

REDACTED SAMPLE ARBITRATION OPINION

DID PUBLIC EMPLOYER VIOLATE THE CNA BY ASSIGNING NON-EMERGENCY DUTIES ON “HIGH HEAT” DAYS?

In the Arbitration Between:

SOUTHERN STATES FIREFIGHTERS,	X
	X
Claimant,	X
	X
-and-	X
	X
COWETA GEORGIA FIRE DISTRICT,	X
	X
Respondent.	X
	X
US Arbitration Service	X
Case Number: 123-12	X
Grievance: Outside Activities Grievance	X

OPINION OF THE ARBITRATOR

The Parties

The Southern States Firefighters Union (the “Union”), and the Coweta Georgia Fire District (the “District” or “Respondent”) entered a Collective Negotiation Agreement (“the Agreement”) covering the period from January 1, 2010 through December 31, 2013. (Joint Exhibit 1.) The Agreement permits the Union to initiate grievances, and to pursue unresolved disputes to arbitration. (Joint Exhibit 1, Article VI, Sections 1 & 4.)

The Procedural History

The Union filed a grievance dated August 9, 2012. It alleged Respondent violated Article XXXVI of the Agreement by sending Firefighters to participate in

non-emergency events when the heat index was over 88 degrees. (Union Exhibit 1.)

When the grievance was not satisfactorily adjusted, the Union submitted it to arbitration before a neutral to be selected under the procedures of the _____ Arbitration Service. (See Joint Exhibit 1.) The undersigned was appointed as arbitrator under those procedures. A hearing was held on January 17, 2013 in Coweta, Georgia. The parties attended; were represented by counsel; and had full and equal opportunity to present evidence and argument. The record was declared closed that day. In keeping with Article IV, Section 4 of the Agreement, the arbitrator's determination became due within thirty days, i.e., by no later than February 16, 2013.

The Issue in Dispute

At the January 17, 2013 hearing, the parties stipulated the issue to be:

Did the Fire District violate Article XXXVI of the Collective Negotiation Agreement when it assigned fire companies to perform non-emergencies on days and times when the heat index was 88 degrees or above, and when it failed to broadcast the heat index at 0900 and 1300 hours daily?

If not, what shall the remedy be?

Relevant Language in the Agreement

ARTICLE IV GRIEVANCE PROCEDURE AND ARBITRATION

SECTION 1. PROCEDURE...

In the event of any unresolved grievance, either party may submit such grievance for the appointment of an impartial arbitrator in accordance with its rules and regulations of the _____ Arbitration Service. The arbitrator shall have the authority to hear and determine the grievance, and his decision shall be final and binding on all parties. The arbitrator shall have no right to vary or modify the terms of the Agreement and shall decide the dispute within thirty

(30) days after the hearing has been closed.

**ARTICLE XXXVI
OUTSIDE ACTIVITIES**

SECTION 1. *No fire company shall be assigned to outside activities* such as drills, inspections or training except for emergency inspections and drills which should be designed for adverse weather conditions *when the index is 88 or above. The foregoing restrictions may be relaxed at the discretion of the Chief* so that such activities may be limited to a lower t-h index. (Emphasis added.)

SECTION 2. The present practice with regard to outside activities shall continue concerning rain.

SECTION 3. The District shall “broadcast” the heat index at 0900 hours and 1300 hours daily.

Findings of Fact

In 2012, the Coweta County Fire District (the “District”) undertook a special initiative in conjunction with the County Police. (Joint Exhibit 2.) Launched on May 10, 2012, the joint initiative was meant to foster better community relations, increase respect for uniformed personnel, and increase public safety and fire prevention awareness. (Joint Exhibit 2.) All Fire District personnel were ordered to participate.

Later in May, the County Administrator requested Fire District participation in the nationwide “Let’s Move” program designed to create “safe havens, healthy activity zones and inter-generational fitness.” (Union Exhibit 5.) It was to be conducted at various County parks. As discussed *infra*, the parties have stipulated that on three of these days the temperature was above 88° Fahrenheit while activities were taking place. Assigned fire companies were ordered to carry out “a company drill in public view.” (Union Exhibit 5.)

