MICHAEL D. RAPPAPORT
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15445 Ventura Blvd., Box 84
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May 9, 2012

Andrew . Rempfer
Cogburn Law Offices
9555 S. Eastern Avenue
Suite 280
Las Vegas, Nevada 89123

Yolanda T. Givens
Deputy DA
Office of the District Attorney
500 S. Grand Central Parkway
P.O. Box 552215
Las Vegas, Nevada 89155-2215

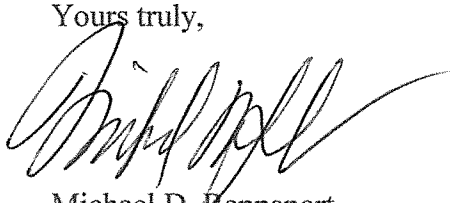
Re: **Clark County Fire Department vs. Donald Munn**

Dear Mr. Rempfer and Ms. Givens:

Enclosed you will find my award and invoice for the above captioned matter. Please forward my invoice to the appropriate person for payment.

Thank you for this opportunity to serve the parties.

Yours truly,



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INVOICE

CLARK COUNTY FIRE DEPARTMENT

and

DONALD MUNN

May 9, 2010

FEES

3 days of hearings at $1500 per day.....$4500.
6 days of study and writing at $1500 per day.....$9000.

TOTAL FEES.....$13,500

EXPENSES

3 trips Los Angeles/Las Vegas

Airfare.....$1058.20
Hotels and Meals.....$475.07
Car Rental and Gas.....$141.96
Airport Parking.....$74.00

TOTAL FEES.....$1749.23

TOTAL FEES AND EXPENSES.....$15,249.23

OWED BY THE COUNTY.....$15,249.23

(The parties have each pre-paid the arbitrator $6750 for a total of $13,500. The County is therefore ordered to reimburse $6750 to Mr. Munn and to pay the arbitrator an additional: **$1749.23**)

COUNTY PLEASE PAY ARBITRATOR.....$1749.23
COUNTY REIMBURSE MR. MUNN.....$6750.00

ARBITRATION AWARD

In the Matter of the Arbitration Between:

CLARK COUNTY FIRE DEPARTMENT

and

DONALD MUNN

Subject: **MUNN TERMINATION**

Appearances:

For Clark County:	Yolanda Givens Deputy DA Office of the District Attorney 500 S. Grand Central Parkway P.O. Box 552215 Las Vegas, Nevada 89155-2215
For Donald Munn:	Andrew L. Rempfer Cogburn Law Offices 9555 S. Eastern Avenue Suite 280 Las Vegas, Nevada 89123
Arbitrator:	Michael D. Rappaport 15445 Ventura Blvd. Box 84 Sherman Oaks, Ca. 91403

BACKGROUND

The case before the Arbitrator arose out of a decision by the Clark County Fire Department (herein "Department" or "County") to terminate firefighter Donald Munn (herein "Grievant" or "Munn") on May 17, 2011 for violation of Article 16 of the Collective Bargaining Agreement dealing with sick leave, as well as violation of five other rules and regulations of the Department.

SUMMARY OF FACTS

Munn was hired by the Department in 1993 and at the time of his termination he held the position of a firefighter.

The events leading up to the present case began when the Department conducted an audit of the use of sick leave by its employees. The audit was initiated while the Department was preparing for an interest arbitration dealing with the issue of the use of sick leave. During that audit a list was prepared of employees who used the most amount of sick leave. Munn was among those listed who utilized fifteen or more shifts of sick leave during a year period.

The Department then looked more closely at the use of sick leave by Munn and others on that list and in so doing discovered emails from Munn which suggested to the Department the questionable use of sick leave. The emails contained in Department Exhibit 1 showed in one case an email from the Grievant dated May 4, 2009 to a Captain Williams in response to Williams asking if anyone had vacation scheduled but was not intending to use it because Williams needed a particular vacation date. The Grievant replied by saying, "...We are going away for the whole month but, if a couple of those days will help you I can call in sick." The Department concluded that the Grievant was offering to convert some of his previously scheduled vacation days into sick leave so his fellow employee could use those days for vacation. The Department believed that this indicated that the Grievant was pre-planning sick leave far in advance of knowing whether he would need sick leave on the days in question.

In a second email to another employee, dated June 9, 2010, Munn wrote: "Just a note before I leave for the summer..." This email caused the Department to investigate how the Grievant could plan to be gone for the entire summer.

A third email to the Grievant dated June 11, 2010 from a fellow employee asked how one gets an entire summer of vacation. The Grievant replied: "...I have just come to a point that it just doesn't matter. Between being sick and vac it will seem like most of the summer." This again raised questions for the Department about whether Munn was planning to take the entire summer off through the use of pre-planned sick leave, as well as vacation.

A fourth email from the Grievant to various employees indicated: "I come home on the 1st, work the 2nd, 4th, 6th and gone until August 20." The question was raised by this email of how the Grievant could be planning to be gone through the summer until August 20th.

Fire Chief Bertral Washington's first response, after receiving the information regarding the emails, was to send Munn a letter entitled "Forfeiture of Sick Leave Accrual." This was because the emails suggested a violation of sick leave usage under Article 16 and therefore the Grievant, as permitted by Article 16, was required to forfeit six months of sick leave which would otherwise accrue. Shortly after sending the letter, the Chief rescinded the letter when the Union argued that forfeiture was discipline, and therefore there first had to be a Joint Investigative Team (herein "JIT") convened. Shortly thereafter Chief Washington convened a JIT with instructions to investigate any possible violation of Department rules and regulations by the Grievant due to the inappropriate use of sick leave.

The purpose of a JIT is to investigate conduct which might result in discipline. A JIT consists of one representative from the Union and one from Management.

