BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GERMANTOWN MUNICIPAL EMPLOYEES UNION, LOCAL 3024, DISTRICT COUNCIL 40, AFSCME, AFL-CIO

and

VILLAGE OF GERMANTOWN

Case 57
No. 64053
MA-12791

Appearances:

Lee Gierke, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 727, Thiensville, Wisconsin 53092-0727, appearing on behalf of the Union.

Attorney James R. Korom, vonBriesen, Purtell & Roper, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 700, P.O. Box 3262, Milwaukee, Wisconsin, appearing on behalf of the Village.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "Employer" or "Village" are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Germantown, Wisconsin, on April 11, 2005. The hearing was not transcribed and the parties thereafter filed briefs that were received by July 8, 2005.

Based upon the entire record and arguments of the parties, I issue the following decision and Award.

ISSUES

The parties were unable to stipulate to the issues. The Union poses the following issues:

1. Was the Village of Germantown unreasonable when it arbitrarily and capriciously denied medical payments for G.S. [1] for medical tests that he was ordered to take as a condition of employment?

2. If so, what is the remedy?

The Village raises a substantive arbitrability objection to any allegations regarding the Village safety and health policy, and state safety and health regulations being properly before the Arbitrator. The Village also states that the Arbitrator has no authority to interpret the language of the Employer's health insurance plan in order to force the Village to foot the cost for the Grievant's medical bills.

The Village proposes the following substantive issues:

1. Did the Employer violate Article 2, Management Rights, of the collective bargaining agreement as alleged in the grievance?

2. If so, what is the appropriate remedy?

Having reviewed the entire record, the Arbitrator adopts the Village's framing of the issues.

FACTUAL BACKGROUND

General Background

G. S. ("Grievant"), by the nature of his employment with the Village of Germantown Water Department, is required to participate in the respirator certification program that the Village is mandated to implement due to Occupational Safety and Health Act ("OSHA") regulations. This program is outlined in the Village "**Safety & Health Hand Book** for employees" (2003 Edition). The handbook states in reference to the "Respiratory Protection Program" that the Village "has determined that its employees are exposed to respiratory hazards during routine operations" including, but not limited to, chlorine liquid, fluoride, dust, sewer gases and "potential or actual Immediately Dangerous to Life or Health (IDLH) conditions." The purpose of the program, according to the handbook, "is to ensure that the Village of Germantown employees are protected from exposure to these respiratory hazards." A Program Administrator is responsible for administering the respiratory protection program. Tim Zimmerman serves as the Program Administrator for the Village "when and if respirators are needed."

[1] Following the lead of the Union, this Award will refer to the employee by his initials or "Grievant" rather than to his name to insure his privacy due to the medical nature of the grievance.

The handbook provides that an employee who participates in the respiratory protection program does "so at no cost to them." "The expense associated with training, medical evaluations and respiratory protection equipment will be borne by the Village of Germantown."

The handbook also provides that employees who wear respirators "must pass a medical exam before being permitted to wear a respirator on the job." Employees may not "wear respirators until a licensed physician has determined that they are medically able to do so." Medical evaluation procedures for respirator use include the requirement that an employee fill out a medical questionnaire. "Follow-up medical exams will be granted to employees as required by the standard, and/or as deemed necessary by the licensed physician." Once an employee receives clearance and begins to wear his or her respirator, additional evaluations will be provided under the following circumstance: "Employee reports signs and/or symptoms related to their ability to use a respirator, such as shortness of breath, dizziness, chest pains, or wheezing."

Facts Giving Rise to the Instant Dispute

The Grievant completed an OSHA 1910.134 Medical Questionnaire for Respirator Users on October 30, 2003.

On November 7, 2003, Dr. Gina Buono, who was monitoring the Village's respirator program, conducted a medical examination and physical of the Grievant. According to Dr. Buono, the Grievant was very vague and indecisive in this examination, and did not provide answers to her inquiries that were consistent with the answers he provided on the questionnaire. Dr. Buono added that the Grievant was responsive to her questions, but did not provide clear answers to questions about his possible exercise intolerance, chest pain and shortness of breath.

Based on the foregoing, Dr. Buono recommended that the Grievant see his own physician regarding the medical evaluation. Dr. Buono gave the Grievant a medical treatment form, and instructed the Grievant to give this form to his treating physician. On this form, Dr. Buono indicated that the Grievant had complained of exercise intolerance and shortness of breath and anxiety causing chest tightness. Dr. Buono noted that the Grievant needed an "ETT (stress test) to be cleared for respirator use."

