

BEFORE THE ARBITRATOR

In the Matter of a Dispute Between

VILLAGE OF MENOMONEE FALLS

and

MENOMONEE FALLS POLICE ASSOCIATION

Case 97
No. 72202
MA-15255

AWARD NO. 7893

Appearances:

Daniel G. Vliet, Buelow, Vetter, Buikema, Olson & Vliet LLC, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin, appeared on behalf of the Village.

Mr. Brendan P. Matthews, Cermele & Matthews, S.C., 6310 W. Bluemound Road, Suite 200, Milwaukee, Wisconsin, appearing on behalf of the Union.

ARBITRATION AWARD

On August 8, 2013, the Village of Menomonee Falls (hereinafter “Village” or “Employer”) and the Menomonee Falls Police Association (hereinafter “Association” or “Union”) filed a request with the Wisconsin Employment Relations Commission seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. A hearing was conducted on October 30, 2013, in Menomonee Falls, Wisconsin. A record of the proceedings was taken and distributed to the parties. Briefs were filed and exchanged by December 13, 2013. A post-hearing motion was filed and briefed by January 10, 2014. The Association filed an additional submission on July 23, 2014. The Village objected to consideration of that submission on the same day. This Award is based on the record created at hearing on October 30, 2013.

This Award addresses the right of Police Officer Christine Jungbluth to work light duty during a portion of her pregnancy.

BACKGROUND AND FACTS

The Village has a Police Department (hereinafter "Department") which employs approximately 55 sworn officers. The Association represents a bargaining unit of full-time police officers of the Employer below the rank of sergeant. There are approximately 40 officers in the bargaining unit. The Village and the Association are signatories to a collective bargaining agreement whose relevant provisions are set forth below.

The Department has historically provided a very generous light-duty program. Officers who have been medically determined to be unable to perform the full range of duties have been provided light duty opportunities consistent with their medical release. This has included officers injured on the job, officers injured off the job, officers who were ill, and officers who were pregnant.

In 2011, the Department found itself with five police officers on light duty at one time. Two were injured on the job, two were pregnant, and one was injured off the job. The circumstance placed a significant financial stress on the Department. Police Chief Anna Ruzinski determined that the Department could not accommodate this level of light duty. For some period of time, the two pregnant officers job shared a light duty position. When one of the officers went off light duty the job share ended.

On October 21, 2011, Chief Ruzinski issued the following memo:

From: Ruzinski, Anna
Sent: Friday, October 21, 2011 4:00 PM
To: PD Officers; PD Sergeants; PD Command Staff
Subject: Light duty status

Due to budgetary reason, I can no longer offer light duty to any officer injured off-duty. It has too big of a fiscal impact and as I fight for positions in the budget, I cannot justify that fiscal impact. I am telling you this now because you will be meeting with Aflac representatives in November. You may want to consider the type of coverage you have depending on your situation. This was not an easy decision to make, but I do not want to lose any more of our authorized strength.

If you have any questions or concerns regarding this please see me when I return or speak with Capt. Waters if it can't wait.

Respectfully,
Chief AMR

Association President Brian Walter contacted the Chief to arrange for a meeting to discuss the memo and its implications. The parties met and agreed that requests for leaves would be subject to a case-by-case consideration, with consideration as to the availability of light duty. Following the meeting a second memo was issued on November 30, 2011. That memo provided:

From: Ruzinski, Anna
Sent: Wednesday, November 30, 2011 1:39 PM
To: PD Officers
Cc: PD Command Staff; PD Sergeants; 'Brendan P. Matthews'

To all officers:

In late October I sent an e-mail that stated light duty would no longer be available for injuries occurring off duty. I would like to clarify my reasoning. Section 10.02 of your contract addresses temporary light duty when an injury occurs on duty. This is also addressed General Order 4202 Absence from Duty, Section VII(A) – Light Duty. Because it affects the worker's comp insurance for the village it is fiscally responsible to bring an officer who has been injured on duty back to work as soon as he/she is medically authorized to return, even in a limited capacity. As stated in General Order 4202, Section VII(B), "Priority will always be given to light duty assignments for members on injured-on-duty status."