After meeting with Munn and further investigating Munn's use of sick leave, including reviewing the Telestaff calendar information, which is a computerized calendar which shows employees' schedules, including which days employees worked on a month to month basis, as well as their usage of sick leave and vacation, as well as other information, the JIT issued its findings on April 20, 2011 to Chief Washington. The report from the JIT indicated that Munn provided letters from various physicians regarding some of the dates for which he was out on sick leave during the period in question. This document went on to indicate, however, that the JIT told Munn that the documents submitted would probably not be sufficient to excuse the absences and that he would need to provide actual Certificates of Illness ("COI") for the dates he took sick leave. The document then stated, "The COIs are necessary...since Firefighter Munn's emails clearly showed that he planned his sick leave well in advance and in conjunction with vacation leave to be out of town for extended periods. Additionally, the JIT felt that firefighter Munn used his son's disabilities as an excuse to cover for these planned trips out of town." The document then noted that Munn sent the JIT COIs for some of the specific dates cited by the JIT, but not for all of them. The JIT then reported under the heading "Findings:"

> "The JIT finds that while firefighter Munn had excessive sick leave during the months of March, April, July and August 2009, as well as June, July, and August 2010, he was in compliance with Article 16.5a...This Article stipulates providing a COI on the first absence after three (3) absences or whenever there is reason to believe that

> sick leave privileges are being abused. Since Firefighter Munn did not use sick leave in excess of three consecutive shifts, he did not violate this Article...However, the emails he sent on May 4, 2009 and June 9, 2010 clearly showed he planned to be gone for the entire summer of 2009 and 2010, effectively preplanning his sick leave and utilizing it in conjunction with his vacation to ensure adequate leave for these periods of time..."

Under the heading of "Summary," the JIT wrote:

> "...Firefighter Munn believes he followed Article 16...It is not 100 percent clear to the JIT Team whether firefighter Munn did or did not misuse sick leave privileges on the dates as outlined...However, the evidence would suggest that firefighter Munn manipulated the system and planned to use sick leave in advance to gain time off to spend summers at his residence in Utah. The evidence also would suggest that by using his son's disability and by obtaining COIs backdated to cover the documented dates he called in sick, Firefighter Munn demonstrated he was less than honest in his utilization of sick leave. This manipulation of contract language enabled Munn to maximize his time off to accomplish his goal of not spending summers in Las Vegas." (JX3)

After the JIT report was received by Chief Washington, in a letter to Munn dated May 9, 2011, Chief Washington referenced the JIT report and said that he had reviewed the facts and the information contained within the JIT. He then stated that he regarded Munn's general conduct, including the use of sick leave, as inappropriate and constituting a "gross and willful" violation of the following rules and policies:

CBA Article 16 (Sick Leave)
Rule and Regulation 2.7, item 3 (General Conduct)
Rule and Regulation 2.32, item 6a (Telestaff)
Rule and Regulation 2.4 (Absence from Duty Without Proper Authorization)
Rule 1.3 (Disruption of Department's Performance)
Rule 2.29, Item 4, a. iii, and b.i (FD Computers and Electronic Equipment)

The letter then went on to state among other things: "You misused and abused your sick leave benefits in a manner so egregious that termination of your employment is appropriate." The letter then indicated that the Chief was recommending involuntary termination.

After receiving this letter, a Step 1 meeting with Munn and his Union representative was held on May 16, 2011. After the meeting Chief Washington sent

a letter to Munn in which he cited that meeting and then went on to uphold his earlier recommendation that Munn be terminated. The matter was then properly brought before the Arbitrator for a final and binding determination.

APPLICABLE CONTRACT LANGUAGE

ARTICLE 16

Sick Leave

...

4. Accrued sick leave may only be used for a bona fide illness of the employee or a member of his immediate family defined as...child...

If at any time the Battalion Chief suspects abuse of leave, the Battalion Chief may request written medical documentation verifying the use of partial sick leave.

5. Employees covered by this Agreement shall be subject to the following requirements of proof of illness or forfeiture of sick leave.

a. Certificate of Illness: evidence in the form of a physician's certificate, or certificate of illness shall be furnished as proof of adequacy of the reason of the employee's absence during the time when sick leave was requested. Certificates of Illness may be requested by the Fire Chief or his/her designee when there is one (1) absence in excess of three (3) days or more and whenever there is reason to believe that sick leave privileges are being abused.

b. Forfeiture of Sick Leave:...A person claiming sick leave with pay, and any appointing authority approving the same, where it is shown that such claim was made or approved by such claimant or appointing authority knowing that such claimant was not in fact sick or otherwise entitled thereto, shall forfeit all sick leave which would otherwise accrue for a period of six (6) months thereafter...

ARTICLE 23

Grievance and Arbitration Procedures

...

2. Discipline subject to this disciplinary procedure is defined as an employee's oral reprimand, written reprimand, suspension, demotion or involuntary termination from County service, carried out in accordance with the guidelines that are established in the Clark County Fire Department (CCFD) Rules and Regulations.

...

7. Discipline

The proceedings for written reprimands, suspensions, demotions and involuntary terminations of this Article shall consider the incident and the discipline in terms of severity of the action, evidence of progressive discipline and appropriateness of the disciplinary action. Progressive discipline is defined to include an employees' oral reprimand, written reprimand and thereafter more severe disciplinary action. The Union recognizes the need for more severe initial disciplinary action in the event of major violation of established rules, regulations or policies of the County or its operating departments. The decision to uphold the disciplinary action shall be based on the reasonableness of the discipline imposed by the supervisor in response to the actions taken or not taken by the employee.

All written reprimands, suspensions, demotions and involuntary termination appeals of employees covered by this Agreement shall be handled solely in accordance with the procedures set forth in this Article and CCFD Rules and Regulations, with the decision of the internal panel or Arbitrator being final and binding on the parties.

> A. No employee who has satisfactorily completed probation may be given an oral reprimand, written reprimand, suspended, demoted or terminated without just cause. Just cause may include, but not be limited to: inefficiency, incompetence, insubordination, habitual or excessive tardiness or absenteeism, abuse of sick leave or authorized leaves, and violation of established departmental work rules or procedures...
>
> ...
>
> G. A full time permanent employee who...is recommended for a suspension, demotion or termination...shall be given a written statement, documented on an Employee Interview Sheet (EIS) setting forth the charges upon which the proposed...termination is based. The statement shall include an identification of the specific charges against the employee and an explanation of the evidence to include: (1) Specific action or inaction by the employee that led to the

proposed disciplinary action; (2) Specific citation to the rule, regulation, procedure, or other Departmental or County rule, regulation or procedure that has been violated; (3) Previous related disciplinary action that the employee has received; (4) Mandatory corrective measures if applicable.