On November 10, 2003, the Grievant met with the Village Respirator Program Administrator Tim Zimmerman, and was given a letter and verbal instructions that he had thirty (30) days in which to follow through with the request of Dr. Buono to see his own physician. The Grievant asked who would pay for the tests and Zimmerman replied that the Village would pay for all tests necessary to wear a respirator. Kevin Bartlein, Union President, was present for this meeting and witnessed Zimmerman's response that the Village would pay for the follow-up evaluation recommended by Dr. Buono.

On November 12, 2003, the Grievant had an appointment with Dr. David A. Kornhauser, his personal physician for the past fifteen (15) years. The Grievant explained to Dr. Kornhauser that because of testing done at work, he was required to do some follow-up testing with him. The Grievant testified that he gave Dr. Kornhauser or his nurse the form that Dr. Buono gave him that called for further testing as well as Dr. Buono's phone number in case he had any questions. Dr. Kornhauser does not remember receiving that paperwork or being told to call Dr. Buono if he had any questions. Dr. Kornhauser testified that he didn't believe that the Grievant mentioned that he needed a stress test or that he was sent to see Doctor Kornhauser to answer the question whether he could safely wear a respirator. Dr. Kornhauser stated that the Grievant asked for pulmonary testing and complained of chest pains.

Based on his conversation with the Grievant, Dr. Kornhauser did the following preliminary testing:

DESCRIPTION	***CHARGES***
ELECTROCARDIOGRAM, CO	153.00
OFFICE/OUTPT VISIT	264.00
BASIC METABOLIC PANEL	78.50
AUTO HEMOGRAM/PLATE/D	71.00
ASSAY SERUM CHOLESTER	29.00
PROSTATE SPECIFIC ANT	102.00
ASSAY THYROID STIM HO	74.50
VENIPUNC FNGR, HEEL, EA	15.00
TEST FECES FOR BLOOD	17.00

He also ordered additional tests.

On November 14, 2003, additional tests were performed as follows:

DESCRIPTION	***CHARGES***
DOPPLER COLOR FLOW	295.00
DOPPLER ECHO HEART, CO	355.00
ECHO HEART, STRESS	905.00
CARDIAC STRESS TST, CO	668.00

On November 19, 2003, additional tests were performed as follows:

DESCRIPTION	***CHARGES***
LIPID PANEL	95.50
VENIPUNC FNGR, HEEL, EA	15.00

On December 23, 2003, the Grievant had a follow up with Dr. Kornhauser to review the test results. Based on the examination and test results, Dr. Kornhauser prescribed medication to help correct a medical condition that he diagnosed. The cost of this office/outpatient visit was $101.00. The Grievant reminded Dr. Kornhauser to forward the necessary paperwork to Dr. Buono.

Thereafter, in early 2004, the Village questioned the Grievant as to why it had not heard from the doctor concerning clearance for respirator usage within the thirty (30) days as requested. The Grievant followed up with a call to Dr. Kornhauser who faxed clearance to Dr. Buono on January 8, 2004.

Bills for the physician visits and testing are sent to the insurance administrator for the Village, Nancy Wrybock. Employees of the Village are covered under a group medical plan that is self-insured by the Village. The third party administrator reviews the bills and based on the insurance coverage in effect pays claims

This happened in the Grievant's case. However, the Grievant called Wrybock and questioned why the payments for these procedures were made through the regular group health insurance plan. The Grievant did not want these charges to count against his health insurance lifetime maximum. Wrybock asked the Grievant to bring the bills in.

The Grievant brought the bills in and showed them to Wrybock. She agreed with the Grievant that the payments should not have been made through the Village's health insurance plan. She stated that employment related medical expenses were not covered under the plan but were the Village's responsibility under a different account

By letter dated March 16, and April 13, 2004, the Village took the position that it was not under any obligation to pay the bills for the services the Grievant received.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 2 – MANAGEMENT RIGHTS

2.01 Rights: The Board possesses the sole right to operate the Village and all management rights repose in it, subject only to the provisions of this contract and applicable laws. These rights include, but are not limited to the following:

A. To direct all operations of the Village;

B. To establish reasonable work rules and schedules of work in accordance with the terms of this Agreement;

. . .

