

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF WAUSAU

and

**LOCAL 415, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
WAUSAU FIRE FIGHTERS ASSOCIATION, AFL-CIO and CLC**

Case 135

No. 68538

MA-14262

(Sick Leave/Temporary Duty Grievance)

Appearances:

Dean R. Dietrich, Attorney, Ruder Ware, 500 First Street, Suite 8000, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appeared on behalf of the City of Wausau.

John B. Kiel, Attorney, 3300-252nd Avenue, Salem, Wisconsin 53168, appeared on behalf of Local 415, International Association of Fire Fighters, Wausau Fire Fighters Association, AFL-CIO and CLC.

ARBITRATION AWARD

The City of Wausau, herein the City, and Local 415, International Association of Fire Fighters, Wausau Fire Fighters Association, AFL-CIO and CLC, herein the Union, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Union filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission to resolve a grievance filed by the Union concerning the application of the sick leave/temporary duty provisions of the collective bargaining agreement. From a panel the parties selected Commissioner Paul Gordon to serve as arbitrator. Hearing on the matter was held on July 16, 2009 in Wausau, Wisconsin. No transcript was prepared. A briefing schedule was set and later extended by the parties, and the record was closed on October 27, 2009.

ISSUES

The parties did not stipulate to a statement of the issues, but agreed that the arbitrator would frame the issues as best reflected by the record. At the hearing the Union stated the issues as:

Did the City violate the collective bargaining agreement and the temporary duty agreement when it unilaterally issued "Sick Leave Policy Revision #2" on November 21, 2007 and unilaterally reduced Brian Stahl's sick leave account by twenty-four (24) hours as a result of his October 12, 2007 absence due to a work related injury?

If so, what is the appropriate remedy?

In its briefing the Union stated the issues as:

Did the City violate the collective bargaining agreement and the temporary duty agreement when:

1. it unilaterally issued "Sick Leave Policy Revision #2" on November 21, 2007; and when
2. it unilaterally offered light duty to and reduced Brian Stahl's sick account by twenty-four (24) hours as a result of his October 12, 2007 absence due to a work related injury? If so, what is the appropriate remedy?

At the hearing the City stated the issues as:

Concerned the right of the City to offer a limited duty assignment or a restricted duty assignment to a member of the bargaining unit and provide an opportunity for the employee to decide whether or not they were going to work that restricted duty assignment?

In its briefing the City stated the issues as:

Whether the City violated the Labor Agreement when it offered firefighters the opportunity to return to work on light duty within their medical restrictions if taking time off related to worker's compensation?

If so, what is the appropriate remedy?

The arbitrator frames the issues best reflected by the record as:

Whether the City violated the Labor Agreement when it unilaterally offered firefighters the opportunity to return to work on light duty within their medical restrictions if taking time off related to worker's compensation without such duty being first requested by the employee?

Whether the City violated the Labor Agreement when it unilaterally reduced Brian Stahl's sick account by twenty-four (24) hours as a result of his October 12, 2007 absence due to a work related injury?

Did the City violate the collective bargaining agreement and the temporary duty agreement when it unilaterally issued "Sick Leave Policy Revision #2" on November 21, 2007?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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 the 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.
- F. To take whatever action is necessary to comply with State or Federal law.
- 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 modifications of the 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 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 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

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 as 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:

BACKGROUND AND FACTS

The Temporary Duty agreement set out above has been in its current form since it was originally agreed to in 1995. Before that there was a City wide policy that there was no light or restricted duty offered for any employees with medical restrictions due to on the job injuries. However, prior to 1995 there had been a telecommunication position or status (house dog) in the fire department which allowed an employee with medical limitations when injured to perform light duty for a time rather than use sick leave. When that status or position was eliminated the 1995 Temporary Duty agreement was entered into. At the hearing in this matter the City Human Resources Specialist testified that this was for off the job injuries to extend work time in order to save sick leave. In 2003 a bargaining unit member, Chad Eberle, was ordered by the Department, against his wish, to take a take light duty assignment while he was otherwise off work and on worker's compensation due to a job related injury. That order was grieved by the Union and the grievance was sustained in grievance arbitration. CITY OF WAUSAU, Case 107, No. 63348, MA-12556 (Baumann, 12/04). Other than those instances referenced in the Eberle grievance arbitration award occurring after Eberle was ordered to work, on no other occasion since the 1995 agreement to October 10, 2007 was light duty

ordered to be performed or required of bargaining unit members who had been injured at work and were otherwise off duty on worker's compensation in order to preserve sick leave. The City did not make any deductions from the sick leave accounts of any such employee for the time they were off work on worker's compensation and declined any light or temporary duty made available or offered by the City. There have been occasions where employees who had been injured at work and were off duty on worker's compensation had requested Temporary Duty within the limits of their medical condition and were granted such duty.

During the 2005 collective bargaining there was at least one proposal by the City that would have altered the Temporary Duty agreement by requiring those off work on worker's compensation to come back to work on restricted duty. The Union did not agree to that proposal.

