FEDERAL MEDIATION AND CONCILIATION SERVICE

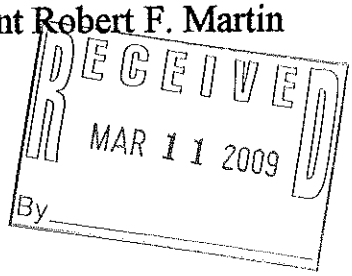
In the Matter of the Arbitration between

ST. PETERSBURG ASSOCIATION OF FIREFIGHTERS, LOCAL 747 IAFF,
Union,

and

CITY OF ST. PETERSBURG, FL,
Employer.
_____/

FMCS No. 09-51731
Grievant Robert F. Martin



OPINION OF THE ARBITRATOR

March 9, 2009

After a Hearing Held on January 23, 2009
In the 8th Floor Conference Room of
The Municipal Services Center, St. Petersburg, Florida

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I. A Case of First Impression

This case presents a question not addressed by any Florida court in a reported decision:

> Whether an exculpatory clause in a medical consent form is valid and enforceable under Florida law?

The arbitrator has been unable to find a Florida case on point, and the parties do not cite any such case. The most recent case from the Florida Supreme Court addressing a somewhat related question, whether a parent may bind a minor's estate by the pre-injury execution of a release, which the court answered in the negative, does not provide an answer to the question presented here. *Kirton v Fields*, 997 So 2d 349 (Fla 2008).

II. Background of Dispute

Robert F. Martin ("Grievant") has been employed for over 34 years by the Fire & Rescue Department of the City of St. Petersburg, Florida ("Employer" or "City"). For the past 21 years, he has held the rank of lieutenant. He is a member of the St. Petersburg Association of Firefighters, Local 747 of the International Association of Fire Fighters ("Union"), which represents firefighters, paramedics, and lieutenants. For the sake of simplicity, this group of employees will be referred to as "firefighters". Relations between the City and the Union are governed by a collective bargaining agreement running from July 21, 2008 through September 30,

2010 (JX 1 or "CBA").

The City long has required firefighters to undergo an annual physical examination, which usually is performed during the month in which a firefighter's birthday falls. The requirement is in § 24.6 of the current CBA, which provides in pertinent part:

> A. Employees covered by this labor Agreement shall be required to undergo an annual employer physical examination as scheduled by the Fire Department.
>
> The Employer reserves the right to require any employee to undergo a physical examination at any time.
>
> B. The Employer shall determine the extent of the examination and bear the cost of each examination. The results of these physicals shall be sent to each employee upon completion of the physical.
>
> ...
>
> D. The Department will make every effort to ensure that confidentiality is maintained when a copy of the results of the physical examination is forwarded to the employee. To this end, the medical report shall be supplied to the Department by the medical facility in duplicate and shall go for review to an employee so designated by the Fire Chief, who will follow up on those indicating such a need. All physical examination reports will be maintained in a separate file at Fire Headquarters.
>
> The provider will mail the results of the annual physical directly to the employee. The employee will be responsible for any needed follow up with his or her personal physician. Should the employee fail to follow up on a medical problem and that medical problem leads to a work-related illness or injury, the employee may be subject to discipline and will not be eligible for on-duty injury pay.

F. If an employee after being scheduled for his physical examination, fails to keep his appointment, he may be subject to disciplinary action.

The examination includes medical tests specified in § 24.6.B, among them being tuberculosis testing.

For the past 10 years or so, these annual physicals have been conducted by BayCare Occupational Health ("BayCare") in St. Petersburg. Prior to 2008, Grievant always had signed consent forms without reading them and taken his physical. For example, in 2007, he signed an Employee Consent and Authorization for Physical Examination (CX 3), which reads in pertinent part:

> I, Bob Martin, the undersigned, hereby authorize BayCare Corporate Health physicians and health care professionals to perform a physical examination on me, which may include, but is not limited to, x-rays, electrocardiogram, visual testing, venipuncture, audiometric testing, spirometry testing, treadmill stress test, urinalysis and/or other diagnostic or screening procedures. I hereby authorize BayCare Corporate Health to release information from my physical examination, to my employer/prospective employer or their representative, my employer's workers' compensation insurance company or other related third-party payors or their reviewing agencies. If I should experience any adverse effects while undergoing the above procedures, I hereby authorize BayCare Corporate Health, its physicians and health care professionals to administer treatment as deemed necessary in their professional judgment.
>
> This authorization is valid for this and all related visits to BayCare Corporate Health or its affiliates. I release BayCare Corporate Health of all responsibility for loss of confidentiality and damages related to the loss through access and/or copies made of records released in compliance with this authorization.

