BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WATERTOWN PROFESSIONAL FIRE FIGHTERS ASSOCIATION, LOCAL 877, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO

and

CITY OF WATERTOWN

Case 89
No. 71804
MA-15215

Appearances:

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

Buelow, Vetter, Buikema, Olson & Vliet, LLC, by **Attorney Nancy L. Pirkey**, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin 53186, on behalf of the City.

ARBITRATION AWARD

The Watertown Professional Fire Fighters Association, IAFF, Local 887, AFL-CIO (herein the Union) and the City of Watertown (herein the City) have been parties to a collective bargaining relationship for many years and at the time the chain of events pertinent hereto began, were operating under an agreement covering the period January 1, 2012 through December 31, 2012. On October 23, 2012, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration regarding the unilateral implementation of a light duty policy, allegedly in violation of the collective bargaining agreement. The undersigned was selected by the parties from a panel of WERC staff to arbitrate the matter and a hearing was conducted on February 26, 2013. The proceedings were not transcribed. The parties filed initial briefs March 28, 2013 and reply briefs by April 12, 2013, whereupon the record was closed.

ISSUES

The parties stipulated to a statement of the issue, as follows:

Did the City violate the collective bargaining agreement between the parties when it unilaterally altered the work schedule of certain employees to perform light duty assignments?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

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:

. . .

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.

. . .

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

i) To make or 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 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 V – HOURS OF WORK

5.02 – Fire fighting employees will work a normal work cycle of one 24-hour tour of duty followed by one 24-hour off period, followed by one 24-hour tour of duty, followed by one 24-hour off period, followed by one 24-hour tour of duty, followed by four 24-hour off periods. The normal starting time for a tour of duty will be 7:00 a.m.

5.03 – Trading tours of duty will be permitted with the prior consent and approval of the Fire Chief or the officer in charge. Requests for such trades shall be in writing and shall specify the employees involved in the trade, the reason for the trade, the date the trade will be made and the date the trade will be repaid. All trades must be repaid within twelve (12) calendar months. The Chief will act on the trades no later than thirty (30) days prior to the first trade date. All trades will be made in compliance with the Fair Labor Standards Act and rules and regulations enacted thereunder, if applicable, but in no event will such trade be permitted if such would subject the Employer to overtime or any additional payments. This section shall be administered in a reasonable and non-discriminatory manner.

. . .

5.05 – The normal duty day for fire fighters shall be 8:00 a.m. to 11:30 a.m. and 1:00 p.m. to 4:30 p.m., Monday through Friday, and 8:00 a.m. to 11:30 a.m. Saturdays, excluding holidays. - circumstances, included, but not limited to, the giving of tours.

. . .

ARTICLE VIII – SICK LEAVE

8.01 – Firefighting 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 firefighting 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.

. . .

8.03 – 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 successive tours of duty. For good cause, the Chief may request such physician's certificate for absence of lesser duration.

ARTICLE IX – WORKERS COMPENSATION

9.01 – If an employee is injured while performing work for the City and is receiving Worker's Compensation payments for temporary-partial or temporary-total disability, he shall receive the difference between his regular salary and his Worker's Compensation payments during his period of disability, or a period of ninety (90) days from the date of the initial injury, whichever is less. If the employee is unable to return after the expiration of ninety (90) calendar days, his department head may request the Common Council to extend those payments for just cause. Payments under this section shall not be deducted from accumulated sick leave. The provisions of this Article shall not apply to new employees during their initial probationary period.

. . .

ARTICLE XXIII – AMENDMENTS AND SAVINGS CLAUSE

23.01 – This Agreement may not be amended, altered or added to, except by the mutual consent of the parties in writing.

23.02 – If any article of this Agreement or any addenda thereto should be held invalid by operation of law or any tribunal of competent jurisdiction, or if compliance with or enforcement of any article should be restrained by such tribunal, the remainder of this Agreement and addenda shall not be affected thereby, and negotiations on the same subject matter shall be instituted to adjust such article.

OTHER RELEVANT PROVISIONS

WATERTOWN FIRE DEPARTMENT
SOG 518 – LIGHT DUTY

Purpose: Establish the policy to assist in the rehabilitation of the injured employees and to maintain the productivity of the City.

Policy: Any employee, unable to perform the essential functions of their regular job because of an injury or illness that temporarily prevents their return to regular assigned duty, where possible, be temporarily assigned to alternative productive work, subject to necessary medical certification.

