

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**DePERE PROFESSIONAL FIREFIGHTERS ASSOCIATION,
LOCAL 1998, IAFF, AFL-CIO**

and

CITY OF DePERE

Case 77
No. 62415
MA-12278

Appearances:

Judith Schmidt-Lehman, City Attorney, City of DePere, DePere City Hall, 335 South Broadway, DePere, Wisconsin 54115, appearing on behalf of the Employer.

John B. Kiel, Attorney at Law, 700 West Michigan, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201, appearing on behalf of the Union.

ARBITRATION AWARD

On June 2, 2003, the DePere Professional Firefighters Association, Local 1998, IAFF, AFL-CIO, filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint a member of its staff to hear a dispute between the Union and the City of DePere. The Commission appointed William C. Houlihan, a member of its staff, to hear and decide the grievance. A hearing was initially scheduled for September 17, 2003, but was indefinitely postponed by the parties. The matter was subsequently rescheduled, and was heard on November 10, 2004, in DePere, Wisconsin. A transcript of the proceedings was taken and distributed by December 1, 2004. Post-hearing briefs and reply briefs were submitted, and exchanged by March 1, 2005.

This Award addresses the denial of sick leave, and termination, of firefighter Jeff Dziewit.

BACKGROUND AND FACTS

The City and Union are signatories to a collective bargaining agreement, the relevant portions of which are set forth below. Jeff Dziewit began employment with the City in

October of 1992 as a Firefighter, Mechanic and EMT. Mr. Dziewit was terminated on February 27, 2003. At the time of his termination, Mr. Dziewit had 1,922 hours of sick leave accumulated, which he was not permitted to use. The Union believes he was entitled to do so, and that the termination was premature.

During the course of his employment, Mr. Dziewit experienced a number of injuries, which ultimately caused him to file a duty disability application. His attending physician was Dr. Tressler. As a result of the duty disability application, Dziewit was evaluated by Dr. Ronald Barnes, who is affiliated with the Aurora BayCare Medical Center in Green Bay on December 9, 2002. Dr. Barnes report sets forth the following relevant medical history, which sufficiently summarizes Dziewit's medical history for purposes of this Award:

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HISTORY:

Pre-existing status: Mr. Dziewit recalls the beginning of problems to his knees following a motor vehicle accident that occurred while he was fighting a St. Norbert College dormitory fire in the mid-1990's. He was unable to give us a specific date. The incident occurred when a motor vehicle struck him very slowly on the anterior knees. He buckled to the ground and had some pain in his knees at that point. It is unclear whether or not he sought medical attention for this incident. He is uncertain of that particular fact at this time. A 2nd incident occurred relating to the left knee in 1996 when he slipped on a metal grating with subsequent twisting and bending of his left knee. He did seek medical attention for this condition and an endoscopic procedure was performed on his left knee on November 21, 1996.

According to the medical documentation from Dr. Tressler dated January 22, 1997, he was limited to not being active in racquetball or anything vigorous for about 6 weeks. There was continued pain in the left knee despite this limitation, and he underwent a 2nd MRI of the left knee in April of 1997. A 2nd left knee arthroscopy was then performed on May 29, 1997, resulting in a closed meniscectomy. Once again, he was placed on work limitations but was eventually returned to full duty on August 28, 1997.

According to Dr. Tressler in August of 1998, Mr. Dziewit started having some difficulties with his right knee and due to these issues, an endoscopic evaluation of the right knee was performed on October 15, 1998, resulting in a lateral meniscectomy and diagnosis of femoral chondromalacia. He was again off work for a period of time and returned on December 7, 1998. Persistent peripatellar pain continued and Dr. Tressler recommended re-scoping of the right knee from a note on May 14, 1999. Mr. Dziewit decided to wait at that point.

On May 19, 1999, Mr. Dziewit also sustained another injury. He fell and while he was trying to break his fall with his left arm, he developed significant shoulder pain. X-rays of his shoulder were essentially unremarkable.

On December 15, 1999, another injury to the right knee occurred. Apparently, Mr. Dziewit was trying to set up a hoist and when he bent over he felt a "crack" over the anterior aspect of the knee. He became stiff and swollen at the time, according to Dr. Tressler's notes, and another MRI was performed of (sic) the right knee on January 21, 2000, which exhibited a medial and lateral meniscus tear of the right knee. Once again, he underwent endoscopic surgery of the right knee on February 29, 2000, to repair the meniscal tears and to remove some of the femoral chondromalacia.