Regarding officers injured off-duty, G. O. 4204, Section VII (B) states: "Light duty may be authorized for members on sick leave only if the Chief of Police determines appropriate light duty assignments are available." Each time an officer requests light duty, the commanders are polled to see if there is sufficient work to support a light duty assignment. In the past we had special projects such as scanning cold cases, or assisting with accreditation. As stated in G.O. 4204, Section VII(D), "Authorization for light duty assignments are at the sole discretion of the Chief of Police and are not a guaranteed entitlement." I have denied light duty in the past because the work was simply not there.

Each case will be looked at individually. It is not my intention to financially strap anyone. But, as I fight to maintain the number of authorized positions I cannot in good conscience simply approve all requests for light duty. As an organization we loose (sic) an officer twice. First we loose (sic) them from patrol work during the

injury/light duty. Then we loose (sic) the officer later in the year because he/she was able to save time that otherwise would have been used for FMLA. FMLA and other accrued time is given to you for these circumstances. You also have a provision in your contract that allows you to donate comp time to another member who may not have accrued enough time for a serious injury.

I wanted to notify you that light duty is not an absolute to afford you the opportunity to subsidize with your AFLAC insurance renewals if need be. I hope this clarifies things for you.

Respectfully,
Chief AMR

Those employees who were on light duty at the time of the emails were allowed to remain on light duty. Effective January 1, 2012, there was no light duty made available for anyone other than someone injured on the job.

Prior to the issuance of the Chief's emails, the Village had a series of special projects that lent themselves to light-duty assignments. Those projects have since dried up.

Christine Jungbluth, the Grievant, became pregnant in 2013. Her doctor indicated that she was not able to work on the street effective April 15, 2013. She applied for light duty and was turned down. On April 23, 2013, the Grievant filed a grievance. The grievance raised a number of claims, one of which forms the basis for this dispute. That claim cited Article X, Section 10.02, of the collective bargaining agreement and General Order 4204. The grievance contends: "The Grievant was denied a Light Duty assignment due to her pregnancy. While the Agreement only outlines Light Duty assignments for work-related injuries, the parties have a history and past practice of providing Light Duty assignments for officers with non-work-related injuries, including pregnancy. The 'Absence from Duty' policy specifically recognizes that practice."

Chief Ruzinski filed an answer on May 3, 2013, which denied the above-described claim as follows:

I am responding to the grievance you filed on April 12, 2013 at step 2 of the grievance procedure. ...

* * *

2. Under Section 10.02 an employee who has been injured on duty may be assigned to temporary light duty. Section 10.02 does not provide for light duty for off duty injuries, illnesses or pregnancy. As provided under General Order 3205 dated November 15, 2010, light duty may be available when an officer has an on duty injury. An email was sent to all officers on October 21, 2011 confirming that

light duty work was no longer available for off duty injuries (Exh. A). A similar email was sent to all officers on November 30, 2011 (Exh. B). Since this Order was implemented no officers with off duty injuries or illnesses have been permitted to work light duty. Further, there is very little light duty work available regardless of whether the injury was on or off duty. The Department is not obligated to create light duty work; there must be actual work available that needs to be done that is within the restrictions placed on the officer. Finally, as you will recall in my email to you of April 3, 2013, I advised you that the Department would consider you for available light duty work, if there is any available (Exh. C). However, no such work currently exists. As indicated in my email, I am willing to consider you for light duty work if it becomes available.

* * *

Prior to this grievance, there was a practice of providing light duty to pregnant officers who reached a point in their pregnancies where their attending physicians indicated they could no longer work on the street. Bargaining unit members who became pregnant and worked light duty included the following; J.I. (1995), K.M. (2002) and (2005), J.G. (2008-09) and (2010), M.S. (2011) and Christine Jungbluth (2011). In 2011, when there were five employees on light duty M.S. and Jungbluth job shared for a period of time. Chief Ruzinski testified that was the case because the Village could not accommodate all of the light duty requested.

The essence of this dispute is that the Village believes the practice of providing light duty to pregnant employees was terminated by the October 21 and November 30 emails. The Union believes those emails are specific to off work injuries and not to pregnancies.