A) Consistent with work the restrictions outlines [sic] by an employee's individual physician concerning weight lifting, mobility and/or other prohibited job functions, the Department may, at its sole discretion, assign an employee on Workers Compensation leave or medical disability leave, to Light Duty, consistent with said restrictions. Should a question concerning work restrictions arise, the Department reserves the right to require the employee submit to a physical examination, at no cost to the employee, by a physician selected by the Department.

B) Light Duty assignments will be temporary in nature. Such assignments will not extend beyond six months except in unusual cases, where a brief extension may be allowed for valid medical reasons. The decision will be at the discretion of the Mayor or his designee.

. . .

E) The 40-hour work schedule shall be Monday through Friday. The hours for non-union members shall be 0800-1630. The hours for Union members shall be 0700-1630, with 1½ hours for lunch. At no time will light duty employees figure into staffing.

F) Any vacation or holiday time off scheduled prior to the occurrence of an extended illness/injury shall be cancelled as soon as it is determined that the employee will not be available for full duty on the scheduled dates. These dates

will become immediately available for pick by other shift members under normal vacation pick guidelines.

. . .

J) For 40-hour Light Duty employees, each 24 hour vacation day or holiday accrued may be used as three 8-hour days off. The three 8-hour days totaling one complete vacation/holiday day must be picked at the same time as one "vacation pick." The days do not have to be consecutive; however they must fall within the employee's Light Duty period.

CITY OF WATERTOWN

EMPLOYEE HANDBOOK OF POLICIES AND PROCEDURES

RELATIONSHIP WITH UNION CONTRACTS

The provisions of this handbook shall apply to all employees, to the extent they do not conflict with a union contract. In the event of a conflict, the union contract shall prevail.

WORKMAN'S COMPENSATION

COMPENSATION WHEN INJURED. If an employee is injured while performing work for the City and is receiving Workmen's Compensation payments for temporary partial or temporary total disability, he shall receive the difference between his regular salary and his workmen's compensation payments during his period of disability for a period of 90 calendar days from the date of the initial injury, or until he is able to return to his regular job, whichever is less.

In the event the City makes payments as required by this section, and it is ultimately determined that a third party is responsible for the injuries to the employee, and a recovery is obtained from said third party by the employee, the City shall be protected and have rights of subrogation to the extent that it makes payments to the employee as provided in this section.

In addition to the foregoing, the City of Watertown hereby establishes a modified/restrictive duty work program for persons on temporary disability, as follows:

A. Consistent with the work restrictions outlined by an employee's individual physician concerning weight lifting, mobility and/or other prohibited job functions, the City may, at its sole discretion, assign an employee on Worker's Compensation Leave or medical disability leave to gainful employment with the City, consistent with said restrictions. Should a question concerning work restrictions arise, the City reserves the right to require that the employee submit to a physical examination, at no cost to the employee, by a physician selected by the City.

B. An employee shall be eligible for modified/restrictive duty work program for up to six (6) months and only one time per running twelve (12) month period.

C. Failure to accept a modified/restrictive duty assignment within the established limitations eliminates any Workers Compensation payments, sick leave pay and duty incurred disability pay as provided hereinabove. Acceptance of the modified/restrictive duty assignment assures continuation of these provisions.

D. While on modified/restrictive duty program, the employee shall receive his regular straight-time hourly wage rate or salary for his classification for all hours worked regardless of work performed.

BACKGROUND

The City of Watertown Fire Department provides fire protection, emergency and non-emergency services to the City of Watertown. The Department staff consists of 21 full-time employees, 16 of whom are members of the bargaining unit represented by Local 877, and also includes a contingent of Paid On-Call personnel. The employees are organized into three shifts on a rotating 24-hour cycle and work a nine-day California schedule, which means each employee works one day on, one day off, a second day on and a day off, a third day on and four days off. Minimum staffing calls for five employees to be on duty at any given time. The collective bargaining agreement between the parties contains language addressing employees receiving Workers' Compensation, but has no language addressing light or restricted duty for employees who are unable to perform all their job duties due to temporary physical impairment.