> I have read this consent form in its entirety and fully understand its contents. I have been informed about the risks and benefits of the physical examination and agree to proceed. The witness whose signature appears below has fully explained any questions I may have regarding this consent form and its contents. I acknowledge receipt of the Notice of Privacy Practices.
>
> /s/ Bob Martin ... /s/ [Witness] 7/20/07

In 2005, Grievant signed a Tuberculosis Medical Surveillance form (UX 2), which did not contain any release of liability but which did state in part:

> **Dear Client:** If your TB skin test will be given and/or read at another institution, you must provide us with documentation. On that institution's letterhead, include the name and title of the person verifying the test, their phone number, the dates given and read, and the size of induration.

In 2008, BayCare changed its forms.[1] The consent form was retitled "Employee Consent and Authorization (Physicals)" but basically is just a rearrangement of the earlier form. However, the TB form was changed in substantive ways. Its title was changed to "Tuberculin Skin Test (TST) Consent", and a release of liability clause was inserted. The changes to the BayCare forms raised concerns among Union employees, including Grievant.

In June of 2008, Grievant went to BayCare for his physical and was

[1] The reasons for the changes were not explained at the arbitration hearing. Allusion was made to HIPAA, the Health Insurance Portability and Accountability Act, but HIPAA was enacted in 1996, and the Privacy Rule promulgated under it took effect in 2003. Because the issues presented can be resolved by reference to Florida law, discussion of HIPAA or other federal law is unnecessary.

presented with the new forms to sign, which he did not want to do. Instead, he called the fire chief, who told him to return to work. On August 22, 2008, City and Union representatives met for a consultation under CBA Article 25, in an effort to allay the concerns of Union members; Grievant did not attend. The meeting was not altogether successful.

In a memorandum dated September 3, 2008, subject: Direct Order (CX 1), the fire chief instructed Grievant thusly:

> You are directed to complete the annual physical as required by Article 24.6 of the labor agreement dated July 21, 2008, through September 30, 2010. Your physical shall be scheduled and completed no later than close of business on September 17, 2008.
>
> Your respective District Chief will coordinate scheduling. Thank you for your prompt attention in this matter.

Grievant signed the memo on September 9, 2008. The chief sent similar memos to 6 other firefighters, who then took their physicals as directed.

On September 15, 2008, Grievant returned to BayCare for his physical. Again he was presented with the new forms, which he marked up and signed as indicated:

> **Employee Consent and Authorization (Physicals)**
>
> ...
>
> I, Bob Martin, the undersigned, hereby authorize BayCare Occupational Health physicians and health care professionals to obtain a complete medical and health history and perform a physical examination, which may include x-rays, electrocardiogram, visual testing, venipuncture, audiometric testing, pulmonary function testing,

treadmill stress test, urinalysis and/or other diagnostic or screening procedures. ~~If I should experience any adverse effects while undergoing the above procedures, I hereby authorize BayCare Occupational Health, its physicians and health care professionals to administer treatment as deemed necessary in their professional judgment.~~

I have read this consent form in its entirety and fully understand its contents. The witness whose signature appears below has fully explained any questions I may have regarding this consent form and its contents. I acknowledge receipt of the Notice of Privacy Practices.

/s/ Bob Martin 9/15/08 [Witness]

I, Bob Martin, the undersigned, hereby authorize BayCare Occupational Health to release information from my medical record to my employer/prospective employer or their representative. ~~This authorization is valid for this visit to BayCare Occupational Health or its affiliates.~~

~~I release BayCare Occupational Health of all responsibility for loss of confidentiality and damages related to the loss through access and/or copies made of records released in compliance with this authorization.~~

/s/ Bob Martin 9/15/08 [Witness]

...

CX 2.

TUBERCULIN SKIN TEST (TST) CONSENT

...

I hereby authorize and direct BayCare Occupational Health to administer the Tuberculin Skin Test (TST). I acknowledge that I am receiving this test voluntarily, and that I have no condition medical or otherwise which would cause an adverse effect on me. ~~I hereby release BayCare Occupational Health, employees, physicians and/or others from any and all liability associated with the administration of the Tuberculin Skin Test or subsequent complications including but not limited to any adverse effects. I understand that this release shall~~

~~also be binding on my heirs, executors, administrators and assigns. I authorize BayCare Occupational Health to contact my physician if they deem necessary and to contact me with follow-up information. I authorize any records affiliated~~ with this test to be released to my employer/school. I acknowledge receipt of the Notice of Privacy Practices.