Beginning on September 26, 2000, he relates to Dr. Tressler that he has achy and sore knees with weather changes and if he does a lot of ladder climbing. An episode occurred, according to Dr. Tressler's notes on January 17, 2001, where he was running and jumping rope and he started having some left heel pain. Subsequent determination by Dr. Tressler, was that of a stress fracture to the calcaneus and he was limited to non-stressful activities.

On July 23, 2001, Dr. Tressler notes significant crepitous in both knees when doing repetitive ladder climbing, squatting, and kneeling.

On May 21, 2002, Dr. Tressler notes that "on May 17 he was working on engine #3, when he crawled from the bottom of the engine up to the pump area and struck the top of his shoulder. He now complains of pain and discomfort. He also states that he has some clicking." MRIs of the shoulder and right elbow were performed. The right elbow MRI revealed a partial tear of the common extensor tendon. Because of this finding, Mr. Dziewit underwent repair of the extensor tendon of the right elbow on May 22, 2002.

Limitations continued to the right elbow, with an eventual loss of ability for full extension of the elbow to a 5-degree loss. By August 27, 2002, the lack of ability to fully extend was a loss of 10 degrees with some weakness of the extensors, as well as his flexors.

Dr. Tressler gave Jeff a functional capacity evaluation on October 23, 2002, and made recommendations for permanent partial impairment of the right elbow to 10% on November 20, 2002.

The persistence of crepitous and pain in the knees persisted as well and continues to the present time.

. . .

Mr. Dziewit spent a substantial portion of the second half of calendar 2002 on Worker's Compensation, primarily attributed to his right elbow condition. He was off from May 22 through essentially the end of the year.

In the early fall of 2002, the City initiated a light duty program. On September 26, 2002, the City offered the grievant light duty as a temporary and transitional measure, calculated to facilitate Dziewit's full return to work. He performed light duty in October and November of 2002.

Mr. Dziewit was sent for a functional capacity evaluation which was conducted on October 21, 2002. A key finding of that evaluation included the following:

"According to the job description provided by Jackie Nystrom, the client's abilities **do not match** the job requirements. Specifically, he is unable to perform lifting/carrying up to 150 lbs., constant kneeling, and constant stair/ladder climbing demands of the job. . . ."

It was the uncontradicted testimony of Employer witnesses that the medical bill for this functional capacity evaluation was the last medical bill submitted for treatment of Mr. Dziewit's elbow.

Mr. Dziewit was seen by Dr. Ralph Blasier, an orthopedic surgeon, who conducted an independent medical examination, on behalf of the Worker's Compensation insurance carrier, on November 16, 2002. Dr. Blasier submitted two reports. The first, based on the doctor's actual examination and review of record, includes the following:

"Based on the historical information I have today, and based on his assertion that a firefighter needs to be able to have full grip strength to work at accident scenes, and control stretchers and hoses, he may not be able to return to full duty."

Dr. Blasier did not recommend further treatment and indicated the existence of permanent partial disability at the right elbow. He further indicated "Permanent restrictions would preclude the necessity of forceful gripping with the right hand."

Dr. Blasier submitted a supplemental report dated November 27, 2002. Dr. Blasier explained the basis for the supplemental report as follows: "The basis for this supplemental report is subrosa videotape made of the claimant which I have just received and reviewed." Dr. Blasier's review of the videotapes caused him to write as follows:

"In summary, they show Jeffrey Dziewit, who looks the same as the man I examined, doing vigorous work with both upper limbs. The opening scenes

were taken on October 27, 2002, and they showed him pulling a trailer with his

right hand gripping the upper edge of the trailer box, and guiding the tongue of the trailer with his left hand. But most importantly, he is able to put a forceful pulling grip with the right hand with no appearance that the trailer is overpowering him. . .It shows him hammering in vertical lag bolts to bolt the garage, which is yet to be built, onto the new slab. It shows him installing and lining up and tying rebar for the slab. All of this requires vigorous work in all positions; bending, squatting, stooping, lifting, carrying, hammering, gripping, and using both arms in a full range of positions. He worked on this videotape for approximately three hours with no breaks, no interruptions, and no periods of rest. At one point, he is bending the rebars using two single-handed grips and a foot in between. In other words, he grabs the bar on the right, puts his foot in between, grabs the bar on the left and pulls to bend the rebar into shape against his foot in the middle. This requires massive gripping with both hands, and he is able to do it with apparent ease.”

