

IN THE MATTER OF ARBITRATION) GRIEVANCE ARBITRATION
)
 between)
City of Duluth, Minnesota) Patrick Rix - Overtime Pay
)
 -and-) BMS Case No. 13-PA-0662
)
AFSCME Council 5, Local) June 21, 2013
No. 66)
))

APPEARANCES

For City of Duluth, Minnesota

Steven B. Hanke, Assistant City Attorney
Theresa Severance, Human Resources Administrator

For AFSCME Council 5, Local No. 66

Diane Firkus, Field Representative
David Leonzal, Second Chair
Patrick Rix, Grievant

JURISDICTION OF ARBITRATOR

Article 45, Grievance Procedure, Section 45.4 of the 2011 Collective Bargaining Agreement (Union Exhibit A; City Exhibit #2) between City of Duluth, Minnesota (hereinafter "Employer" or "City") and AFSCME Council 5, Local No. 66 (hereinafter "Union") provides for an appeal to final and binding arbitration of disputes that are properly processed through the grievance procedure.

The Arbitrator, Richard John Miller, was selected by the Employer and Union (collectively referred to as the "Parties") from a panel submitted by the Minnesota Bureau of Mediation

Services. A hearing in the matter convened on May 22, 2013, at 9:30 a.m. in the City Attorney's Office Law Library, Room 410, at the Duluth City Hall, 411 First Street, Duluth, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his personal records. The Parties were afforded full and ample opportunity to present evidence and arguments in support of their respective positions. The Parties elected to make closing arguments in lieu of filing post hearing briefs, after which the record was considered closed.

The Parties agreed that the grievance is a decorous matter within the purview of the Arbitrator, and made no procedural or substantive arbitrability claims.

ISSUE AS DETERMINED BY THE ARBITRATOR

Is the Grievant entitled to receive overtime pay from May 9, 2011 through November 12, 2012?

STATEMENT OF THE FACTS

The Grievant, Patrick Rix, is an honorably discharged Veteran and entitled to the employment protections provided by the Veterans Preference Act (Minnesota Statutes Section 197.46).

The Grievant is employed by the City as a Utility Operator and assigned to the City's Public Works and Utilities Department. (Union Exhibit E).

The Grievant began his employment with the City on January 20, 2009. He was in the City's apprenticeship program. He was

also serving his initial period of probation, which is required of all new employees.

At the time the Grievant began his employment with the City he was a combat Veteran of the second Iraq war. On April 21, 2009, the Grievant informed the City that he had been given orders to report for active duty for a period of time not to exceed 400 days. He was required to report on June 17, 2009. He was deployed to Afghanistan and returned home on June 9, 2010.

Around the time the Grievant informed the City of his impending deployment, two of his supervisors reported negative job evaluations regarding his job performance. These included alleged excessive cell phone use, lack of willingness to perform assigned tasks, excessive smoke breaks, and poor attendance. It was determined by supervision not to discuss these issues with the Grievant until he returned from military duty.

The Grievant returned to City employment on June 21, 2010. He was still in the City's apprenticeship program and serving his initial period of probation upon his return to work. There were similar complaints about the Grievant's job performance between June 21 through June 29, 2010. This resulted in the Grievant receiving a verbal warning reduced to writing on July 1, 2010, for poor job performance. The Grievant stated he would modify his behavior.

Shortly after July 1, 2010, the Grievant went on an extended leave of absence. The Grievant was diagnosed with PTSD upon his return from deployment and also suffered from a cervical spine injury incurred in a duty-related accident while deploying.

The Grievant returned from medical leave on March 2, 2011. Between March 2, 2011, and May 9, 2011, there was no record of disciplinary action take against the Grievant, except that on May 5 and 6, 2011, the Employer learned of some attendance and work performance issues.

On May 9, 2011, the City's Human Resources Department confirmed that May 9, 2011, was the Grievant's last day of probation. The Grievant was terminated shortly before his shift ended on that day. (Union Exhibit B).

The Grievant elected to challenge his termination pursuant to the Veterans Preference Act ("VPA") by providing timely notice to the City. A VPA hearing was ultimately held on July 5, 2011, before the City Civil Service Board, in its capacity as the City Veterans Hearing Board.

The VPA Board decided on July 11, 2011, to reverse the Grievant's termination and ordered the City to return the Grievant to his position of Utility Operator and to provide him with any back pay and benefits to which he may be entitled. (City Exhibit #3; Union Exhibit C).

The Grievant admitted during the VPA hearing that he was diagnosed with PTSD, suffers from a cervical spine injury incurred while he was deployed, and takes prescribed medications (including a narcotic pain medication) to treat both of these medical conditions. The Grievant also admitted that the medications negatively affected his work performance and that on some days he did not remember being at work and driving a City truck at 60 mph and did not know why.

