

**SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION
DIVISION OF LABOR AND MANAGEMENT**

**KURT GERES and MITCHELL
FIREFIGHTERS LOCAL 4166,**

HF No. 5 G, 2010/11

Petitioners,

v.

DECISION

THE CITY OF MITCHELL,

Respondent.

This matter came before the Department of Labor and Regulation when Petitioners, Kurt Geres and Mitchell Firefighters Local 4166 filed a Petition for Hearing on Grievance on October 22, 2010, pursuant to SDCL 3-18-15.2. The Department conducted a hearing on January 26, 2011, in Mitchell, South Dakota. Thomas K. Wilka appeared on behalf of Petitioners. Randolph Stiles and Dennis Maloney represented the Respondent.

Issues:

This case raises the following legal issue:

Whether the City of Mitchell violated, misinterpreted or inequitably applied the provisions of the negotiate agreement or National Firefighters Protection Association 1582 Standards when it terminated the employment of Kurt Geres?

Facts:

The facts of this case are as follows:

1. Kurt Geres (Geres) was hired by the City of Mitchell (City) as a firefighter and medic on March 14, 1995. Prior to that time, Geres had been a firefighter-EMT in East Grand Forks, Minnesota.
2. While employed by City, Geres was a member of the Mitchell Firefighters Local 4166 (Union).
3. At the request of the Union, the City adopted the National Firefighters Protection Association 1582 (NFPA 1582) Standards. The implementation of the NFPA 1582 standards has been solemnized in every collective bargaining agreement negotiated between the City and Union since 2006, including the agreement

(negotiated agreement) which was in effect during the relevant events in this case.

4. The NFPA 1582 standards require annual medical examinations of all City firefighters to evaluate whether each firefighter is physically capable of safely performing the tasks involved in firefighting.
5. The City retained Dr. Darla Edinger of Avera Queen of Peace as the fire department physician to perform the duties assigned by the NFPA 1582 standards. Edinger is professionally competent to hold that position.
6. As a City firefighter, Geres was required to use a self-contained breathing apparatus (SCBA).
7. In October of 2009, Geres was hospitalized with mycoplasma pneumonia. He was again treated for pneumonia and a respiratory infection in the spring of 2010.
8. A physician has prescribed systemic corticosteroids and bronchial rescue dilators for Geres within the past two years.
9. On April 13, 2010, Geres reported to Dr. Edinger for his annual medical examination as dictated by NFPA 1582. He was given a pulmonary function test called a spirometry. The test results indicated a breathing problem significant enough that Geres could not wear a SCBA unit.
10. As a result of Geres' initial spirometry, Geres was restricted to paramedic work only on April 13, 2010. Dr. Edinger referred Geres back to his primary physician, Dr. Campbell, because his recent illnesses may have impacted the spirometry results.
11. After recovering from the pneumonia and respiratory infection, Geres returned to Dr. Edinger to complete his annual examination. Dr. Edinger ordered another pulmonary function test which was performed on June 21, 2010. Geres' second spirometry results were also substandard. In addition, Dr. Edinger discovered a diagnosis of asthma while reviewing Geres' primary physician's records.
12. After Geres' second spirometry test, Dr. Edinger believed that he may have asthma. Consequently, she referred him to a pulmonologist, Dr. Brian Hurley.
13. Dr. Hurley concluded that Geres met the criteria for a current diagnosis of asthma and that Geres was unable to show adequate reserve of both FVC and FEV1 to be equal to or greater than 90% without bronchodilator rescue medications. Dr. Hurley also concluded that Geres could not meet NFPA 1582 standards' 9.7.6.1 (1) through (6) and could not safely perform essential job tasks 1, 2, 3, 4, 5, 7, 9, 13 without the use of bronchodilator rescue medications.

14. On September 2, 2010, Dr. Edinger reported to the City that Geres was not fit for duty as a firefighter and the City terminated his employment.
15. Relevant sections of the negotiated agreement and the NFPA 1582 standards are identified in the analysis of this decision.
16. Additional facts may be discussed in the analysis below.

Analysis:

Grievance:

Geres and the Union initiated this action by filing a grievance with the City. SDCL 3-18-1.1 defines, "grievance" as follows:

The term "grievance" as used in this chapter means a complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies or rules of the government of the state of South Dakota or the government of any one or more of the political subdivisions thereof, or of the public schools, or any authority, commission, or board, or any other branch of the public service, as they apply to the conditions of employment. Negotiations for, or a disagreement over, a nonexisting agreement, contract, ordinance, policy or rule is not a "grievance" and is not subject to this section.

