the issue, the City contends that the Side Agreement regarding "temporary duty" is not relevant to these proceedings. The City argues that "temporary duty" and "restricted duty" are substantively different concepts, that the Side Agreement does not apply, and that Article 4, Management Rights, is controlling.

For the reasons stated below, I find that "temporary duty", "restricted duty" and "light duty" are essentially the same: a duty assignment to an individual who is temporarily unable to perform some of the normal tasks of his or her job. I also find that the clear past practice of the parties has been to allow firefighters who were injured on the job and temporarily unable to fully perform all of their job duties to be absent from work throughout the healing process. The Side Agreement, denominated as "Temporary Duty", while developed in settlement of an off-the-job injury grievance does not, on its face, distinguish as to where an injury occurred, and Article 31 of the collective bargaining agreement effectively limits the Management Rights clause of the labor agreement, requiring the Employer to maintain the past practice.

The Side Agreement

The parties agree that the Side Agreement was negotiated in full settlement of a "light duty" grievance in 1995. They also agree that the circumstances giving rise to that grievance and the Side Agreement involved an employee who had been injured off-the-job. However, the document is silent as to whether it is applicable only to individuals who were injured off-the-job, or whether it is also applicable to those who are injured on the job. Record evidence was presented regarding two individuals who were injured off-the-job and requested, and were granted, a modified work assignment based upon the Side Agreement. In addition, in 2002, a firefighter who was injured on-the-job requested, and was granted, "temporary duty" pursuant to the Side Agreement so that he could continue his participation in the paramedic training program.

The Side Agreement does not define "temporary duty." It states that "[t]his provision shall only be utilized in the event the employee is unable to fully perform the function of their job due to medical reasons." The Employer misconstrues this language to mean that an injured employee is unable to "perform any of their job duties." (Employer Initial Brief, at p. 13,

emphasis in original) The language of the Side Agreement itself, however, states that an employee, regardless of when or how injured, who, under the care of a medical provider, is restricted in the performance of his or her job duties, is eligible for "temporary duty," upon the request of the employee. The Side Agreement also provides that the "temporary duty" is to be assigned in accordance with the limitations of the employee, as defined by the employee's physician, and the needs of the department.

The Side Agreement also provides that the work week, hours, and shift are defined in Article 13 of the Labor Agreement, and provides that individuals on "temporary duty" may be assigned a schedule of less than fifty-six hours per week. The language of section 5 of the Side Agreement clearly contemplates that an individual on "temporary duty" may work forty (40) hour weeks, but this is not a requirement of a "temporary duty" assignment.

On its face, the Side Agreement relating to "Temporary Duty" states that such duty will be made available to an injured employee, only at the request of such an employee, regardless of the nature of the injury, no matter where or when the injury occurred, provided, however, that the work is within restrictions imposed by the medical provider. Because the bargaining history of the Side Agreement was extensively developed at hearing, the undersigned looks to other arguments before sustaining the grievance based on the clear and unambiguous language of the Side Agreement.

The Labor Agreement

The Employer contends that "restricted duty" is something different than "temporary duty." According to Ila Koss, "temporary duty" is a request by an employee to do a temporary assignment outside of his or her job description, because s/he is unable to do his/her job and wants to get pay and benefits. "Restricted duty" is assigned by the Employer to an individual who has suffered an on-the-job injury and has restrictions placed on his/her ability to work by a physician. The employee is assigned to his/her regular shift and job, but is not to do anything that requires violating the restriction that the doctor has placed on him or her.

"Restricted duty" is not referenced in the labor agreement at all. Although referenced in both the labor agreement and the Side Agreement, none of the documents in evidence specifically define "temporary duty." As noted above, the Side Agreement describes who can request "temporary duty", when it is assigned, how long it is to last. The labor agreement, at Article 13, Section C, denominated as "Normal Work Week of Fire Inspection Employees and Temporary Duty Employees" states that the normal work week of the fire inspection employees is an average of 40 hours per week. The section is silent as to the normal work week of "temporary duty" employees. Similarly, the labor agreement at Article 13, Section D, denominated as "Normal Work Day for Fire Inspection Employees and Temporary Duty Employees" identifies the specific hours of work for fire inspection employees, and is silent as to the hours of work for "temporary duty" employees. Article 13, Section E, denominated as

"Change in Schedule" does reference temporary duty employees and states that the normal schedule of such employees and that of the least senior Firefighter/Inspector on duty "may be changed by the Chief, when the need arises, with reasonable notice." 2/

2/ In usual contract construction, section headings are provided for ease of reading the document, and are not substantive in nature. I have no reason to believe that the labor agreement between these parties differs from the norm in this respect.