Review of the video caused Blasier to revise his opinion to the following:

“In my opinion, the serruptitious video shows a man of good capability, without any overt sign of limitation of strength or symptom production, which would be at such a level as to preclude activities. Therefore, based on the videos, he has no evidence of permanent partial disability, nor does he require permanent restrictions.”

Blasier goes on to provide a full release to return to work.

The videotapes were forwarded to Dr. Barnes, who subsequently rendered an opinion that the videotapes were “consistent with the functional capacity evaluation that was performed at Bellin Occupational Health Solutions on October 21, 2002.”, and with the subsequent evaluation for disability purposes.

The Worker’s Compensation carrier terminated Worker’s Compensation benefits. Following receipt of the independent medical examination, the City, on December 9, 2002, directed Dziewit to return to full duty on Tuesday, December 10, 2002.

As previously noted, Mr. Dziewit was examined as a part of a disability evaluation by Dr. Barnes of the Aurora Bay Medical Center on December 9. Dr. Barnes indicated that Dziewit’s prognosis is poor, and that his knees and elbow appear to be in a stable state and probably will not improve with time. Barnes went on to indicate that Dziewit is “more likely than not at maximum medical improvement. . .maximum medical improvement regarding both the injuries to his knees and elbow as far as medical treatments are concerned.” Barnes indicated: “We do not recommend any return to work as a firefighter, which requires a heavy work status and normal joint function.”

Following the Employer's direction to Dziewit that he return to work, Dziewit called and requested a sick day. He was advised that he was not eligible for a sick day based upon the independent medical examination. He thereafter took vacation.

The Employer subsequently received a letter from Dr. Tressler. That letter, dated December 11, 2002, provided the following:

"To Whom It May Concern:

It is my opinion that Jeff Dziewit is unable to return to work as a firefighter/mechanic at any time in the future.

This opinion is based on the review of the functional capacity evaluation as well as my knowledge of his conditions of his knees.

It is also my opinion that he could return to light duty and lift up to 40 pounds, however any repetitive climbing and lifting or squatting and crawling is certainly out of his realm of capability.

Sincerely,

H.A. Tressler, M.D."

Tressler had previously, on May 3, 2000, provided a full return to work for Dziewit relative to his knees.

In response to Tressler's letter, the City, on December 17, 2002, sent Mr. Dziewit a letter, which included the following:

". . .Dr. Tressler does not address your elbow injury. Since the last information we have regarding that injury is from the independent medical examination conducted by Dr. Ralph Blasier on November 16, 2002, which indicates that you are able to return to work from that injury without restriction, you are expected to report for duty. . ."

Mr. Dziewit did not return to work. In the month of December, he took one sick day for the flu and five days vacation. In the month of January, 2003, he took two days sick leave for the flu, he took one holiday and three days of vacation. He thereafter took a number of days under the Family Medical Leave Act to care for a family member.

On January 6, 2003, Dziewit, accompanied by his Union representative, Ben Hermans, met with Fire Chief Stephen Servais and Jackie Nystrom, Human Resources Director. Dziewit asked about the availability of light duty. Servais asked what the Department could do to help

to shove, he could return. Servais followed that meeting up with a January 8 letter. In that letter he notes: "I asked you to provide me with information as to how the City and the Fire Department can accommodate you to facilitate your return to work. At that time, you replied that you would never be able to return to work as a firefighter."

Dziewit replied by letter dated January 24, 2003, which provided the following:

"This is in response to the letter I received dated January 8, 2003. I request that I should be allowed to return to work on light duty according to my doctor's limitations, and restrictions stated in his letter of December 11, 2002. If this is not workable or acceptable, I request to use my comp time, vacation time, and holiday time until it is exhausted or until we resolve this matter."

On or about January 16, 2003, Dziewit applied for duty disability, which was ultimately denied on March 4, 2003.