SDCL 3-18-1. The Department's role in grievance cases is set forth in SDCL 3-18-15.2. That statute states in part:

If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved . . . it may be appealed to the department of labor . . . The department of labor shall conduct an investigation and hearing and shall issue an order covering the points raised, which order is binding on the employees and the governmental agency.

SDCL 3-18-15.2. In this case, the Department must determine whether the City misinterpreted or inequitably applied the terms of the negotiated agreement or the any of the NFPA 1582 standards.

The burden of proof falls on Geres and the Union as grievants. Rininger v. Bennett County School District, 468 NW2d 423 (SD 1991). In this case, the Negotiated Agreement is a collective bargaining agreement. "Trade agreements or collective bargaining agreements are contracts under South Dakota law." Hanson v. Vermillion Sch. Dist., 727 N.W.2d 459, 467 (S.D. 2007). Disputes over collective bargaining agreements are to be settled by general contract principles. Id. at 468.

City's Conduct:

The parties agree that the City adopted the NFPA 1582 standards at the request of the Union. Those standards are incorporated into the negotiated agreement at Article 27, Section 1. The provision states:

The Committee for Union-Management Cooperation shall support the provision of a comprehensive mandatory annual medical exams as outlined by NFPA 1582 (current edition) and provided by the City. All recognized members of the collective bargaining unit shall receive an annual comprehensive medical exam to be conducted every twelve (12) months (=/- 3 months). This is to be accomplished by a three (3) year phase-in with eight (8) employees in 2007, eight (8) in 2008 and the remainder in 2009.

Once incorporated into the negotiated agreement, the NFPA 1582 becomes binding on the parties. See, James River Equipment Co. v. Beadle Co. Equipment, Inc., 2002 S.D. 61, ¶ 21, 646 N.W.2d 265. Claimant argues that the phrase “as outlined by the NFPA 1582” as stated in the negotiated agreement indicates that the NFPA 1652 standards are guidelines and are not mandatory. The Department disagrees. The term “as outlined by NFPA 1582” refers to the form of the document, not to its enforceability.

Once adopted, some of the NFPA 1582 provisions are mandatory and some are for guidance. The NFPA 1582, section 3.2.3 states, “[s]hall. Indicates a mandatory requirement.” NFPA1582, section 3.2.4 states, “[s]hould. Indicates a recommendation or that which is advised but not required.”

Dr. Edinger determined that Geres has asthma. This determination was supported by Dr. Hurley’s examination of Geres and his medical history. The NFPA 1952 standards state the following with regards to asthma:

9.7.6 Asthma.

9.7.6.1 Physician Evaluation. Asthma compromises the member's ability to safely perform essential job tasks 1, 2, 3, 4, 5, 7, 9, and 13, and the physician shall report the applicable job limitations to the fire department, unless the following provisions are met:

- (1)** The member denies bronchospasm during exertion, temperature/humidity extremes, irritant exposures, fire activities, or hazmat activities.
- (2)** The member denies the use of bronchodilator rescue medications during exertion, temperature/humidity extremes, irritant exposures, fire activities, or hazmat activities.
- (3)** A review of the member's fire department records (training, operations, rehabilitation, and medical) verifies that no asthmatic episodes have occurred during fire suppression or hazardous materials operations or training.

(4) As defined by the "Guidelines for the Diagnosis and Management of Asthma," the member has mild asthma classified as either "Step One" (no control medications and requires inhaled bronchodilator rescue medications for attacks no more than 2 times per week) or "Step Two" (daily control medications needed consisting of low-dose inhaled corticosteroids or cromolyn or oral leukotriene modifiers - for example, Montelukast- and requires inhaled bronchodilator rescue medications for attacks no more than 2 times per week).

(5) The member's asthma has not required systemic corticosteroids, emergency room treatment, or hospital admission in the last 2 years.

(6) The member shows adequate reserve in pulmonary function (FVC and FEV₁ greater than or equal to 90 percent) and no bronchodilator response measured off all bronchodilators on the day of testing.

