BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS (IAFF) LOCAL 877

and

CITY OF WATERTOWN

Case 91
No. 72006
MA-15233

(Sick Leave Grievance)

Appearances:

Patrick Kilbane, Field Services Representative, International Association of Fire Fighters, 6847 East County Road "N", Milton, Wisconsin 53563, appearing on behalf of the Union.

Nancy Pirkey, Buelow Vetter Buikema Olson & Vliet, LLC, Attorneys at Law, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin 53186, appearing on behalf of the City of Watertown.

ARBITRATION AWARD

The International Association of Fire Fighters (IAFF) Local 877, hereinafter referred to as the Union, and the City of Watertown, hereinafter referred to as the City or Employer, are parties to a collective bargaining agreement that provides for final and binding arbitration of unresolved grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the Sick Leave grievance. A hearing was held in Watertown, Wisconsin on April 18, 2013. The hearing was not transcribed. The parties filed briefs and reply briefs, whereupon the record was closed on June 7, 2013. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Union framed the issue as follows:

Did the City violate the collective bargaining agreement between the parties when it modified SOG 529 by incorporating an unreasonable work rule into revised SOG 529.1 and if so, what is the appropriate remedy?

The City framed the issue as follows:

Did the City violate Article III or Article VIII when it revised the existing policy defining when "good cause" requires an employee to provide a physician's statement in order to receive paid sick leave? If so, what is the appropriate remedy?

I have not adopted either side's proposed wording of the issue. Based on the entire record, I find that the issue which is going to be decided herein is as follows:

Did the City violate the collective bargaining agreement by implementing SOG 529.1? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2013-14 collective bargaining agreement contains the following pertinent provisions:

ARTICLE III - MANAGEMENT RIGHTS

3.01 - The Union recognizes the prerogatives of the Employer to operate and manage its affairs in all respects in accordance with its responsibility and in the manner provided by law, and the powers or authority which the Employer has not specifically abridged, delegated or modified by other provisions of this Agreement are retained as the exclusive prerogatives of the Employer. Such powers and authority, in general, include, but are not limited to the following:

a) To determine its general business practices and policies, including the purchase and utilization of equipment.

b) To manage and direct the employees of the Employer, to make assignments of jobs, to determine the size and composition of the work force, to train or retrain employees, to establish standards of job performance, to determine and schedule the work to be performed by the work force and each employee, and to determine the competence and qualifications of the employees.

c) To determine the methods, means and personnel by which and the location where the operations of the Employer are to be conducted.

d) To take whatever action may be necessary in situations of emergency.

e) To utilize part-time employees when deemed necessary.

f) To hire, promote and transfer and lay off employees and to make assignments and promotions to supervisory positions.

g) To suspend, demote, discipline or discharge employees pursuant to §62.13, Wis. Stats.

h) To create new positions or departments; to introduce new or improved operations or work practices; to terminate or modify existing positions, departments, operations or work practices; and to consolidate existing positions, departments or operations.

i) To make and alter rules and regulations for the conduct of its business and of its employees. The reasonableness of any new or revised rule is subject to the grievance procedure.

3.02 - Both parties agree that every incidental duty connected with the operation of the Fire Department is not always specifically described. Nevertheless, it is intended that all such duties shall be performed as directed by the Chief or his representative. But it is recognized that the primary mission is the protection of life and property.

. . .

ARTICLE VIII – SICK LEAVE

8.01 Fire fighting employees who have been continuously employed by the Employer for a period of at least six (6) months shall be entitled to sick leave with pay on the basis of twenty-four (24) hours for each calendar month of full-time service. Although such new employees are unable to use sick leave during their first six (6) months, they will accrue sick leave on the above basis during such period. Unused sick leave may be accumulated to a total of not more than 1,272 hours. (Present fire fighting employees whose accumulated sick leave exceeds 1,200 hours as of January 1, 1975, shall not lose such excess accumulation, but they shall not be allowed to accumulate sick leave until their accumulated sick leave falls below the maximum amount stated above.)

8.02 An employee on sick leave shall be required, on request, to file with the Chief or his representative, a written report upon his return to duty, on

a form furnished by the Employer, stating his length of absence from duty and the nature and effect of his illness or injury.

8.03 To be eligible for paid sick leave, an employee must:

a) Wherever possible, report his illness or injury to the officer in charge one (1) hour before his tour of duty, provided, however, that in cases of known extended illness or injury, the employee will periodically notify the Chief of his progress.

b) File with the Chief or his representative on return to duty, a physician's statement to the effect that he was unable to perform the duties of his position, specifying the cause, where such absence is for three (3) or more consecutive tours of duty. For good cause, the Chief may request such physician's certificate for absence of lesser duration.

8.04

a) Sick leave shall include absences from duty on a scheduled workday because of an employee's illness or injury or exposure to contagious disease or, upon proper notice to the Chief or his representative, because of serious illness, injury or emergency in the employee's immediate family, i.e., parent, child or spouse. Sick leave may be taken on an hourly basis, but will be charged in one hour segments.

b) In the event an employee calls in sick in the morning and tells the officer in charge he is attempting to see a doctor, the employee may come back to work at any time, if the doctor approves his returning to work. In the event an employee calls in sick in the morning and does not tell the officer in charge that he is attempting to see a doctor or does not consult a doctor, and such employee feels better later and desires to return to duty during that shift, such employee will not be permitted to return to duty until at least the first eight (8) hours of that shift have elapsed.

c) In the event of a death in the family, employees shall receive paid funeral leave in the following amounts for absences from regularly scheduled work up to and including the day of the funeral:

Fire Fighting Employees:

1) No more than forty-eight (48) hours in the event of the death of a parent, child or spouse.