On December 19, 2011, Fire Chief Greg Michalek issued a memorandum to Fire Fighter William Adams assigning him to Light Duty and placing him on a five-day schedule from 0800 to 1630 until such time as he was able to return to full duty. The next day, the City Council passed a resolution adopting an Employee Handbook containing a separate Workers' Compensation policy, but also making the Handbook subordinate to conflicting language in Union contracts. On December 30, 2011, Adams filed a grievance over the Light Duty

assignment, but the parties agreed to hold the grievance in abeyance pending an opportunity for the parties to negotiate over the Light Duty policy. The Department developed a policy and presented it to the Union, but the parties were not able to agree on all of its terms, so on April 18, 2012, Chief Michalek issued Policy #518, but indicated it would not be enforced pending outcome of the aforementioned negotiations. The Union insisted that any such policy be agreeable to all parties and incorporated into the contract. The parties ultimately settled their negotiations over the 2013-14 contract, but did not reach agreement on a Light Duty policy. Meanwhile, through the course of 2012 Michalek continued to assign light duty to employees with physical limitations, including Fire Fighters John Duvernell, Brad Herring and Mason Pugh. All of these assignments were grieved and all were also held in abeyance pending outcome of the 2013-14 contract negotiations. In August 2012, the Union activated all four grievances, which were denied by the Chief and then by the City Finance Committee, citing management rights. Additional facts will be referenced in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Union

The Union argues that the language in the contract predates the Light Duty policies adopted by the City and supersedes any verbal agreements between the parties and any conflicting ordinances or policies. Thus, the light duty policy applied by the City does not automatically apply to Union members where there is conflict between the policy and the contract. The City Handbook conflicts with the Workers' Compensation and Sick Leave language in the contract in that the Handbook makes receipt of Workers' Compensation, sick leave, or disability benefits contingent upon accepting a Light Duty assignment. There is no such language in the contract and, as such, the policy conflicts with the Workers' Compensation and Sick Leave provisions of the contract.

The contract also contains a 24-hour nine day schedule which is abrogated by the Chief's employees who have scheduled alternate activities on their off days, such as secondary employment, child care and continuing education. It is no accident that no such light duty language is included in the contract, or that prior to Chief Michalek light duty was never assigned. The policy, as currently applied, violates Article 5 of the contract and is unreasonable. The Union does not dispute the right of the City to adopt reasonable rules, but the requirement of reasonableness exists to prevent the City from exceeding its authority by adopting rules that violate the contract. There is no mutual agreement to adopt a light duty policy and the grievances should be sustained.

The City

The City asserts that the basis of the grievances is not the specifics of the light duty policy, but whether the City can assign light duty without specific language in the contract. Such authority unequivocally exists within the City's management rights and to find otherwise

would render the management rights clause meaningless. The City has had a light duty policy since 1991 and includes all City employees, including Fire Fighters. The previous Chief did not apply the policy to Fire Fighters. The Employee Handbook adopted in 2011 likewise applies to all employees and does not conflict with the contract because the contract does not address light duty. Chief Michalek determined that the Handbook did not adequately address operational issues in the Fire Department and so adopted Policy #518. This was discussed with the Union, which agreed to the terms of Policy #518, but demanded that it be bargained into the contract. Bargaining ensued, but was unsuccessful and the agreed contract did not contain light duty language. The fact that the Union was unable to bargain limitations to light duty means there are no limitations. The contract provides for a normal work cycle of 9 days of alternating-24 hour shifts and a normal start time of 7:00 a.m. This does not guarantee fixed schedule and arbitrators have ruled that such language permits the possibility of alterations.

The management rights clause permits the City to adopt rules governing the conduct of its business and employees unless specifically abridged, delegated, or modified by other provisions of the contract. SOG 518 addresses employees who are medically unable to perform their regular duties, is reasonable in scope, favorable to employees and related to the operation of the Department. At hearing, the Union admitted that it agreed with the policy's terms and only objected that it was not included in the contract. Thus, the policy must be deemed reasonable, including a change in the normal work hours. Here, the Chief did modify the work hours of the Grievants in order to accommodate their work restrictions. This does not make the policy unreasonable. This policy furthers a legitimate purpose of management in that it because it reduces the use of Workers' Compensation and sick leave and gives workers an incentive to return to work.

Light duty is a complicated issue touching on numerous laws and regulations. Here, the Workers' Compensation Act, Fair Employment Act and Americans with Disabilities Act are all implicated and require the City to provide light duty to its employees. If an employee refuses light duty, workers' compensation benefits may be denied for the period of the disability. The WFEA also requires that an employer make accommodations for injured workers, which includes altering work hours and duties, as does the ADA. This establishes that the City has an obligation to offer light duty, regardless of whether there is contract language and, because the City's policy comports with legal requirements it must be deemed reasonable. The grievances should be denied.

