
In the Matter of the Arbitration between

the City of Rochester, NY

and

Rochester Fire Fighters' Association,
Local 1071

AWARD OF
ARBITRATOR

JUDITH A. La MANNA

Issue: Contract language

Grievant: [REDACTED]

Panel

APPEARANCES

For the Employer:	Thomas S. Richards, Corporation Counsel, BY Yvette Chancellor Green, of Counsel City of Rochester, NY
For the Union:	Lawrence J. Andolina, Esq. Trevette, Christo, Salzer & Andolina, PC, Rochester, NY

DATE OF HEARING: May 21, 2008

LOCATION OF HEARING: City Hall, Rochester, NY

EVIDENCE: The record contains six numbered exhibits. J. 1-2; C. 1-4.

COLLECTIVE BARGAINING AGREEMENT (J.1): (July 1, 2003 – June 30, 2008)

WITNESSES: None.

This proceeding is conducted pursuant to the terms of the above-noted collective bargaining Agreement ("Agreement" or "contract") between the City of Rochester ("City" or "Employer") and the Rochester Fire Fighters' Association ("Union"). The subject grievance was filed on September 10, 2007, that Article 5§2E and other provisions of the Agreement were violated in the manner in which Firefighter [REDACTED] ("Grievant") was treated regarding a Fitness for Duty examination. J.2.

On May 21, 2008, a hearing was held before the undersigned. The parties appeared by their counsel and agreed to Joint Exhibits; City exhibits were marked and received without objection. Each proposed an Issue, but they were unable to agree on the Issue statement and asked this Arbitrator to do so for them.

The Association proposed the following issue:

Did the City violate the collective bargaining Agreement when it ordered the Grievant to an Independent Medical Examination ("IME") with Jay Supnick, Ph.D.? If so, what shall be the remedy?

The City proposed the following issue:

Whether the City violated Article 5§2 of the collective bargaining Agreement when Fire Surgeon Dr. Shmigel referred the Grievant to Dr. Jay Supnick, a psychologist, for evaluation? If so, what shall be the remedy?

The parties waived oral opening statements and agreed to present and argue the case on papers, which they timely submitted postmarked July 18, 2008. In thus closing the hearing, both the City and Association offered their arguments in comprehensive, well-drafted statements, with attached references. In reaching the Award herein, those closings were fully reviewed and considered along with all material in evidence.

ISSUE

After hearing the case and reviewing the evidence and arguments, I find the Issue to be as follows:

Did the City violate Article 5§2.E of the collective bargaining Agreement when it ordered the Grievant to an Independent Medical Evaluation with Jay Supnick, Ph.D.? If so, what shall be the remedy?

CONTRACT J.1.

ARTICLE 5 §2.E. At the Employer's discretion, any member may be required to report for a medical examination to a physician(s) designated by the employer for the purposes of verifying a claim of illness or injury or to verify the member's ability to perform the essential functions of the job. The costs of any such examinations shall be borne by the Employer.

SUMMARY OF THE CASE

The City's Fire Surgeon is Dr. Boris Shmigel. By letter dated August 17, 2007, Dr. Shmigel notified Grievant [REDACTED] of an appointment made for him for August 28 for an "Independent Medical Evaluation with Dr. Jay Supnick". C.1. Dr. Shmigel and Grievant's psychologist had a communication, after which Grievant did not appear at the August 28 appointment with Dr. Supnick. (Stip.) Thereafter, Grievant was told by a letter dated August 30, 2007 from Fire Chief Madison that he was "required to report" (ordered – 'Stip.) to a newly scheduled appointment with Dr. Supnick on September 7, 2007, pursuant to Article 5§2.E, for an "Independent Medical Evaluation". C.2. Supnick is a psychologist, not a medical doctor. (Stip.) Grievant appeared at that appointment, but for other reasons Supnick did not issue a report. (Stip.)

By letter sent as a facsimile transmittal on September 10 to Executive Deputy Fire Chief Mitrano, the Union formally grieved the aforesaid directive as a violation of Article 5§2.E, complaining that Dr. Jay Supnick is not a "physician". J.2.

Fire Chief Caufield issued a letter dated September 21, 2007, giving [REDACTED] "a written order" "to submit to a psychiatric Fitness for Duty Evaluation", also termed an "Independent Medical Evaluation". That appointment was with "psychiatrist" Dr. Letourneau. C.3 Grievant complied with that order and attended the examination.

The grievance moved through the grievance process (letters dated September 12, 13, 18, 19 and 28) and by letter from the Union dated October 3, arbitration was requested. J.2.

DISCUSSION

Supnick was not “functioning under [Shmigel’s] auspices”. To the contrary, Dr. Shmigel (C.1) notified Grievant that he was being sent to Supnick for an Independent Medical Evaluation. Thus Supnick was intended to be independent.

The Article 5§2.E was to be “independent”, understood from all correspondence with Fire Fighter [REDACTED]. A requirement for independence does not mean that a medical doctor must “personally perform all tests, exams,” etc., but must have such tests, exams, etc., conducted under his/her direction and control.

Tenets of contract interpretation require a plain meaning be given to language when the meaning is not given specific definition. Article 5§2.E allows the City to send a unit member for a “medical examination” to a “physician”. The plain meaning of “physician” is of medical doctor, one who can, as called-for by Article 5§2.E, verify “a claim of illness” or inability to perform the job. Overlooked in the concentration on the term “physician” is the contract requirement that the review be a “medical” examination. Only a medical physician can perform a medical examination. Finally, the review is to be a medical “examination” and not – as was incorrectly used in all directives to Grievant [REDACTED] – an “evaluation”.

Thus, although Supnick was independent, he was not qualified under Article 5§2.E to perform the medical examination because he is not a physician.

AWARD

Having heard and considered all of the above facts, testimony, evidence and allegations and arguments of the parties, as well as the relevant Contract provisions:

This grievance is sustained.

The City violated Article 5§2.E of the collective bargaining Agreement when it ordered the Grievant to an Independent Medical Evaluation with Jay Supnick, Ph.D., because Supnick is a psychologist and therefore not a physician able to provide a medical examination.

The City is to cease and desist in using other than medical doctors for such Article 5§2.E reviews.

As soon as it can be accomplished after the issuance of this Award:

1. The City is to collect from its own files any and all records it has regarding the referral and actual evaluation of Fire Fighter [REDACTED] by Supnick and return those to the attorney for the Union. It is to provide with that material, if requested and prepared by the attorney for the Union, a certification that all such materials have been removed and returned and that no copies have been retained.
2. The City is to collect from Dr. Supnick any and all records he has regarding the referral and actual visit to him by Fire Fighter [REDACTED] for return to the attorney for the Union.
3. The City is to secure a sworn certification from Dr. Supnick, if requested and prepared by the attorney for the Union, that all materials concerning Grievant have been removed from his records for return and that no copies have been retained by him.

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS:

I affirm, pursuant to §7507 of the New York Civil Practice Law and Rules and my oath as Arbitrator, that I that I am the individual described in and who executed the foregoing instrument, which is my AWARD.

Signed: Judith A. La Manna
Judith A. La Manna, Esq.
224 Harrison Street (#306)
Syracuse, NY 13202

Date: August 5, 2008