L. Nothing contained in this Article shall be construed as divesting an employee of any right granted elsewhere in this Agreement or the Wisconsin Statutes.

2.02 Exercise of Rights: The Employer agrees that it will exercise the rights enumerated above in a fair and reasonable manner, and further agrees that the rights contained herein shall not be used for the purpose of undermining the Union or discriminating against its members.

. . .

ARTICLE 7 – GRIEVANCE PROCEDURE

7.01 Definition of Grievance: A grievance shall mean a dispute concerning the interpretation or application of this contract.

. . .

ARTICLE 8 – ARBITRATION

. . .

8.05 Decision of Arbitrator: The Arbitrator shall not modify, add to or delete from the express terms of the Agreement.

POSITIONS OF THE PARTIES

Union's Position

The Union basically argues that the Village violated the collective bargaining agreement when it arbitrarily and capriciously denied medical payments for the Grievant for medical tests that he was ordered to take as a condition of employment.

The Union also argues that it is unrealistic to expect that the Grievant should have questioned the cost and/or the necessity of the tests that the doctor ordered.

The Union further argues that there is no evidence to substantiate the Village's claim that the Grievant was uncooperative with this program.

The Union claims in addition that the Grievant is caught in a "catch 22." In this regard, the Union points out that the Village's regular group health insurance won't pay the claim because it is employment related while the Village won't pay it because it was not

needed for the respirator. Meanwhile, "the employee is unreasonably faced with creditors demanding payment by him."

The Union adds that the contract is broader than the words within its pages and, consequently, while the Arbitrator is not the judge of state and federal statutes, he/she "can look to those instruments to help define and determine the intent of the contract language." The Union states that the regulations and statutes that are referenced within the labor agreement demonstrate just how unreasonable the Village's action is in the instant case.

The Union rejects the Village's attempt to paint a picture of an employee who went to the physician on his own and then wanted the Village to pay all the bills. The Union claims that the Grievant went to the doctor for only one reason – to get clearance for the respirator.

The Union points out that the physician determined the tests, not the Grievant, and the physician had no need or requirement to consult with anyone else.

The Union adds that the Village's claim that the tests were unnecessary is not supported by either physician.

The Union states that the cases relied upon by the Village are not on the mark.

Based upon the evidence and the foregoing arguments, the Union requests that the grievance be sustained and that the Village be ordered to immediately pay the entire outstanding bill (less any reduction in the charges agreed to by the physician).

Village's Position

The Village initially argues that the only substantive issue before the Arbitrator is to determine whether the Village violated Article 2. The Village maintains that the Union's allegations regarding the Village safety and health policy, state safety and health regulations, and the health insurance plan are not substantively arbitrable.

The Village also argues that the Grievant failed to cooperate and obtain the specific and narrow treatment required to answer the question of whether he could safely wear a respirator. In support thereof, the Village maintains that it did not authorize any of the extensive testing that the Grievant received from Dr. Kornhauser and his associates; that the Grievant failed to inform Dr. Kornhauser of the narrow purpose of his visit (an answer to the specific question of whether he could safely wear a respirator); that much of the testing received by the Grievant from Dr. Kornhauser and his associates was unnecessary; and that the Grievant was not responsible in the treatment sought by him at the request of the Village because he did not question the extensive testing or battery of physical examinations he received or verify costs and payments.

The Village next argues that in similar cases arbitrators have found that reimbursement or payment to the employee is not always necessary. In this regard, the Village opines that the "Arbitrator may be tempted to be sympathetic to the employee in this case because of the amount of medical expenses in dispute." However, the Village points out other arbitrators "have analyzed similar situations and determined that full or partial payment by the employee in those cases was appropriate."

Finally, the Village argues that arbitrators have considered division of the remedy when an all-or-nothing solution does not seem equitable or effective. Utilizing such an approach, the Village urges that if the Arbitrator finds the contract language was violated and orders a remedy the remedy should require the Grievant to pay a portion of the costs of tests and services unrelated to the stress test, and the Village would pay the costs for the stress test and related tests.

In rebuttal to the Union's arguments, the Village argues that the Grievant is responsible for the medical charges because he created the dispute in the first place because he didn't inform Dr. Kornhauser of the limited scope of his visit and didn't question the cost or the necessity of the tests that Dr. Kornhauser ordered. The Village adds that any ambiguities about the necessity for the disputed testing must be construed against the Grievant as the individual who caused these ambiguities to occur.