Union Reply

The Union does not dispute the City's right to create *reasonable* work rules, but argues that the action of the Chief in unilaterally imposing light duty assignments on bargaining unit employees based on language in the Employee Handbook that violates the collective bargaining agreement. The Union never conceded that the light duty policy was reasonable or acquiesced on the issue, but entered into negotiations hoping to resolve the violations with the contract language. The City rejected all of the Union's proposals. It is also incorrect to state that the Union is trying to achieve in arbitration what it could not gain in bargaining. The City was

aware of the Union's position prior to negotiations and rejected all the Union's proposals. In fact, it is the City, which continues to violate the contract, that is trying to achieve through arbitration what it should have bargained. Sustaining the grievances will not invalidate the management rights clause, only prevent the City from imposing rules that violate the contract.

The City relies on the Management Rights clause and Handbook to argue that the light duty policy is reasonable, but both documents give deference to the contract where they are in conflict. The City abridged, modified and delegated its management rights in agreeing to contract language on workers' compensation, sick leave and hours of work. Now it seeks to use the Management Rights clause to abrogate those provisions. It has been held that failure to negotiate language means it does not exist, which applies here. The City rejected the Union's light duty proposals and now must live with the reality that there is no light duty policy because the policy used by the City violates the contract.

SOG 518 is not reasonable because it violates the contract. The Union tried to negotiate a policy that complies with the contract, but the City refused all its proposals. Now the City would have SOG 518, which did not exist when the grievances were filed, considered a reasonable rule justifying denial of the grievances. The Employee Handbook and SOG 518 require an employee to accept a light duty assignment in order to receive workers' compensation, sick leave, or disability benefits. There is no such requirement in the contract, and the cases cited by the City do not support allowing the City to impose them in violation of the contract. The City is, in effect, asking the arbitrator to modify the contract, something that the contract does not permit.

The City also relies on various statutes to support its argument that it may have an obligation to provide light duty to its employees, but cites no authority establishing that there is such a definite obligation. If the City is unsure of its obligations, it cannot advance an argument that SOG 518 is necessary to meet them. Further, these laws have existed for many years, so it is hard to conceive how the City just now discovered a need to comply with them.

City Reply

The Union mischaracterizes the contract by suggesting that it establishes a fixed 24 hour workday and a fixed starting time of 7:00 a.m. This is not true. The contract includes a broad management rights clause and offers no guarantees that the work schedule cannot be modified when needed. The management rights clause permits the City to determine the schedule of work and Article V specifically refers only to normal work times. The Union chooses to regard "normal" work times as being a guarantee, but arbitrators have not taken that view. Rather, they have interpreted "normal" as referring to conformance with a usual standard, but not as a guarantee. Here, the schedule changes were only temporary, such that they did not redefine the work week, thus there was no contract violation.

The policy is reasonable, as established by the fact that the Union agreed to all its terms and only demanded that it be included in the contract. Further, the policy furthers a legitimate

objective of the City in assisting in the rehabilitation of injured employees and maintaining the productivity of the Department. The policy was distributed to the employees and was only implemented after the bargaining process was complete. If the Union wanted to prevent the policy from being implemented, it should have bargained it, not sought a change in arbitration. The grievances should be denied.

DISCUSSION

In this case, the City and the Union are in disagreement over the Fire Chief's unilateral implementation of a Light Duty policy for employees who are unable to perform their normal duties due to injury or illness. The history of the development of this policy is set forth in the Background section above. Suffice it to say that the current policy was developed by Fire Chief Gregory Michalek after he was hired by the City in 2011. The policy was originally an outgrowth of the City's Employee Handbook, which was adopted by the City Council in December 2011 and was made applicable to all City employees with the caveat that it would not supersede any contrary provisions contained in a collective bargaining agreement. In April 2012, however, Chief Michalek, along with Union representatives, drafted Standard Operating Guide (SOG) 518, which applied specifically to the Fire Department and covered a number of issues concerning light duty that were not included in the Handbook. The City would not agree to include the policy in the 2013-14 contract, so it was left out and was ultimately adopted by the City unilaterally as a Department policy.