In June a Firefighter was injured while playing basketball during a Summer Initiative event. Chief Pete M. later issued an advisory to all District officers and members. They were notified that

...a restriction is being placed on the Summer Initiative Program. District personnel are not to engage in any physical activity as it relates to this program. This will include, but is not limited too, playing baseball, basketball, football or any other related activity associated with Summer Initiative events. The administration appreciates the initiative some have showed in getting involved with the community, but to limit the risk of injury, *they are to refrain from participating in any physical sporting event while on duty and limit themselves to observing only.*

(Union Exhibit 4.) (Emphasis added.)

Notwithstanding this limitation, the Union received complaints that both the Summer Initiative, and the Let's Move implementation had resulted in Article XXXVI violations. Specifically, members protested being assigned to outreach activities on days when the heat index equaled, or surpassed 88°F. Union President Hal R. gave testimony about some of these events.

By way of example, HR testified concerning Wednesday, July 4th. Firefighters had been required to perform a ladder drill during a music festival at Ofenki Park when the heat index frequently exceeded 90.0 °F. (See also Union Exhibit 6.) He also testified that Firefighters performed non-emergency activities at Let's Move events on June 16th and 24th The hottest of the three days was July 4th. During the relevant hours, the heat index was:

<u>Time of Reading</u>	<u>Temp.</u>	<u>Heat Index</u>
8:51am	91.9 °F	97.4 °F
9:51am	95.0 °F	99.0 °F
10:51am	97.0 °F	98.3 °F

11:51am	97.0 °F	99.3 °F
1:51pm	100.9 °F	104.0 °F

(See also Union Exhibits 7A, B & C.)

The record finally reflects that the District infrequently “broadcast” the heat index at 0900 hours and 1300 hours daily¹.

THE PARTIES’ POSITIONS

The Union’s Contentions

The Union seeks an Award directing Respondent to adhere to Article XXXVI by regularly broadcasting the heat index, and by not assigning its members to outside activities whenever that index is 88, or above. This is not a challenge to the District’s right to make community relations assignments.

(Testimony of Hal R., and Union Exhibit 1.) Rather the grievance seeks enforcement of contract provisions designed to protect firefighters by keeping them fresh and hydrated in the event they must respond to a fire.

The grievance, the Union asserts, is not very complicated. It turns on express contract language barring the Fire District from assigning non-emergency outside activities when the heat index is 88 or above. The Union stresses that the phrase “such as drills, inspections or training,” which follows “outside activities” is by way of illustration, and not limitation. Activities clearly include ones other than those listed. Moreover, contrary to the County’s contention, nothing in the provision restricts the activities in question to strenuous ones.

¹ Respondent acknowledges that it has fallen short of the mandate in Section 3 of Article XXXVI to broadcast the heat index twice daily.

The District's Contentions

Article XXXVI was designed to protect firefighters, and references activities requiring stamina and/or strength. The Summer Initiative does not fit within the contractual proscription since activities were not strenuous. Indeed, participation was meant to reduce fire fighting through education.

Notwithstanding that the heat index on some occasions exceeded 88, firefighters were never required to undertake strenuous activities during Let's Move events.

Determination

The Arbitrator is required to interpret Sections 1 and 3 of Article XXXVI. Section 3 presents no challenge. Respondent acknowledges that this provision mandates it to "broadcast' the heat index (temperature and wind chill factor) at 0900 hours and 1300 hours daily." These broadcasts furnish the data from which Fire Officers may determine whether Section 1's restrictions are applicable at specific hours.

Their determinations about assignments are to be made in keeping with the contractual prohibition that "No fire company shall be assigned to *outside activities such as* drills, inspections or training...when the index is 88 or above."² (Emphasis added.) Construing the phrase "outside activities such as" is the key to resolving the grievance.