The EIS shall provide the opportunity for the employee to respond with written rebuttal to the charges.

RULES AND REGULATIONS ALLEGEDLY VIOLATED BY MUNN

The following rules and regulations were cited as violations of Clark County Fire Department Rules and Regulations by Munn which justified his termination in addition to the allegation that Munn violated Article 16, Item 4 of the Collective Bargaining Agreement.

1. Rule and Regulation 2.7(3) General Conduct

...

3. While on duty, employees shall be just and honorable in all their relations with each other and shall not act in a manner calculated to create a disturbance or dissention within the Department.

2. Rule and Regulation 2.32 (C)(6)(a) – Telestaff

Anti-Sign Up

Anti-Sign Up is a work code that places employee into a totally unavailable status for overtime/call back or mandatory pict list.

a. Employees with approved leave as outlined in the CBA...airline tickets, court orders, or medical appointments, etc. shall request via E-mail to their Battalion Chief to be placed on anti-sign up 24 hours in advance.

...

d. Failure to request anti-sign up shall leave employee available to fill mandatory vacancies.

3. Rule and Regulation 2.4 – Absence From Duty Without Proper Authorization

1. No member shall be absent from duty without proper leave...

2. Any member absent without proper leave for three (3) consecutive shifts (fire suppression)...will be automatically terminated.

4. Rule and Regulation 1.3 – Disruption of Department's Performance

Fire Department members shall not make any statements, oral or written for publication or otherwise, which bring the Department or its officers into disrepute or ridicule or which disrupt or impair the performance of official duties and obligations of officers of the department...

Members shall not disrupt or impair performance of the official duties of the department, nor interfere with or subvert supervision or discipline of other department members. Willful violation of this rule by a member may result in disciplinary action, which shall be administered commensurate to the gravity of the acts or statements.

5. Rule Regulation 2.29, 4(a) (aiii) b(i) 4(b) (viii) Computers and Electronic Equipment

4. Internet and Electronic Mail (E-mail)

a. The County provides Internet and E-mail assistance to allow more efficient and effective methods for employees to conduct County business. As such, primary use of these systems shall be for business purposes. When sending E-mail messages and using the Internet, propriety and good judgment should be exercised...employees shall have limited personal use of Internet and personal E-mail access for non-work related business provided:

...

iii The use does not create the appearance of impropriety.

b. The following Internet and E-mail uses are prohibited:

i. communications that may in any way be construed by others as disruptive, offensive, abusive or threatening.

...

SUMMARY OF THE POSITION OF THE PARTIES

DEPARTMENT

The Department began by arguing that Munn demonstrated fraudulent use of sick leave, abuse and manipulation of the R&Rs and dishonesty. It was then argued that Munn could not establish a bona fide use of sick leave since the four emails written by Munn presented clear evidence of fraudulent use of sick leave. The County then cited each email and argued that they amounted to an expressed intent to plan sick leave use in advance, even when neither Munn nor a member of his family was sick, in an attempt to game the system. This amounted to a clear violation of the CBA which permits sick leave to be used only for a "bona fide illness."

It was then pointed out that Chief Washington testified that even though he knew Munn never acted on his offer in the email to Williams, that did not mitigate the situation because when the Grievant was questioned about the email, he expressed a willingness to do it again since he did not see anything wrong with what he did.

With regard to the other emails, it was argued that by suggesting that he would be "gone for the summer," even though he was scheduled to work nine scheduled shifts after he scheduled vacation, this shows that Munn clearly planned to use sick leave, along with his vacation, to enable him to be gone for the entire summer.

It was also argued that the fact Munn worked as scheduled on July 4, since if he had called off on that day, he would have missed holiday pay, suggests even more gamesmanship since Munn called off sick his next scheduled shift on July 6.

The next email that was cited was dated June 11, 2010 in which Munn expressed an intent to utilize sick leave, whether or not he was sick, by saying that he would be gone most of the summer. This was evident when he wrote: "...I have just come to a point that it just doesn't matter. Between sick and vac it will seem like most of the summer." This email shows that Munn either psychically anticipated being sick, or that he intended to fraudulently call in sick. It was further contended that Munn's comments show that he did not see taking the summer off as extraordinary, simply because all he needed and intended to do was to combine sick and vacation leave. Furthermore, his statement "It just doesn't matter" suggests his willingness to flaunt the rules in order to accomplish his purpose to get the entire summer off.

Another email from Munn that was cited was one dated June 25, 2010 to fellow employees, who were on a committee with Munn, who volunteered to

administer funds to pay for things for fire stations, such as television sets, etc. That email stated he would be out until August 20, except for three scheduled workdays. The problem, according to the Department, is at that point when the email was written, Munn had eight scheduled workdays between June 25 and August 20. The record showed, however, that he only worked three of them, which meant that the email again revealed Munn's preplanned use of sick leave in order to extend his vacation.

It was then argued that these emails also violated the rules and regulations dealing with the use of computers and electronic equipment, R&R 2.39, since it showed poor judgment and created the appearance of an impropriety.

The Department next argued that the doctors' excuses submitted by the Grievant were not believable and contended that the excuses demonstrated a lack of candor and misrepresentation about sick leave use. It was then contended that it was reasonable for Chief Washington to question the accuracy and authenticity of the COIs since they all indicated dates of physical observation that appeared unrelated to the actual dates in which Munn was absent. In addition it was noted that all of the COIs excused Munn for full shifts, rather than for partial shifts, which would have been necessary if he had a doctor's appointment. This further suggests, according to the Department, that Munn preplanned his use of sick leave.

The Department then argued that the Telestaff calendars confirmed a pattern of use, which created a negative financial impact for the Department, because Munn regularly called in sick after 8:00 p.m., which triggered an expensive callback. It was then noted that a callback is a form of pay related to overtime and is compensable with the State pension system.

It was next argued that the JIT found Munn dishonest in his use of sick leave since the evidence suggested that Munn manipulated the system and planned to use sick leave in advance to gain time off to spend the summers at his residence in Utah. It was also pointed out that the JIT found that the evidence suggested that the Grievant used his son's disability and that Munn was less than honest in his utilization of sick leave.

