In the Matter of the Arbitration between

IAFF, LOCAL 863

and

CITY OF NEWTON

OPINION AND AWARD

AAA Case No. 11 390 00052 08

The parties submitted this case to arbitration pursuant to their collective bargaining agreement. A hearing was held on August 28, 2008. Harold L. Lichten, Esq., appeared on behalf of the Union; and Joseph P. McConnell, Esq., appeared on behalf of the City. Post-hearing briefs were received from the parties by November 10, 2008.

ISSUE

> Did the City violate Article IVB when it denied injured on duty status to Firefighter Davis with respect to his September 24, 2007 injury? If so, what shall be the remedy?

The cited contract provision states in relevant part:

> **Injured Leave – Limited Duty/Limit on Annual Compensation**
>
> **4B.01 Injured Employees** – Whenever a firefighter is incapacitated for duty because of injury sustained in the performance of his duty without fault of his own . . . he shall be granted leave without loss of compensation or benefits in accordance with present practice for the period of such incapacity . . .

BACKGROUND

Requirements of Job, Policies, and Facilities. It is undisputed that firefighting is a physically demanding job. Many of the tasks performed by firefighters – wearing

and carrying heavy equipment, throwing ladders, holding and moving a charged fire hose, carrying and dragging victims, overhauling ceilings with fire hooks – require substantial fitness, and especially upper body strength. Applicants must pass a medical physical and new recruits must go through training which includes fitness training and strength tests related to the basic tasks of a firefighter.

Recognizing the importance of physical fitness, the National Fire Prevention Association, an insurance industry-funded organization which issues oft-cited standards, included the following physical requirements in NFPA 1500:

> **10.3 Health and Fitness**
>
> **10.3.1** The fire department shall establish and provide a health and fitness program that meets the requirements of NFPA 1583, *Standards on Health-Related Fitness Programs for Fire Fighters*, to enable members to develop and maintain a level of fitness that allows them to safely perform their assigned functions.
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> **10.3.2** The maintenance of fitness levels specified in the program shall be based on fitness standards determined by the fire department physician that reflect the individual's assigned functions and activities and that are intended to reduce the probability and severity of occupational injuries and illnesses.
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> **10.3.3** The fire department health and fitness coordinator shall administer all aspects of the physical fitness and health enhancement program.

The NFPA standards are not binding on the City and have never been adopted by Newton. The City has also chosen not to participate in the wellness program authorized under G.L.c.31, §61B, under which participating communities receive reimbursement from the State. The City has never issued a general order to firefighters directing them to work out or to maintain a certain level of physical fitness. The Department did

recently place a firefighter on administrative leave because it decided he was unfit for duty due to his weight and physical condition. He was directed to participate in a City-mandated physical fitness program to enable him to attain a condition which would render him fit for duty. The Union filed a prohibited practice charge claiming the fitness program was instituted without bargaining, but did not file a grievance under the collective bargaining agreement.

In 1981, then Chief Edward Reilly issued a memorandum to all Department personnel advising them that the joint Safety Committee and he were interested in starting a voluntary physical fitness program, which would be monitored by the Health Department. He wrote that the program would not necessarily involve physical exercise, but could also deal with stress, weight loss, and blood pressure. Interested people were told to contact the assistant chief. There is no evidence that the program was ever initiated.

Seventeen years later, Union President Joseph Capello wrote to Mayor David Cohen. He indicated that he had learned the City had granted $10,000 to the Police Department, and $25,000 to the City Hall Association, to purchase physical fitness equipment. Capello asked for $10,000 for the Fire Department to purchase such equipment for each fire station, since Local 2759 recognized the importance of good health and physical fitness. Capello further noted that currently the Association purchased for stations kitchen utensils, televisions, air conditioners, and some fitness equipment, but that these purchases imposed a burden on the Association. Capello included with his request a letter from Pat Schindeler, the occupational health nurse

practitioner retained by the City, in which she endorsed the request for health and fitness equipment for the firefighters. Cohen did not act on Capello's request.