2) No more than twenty-four (24) hours in the event of the death of a mother-in-law, father-in-law, brother or sister.

3) No more than twenty-four (24) hours in the event of the death of a brother-in-law, sister-in-law or grandparent, provided that the funeral occurs on a day when the employee is scheduled to work.

8.05 In the event an employee does not have sufficient paid sick leave to cover the illness or injury of the employee or in the event an employee requires additional funeral leave in excess of that provided for in Section 8.04, an employee may, at the discretion of the Fire Chief, be allowed up to three (3), twenty-four (24) hour workdays as leave of absence without pay in any calendar year for such purposes. Leaves of absence without pay for such purposes in excess of three (3), twenty-four (24) or eight (8) hour workdays, as the case may be, in any calendar year, may be allowed, provided, however, that prior approval must be given by the Common Council. Paid sick leave shall not accrue during any such unpaid leave of absence in excess of thirty (30) consecutive calendar days.

BACKGROUND

The City of Watertown operates a Fire Department. The Department's operations are directed by a fire chief, hereinafter Chief. The Union is the exclusive collective bargaining representative for most of the employees in the Fire Department.

The fire department provides fire fighting and emergency medical services 24 hours per day, 7 days per week. The firefighters work a 24-hour day schedule, with a consistent cycle of days on and off duty, commonly referred to as the California schedule. The work cycle is composed of 1 day on duty, 1 day off duty, 1 day on duty, 1 day off duty, 1 day on duty, and 4 days off-duty. Following the end of the cycle with 4 days off, the cycle begins again and continues to be repeated. The fire department employs 21 full-time personnel, plus some paid on-call personnel. 16 of the full-time personnel are members of the bargaining unit. The employees are divided into three shifts: A, B and C. Each shift is staffed with a combination of bargaining unit and non-bargaining unit full-time personnel to provide a minimum daily staffing of 5 on-duty personnel at all times. The paid on-call personnel supplement the full-time personnel as needed.

Given the Department's relatively small size and its 24/7 staffing requirements, attendance of firefighters is crucial to the Department's operation.

Since at least 2004, the collective bargaining agreement has contained language that permits the Chief to require a physician's statement to confirm that an employee is sick and unable to perform his job duties. This contract language, which is currently found in Section 8.03(b), identifies two situations in which a physician's statement may be required: 1)

when an employee has been absent for three or more consecutive "tours of duty"; and 2) for "good cause", for absences of lesser duration (meaning less than three tours of duty).

On July 1, 2005, the Chief implemented a policy dealing with when a physician's statement will be required. The policy provided thus:

Subject: Physician's Statement for Paid Sick Leave

Purpose: Under Article 8 Section 8.03(b), the Fire Chief has the discretion to require physician's statements for absences of less than three days if there is "good cause" for doing so. It is the City's prerogative to determine what is "good cause" on a case-by-case basis.

In order to provide some guidance to employees, listed below are the circumstances, in addition to those that are listed in Article 8 Section 8.03(b), which will require a physician's statement to cover the absence in order for the employee to receive paid sick leave.

Definitions: Excused Absence is one where the employee provides a physician's statement documenting that he/she was seen on his/her duty day for which he/she called in sick.

Unexcused Absence is one where the employee does not provide a physician's statement documenting that he/she was seen on his/her duty day for which he/she called in sick.

Procedure: More than four (4) unexcused absences in a twelve month calendar year period which will start with the effective date of this Standard Operating Procedure.

In this instance, the employee will be required to provide a physician's statement documenting that he/she was seen on the duty day for which he/she called in sick, in order to receive paid sick leave as per Article 8 Section 8.03(b) of the contract between the City of Watertown and IAFF Local 877 for any sick days used in the next twelve-month period beginning with the fifth sick day used.

Out of pocket expenses, if any, incurred by employees who see a physician in order to procure a physician's statement to be eligible for paid sick leave will be paid by the City.

> Employees will be notified in writing when future sick leave use will require a physician's statement in order to receive paid sick leave. This notification will also specify that the future date when such statements will not be required will be computed beginning on the fifth sick leave use.
>
> Employees will also be given a written statement at the end of the specified time that a physician's statement will be required.
>
> Employees who are required to present a physician's statement to receive paid sick leave must turn the statement in when they report for duty for their regular shift or a time trade or a hire back shift. This does not apply to employees who come in for pages.
>
> If an employee forgets his/her physician's statement, he/she will have the option of one of the following:
>
> 1. The employee will be given no more than one (1) hour of unpaid leave to go home get the physician's statement and return to duty. He/she will then be paid sick time for the period covered by the note. No holdover overtime will be paid for these absences.
>
> 2. The employee can arrange to have the physician's statement brought to the station by 1900 hours that day by another party.
>
> There will be no disciplinary action taken.

The Union did not grieve or challenge this policy when it was implemented, including the requirement in the first paragraph of the "Procedure" section that "good cause" will require an employee submit a physician's statement any time the employee has more than four unexcused absences in a 12-month period. That requirement came to be known in the Department as the 4/5 rule. It got that name because employees who used 4 or fewer unexcused sick days in a calendar year did not have to provide a physician's excuse; the use of a 5th sick day in a calendar year triggered the requirement that a physician's excuse be provided.

Thus, after the policy referenced above was issued, an employee was required to provide a physician's statement to support the need for sick leave in three instances: (1) When the employee called in sick for three or more consecutive days; (2) When the employee used sick leave for more than four days in a calendar year and did not provide a physician's

statement for any of those individual sick days; or (3) When the Chief determined, on a case-by-case basis, that there was "good cause" to require a physician's statement to support the use of sick leave.