On October 3, 2007 Brian Stahl, a member of the Union, was injured at work. He experienced pain in his rib area which remained for several days. He continued to work as scheduled and notified his employer of his injury in writing on October 8th. On October 9th he went to his Doctor and provided the City with a doctor's note concerning his injury. The City faxed a report form to the Doctor which the Doctor filled out and returned the following day, October 10th, containing a light duty 20 pound lifting restriction through October 16th, and noted Stahl was on pain medication.

On October 10th the Battalion Chief called Stahl and offered light duty to him. Stahl did not request light duty, and declined the offer of light duty and said he was on medication for pain. At the Battalion Chief's request Stahl brought his medication sheet to the department. While there, the Fire Chief asked Stahl if he would accept light duty, which he again declined, and he did not ask for light duty or Temporary Duty. He was then told that the City would deduct 24 hours from his sick leave account for October 12th, a day he was otherwise scheduled to work. He did not work October 10th or October 12th. The City deducted 24 hours from his sick leave account for each day for a total of 48 hours because he did not accepting light duty on October 10th and for October 12th. Normal schedules of duty for Firefighter Employees and Temporary Duty Employees contain 24 hour shifts.

On October 31st Stahl and his Union representative met with the City to contest the deduction of the 48 hours from his sick leave account and contended that he was not offered light duty for those days -- as opposed to being ordered or required to work light duty or lose sick leave time. The parties discussed the prior Eberle grievance arbitration, among other things. The City maintained that it had offered Stahl the ability to come to work and that it was his decision whether to come to work or not. The City acknowledged that there may have been some confusion over the nature of the events of October 9th and October 10th as to what Stahl might have understood as to light duty offers on October 10th. The City therefore credited back 24 hours of sick leave for October 10th. The City did not credit back 24 hours of sick leave for October 12th.

According to the testimony at the hearing of the City Human Resources Specialist, it is the City policy to offer light duty within medical restrictions to an employee on worker's compensation if it has work within those restrictions available. This, according to the hearing testimony of City Human Resources Specialist, is reflected in paragraph 5 of the Sick Leave Policy Revision #2, below.

On November 16, 2007 the Union filed a grievance on Stahl's behalf concerning the deduction of 24 hours from his sick leave account for October 12th because he had an on-duty worker's comp injury and had not requested a temporary duty assignment. The grievance contended this violated the Temporary Duty agreement.

On or about November 21, 2007 the City adopted and distributed to all department personnel the following policy:

* * *

Subject: Sick Leave Policy Revision #2

* * *

Due to concerns regarding sick leave usage, along with changes to the Family Medical Leave Act (FMLA) and the Health Insurance Portability and Accountability Act (HIPPA), an update to the Leave Use Policy is needed.

As a result, the sick leave policy is revised. This memorandum also addresses FMLA and Workers Compensation. Beginning this date the following procedures will be implemented:

* * *

Procedure

* * *

5. If this time off is related to Workers Compensation:

You are required to present a medical form completed by your doctor that defined your degree of limitation(s) and restriction(s) and it must be signed by your doctor.

Light duty will only be offered to you if it is in compliance with your degree of limitation(s) and restriction(s).

You will be placed on sick leave if you turn down light duty that is offered.

You must bring in a completed Return to Work form which is expected before or upon your return to work.

* * *

On November 30, 2007 the Union filed a grievance objecting to the November 21st Sick Leave Policy Revision #2, contending that the policy was contrary to the language and past practice of the Temporary Duty agreement.

Both grievances were denied by the City. By agreement of the parties they were combined into the instant grievance arbitration.

Further facts appear as are set out in the discussion.

POSITIONS OF THE PARTIES

The City

In summary, the City argues that the case involves the management of the Fire Department, not a re-litigation of the prior Eberle grievance. In Eberle the employee was ordered to return to work and was assigned light duty. Here, Stahl was offered the opportunity for light duty, but the decision was up to Stahl. He could choose to come to work with the light duty assignment or continue off work. Since he would not qualify for worker's compensation payment, he was placed on sick leave in order to continue his salary. He could have chosen to take a leave of absence without pay, but it was not anticipated that he would want to do so. The policy at issue was adopted after the incident with Stahl. It reflects the Department's understanding of how the policy should apply if a firefighter suffers a work-related injury and what should happen if the employee does not wish to return to work when offered light duty within their medical limitations. The conduct of the City is a logical extension of its management rights under the management rights clause. The City wanted to afford Stahl the opportunity to report to work within his medical limitations. This is a management right necessary for the City to effectively operate the Department. It was not the imposition of a requirement upon Stahl. It was not a violation of the Temporary Duty agreement, which was to provide temporary duty for firefighters who suffered off the job injury and wanted to continue salary payments when at or near exhaustion of sick leave.

The City argues that its conduct regarding light duty was a reasonable exercise of its management rights. Its conduct is limited to offering Stahl the opportunity to report to work and perform light work within his medical limitations. By working light duty he is not required to use sick leave in order to continue his salary or after exhausting sick leave and workers compensation benefits that would apply. This encourages firefighters to return to work and be more inclined to report to duty instead of being off duty. This is a reasonable and legitimate exercise of the management rights reserved to the City.