Contrary to the assertions of the Employer, these provisions do not establish that "temporary duty" is a different entity than "restricted duty." While the practice of the Employer has been to assign "restricted duty" personnel to their regular fifty-six (56) hour workweeks, the language of the contract (and the Side Agreement) does not disallow assignment of "temporary duty" employees to a fifty-six (56) hour workweek.

Because both "restricted duty" and "temporary duty" are assignment of work to employees who have suffered an injury and have been released to work by their physician, with some restriction on their ability to fully perform the duties of the job, I conclude that the two concepts are one and the same: a modification of job duties resulting from an injury that limits an employee from fully performing his or her job. 3/

3/ Having concluded that temporary duty and restricted duty are one and the same, there is no longer a need to place either term in quotes.

The parties are in agreement that prior to March 2003, employees who were injured on the job were not assigned to restricted duty but, rather, were able to stay away from work and collect worker's compensation until such time as they were released to work without restrictions by their physician. 4/ That is, there was a clearly communicated, mutually understood past practice that employees who were injured on the job did not have to report for work until they were 100% fit for duty. There is no question that the Employer unilaterally changed this practice in March 2003, based on its reading of the Management Rights clause of the labor agreement. The City contends that it did not need to negotiate the change to require restricted duty inasmuch as they "didn't think they needed a clause asking employees to come to work." (Testimony of Ila Koss)

4/ The only references in the labor agreement to Worker's Compensation are found in Article 18 –Sick Leave. Those provisions address the manner in which the difference in pay between statutory worker's compensation and negotiated pay are to be dealt with after an employee has been off work for ninety (90) days. The contract is silent on the subject of this grievance.

The Employer contends that the Management Rights clause of the agreement reserves to it, among other rights, the right to direct all City operations, assign employees, and determine the personnel for the City's various operations. While agreeing that it has not assigned on-the-job injured employees to restricted work prior to March 2003, it contends that its failure to fully exercise that right is not lost, as management retains all rights not expressly waived or limited by the labor agreement. As such, the City contends that, in an effort to reduce costs associated with worker's compensation claims, it determined to assign employees to restricted duty and it did not need to bargain about this change in practice with respect to employees who were injured on the job.

The Management Rights clause in question does, of course, have limits on the Employer's ability to exercise the rights enumerated therein. The preamble to the listing of rights reserved to management states:

> The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract.

One of the provisions of the contract is Article 31 which states: "The City will not unilaterally change any benefit, practice or condition of employment which is mandatorily bargainable."

Thus, if the implementation of a restricted duty program is a mandatory subject of bargaining, the Employer has violated the collective bargaining agreement by making a unilateral change by requiring on-the-job injured employees to report to work and perform work within their medical restrictions. There is no question that a restricted duty program primarily relates to wages, hours and working conditions. It is not primarily formulation of policy and, in the instant case, the change was implemented due to economic considerations.

Prior to March 2003, employees who were injured on the job were permitted to stay at home, with full pay, until released by their physician to perform their job without restrictions. Under the restricted duty policy, employees are required to forego the privilege of staying home until fully recovered, and must return to the work place and perform as much of their job as possible, within medical restrictions. This represents a loss of a substantial benefit to the employees and is a mandatory subject of bargaining. 5/ While it is understandable that the City wishes to reduce its worker's compensation costs by returning employees to work sooner rather than later, this is a topic that the Employer must bargain with the Union. Unilateral implementation of the restricted duty policy constitutes a violation of Article 31 of the collective bargaining agreement, as well as of the Side Agreement regarding temporary duty.

5/ See City of Superior (Fire Department), Case 99, No. 42006, MA-5527 (Schiavoni, 10/89), City of Oshkosh, Case 138, No. 43777, MA-6071 (Crowley, 10/90).

The employees who were involuntarily assigned to restricted duty were denied a substantial benefit of non-work time to recuperate, but they did not suffer a loss of pay. Had they been at home on worker's compensation, they would have received the same pay as they received in reporting to work on restricted duty. Although I find that the Employer violated the labor agreement and the Side Agreement by assigning the employees to restricted duty, back pay, as requested by the Union, would unjustly enrich these employees. Accordingly, I decline to award the requested monetary relief.

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

AWARD

1. The grievance is sustained. The Employer violated both the labor agreement and the "Temporary Duty" Side Agreement.

2. The Employer is to immediately rescind all current orders compelling employees to report to work on restricted duty when injured or ill.

3. The Employer is to cease and desist from ordering employees to report to work on restricted duty when injured or ill.

Dated at Madison, Wisconsin, this 16th day of December, 2004.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

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