In 2012, the sick leave policy was updated by the Chief on two occasions. The first change was issued on April 5, 2012. That policy was incorporated into a different format and with a new title – a Departmental Standard Operating Guide (hereinafter SOG). This policy provided thus:

> Title: Physician's Statement for Paid Sick Leave
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> Purpose: Under Article 8 Section 8.03(b), the Fire Chief has the discretion to require physician's statements for absences of less than three days if there is "good cause" for doing so. It is the City's prerogative to determine what is "good cause" on a case-by-case basis.
>
> Policy: An Excused Absence is one where the employee provides a physician's statement documenting that he/she was seen on his/her duty day for which he/she called in sick.
>
> An Unexcused Absence is one where the employee does not provide a physician's statement documenting that he/she was seen on his/her duty day for which he/she called in sick.
>
> After four unexcused absences, the employee will be required to provide a physician's statement documenting that he/she was seen on the duty day for which he/she called in sick, in order to receive paid sick leave as per Article 8 Section 8.03(b) of the contract between the City of Watertown and IAFF Local 877 for any sick days used in the next twelve month period beginning with the fifth sick day used.
>
> Employees will be notified in writing when future sick leave use will require a physician's statement in order to receive paid sick leave.
>
> Employees who are required to present a physician's statement to receive paid sick leave must turn the statement in when they report for duty for their regular shift or a time trade or hireback shift. This does not apply to employees who come in for pages.

Substantively, SOG 529 made four changes to the policy that preceded it. The four changes were: (1) The language stating the City will pay for out of pocket expenses incurred

in order to procure a doctor's statement was deleted; (2) The language specifying the details to be included in the notice to employees was deleted; (3) The language setting forth two different options for an employee to submit a physician's statement for those employees who forget to submit that statement on the day they return to work was deleted; and (4) The language stating that disciplinary action will not be taken was deleted.

The Union did not grieve or challenge any of the changes adopted in SOG 529 when it was implemented on April 5, 2012. As a result, the changes referenced in the preceding paragraph are not a part of this grievance arbitration.

Later that same year, the Chief determined that further changes needed to be made to SOG 529 to better define when "good cause" exists to require a physician's statement for absences of less than three days duration. (Note: The reason he made this determination will be addressed later). On November 20, 2012, the Chief issued a new policy which was denominated as SOG 529.1. It provided thus:

Title: Physician's Statement for Paid Sick Leave

Purpose: Under Article 8 Section 8.03(b), the Fire Chief has the discretion to require physician's statements for absences of less than three days if there is "good cause" for doing so. It is the City's prerogative to determine what is "good cause" on a case-by-case basis.

Policy: An Excused Absence is one where the employee provides a physician's statement documenting that he/she was seen on his/her duty day for which he/she called in sick.

An Unexcused Absence is one where the employee does not provide a physician's statement documenting that he/she was seen on his/her duty day for which he/she called in sick.

After four unexcused absences, the employee will be required to provide a physician's statement documenting that he/she was seen on the duty day for which he/she called in sick, in order to receive paid sick leave as per Article 8 Section 8.03(b) of the contract between the City of Watertown and IAFF Local 877 for any sick days used in the next twelve month period beginning with the fifth sick day used.

Employees will be notified in writing when future sick leave use will require a physician's statement in order to receive paid sick leave.

> Employees who are required to present a physician's statement to receive paid sick leave must turn the statement in when they report for duty for their regular shift or a time trade or hireback shift. This does not apply to employees who come in for pages.
>
> A physician's statement shall also be required for any sick day prior to the start of a vacation or at the end of a vacation. Additionally, a physician's statement shall be required for sick time on a holiday, or the day before or after a holiday. Failure to supply a physician's statement shall result in discipline.

SOG 529.1 is identical to SOG 529 in all respects except one: SOG 529.1 contains the following additional final paragraph:

> A physician's statement shall also be required for any sick day prior to the start of a vacation or at the end of a vacation. Additionally, a physician's statement shall be required for sick time on a holiday, or the day before or after a holiday. Failure to supply a physician's statement shall result in discipline.

This new language requires a physician's statement when an employee calls in sick on the day prior to or after a vacation day or holiday, or on the day of the holiday.

Prior to making the above-referenced change, and implementing SOG 529.1, the Chief reviewed attendance records for all members of the Fire Department, union and non-union alike. The Chief reviewed holiday schedules, vacation schedules and attendance records for all members of the Fire Department for all of 2011 and 2012, and for 2013 through March 31, 2013. Those records showed that the following employees took sick leave either on the work day before, the work day after, or on the actual holiday in 2011 and 2012: Adams took sick leave on a holiday and the day after a holiday in 2011, and on a holiday in 2012; Butzine took sick leave on a holiday in 2012; Esmeier took sick leave on a holiday and the day after a holiday in 2012; Fohr took sick leave on a holiday and the day after a holiday in 2012; Hering took sick leave on holidays and the days before and after holidays in 2012; Kreilkamp took sick leave on holidays and days before and after holidays in 2012; Kurtz took sick leave on holidays and days before holidays in 2011; and Pugh took sick leave on a holiday and the day after a holiday in 2012. As to vacations, the records showed that the following employees took sick leave either the work day before or after a vacation day in 2011 and 2012: Butler took sick leave before vacation days in 2011 and 2012; Christian took sick leave before and after vacation days in 2011; Gordon took sick leave before vacation days in 2011; Kreilkamp took sick leave on either the work day before or after a vacation day in 2011 and 2012; and Kurtz took sick leave on either the work day before or after a vacation day in 2011 and 2012.