Signature: /s/ Robert Martin Date: 9/15/08

...

UX 1.

A BayCare employee, whom Grievant did not identify by name but to whom he referred as a nurse, told Grievant that the physical exam would not be performed unless he signed the forms without qualification. When Grievant demurred, the BayCare employee sought to call the fire chief, who was unavailable. The call was transferred to the assistant chief of operations, who spoke with Grievant. The assistant chief was not interested in the details of Grievant's objections and told Grievant to work out his problems with BayCare and not to return to work until he had completed the physical.

Grievant refused to sign the forms unaltered and BayCare refused to proceed with the examination. Grievant returned to work without taking the physical, which he twice had been ordered to do, the first time in writing by the fire chief and the second time verbally by the assistant chief of operations. In an Employee Notice dated September 15, 2008 (JX 2), Grievant was charged with two counts of insubordination, a Group III

Offense under the City's Rules and Regulations of the Personnel Management System (JX 3 or "Rules & Regs"). While even a first Group III Offense may merit dismissal, the fire chief recommended only a 30-day suspension without pay, because of Grievant's long tenure and good work record. Grievant received the Employee Notice on September 18, 2008.

A grievance was filed on September 26, 2008 (JX 5). A hearing was held on November 6, 2008, before the City's senior labor relations officer. Grievant was represented by counsel. The hearing officer denied the grievance in a 4-page Response (JX 6). The Union demanded arbitration, and an arbitrator was selected from a list compiled by the Federal Mediation and Conciliation Service.

A *de novo* hearing was held on January 23, 2009, in the Municipal Services Center in St. Petersburg, before the undersigned arbitrator. The parties were represented by their respective counsel, who stipulated in writing that the ultimate issue presented is:

> Whether there was just cause to suspend Lt. Robert Martin for 30 days without pay and, if not, what is the remedy?

In this as in virtually every arbitration, numerous subsidiary issues must be addressed before a decision can be rendered on the ultimate issue.

In opening statement, the assistant City attorney emphasized the importance of the case, suggesting that it has "implications for the future".

The unusually large attendance at the hearing bore witness to its importance. Briefs were filed on February 27, 2009. The arbitrator's reasoning and award are set out below. Additional facts are stated as needed.

III. Authorities

Relevant provisions from the collective bargaining agreement, the City's Rules and Regulations, Florida Statutes, and the Florida Constitution are set forth below. Other provisions are cited as needed.

III.A. The Collective Bargaining Agreement

FROM ARTICLE 3, EMPLOYEE RIGHTS

3.1 Employees are also entitled to the benefits and rights of the Personnel Management System of the Employer. If any conflicts occur between this Labor Agreement and the City's Personnel Management System Rules and Regulations, the Labor Agreement shall take precedence.

3.5 Employees are entitled to any and all benefits and rights described in Florida Statutes 112.80 through 112.84, and any and all benefits and rights that may be added to said Statute during the term of this Agreement. Any allegations of a violation of these benefits or rights shall not be subject to any arbitration appeal but may be grieved under the provisions of Article 5, Grievance and Arbitration Procedure, through Step 2 only.

FROM ARTICLE 4, MANAGEMENT RIGHTS

4.1 The Union recognizes the prerogative of the Employer to operate and manage its affairs in all respects in accordance with its responsibilities; and the powers or authority which the Employer has not officially abridged, delegated, or modified by this Agreement are retained by the Employer. Management officials of the Employer retain the rights, in accordance with applicable laws, regulations, and provisions of the Personnel Management System, but are not limited to the following:

A. To determine the organization of City government.
B. To determine the purpose of each of its constituent agencies.
C. To exercise control and discretion over the organization and efficiency of operations of the City.
D. To set standards for services to be offered to the public.
E. To manage and direct the employees of the City.
F. To hire, examine, classify, promote, train, transfer, assign, schedule and retain employees in positions with the City.
G. To suspend, demote, discharge, or take other disciplinary action against employees for just cause.
H. To increase, reduce, change, modify, or alter the composition and size of the work force, including the right to relieve employees from duties because of lack of work, funds or other legitimate reasons.
I. To determine the location, methods, means, and personnel by which operations are to be conducted, including the right to contract and subcontract existing and future work.
J. To determine the number of employees to be employed by the City.
K. To establish, change, or modify the number, types and grades of positions or employees assigned to an organization, unit, department or project.
L. To establish, change, or modify duties, tasks, responsibilities, or requirements within job descriptions in the interest of efficiency, economy, technological change, or operating requirements.
M. To change, modify or delete any Rule or Regulation.