(7) The member has a normal or negative response (less than 20 percent decline in FEV₁) to provocative challenge testing using either cold air, exercise (12 METS), or methacholine (PC20 greater than 8 is considered normal, as response at dose greater than 8 mg might not be clinically significant). If the member reports good control only when taking prescribed control anti-inflammatory medications (e.g. inhaled corticosteroids, cromolyn, or leukotriene modifiers), then consideration should be given to continuing these medications during the testing. The member should not use bronchodilators (short- or long-acting bronchodilators) the day of testing because these medications can undermine the purpose of this test-that is, demonstrate normal pulmonary function without clinically significant bronchodilator response or airway hyperreactivity. Provocative challenge testing should be performed the first time the member is evaluated for asthma and only if all of the provisions in 9.7.6.1(1) through 9.7.6.1(7) indicate that the member's asthma is under acceptable control. Provocative challenge testing is not required annually and should only be repeated if clinically indicated.

(8) The fire department provides and the member agrees to wear SCBA during all phases of fire suppression (i.e., ingress, suppression, overhaul, and egress).

(9) The member has a signed statement from a pulmonary or asthma specialist, knowledgeable in the essential job tasks and hazards of firefighting, that he/she meets the criteria specified in 9.7.6.1(1) through 9.7.6.1(6) and that the member can safely perform essential job tasks 1, 2, 3, 4, 5, 7, 9, and 13 without the use of bronchodilator "rescue" medications.

9.7.6.2 Physician Guidance. The physician shall consider the following when evaluating the member's asthmatic condition:

- (1)** Exposures to exertion, temperature extremes, combustion by-products, irritants, and particulate matter are all potent provokers of asthma attacks.
- (2)** Bronchodilator medications are not adequate maintenance therapy to control symptoms in the irritant environment of the fuel ground or hazardous materials incident scene because their use has not been approved by the FDA for use on the fire ground or hazardous materials incident scene and because several studies have implicated the frequent use of beta-agonists (short- and long-acting bronchodilators) as an independent predictor or risk for sudden death and myocardial infarction in the United States, Canada, Britain, New Zealand, and Australia.
- (3)** Acute hyperreactivity in this environment can induce immediate or progressive clinical asthma (bronchospasm and wheeze) that can lead to sudden incapacitation from status asthmaticus and/or cardiac ischemia.
- (4)** The member's work history, as well as clinical findings on annual evaluation, should be used as an assessment of the member's practical ability to safely perform the essential job tasks.

The NFPA 1852 lists the following essential job tasks for member firefighters

9.1 Essential Job Tasks.

9.1.1 The essential job tasks listed by number in this chapter are the same as those listed in Chapter 5 and shall be validated by the fire department as required by Chapter 5.

9.1.2 The fire department physician shall use the validated list of essential job tasks in evaluating the ability of a member with specific medical conditions to perform specific job tasks.

9.1.3 Essential job tasks referenced throughout this chapter by number only shall correspond to the following model list:

- (1)** Performing fire-fighting tasks (e.g., houseline operations, extensive crawling, lifting and carrying heavy objects, ventilating roofs or walls using power or hand tools, forcible entry, etc.), rescue operations, and other emergency response actions under stressful conditions while wearing personal protective ensembles and SCBA, including working in extremely hot or cold environments for prolonged time periods
- (2)** Wearing an SCBA, which includes a demand valve-type positive-pressure face piece or HEPA filter masks, which requires the ability to tolerate increased respiratory workloads