Another argument put forth by the Department was that Munn violated the anti-sign up rule because Munn requested and was placed on anti-sign up continuously from May 25, 2010 to September 11, 2010 as shown by Department Exhibit 15. It was contended that this use of anti-sign up was consistent with his earlier indication in an email that he would be absent for the summer. It was then stressed that although anti-sign ups were permitted for employees on approved sick leave and vacation leave, Munn also took anti-sign up on days which the records indicate were not connected to approved sick or vacation leave.

The Department also rejected Munn's assertion that he had a court order to take care of his handicapped child as an explanation for the use of the anti-sign up. This is because the document presented during the hearing was entitled "Order Appointing Co-Guardians."

The Department then rejected a document from Union Executive Board member Michael Afanasiev, which was an unauthenticated hearsay document which suggests that Munn was instructed by former Chief Morgan to "turn in paperwork" to be placed on anti-sign up. It was then noted that the Department employee responsible for Human Resources, Michael Ware, testified that he attended the meeting referenced in Afanasiev's letter, but Munn never turned in the paperwork to be placed on anti-sign up. Ware also testified that he was not aware of Morgan offering Munn a blanket continuous anti-sign up approval during the meeting that was referenced.

According to the County, Munn also brought disrepute to the Department because his emails were subject to public disclosure. Chief Washington's testimony was then cited in which he indicated that Munn's sick leave contributed to negative attention in the media which wrote stories which indicated that firefighters used sick leave and vacation interchangeably.

The Department then went on to argue that it was clear that there was just cause to terminate Munn because his abuse of sick leave violated established rules and procedures. Furthermore, progressive discipline was not necessary because it would have been futile since Munn indicated that he would again, if called upon to do so, volunteer to call in sick when he was not sick. It was also argued that he expressed an inclination to misuse sick leave by stating that "it just didn't matter" in one of his emails. This means that progressive discipline was not applicable because when Munn's conduct is viewed as a whole, it constituted a major violation of Department rules.

The County also argued that it does not need an honesty rule to justify discipline in a case such as this one. Chief Washington's testimony was cited in this regard that it was important for Munn to be honest in his responsibility as a firefighter.

The Department next asserted that it provided Munn due process before he was terminated since he was given notice of the conduct about which he was being investigated. Therefore his claims of ignorance are not to be believed. It was then pointed out that the Grievant was interviewed as part of the JIT investigation. In addition Chief Washington provided clarification in a clarification meeting with Munn on May 3. Munn also received a JIT resolution meeting with the Chief on May 10. Finally Munn received a hearing with the Chief on May 16 which also occurred before the final decision was made to terminate Munn. This means that Munn had

multiple opportunities to deny, explain or justify his conduct before being terminated.

The County then argued that Chief Washington was not bound by Article 16(5). This is because the CBA indicates that abuse of sick leave and violation of Departmental rules may constitute just cause for termination. It was then noted that the sick leave abuse provision is part of the discipline section of the grievance and arbitration procedures which is significant because the just cause termination provision was not qualified by the forfeiture of sick leave provision. This means that the Chief was not limited in his penalty for sick leave abuse to forfeiture under Article 16(5). It was also stressed that the Chief not only found abuse of sick leave, but also concluded that Munn violated the General Conduct, Telestaff, Absence From Duty Without Authorization, Disruption of Department's Performance and Computers and Electronic Equipment rules, as well as other established work rules.

According to the Department, Chief Washington was also not bound by the JIT findings. This is because under the Collective Bargaining Agreement, the JIT is required to send the Chief its findings for the Chief's decision. This means that although the JIT did not find a violation of Article 16(5), this does not mean that the Chief was therefore obligated to disregard the other information from the JIT, the audit, Telestaff, and his subsequent interview with Munn. Therefore, although the JIT findings did not inquire about whether Munn violated the Department rules and regulations, nonetheless there is no contractual prohibition limiting the Chief to the JIT's considerations.

In conclusion it was argued that the record established that Munn fraudulently misused sick leave while engaging in manipulation and gaming the system as shown by his emails, Telestaff records, doctors' excuses and Munn's interviews. Furthermore, the pattern and manner of sick leave usage, as well as the anti-sign up use, cumulatively show a plan to utilize sick leave in order to extend vacation. In addition the timing when he called in sick triggered additional expenses for the Department. Finally, it was stressed that Munn had been dishonest in responding to the JIT and the Chief about his use of sick leave. This all means that termination was warranted under just cause.

SUMMARY OF THE POSITION OF FIREFIGHTER MUNN

Munn contended that the County failed to meet its burden of proving that there was just cause to terminate him.

It was stressed that the County failed to forewarn Munn of the possible consequences of sick leave misuse, and that under just cause, adequate forewarning of possible consequences for violation of a rule must be provided. In this case the

County failed to produce any evidence to show that it ever warned Munn that he was misusing sick leave under Article 16.5(a) of the CBA or the consequences for doing so. The testimony of Union Vice President Thomas Touchstone was cited when he testified without contradiction that the County had never provided Munn or any other firefighter forewarning of potential consequences for misuse of sick leave.

Munn conceded that the County attempted to show that he misused the anti-sign up provision in the CBA and that he had been previously disciplined for it. It was argued, however, that anti-sign up does not relate to sick leave, Article 16.5(a) or any other rules or regulations cited by Chief Washington when he terminated Munn. All this means that Munn had never been forewarned that he might be misusing sick leave and certainly he was never warned that he could be terminated for such actions.

It was also stressed that Munn testified without contradiction that he actually had an excess of unused sick leave in 2008 and 2009.

The next argument put forth by Munn was that the County's investigation by Chief Washington was neither conducted fairly nor objectively. It was contended that Chief Washington's testimony regarding the investigation was convoluted, if not an outright fabrication, and that his decision to terminate Munn was arbitrary. It was then stressed that the JIT findings were in the record and that it was unequivocal and undisputable that the JIT found that Munn did not use sick leave in excess of three consecutive shifts and thus he did not violate Article 16.5(a).