In August, 1999, however, the Union and the City settled a grievance on an unrelated matter. Part of that settlement called for the City to establish a fund of $5000 in each of three years which would be used to reimburse the Union for the purchase of "fixtures, equipment or utensils for the improvement of living conditions or living quarters at the station houses." Capello testified that requests came in from firefighters, including for fitness equipment in those stations which did not have it. Purchases were subject to approval by the chief, but nothing requested by the Union was denied. According to Capello, when the fitness equipment was put in the stations, supplementing items firefighters had brought in or had been contributed by citizens, some firefighters used it, while others did not.

Firefighters work a twenty-four hour shift, starting at 8 am. A schedule for the day is posted which often includes training or other activities from 9 am to 11:30 am, time back in the station from 11:30 am to 1:30 pm, specified activities from 1:30 to 3:30 pm, and then free time. Individual commanding officers have encouraged firefighters to regularly engage in fitness activities during their unscheduled time and some firefighters have done so. Deputy Chief Thorne, for example, has often listed two hours of physical fitness training on the daily training report. He personally works out religiously, and has three or four firefighters who join him. Others in the station may stretch or walk, but he does not check to see if everyone was engaged in some form of exercise during the two hours he listed for physical fitness training. Current Union President Lt. Thomas Lopez has never ordered firefighters to work out, although he has strongly encouraged them to

do so. He acknowledged, however, that some firefighters will not go near the fitness equipment and that some of these people are still very competent in the performance of their duties.

Davis Injured in Station. Lamont Davis began working for the Newton Fire Department in January, 1995, after serving for four years in the Marines. Prior to coming to Newton, he took pride in his level of fitness and he considered physical training to be an integral part of his life. Among the activities he undertook was regular weight training, learning techniques from the *Encyclopedia of Bodybuilding*, which was written by Arnold Schwartzeneger. After his employment with Newton commenced, he was sent to the State Fire Academy, where there was a daily physical fitness training component. Lectures were also given on the importance of being physically fit to be able to adequately and safely perform the rigorous duties of fire suppression and rescue, and to avoid injury.

From the time of his assignment to fire stations in Newton, Davis regularly worked out on the equipment provided in the station, generally in the afternoons or evenings when the firefighters were on duty, but had free time. He often worked out with a number of other firefighters. When he or the others felt the need for a spotter when lifting weights – either because of the amount of weight being lifted or the number of repetitions being done – they would ask another firefighter for assistance.

On September 24, 2007, Davis and Firefighters Derek Mandatore and Ron Fremont were working out around 6 pm in the exercise room in Station 1. Davis was doing triceps extensions with a 65 pound dumbbell, a weight he regularly used for this exercise. Employing a technique he had learned from the *Encyclopedia*, while seated on

a chair he lifted the dumbbell from the floor to his thigh, from his thigh to his `shoulder, and then with both hands he held the weight behind his head and did sets of ten extensions. During his third set, he heard a pop and felt a burning sensation in his right elbow. The other firefighters heard the pop and saw that Davis was in obvious pain.

Davis immediately went upstairs in the station and reported his injury to Lt. Thomas Lopez, who was the officer in charge that shift. Within ten minutes Davis was taken by ambulance to the Newton-Wellesley Hospital where he was tentatively diagnosed with a ruptured triceps. When Davis returned to the station on the 24th, his right arm was in a sling. Davis dictated a report to Fremont, stating that "While exercising while on duty to maintain my level of fitness I injured my elbow. . ." Fremont wrote out the report, which Davis signed as best he could. The other two firefighters submitted corroborating statements.

The reports were submitted through the chain of command, apparently with a request that Davis be placed on injury leave. Two days later Chief Joseph Lacroix wrote to Davis:

> . . .
> Based on the information currently available to us, the City of Newton denies your 111F[1] claim for payment of medical services and lost time for your right elbow/triceps tear for the following reasons:
> - Extracurricular activity at time of accident/incident was not a required activity of the Fire Department.
> - Available medical evidence does not substantiate a work-related injury.
> - The alleged injury did not arise out of and in the course of employment.
> - The alleged injury is not causally related to a work accident/incident.