The Village rejects the Union's argument that the proper approach was for the Village to approach the Union and the Grievant and "work together to question the necessity and costs associated with these tests" as too late. (Emphasis in the original). The Village emphasizes the Grievant was expected to behave reasonably when he went to his treating physician to make sure that the services provided were necessary and cost effective.

Finally, the Village argues that a decision in the Grievant's favor will have serious adverse effects on it, its employees, and taxpayers.

Based on all of the above, the Village requests that the Arbitrator deny the grievance.

DISCUSSION

Substantive Arbitrability

The question of whether a matter is subject to grievance arbitration goes to the jurisdiction of the Arbitrator and is a threshold issue that must be addressed before any other aspect of the case may be dealt with. The Village asserts that the only issue properly before the Arbitrator is whether the Village violated Article 2 of the collective bargaining agreement. The Village opines that the Village safety and health policy, state safety and health regulations and the parties' health insurance plan are not substantively arbitrable.

The Arbitrator agrees with the Village that the instant dispute can be resolved by looking at the question of whether the Village violated Article 2 by its actions herein. The grievance claims that the Village violated Article 2 by its failure to pay all medical bills associated with the respirator testing. (Joint Exhibit No. 2).

Article 2 – Management Rights provides that the Village Board "possesses the sole right to operate the Village and all management rights repose in it, subject only to the provisions of the contract and applicable laws." These rights include Section 2.01 B. which provides: "*to establish reasonable work rules* and schedules of work in accordance with the terms of this Agreement." (Emphasis added).

The agreement does not define what is meant by the term "work rules." Nor does bargaining history or past practice shed light on its meaning. Arbitrators give words their ordinary and popularly accepted meaning in the absence of a variant contract definition, or extrinsic evidence indicating that they were used in a different sense or that the parties intended some special colloquial meaning. Elkouri and Elkouri, *How Arbitration Works*, 6th Edition, pp. 448-449 (2003).

Work refers to "employment." *The American Heritage Dictionary of the English Language, Second College Edition*, (2nd Ed. 1985) p. 1390. Rule is defined as "an authoritative direction for conduct." *The American Heritage Dictionary of the English Language, Second College Edition, supra*, p. 1076. Therefore, work rules refer to the directives and standards established by an employer that govern how an employee functions in the workplace. Such a definition conforms to the definition of "work rules" found in *Roberts' Dictionary of Industrial Relations*, (BNA, 1966) p. 465 which provides that work rules are the "regulations in accordance with which work is done."

The **Safety & Health Hand Book** covering the "Respiratory Protection Program" for employees of the Village easily falls within the meaning of the term "work rules." It states that the Village "has determined that its employee's are exposed to respiratory hazards during routine operations." The purpose of the program is to ensure that Village "employees are protected from exposure to these respiratory hazards." The program "*applies to all employees who are required to wear respirators during normal work operations, and during some non-routine or emergency operations* such as a spill of a hazardous substance." (Joint Exhibit No. 8, p. 86). (Emphasis added). The requirements set forth in this program clearly apply to all employees who are required to wear a respirator in the performance of their work. Pursuant to Article 2, Section 2.01 B., the Hand Book and Program are incorporated into the collective bargaining agreement. Elkouri and Elkouri, *supra*, p. 767. A clause prohibiting the arbitrator from adding to the terms of the agreement does not preclude the arbitrator from considering established work rules in determining whether the Village violated Article 2 herein. Id.

Having reached the above conclusions, it is unnecessary to address any issues regarding state safety and health regulations and the parties' health insurance plan as being properly before the Arbitrator.

The Merits of the Case

The question before the Arbitrator is whether the Village violated Article 2, Management Rights, of the collective bargaining agreement as alleged in the grievance.

The grievance asserts that the Village violated Article 2 by failing to "pay all bills associated with the respirator testing."

As noted above, the Respiratory Protection Program is incorporated into Article 2 pursuant to Section 2.01 B. which provides that the Village has the right "to establish reasonable work rules." Section 2.02 also provides that the Village will exercise this right "in a fair and reasonable manner." Consequently, the Village has a responsibility to administer the Respiratory Protection Program in a fair and reasonable manner.