The record also showed, according to Munn, that Chief Washington exercised his "prerogative," which is not found in the CBA, to find charges beyond what the JIT had found. It was then pointed out that it was not until May 10, 2011 that Munn received correspondence from the Chief wherein the Chief charged Munn with violation of Article 16.5 and the five regulations. Munn then emphasized that the May 10, 2011 correspondence from the Chief was the absolute first time that he or the Union had ever been told by the Department that Munn violated either the CBA or any regulations. This means that the Chief essentially conducted a secret Step 1 which was unfair because it meant that Munn was effectively on trial twice. It was also stressed that Chief Washington was not objective since he misrepresented the JIT's finding. Touchstone testified that he specifically asked the Chief for evidence sustaining the violation, but the Chief did not provide any. Most important, the Chief added violations, which were the ones pertaining to the rules and regulations, which the JIT never addressed or charged against Munn.

It was also argued that Munn credibly testified without contradiction that a JIT is convened only to investigate one violation at a time. This is why it was so extraordinary for the Chief to write Munn on May 9 and accuse him of violating all

the rules and regulations that the Chief cited.

All of this means that Munn was deprived of procedural due process notice of what he had been accused of violating. It also means that the Chief's investigation was unfair, arbitrary, capricious and certainly not objective in violation of just cause principles.

The County also, according to Munn, failed to prove that Munn violated any provision of the CBA or the rules and regulations. This is because the County failed to produce any evidence showing Munn violated the CBA.

It was then stressed that the CBA clearly indicates that (COIs) may be requested when there is one absence in excess of three days or more "and" whenever there is reason to believe that sick leave privileges are being abused. This same language had been in the Contract since at least 1981 and means that a COI may only be requested if a firefighter has one absence in excess of three consecutive shifts and the County has reason to believe there was abuse. Both must be present. In this case, however, the JIT misquoted Article 16.5 since its report indicated a COI can be requested when a firefighter misses one absence in excess of three days "or" the County has reason to believe that the firefighter abused sick leave. This was a clear mistake since the CBA does not say "or." Instead it says "and." This was a small, but significant, error, but not the only error in the JIT report. It was noted in this regard that the JIT said that Munn was absent on July 6 and July 14, 2009, yet the calendar that the County produced proved that he worked those days.

All this means that the County did not have the right to force Munn to produce COIs under the Collective Bargaining Agreement and the JIT was mistaken in that regard.

It was also noted with respect to the COIs that the County asked Munn to provide them for dates as far back as a year and a half earlier. Munn did his best to do so.

It was also pointed out that Munn had nothing to hide, so therefore he attempted to appease the JIT by obtaining COIs for the dates that he or his son had been ill or needed care. Therefore the County's assertion that Munn falsified the COIs is "disgusting" and made in bad faith and without a reasonable basis to proffer this assertion.

Munn then stressed, based on the above, that since he never had one absence in excess of three consecutive shifts, the County never had any right to ask him for any COIs. Therefore, any discipline based on the alleged misuse of sick leave is consequently "fruit of a poisoned tree," which means that it is evidence that the

County never should have acquired, but for the County's misapplication of its contractual rules and obligations. Therefore the fruit of the poisoned tree doctrine precludes any evidence or arguments that Munn violated the rules and regulations.

Munn then went on to address the specific allegations regarding violations of the five rules and regulations cited by the Department.

With regard to Rule and Regulation 2.7, it was argued that the County, and not Munn, was solely to blame for any disrepute brought upon the Department in this whole matter because the County provided the unredacted email to the media.

With regard to Rule and Regulation 2.32, which is the Telestaff policy, it was pointed out that the Department demonstrated that it was easy to pull up information regarding work scheduling, including firefighters out sick or on vacation, etc. It was then argued that since it was so easy to pull that information from Telestaff, it should not have taken the County nearly two years to do so. Furthermore, the record showed that it was only because of the interest arbitration, with all its political and social implications, that alleged sick leave abuse became an issue.

With regard to Rule and Regulation 2.4, which is the absence from duty without proper authorization provision, it was pointed out that the JIT clearly said that Munn had never missed more than one absence for three consecutive days. Furthermore, Chief Washington failed to provide any evidence contradicting the JIT. Therefore, Munn was never absent without proper authorization.

As to Rule and Regulation 1.3, which is disruption of the Department's performance rule, it was argued that this regulation is so vague and the allegation against Munn so nebulous, that it was a "fools errand." It was stressed that the County intentionally and voluntarily released emails as part of its negotiating tactics with the Union and that the County is now relying on that to claim that somehow Munn disrupted the Department's performance though the use of those emails. This meant that the County's position was complete hypocrisy since it caused the very disrepute for which Munn was terminated. Furthermore, even if Munn is guilty of violating this provision, it certainly would not warrant termination.

As to Rule 2.29, which deals with misuse of Department computers, it was contended that this allegation was so overly broad and vague that it could ensnare anyone. It was also argued that even if there was a violation, it does not warrant termination. This is especially true in this case when Munn had never been disciplined, much less progressively disciplined, for violating any of these rules and regulations.

Munn then went on to contend that the Department did not apply its rules

and penalties evenhandedly and without discrimination. In support of this position Thomas Touchstone's testimony was cited in which he indicated that in his eleven years as Union vice-president, he had never seen anyone disciplined, let alone terminated, for a similar alleged violation, except for one other person who was terminated after the Grievant.

It was also alleged that there was a violation of the FMLA since if an employee like the Grievant, or a family member, has a serious health condition, such as his son, the County cannot continually insist on doctor's notes when the leave is believed to be for reasons already qualified as an FMLA leave.

Munn next argued that the discipline imposed was unreasonable and it did not equate to the seriousness of the offense. It was stressed that Article 16.5(b) imposes only one penalty for the misuse of sick leave, which was exactly the same penalty the Chief rescinded in February 2011, which is six months of non-accrual. No other form of discipline is allowed. Thus Munn's termination for alleged misuse of sick leave is contractually prohibited, draconian and ignorant. Furthermore, Munn readily admitted that the first email that he sent was a mistake and he was contrite and apologized for it. The County ignored that, as well as the fact that he had eighteen years of excellent service without any prior record of discipline, except for one penalty for refusing mandatory call-back. It was argued that the basis for that discipline in that instance was shaky given the court order Munn had concerning guardianship and the confusion regarding what former Chief Morgan said to HR Representative Ware and Union Representative Afanasiev.

Based on all the above, it was argued that the County failed to carry its burden of proof to show just cause existed to terminate Munn and, as a result, Munn should be reinstated with all attendant benefits and pay retroactively applied.