The City argues that the management rights Article gives the City the authority to offer light duty to members of the Union. Management retains all rights absent a specific restriction in the labor agreement. The rights retained by the City include the right to offer employees the opportunity to work and perform work within medical restrictions, enumerating several of the management rights. The action taken by the City is only to offer the opportunity for firefighters to report to work and perform work within their medical restrictions. The City was exercising its management rights when it established the policy regarding sick leave which included providing an opportunity for employees to report to work and perform duties within their medical limitations.

The City further argues the operation of the worker's compensation statute should not interfere with the right of the City to offer light duty work to members of the department. The Union argues that the City should not exercise its management rights to offer light duty work to members of the department because the firefighters may choose not to report to work and may lose eligibility for worker's compensation benefits. The operation of the workers compensation statute should not interfere with the right of the City to offer work to members of the Department. The management rights clause under Article 4 gives the City the right to comply with applicable state statutes, including workers compensation. The case centers on the labor agreement, and for the Union to argue that the City may or may not take action based upon the operations of the statutes exceeds the scope of review under the labor agreement. Nothing in the labor agreement suggests the rights of the City are limited or restricted to those a state statute may impact benefits or eligibility of benefits of an employee. Wisconsin has a workers compensation statute applied by the appropriate state agency, which should not be a factor in determinations here under the labor agreement.

The City also argues that the provisions of the Temporary Duty agreement do not restrict the right of the City to offer limited duty work to members of the department. That agreement was negotiated to address Union concerns after the house dog position was eliminated. This position was available for employees to report to work and perform limited duty work if they had exhausted their sick leave and would have to go on leave without pay because of an injury they suffered while off duty that prevented them from returning to work and performing all the duties of the firefighter position. This temporary Duty agreement was for firefighters who suffered an off the job injury. Employees wanted the opportunity to request temporary duty. The provisions of the Temporary Duty agreement do not apply to the situation faced in these grievances. The City offered an opportunity for employees on worker's compensation to report and to perform duties within their medical restrictions. This is a different circumstance from the situation which caused the parties to enter into the Temporary Duty agreement. The Temporary Duty agreement provides that employees may request temporary duty assignments. To suggest this language prevents the City from offering a firefighter the opportunity to work on limited duty creates an absurd result and a result contrary to the management rights language in Article 4. This would mean the City cannot offer the work, but rather can only react if the employee asked for the opportunity to work. This is an absurd result of the employee being the one who controls whether the employee will come to work or whether the employee will inquire as to whether there is work available for the employee within his/her medical limitations. The City here is affording an opportunity to perform duty within their medical restrictions; there is no action by the City to require a firefighter to report to work when unable to perform all the regular duties of the position.

The City argues that the prior arbitration decision between the City and the Union is not applicable to the case before the arbitrator. The Eberle case and this case have different issues. This case involves City action to offer to an employee the opportunity to work and make available restricted duty work for the employee within the medical limitations. This is not a case, like Eberle, where the City unilaterally ordered an employee to report to work and perform duties within medical restrictions. The Eberle award addressed a very specific issue. The City acknowledges that the Eberle award involved an employee who suffered an on the job

injury but that is the only similarity between that case and the instant one. In this case the City did not order Stahl back to work. It only offered the opportunity to work within medical limitations. This allows a firefighter to report to work and continue to be productive even though the employee suffers an injury that restricts the employee from performing all of the regular firefighter duties. This is good public policy for the City and employees. It is obvious that the City made adjustments in how it handles the use of sick leave and return to work for light duty after the Eberle arbitration award. The City no longer requires the employee to report to work for restricted duty. Employees are offered that opportunity, but it is not a requirement. The Eberle award is not precedent and cannot be relied upon when considering this matter.

The City also argues that the Union's reliance on past practice is also not controlling in this instant matter. The Union offers no evidence of a past practice that is relevant or particular to the conduct that is in dispute in this proceeding. This case is about whether the City can offer restricted duty. That conduct is not something that was done by the City in the past and is not controlled by any alleged past practice as the Union suggested. The offering of restricted or light duty under the Temporary Duty agreement only applies where an employee has suffered an off the job injury and wishes to return to work instead of using sick leave or after exhausting all available sick leave. The Temporary Duty agreement was negotiated for a specific purpose, the loss of the house dog assignment. That is not what is being addressed in this case. The policy provides an opportunity for an employee who suffers an on the job injury to come to work and perform restricted duty within their medical limitations. This is very different than the alleged past practice relied upon by the Union to argue that the City cannot offer this type of return to work opportunity. The arbitrator must assess the conduct of the City in this case based upon the management rights language and the right of the City to operate the department.

The City requests that the grievances be denied.