After the information referenced above was compiled, the Chief concluded that the number of instances where employees called in sick either the work day before or after a holiday, or on the actual holiday in 2011 and 2012 was "excessive". The Chief further

concluded that the number of instances where employees called in sick on the work day immediately before or after a vacation day in 2011 and 2012 was "excessive". In his view, the data referenced above showed a "pattern" of employees taking sick leave immediately around a holiday or vacation. To address that "pattern" and perceived problem, the Chief revised SOG 529 and renumbered it SOG 529.1. As already noted, the last paragraph of the new policy provides that the Chief has good cause to require an employee to provide a doctor's excuse (aka a physician's statement): (1) if the employee calls in sick either the work day before or after a vacation day; or (2) if the employee calls in sick on a holiday, or the work day before or after a holiday.

The Union grieved the revisions that the Chief made to the sick leave policy on November 20, 2012, alleging this latest revision to the policy was unreasonable. After the grievance was filed, the parties held the grievance in abeyance so that they could bargain over this issue in the negotiations for a successor to the 2012 agreement. The parties subsequently bargained and reached a voluntary settlement over the terms of a 2013-2014 labor agreement, but the terms of that contract settlement did not include any change in Article III – Management Rights or Article VIII – Sick Leave, nor did it resolve the pending grievance. The Union then reactivated its grievance and it was processed through the various steps of the contractual grievance procedure and was appealed to arbitration.

. . .

The Fire Chief has been monitoring sick leave usage since SOG 529.1 was implemented on November 20, 2012. The record shows that for the period of January 1, 2013 through March 31, 2013 sick leave usage is down. Over that same time period (January 1 through March 31) employees used 14 sick days in 2011, 14 sick days in 2012 and 8 sick days in 2013. Also, during that same time period (i.e. January 1 through March 31, 2013), no employee has taken a sick day before, after or on a holiday, nor has an employee taken a sick day on the work day before or after a vacation day.

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Some additional facts will be referenced in the **DISCUSSION**.

POSITIONS OF THE PARTIES

Union

The Union's position is that SOG 529.1 is an unreasonable work rule. According to the Union, the document provided by the City (i.e. Joint Exhibit 8) to support its claimed "abuse of sick leave by employees" is inaccurate. While the City characterizes that document as showing an actual pattern of "sick leave abuse", the Union maintains that the document shows no such pattern. The Union also contends that the City has not shown the requisite

"good cause" for their rule to pass muster. Building on all of the foregoing, it's the Union's view that SOG 529.1 violates the collective bargaining agreement. It elaborates as follows.

To put this contractual dispute in an overall context, the Union begins by citing the two contract provisions which it believes are applicable, namely Sec. 3.01(i) and Sec. 8.03(b). First, it notes that pursuant to Sec. 3.01(i), the City can adopt a new work rule, subject to a reasonableness standard. Second, the Union notes that Sec. 8.03(b) gives the City the right to request a physician's excuse when an employee uses sick leave for less than three consecutive calendar days. It further notes that this article is conditioned on the requirement that the Fire Chief must have "good cause" for making such a request.

The Union contends that the Chief's new policy (SOG 529.1) is unreasonable and not based on "good cause". To support that contention, the Union points out that the reason the Chief changed SOG 529 was because he reviewed the sick leave usage of employees in 2011, 2012 and through March 31, 2013. That data is contained in Joint Exhibits 9, 10 and 11. That data, in turn, was used to create Joint Exhibit 8.

The Union "disputes the accuracy" of Joint Exhibit 8. It starts by addressing the sick leave usage of employees in 2011. First, it challenges the Employer's contention that in that year, two employees took sick leave on a holiday, or on the work day before or after a holiday. The Union contends that that year, just one employee took a sick day on a holiday, or on the work day before or after the holiday. Second, the Union acknowledges that in 2011, there were six instances when an employee called in sick on the work day immediately before or after a vacation day. Turning now to sick leave usage in 2012, the Union disputes the Employer's contention that in that year, nine employees took sick leave immediately before or after a holiday. The Union contends that that year, just six employees took sick leave immediately before or after a holiday. The Union also disputes the City's contention that in that year, four employees took sick leave on the work day before or after a vacation day. According to the Union, just one employee did that. Putting all the foregoing together, the Union maintains that "there is no semblance of a pattern whatsoever", and the use of sick days on the work day before or after a vacation or holiday, or the actual holiday, "is minimal".

As part of its contention that the City's data on sick leave usage surrounding a holiday or vacation is inaccurate, the Union offers the following examples to support their conclusion. One example cited by the Union is an employee by the name of Ralph Wandersee, who took sick leave on April 8, 2012. The Union notes that that day was Easter Sunday, and the holiday identified in the collective bargaining agreement is Good Friday. Another example is that the Union alleges that Firefighter Hering's use of sick leave in December 2012 was covered by a doctor's excuse. Third, the Union also cites sick leave taken by Firefighters Duvernell and Pugh as examples of sick leave usage supported by a physician's statement. Finally, the Union reviews the work calendars for various employees and argues over whether the absences were excused or unexcused. Building on the foregoing, it's the Union's view that Joint Exhibit 8 does not support changing the old sick leave rule.