[1] Chapter 41, Section 111F is the statute which provides that a firefighter "incapacitated for duty because of injury sustained in the performance of his duty without fault of his own . . . shall be granted leave without loss of pay for the period of such incapacity."

> You are advised to seek medical treatment under your own health insurance coverage.

This diagnosis of a ruptured triceps was subsequently confirmed with an MRI and Davis had corrective surgery. As a result of the injury and surgery, Davis was out of work until January, 2008. Had he been placed on injury leave, he would have received his full salary and that money would not have been taxed. The City would also have paid all medical bills. Because the leave was denied, he had to have medical expenses covered by his health insurance, which imposed certain co-pays and deductibles. To maintain his salary, Davis had to completely exhaust his accumulated sick leave and vacation.

Past Administration of Injury Leave. Capello testified that the City has previously always granted injury leave to firefighters who were injured in the station. He cited examples of people who got hurt while cleaning the facility, while rolling hoses after a fire, or who suffered from a convulsion. He could not recall anyone ever sustaining an injury while cooking a meal.

The Union also introduced two documents which relate to 111F leave. In June, 1992, City Solicitor Daniel Funk was asked to offer an opinion on the question of whether an off-duty firefighter who volunteered at a fire scene, and who was hurt during that activity, would be entitled to 111F benefits. Funk found that since the question presumed the off-duty firefighter first asked the officer in charge for permission to assist and that permission was granted, the officer would be deemed an employee hurt in the performance of his duty. Funk cited *Wormstead v. Town Manager of Saugus,* 366 Mass. 659 (1975), in which the Supreme Judicial Court adopted a broad construction of the

phrase "in the performance of his duties," finding it comparable to the words "arising out of and in the course of his employment," which are used in c.152, the Worker's Compensation statute.

The other document was a Step III grievance answer dated January 9, 1997, issued by the Director of Affirmative Action/Staff Development Leon Brathwaite on behalf of the City. A grievance had been filed apparently because the Fire Department had not restored sick leave to Donald Gentile, who had been out of work due to a heart condition, and had not followed a consistent practice in handling the matter. Brathwaite determined that the Police Department submitted the medical reports of the employee seeking 111F benefits to the City physician for his review. Brathwaite followed this step with Gentile's medical records and the City physician determined that Gentile's heart condition was a 111F-covered illness and that his sick leave should be restored. Brathwaite recommended that the Fire Department should adopt the Police Department's procedure and he directed that Gentile's leave should be changed to 111F.

UNION POSITION

Davis suffered a disabling injury while on duty, at the station, engaged in physical fitness training on City-provided or sanctioned equipment. Article IV(B) of the contract covers injuries incurred in the performance of duty, and mandates that this phrase will be consistent with the present practice of the parties. The unrefuted evidence regarding past practice is that the City has uniformly given injured on duty (IOD) benefits in every instance when a firefighter has suffered any type of injury at the station. Further corroborating the practice was the 1997 grievance settlement in which the City acknowledged that any heart pain suffered at work is regarded as a work-related injury;

and the opinion of the City solicitor that an injury sustained on the employer's premises while the person is occupying himself consistent with his job will be accepted as a work-related injury.