The Union

In summary, the Union argues that the present dispute is governed by the plain language of the Temporary Duty agreement. The goal in contract interpretation is to ascertain the intent of the parties, which is evidenced by the words they choose, if unambiguous. Clear and unambiguous contract language should be applied as written without resort to other evidence of intent. Disagreement over meaning of language doesn't mean it is ambiguous, citing legal and arbitral authorities. The terms light duty, restricted duty, limited duty and temporary duty are essentially the same. Here the language of the Temporary Duty agreement is plain and unambiguous. It states that temporary duty will be made available to employees only at the request of the employee. Stahl did not request temporary duty. The City offer made temporary duty available to Stahl. The City knowingly compromised Stahl's eligibility for workers compensation benefits, and thereafter assigned him to sick leave. Nothing in the Temporary Duty agreement suggests the City had the right to offer - make available - temporary duty. The plain and unambiguous language indicates that temporary duty will only

be made available to employees at the employee's request. When the City offered light duty and reduced Stahl's sick leave account it violated the terms of the contract and the side letter of agreement for Temporary Duty. The City violated them a second time when it adopted the November 21, 2007 sick leave policy as to worker's compensation provisions.

The Union argues that Arbitrator Bauman's award in the Eberle case should be given final and binding effect in this case. The parties' labor agreement provides for final and binding arbitration in Article 8. The meaning of the contract and side letter of agreement regarding temporary duty was visited before in the Eberle grievance arbitration. By arbitral precedent and agreement between the parties the earlier grievance should be given controlling precedent, citing arbitral authorities. Here, the Eberly case is on point. It has the same contractual provisions, same parties, same fact situation and the same evidence. The City's claim that it merely offered temporary duty rather than ordering it is to jump over the significant commonality of the cases and the common violation of the contract. Neither Eberly nor Stahl requested temporary duty yet, the City unilaterally made it available to them in violation of the temporary duty agreement. The agreement provided that that temporary duty is to be made available to employees only at the request of the employee. The City should not be allowed to avoid the final and binding effect of the Eberle case with a weak, post violation distinction. The prior arbitration award concluded temporary duty and light duty are essentially the same, the temporary duty under the side letter would only be made available to employees at their request, and the implementation of a restricted or light duty program is a mandatory subject of bargaining. The City faced an obligation to bargain a change to the employees' privilege in the temporary duty agreement. The grievance there was sustained on the clear and unambiguous language of the temporary duty agreement. Since that decision there have been no material changes in circumstances and there is no evidence that the Temporary Duty agreement was intended to mean and be applied in a manner other than expressed in the Eberle award. Both grievances should be sustained based on the earlier decision.

The Union also argues that the City unilaterally changed a substantial benefit available to employees in violation of the collective bargaining agreement. In the past, bargaining unit members injured at work enjoyed the right to recover at home and collect worker's compensation benefits, citing the Eberle award. Setting Eberle aside, between 1995 and October of 2007 Union members injured at work were allowed to recover at home while collecting worker's compensation benefits without a reduction in their accrued sick leave. The City offer and making temporary duty available to Stahl jeopardized his eligibility for worker's compensation benefits. As a City witness pointed out, once an employee is offered temporary duty they have a choice to accept or decline that offer, and if declined they risk the loss of worker's compensation benefits. This is a loss of a substantial benefit and is a mandatory subject of bargaining, citing Sec. 102.43(9)(a), Wis. Stats., and Eberle. The City executed a unilateral change to a mandatory subject of bargaining in violation of the collective bargaining agreement, including Article 31 – Past Practice and the Temporary Duty agreement. The November 21, 2007 sick leave policy also violated Article 31 and the Temporary Duty agreement by changing a benefit, practice and condition of employment that is mandatorily bargainable.

The Union further argues that the City should not be allowed to unilaterally seize that which it is unwilling to obtain in collective bargaining. In collective bargaining in 2005 the City proposed changes to have those on worker's compensation come back on restricted duty, complaining of the high cost of worker's compensation claims. The Union did not agree to this change. In the fall of 2007 the City acted on its own accord. This makes a sustainable grievance, citing arbitral authority. The City offer of temporary duty to Stahl and change in the sick leave policy was an attempt to avoid the obligation to bargain and get around the Eberle decision. This effort to escape the duty to bargain should be blocked. These matters belong at the bargaining table.

The Union argues the City violated Article 18 – Sick Leave when it unilaterally placed Stahl on sick leave. Article 18, paragraph F makes clear that employees eligible for worker's compensation benefits have the right to endorse their workers' compensation check to the City and receive in exchange their normal paycheck based on their normal work week with no loss of sick leave during the first ninety working days of benefit. Here the City unilaterally placed Stahl on sick leave, and he lost sick leave within the first ninety working days of benefit. This is a clear violation of Article 18, paragraph F.