On February 3, 2003, Human Resource Director Jackie Nystrom responded to Dziewit's January 24 letter, with the following:

"We are unable to accommodate your request for continued light duty. Under the City's light duty return to work policy, light duty assignments are temporary and transitional in nature. It does not appear from Dr. Tressler's letter that your condition is either temporary or transitional.

In light of the information we have available to us, it appears that your employment with the City of DePere as a firefighter must be terminated insofar as you are no longer qualified for the duties of that position."

Dziewit replied to Nystrom by letter dated February 12, 2003, which included the following provisions:

". . .It is of great distress to me that I would return to work and not only chance hurting one of my fellow firefighters or God forbid, a patient. This is not even mentioning the chance of hurting myself more, which would be the least of my concerns at this point. . .

All I am asking is that you allow me the same courtesy as well as the courtesy of using my sick leave due a medical condition in which I have surrendered all information to you, a condition which I have been inflicted with due to on the job injuries."

Dziewit was terminated by letter dated February 27, 2003. The termination was grieved by letter dated March 28, 2003, which provided the following:

“It is Local 1998’s understanding that Jeff Dziewit has approximately eighty (80) days of accrued, unused sick leave remaining in his account. Dziewit was terminated before he exhausted his unused, accrued sick leave. Please place Dziewit on sick leave and rescind termination until such time as Dziewit has exhausted his accrued, unused sick leave. In the alternative, please place Dziewit on light duty until such time as he is permanently disabled or able to return to work as a firefighter.”

The Employer denied the grievance on the basis that

“the collective bargaining agreement between the parties does not allow for the use of sick leave under circumstances such as this where an employee is not ill or injured, but provides information that he/she no longer can perform the duties of the job.”

Second, light duty assignments under the City’s return to work policy are temporary and transitional in nature. Jeff’s condition is not temporary; both he and his doctor, Dr. Tressler, have expressed the opinion that Jeff will never be able to return to work as a firefighter. Any light duty assignment therefore would not be temporary or transitional. The City’s return to work policy does not provide for permanent light-duty assignments.”

The Union appealed the Chief’s decision. The Union dropped its request to have Dziewit placed on light duty. It indicated a desire to pursue its contention that Dziewit had been denied use of his accrued sick leave until it was exhausted.

There is a dispute over whether or not Dziewit asked to use his sick leave during the winter of 2002-2003. I conclude that he did request the use of sick leave and that the City was on notice of that fact.

ISSUE

The City believes the issue to be:

On February 27, 2003, was grievant eligible to use sick leave benefits until exhaustion thereof?

The Union frames the issue as follows:

Did the City of DePere have just cause to terminate Jeff Dziewit on February 27, 2003? If not, what is the appropriate remedy?

I believe these are different statements of a common issue. The Union in essence contends that the City cannot terminate Dziewit because he is entitled to use his sick leave so

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 3

Management Rights

The Association recognizes that, except as otherwise provided in this Agreement or as may affect the wages, hours, and working conditions of the members of the Association, the management of the City and its business and the direction of its work force is vested exclusively in the employer. . . Such rights include, but are not limited to, the following:

. . .

- d. To discipline or discharge employees for just cause;

. . .

ARTICLE 22

Sick Leave

In order to be granted sick leave with pay, the employee must adhere to the following:

- a. Report promptly to the Chief the reason for his/her absence if he is unable to report for duty.
- b. Permit the City to make such medical examinations or nursing visits as it deems desirable.
- c. Submit a medical certificate for any absence of more than forty-eight (48) successive duty hours if required by the City.
- d. Payment of authorized sick leave will be made upon filing of a sick leave voucher approved by the Chief.

“Sick leave” means any physical or mental injury, illness or requirement that employees be personally attended by a physician, dentist or other medical practitioner or situations where their attendance is required as a result of a medical emergency or grave illness involving an employee’s spouse, child, parent or legal guardian which prevents the performance of an employee’s regular and usual duties. Sick leave benefits shall not be abused. Abuse of sick

charging an absence to sick leave or when an employee uses sick leave for unauthorized purposes. Abuse of sick leave shall be grounds for disciplinary action, including removal.