Even if the past practice were not dispositive, the Union's position is supported by controlling caselaw. Under *Wormstead*, the key factors are whether, at the time of the injury, the employee was being paid, was on call, and was "engaged in activities consistent with and helpful to the accomplishment of job functions." Physical fitness is a requirement for obtaining a firefighter position and passing the Academy; it greatly impacts on a firefighter's ability to safely perform his or her job; it is encouraged by the City through the provision of equipment and workout space; and supervisors, including Davis's, routinely schedule time for training and actively encourage firefighters to partake. Recognizing the benefits to the employer and employee of weight training, the one reported case involving a firefighter who tore a muscle while lifting weights while on duty at the station, found the injury arose out of or in the course of employment, and awarded Worker's Compensation benefits. *Gray v. City of East Orange,* 2007 WL 1373216, *1(N.J.Super.A.D. May 11, 2007). In light of the relationship of physical fitness to the job of a firefighter, and the fact a firefighter is required to be at the station for twenty-four hour shifts, weightlifting cannot be reviewed as a "purely voluntary recreational activity," even assuming the exemption found in the Worker's Compensation statute were applicable to c.41, §111F-type coverage, which it is not. Further, cases from Massachusetts (*Moore's Case,* 330 Mass. 1 (1953) and other states have found that injuries incurred from activities like playing basketball on breaks at a company facility represent compensable events. Davis should therefore be retroactively awarded injury

leave under the contract and made whole for all expenses for medical treatment which would have been paid for by the City.

CITY POSITION

Davis was not entitled to IOD leave because he was not injured in the performance of his duty through no fault of his own. Rather, he was injured while engaging in a purely voluntary, recreational activity, which the 1985 amendment to c.152, §1(7A) clarified as not being work-related and compensable. While firefighters must be physically able to perform their duties, the City has never adopted a wellness program under c.31, §61B, and there is no required fitness program for the Department, especially not one which requires weightlifting. Whatever physical activities are mandated for recruits and trainees are dictated and monitored by superior officers. Some superior officers encourage their subordinates to work out regularly during their unscheduled time while on shift, but such activity is not obligatory. Many firefighters, whom the Union views as fully capable in the performance of their job, never work out. Others, like Davis, enjoy regular exercise. Davis chose to do a triceps extension with a 65 pound dumbbell, the maximum he was capable of lifting, without the benefit of a spotter. This activity was clearly recreational, and not related to the performance of his firefighting duties.

Neither Article IVB nor c. 41, §111F were ever intended to cover such activities. Contrary to the Union's assertion, there has been no practice in Newton of applying the contract provision in this circumstance. Capello, who retired seven years ago, did state that the City had covered on-duty injuries which occurred in the station, but his examples

were limited to people hurt while coiling hoses or cleaning bathrooms. Never has the City agreed that Article IVB benefits are applicable to injuries incurred in voluntary, recreational activities.

The Union's claim has no basis in caselaw. In *Wormstead,* the Court ruled a §111F injury had to be incurred while an employee is engaged in activities consistent with and helpful to the accomplishment of his job functions. The weightlifting, which Davis has done for years for his own enjoyment, was not helpful to nor consistent with firefighting duties. As the Massachusetts Appeals Court found in *Bengtson's Case,* 34 Mass.App.Ct. 239, 609 N.E.2d 1229 (1993), injuries arising from voluntary recreational activities are not compensable. If this injury were covered merely because it occurred in the station while Davis was on duty, the City would be forced to review and monitor all recreational activities of firefighters in the station. It is conceivable the City would have to eliminate all workouts until it could ascertain the requirements necessary to perform them safely and without risk of municipal liability.

OPINION

Issues Involved in Case. When one starts trying to anticipate all the possible ramifications of this grievance, conjuring and addressing hypothetical situations, there is a danger that far more will be decided than is necessary or prudent. It is therefore important to focus on the specific facts of this case, which are not really in dispute.

There is no question that firefighters are required to be at work, largely in the station, for twenty-four hour shifts. During that time they do some tasks which are directly related to firefighting responsibilities, such as coiling hose and cleaning

suppression and rescue equipment. They also do things related to living within the confines of the station while in a paid, on-call status, things for which most employees are not paid. These include cooking and eating meals, sleeping, showering, and exercising. None of these life-function activities are expressly mandated by the City, but they are done in space provided by the City, using equipment provided or accepted by the City, and with full knowledge and approval of the City.