FROM ARTICLE 5, GRIEVANCE AND ARBITRATION PROCEDURE

5.1.A. The purpose of this Article is to establish a procedure for the orderly adjustment of grievances and for settlement of disputes between the Employer and employees of groups of employees involving the interpretation or application of this labor Agreement.

J. Employees will follow all written and verbal directives, even if such directives are allegedly in conflict with the provisions of this Agreement. Compliance with such directives will not in any way prejudice the employee's right to file grievance within the time limits contained herein nor shall compliance affect the ultimate resolution of the grievance. No

employee or group of employees may refuse to follow directions pending the outcome of a grievance.

5.2.F. The arbitrator shall not have the power to add to, subtract from, modify or alter the terms of the collective bargaining agreement in arriving at a decision of the issue or issues presented, and shall confine his decision solely to the interpretation or application of the agreement. The arbitrator shall not have authority to determine any other issues not submitted to him.

G. The decision of the arbitrator shall be final and binding upon the aggrieved employee, and/or the Union, and the Employer, except that either party may appeal the arbitrator's decision to a court of law.

H. The arbitrator's fee and expenses, and the FMCS ... fee for the first list of arbitrators shall be borne by the losing party. ... Where the Union represents the aggrieved employee in the arbitration proceeding, and the arbitrator determines in favor of the Union, the City will be considered the losing party and will bear the full cost of the award and FMCS fee. ...

L. Upon receipt of the arbitrator's award, corrective action, if any, will be implemented as soon as possible, but in any event no later than ten (10) work days after receipt of the arbitrator's award.

FROM ARTICLE 24, GENERAL PROVISIONS

24.7 Prevailing Rights

All rights, privileges and working conditions enjoyed by the employees at the present time which are not included in this Agreement, will be presumed to be reasonable and proper and will not be changed arbitrarily or capriciously.

III.B. Rules and Regulations of the Personnel Management System

FROM APPLICATION

Special Notes, 5. If any direct conflicts exist between policies and procedures included in the Rules and Regulations and a current City labor agreement, the terms and conditions of the labor agreement shall take precedence for employees in classifications represented by a bargaining

agent, whether the rights and benefits are greater or less than those provided in the Rules and Regulations.

FROM SECTION 1: GENERAL PROVISIONS

1-4.D. All personnel records and reports containing medical information of an employee shall be maintained in a separate file. Inspection and copying of such records shall be limited in accordance with the provisions of the Americans With Disabilities Act, The Family and Medical Leave Act and the Florida Public Records Act.

FROM SECTION 7: CODE OF CONDUCT
AND DISCIPLINARY PROVISIONS

7-4.A. Employees are expected to abide by ... all established departmental policies, and may be disciplined for violation of either City or departmental rules and regulations.

Group III Offenses, 5. Insubordination by the refusal ... to comply with written or verbal instructions of the supervisory force ... .

FROM SECTION 8: GRIEVANCE AND APPEAL PROCEDURES

8-3.F. Employees are expected to follow all lawful written and verbal directives of supervisors and management. Compliance with such directives will not in any way prejudice the employee's right to file a grievance within the specified time limits nor shall compliance affect the ultimate resolution of the grievance. No employee or group of employees may refuse to follow directions of the supervisory force pending the outcome of a grievance. Failure to follow orders is grounds for a charge of insubordination and may result in disciplinary action or dismissal.

III.C. Florida Statutes

FIREFIGHTERS' BILL OF RIGHTS REFERENCED IN CBA § 3.5

112.81 Definitions.--As used in this part:

(1) "Firefighter" means any person who is certified in compliance with s. 633.35 and who is employed solely within the fire department or public

safety department of an employing agency as a full-time firefighter whose primary responsibility is the prevention and extinguishment of fires; the protection of life and property; and the enforcement of municipal, county, and state fire prevention codes and laws pertaining to the prevention and control of fires.

(2) "Employing agency" means any municipality or the state or any political subdivision thereof, including authorities and special districts, which employs firefighters.

(3) "Informal inquiry" means a meeting by supervisory or management personnel with a firefighter about whom an allegation of misconduct has come to the attention of such supervisory or management personnel, the purpose of which meeting is to mediate a complaint or discuss the facts to determine whether a formal investigation should be commenced.

(4) "Formal investigation" means the process of investigation ordered by supervisory personnel, after the supervisory personnel have previously determined that the firefighter shall be reprimanded, suspended, or removed, during which the questioning of a firefighter is conducted for the purpose of gathering evidence of misconduct.

(5) "Administrative proceeding" means any nonjudicial hearing which may result in the recommendation, approval, or order of disciplinary action against, or suspension or discharge of, a firefighter.