ISSUE

The parties could not stipulate as to the issue. The Association believes the issue to be:

Did the Village violate the express or implied terms and conditions of the collective bargaining agreement and/or past practice when Officer Jungbluth was denied light duty work due to her pregnancy?

The Village regards the issue as:

Whether the Village violated Sections 10.02 and/or 5.01 of the collective bargaining agreement when it did not provide light duty work for the grievant, and, if so, what is the appropriate remedy?

Both proposed issues will be addressed in this Award.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE V – MANAGEMENT RESPONSIBILITIES

Section 5.01: The normal functions of management and the direction of working forces including, but not limited to, the hiring of employees, suspending, discharging, or otherwise disciplining of employees, establishing reasonable rules and regulations, scheduling of work, the determination of methods and means of operation, and the control and regulation and use of all equipment are exclusive functions of the Village; provided, however, that in the exercise of such functions the Village shall observe the provisions of this Agreement and applicable State and local laws.

* * *

ARTICLE X – WORKER’S COMPENSATION

Section 10.01: Full-time employees injured in the line of duty shall be compensated at full pay, not to exceed twelve (12) months, while disabled. Employees shall reimburse the Employer for any moneys (sic) received from worker’s compensation.

Section 10.02: Employees who have been injured on duty may be assigned to temporary light duty subject to the limitations resulting from the injury. Either the Village or the employee may request a medical certification to clarify the nature of the work

which the employee is able to perform. Work assigned as light duty shall be work normally performed by police department personnel unless the employee agrees to work for Village departments other than the police department. This work may be performed at those times and in those places appropriate for the nature of the work, taking into consideration the shift preference of the employee. An employee on light duty shall not have any benefits or pay diminished in any way.

Light duty assignment shall not exceed one (1) year in duration and are intended for those situations where there is a medical likelihood of return to full duty within one (1) year.

* * *

ARTICLE XXII – MATERNITY LEAVE

Section 23.01: Female employees who become pregnant are allowed to work only as safety and health permit. A statement from the employee's doctor indicating the approximate date of birth is required when pregnancy becomes known. The physician's approval should be provided from time to time as employment continues.

A maternity leave of absence will be granted for the period of time that the employee is unable to work. This means that the purpose of a maternity leave is to provide a leave of absence for the purpose of childbirth rather than child care and support after delivery. There is an expectation that the employee will return to work as soon as physically capable. A statement from the doctor is required within six (6) weeks following termination of pregnancy indicating (sic) when the employee will be physically able to return to work. A maternity leave is absence without pay except that an employee who is on maternity leave may substitute her accumulated sick leave, vacation days, or holidays to provide compensation while on maternity leave and shall designate to the Employer which days she wants to use.

While on maternity leave the employee will continue to accrue seniority and will not incur any loss of benefits. The Village may require a medical certificate evidencing that an employee is medically able to return to work.

RELEVANT PROVISIONS OF GENERAL ORDER 4204**VII. LIGHT DUTY**

- A. A member who is on injured-on-duty status may be assigned light duty when medically authorized. The nature and extent of light duty will be based on the medical evaluation of the injury or other condition preventing the member from performing regular duties. All light duty must be reviewed and approved by the Chief of Police based on written medical authorization for light duty.
- B. Light duty may be authorized for members on sick leave only if the Chief of Police determines appropriate light duty assignments are available. Priority will always be given to light duty assignments for members on injured-on-duty status.
- C. Light duty assignments shall not exceed one year in duration and are intended for those situations where there is a medical likelihood of return to full duty within one year.
- D. Authorization for light duty assignments are at the sole discretion of the Chief of Police and are not a guaranteed entitlement.

DISCUSSION

The parties agree that there was a practice of making light duty work available to pregnant employees when they were no longer able to perform the traditional duties of a police officer. That practice did have some limitation. Jungbluth and M.S. shared a job when there wasn't sufficient light duty to go around. Chief Ruzinski indicated that the Department had a number of special projects that lent themselves to light duty. She further indicated that those projects dried up, and that there is much less light duty work available.

There were a number of factors, including the budget, the number of people on light duty, and the reduced availability of light duty work that caused the Chief to issue the October 21 and November 30 emails. It was the Chief's testimony that she regarded her reference to an off duty injury to be a generic catchall for a serious health condition off duty. This would include illness, injury or pregnancy. Her testimony distinguished between an on the job injury and all other forms of serious health conditions arising off the job. There is no separate policy for pregnancy and light duty. It has been treated similarly to off the job injury or illness.