Regarding physical fitness, the City requires recruits to pass the program at the training academy, which involves participating in supervised physical activities and passing tests. Once a firefighter is through with the initial training, no physical fitness requirements or standards are in place. The City has elected not to participate in a state-funded wellness program under c. 31. §61B. Employees are not directed to work out, either while in the station or outside. The City does, however, provide workout rooms in each station and it has either paid for, accepted donations of, or allowed employees to bring in and use, various forms of equipment, including weights. While there is no compulsion to work out, a number of the superior officers strongly encourage their subordinates to utilize the workout facilities on a regular basis, and model that behavior. City officials are aware that some employees regularly work out during their unassigned time on their shifts.

Davis was one of the firefighters who routinely worked out in the station while on duty. Lifting weights was an activity he did before he joined the Department. He performs the exercise because he believes it benefits his general health and his ability to do the physically demanding tasks of a firefighter. There was no evidence put in the record which established that the particular exercise he was doing when he sustained his

injury is essential to the performance of the duties of a firefighter in Newton, nor that lifting weights is essential to safely work as a firefighter. There was also no evidence which established that for someone with his experience weightlifting, using a sixty-five pound dumbbell, and doing triceps extensions without a spotter, was imprudent or negligent.

Present Practice Supportive, But Not Dispositive. Article IVB states that the IOD benefits will be awarded in accordance with present practice. If there had been prior instances of on-duty firefighters being injured while working out in the station, there would be clear guidance as to how to apply the standard of "sustained in the performance of his duty without fault of his own" to such a fact pattern. Since this is a case of first impression in Newton, however, no binding past practice exists.

One can draw some conclusions from how IOD benefits have been administered in other circumstances. The Union is correct that the City has routinely granted the benefits whenever a firefighter has sustained an injury while on duty in the station. Those injuries have largely occurred while the employee was coiling a hose, sliding down a pole, or cleaning the station, activities which arguably are directly related to the regular tasks performed by firefighters. Never before have the parties addressed the issue of whether a voluntary activity in the station – be it exercise, cooking, showering, or sleeping – may constitute part of the performance of duty.

The fact that the City granted the IOD benefits to firefighters who experienced heart symptoms in the station, even while not engaged in a task like coiling a hose, supports the conclusion that an employee does not have to be performing a particular category of activities while on duty to qualify. The heart example carries with it its own

ambiguity, however. According to Capello, the firefighter who was the subject of the 1997 grievance, and whose benefits Brathwaite approved, had experienced his heart symptoms away from the station. Given the presumption of a nexus between heart disease and firefighting which exists under the retirement law, one can argue that heart symptoms may be viewed as a special case, even within the context of Article IVB and §111F. Hence, while there is nothing in the evidence of practice which supports the City's position, it cannot be said the City is bound by practice to grant IOD benefits to a firefighter who gets injured while exercising in the station. This grievance must therefore be resolved based on an analysis of caselaw.

Activity Consistent With and Helpful to Accomplishment of Firefighting Functions. Both parties acknowledge that the most relevant decision interpreting §111F is *Wormstead.* That case involved a police officer who, while on call, drove home for a lunch break, and was hurt in an accident on his way back to the station. In finding that the injury arose in the course of his employment, the Court noted that he was being paid, was on call, and was engaged in activities consistent with and helpful to the accomplishment of police functions. It found that having police relax for a short period in the middle of their shift was of benefit to the town, and going home for lunch was an accepted practice. The act of transporting investigation papers from his home to the station was deemed a "task incidental to the performance of his duty."

Applying a similar analysis to this case, Davis was clearly in a pay status and on-call in the station, ready to respond to any alarm. He was engaged in exercise in the station, on City supplied or authorized equipment. The purpose of the exercise was to render him better able to perform the physically taxing job of firefighting. Whether or

not Davis's workout routine was indispensable to being a competent firefighter, there can be no doubt that physical fitness is beneficial to the individual firefighter and hence to the City. If going home for lunch to relax creates a benefit for the employing community, increasing one's strength and cardio-vascular health certainly does.