The aforesaid program expressly provides that employees who participate in the Respiratory Protection Program do "so at no cost to them" and that "the expense associated with training, *medical evaluations* and respiratory protection equipment will be borne by the Village of Germantown." (Emphasis added). The Village's physician, Dr. Buono, told the Grievant to have further testing and evaluation for respirator clearance done by his personal physician. (Joint Exhibit Nos. 5 & 13). Timothy Zimmerman, the Wastewater Superintendent, further ordered the Grievant to "go see your own physician regarding the medical evaluation." Zimmerman added that "the Village will pay for the follow-up." The Village put the directive in writing and gave the Grievant 30 calendar days to follow through. (Joint Exhibit No. 6). Based on the foregoing, the Arbitrator finds it reasonable to conclude that the Village is required to pay all the bills for the ordered medical evaluation.

The Village argues, however, that it should not be liable for the bills because the Grievant failed to cooperate and obtain the specific and narrow treatment required to answer the specific question of whether he could safely wear a respirator. The record does not support a finding regarding same.

In this regard, the Village first claims that after Dr. Buono completed the Grievant's examination and physical, she determined that the Grievant should see his treating physician for the sole purpose of receiving a stress test to determine whether the Grievant could safely wear a respirator. According to the Village, there is no evidence that it authorized any of the extensive testing or the battery of physical examinations that the Grievant received from Dr. Kornhauser and his associates.

To the contrary, the referral form from Dr. Buono does not state that the Grievant is being referred for the *sole* purpose of a stress test. (Emphasis added). Instead, it refers broadly to a number of concerns that were raised during the initial history and physical for respirator use regarding the following health issues: that the Grievant has complained of or should be checked out for exercise intolerance and shortness of breath; anxiety causes chest tightening; and needs an ETT (stress test) to be cleared for respirator use. (Joint Exhibit

No. 5). It places no restrictions on Dr. Kornhauser's review of these issues pertaining to the Grievant's ability to safely use a respirator. Id. The Grievant was referred broadly for "additional medical evaluation" related to respirator use. (Joint Exhibit No. 13).

Likewise, the Village's letter dated November 10, 2003 to the Grievant directing him to be evaluated by his physician to determine his ability to use a respirator does not limit his visit to a stress test. (Joint Exhibit No. 6). Instead, it states broadly that based on the Grievant's responses to questions from Dr. Buono "she made a recommendation to you to see your own physician regarding the medical evaluation." Id. The medical evaluation performed by Dr. Buono noted a number of issues relating to the Grievant's ability to use a respirator as noted above. (Joint Exhibit No. 5).

The Village also claims that when the Grievant sought treatment from Dr. Kornhauser and his associates, the Grievant made no mention to Dr. Kornhauser that the procedures were work related, that he already received a medical evaluation from Dr. Buono, that she requested the stress test to answer the narrown question of whether he could safely wear a respirator, or even to give Dr. Kornhauser her name or phone number to coordinate his services.

However, the Grievant testified credibly that he explained to his physician that because of testing done at work, he was required to do follow up testing with his personal physician. He gave his doctor the paper work from Dr. Buono that referenced the purpose of that visit being related to respirator use and said that if he had any questions he should contact Dr. Buono. He also described his initial exam with Dr. Buono to Dr. Kornhauser.

Dr. Kornhauser's own medical records support a finding that the Grievant communicated that his visit was for work reasons. On the first page of the notes from Dr. Kornhauser there are two entries that support the Grievant's claim that he went to Dr. Kornhauser for work reasons:

- "had company PE at Med Assoc., was advised he needed further Testing for cardiac reasons, states he become [sic] SOB with chest tightness at times. (Visit notes from Elizabeth A. Schulteis on 11/12/03, Joint Exhibit No. 9).

- This 50-year-old male was send today complaining of possible stress reactivity. He had pulmonary testing done through his work employment. After discussion with occupational health person, he answered some questions that were certainly more suspicious of chest discomfort than stress reactivity. (Dr. Kornhauser notes from 11/12/03 visit, Joint Exhibit No. 9).

The Village further claims that at hearing Dr. Buono determined that much of the testing received by the Grievant from Dr. Kornhauser and his associates was unnecessary for purposes of conducting a stress test or to answer the narrow question of whether the Grievant

could safely wear a respirator. Dr. Buono reached no such conclusion. To the contrary, Dr. Buono gave the following testimony:

- "His word can outweigh mine."
- "If a patient was vague and had conflicting symptoms like the Grievant you would order lots of tests."
- "Dr. Kornhauser may have had more knowledge. I have no reason to question his judgment."
- The testing was "a little bit excessive."
- The tests could have been "appropriate."
- "Medicine is not a cookbook."