The four Fire Fighters who are the Grievants in this matter were assigned light duty while the parties were negotiating over the policy. Their dispute primarily concerns the fact that they were assigned 40-hour per week work schedules, Monday through Friday, unlike the other bargaining unit members, who worked a regular 9-day rotation of 24-hour shifts, averaging 56 hours per week. The Union asserts that the City's action violates numerous provisions of the contract. This is alleged to violate both the contract, which specifically limits management rights in the areas in question, and the Employee Handbook, which is superseded by the collective bargaining agreement where they are in conflict. The City asserts that its management rights give it authority to establish reasonable work rules, that the policy is a reasonable exercise of management rights and that it is not in conflict with the contract.

As to the work schedule, Article V of the contract provides that the normal work schedule is a 9-day cycle of 24-hour shifts, with the workday normally commencing at 7:00 a.m. Under the Light Duty policy, however, Fire Fighters work a 5-day, 40-hour week. The Union argues that the policy, therefore, violates Article V and that Fire Fighters on light duty may be assigned duties consistent with their physical limitations, but must be provided the same hours of work as the other members of the bargaining unit. I disagree, primarily due to the inclusion of the word "normal" in the work schedule provision. As the City notes, numerous arbitrators have concluded that words such as "normal" and "regular" in a work schedule provision establish a baseline standard that is, under ordinary circumstances, the typical work day and work week. They also qualify the provision, however, such that management may from time to time alter the schedule temporarily to address exigent

circumstances. [Cf., Village of Grafton, MA-15001 (Carne, 4/9/12); City of Fitchburg, MA-14512 (Jones, 2/23/11); Taylor County, MA- 14797 (Levitan, 1/18/11); Jackson County, MA-12338 (Houlihan, 3/17/05)]. The situation where employees are under temporary physical restrictions is just such a circumstance. These employees are by definition unable to perform the normal duties of a Fire Fighter and are assigned duties within their physical restrictions for a period not to exceed six months, except in unusual circumstances. Such duties are of a type that may be accomplished during a 5-day, 40-hour week, without the need for the employees to be available 24-hours per day. Once the employees return to normal duty, their schedules return to normal. While the altered schedules may be inconvenient for the employees, therefore, due to their other outside activities, they are not inherently unreasonable, nor are they *per se* violative of Article V. Likewise, the policy language in SOG 518 regarding time trades does not violate the contract. Time trades between Fire Fighters are permitted under Sec. 5.03, but contemplate that the employees work the same schedules and are capable of performing the same duties. Fire Fighters on light duty assignments are obviously on different schedules and cannot perform regular duties. While on light duty, therefore, they could not honor time trades with Fire Fighters on regular duty. It is only reasonable, therefore, that previously agreed time trades be cancelled during their period of limited duty.

Other parts of the City's policy are more problematic, however. I refer, here, specifically to the language in the Employee Handbook requiring the acceptance of limited duty as a condition for receiving workers' compensation benefits or disability pay, or for using sick leave. While these provisions do not appear in SOG 518, I address them here to clear up any confusion about the City's ability to apply the Handbook language to Fire Fighters who are unable to perform their regular duties due to illness or injury. The contract provides for payment of the difference between a Fire Fighter's regular wage and his/her workers' compensation benefits. It also provides that Fire Fighters may accrue sick leave and use it while off work for illness or injury. The relevant provisions do not, however, condition the receipt of benefits or the use of sick leave on the Fire Fighter's agreement to accept light duty. Further, the Handbook specifically states that it does not apply in cases where the Handbook language conflicts with provisions in a collective bargaining agreement. Clearly, the language of the Handbook conflicts with the contract in these specific areas, by imposing additional extra-contractual requirements on Fire Fighters in order to receive workers' compensation benefits or to use sick leave and, as such, those portions of the Handbook are unenforceable. I note, parenthetically, that, unlike SOG 518, the provisions of the Handbook were not discussed with the Union before they were adopted so the arguments advanced by the City regarding their supposed acceptability to the Union by virtue of having been collaboratively drafted do not apply.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

The City did not violate the collective bargaining agreement between the parties when it unilaterally altered the work schedule of certain employees to perform light duty assignments and, to that extent, the grievance is denied. The City may not, however, under its light duty policy, condition the receipt of workers' compensation benefits or the use of sick leave on acceptance of light duty by Fire Fighters who are unable to perform their normal duties due to illness or injury.

Dated at Fond du Lac, Wisconsin, this 2nd day of August, 2013.

John R. Emery /s/

John R. Emery, Arbitrator

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