On July 15, 2011, the City sent the Grievant a letter, that based upon his disclosures regarding his personal health made at the VPA hearing, obligates the City under the Drug and Alcohol Use Policy (City Exhibit #6; Union Exhibit F) to conduct a Fitness for Duty Medical Assessment pursuant to Article 29.3 of the Parties' Collective Bargaining Agreement. (City Exhibits #2, #4; Union Exhibit A). The Employer provided the Grievant with a copy of the City's Fitness for Duty Policy. (City Exhibit #5).

The Grievant was evaluated by Dr. Brian Konowalchuk, M.D., M.P.H. on July 18, 2011. The Grievant stated to Dr. Konowalchuk during his Fitness for Duty Medical Assessment that he does take prescribed narcotics, but "does not take narcotics before or after work. On the days he works, he notes that he only takes them at the completion of work." (City Exhibit #8, p. 3; Union Exhibit G, p. 3). In spite of the Grievant's admissions, Dr.

Konowalchuk concluded in his Fitness for Duty Medical Assessment Report:

Based on my examination and evaluation of the medical record, I agree with, and support, the restrictions outlined by Dr. Clyde Markon. Due to multiple sedating medications, Mr. Rix should be instructed to avoid operating heavy equipment or commercial motor vehicles, working at heights or in safety-sensitive positions.

I would advise extreme caution regarding regular daily driving or operating personal vehicles or equipment. Based on these recommendations, Mr. Rix is not fit for duty as a Utility Operator for the City of Duluth.

(City Exhibit #8, p. 7; Union Exhibit G, p. 7).

Thus, on or about July 18, 2011, the Grievant was declared by Dr. Konowalchuk to be medically unfit for duty as a City Utility Operator.

On September 9, 2011, the Union filed a grievance alleging that the Grievant was not given the opportunity to work overtime and not paid for any overtime since his discharge on May 9, 2011. (City Exhibit #1; Union Exhibit D).

On September 28, 2011, the Grievant submitted to another Fitness for Duty evaluation to determine whether he could return to work with the City. This was conducted by Dr. Thomas G. Gratzer, M.D., a Board Certified Forensic Psychiatrist. Dr. Gratzer prepared a Fitness for Duty Examiner Assessment Report on October 4, 2011. (City Exhibit #9; Union Exhibit H). Dr. Gratzer opined:

I would agree with Dr. Konowalchuk that Mr. Rix is not fit for duty as described in his job description. I would note the narcotics he is taking are sedating and Mr. Rix is also on a number of sedating psychiatric medications.

(City Exhibit #9, p. 8; Union Exhibit H, p. 8).

Dr. Gratzner recommended before the Grievant is allowed to return to work the following should occur:

In my opinion, Mr. Rix should undergo a chemical dependency assessment and possible chemical dependency treatment for his increasing use of narcotics. Mr. Rix would also likely benefit from attending a pain management program.

(City Exhibit #9, p. 9; Union Exhibit H, p. 9).

On October 10, 2011, Dr. Konowalchuk sent a letter to the City, which reaffirmed his conclusion that the Grievant was unfit for duty based upon the same conclusion reached by Dr. Gratzner. (City Exhibit #10; Union Exhibit I).

Dr. Konowalchuk recommended to the City on October 20, 2011, that "the most appropriate way to proceed with Mr. Rix's return to employment would be to have him participate in a chemical dependency evaluation and treatment program." (City Exhibit #11; Union Exhibit J). The Grievant concurred and was interviewed by Robert F. Lyman, M.S.Ed., LICSW, a substance abuse professional on November 14, 2011. (Union Exhibit K).

Mr. Lyman prepared a Chemical Use Assessment Evaluation Report dated November 14, 2011. (City Exhibit #12; Union Exhibit K). Mr. Lyman opined that "Mr. Rix is chemically dependent but is not suitable at the present time for any type of

chemical dependency treatment and/or a pain management program.”
Id., p. 9. Mr. Lyman concurred with the conclusions reached by
Dr. Konowalchuk and Dr. Gratzner that the Grievant was unfit for
duty. Id., p. 10.

On December 19, 2011, Dr. Konowalchuk sent a letter to the
City, which reaffirmed his conclusion that the Grievant was
unfit for duty based upon Mr. Lyman’s conclusion and that of Dr.
Markon, who had been treating the Grievant at the VA Medical
Center. (City Exhibit #13; Union Exhibit M).

The Grievant was admitted to the VA Center in St. Cloud,
Minnesota for treatment of his medical conditions on February 3,
2012, and he was discharged from the hospital on April 26, 2012.