As the Union sees it, the Chief made the change to the old sick leave rule because he thought Joint Exhibit 8 showed a significant pattern of sick leave abuse. In response, the Union asks rhetorically: "Where is the pattern of abuse?" The Union answers that rhetorical question by saying that none exists. Specifically, the Union submits that the City did not offer any evidence to back up its claims of sick leave abuse by employees. It also points out that the Chief did not conduct an investigation into the use of sick leave by employees. The Union contends that the new rule is arbitrary and discriminatory and imposes an undue burden on employees whether they are frequent users of sick leave or rarely use sick leave. That's because it forces them, under a guarantee of discipline for not complying with the rule, to make unnecessary visits to the doctor for themselves or their immediate family members costing them and the City money. The Union argues that the revision unnecessarily modifies the 4/5 rule which the Chief has not only failed to enforce, but has not provided "a shred of evidence" to demonstrate its ineffectiveness and need for modification. The Union asserts that when the parties placed the words "good cause" into Section 8.03(b), the words weren't intended to give the Chief an unfettered right to make additional requests for physician's excuses on a whim or on pure speculation. Rather the Chief must actually have "good cause" to make the request. The Union avers that that burden has not been met and, as a result, the revision imposed by the Chief and incorporated into Policy No. 529.1 is unreasonable.

Finally, as part of its argument that SOG 529.1 is unreasonable, the Union responds to the Employer's contention that numerous arbitration awards support its claim that the revised sick leave policy is reasonable. The Union disputes that assertion, and distinguishes all of those awards from this matter on the basis that in none of those awards did the Employer have to meet a "good cause" standard prior to issuing a new or revised rule.

The Union therefore requests that the arbitrator sustain the grievance.

City

The City's position is that it did not violate the collective bargaining agreement by implementing SOG 529.1. Here's an overview of the City's case. The Chief analyzed attendance records from 2011, 2012 and part of 2013 and determined that there was a pattern of excessive sick leave usage around vacation and holiday time off. He concluded that the existing sick leave policy needed to be expanded to address this problem. Specifically, he decided to require a physician's statement to support sick leave which was taken surrounding a holiday or vacation. According to the Employer, this new rule was narrowly tailored to address a legitimate business purpose (i.e. curbing excessive sick leave usage on the work day before or after a holiday or vacation day). The City contends that attendance records from 2013 demonstrate that revisions to the SOG have been effective because overall sick leave usage is down, and there have been no instances of employees calling in sick before or after a vacation day, or on, before or after a holiday. The City maintains that the revised SOG serves a legitimate interest of management and therefore is a reasonable work rule. It elaborates as follows.

First, the City argues that it, through the Fire Chief, has a unilateral right under Article III to issue and/or update, revise or expand work rules governing the operation of the Fire Department subject to a "reasonableness" standard.

Next, for background purposes the City avers that Article VIII, B gives it the contractual right to require a physician's statement for absences of "less than three days if there is 'good cause' for doing so." It notes that since at least 2005, the City has had a policy which defines when "good cause" exists to require a physician's statement for an absence of less than three days. The first policy was implemented in 2005. This policy was updated on April 5, 2012 when the Chief issued SOG 529. The Union did not file a grievance over the changes implemented under SOG 529. The policy was updated again on November 20, 2012 and renumbered as SOG 529.1. According to the City, this new policy provides advance notice to employees that "good cause" exists to require a physician's statement when sick leave is used immediately before, after or on a holiday or when sick leave is used prior to the start of a vacation or at the end of a vacation. The City avers that this "new language was added to the existing rule as a transparent, yet clear, means of identifying (and hopefully stemming) inappropriate use of sick leave to extend vacation or holiday time off."

Third, the City argues that it has met the standard for proving that the revised policy on sick leave is reasonable. It cites various WERC arbitration decisions which have defined "reasonableness" including one wherein Arbitrator Jones defined it thus: "The commonly accepted test of reasonableness of a work rule is whether it attempts to regulate a legitimate objective of management." The City contends that, in this case, the City has a legitimate purpose for modifying the policy because the Chief used objective evidence to identify a pattern of absences surrounding vacation and holiday time off and determined that these absences have a negative effect on the Fire Department's operations. Specifically, the Chief did an analysis of the use of sick leave either before or after a holiday or on the actual holiday. He found two instances of sick leave used either on the day of the holiday, or on the work day immediately before or after the holiday in 2011. In 2012 though, the number of instances of sick leave on a holiday, or immediately before or after a holiday jumped to nine occurrences. The Chief also determined that similar issues were raised when analyzing sick leave usage on the workdays immediately before and after a vacation day. Specifically, the City notes that there were six instances where employees took sick leave immediately before or after a vacation day in 2011, and four instances in 2012. Additionally, it notes that three employees called in sick on June 3, 2011; two of those employees calling in sick did so on the last work day before a vacation day. Three employees calling in sick on the same day represents one-half the workforce scheduled to work on that day. Based on these trends in sick leave usage, the Chief determined that a pattern of abuse was occurring and that he needed to take some action in response. The Chief decided that the best means to determine whether an employee legitimately needed sick leave was to require a physician's statement for any instance of sick leave use on a holiday, on the work day immediately before a holiday or vacation day, or on the work day immediately after a holiday or vacation day. The City asserts that the Chief could have considered each of the absences occurring on or around vacation and holiday time off on a case-by-case basis and determined whether sick leave was being abused, but he

decided instead that it would be more fair to employees to revise the SOG and provide guidance and advance notice to employees so that they can adjust their conduct and comply with the revised rule.

As part of its argument on this point, the City argues that the Union "either misreads or misinterprets" the sick leave data provided by the City regarding sick days taken by bargaining unit members either on the work day before or after a vacation day or holiday, or on the actual holiday in 2011 and 2012. The City contends that Joint Exhibit 8 is factually correct. Building on that, the City avers that the Union underestimates the sick leave taken in 2011 surrounding a holiday. It notes in this regard that the Union claims that in 2011, no employee took a sick day on a holiday, or on the work day before or after the holiday. The City disputes that contention, and contends that two different employees took sick leave on the work day before or after a holiday. The City also asserts that the Union underestimates the sick leave taken in 2012 surrounding a holiday or vacation. With regard to holidays, while the Union believes there were six occasions when an employee called in sick on the work day before or after a holiday, the Employer's position is that the correct number is nine occasions. With regard to vacations, while the Union puts the number at one, the Employer's position is that the correct number is four.

Next, the City cites various arbitration awards wherein the arbitrator upheld the Employer's rule or policy as being reasonable. It argues that those decisions support the reasonableness of the Chief's actions in this case.

Finally, it's the Employer's view that the Union's allegation that the revised sick leave policy is "unreasonable" does not stand up under scrutiny. Here's why. First, the Employer maintains that the Union's first claim can be dismissed because it does not count FMLA leave or worker's compensation leave as an Unexcused Absence under SOG 529.1. Second, the Employer disputes the Union's contention that the policy is unreasonable because of the cost impact to the employee of obtaining a physician's statement. The Employer points out that employees are already required to incur the cost of providing a physician's statement under the sick leave policy which has been in place since 2005. It further notes that the Union did not object to the cost impact of this rule when it was implemented then. The Employer also relies on various arbitration awards wherein the arbitrator held that in determining the reasonableness of a work rule, the cost impact of the rule is not considered. It further avers that while individual employees may incur some out-of-pocket costs for a doctor's visit, the cost impact to the City in overtime and lost productivity is much greater. Third, the City disputes the Union's contention that the policy is unreasonable because of the imposition on the employee of having to see a doctor on a holiday, especially when the sick leave is taken for the illness of a parent, spouse or child. It notes that in most cases, the employee is not calling in sick on the actual holiday. Building on that, the Employer submits that the Union's argument that the employee will have to find a clinic open on the actual holiday to receive treatment, or go to the emergency room, is simply incorrect. The City also argues that the inconvenience of having to obtain a physician's excuse is not enough to outweigh the City's operational and staffing needs. It's the City's view that reasonableness is not determined by a balancing test between

management's needs and the convenience of the employees. According to the Employer, the new rule does not cause an undue burden on the employees. That's because only an employee who extends his/her vacation or holiday time off with sick days would be required to provide a physician's statement.

The City therefore asks that the grievance be denied and dismissed.

DISCUSSION

This case involves the City's requiring a "physician's statement" (i.e. known in layman's terms as a doctor's excuse) from employees when they take sick leave immediately before or after a vacation day, or on, before or after a holiday.

To help put this matter in an overall context, I'm going to begin my discussion with the following contractual and historical overview.

Section 8.03(b) gives the Chief the right to require a physician's statement for absences of less than three days if there is "good cause" for doing so. Since at least 2005, the City has had a policy which defines when "good cause" exists to require a physician's statement for an absence of less than three days. The first policy was implemented in 2005. This policy was revised and updated in 2012 when the Chief issued SOG 529 on April 5, 2012. The Union did not grieve the changes implemented under SOG 529. The policy was updated again on November 20, 2012 and renumbered as SOG 529.1. SOG 529.1 is identical to the prior policy (i.e. SOG 529) except for one paragraph. SOG 529.1 includes the following paragraph which was not part of SOG 529:

> A physician's statement shall also be required for any sick day prior to the start of a vacation or at the end of a vacation. Additionally, a physician's statement shall be required for sick time on a holiday, or the day before or after a holiday. Failure to supply a physician's statement shall result in discipline.

This paragraph's meaning is not disputed. This paragraph puts employees on notice that the Chief has "good cause" to require a physician's statement when sick leave is used immediately before, after or on a holiday, or when sick leave is used prior to the start of a vacation or at the end of a vacation. According to the City, it added this new paragraph to the existing sick leave policy as a means of "stemming inappropriate use of sick leave to extend vacation or holiday time off." The Union grieved the implementation of this new rule.

Aside from Section 8.03(b) noted above, the other contractual basis for the Union's grievance is this: Sec. 3.01(i) of the Management Rights clause says that the Employer can unilaterally create and revise work rules, subject to a reasonableness standard. In light of that language, the obvious question to be answered here is whether SOG 529.1 is reasonable within the meaning of Sec. 3.01(i).

Based on the rationale which follows, I answer that question in the affirmative, and find that SOG 529.1 is a reasonable work rule within the meaning of Sec. 3.01(i).

Before I explain my rationale though, I'm going to address the following matters.

First, the Union objects to the fact that the Chief did not provide any evidence to the Union supporting the change to the sick leave policy before the change was implemented. Implicit in this contention is that he should have. There's a simple response for this claim. It's this: the Chief did not have to provide any evidence to the Union beforehand. That's because Article III does not require the Chief to provide any evidence to the Union before implementing a new or revised rule. While a prior Chief may have provided sick leave usage data to the Union related to the adoption of the sick leave policy in 2005, that action did not create a binding precedent which the current Chief had to follow. Thus, the fact that sick leave usage data may have been provided to the Union on one prior occasion did not create a requirement or binding past practice that the City had to satisfy in this case.