DISCUSSION AND AWARD

After considering the evidence and arguments put forth by the parties, the Arbitrator has concluded that the County did not meet its burden of proving that Munn was guilty of the abuse of sick leave and the other violations for which he was terminated.

Before going into the specifics of why the Arbitrator concluded that the County was unable to prevail in the various allegations against Munn, the Arbitrator believes that it is first important to indicate to the parties the level of proof that was used by the Arbitrator in making this determination.

There have been many awards and discussions among arbitrators, as well as parties, dealing with the question of the nature of the burden of proof in a

termination case. In many cases a union will argue that the employer should have the burden of proof beyond a reasonable doubt. This is because the union will typically argue that a termination case is equivalent to capital punishment in the labor relations world. Conversely, employers often argue that the burden of proof in a termination case should be simply the preponderance of evidence since a disciplinary case arises out of the collective bargaining agreement and, therefore, it is contractual in nature. In the Arbitrator's experience, most arbitrators, including the present Arbitrator, reject both of those arguments and instead tend to regard the appropriate burden of proof as clear and convincing. That is to say, an arbitrator wants to be clearly convinced that the grievant in a termination case committed the acts as alleged that would justify termination. This is all the more so as in a case, such as the case now before the Arbitrator, in which moral turpitude, such as dishonesty, is alleged. This is because upholding a termination under such circumstances not only is likely to result in loss of the job at issue, but could also brand the discharged employee as dishonest or someone who is not to be trusted when applying for any future employment. Furthermore, in a case in which the employee, such as Munn, has engaged in a specialized, highly skilled and trained profession, such as firefighting, this argument is all the more significant because a loss of a job as a firefighter based on alleged dishonesty is likely to amount to not only a loss of a job, but the loss of a career as well. Therefore, the Arbitrator is convinced that the burden of proof must be clear and convincing

In the instant case, however, the Arbitrator was simply not persuaded that the County was able to meet its burden of clearly and convincingly proving that Munn abused his sick leave.

There is no question that the County was able to establish that Munn took a large amount of sick leave. Simply taking a large amount of sick leave, however, in and of itself, even if it was more sick leave than most employees in the Department, is not a violation of the Collective Bargaining Agreement or sick leave policy. Therefore, the mere fact that Munn took so much sick leave cannot in itself serve as a basis of the termination of his employment.

The Arbitrator must also note that the record established that the sick leave that Munn took was sick leave that he had earned. This is important because there was no showing that the Grievant at any time ever exceeded the amount of sick leave to which he was entitled.

All this leaves, therefore, as the controlling issue, the question of whether the County was able to prove that Munn did not have a reasonable need to take sick leave on the days in question and that he did not utilize that sick leave in order to deal with a medical problem regarding either himself or a member of his family, and particularly his son. The Arbitrator is persuaded, however, that the County was unable to prove that the sick leave taken by Munn was not used for medical related

purposes. In fact, the County admitted that it could not prove that when Munn took the sick leave in question, that neither himself, nor a member of his family, did not have a medical problem. (transcript p. 355) Instead it appears to the Arbitrator that the County's case was largely based on speculation and conjecture regarding the timing and the dates on which Munn took sick leave and the emails. Thus the Arbitrator was not persuaded, based on any proof submitted by the County, on the days that Munn took sick leave, that he did not use it appropriately.

In addition the Arbitrator must note the findings of the JIT when it concluded:

> "The JIT finds that while Firefighter Munn had excessive sick leave during the months of March, April, July and August 2009, as well as June, July and August 2010, he was in compliance with Article 16.5.a...Since Firefighter Munn did not use sick leave in excess of three consecutive shifts, he did not violate this Article. He was also able to provide COIs for absences occurring in August and September 2009, as well as June, July, August and September 2010."

The Arbitrator recognizes that it is very difficult for the County to establish that neither Munn, nor other employees suspected of abusing sick leave, were indeed abusing sick leave. In fact, the record has established in this regard that no other employee had ever previously been terminated for abuse of sick leave.

In part this is true because of what can only be described as the liberal policies contained in the Collective Bargaining Agreement regarding sick leave. The Collective Bargaining Agreement indicates that an employee has to be absent in one absence for more than three days and suspected of abusing sick leave before the employee can be required to bring in information in the form of doctors' excuses, etc. to prove the legitimacy of the absence. In the present case, there is no dispute that Munn never had one absence in excess of three days. This means that even if the County suspected that Munn was abusing sick leave, it did not have the right, under the terms of the Collective Bargaining Agreement, to ask him to produce documentation to establish that there was no abuse of sick leave. Nonetheless, the record has established that Munn did provide, as best he could, information regarding some of the absences that were suspect. While the County raised concerns regarding some of the justifications produced by physicians to support Munn's contentions regarding the legitimacy of his absences, nonetheless, it must be pointed out that the documents that Munn was able to produce were, in essence, retroactive documents, that went back anywhere from a year to two years after the absences were questioned. Therefore, it is understandable that these retroactive documents might not be as specific as the County would expect they might be if they had been required at the time that the sick leave was taken, This fact, however, was not Munn's fault since the County could not require them under the CBA when the

leave was taken since Munn had never had one absence in excess of three days and Munn was not suspected of sick leave abuse when he took the sick leave at issue. This is not to say, however, that the timing of the sick leave, combined with Munn's vacation days, could not raise suspicion. For purposes of upholding a termination, however, suspicion and conjecture are not sufficient.

The Arbitrator is also persuaded that the County did not have the right to even ask Munn for those documents, even during the investigation, given the terms of the Collective Bargaining Agreement, since there is no dispute that Munn never had one absence in excess of three days. Therefore, the Arbitrator is fully persuaded that even though the County may not have been satisfied, for whatever reason, with some of those documents, they could not be used to support Munn's termination.

The Arbitrator must also note that it is difficult to make a determination, both for the County, as well as the Arbitrator, that there was abuse of sick leave, in part because of the situation with Munn and his family. The record has established without dispute that Munn has a twenty year old son who, as a result of fetal alcohol syndrome, is in need of almost constant care and who must be monitored carefully. According to documentation produced by Munn, his son should not be put in situations which he regards as stressful, since he may physically act out to the detriment of himself or others. Furthermore, his son's behavior, apparently, based on the information provided, is unpredictable since there could be an outburst or medical problem at any time which could require medical attention. As a result, the Arbitrator is persuaded that the fluid and unpredictable situation involving Munn's son means it was all the more difficult for the County to be able to provide convincing proof to the Arbitrator that on days which the County regarded Munn's use of sick leave to be questionable, they were, in fact, questionable.

