

Case Highlights Potential Conflict Between Powers of Medical Director and the City in Discharging EMS Staff When Losing "Credentials"

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Two Grievance arbitrations involving *Local 311, International Association of Fire Fighters, AFC-C10 and City of Sun Prairie* explored the relationship between a medical director's decision to withdraw the credentials of two paramedics based on alleged poor patient care, which, in turn, led to their discharge by the City. While there are many facts that add to the complexity of these cases, the key focus is the City's decision to terminate two EMS employees for their patient care decisions and actions taken on one emergency call and the medical director's decision to withdraw the credentials of both employees to work as paramedics under her license. Both the basis for the decisions and the remedy implemented by the Arbitrator make these cases worth exploring.

The First Award – Just Cause to Dismiss Not Proven

Arbitrator Richard B. McLaughlin first found the City did not have just cause to discharge the two employees. (A/P M-14-026, 2/17/15). In the second award, Arbitrator McLaughlin determined the "make whole" remedy including both back and front pay, which is rarely seen, totaling \$662,252 for the two employees. (A/P M-14-026, 1/19/17).

State regulations (Chapter DHS 110, Wis. Administrative Code) provide that an employee must be certified or licensed as an EMT by the Department and must be credentialed by each "emergency service provider" in order to "perform emergency medical care." However, the regulations also state: "[t]he termination or withdrawal of an individual's credential does not by itself affect the individual's certificate or license."

The City's EMS Director raised specific concerns alleging the two employees (1) did not implement appropriate medical protocols in an appropriate, effective and timely manner; (2) failed to recognize cardiac rhythms; (3) did not meet standards of professionalism and empathy; and (4) engaged in deceptive practices.

The Medical Director concluded that "my concern is whether treatment was withheld or whether the patient was not treated in timely fashion, either due to personal bias or based on not recognizing patient condition and following appropriate protocols. Comments corroborated by others on scene including 'this is a waste of resources' and regarding transporting the patient, 'I didn't think we were going to need to' along with the above data from the code, are concerning that this in fact did occur." The Medical Director rescinded the credentials of the EMTs and their employment was terminated.

The review of the two paramedics' patient performance was triggered by an email sent to the City's EMS Director by another City paramedic who appeared on the scene shortly after the two grievants began treating the patient. He was critical of the two paramedics' conduct to the patient.

The Union argued the City lacked just cause to terminate both employees because the City used the Medical Director's decision to rescind the credentials as the grounds to terminate the two employees. The Union also claimed the City did not prove the allegations it made against the employees for their lack of care and violation of protocols.

The City claimed just cause existed for the termination of the employees because the employees are not able to be employed by the City once their credentials were withdrawn, nor are they entitled to reinstatement since they are not credentialed. The City has no control over the Medical Director's decision to withdraw credentials. The City also terminated the employees for violation of protocols in the handling of the patient.

Arbitrator McLaughlin analyzed each of the seven just cause standards in detail to determine whether the City met the identified standard. He found the City failed to meet five out of the seven factors where it usually takes only one to lead to failure of establishing just cause. He was extremely critical of the City's investigation to determine if poor patient care occurred. He concluded: "[t]he investigation was not a disinterested attempt to determine fact. It neither generated, nor sought to generate, a chronology based on reliable evidence." The Arbitrator was critical of the EMS Director's reliance on the other paramedic's email expressing unsubstantiated concerns rather than to find actual facts.

The alleged charges were serious and involved lack of care; unwillingness to treat the patient; statements made involving giving up, wasting resources, seeking physician orders to halt care, and others. Arbitrator McLaughlin stated: "The objectivity of the investigation was tenuous from its start." The Arbitrator reviewed the allegations of poor patient care and violation of protocols and found that they fell short of serious misconduct that would warrant termination.

The Arbitrator concluded the City found "no substantial evidence" that the two employees "engaged in unprofessional conduct not amenable to training." Therefore, the Arbitrator concluded that perhaps an oral or written warning, along with training and counseling, would have been appropriate as opposed to discharge.

Interestingly, the Arbitrator did not directly rule on whether the City could have properly terminated an employee for not having "credentials." Instead, Arbitrator McLaughlin stated:

The City alleges reinstatement is not available as a remedy, but this presumes a split between the [EMS Director's and Medical Director's] exercise of authority as a matter of contract, if not law. There was no split in the imposition of the discipline, but the discipline presumed the existence of willful misconduct by the M71 crew. None was proven and it would be premature, if not inappropriate, to conclude that either the [EMS Director or Medical Director] would seek termination via revocation of credentials without willful misconduct. The **AWARD** entered below addresses this dilemma by stating broad, make whole relief. If there are issues regarding what constitutes make whole relief, the retention of jurisdiction allows the parties to consider and to address them prior to formal action on my part.

As a remedy the Arbitrator ordered the City to make the two employees "whole." In an amended award three months later, the Arbitrator further clarified his remedy by ordering reinstatement of both employees to the paramedic position and making them whole for lost wages and benefits.

The Circuit Court Upholds the Arbitration Award

The Union appealed the arbitration award to Circuit Court to confirm it while the City moved to vacate it. *Local 311, IAFF, AFL-CIO v. City of Sun Prairie*, 15 CV 1284, Richard G. Niess, 1/07/16. The City moved to vacate the award since both employees lost their credentials and are arguably legally barred from employment as paramedics.

The Court rejected the City's argument because the flawed investigation that led to the Arbitrator rejecting the City's allegations of poor patient performance was the same investigation that led the Medical Director to withdraw the paramedics' credentials. The Court refused to second-guess the Arbitrator's decision that the City lacked just cause to discharge the two paramedics. Judge Niess noted the high standard that must be met in overturning an arbitration award.

The Court also reviewed state regulations regarding credentials and found the withdrawal of credentials did not disqualify the employees from employment with the City as paramedics. It "simply limits the services they may perform for the City, i.e. – direct medical care at the emergency scene, during transport, or at the destination hospital." The City's job description includes "a great number of tasks that are not 'emergency medical care.'" The job description also "does not specify credentials from the City's EMS medical director as a requirement for the position."

The Court confirmed the arbitration award and remanded it to the Arbitrator to finalize the remedy.

Second Arbitration Case: Make Whole Remedy Includes Back and Front Pay

Both parties agreed the remedy must make the two employees whole and reinstatement was not available. Therefore, front pay could be considered. Much of the dispute in the second arbitration case focuses on calculations of back pay and front pay by the Union and City experts.

After reviewing the calculations and arguments, Arbitrator McLaughlin granted one employee about \$168,000 in back pay and \$140,000 in front pay. The other employee received about \$124,000 in back pay and \$189,000 in front pay. The front pay amounts are based on approximately three years of salary.

The City is planning to appeal this case.

Conclusion

These decisions underscore the relationship between state regulations governing "credentials" and being "licensed or certified" to serve as a paramedic. In the eyes of some Arbitrators and circuit courts, losing "credentials" does not automatically result in losing "certification." Credentials, among other necessary qualifications and duties that an employee would need to perform such as maintaining the ability to lawfully drive the employer's vehicles, lawfully possessing a firearm, and testifying credibly in court, are of such critical importance that employers must make employees aware of the consequences of losing a credential, a qualification, or the ability to perform a critical function of the job.

Public employers are advised to review job descriptions and decide whether maintaining credentials should be a condition of employment to hold a paramedic job. This case also serves as a valuable reminder that the seven tests of just cause is a very high standard for employers to meet. Careful attention to detail in conducting a fair, objective and comprehensive investigation is critical in upholding any discipline that results.

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