The Union argues the City's unilateral modification of the sick leave policy violates the collective bargaining agreement and the side letter of agreement regarding Temporary Duty. The sick leave policy existing since 1999 made no reference to light duty, temporary duty, restricted duty or any other form of alternate work. After Stahl filed his grievance the City unilaterally modified the sick leave policy to include the provisions of paragraph 5 in the November 27, 2007 policy revisions. This unilateral restriction of workers compensation is a change in a mandatorily bargainable benefit, practice or condition of employment. Proposals relating to sick leave are mandatory subjects of bargaining, citing arbitral authority. The City violated Article 31 – Existing Practices. The change also conflicts with Article 18, paragraph F, which provides for endorsing worker's compensation check to the City for normal pay without loss of sick leave. The changed policy would result in a loss of sick leave if a member turns down light duty. The change is a violation of the plain language of the collective bargaining agreement.

The Union further argues the City violates the duty of good faith and fair dealing. Every contract has duty of good faith and fair dealing, citing arbitral authority. The City position is it has the sole and exclusive discretion to do as it pleases in regard to temporary duty or alternate work arrangements. As it did what it wants, it can hardly be said the City did anything but breach the duty of good faith and fair dealing. The plain language of the Temporary Duty agreement and the Eberle award were ignored. The City failed in bargaining to get the concession. It now ignores that process by acting unilaterally. It admits it was an attempt to get around the Eberle award. It went further in changing the sick leave policy in violation of Article 18, paragraph F to secure a concession in bad faith and without fair dealing.

The Union requests an appropriate remedy for Stahl and similarly situated members of Local 425, a rescission of the November 21, 2007 policy revision #2 regarding light duty, a return to the status quo and make whole relief at time and one half for all light duty hours worked during the time they would otherwise have been free to recuperate at home.

City Reply

In summary, the City replies that the arbitration award in the Eberle case is not applicable to this dispute. That fact situation is entirely different from the situation relating to Stahl. Stahl was offered an opportunity to perform light duty and he chose, of his own volition and accord, not to perform light duty. And the City reinstated the sick leave for October 10th due to his potential confusion. Eberle only applies to fact situations that are similar to the fact situation in dispute in that proceeding, which is clearly different and distinct from that here. The Union's reliance on the Eberle award is inappropriate and contrary to arbitral precedent.

The City argues the Temporary Duty agreement does not apply to the circumstances of this grievance. The Temporary Duty agreement is for instance where a firefighter has exhausted all available sick leave and needed to report to work due to a non-work related injury in order to preserve his/her employment and pay status. Witnesses for the City and the Union acknowledge the agreement was entered into because of a loss of a dispatch position used to allow an injured firefighter to report to work and not suffer loss of pay status because they had exhausted all sick leave. Uncontroverted testimony shows the agreement was to allow those with a non-work related injury the opportunity to perform some level of work and continue pay status. The agreement does not apply to Stahl's work related injury and he was eligible to receive worker's compensation and continue in pay status in accordance with Article 18, paragraph F. And the City did not violate that Article. It offered limited duty to Stahl. The decision was his to take it or not. His decision is the only decision that impacted whether or not he was eligible for a worker's compensation benefit.

The City also argues that the Actions of the City did not unilaterally change a benefit available to bargaining unit members. The labor agreement cannot supersede the provisions of the workers compensation statute. That would be contrary to legal principals and Article 30 - Savings Clause of the labor agreement. The City has the right to make an offer of limited duty to a firefighter, who then has the right to decide whether to accept that assignment. How the worker's compensation statute is applied when an employee refuses to work a limited duty assignment is not governed by or limited by the labor agreement. The City offered an opportunity to work limited duty. Employees have not been denied any benefit by operation of the City. The applicability of the worker's compensation benefit is determined by operation of the statute, not the actions of the City.

The City argues that the Union's objection to the placement of a firefighter on sick leave ignores the real issue before the arbitrator. The revised sick leave policy is based on the assumption that a firefighter will want to continue his/her salary if the firefighter is no longer eligible to receive worker's compensation benefits and the provisions of Article 18, paragraph F do not apply. The decision rests with the firefighter, not with the Fire

Department. A firefighter could be placed on leave without pay or continue to claim eligibility for worker's compensation benefits and face a determination from the Worker's Compensation Division on the eligibility for that benefit. The City assumed that the firefighter would want to continue pay status rather than be placed on leave without pay. That assumption does not contravene the right of the City to offer limited duty to a firefighter who claims a work related injury. Leaving the decision to the employee is recognized in the sick leave policy. This inherent right and the discretion given to the firefighter is consistent with the management rights of the City.

Union Reply

In summary, the Union replies that the City's own argument exposes the City's violation of the past practices clause of the collective bargaining agreement. The dispute goes back to 1995. In the course of that history limited or restricted duty has been made available to employees only at the employee's request. Other than Eberle and Stahl, the City has never taken the unilateral initiative to offer limited or restricted duty to employees. In the past bargaining unit members have enjoyed the right to recover from work related injuries at home with no loss of sick leave and without the risk of a loss in worker's compensation benefits. With Stahl, the City now changes the past practice regarding light duty. The City's own brief argues that this is different from everything that has occurred previously. Article 31 – Past Practices is clear. The City cannot change the historical application of any benefit, practice or condition of employment which is mandatorily bargainable. Light duty policies concerning an employee's right to recover at home is a mandatory subject of bargaining, citing arbitral authorities. When the City changed the manner in which it applied temporary duty it violated Article 31.