The City has focused on the fact that it did not require Davis to work out, that he did so voluntarily. While Davis was not under any order to lift weights, it is apparent that superior officers in Newton have actively encouraged firefighters to regularly work out during their down time in the station, and the City has seen fit to provide facilities and equipment. Various of the cases applying Worker's Compensation law cited by the parties have found that if an athletic activity takes place on the employer's premises, over an extended period of time and with the knowledge of the employer, the mere fact that the employee engaged in the activity voluntarily did not preclude a finding that the recreation and the employment were sufficiently related to support an award of benefits. Of particular note is that the cited cases did not even involve employees like firefighters, for whom the physical fitness and strength are directly related to actual job functions. Directly on point, the New Jersey case cited by the Union explicitly found that the weight training performed at the station by a firefighter was a job-related activity.

Also related to the issue of voluntariness is the reality that firefighters work a twenty-four hour shift. It is required that they be at the station during their shift, and it is understood that the only way a twenty-four shift is feasible is if firefighters are permitted to conduct life-activities while on the clock. For people who want to maintain their physical fitness, something universally recommended by health professionals, this means working out at the station. Given this reality, working out is no more voluntary than

cooking and eating meals, sleeping, or showering. That people sometimes sustain injuries while carrying out these life activities is a predictable consequence.

There is a substantial question of whether the amendment to c.152, §1(7A) excluding purely voluntary participation in recreational activities applies to c.111F and Article IVB. Even if it does, however, that amendment would not preclude Davis from recovering. The *Bengtson's Case* decision cited by the City, which involved an employee who was injured playing on a company-sponsored softball team during non-work hours, looked beyond mere voluntariness, summarizing the factors set forth in *Moore's Case*:

> [The] criteria which may be resorted to in determining whether the employment and the recreation are related with sufficient closeness to warrant an award . . . may be enumerated as follows: (1) The customary nature of the activity. (2) The employer's encouragement or subsidization of the activity. (3) The extent to which the employer managed or directed the recreational enterprise. (4) The presence of substantial pressure or compulsion upon the employee to attend and participate. (5) The fact that the employer expects or receives a benefit from the employee's participation in the activity, whether by way of improved employer-employee relations; through greater efficiency in the performance of the employee's duties; . . . Apart from the existence of employer compulsion, which often might warrant or even require a finding in favor of the employee, the presence or absence of any one of the other factors listed would not necessarily determine the issue. Nor, indeed, is the foregoing enumeration meant to be exclusive of other factors which might appear in a given case. What is required in each case is an evaluation of the significance of each factor found to be present in relation to the enterprise as a whole. Upon such an evaluation must the decision as to the closeness of the connection between the employment and the recreation ultimately rest. at 246-7.

Applying these factors to Davis's weightlifting, it is apparent it would not be excluded from coverage as a purely voluntary recreational activity. He did the workout while at work, in pay status. He used City facilities and equipment. Davis, as well as other firefighters, including superior officers, partook of this activity on a customary and overt basis. The City gained direct benefit from the activity, since it got a stronger, fitter firefighter. That he sustained an injury while working out was an unfortunate happening, but it was an injury incurred which engaged in an activity consistent with and helpful to the accomplishment of fire functions.

Concerns About Exposure. The City's fear of potential liability is understandable and not unreasonable. Unlike the physical activities done as part of the training academy or fire site drills, which happen under the direct supervision of superior officers, firefighters are left to work out on their own. The City would be within its rights to evaluate its risk and to set reasonable policies governing the use of the workout facilities. Further, Article IVB provides its own limitations on the right to recover for an injury, even one incurred in a work-related setting. Injuries which are the fault of the firefighter are not covered. The City did not introduce evidence which would have supported a finding that Davis's use of a sixty-five pound dumbbell, or his performance of triceps extensions without a spotter, was negligent or imprudent.

AWARD

The City violated Article IVB when it denied injured on duty status to Firefighter Davis with respect to his September 24, 2007 injury. He shall be made whole for the vacation or sick leave he used to cover his absence, and for any out-of-pocket expenses he incurred for medical care related to his injury.

Mark L. Irvings
Arbitrator

November 19, 2008