The emails in question specifically address off duty injury. They do not specifically address pregnancy. At the time, there was at least one employee on light duty as a result of pregnancy. The emails do not specifically address illness. If the email's reference to injuries occurring off duty was intended to include pregnancy and illness the language was imprecise. That said, the grievance complains that "... the parties have a history and past practice of providing Light Duty assignments for officers with non-work-related injuries, including pregnancy." The grievance appears to use the phrase non-work-related injury as a broad reference to situations other than injury, including pregnancy.

The Association met with the Chief following the issuance of the October 21 email. Following that meeting, the October 21 email was replaced by the November 30 email. It appears that there was at least tacit or grudging acquiescence as to its terms. The Chief testified that the revised document reflected the conversation that occurred. There was no light duty provided to anyone who suffered an off duty injury or illness in 2012. There was no grievance filed.

The November 30 email again refers to injuries occurring off duty. The email goes on to draw a distinction between injuries occurring on duty and those occurring off duty. The first paragraph refers to the contract, Article 10.02, which regulates on duty injuries, and provides the rationale for providing light duty priority to those individuals. Paragraph 2 addresses officers injured off duty and refers to General Order 4204. The email points to the language of the General Order which refers to members on sick leave. The email points out the distinction, drawn by the General Order, between injured on duty and those on sick leave. There is no reference to injured-off-duty in the General Order. The General Order references sick leave, which use extends beyond off work injuries.

The overall theme of the email is that there will be less light duty made available. It notes that "I have denied light duty in the past because the work was simply not there." It is not clear from the record what light duty was referenced. However, the record does indicate that the two pregnant employees were required to job share light duty in 2011 because the work was not there.

The real modification brought about by the November 30 email was the commitment to consider requests on a case-by-case basis. The grievance answer commits to doing that. The third full paragraph of the November 30 email describes the operational problem of losing an officer twice when the officer goes on light duty. The circumstance described is as applicable to pregnancy as it is to injury or illness.

The Association feels the email only terminated that portion of the practice that involved off duty injury. This claim is consistent with the literal reading of the topic sentences of the first two paragraphs of the November 30 email. It is not consistent with the purpose of the email, nor with the reference to sick leave in paragraph 2, citing the General Order, nor is it consistent with the previous denial of light duty for lack of work.

The Village regards the email as terminating the practice of essentially guaranteeing light duty to anyone other than those injured on duty. This view is consistent with its view of the budget and the depleted availability of limited duty work. However, the language used in the declarative sentences is directed to injury and does not address pregnancy.

As a practical matter the Village is right. Under the Association's construction of the email, officers who incur an injury off the job would be covered by the November 30 email. Pregnant employees would not and would be entitled to light duty. It is unclear what the status of officers who became ill would be. As to the pregnant employees, the practice was that those employees were offered light duty. The offer was not absolute. Two employees shared a job. That only represented a single incident, but it was the most current event. The reduced availability of hours occurred because the Village determined that it did not have enough light duty work to go around.

The practice consisted of seven pregnancies, involving five women. The sharing episode involved two of the five women and two of the seven pregnancies. It was not an insignificant incident. I believe that, even in the face of the practice, the Employer retained some degree of control over how much light duty had to be offered. If the Association were to prevail in this proceeding, it would raise the question as to how much light duty was required. I think the Employer is in the best position to make that judgment.

I think the notice was sufficient to terminate the practice. The body of the November 30 email referenced employees on sick leave, which went beyond the reference to injured-off-duty. The description of the problem from the Village's perspective certainly extended to all non-work-related illness, injury, and pregnancy. The reference to General Order 4204 invoked a policy that made light duty for those on sick leave at the discretion of the Chief.

I think the Chief did use the term injured-off-duty as intending to describe a broader range of light duty applicants. As such, it is in artful. However, the grievance uses the same shorthand. It appears that it reflects the parlance of the workplace and not a conscious decision to create different categories of employees for light duty purposes.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 25th day of July 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

William C. Houlihan, Arbitrator