The conclusion that the Grievant was unfit for duty was
again reaffirmed by Dr. Konowalchuk on September 10, 2012, even
after the Grievant had changed and/or eliminated some of his
narcotic medications. (City Exhibits #14, 15; Union Exhibit N).

The Grievant sought another Fitness for Duty Medical
Assessment by another doctor. The City agreed. On September
20, 2012, Dr. Douglas M. Wendland, M.D., examined the Grievant
and reviewed his medical history, after which he concluded that
the Grievant is medically fit to “return to the job of Utility
Operator for the City of Duluth without restriction or
accommodation,” with an effective date of October 10, 2012.
(City Exhibit #16; Union Exhibit O).

The City received Dr. Wendland's Fitness for Duty Medical Assessment Duty Report on October 14, 2012. This prompted the City on October 18, 2012, to offer re-employment to the Grievant within thirty (30) calendar days, as the Grievant had been recently employed by another employer (Duluth Steel Fabricators) as a welder, while being on paid administration leave from the City from the date of his discharge. (City Exhibit #17; Union Exhibit P). The Grievant ultimately accepted re-employment with the City to his previous job of Utility Operator, with an effective date of November 12, 2012.

The Parties were unable to resolve the grievance pertaining to whether the Grievant is entitled to overtime pay for lost overtime opportunities from May 9, 2011 through November 12, 2012 (minus his period of hospitalization at the VA Center). The Parties concede that the lost overtime opportunities for the Grievant during the period of time in question would be at least \$18,000. (Union Exhibit Q).

ANALYSIS OF THE EVIDENCE

The sole issue before the Arbitrator is whether the Grievant is entitled to receive overtime pay for lost overtime opportunities from the date of his discharge on May 9, 2011 through November 12, 2012, the date of his reinstatement to his former position of Utility Operator (minus his period of hospitalization at the VA Center). The Grievant is not claiming

any other monetary relief, as he was paid wages and other fringe benefits during this time period.

It is undisputed that the City has the contractual right under Article 29.3, for work-related reason stated in writing to the employee, to require an employee to submit to medical examination, paid for by the Employer, to determine an employee's medical fitness to perform an employee's job duties and responsibilities or to attend work.

In this case, the City complied with its contractual obligations under Article 29.3 to require the Grievant to submit to a Fitness for Duty Assessment. There was a valid work-related reason for requiring the Grievant to submit to a Fitness for Duty Assessment. The Grievant admitted during the VPA hearing on July 5, 2011, that he was diagnosed with PTSD, suffers from a cervical spine injury incurred while he was deployed, and takes prescribed medications (including a narcotic pain medication) to treat both of these medical conditions. The Grievant also admitted that the medications negatively affected his work performance and that on some days he did not remember being at work and driving a City truck at 60 mph and did not know why.

Most certainly, the Grievant's disclosures were troubling to the City, as the Overview for the Fitness for Duty Policy states:

The City of Duluth is committed to providing a safe workplace. In order to provide a safe work environment, employees must be able to perform their job duties in a safe, secure, productive and effective manner, without presenting a safety hazard to themselves, other employees, the City of Duluth (as the employer) or the public.

(City Exhibit #5, p. 1).

As a result of the Grievant's disclosures at the VPA hearing, and based upon the Overview of the Fitness for Duty policy, the City was justified in requiring the Grievant to submit to a Fitness for Duty Assessment with Dr. Konowalchuk on July 18, 2011, which was paid for by the Employer, to determine the Grievant's medical fitness to perform his job duties and responsibilities as a City Utility Operator.

A Fitness for Duty Assessment aims to promote and maintain the highest degree of physical, mental and social well-being of employees; to prevent decline in health caused by their working conditions; to protect employees in their employment from risks resulting from factors adverse to health; and to place and maintain employees in an occupational environment adapted to their physiological and psychological capabilities. Simply, it aims to adapt work to the employees and each employee to his or her job to prevent future health and safety risk for the employee, co-workers and the public.

An initial Fitness for Duty Assessment is generally conducted by an occupational health doctor, familiar with both

working and health conditions of the employee in his or her work setting. Follow-up Fitness for Duty Assessments are also proper if administered by qualified health care professionals, familiar with the employee's job duties and responsibilities.

Accordingly, a Fitness for Duty Assessment is a dynamic concept for qualified health care professionals. Its assessment is required after the emergence of an employee's health problem or periodically, especially for hazardous, physically demanding or safety-sensitive jobs.