- (3)** Exposure to toxic fumes, irritants, particulates, biological (infectious) and nonbiological hazards, and/or heated gases, despite the use of personal protective ensembles and SCBA
- (4)** Depending on the local jurisdiction, climbing six or more flights of stairs while wearing fire protective ensemble weighing at least 50 lb. (22.6 kg) or more and carrying equipment/tools weighing an additional 20 to 40 lb. (9 to 18 kg)
- (5)** Wearing fire protective ensemble that is encapsulating and insulated, which will result in significant fluid loss that frequently progresses to clinical dehydration and can elevate core temperature to levels exceeding 102.2°F (39°C)
- (6)** Searching, finding, and rescue-dragging or carrying victims ranging from newborns up to adults weighing over 200 lb. (90 kg) to safety despite hazardous conditions and low visibility
- (7)** Advancing water-filled hoselines up to 2 ½ in. (65 mm) in diameter from fire apparatus to occupancy [approximately 150 ft. (50 m)], which can involve negotiating multiple flights of stairs, ladders, and other obstacles
- (8)** Climbing ladders, operating from heights, walking or crawling in the dark along narrow and uneven surfaces, and operating in proximity to electrical power lines and/or other hazards
- (9)** Unpredictable emergency requirements for prolonged periods of extreme physical exertion without benefit of warm-up, scheduled rest periods, meals, access to medication(s), or hydration
- (10)** Operating fire apparatus or other vehicles in an emergency mode with emergency lights and sirens
- (11)** Critical, time-sensitive, complex problem solving during physical exertion in stressful, hazardous environments, including hot, dark, tightly enclosed spaces, that is further aggravated by fatigue, flashing lights, sirens, and other distractions
- (12)** Ability to communicate (give and comprehend verbal orders) while wearing personal protective ensembles and SCBA under conditions of high background noise, poor visibility, and drenching from hoselines and/or fixed protection systems (sprinklers)
- (13)** Functioning as an integral component of a team, where sudden incapacitation of a member can result in mission failure or in risk of injury or death to civilians or other team members.

Dr. Edinger concluded that Geres was unfit for duty as a firefighter on September 2, 2010. The Department cannot dispute that conclusion. Dr. Hurley's appraisal made clear that Geres has asthma and that he could not meet many of the provisions required by NFPA 1852, section 9.7.6.1 for a firefighter with asthma to safely perform his duties.

Geres argues that the City did not comply with the requirement of section 5.1.4 of NFPA 1852.¹ That section requires the City Fire Department to provide a list of the essential tasks to the department's physician to be used to evaluate its members and candidates. However, it was evident from Dr. Edinger's testimony that she was aware of and understood the essential job tasks and had used them in her evaluation. While Union members testified that all the essential tasks were not necessary and that the use of SCBA equipment was not required of all members on fire calls, it is the City Fire Department's role and not the Union's, to make those determinations.

Ultimately, the department's physician is granted the authority to evaluate the firefighters to determine their fitness for duty by NFPA 1852, section 9.3 and 9.3.1.² In this case, Dr. Edinger exercised that authority when she determined that Geres was not fit for duty.

Geres also asserts that the City failed to comply with Section 3 of the negotiated agreement. That section states:

Section 3. The Committee for Union-Management Cooperation will establish and agree upon guidelines for "Return to Work" if an incumbent employee is deemed "not fit for duty" by the NFPA 1582 standards.

Even if the City did not negotiate "return to work" guidelines as required by this section, that fact does not substantively alter the outcome of this case. Dr. Edinger determined that Geres' asthma was a chronic, i.e. permanent, condition, a conclusion supported by Dr. Hurley's appraisal and the NFPA 1852, section A9.7.6. Consequently, "return to work" guidelines would have been fruitless. It is noteworthy that Geres provided no evidence at hearing that his asthmatic condition had improved or that he is any more capable of meeting the requirements of section 9.7.6.1 than he was at the time of his termination.

¹ 5.1.4 The fire department shall provide the fire department physician with the list of essential tasks to be used in the medical evaluation of members and candidates.

² 9.3 Fire Department Physician Roles.

After individually evaluating the member and the member's medical records (including job-related medical rehabilitation records), the fire department physician shall recommend restricting members from performing only those specific job tasks that cannot be safely performed by the member given his/her medical condition.

9.3.1 If an illness, injury, or other debilitating condition has altered a member's ability to safely perform an essential job task, the fire department physician shall notify the fire department that the member is restricted from performing that task while on duty.

Finally, Geres argues that he should have been allowed to use his FMLA leave before he was terminated. Here too, his argument falls short. It is the employee's responsibility to request FMLA leave. In this case, he did not do so until after he was terminated. At that point, the City was not obligated to honor his request.

Conclusion:

The City of Mitchell did not violate, misinterpret or inequitably apply the provisions of the negotiate agreement or National Firefighters Protection Association 1582 Standards when it terminated the employment of Kurt Geres. Respondent's attorney shall submit Proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within 20 days from the date of receipt of this Decision. Petitioner's attorneys shall have 20 days from the date of receipt of Respondent's Proposed Findings of Fact and Conclusions of Law to submit objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Respondent's attorney shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 18th day of July, 2011.

SOUTH DAKOTA DEPARTMENT OF LABOR
AND REGULATION

 /s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge