

BEFORE THE ARBITRATOR

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In the Matter of a Dispute Between

CITY OF GREENFIELD

and

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1963

Case 144

No. 72118

MA-15238

AWARD NO. 7890

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**Appearances:**

James R. Korom, von Briesen & Roper S.C., 411 E. Wisconsin Avenue, Suite 1000, Milwaukee, Wisconsin, appearing on behalf of the City of Greenfield.

Timothy E. Hawks, Hawks Quindel S.C., 222 E. Erie Street, Suite 210, P.O. Box 442, Milwaukee, Wisconsin, appearing on behalf of International Association of Fire Fighters, Local 1963.

**ARBITRATION AWARD**

On May 23, 2013, the City of Greenfield and Local 1963 of the International Association of Fire Fighters filed a request with the Wisconsin Employment Relations Commission requesting that the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. Following appointment, a hearing was conducted on September 17, 2013, in Greenfield, Wisconsin. A record of the proceedings was taken and distributed on September 30, 2013. Post hearing briefs and reply briefs were filed and exchanged by November 20, 2013.

**ISSUE**

The parties stipulated to the following issue:

Did the Employer violate the collective bargaining agreement when it terminated the employment of Scott Wagner? If so, what is the appropriate remedy?

### **BACKGROUND AND FACTS**

Scott Wagner, the Grievant, has been employed by the Greenfield Fire Department as a Firefighter and Paramedic since his hire in January 2000. Wagner experienced hip pain for some period of time, which led to his seeing a series of doctors for treatment. From 2007 to 2012, he saw a number of doctors for treatment without success. In July 2012, Wagner saw Dr. Matthew Bong, who had previously treated him for an unrelated matter.

During this visit, Wagner and Dr. Bong agreed that the more conservative treatments were not successful and they should proceed with an anterior total left hip replacement. The surgery was successfully performed on September 10, 2012. Wagner had a follow-up visit with Dr. Bong on September 18, 2012. His sutures were removed on September 25, 2012.

On September 26, 2012, Wagner met with Fire Chief Jon Cohn, Assistant Chief George Weber, and Battalion Chief Shawn Hammernik. During the course of the conversation, Wagner explained the surgery and the men discussed his medical status, including the potential for Wagner to be on disability status. The conversation addressed a number of possibilities, including duty-related disability status. Wagner advised the group that he was exploring a duty disability application.

On October 23, 2012, Dr. Bong authorized a light duty return to work for Wagner. His return was subject to the following restrictions: "No lifting greater than 25 lbs., no pushing/pulling greater than 25 lbs., seated work only, no climbing." Wager returned to work on light duty and continued to work on light duty until he was terminated in December 2012.

On October 30, 2012, Wagner had a follow-up visit with Dr. Bong. The visit indicated that Wagner had no complaints, the incision was healing, he was walking with a steady gait, and he was neurologically intact distally. The doctor's notes included the following plan:

I had a discussion with Scott. I am not sure how wise it is for him to continue to be a firefighter as people are counting on him, and with a hip replacement we do not want him running and being overly aggressive with heavy lifting. He seems to be in agreement with that and most likely at some point will be transitioning to a different line of work. I would like to see him back in the office at the 1-year anniversary of his surgery. We will get repeat radiographs of his left hip.

The October 30, 2012 visit was Wagner's last medical visit before he was terminated. His next trip to see the doctor was on January 15, 2013.

On November 16, 2012, Dr. Bong provided an updated return to work. The return had a number of restrictions, including "no lifting greater than 100 lbs., no pushing/pulling greater than

100 lbs., allow for position changes as required, no climbing/ladders, no running, no heavy equipment.” All but the position changes as required were indicated to be “long term restrictions.”

Upon receipt of the return-to-work release, Assistant Chief Weber asked Wagner what long term meant. Wagner replied that he did not know. This exchange prompted Chief Cohn to call Dr. Bong’s office. He spoke with Dr. Bong’s assistant, Kelly Gaffney, who indicated that long term meant forever.

A meeting was convened on November 27, 2012. The meeting included Chief Cohn, Assistant Chief Weber, Ben Granberg, the Human Resource Director, Wagner, and Garret Cieczka, Wagner’s Union Representative. Wagner was advised that Dr. Bong’s office had indicated that the restrictions were permanent. The parties discussed the possibility of various alternative assignments, none of which proved to be workable.

At some point in the day Weber suggested to Wagner that he clarify the status of his restrictions with Dr. Bong. Wagner testified that he attempted to contact Dr. Bong over the next few days but was unsuccessful. He indicated that his calls were not returned.

Later in the day, on November 27, 2012, the City received the following facsimile from Dr. Bong’s office:

RE: Scott S. Wagner

...

Pursuant to a recent telephone conversation you have requested the following clarification of the return to work status of the above named patient.

Scott has long term restrictions listed on his return to work slip which should be defined as **permanent restrictions**.

Should you require additional information please feel free to contact my administrative assistant, Kelly G., ...

Sincerely, Matthew Bong, M.D.

The content of the letter was shared with Wagner that same day. He was then advised not to return to work.

A meeting was held on December 4, 2012. The Grievant was terminated at that meeting for the reasons that are set forth in the termination letter.

December 4, 2012

Mr. Scott Wagner

Re: Your Current Medical Condition

Dear Scott:

We have received an updated medical report from your physician that identifies the restrictions which Dr. Bong has placed on your release to return to work as of January 2, 2013. These restrictions include:

- No lifting greater than 100 pounds
- No pushing/pulling greater than 100 pounds
- Allow for position changes as needed
- No climbing/ladders
- No running
- No heavy equipment

Your physician stated that these were “long term restrictions.” We contacted your physician to seek clarification of the phrase “long term restrictions.” Your physician responded by letter dated November 27, 2012 that these work restrictions are permanent. I have attached a copy of both medical reports for your review.

Since receiving these reports, the Fire Department has been attempting to determine whether it can reasonably accommodate these work restrictions on a permanent basis. The Fire Department does not have any jobs that you could perform that fit within these restrictions. The Department also considered whether it could modify the job duties of your current position as a Firefighter/EMT so that you could return to work. If you did return to work on January 3, 2013, the Department would have to create a very restrictive light duty position for you on a permanent basis. Based on the physically demanding nature of the work that firefighters and EMT’s perform on a regular basis, the Department cannot modify your job duties to the extent required for you to return to work. Thus, the Fire Department cannot reasonably accommodate your medical condition on a permanent basis.

As a result, the City will be terminating your employment effective immediately. I want to make it clear that this decision is not disciplinary in nature nor is it based on your work performance. Our decision is based solely on the permanent work restrictions imposed by your doctor and our inability to create a meaningful

job that you can perform within these work restrictions.

\* \* \*

On December 8, 2012, a grievance was filed alleging that the termination of Wagner violated the contract, and further asserting that Wagner was entitled to medical leave and extension of leave within the meaning of Article 8 of the collective bargaining agreement, relevant portions of which are set forth below. The grievance was denied and appealed through the grievance procedure.

Wagner testified that he made further efforts to see Dr. Bong without success. Dr. Bong testified that Wagner was a no-show for an appointment scheduled for December 4, 2012, the day Wagner was terminated. Ultimately, Wagner did not see Dr. Bong again until January 15, 2013. On December 17, 2012, Dr. Bong sent a status report which confirmed the nature of the surgery performed, that recovery was proceeding within normal limits, and indicating that Wagner would be returning for a re-evaluation in four to six months.

On January 15, 2013, Wagner met with Dr. Bong regarding his right knee. Dr. Bong examined the knee and had x-rays taken of the knee. The doctor's notes of the visit outline the knee problems leading to the visit, the result of examination of the knee, x-ray results, and the assessment and plan for treatment of the knee. There is no mention of Wagner's hip in the report.

On January 16, 2013, Dr. Bong issued the following;

To Whom It May Concern:

Scott was seen in follow-up on 1/15/13 for evaluation of his left hip. He is status post left total hip replacement.

After further evaluation I have revised his restrictions. The only restriction Scott has at this time is no running.

Should you require additional information please feel free to contact my administrative assistant, Kelly G. ...

At hearing, Dr. Bong could not recall or explain the basis for his change of opinion. He did testify that he did no examination or testing of the hip. He testified that all the concerns he had continued to exist. He further testified that he and Wagner must have had some sort of discussion relative to the restrictions.

Dr. Bong testified that the healing period from the hip replacement surgery should run from one to one and one-half years. He further indicated that a full return to work should occur six to nine months following surgery. He indicated that for a strenuous job like firefighting, the year and one-half is more appropriate.

Following receipt of the grievance and the revised medical opinion from Dr. Bong, the City determined to secure a second opinion. The City turned to Dr. Dennis Sullivan, an Orthopedic Surgeon. Dr. Sullivan reviewed Wagner's charts and Dr. Bong's findings and concurred with Dr. Bong's November 27, 2012 opinion. The conclusion of Dr. Sullivan's report, dated April 29, 2013, provides the following:

I would point out that Dr. Bong did have a discussion with Mr. Wagner on October 30, 2012 in which he felt it was not wise for him to continue to be a firefighter as other people would be counting on him, and with hip replacement, he did not want him running or being overly aggressive or doing any heavy lifting.

If Mr. Wagner were returning strictly to a supervisory role working for the Fire Department, I would not have any significant objections to that. I do not feel he can lift greater than 100 pounds. He should not be jumping off of equipment or climbing ladders, or being in a situation where the risk of tripping or falling is significantly increased. For these reasons, I do not feel that it is appropriate for a patient with a total hip replacement to return to the occupation of a firefighter. If you have further questions, please feel free to contact this office.

Dr. Sullivan did not see or examine Wagner.

The City has accommodated other firefighters in the past. Reed Viertel sustained permanent hearing loss from an air horn that went off when he was standing nearby. Mr. Viertel went on extended sick leave that lasted between six months and one year. Viertel worked light duty for a period of time, but was unable to return to full duty and was awarded disability. Rick Scharff suffered from congestive heart failure and was allowed to work light duty for an extended period of time. To accommodate his condition, Scharff was assigned to work as a heavy equipment operator. Tim Barthel had a resurfacing of his hip while working as a firefighter for the City. After Barthel's procedure, he was on sick leave for over one year. He did not return after his leave ended.

## **RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT**

### **ARTICLE 8 – SICK LEAVE**

#### **Section 8.01 ELIGIBILITY**

Employees who become ill or injured when not in actual performance of duty and as a result therefore are not able to perform their normal duties (provided said illness or injury is not willfully self-inflicted) shall receive full pay subject to the following limitations:

(1) Sick Pay:

- (a) Accumulation. Sick pay may accumulate computed from the date of the member's employment at the rate of eighteen (18) hours per month, such accumulation not to exceed two thousand seven hundred (2,700) hours. Accumulated sick leave pay credits shall not accrue to the member's benefit until he/she has completed six (6) months service.
- (b) Doctor's Certificate: ...
- (c) Medical Leave. When a member is unable to work for a period of three (3) or more weeks beyond accumulated sick leave pay because of a non-duty related illness or injury, he/she shall be granted a leave of absence for three (3) months, for such illness or injury when substantiated by a doctor's certificate showing reason for such leave of absence and giving approximate period of proposed absence. During this period, the member's job status will not be changed. Members may return to work upon presentation of a doctor's certificate to the Fire Chief three (3) days before returning date.

\* \* \*

ARTICLE 21 – MANAGEMENT RIGHTS

Section 21.01

It is agreed herewith that the City possesses the sole right to unilaterally operate the City Government by its duly authorized officials and all such rights repose in it unless expressly waived in writing. ... The rights of the City, which are generally exercised by the Fire Chief, include but shall not in any manner of construction of this Agreement be limited to the following unilateral rights:

- (a) To direct all operations of the City Government;

- (b) To hire, promote, transfer, assign and retain employees in positions with the City and to suspend, demote, discharge and take any and all other disciplinary action against employees;
- (c) To relieve employees from their duties because of lack of work or for other legitimate reasons;

\* \* \*

### DISCUSSION

I do not believe the City rushed to terminate the Grievant. Wagner had experienced hip pain for years. His decision to have surgery evolved over time and was not the product of a snap decision. The surgery occurred on September 10, 2012. That same month, Wagner discussed the potential for a disability retirement with the fire management. His light duty release followed. Wagner visited his doctor in October and the two discussed transitioning to a different line of work. Two weeks later, the updated return to work had fewer restrictions, though the restrictions were incompatible with continued employment as a firefighter. The restrictions were indicated to be long term. Chief Weber asked Wagner what long term meant, and Wagner replied that he did not know. I think it was logical to ask Wagner what long term meant. The information was provided in the context of discussion over the eventuality of a return to work or disability status.

The City then turned to the doctor for guidance. That appears to be both logical and predictable. Wagner was on limited duty. The restrictions were noted to be long term, and Wagner could not identify what long term meant. It appears to me that the City was acting logically and in good faith by asking the doctor what he meant. Chief Cohn was advised by Dr. Bong's assistant that long term meant forever. The City asked the doctor to put the timeline in writing and called for another meeting with Wagner.

The parties met again on November 27, 2012. Wagner was advised that the doctor's office had indicated that his restrictions were deemed permanent. As the meeting unfolded, Weber suggested to Wagner that he should get the status of his restrictions clarified. The City had not yet received the faxed letter. The advice appears to be supportive.

Wagner asked about seeing another doctor assigned by the City. Granberg said no. The only purpose of such a visit would be to obtain a contrary opinion. I do not think the City can be faulted for declining to create a situation where it is faced with conflicting medical opinions as to whether or not a firefighter was fit to return to duty. This is a formula for litigation, particularly with the potential disability claim in the background.

When the faxed letter arrived, it was delivered to Wagner promptly.

Wagner was terminated because the Department understood the restrictions to be permanent. The Department regarded the restrictions as incompatible with the job performance



duties of a firefighter and did not believe there was a suitable accommodation available. The decision came three (3) months following the surgery and following receipt of the doctor's letter indicating that the restrictions were permanent. The context of the decision was the discussion surrounding Wagner's potential disability status.

The Union contends that the healing period is one to one and one-half years. It further cites Dr. Bong's testimony that it would take six to nine months for a hip replacement patient to return to a physically vigorous job like firefighting. It is the view of the Union that, had the City exercised appropriate patience, Wagner would ultimately have been given a release that would have permitted him to return to work.

In essence, the Union asserts that a permanent restriction could not be assigned until the healing period was complete. Whatever the logic to that view, Dr. Bong did assign a permanent restriction to Wagner on November 27, 2012.

The Union is critical that the City relied upon the information supplied by Dr. Bong's assistant, Kelly G. The matter was certainly serious enough to warrant the attention of Dr. Bong. However, it was not the decision of the City to search out the assistant in lieu of the doctor. From the record, it appears that Dr. Bong directs a good deal of the communication of his practice through his assistant. The restrictions letter was signed by Dr. Bong, not his assistant. It directs inquiry to her.

It is the view of the Union that Dr. Bong's evaluation of the Grievant, particularly that expressed in his January 16, 2013 letter, should be given weight over the contrary opinion of Dr. Sullivan. I would typically agree that the opinion of the treating physician should be given greater consideration than the opinion of a non-treating doctor who has never examined the patient and who based his opinion on medical records. However, in this proceeding, I found it difficult to defer to Dr. Bong.

Dr. Bong performed the surgery and provided the follow-up care. As of October 2012, the prognosis for healing and recovery was good. It is in that context that Dr. Bong noted the conversation between himself and Wagner to the effect that Wagner discussed a change in career with a return visit scheduled for one year. It was just over two weeks later that Dr. Bong provided an updated return to work with significant restrictions that he termed to be long term. When asked to quantify long term, Dr. Bong signed a status letter indicating that the restrictions should be regarded as permanent. The reference to permanent was in bold type for emphasis.

I think the January 16, 2013 letter is out of character with the evaluation and prognosis that preceded it. The January letter removes the significant restrictions that barred Wagner's return to firefighting and appear to be at odds with the October 30, 2012 notes relating to a return to firefighting. Dr. Bong's testimony at hearing was disappointing and did little to shed light on the medical basis of the January 16, 2013 release.

The letter indicates that the January 15, 2013 visit was for an evaluation of the hip. That was not the case. The visit was scheduled for an evaluation and treatment of Wagner's knee. The

visit was the first time Dr. Bong would have seen Wagner since October 30, 2012. Dr. Bong could not recall much detail about the January 15 visit. He did testify that he did not conduct any further evaluation of the hip. When asked why he changed his evaluation, Dr. Bong indicated that he could not recall. Dr. Bong did indicate that he and Wagner may have discussed the restrictions but that he could not recall any medical basis for modifying the restrictions.

Dr. Bong testified that the average healing period for hip replacement surgery would be between one and one and one-half years. He further indicated that it would be six to nine months until someone is ready to return to work. Dr. Bong indicated that his December 17, 2012 status report was designed to give him some wiggle room on his prognosis. He indicated that it would put Wagner at the year and one-half point. The doctor's timeline for seeing Wagner was consistent with the six to nine month return to work timeline. It was not consistent with the one to one and one-half years for a full healing period.