In regard to the specific tests that were performed and whether they were necessary or not, Dr. Buono testified:

- "Thyroid possibly."
- "Prostrate, fecal matter testing no."
- "Lipid panel is a good thing if the patient is at risk for cardiac problems."
- "Basic metabolic panel (kidney function test), would not be the first thing."
- When looking at the risk factors for the heart, you would do cholesterol testing, a basic EKG, hypertension.
- "2 view chest x-ray, not needed for respirator, but would be if heart is the issue."
- "Seemed a normal sequence of events for stress test, Doppler, etc."
- "Only rule out a couple of tests completely."

Dr. Kornhauser testified that based on the information that he had the tests he ordered were medically necessary in order to determine if the Grievant was able to wear a respirator.

The Village asserts that the Grievant did not act as a responsible steward of the taxpayers' resources because he did not question the tests, examinations and costs of the services he received from Dr. Kornhauser and his associates.

The Village concedes that the Grievant did not "intentionally ask his doctor to perform a number of unnecessary test in a malicious effort to obtain the most medical services at the full expense of the Village." Instead, the Village asserts "the real problem is the Grievant simply did not care how much the medical tests cost or how many medical tests his treating physicians performed." (Emphasis in the Original). However, there is no evidence to support such a finding. To the contrary, the Grievant testified that he requested, of both the physician doing the initial screening for the Village and of the supervisor administering the program, that the Village physician administer the tests herself. The Grievant only went to his physician at the Village's direction.

In addition, the Grievant testified that he had no reason to question the tests because he had definite symptoms and he had been going to Dr. Kornhauser for fifteen (15) years. He stated that he was not a medical doctor or in a position to question Dr. Kornhauser's actions. He added that no one from the Village told him that he had to get clearance from the Village for tests conducted by Dr. Kornhauser.

Except in two instances (fecal testing and prostate), Dr. Buono could not say that the tests performed by Dr. Kornhauser and his associates were unnecessary. Not surprisingly Dr. Kornhauser said that they were appropriate given the symptoms described by the Grievant.

In addition, the Village handbook in the section dealing with respirator use makes it clear that the symptoms the Grievant was complaining about (shortness of breath and chest pains) are directly related to his ability to wear a respirator. Dr. Buono noted these concerns of the Grievant in her referral form that went to Dr. Kornhauser. These are the symptoms that Dr. Kornhauser evaluated as a result of his additional testing.

Based on same, and the foregoing, the Arbitrator rejects the Village's contention that the Grievant did not act in a responsible manner when he visited Dr. Kornhauser.

The Village next argues that the Arbitrator may be tempted to be sympathetic to the Grievant because of the amount of medical expenses in dispute. According to the Village, however, other arbitrators have analyzed similar situations and determined that full or partial payment by the employee in those cases was appropriate. Those cases, in the Arbitrator's opinion, are distinguishable from the instant dispute.

The Village first cites VILLAGE OF GERMANTOWN (POLICE DEPT.), Case 213, No. 49934, MA-8109 (Gratz, 9/94), where the arbitrator denied an employee's request for mileage reimbursement and eleven hours of overtime for driving time when the employee decided to commute daily for a multi-day training program in Appleton. The Village had a

practice and directive requiring employees to stay at a dormitory in Appleton during the week,

and employees were informed that any travel was on their own time and expense during the training. The arbitrator upheld the Village's practice and directive and denied the employee's request for both mileage reimbursement and overtime.

In VILLAGE OF GERMANTOWN (POLICE DEPARTMENT), *supra*, the employer clearly told the employee that it would not pay for the expenses that were later claimed. In addition, the employer had a practice and directive requiring employees to stay at the training. In the instant case, the Village ordered the Grievant to go to his doctor and told him that the Village would cover the expenses. There was no past practice or directive that would require the Grievant to pay all or part of the requested tests.

The Village also cites OCONTO COUNTY (SHERIFF'S DEPARTMENT), Case 109, No. 48085, MA-7502 (Engmann, 11/93). There, the arbitrator refused to reimburse a Deputy for the full $6404 of education expenses incurred by the employee. Instead, the arbitrator awarded only $3050 because the amount subject to possible reimbursement was stated in a "Memorandum of Understanding" as contingent upon money available from grants and the Department education budget.