(6) "Interrogation" means the questioning of a firefighter by an employing agency in connection with a formal investigation or an administrative proceeding but shall not include arbitration or civil service proceedings. Questioning pursuant to an informal inquiry shall not be deemed to be an interrogation.

112.82 Rights of firefighters.--Whenever a firefighter is subjected to an interrogation, such interrogation shall be conducted pursuant to the terms of this section.

(1) The interrogation shall take place at the facility where the investigating officer is assigned, or at the facility which has jurisdiction over the place where the incident under investigation allegedly occurred, as designated by the investigating officer.

(2) No firefighter shall be subjected to interrogation without first receiving written notice of sufficient detail of the investigation in order to reasonably apprise the firefighter of the nature of the investigation. The firefighter shall be informed beforehand of the names of all complainants.

(3) All interrogations shall be conducted at a reasonable time of day, preferably when the firefighter is on duty, unless the importance of the interrogation or investigation is of such a nature that immediate action is required.

(4) The firefighter under investigation shall be informed of the name, rank, and unit or command of the officer in charge of the investigation, the interrogators, and all persons present during any interrogation.

(5) Interrogation sessions shall be of reasonable duration and the firefighter shall be permitted reasonable periods for rest and personal necessities.

(6) The firefighter being interrogated shall not be subjected to offensive language or offered any incentive as an inducement to answer any questions.

(7) A complete record of any interrogation shall be made, and if a transcript of such interrogation is made, the firefighter under investigation shall be entitled to a copy without charge. Such record may be electronically recorded.

(8) An employee or officer of an employing agency may represent the agency, and an employee organization may represent any member of a bargaining unit desiring such representation in any proceeding to which this part applies. If a collective bargaining agreement provides for the presence of a representative of the collective bargaining unit during investigations or interrogations, such representative shall be allowed to be present.

(9) No firefighter shall be discharged, disciplined, demoted, denied promotion or seniority, transferred, reassigned, or otherwise disciplined or discriminated against in regard to his or her employment, or be threatened with any such treatment as retaliation for or by reason solely of his or her exercise of any of the rights granted or protected by this part.

112.83 Rights of firefighters with respect to civil suits.--If an agency employing firefighters fails to comply with the requirements of this part, a firefighter employed by such agency who is personally injured by such

failure to comply may apply directly to the circuit court of the county wherein such employing agency is headquartered and permanently resides for an injunction to restrain and enjoin such violation of the provisions of this part and to complete the performance of the duties imposed by this part.

112.84 Rights of firefighters nonexclusive.--

(1) The rights of firefighters as set forth in this part shall not be construed to diminish the rights and privileges of firefighters that are guaranteed to all citizens by the Constitution and laws of the United States and of this state or limit the granting of broader rights by other law, ordinance, or rule. These rights include the right to bring suit against any individual, group of persons, association, organization, or corporation for damages, either monetary or otherwise, suffered during the performance of the firefighter's official duties or for abridgment of the firefighter's rights, civil or otherwise, arising out of the performance of his or her official duties.

(2) This part is neither designed to abridge nor expand the rights of firefighters to bring civil suits for injuries suffered in the course of their employment as recognized by the courts, nor is it designed to abrogate any common-law or statutory limitation on the rights of recovery.

FROM SECTION 766.102

766.102 Medical negligence; standards of recovery; expert witness.--

(1) In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider as defined in s. 766.202(4), the claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

(2)(a) If the injury is claimed to have resulted from the negligent affirmative medical intervention of the health care provider, the claimant must, in order to prove a breach of the prevailing professional standard of care, show that the injury was not within the necessary or reasonably foreseeable results of

the surgical, medicinal, or diagnostic procedure constituting the medical intervention, if the intervention from which the injury is alleged to have resulted was carried out in accordance with the prevailing professional standard of care by a reasonably prudent similar health care provider.

(b) The provisions of this subsection shall apply only when the medical intervention was undertaken with the informed consent of the patient in compliance with the provisions of s. 766.103.

III.D. The Florida Constitution

ARTICLE I

SECTION 23. Right of privacy.--Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

IV. The Positions of the Parties

As this is a discipline case, the Employer bears the burden of proof. The City seeks to justify its suspension of Grievant on the basis of the obey now-grieve later provision of CBA § 5.1.J, which also is included in its Rules & Regs, § 8-3.F. Employer brief @ 2, 7. In Grievant's defense, the Union interposes the Prevailing Rights provision of the CBA, § 24.7, which, so the Union argues, encompasses Grievant's "rights under the Florida and federal Constitutions, as well as basic tort and contract law". Union brief @ 8.