The Arbitrator agrees with the County that the emails that were sent by Munn, as well as the pattern of the use of sick leave and vacation on the days in question, and particularly the summers at issue, could raise suspicion about the possible abuse of sick leave. This is particularly true given the allegation by the County that Munn was planning his use of sick leave in advance in order to enable him to take off the summer in question. Thus the Arbitrator understands why the County became concerned about what it regarded as a possible misuse of sick leave. The problem in the instant case, however, is that having a concern is not the same thing as the County being able to prove that there was an actual and verified abuse of sick leave sufficient to justify Munn's termination. Instead, the Arbitrator is persuaded that essentially the County's case was built largely on speculation as to whether Munn was abusing sick leave without being able to produce the proof necessary to justify Munn's termination. This was particularly true since Munn, although not required, was able to produce at least some evidence from doctors regarding the use of his sick leave.

Based on all the above, the Arbitrator is persuaded that the County was unable to meet its burden of convincingly proving actual abuse of sick leave as indicated by Article 16 that would be sufficient to establish a violation of Article 16 that would justify Munn's termination.

There were also other rules and regulations (herein "R&R") raised by the County which contributed to its decision to terminate Munn.

The first of these is the alleged violation of R&R 2.7, Item 3, General Conduct. The specific regulation that was cited states: "While on duty, employees shall be just and honorable in all their relations with each other and shall not act in a manner calculated to create a disturbance or dissention within the Department." The Arbitrator does not find that Munn violated this R&R. Clearly there was no persuasive showing that Munn did anything that was "calculated" to create a disturbance or dissention within the Department. While it might be argued that Munn did not act honorably if he, in fact, abused his sick leave or had any intention to do so, however, since the Arbitrator found that the County was not able to establish that he abused his sick leave, the Arbitrator does not find that this R&R is applicable.

The next R&R that the County cited was R&R 2.32, Item C (6)(a) dealing with Telestaff. Item C(6) deals with the anti-sign up provision. There is no dispute that Munn was on anti-sign up during the relevant periods in question. The Arbitrator notes that when Chief Washington was asked about why he regarded Munn's behavior as violating this R&R, the Chief testified that it was because for a significant portion of time, Munn requested and received anti-sign up. This testimony in and of itself does not clearly establish in the Arbitrator's opinion why Munn violated this rule. As testified to by the Chief, "And for a significant portion of time that he requested and received anti-sign up, he violated this rule and regulation." (transcript p. 166) As indicated by the Chief, Munn requested and received anti-sign up for a significant period of time. It was not, however, Munn's place to make a decision as to whether he should have received anti-sign up. In fact the evidence in this regard, based in part on Chief Washington's testimony, shows that Munn, after requesting anti-sign up, as clearly it was his right to do, was granted anti-sign up. The record shows that Chief Washington, who was questioned during his testimony with regard to the anti-sign up, testified as follows:

Question: "With regard to the anti-sign up, isn't it up to the battalion chief to approve that?"

Answer: "Yes."

Question: "How did you factor in the idea that the anti-sign up that showed up on the calendar on tab 13 had been approved and accepted by the bat chief for Mr.

Munn?"

Answer:, "That's something else that I asked Mr. Munn about and he indicated to me that one of the battalion chiefs,...had to give him that particular anti-sign up leave because of the situation and behavioral issues with his son. So the concern I had at that time was whether or not our battalion chiefs understood how they were supposed to apply this particular rule in his case."

Question: "Did you form an understanding or an opinion whether or not the bat chiefs had appropriately approved Mr. Munn?"

Answer: "I did."

Question: "What's your opinion?"

Answer: "My opinion is that it was not applied correctly by the battalion chief."

Question: "Did you meter out any discipline to the battalion chief about this?"

Answer: "We took some formal corrective actions about that." (transcript pp. 168-169)

The Arbitrator found this testimony, along with evidence produced by Munn regarding this issue, to clearly establish that Munn met his obligations to ask for anti-sign up, but it was not up to Munn to grant the request. Instead, Munn's supervisor, a battalion chief, after receiving Munn's application, apparently granted him the anti-sign up at issue. Therefore, it is not at all clear to the Arbitrator why on that basis, having been told by the battalion chief, even if the battalion chief was in error, that Munn was granted anti-sign up because of issues with his son, that Munn should somehow be found liable for termination because he used the anti-sign up that was granted to him by a battalion chief. The Arbitrator must also note that although the County took the position that the anti-sign up was abused by Munn and had not been properly granted to Munn, nonetheless, the County did not call the battalion chief who apparently granted the anti-sign up to rebut Munn's position. Therefore, after considering this issue, the Arbitrator is persuaded that Munn did not commit an offense that would be terminable under just cause notions of the Collective Bargaining Agreement.

Munn was also accused of violating R&R 2.4 that deals with absence from duty without proper authorization. It appears to the Arbitrator that after reading this R&R, it deals with employees who basically are AWOL. The Arbitrator is not persuaded that Munn was at any time absent from duty within the meaning of this section. This is because the language indicates: "No member shall be absent from duty without proper leave, or shall be absent from duty without permission." In the

instant case Munn was absent from duty because he was either on vacation or he was on sick leave. This means that he was not absent from duty without permission, even though the County at this time is asserting that Munn was abusing sick leave. Nonetheless, he still in effect had permission to be absent since he had taken sick leave, which he had properly earned. In addition the Arbitrator must note that in order to be terminated under this section of the R&R, it states: "Any member absent without proper leave for three (3) consecutive shifts (fire suppression)...will be automatically terminated." There is no showing that Munn was ever absent without proper leave for three consecutive shifts. Therefore the Arbitrator finds that Munn did not violate R&R 2.4 dealing with absence from duty.