The Union argues that the City's claim that the Eberle grievance is not controlling ignores the clear and unambiguous holding of arbitrator Bauman. When the City offers light duty to an employee it is in fact making light duty available to that employee. The Eberle award relied on the side agreement as the foundation on which it concluded that the City violated the collective bargaining agreement when it made light duty available to Eberly and made him accept it. That same foundation should control this case. The only difference is that rather than make Stahl work light duty, the City subjected him to a loss of worker's compensation benefits should he not accept. The same conclusion applies in both cases. The City violated the side letter of agreement.

The Union also argues that the City's claim that the side letter of agreement applies only to off the job injuries is unpersuasive. The City claim that the side agreement only applies to off the job injuries was lost in the Eberle award. If the City wants to change the agreement it should be directed to the bargaining table.

The Union further argues that the management rights clause does not support the City's unilateral violations of the collective bargaining agreement. The City's argument about management rights was made and lost in the Eberle award. The City has a duty to bargain before making changes because the light duty provision and the sick leave provisions are mandatory subjects of bargaining. They are governed by Article 31 ahead of the management rights clause.

The Union argues that in offering light duty to employees who suffer on the job injuries the City uses the worker's compensation statute to leverage a change in conditions of employment and avoid its duty to bargain. The City asks the arbitrator to ignore the consequences of the offer of light duty. The offer triggers an exposure to bargaining unit members if they decline and run the risk of being denied worker's compensation benefits. Few would run that risk. The employer compels an injured employee to report to work, and deprives the member of the right to recover at home without loss in benefits. This changes wages, hours and working conditions without bargaining.

DISCUSSION

As summarized by the City at the hearing, the case concerns the right of the City to offer a limited duty assignment or a restricted duty assignment to a member of the bargaining unit and provide an opportunity for the employee to decide whether or not they were going to work that restricted duty assignment. For purposes of this award, the undersigned is persuaded that limited duty, light duty, restricted duty and temporary duty are all work assignments within physical or medical limitations placed upon an employee by their physicians. There are three facets to the offer of such duty in this case. One is the offer made to Stahl while he was on worker's compensation. The second is the deduction of 24 hours from his sick leave balance. The third is the issuance of the Sick Leave Policy Revision #2 which reflects the action taken in the Stahl offer.

One of the pillars upon which the City builds its case is the Management Rights clause of Article 4 of the collective bargaining agreement and the retained rights principle buttressing that. The City argues that it has the management right to offer light, restricted or temporary duty within the medical restrictions of an employee who is otherwise off work on worker's compensation due to a work related injury. It is then the employee's choice whether or not to accept that work, with whatever ramifications to the employee for worker's compensation benefits being a function of the worker's compensation statutes, not the actions of the City or the result of anything in the collective bargaining agreement. However, the management rights clause does not stand alone. The clause itself states that "such rights must be exercised consistently with the other provisions of this contract." The pillar of management rights is thus joined by the pillars relied upon by the Union, Article 18 – Sick Leave paragraph F, the Temporary Duty agreement, and Article 31 - Past Practices, to support the whole of the contract, which must be read as a whole and its various components harmonized with each other. The City's management rights are limited by the other terms of the collective bargaining agreement. Whether those other terms apply to the situation faced by Stahl and the Sick Leave Policy Revision #2 to limit management rights, and if so, how they apply, will be determinative of the issues.

A foundational question must be decided. The City contends that it is merely making an offer of a work assignment and that is not in conflict with any other provision of the collective bargaining agreement. The Union contends that in making that offer the City is really making such duty available without the request of the employee in contravention of the

Temporary Duty agreement and also in contravention of Article 18 paragraph F, which provides the employee with continued full salary for a time in exchange for the worker's compensation check, and thereafter the employee retains the choice of using sick leave to supplement worker's compensation benefits. The Union argues, and the City does not dispute, that by making the offer, if declined by the employee, the employee risks losing worker's compensation benefits under the application of Sec. 102.43(9)(a), Wis. Stats. Without the offer there is presumably no risk to the employee. The undersigned recognizes that the risk of loss of worker's compensation benefits can influence what choice an employee would make based upon the offer being made by the City. The employee has a financial gain if the offer is not made because the employee gets a full salary without using sick leave for up to ninety days. If the employee does not accept the offered work assignment then there is no regular salary, worker's compensation is jeopardized, and resort must be made to any accumulated sick leave for income continuation. On the other hand, the City has the potential to lower its worker's compensation exposure and related costs if such an offer is not accepted, and it might avoid the payment of up to ninety days of the difference between workers' compensation and salary without reducing the liability of accumulated sick leave. The way Article 18, paragraph F and the Temporary Duty agreement are worded the employee injured on the job endorses the worker's compensation check to the City and receives a full salary without loss of or use of sick leave for the first ninety days. Thereafter the employee must exercise an option for receipt of worker's compensation benefits and no other salary or reduction on sick leave, or to receive workers' compensation benefits with the balance of salary made up from reducing the sick leave account. It is up to the employee to request that temporary duty within medical limitations be made available. The pertinent provisions of Article 18, paragraph F State:

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.