As previously noted (n 1), the constitutional issues presented can be resolved with reference to the Florida Constitution, as the privacy rights

which it grants are broader than those granted by the US Constitution. *University Books and Videos, Inc v Metropolitan Dade County*, 78 F Supp 2d 1327, 1343 (SD Fla 1999); *Von Eiff v Azicri*, 720 So 2d 510, 514 (Fla 1998).

V. Discussion and Analysis

BayCare's TB form presents the more serious problems in this case, so it is addressed first. Throughout the discussions in this opinion, it must be remembered that management officials are constrained by "applicable laws, regulations, and provisions of the Personnel Management System" (CBA § 4.1), that their directives must be "lawful" (Rules & Regs § 8-3.F), and that they may discipline employees only "for just cause" (CBA § 4.1.G). In addition, Florida's constitutional privacy provision establishes a fundamental right which must be evaluated under the high standard of compelling state interest. *City of North Miami v Kurtz*, 653 So 2d 1025, 1027 (Fla 1995), *reh den*; *cert den* 516 US 1043 (1996).

V.A. The Consent Form for TB Testing

The TB consent form (UX 1) contains an exculpatory clause to which Grievant objected:

> I hereby release BayCare Occupational Health, employees, physicians and/or others from any and all liability associated with the administration of the Tuberculin Skin Test or subsequent complications including but not limited to any adverse effects. I

> understand that this release shall also be binding on my heirs, executors, administrators and assigns.

Such provisions running in favor of medical institutions or personnel are not favored. The general rule is explained in 61 Am Jur 2d Physicians, Surgeons, Etc, § 293:

> A release or exculpatory agreement purporting to relieve a hospital or individual health-care provider from liability generally is invalid on public policy grounds. Being contrary to public policy and invalid, an exculpatory contract signed by a patient as a condition to receiving medical treatment cannot be pleaded as a bar to the patient's suit for negligence. (Footnotes omitted.)

See also Ann, *Validity and Construction of Contract Exempting Hospital or Doctor from Liability for Negligence to Patient*, 6 ALR 3d 704 & May 2008 Supplement.

As noted at the outset, there does not appear to be a Florida case deciding the validity of such an exculpatory clause running in favor of a medical institution or practitioner. However, principles by which an exculpatory clause may be judged can be found in 38 Fla Jur 2d Negligence, II.B. *Contract Exempting or Limiting Liability*:

> A contract exempting a person from liability for future negligent acts is subject to the objection that it intends to induce a want of care. Consequently, such agreements may be declared invalid on the grounds of public policy. (Footnotes omitted.)

38 Fla Jur 2d Negligence, § 12.

Such clauses must be clear and unequivocal. A preincident release is

not effective to preclude an action based on the releasee's subsequent negligence unless the instrument clearly and specifically provides for a limitation or elimination of liability for such acts. (Footnotes omitted.)

38 Fla Jur 2d Negligence, § 13.[2]

No evidence was offered at the arbitration hearing to explain the intent of the exculpatory clause in the new BayCare TB form. Judged by the principles in Florida Jurisprudence, the clause does not and could not insulate BayCare or its employees from their own negligence. Indeed, if an exculpatory clause for medical malpractice were enforceable under Florida law, then the State undoubtedly would not have a malpractice crisis. See, for example, *Medical Malpractice Crisis, Florida's Recent Experience.*[3]

Moreover, the language of the exculpatory clause is so general that it is impossible to tell just who is released from liability: "BayCare Occupational Health, employees, physicians and/or others". If the phrase read something like "BayCare, its employees, its physicians and/or other health care providers associated with it", then the exculpatory clause might be reasonably delimited, but as it stands, it can be read to release anyone and

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[2] In 38 Fla Jur 2d Negligence, § 14 *Effect of statutes*, the encyclopedia goes on to say that "[t]he public policy of the state would be frustrated by permitting the enforcement of an exculpatory clause that would effectively immunize someone from liability for breach of a positive duty to protect the well-being of another person." (Footnote omitted.) While Fla Stat § 766.102 may not place an affirmative duty on a health care provider to treat a patient, it could be read to mean that, once a provider undertakes to treat a patient, the provider has an affirmative duty to exercise "the prevailing professional standard of care for that health care provider."

[3] http://www.circ.ahajournals.org/cgi/content/full/109/24/2936.

everyone.[4] It is, therefore, impermissibly vague and overbroad. *Bondtex Corp*, 68 LA 476 (Coburn Arb 1977) (grievance sustained when employer discharged employee for refusing to sign overbroad release of medical information). Union brief @ 11.