Second, I've decided to make the following comments about the various arbitration awards cited in the parties' briefs. Certainly I could go through those awards and comment on their applicability, or lack thereof, to this case. Were I to do that, the likely result would be that I would say that decisions A, B and C support my conclusions, while decisions X, Y and Z are distinguishable. I've decided not to do that. In my view, I don't need to address the cited arbitration awards to decide this case. As a result, what the parties are going to get here – for better or worse – is simply my analysis without any reference to those other awards. Consequently, no other comments are going to be made about the various arbitration awards cited by the parties.

Third, I'm going to comment on the scope of my award. Here's some pertinent context. One of the Union's contentions is that the Chief changed the policy in question because he thought that the evidence – which will be reviewed later – showed abuse of sick leave by employees. The Union then goes on to dispute that contention. In my discussion, I'm not going to use the phrase "sick leave abuse". For one thing, that phrase is loaded with subjectivity. That's because subsumed into its common meaning is the assumption that an employee, in taking sick leave on a given day, abused it. The typical sick leave abuse case deals with a single employee and their history of sick leave usage. In this case though, we're not dealing with a single employee and their history of sick leave usage. Instead, this case involves the entire Fire Department and their collective use of sick leave around vacation and holiday time off. That being so, I'm going to characterize this case as a sick leave usage case (as opposed to a sick leave abuse case). I can address the relatively narrow topic of sick leave usage around vacation and holiday time off without delving into why an employee took sick leave on a particular day, or determining whether their usage of same was considered excused or unexcused, or deciding whether their usage of sick leave on that day constituted sick leave abuse. Consequently, I'm not going to address those matters. Instead, what I'm going to address is this: in 2011 and 2012, to what extent did employees in the Department use sick leave – for whatever reason – before or after a vacation day, or on, before or after a holiday?

To answer that question, I'm going to review Joint Exhibit 8. That document purports to accurately identify the sick leave which was used on the work day before or after a vacation day or holiday, or on the actual holiday in 2011, 2012, and the first three months of 2013. In the discussion which follows, I'm going to focus on what that document says happened in 2011 and 2012.

I begin by noting that the parties agree that in 2011, there were six instances when an employee called in sick on the work day immediately before or after a vacation day.

The parties disagree over everything else referenced in that document.

With regard to holidays in 2011, the Union claimed in their original brief that no employees took a sick day on a holiday, or the work day immediately before or after a holiday. In their reply brief, they changed their position and put the number at one. The City contends that two employees took sick leave on the work day before or after a holiday. I credit the Employer's number for the following reasons. Adams took a sick day on April 23, which is the day after Good Friday (April 22, 2011), and Kurtz took a sick day on December 21, 2011, his last work day before Christmas Eve and Christmas Day holidays.

Turning now to 2012, the Union avers that just one employee took a sick day on the workday before or after a vacation day. The Employer maintains there were four occasions where that happened. I credit the Employer's numbers for the following reasons. Butler called in sick on June 12, 2012, his last work day before 4 off days and 3 days of vacation on June 17, 19 and 21, 2012. Kreilkamp called in sick on April 27, 2012, the first workday after a vacation day on April 22, 2012. Kreilkamp also took a vacation day on November 15, 2012 and then called in sick on his next scheduled work day, November 20, 2012. Kurtz called in sick on June 27, had 4 off days, and then took 3 days of vacation.

The Union contends that in 2012, there were six occasions where an employee called in sick on the work day before or after a holiday. The Employer maintains there were nine such occasions. I credit the Employer's numbers for the following reasons. Three of the five total firefighters scheduled to work on April 7 called in sick; April 7th was the day after the Good Friday holiday (April 6, 2012). Two employees (Adams and Butzine) called in sick over the Labor Day weekend, with Adams calling in sick on his last scheduled work day before the holiday (August 29, 2012) and Butzine calling in sick when he was scheduled to work on the actual Labor Day holiday (September 3, 2012). Hering called in sick on the work day before the Christmas Eve holiday, on the actual Christmas Day holiday, and on the work day before the New Year's Eve holiday. Kreilkamp called in sick on three different occasions surrounding a holiday: he called in sick on July 8, 2012, his first scheduled workday after the July 4th holiday; he called in sick on November 20, 2012, his last work day before the Thanksgiving holiday; and he called in sick on December 26, 2012, his first work day after the Christmas Eve and Christmas Day holidays.

As part of its contention that the City's data in Joint Exhibit 8 is inaccurate, the Union calls attention to the following. One example cited by the Union is an employee by the name of Ralph Wandersee, who took sick leave on April 8, 2012. The Union notes that that day was Easter Sunday, and the holiday identified in the collective bargaining agreement is Good Friday. That's true. However, Wandersee is an Assistant Chief and not a member of the bargaining unit. As a management employee, Wandersee receives Easter Sunday as his holiday rather than Good Friday, and he did call in sick on the Easter holiday. Next, the Union submits that Hering's use of sick leave in December, 2012 was covered by a doctor's excuse. That's true. What the Union did not mention though is that Hering did not submit this physician's statement at the time of his illness; instead, he submitted this doctor's excuse in response to the Union's questions about his use of sick leave after this grievance was filed. Third, the Union cites sick leave taken by Duvernell and Pugh as examples of sick leave usage supported by a physician's statement. The City does not dispute that both Duvernell and Pugh provided physician statements to support some of their absences. What the City questions is whether those physician statements were for absences surrounding a holiday or vacation day. That's important, because the City did not offer any evidence that Duvernell took sick leave on the work day before or after a holiday or vacation, or on the actual holiday. Thus, the fact that Duvernell submitted a physician's statement for some of his absences is not relevant to this grievance. As for Pugh, he was identified as one of three firefighters who called in sick on April 7, 2012, the day after the Good Friday holiday. While Pugh provided a physician's statement for some of his absences, no physician's statement was provided for April 7, 2012. Finally, the Union reviews the work calendars for various employees and argues over which absences were excused or unexcused. I find that these arguments are irrelevant herein because the issue in this case is not whether the named employees took excused or unexcused sick leave; instead, the issue is whether they took sick leave immediately before or after a holiday or vacation day, or on the actual holiday. None of the examples cited by the Union in their initial brief invalidate the accuracy of the data in Joint Exhibit 8. Thus, the Union's argument that the Chief's sick leave data is inaccurate because it does not identify excused or unexcused absences is not relevant to this case.