The next rule and regulation which Munn was charged with violating is Section 1.3 which deals with disruption of the Department's performance. That section indicates Fire Department members shall not make "any statements, oral or written for publication or otherwise, which bring the Department or its officers into disrepute or ridicule or which disrupt or impair the performance of official duties... Members shall not disrupt or impair performance of official duties of the department...Willful violation of this rule by a member may result in disciplinary actions which shall be administered commensurate to the gravity of the acts or statements." Again, the Arbitrator was not persuaded that the County was able to establish that Munn violated this R&R. The Arbitrator can find no statements made by Munn designed with the intent of bringing the Department into disrepute or ridicule, nor was there any evidence that anything which occurred in this case disrupted or impaired the performance of official duties of the Department. The Arbitrator must note in this regard that the only statements at issue were the emails. The emails, however, were apparently never intended by Munn to go beyond the individuals to whom they were sent. To the extent that there was adverse publicity arising out of those emails, which it could be argued brought the Department into disrepute or ridicule, the Arbitrator is persuaded that the fault for such action was the fact that the Department itself released not only the emails, but also released Munn's name to the public. Thus the Arbitrator is persuaded that the Department must bear the responsibility and not Munn, to the extent that the emails resulted in any disrepute or ridicule aimed at the Department. The Arbitrator must also note that the rule itself indicates that, "willful" violation of the rule may result in disciplinary action commensurate to the gravity of the acts. The Arbitrator is not persuaded, however, that the County was able to establish that Munn ever intended a willful violation of this rule, nor that the acts involved would justify immediate termination.

The last Rule and Regulation cited by Chief Washington in the termination letter of May 17 was Regulation 2.29, and specifically that part which deals with Fire Department computers. Item 4.a states among other things: "When sending E-mail messages, and using the Internet, propriety and good judgment should be exercised." The specific provision cited by the Chief then goes on to state: "...

employees shall have limited personal use of the Internet...provided: the use does not create the appearance of impropriety." Section (b) (i) which was also cited, states: "The following Internet and E-mail uses are prohibited: (i) Communications that may in any way be construed by others as disruptive, defensive, abusive or threatening." Section 4(b)(viii) states: "The following Internet and E-mail uses are prohibited...Any other use that may compromise the integrity of the County and its business in any way." Looking at the these regulations, the Arbitrator is not persuaded that the Grievant's actions, and specifically the emails which he sent, could be found to be a violation of 4(b)(i) or 4(b)(viii). This is because the Arbitrator was not persuaded that the communications were either disruptive, offensive, abusive or threatening to anyone. The Arbitrator is also not persuaded that there was a violation of (b)(viii) which prohibits any use that may compromise the integrity of the County and its business in any way because that language is very vague and very broad and the Arbitrator is simply not persuaded that the messages that the Grievant sent could be construed to "in any way compromise the integrity of the County and its business."

The Arbitrator, however, was persuaded that the Grievant's emails did violate Section 4(a) which indicates that propriety and good judgment should be exercised and which prohibits the use of email to create the appearance of impropriety. This is because sending an email to another member of the Fire Department that Munn was willing to trade his vacation time to another firefighter and instead utilize sick leave, clearly in the Arbitrator's opinion, does indicate that the Grievant was not using good judgment to make such a statement on the internet and by doing so created the appearance of impropriety. This is true notwithstanding the fact that the Grievant did not engage in the activity he talked about in the email, since he never did make the exchange he referenced. Accordingly, the Arbitrator is persuaded that the Grievant violated this section of the Rules and Regulations. The Arbitrator is not persuaded, however, that violating this section of the Rules and Regulations would justify immediate and automatic termination. This is true, if for no other reason, because the Collective Bargaining Agreement does recognize the concept of progressive discipline in all but the most serious cases. The Arbitrator is not persuaded, however, that the gravity of the Grievant's actions with respect to this email was so significant that it would justify ignoring the contract language with respect to progressive discipline.

With regard to the other emails sent by the Grievant, the Arbitrator did not find that they warranted discipline. This is because the Arbitrator found the Grievant's explanation for what those emails meant to be reasonable. That is to say, the Arbitrator agrees that given the Grievant's schedule, in which he was only scheduled to work five days in June, five days in July and six days in August of 2010, that when the Grievant made reference to "before I leave for the summer," the Grievant's explanation that between the vacation time he had coming, as well as the anti-sign up for which he had been approved, as well as his time off, whether he took

any sick leave or not, that it would seem like he would be gone for virtually the entire summer. Therefore his reference in two of the emails to leaving for the summer and the fact that it would "seem like most of the summer" does not appear to the Arbitrator to be unreasonable. This is particularly true when one considers Munn's explanation with respect to the second email, entitled "Gone for the Summer" that it had to do with not being available to meet with the committee that he was on that supports the purchase and maintenance of equipment in firehouses not paid for by the County.

The Arbitrator was also not persuaded by the County's arguments regarding Munn calling off sick after 8:00 p.m. and its costs to the County. This is because the Arbitrator found reasonable Munn's explanation that at times his son's problems would not manifest themselves until the evening. Furthermore, this issue was not specifically cited as grounds for termination.

Having decided that the County did not have just cause to terminate Munn, and having decided the major substantive issues in this case, the Arbitrator is not persuaded that it would be appropriate or necessary to deal with the procedural arguments raised by Munn in his defense.

AWARD

1. The Arbitrator finds that the County had just cause to discipline Munn for violation of Rule and Regulation 2.29 as a result of his use of the County computer system for the email message he sent to another member of the Fire Department suggesting that he could call in sick on days that he had previously scheduled for vacation. The Arbitrator has decided that since this was a first offense with no intent to either disrupt the Department or compromise the Department, that the appropriate penalty would be a written reprimand.

2. The Arbitrator finds that the County did not have just cause under the Collective Bargaining Agreement to terminate Munn for violation of either Article 16 of the Collective Bargaining Agreement dealing with sick leave or the Rules and Regulations cited by the Department.

3. The Arbitrator orders that Munn be reinstated to his former position and made whole for any losses in earnings or benefits that he would have received had he not been terminated. The County may, however, offset what it owes Munn by any money or benefits earned, or that reasonably should have been earned by Munn, during the period he was off work from the time of his initial suspension until reinstatement under the terms of this award.

4. The County is ordered to pay the Arbitrator's fees and expenses in accordance

with the agreement between the parties and to reimburse Munn for the fees and expenses advanced by Munn to the Arbitrator.

MAY 9, 2012
Date

Arbitrator