Although the collective bargaining agreement expressly authorizes the City to require physical examinations, nothing in the agreement authorizes the City to compel firefighters to sign an exculpatory contract as a condition precedent to undergoing a physical. The injustice is compounded by the fact that an exculpatory contract could impede an employee's right to sue under Fla Stat § 112.84 and § 766.102, by placing a hurdle in the way of his suit for damages, should he suffer injury from the TB test.

The possibility of injury is real. The tuberculin PPD (also known as purified protein derivative) injected into the patient could be contaminated. Indeed, Grievant, who described the TB test procedure at the arbitration hearing, testified that in an earlier test, he was warned that there had been problems with the substance. If a sterile needle is not used, in particular, if a needle is reused, the patient could be exposed to all manner of diseases, including HIV. If the test results are misread, the patient's condition could

[4] Although Grievant did not object to the portion of the TB release which reads, "I have no condition medical or otherwise which would cause an adverse effect on me," it is unclear how the average firefighter would be well enough informed to make such a statement. At most he might be able to represent that he knows of no such condition.

be misdiagnosed. The fact that BayCare put an exculpatory clause into its TB form is proof positive that it anticipated some bad outcomes from the test.

The Union cites and quotes *Tribune Co*, 93 LA 201 (Crane Arb 1989), as "perhaps the most apposite case we have found". Union brief at 10. In that discharge case, an employee who had been involved in a minor traffic accident while driving a company vehicle was ordered to undergo a drug test. In sustaining the grievance and ordering that the employee be made whole, Arbitrator Donald Crane wrote:

> [T]he order to take the drug test was neither justified nor reasonable. I have already explained that the nature of the accident and the lack of suspicion cause the drug test order to be unjust. It is also unreasonable in light of the invasive nature of the procedure (drawing blood) and the wording of the release form. L [the employee] was asked to sign an agreement to release the employees, agents and doctors of the institution that would conduct the test "from any liability" resulting from collecting the urine or drawing the blood. Under the circumstances of L's accident and because the Company did not suspect him of being under the influence, I cannot conclude that he improperly refused to take the test, especially given the wording of the release.

93 LA @ 203. Although the *Tribune* case arose in Tampa, Florida, Arbitrator Crane did not discuss the State Constitution or Statutes.

In § 112.84 of the Firefighters' Bill of Rights, the Florida Legislature has evinced a strong solicitousness for a firefighter's right to sue for damages resulting from work related injuries. By expressly embracing this

Bill of Rights in CBA § 3.5, the City itself has strongly endorsed that right to sue. Because Grievant is required to take a physical exam as a condition of employment, the exam is work related. Elkouri & Elkouri, *How Arbitration Works* (ABA/BNA 6th ed 2003) @ 827 & n 1026, citing *City of Washington, Ohio*, 108 LA 892 (Wren Arb 1997).

Grievant's Step 2 hearing (CBA § 5.2) before the City's senior labor relations officer (JX 6) was an "administrative proceeding" within the meaning of § 112.81(5), during which Grievant underwent an "interrogation" within the meaning of § 112.81(6). Thus the Firefighters' Bill of Rights is implicated in this case. It is true that a firefighter cannot appeal a violation of the Bill to arbitration (CBA § 3.5), but it is equally true that the firefighter can seek redress in circuit court under § 112.83. This analysis of the Firefighters' Bill of Rights confirms the conclusion that the CBA does not confer upon the City the authority to compel a firefighter to sign a release with a third party, exculpating that party from the party's own negligence.

Granting that BayCare cannot insulate itself and its employees from liability for their own negligence, BayCare nevertheless may have a legitimate business interest in protecting itself from the tortious misconduct of others. For example, suppose BayCare purchases needles from a reputable

manufacturer of medical supplies and a defective needle causes injury to a firefighter without any negligence on the part of BayCare or its employees. BayCare may have a legitimate interest in protecting itself—but not the manufacturer of the defective needle—in such situations, and the CBA would not seem to be an impediment to placing a limited exculpatory clause in the TB consent form for that purpose.[5]

V.B. The Consent Form for the Physical Examination

Grievant expressed three principal concerns about the consent form for the examination (CX 2):

(1) He did not want to be treated by BayCare health care providers in the event of "any adverse effects".

(2) He claims that he did not understand the sentence, "This authorization is valid for this visit to BayCare Occupational Health or its affiliates."

(3) He did not want to release BayCare from liability for any loss of confidentiality of his medical records.

Grievant's concerns are addressed seriatim.