The pertinent provisions of the Temporary Duty agreement state:

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

* * *

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.

That is why it matters if the City unilaterally making an offer without first having temporary duty requested by the employee is the same as making temporary duty available without first having it requested by the employee. The undersigned is easily persuaded that it is. When the City makes an offer it is light or temporary duty that it is offering for the employee to work. It does not offer that duty if that duty is not available for the employee to accept the offer. When the City makes an offer of limited, restricted, light or temporary duty (which are all within medical limitations of an employee) it is making that work duty available to the employee.

That leads to the next level of analysis of the three facets of the case. The first of those is to determine if the City's making that duty available without such duty being first requested by the employee violates any provision of the collective bargaining agreement. The Union argues that this violated the Temporary Duty agreement. The City argues that it does not because the Temporary Duty agreement does not apply to workers injured on the job. Rather, argues the City, the Temporary Duty agreement was intended to apply only to non-work related injuries because the house dog position or status pre-1995 was applied to employees with non-work related injuries. There are several reasons why the undersigned is persuaded that the Temporary Duty agreement does apply to employees such as Stahl who have on the job injuries and are on worker's compensation. The first reason is the plain language of the Temporary Duty agreement itself. Paragraph 1 refers to "employees". It does not further limit, condition or otherwise differentiate between employees injured on the job and those with non-work related injuries. While the agreement has limits on how many and for how long temporary duty assignments are available, there is no other limitation or definition of employee. Paragraph 6 also refers to employee and the employee is unable to perform the function of their job due to medical reasons. It does not state the cause of the medical reason or condition it on work related injury. On its face the Temporary Duty agreement applies to those with work related injuries. This is plain and unambiguous language. Nothing in the remainder of the collective bargaining agreement has been argued to present any ambiguity in its meaning. Without ambiguity there is no need to resort to past practice or bargaining history to determine the intent behind the language of the Temporary Duty agreement. That said, it is noted that the record indicates that it has been applied to some with on the job injuries since 1995, and the record does not support a conclusion that there is a mutually recognized and long standing binding past practice whereby the Temporary Duty agreement applies to only non-work related injuries. And bargaining attempts by the City in 2005 to change the language in

some fashion to require those on worker's compensation to come back to work on light, limited or temporary duty, imply the Temporary Duty agreement was understood to apply to those with work related injuries. Finally, there is the prior arbitration award in CITY OF WAUSAU, Case 107, No. 63348, MA-12556 (Baumann, 12/04), the Eberle award. In that award the Temporary Duty agreement was found to apply to a firefighter in the same bargaining unit as this one who was injured on the job and was on worker's compensation. That award considered Article 4, Article 13, Article 18, Article 31 and the Temporary Duty agreement in the same terms as in the current collective bargaining agreement. As in the Eberle case, the collective bargaining agreement here provides for final and binding arbitration. Where a prior arbitration award has been made between the same parties applying the same or very similar contract provisions to the same or similar fact situations, consideration may appropriately be given to that prior award. In SAUK COUNTY, Case 160, No. 65309, MA-13190 (Gordon, 3/07), the principle was discussed:

. . . To come to a different conclusion given the same language and fact situation would foster a type of forum shopping. It would deprive both parties from reliance upon an arbitration decision which, as is often the case, both parties rely on for guidance. The parties agreed to binding arbitration and honoring a prior arbitration award is in accordance with the agreement whose language on arbitration has not been shown to have materially changed. Moreover, arbitral authority compels serious weight and consideration be given to a prior award, even if it may not rise to the status of *Stare Decisis* under the law. This is discussed in *How Arbitration Works*, Elkouri & Elkouri, 6th Ed., pp. 573 – 593, which is noted in part:

Prior labor arbitration awards that interpreted the existing terms of a contract between the same parties are not binding in exactly the same sense that authoritative legal decisions are, yet they may have a force that can be fairly characterized as authoritative. This is true of arbitration awards rendered both by permanent umpires and by temporary or ad hoc arbitrators.

. . .

Prior awards issued by temporary arbitrators, also known as ad hoc arbitrators, also may have authoritative force. Their awards interpreting a collective bargaining agreement usually become binding parts of the agreement and will be followed by arbitrators thereafter. . . .

P. 18 (Citations omitted)

While the exact nature of the issue in Eberle was different than that faced by Stahl and implicated in the Sick Leave Policy Revision #2, the point is, considering all of the above, the Temporary Duty agreement applies to those employees like Stahl with job related injuries. Whether the facts of this case or actions of the City violated that agreement or any other provisions of the collective bargaining agreement needs to be determined.