In, OCONTO COUNTY (SHERIFF'S DEPARTMENT) *supra*, the union was attempting to get all the training paid for and the County took the position that it did not have to pay anything. In concluding that the County had an obligation to abide by the terms of a "Memorandum of Understanding" it agreed to for paying the Deputy's education expenses, the arbitrator wrote:

> Therefore, to accept the County's argument, I would not only have to accept the County entered into said memorandum in bad faith, but I would be forced to be party to said bad faith. The County cannot say to the Grievant, that it will reimburse her and, after she has relied upon said statement, deny her reimbursement by saying the collective bargaining agreement does not allow it. (Emphasis in the Original); OCONTO COUNTY (SHERIFF'S DEPARTMENT), *supra*, p. 9

Here, like OCONTO COUNTY (SHERIFF'S DEPARTMENT), the Village has said to the Grievant that it will pay for the costs associated with his medical evaluation for respirator use. In this regard, the Village's Health and Safety Manual states: "The expenses associated with training, medical evaluations, and respiratory protection equipment will be borne by the Village of Germantown." (Emphasis added); (Joint Exhibit No. 8. p. 87). In addition, the coordinator of the program reaffirmed that to the Grievant when questioned who is going to be paying for these tests. Under these circumstances, the Village is acting in an unreasonable manner by not abiding by the terms of its own manual and written and oral directives to the Grievant and denying reimbursement.

In LEGAL ACTION OF WISCONSIN, INC., Case 4, No. 48303, No. 5002 (Nielsen, 4/93, the arbitrator denied an employee grievance relating to compensation as regular work for

attendance at an eight-day conference in Malaysia. In that case, however, the employee

requested approval of a trip to Malaysia, which was not granted. (Emphasis in the Original). In this case, the Grievant was ordered to do something and assured that the testing would be paid by the Village. (Emphasis in the Original). In that case, the arbitrator found that while some indication of approval or disapproval would have been appropriate prior to the grievant attending the conference, the grievant should have known that attending a conference in Malaysia was not routine. Arbitrator Nielsen determined that "by committing to the trip without prior approval, [the grievant] accepted the risk." LEGAL ACTION OF WISCONSIN, INC., *supra*, p. 9. Any unfairness in the employer's denial of reimbursement or wages after the employee attended the conference was offset by the grievant's unreasonable decision to attend a conference without knowing whether he would be paid by the employer. In contrast, the Grievant was told herein that he should go for further evaluation by his physician and that the costs would be paid by the Village.

The Village further cites a judgment made by Arbitrator Nielsen in the aforesaid case as compelling in this case. Specifically, Arbitrator Nielsen found that "the grievant was equally capable of speaking [with his employer] before finally committing himself to the trip as [was the employer] of speaking with the grievant. One of them should have. Neither did." The Village opines that in the Grievant's case, however, the Village, through Mr. Zimmerman and through Dr. Buono, did communicate specific instructions and limitations to the Grievant. (Emphasis in the Original). The Village states that rather than following those directives the Grievant directly contravened those directives causing the unnecessary medical procedures. However, as noted above, the Grievant did as he was asked and the instructions given by Dr. Buono were not precise or limiting. To the contrary, Dr. Buono mentioned a number of symptoms that the Grievant was complaining of in the context of being evaluated for respirator use. Dr. Buono conceded that most of the tests in question could have been appropriate given the Grievant's complaints of various symptoms. Those symptoms deal with issues directly related to respirator use. Both Dr. Buono and the Grievant's supervisor directed the Grievant in general terms to have further medical evaluation done to be cleared for respirator use. No one put any limitations on the Grievant's subsequent evaluation or told him to check back with the Village or its physician prior to having anything more than a stress test conducted.

Finally, in MANITOWOC COUNTY (HUMAN SERVICES), Case 356, No. 58602, MA-11008 (Gallagher, 8/00), the arbitrator rejected a grievance relating to a denied request to attend a specific conference. Relying solely on past practice, the arbitrator found that the grievant had no right to attend any specific conference without approval. The arbitrator determined that if the "Union were to prevail in this case, theoretically, [an employee] could take any courses which would give him/her [continuing education credits] and which was within the broad generic outlines of relevancy stated in [the] contract] without regard to the County's budgetary restraints . . . Such a result would be economically insupportable." MANITOWOC COUNTY (HUMAN SERVICES), *supra*, p. 8.

However, as pointed out by the Union, in the above case, the employee requested to go to a specific educational program that was not required. (Emphasis in the original). In the

Village, that she perform the required tests. The Grievant was ordered to see his personal physician. (Emphasis in the original).