Dr. Bong testified that his use of long term was a term derived from worker's compensation patients. Its use was intended to relieve those patients from the obligation to keep returning to see him every six weeks. He testified that his subsequent use of the term permanent was intended to convey that the restrictions were intended to be permanent.

Dr. Bong indicated that he changed his opinion. Other than a possible conversation with Wagner, he could offer no basis for the change in opinion. Dr. Bong confirmed his January opinion in the following exchange:

Q ...You write, "The only restriction Scott has at this time is no running." To the best of your ability, to a reasonable degree of medical certainty, is that your opinion as to the only restriction that Scott has at this time?

A I mean, I guess that that was something I was comfortable with in Scott's case and that's ... that's what I ...

Q So the answer is yes?

A Yes.

Dr. Sullivan indicated that he regarded Dr. Bong's November 16, 2012 restrictions to be such that Wagner should not exceed them. Dr. Bong's testimony as to why he changed his opinion was unconvincing.

The Union asserts that the parties never seriously discussed a reasonable accommodation. At the November 27, 2012 meeting, the parties did discuss potential accommodations. The parties discussed the position of fire marshall. The position was filled and outside the bargaining unit. There was a discussion about having Wagner serve as an administrative assistant. The most serious discussion related to having Wagner assigned to a position as a heavy equipment operator ("HEO"). The position is promotional. Cieczka was in line for a promotion to a HEO position

and offered to give up his position to Wagner. Chief Cohn testified that such a position is at times more strenuous than that of a firefighter. On cross-examination, Cieczka indicated that it would be a problem if an HEO was limited to only handling a rig at a fire scene. The Union has not suggested a position or accommodation that would be appropriate under the circumstances.

There is a history of firefighters who have suffered an illness or injury that compromised their ability to do the job and yet were either kept in light duty status or allowed to remain on sick leave for a protracted period of time. In none of the instances were the individuals diagnosed with permanent restrictions which rendered them unfit for firefighter duty. In each of the instances, I suspect all parties knew the conditions were serious and allowed the light duty/sick leave to continue as a bridge to disability or retirement. Wagner had a permanent restriction diagnosis and is a long way from retirement. I do not believe the three examples provide a basis to reinstate Wagner to his job.

The lingering question is whether Wagner is entitled to draw down his sick leave. I believe he is entitled to exhaust his sick leave. Section 8.01 provides that "Employees who become ill or injured when not in actual performance of duty and as a result therefore are not able to perform their normal duties ... shall receive full pay subject to the following limitations." This describes Wagner. He was ill when not in the actual performance of duty. He was unable to perform his normal duties. There are limitations. The first is found in paragraph (1)(a). He has to have the sick leave accumulated. This Award does not direct that he receive sick leave beyond that which he had accumulated. Paragraph (1)(b) requires medical certification. Wagner has satisfied all medical documentation.

Paragraph (1)(c) addresses a medical leave. The leave is not addressed in this Award. It anticipates a return to work and further addresses the member's job status. The extension is at the discretion of the Fire Chief. No other provisions of Section 8.01 apply to this dispute.

The City points out that there exists a retirement pay provision that pays out a percentage of accumulated sick leave upon retirement. The City notes that the Grievant is not eligible for such a payout and that the clause further provides that "... such a gratuity shall not be paid in the event of a termination of employment, or for any reason other than retirement ... ." I do not regard this as a retirement gratuity. Wagner is not retiring. His termination was a non-disciplinary separation, due to non-duty related illness. His rights are controlled by the more specific provisions relating to his eligibility to use sick leave. Section 8.01 is not ambiguous.

The City cites a previous award I issued (City of DePere, Case 77 No. 62415 MA-12278) where I denied the grievance of a firefighter who sought to use his sick leave accumulation following his termination due to the fact that his injuries were such that he could not do the job. In that award, I commented on the fact that I regarded sick leave as a benefit that contemplated a possible return to work. I believe this case warrants a different result because the language in this contract is different. This contract awards an injured employee full sick leave pay. That contract did not.

**AWARD**

The grievance is denied with respect to the question of whether the City violated the contract when it terminated the Grievant.

The grievance is sustained with respect to whether the Grievant is entitled to use his accumulated sick leave.

**REMEDY**

The City is directed to pay the Grievant for the hours he had accumulated in his sick leave account as of the date of his termination.

Dated at Madison, Wisconsin, this 8th day of July 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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William C. Houlihan, Arbitrator