In this case, the Grievant's initial Fitness for Duty Assessment on July 18, 2011, was conducted by Dr. Konowalchuk, an occupational health doctor, who was familiar with the Grievant's job duties and responsibilities as a City Utility Operator. Dr. Konowalchuk concurred with Dr. Markon, who was treating the Grievant at the VA Center, that in spite of the Grievant's admission that he was only taking multiple sedating medications (some of which were prescribed narcotics) on his off-duty hours, the lingering effect of these drugs during his on-duty working hours resulted in him being unfit for duty as a City Utility Operator. This medical conclusion was buttressed by the Grievant's statements during the VPA hearing that the medications negatively affected his work performance and that on some days he did not remember being at work and driving a City truck at 60 mph and did not know why.

Dr. Konowalchuk's conclusion that the Grievant was unfit for duty due to the medications he was taking was affirmed over time by other health care professionals, including Dr. Markon, Dr. Gratzner, a Board Certified Forensic Psychiatrist, and Mr. Lyman, a substance abuse health care professional. Dr. Konowalchuk concurred with the conclusions of these health care professionals, which were conveyed to the City. It was not until Dr. Wendland's Fitness for Duty Medical Assessment conducted on September 20, 2012, and received by the City on or about October 12, 2012, that finally determined the Grievant was medically fit to return to work without restrictions due to the previous medications that he was no longer taking and different medications that would have no lingering, sedating or negative effects while on the job. This medical conclusion was accepted by the City and Dr. Konowalchuk and the Grievant was returned to work.

An analysis of the reported arbitration cases discloses that medical certificates are admitted in evidence and given weight by arbitrators in determining the fitness and ability of employees. Bell Aircraft Corp., 1 LA 281 (1946); Tennessee Coal, Iron & Bridge Co., 11 LA 909 (1948); Carolina Coach Co., 20 LA 451 (1953); Fenwick Fashion Inc., 42 LA 584 (1964).

A doctor's certificate is not to be lightly disregarded. It is common practice in arbitration to treat such certificates

as satisfactory evidence of employee's health. Where the circumstances raise some question as to the real state of the employee's health, the doctor's certificates must ordinarily be given a great deal of weight in resolving the dispute in question. In the absence of any significant impeachment of medical evidence, this evidence must be taken as a proper demonstration of cause for an employee's fitness and ability.

The Grievant claims that the medical professionals who found him to be unfit for duty were unaware of the drugs he was taking or unaware of the lingering effects, if any, of taking the drugs while off-duty. In any event, the Grievant's claims are unfounded by any proof by any medical professional that he was fit for duty until Dr. Wendland's Fitness for Duty Assessment. Thus, from July 18, 2011 through approximately October 10, 2012, the Grievant was medically certified to be unfit for duty by several health care professionals, with the Grievant offering no medical evidence to the contrary. Since there was no significant impeachment by the Grievant of medical evidence from these medical professionals, their findings that the Grievant was unfit for work as a City Utility Operator must stand.

The fact that the Grievant found work as a welder with Duluth Steel Fabricators during part of the time period in

question is a credit to him, but does not prove that he was medically fit to resume his City Utility Operator position at that time of this employment. Most certainly, performing welding in a shop and operating City equipment on the streets are not similar job duties and responsibilities, and do not have the same safety concerns, especially to the public. Moreover, there is no proof as to what medications and what dosage the Grievant was taking during his employment with Duluth Steel Fabricators and how they compare to the medications and dosage known to the health care professionals when they concluded the Grievant to be unfit for duty.

It is reasonable to conclude that the Grievant was not entitled to overtime pay from the dates that he was medically certified to be unfit for duty during the regular work day. Most certainly, if the Grievant was unfit for duty during their regularly scheduled work shift, he would also be ineligible for overtime opportunities and pay.

However, the same analogy applies that if one is fit for duty, one is thus eligible for overtime opportunities and pay. The Grievant was fit for duty, and thus eligible for overtime opportunities and pay, from the date of his discharge on May 9, 2011, to the date of the Grievant's first Fitness for Duty Medical Assessment by Dr. Konowalchuk on July 18, 2011, and from the effective date of October 10, 2012, when Dr. Wendland found

the Grievant to be fit for duty until his re-employment date of November 12, 2012.

AWARD

Based upon the foregoing and the entire record, the grievance is sustained in part and denied in part. The Grievant is entitled to receive overtime pay for any lost overtime opportunities for the period between the effective date of his discharge on May 9, 2011, to the date of the Grievant's first Fitness for Duty Medical Assessment by Dr. Konowalchuk on July 18, 2011, and from the effective date of October 10, 2012, when Dr. Wendland found the Grievant to be fit for duty until his re-employment date with the City on November 12, 2012.

Richard John Miller

Dated June 21, 2013, at Maple Grove, Minnesota.