Fire companies and their members perform their professional duties by undertaking activities. Under Article XXXI covered employees may be assigned to any duty related to "firefighting, fire prevention, rescue, salvage, care and

² The exception for "emergency inspections and drills which should be designed for adverse weather conditions" is not at issue in this grievance.

maintenance of firefighting equipment, apparatus, overhaul work, care, maintenance or housekeeping of firehouses and community relations.” When performed in the open-air the tasks needed to perform Article XXXI’s duties are by definition “outside activities.” For instance, checking a vehicle’s power steering fluid level, and replenishing it--if needed--would be an outside activity if performed at Ofenki Park. Similarly, a hose drill staged at Hobert Park would be an outside activity.

The grievance may never have arisen, or would have been resolved short of arbitration, had Article XXXVI simply read, “No fire company shall be assigned to outside activities when the index is 88 or above.” However, the inclusion of *such as* complicates the matter. As explained in The Little, Brown Handbook (6th ed., HarperCollins, 1995) “*such as* precedes an example that represents a larger subject.” Put another way, *such as* introduces some--but not all--members in a group. Henry W. Fowler in his Dictionary of Modern English Usage (1926) illustrates this concept in the following sentence,

Of our body’s many vital organs, such as the heart, the kidneys, and the liver, people may not know that the skin is the largest organ in the human body.

Absent “heart, kidneys, and the liver” following *such as* the reader would have less information about the nature of vital organs, including the skin. Those words are important to understanding that sentence’s meaning.

Similarly, the words “drills, inspections³ or training” are vital for our interpretation of outside activities as it appears in Article XXXVI. These components of the “outside activities” category share in common: physical

³ The record is silent on the meaning of “inspections.” In context, the clause is construed to include fire prevention and related field examinations.

movement (upper & lower body); exertion; coordination & teamwork among firefighters; at least moderate energy consumption; need for sufficient space; starting, performing, and stopping as directed; and mindfulness of potential hazards. Conversely, nothing points toward a conclusion that standing next to an engine, or discussing fire safety with members of the public are in the same category as drilling and training.

Applying these principles to the Program, the record sufficiently demonstrates that on the June 16, June 24 and July 4, 2012 Article XXXVI was violated. *Assignments* to conduct Company drills in public view implicate sufficient exertion, bodily movements, energy consumption, coordination among firefighters, and lack of control over starting/performing/stopping to come within outside activities which are disallowed when “the index is 88 or above.” These assigned activities were part and parcel of Let’s Move. (See Union Exhibit 5.) Good intentions aside, they conflicted with Article XXXVI’s high heat restriction.

The result differs when these same principles are applied to the Summer Initiative Program, which was designed to promote positive public interaction with uniformed personnel. Participation at these gatherings was meant to “increase visibility throughout the County, foster better community relations and increase public safety and fire prevention awareness.” (Joint Exhibit 2.) Firefighters were instructed to wear “clean, pressed work attire and conduct themselves in a manner that is cordial, respectful, and inter-active with the public.” (Joint Exhibit 2.) They were not expected to be physically active. This is demonstrated by Fire Chief Pete M’s caution--following a basketball injury in June--not to engage in physical activities during Summer Initiative events. (Union Exhibit 4.)

The holding applying the same principles to different outreach programs cannot anticipate the future. It will, hopefully, provide signposts to aid the parties in yet to come applications of Article XXXVI. Regularly broadcasting the heat index is critical to avoiding future difficulties, as its twice-daily publication should be a constant reminder of contractual obligations that high readings may trigger.

Conclusion

The District, in compliance with Section 3 of Article XXXVI, shall broadcast the heat index (temperature and wind chill factor) at 0900 hours and 1300 hours daily. Additionally, in compliance with Section 1 of Article XXXVI, the District shall not assign covered personnel to perform “outside activities” within the meaning of the Agreement, when the index is 88 or above.

Patrick R. Westerkamp, Esq.
Labor Arbitrator