After reviewing the numbers contained in Joint Exhibit 8, and addressing the Union's arguments about that data, I'm persuaded that the numbers proffered by the City in Joint Exhibit 8 are accurate. The work calendars of all employees in the Department confirm the accuracy of the City's data. I'm further persuaded that the numbers proffered by the Union concerning the sick leave taken in 2011 and 2012 surrounding a holiday or vacation are underestimated.

The next question is what to make of those numbers. The Chief thought that the sick leave days identified in Joint Exhibit 8 showed a "pattern" of "excessive" sick leave usage that needed to be addressed. While I'm not going to say that the number of sick leave days taken around a vacation day or a holiday in 2011 and 2012 was "excessive", or that a discernible "pattern" was shown in the sick leave usage identified in Joint Exhibit 8, I nonetheless have no trouble saying that the number of sick days which employees took surrounding a holiday or vacation in 2011 and 2012 was sizeable. It certainly was not the minimal amount that the

Union characterized it as. No matter how the number of sick days are characterized though, those absences around holidays and vacations had a negative effect on the Department's operations and staffing (given the Department's small size). Simply put, the sick leave usage on those days was problematic.

The Chief concluded that the way he would address this problem of sick leave usage surrounding a holiday or vacation was to henceforth require a physician's statement to support that absence. This new requirement is contained in the last paragraph of the new SOG (i.e. SOG 529.1).

The final question to be addressed is whether the City's new rule is reasonable within the meaning of Sec. 3.01(i). Elkouri describes the commonly accepted test of reasonableness of a work rule as "whether or not the rule is reasonably related to a legitimate objective of management." How Arbitration Works, 6th Edition, p. 772. I find that the City's new work rule passes this test for the following reasons. First, I'm going to address the Union's contention that some absences should not be counted as sick leave because they are for worker's compensation injuries or FMLA leave. This first claim misses the mark since the City does not count FMLA leave or worker's compensation leave as an Unexcused Absence under SOG 529.1 because those absences will be supported by medical documentation. Additionally, the attendance records submitted into evidence demonstrate that worker's compensation leave and FMLA leave are not listed as "sick leave" on an employee's records. Thus, these types of absences have not been "counted" in the City's assessment of sick leave usage. Second, I'll address the Union's contention that the policy is unreasonable because of the cost impact to the employee of obtaining a physician's statement. I begin by noting that employees are already required to incur the cost of providing a physician's statement under the sick leave policy which has been in place since 2005. Specifically, if an employee has four unexcused absences in a 12 month period, that employee is required to submit a physician's statement for every sick day used thereafter. This policy was first adopted in 2005 as a form of "good cause" and the Union did not object to the cost impact of this rule when it was implemented. It is difficult to understand how this (new) rule is any more costly than the (old) rule, especially since the Union did not object in July, 2012, when the City removed the language that stated that employees could be reimbursed for out-of-pocket costs incurred to comply with this policy. Third, I'll address the Union's contention that the policy is unreasonable because of the imposition on the employee of having to see a doctor on a holiday, especially when the sick leave is taken for the illness of a parent, spouse or child. In most cases though, the employee is not calling in sick on the actual holiday. Rather, the employee is calling in sick on the work day before or after the actual holiday. Thus, while it's possible that an employee will have to find a clinic open on the actual holiday to receive treatment, that isn't too likely to occur. Moreover, Union Exhibit 1 shows that the requirement can be met (meaning medical documentation is available, even on a holiday). Fourth, I'm persuaded that the inconvenience imposed on the employee of having to obtain a physician's excuse is not enough to outweigh the City's operational and staffing needs. While the new rule imposes a burden on employees to get a physician's statement when they take sick leave around a vacation or holiday, it has not been shown to be an undue burden. Fifth, I'm persuaded that

the last paragraph of the new SOG was narrowly tailored to address a legitimate business purpose (i.e. curbing sick leave usage surrounding vacation and holiday time off). Based on all the above, I find that SOG 529.1 is a reasonable work rule within the meaning of Sec. 3.01(i).

In my view, this case can be summarized as follows. First, Joint Exhibit 8 accurately identifies the sick days taken by employees surrounding a holiday or vacation in 2011 and 2012. Second, the Chief considered those absences problematic, and concluded that he needed to address that problem. Third, the Chief determined that the way he would address that problem and determine whether an employee (or his/her family member) was legitimately sick was to require a physician's statement to support that absence. Fourth, the change which the Chief made to the sick leave policy was narrowly tailored to address a legitimate business purpose (i.e. curbing sick leave usage on the work day before or after a holiday or a vacation day). Finally, SOG 529.1 is a reasonable rule and therefore passes muster under Section 3.01(i) of the collective bargaining agreement.

In light of the above, it is my

AWARD

That the City did not violate the collective bargaining agreement by implementing SOG 529.1. It is a reasonable work rule within the meaning of Sec. 3.01(i). Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 12th day of July, 2013.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

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