Upon discontinuation of employment of an employee who has met the minimum qualifications for a retirement annuity from the Wisconsin Retirement Fund or who qualifies for a disability pension as defined at Chapter 41, Wis. Stats., the City shall credit to the account of such employee an amount equal to the employee's then existing daily rate of pay times the percentages shown below of the accrued and unused sick leave credited to that employee as of the date the employee terminates his/her employment with the City. The amount so determined will be used by the employer to pay the monthly premiums for group hospitalization and medical insurance provided by the employer until such amount is exhausted or until the employee reaches his/her 65th birthday, subject to the approval and requirements of the insurance carrier and/or the policy provided by the employer.

...

POSITIONS OF THE PARTIES

It is the view of the Employer that the contractual definition of "sick leave" requires an active condition of being ill, injured and under treatment. The Employer contends that there is no evidence of ongoing treatment. The Employer contends that there is no indication in the record that the grievant was on the road to recovery. To the contrary, his personal physician indicated that he could not return to work. The Employer contends that the grievant had reached an end of a healing period on all injuries. There is no evidence of active treatment.

It is the view of the Union that in a discharge case the burden of proof rests with the City. The Union claims that at the time of discharge the grievant had a sick leave account. His condition falls within the definition of "sick leave". At the time of his termination, he suffered from a number of medical conditions and was seeing a number of physicians. The City knew the grievant suffered from various medical conditions and that those conditions kept him from coming to work. The Employer terminated the grievant because of his inability to return to work due to his medical circumstances. The Union reviews the conditions necessary to utilization of sick leave, and contends that the grievant satisfied each such condition.

DISCUSSION

The Union seeks reinstatement of Jeff Dziewit for the sole purpose of allowing Mr. Dziewit to collect the accumulated sick leave benefits until such time as the benefits are exhausted. There is no claim here that Dziewit is fit for duty and/or capable of returning to work as a firefighter.

The City terminated Dziewit because he could no longer do his job. That was the conclusion of the functional capacities examination, the attending physician, Dr. Tressler, and Mr. Dziewit. Dr. Blasier, the IME, concluded, based upon viewing a videotape that the grievant was fit for duty. Prior to review of the film, Blasier had speculated that the grievant may not be able to return to work. Based upon the IME, the employer ordered the grievant back to work. The grievant balked. He used various forms of paid leave to avoid a return to work. His words and his actions reflected his own belief that Dr. Tressler was right.

I believe the employer acted within its right to terminate Jeff Dziewit due to his inability to do the job. However just cause is measured, the fundamental wage bargain involves an exchange of labor for money. Dziewit was incapable of satisfying his end of the bargain. The prognosis of his treating physician was that Dziewit was unable to return to work as a firefighter at any time in the future. It is in that context that Dziewit avoided a physical return to work. This is not a case where meaningful recuperation can be reasonably anticipated. To sustain this grievance would leave this employer with an employee who cannot perform the job and who is unwilling/unable to come to work permanently. There is no support in the case law or in the pragmatism of the workplace for such a conclusion.

In its brief, the Union contends that Dziewit qualifies for sick leave under the provisions of the sick leave clause. The grievance seeks to have the grievant restored to the payroll until such time as sick leave is exhausted. This calls into question the very nature of the sick leave benefit. With no hope for a return to work, the result sought by the Union would carry the grievant on the payroll for an additional year.

I do not believe the sick leave clause was intended as a device to keep an employee on the payroll for one year after he was deemed permanently incapable of performing a job. I believe the clause is intended to continue the income of an employee who is ill or injured, in anticipation of that employee's return to work. I further believe the Employer has just cause to terminate an employee who is unable to do the job.

Mr. Dziewit was diagnosed with a heart condition in June, 2003. It was his testimony, corroborated by co-workers, that he experienced chest pains beginning in 2001. He had EKG's performed, which showed nothing unusual prior to the date of his termination. Dziewit testified that he was seeing a doctor about the pains during the time period preceding his discharge. I do not believe that changes the analysis. Mr. Dziewit was terminated because he could no longer perform his job. If anything, the heart condition compounds that concern.

These parties have negotiated a provision which pays out accrued sick leave under certain qualifying circumstances. The grievant meets neither standard. He does not qualify for a retirement annuity. His application for a disability pension was denied.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 8th day of July, 2005.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

WCH/gjc
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