It has already been determined that the action of the City in offering restricted duty work to Stahl was to make that work available to him. The City did this on its own. It did not wait for Stahl to request to make such work available to him. Stahl did not request that work be made available to him. The Temporary Duty agreement specifically provides that temporary duty will be made available to employees only at the request of the employee. To make temporary duty available is the choice of the employee, not the City under the plain language of the Temporary Duty agreement. When the City unilaterally made its offer it violated the Temporary Duty agreement.

The City argues that it has the right and duty to comply with state statutes such as the worker's compensation statutes. However, the City has not offered any persuasive arguments that it is statutorily required to make an offer of light duty to an employee on worker's compensation, or how not making an offer until requested by an injured employee would violate the statute.

Building upon that, the second facet, the implications of the City having deducted 24 hours of sick leave from Stahl's accrued sick leave, must be considered. The provisions of Article 18, paragraph F provide that employees eligible for workers 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. In this case only one day, October 12, 2007, is at issue for 24 hours of sick leave. During the first ninety days there is no provision under Article 18, paragraph F for the City to unilaterally deduct sick leave from an employee otherwise on worker's compensation. Stahl did not request to use sick leave. When the City reduced his sick leave balance by 24 hours in order to augment Stahl's salary it violated Article 18, paragraph F.

The final facet of the case is the issuance of the sick leave policy revision. The City issued its Sick Leave Policy Revision #2 on November 21, 2007. According to the City, that policy is what was applied in Stahl's circumstances. The introductory language to the memorandum of November 21st states that these are revised policies and that they are beginning this date. If they are revised policies and are beginning the date issued, that naturally implies that the policy before then was somehow different. The provisions of that revised policy as to worker's compensation do not on their face indicate if it is the employee or the City who is to initiate or request an offer of light duty within the degree of medical limitations and restrictions. It states:

5. If this time off is related to Workers Compensation:

You are required to present a medical form completed by your doctor that defined your degree of limitation(s) and restriction(s) and it must be signed by your doctor.

Light duty will only be offered to you if it is in compliance with your degree of limitation(s) and restriction(s).

You will be placed on sick leave if you turn down light duty that is offered.

You must bring in a completed Return to Work form which is expected before or upon your return to work.

The second bullet point only makes sense if it is the City who is offering the light duty to the employee, not the other way around. There is no provision for the employee, and only the employee, to make the request for light duty as in the Temporary Duty agreement. Making this offer of light duty under this policy without being first requested by the employee on worker's compensation violates the Temporary Duty agreement for the same reasons as set out above in the Stahl instance. On top of that, the policy places an employee on sick leave if light duty is turned down. This is without regard to the first ninety days provision of Article 18, paragraph F which allows an employee on worker's compensation to endorse the worker's compensation benefit to the City and receive a full salary without reducing sick leave or having to accept a light duty offer. This policy also violates Article 18, paragraph F.

Having determined that the offer to Stahl violated the Temporary Duty agreement, the reduction of Stahl's sick leave balance by 24 hours violated Article 18, paragraph F, and that Sick Leave Policy Revision #2 as to Workers Compensation violates both the Temporary Duty agreement and Article 18, paragraph F, it is not necessary to consider the remaining Union arguments relating to Article 31 Past Practice, mandatory subjects of bargaining, good faith and fair dealing.

Stahl had 24 hours of sick leave deducted from his accrued sick leave in violation of the collective bargaining agreement. Had there not been that deduction he would have continued to receive his full salary (in exchange for endorsing the worker's compensation benefits to the City) and not suffered a loss in sick leave. To make him whole for his loss, his sick leave of 24 hours needs to be credited back to him. The Union argues that all those similarly situated to Stahl should also be made whole and awarded time and one-half for all hours worked under the Sick Leave Policy Revision #2. The record does not contain anything about any such employees or a detailed argument why time and one-half would be warranted. The statement of the issues by the City uses the word firefighters, which implies that the offer was made to more than Stahl. However, the Policy does violate the collective bargaining agreement. This award as applied to Stahl should provide a framework for the parties to determine what, if anything, should be done for any similarly situated employees. In the event that any such issues remain, the undersigned will retain jurisdiction for forty-five (45) days on the issue of remedy.

The City violated the collective bargaining agreement when it unilaterally offered light, restricted or temporary duty to firefighters such as Stahl, when it unilaterally reduced 24 hours of Stahl's sick leave, and in implementing Sick Leave Policy Revision #2. Accordingly, based upon the evidence and arguments presented in this case I make the following

AWARD

1. The grievance is sustained as to Grievant Stahl and as to the Sick Leave Policy Revision #2.
2. For a remedy for Grievant Stahl, the City will credit back 24 hours of sick leave to his accumulated sick leave account and rescind its offer of temporary, restricted or light duty unilaterally made to him.
3. The undersigned will retain jurisdiction for 45 days on the issue of what, if any, remedy is available to any other bargaining unit employees affected by the issuance of the November 21, 2007 Sick Leave Policy Revision #2.

Dated at Madison, Wisconsin, this 3rd day of February, 2010.

Paul Gordon /s/

Paul Gordon, Arbitrator