In addition, this is apparently the first time for the Village or any of its employees to run into this issue. Both employees, who were sent for testing, ran into problems with the Village paying for the associated expenses. The Village ultimately paid for tests (initial visit, EKG and blood testing) beyond the stress test for the other employee. (Joint Exhibit No. 4). Contrary to the Village's assertion, this was not on a non precedent setting basis. Id.

Furthermore, the Village argues that concepts of equity provide this Arbitrator with some options for fashioning an appropriate remedy where an all-or-nothing solution does not seem equitable or effective. However, to apportion the costs of tests and services related to respirator use and the Grievant's mandated second medical evaluation would require the Arbitrator "over one and one-half years after the services were performed – to try and weigh competing medical opinions and second guess the judgment of each physician" something the Village also cautions against. Since both physicians are largely in agreement over the validity or possible validity of all the tests save two or three (the Village would add x-rays to the category of charges not related to respirator use in addition to the prostate examination and fecal-matter testing noted above), such an approach does not seem appropriate.

Finally, the Village opines that the essence of this case boils down to who should pay for three basic categories of charges for medical services. The first category, according to the Village, are those medical charges the Village specifically authorized prior to the performance of services by Dr. Kornhauser which the Village acknowledges it has an obligation to pay (the stress test). (Emphasis in the Original). The second category includes the medical charges for which there does not appear to be any serious argument that they are related to respiratory certification (for example, prostate examinations, x-rays and fecal matter testing). The third category are those medical charges for testing that, in retrospect, may or may not have been necessary for the Grievant to receive clearance for respirator use "when considered in light of Dr. Buono's limited directive to conduct a stress test."

The Village maintains that the key to determining who should pay the medical charges for the testing in the third category lies in deciding whether the Grievant or the Village created this dispute in the first instance. In this same vein, the Village asks rhetorically: "If there is a ruling against the Village, then we must ask what more the Village could possibly do to avoid this in the future?" (Emphasis in the Original).

As noted above, the Grievant went for further medical evaluation by his personal physician in order to be certified for respirator use at the direction of the Village and its doctor. He did so in conformance with the work rules (Village "**Safety & Health Hand Book"** in the Section entitled "Respiratory Protection Program") and, consequently, Article 2 of the collective bargaining agreement. The Village, by refusing to pay for the tests, is in violation of the aforesaid work rules as well as the disputed contract provision. From that

perspective, one might conclude that the Village created this dispute.

However, that is too simple an answer. This was, in the Arbitrator's opinion, a dispute waiting to happen and there are any number of reasons why. However, these are issues that the Village can address either unilaterally or perhaps more effectively in collaboration with the Union.

In requesting that the Arbitrator deny the grievance, the Village argues that a decision in favor of the Grievant "will create a disincentive for employees in the future to seek tailored medical services to answer narrow questions posed by the Village or to ask their treating physicians to communicate with the Village prior to the performance of tests." A decision in the Village's favor, on the other hand, "will ensure that employees seek and obtain the medical testing that is necessary and approved before any extraneous and unrequested testing is conducted." Such a decision, according to the Village, "will best protect the interests of the taxpayers of the Village and the employees."

The Arbitrator is in agreement with most of these sentiments. Employees should seek tailored medical services restricted to answering the questions posed by the Village related to the performance of their work; treating physicians should communicate with the Village prior to the performance of such tests; only medical testing that is necessary and approved should be performed; no extraneous and unrequested testing should be conducted; and these matters ought to be undertaken in a manner designed to protect the interests of both the Village's taxpayers and its bargaining unit employees. The Arbitrator does not believe his decision, limited to the specific facts of this case, is contrary to such principles and encourages the parties to find ways to accomplish these goals.

Based on all of the above, the Arbitrator finds that the answer to the issue as framed by the Village is YES, the Employer violated Article 2, Management Rights, of the collective bargaining agreement as alleged in the grievance. For the reasons discussed above, the Arbitrator finds that it is appropriate to order the Employer to pay the medical bills in question.

In reaching the above conclusions, the Arbitrator has addressed the major arguments of the parties. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator's decision.

Based on all of the foregoing, it is my

AWARD

The grievance is sustained. The Employer is ordered to pay all the medical bills in question.

Dated at Madison, Wisconsin, this 1st day of November, 2005.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

DPM/gjc
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