It is well settled under Article I, § 23, the privacy section of the Florida Constitution, that Grievant has a fundamental right to refuse medical

[5] Provided, of course, that there is no Florida law which imposes some sort of strict liability on BayCare, an issue which the arbitrator does not pursue.

treatment. *In re Guardianship of Browning*, 568 So 2d 4, 10 (Fla 1990); *Matter of Dubreuil*, 629 So 2d 819, 822 (Fla 1993), *reh den* (1994); *Harrell v St. Mary's Hospital, Inc*, 678 So 2d 455, 456-457 (Fla App 4th 1996); *Singletary v Costello*, 665 So 2d 1099, 1102-1103 (Fla App 4th 1996). Any health care provider who treats him against his will is civilly and criminally liable for assault and battery. *Rodriguez v Pino*, 634 So 2d 681, 685 (Fla App 3rd 1994) (citing *Chambers v Nottebaum*, 96 So 2d 716, 718 (Fla App 3rd 1957)); *review den* 645 So 2d 454 (Fla). Of course, Grievant must accept some responsibility for refusing treatment. Fla Stat § 768.81(2), Effect of Contributory Fault; *Rodriguez, supra.*

There is nothing in the collective bargaining agreement which authorizes the City to compel a firefighter to consent to medical treatment by a health care provider not of his choosing; the fire chief conceded as much under cross-examination. To overcome Grievant's right under the Florida Constitution, the City would have to demonstrate a compelling interest and further prove that having him treated by BayCare is the least intrusive means of protecting that interest. *Browning, supra*, 568 So 2d @ 13-14. The City has offered no evidence and made no argument that it has such a compelling interest.

Grievant expressed concern over the meaning of "affiliates" in the

consent form (CX 2), claiming that it could mean "anybody". Concededly, the term is not defined on the form, and no evidence was offered to explain its meaning. However, the TB form (UX 1) does list three organizations at the top of the form, which may be the affiliates to which reference is made in the consent form: Morton Plant Mease Health Care, St. Anthony's Health Care, and St. Joseph's Health Care. In any event, because the form requires Grievant to agree that he "fully understand[s] its contents,"[6] he is entitled to know the identities of BayCare's affiliates.

While Grievant may be entitled to know the precise definition of "affiliates", his claim that he doesn't understand the meaning of "for this visit" strains credulity. In order to perform the exam, BayCare has to have Grievant's authorization to proceed during the visit in which he presents himself for the exam. This much seems self-evident, and Grievant's concern over this point comes across as frivolous.

In contrast, Grievant's concern over the confidentiality of his medical records is not unreasonable, as they are protected by the Florida Constitution's privacy provision, Art I, § 23. *State v Johnson*, 814 So 2d 390, 393 (Fla 2002); *State v Rutherford*, 707 So 2d 1129, 1131 (Fla App 4th 1997), *review den* 718 So 2d 171 (Fla 1998); *McAlevy v State*, 947 So 2d

[6] Curiously, Grievant did not cross out this portion of the form.

525, 529 (Fla App 4th 2006) (per curiam). The negligent release of confidential medical information is actionable. *Florida Dept of Corrections v Abril*, 969 So 2d 201 (Fla 2007).

There are obvious ways that the confidentiality of Grievant's medical records could be lost as a result of BayCare's negligence, even after BayCare releases them pursuant to authorization. BayCare could send them out in an inappropriate envelope, such as one having a transparent cellophane window through which information is revealed; BayCare might fail to seal even the best of envelopes; or BayCare might misaddress the envelope so that it falls into the wrong hands. As before, there is nothing in the collective bargaining agreement which authorizes the City to compel Grievant to sign an exculpatory contract relieving BayCare from liability for negligence with respect to his medical records.

Also as before, there may be situations in which BayCare has a legitimate business interest in protecting itself against the tortious misconduct of others. Once BayCare has placed a firefighter's medical record in an envelope appropriate for the mailing of such confidential records, properly sealed, correctly addressed, with first class postage prepaid, and has deposited the envelope in the US mail, then BayCare may be relieved of further liability for any loss of confidentiality. Transmission

by certified mail, return receipt requested, might allay the concerns of both firefighters and BayCare.

Another of Grievant's complaints pertains to questions about his family medical history. In this case, Fla Const Art I, § 23 affords him no protection, as the right to privacy is purely personal. *Sieniarecki v State*, 756 So 2d 68 (Fla 2000) (daughter may not assert her mother's right to privacy). Exceptions might be if Grievant were asserting the right on behalf of one of his minor children, *Ritz v Fla Patient's Comp Fund*, 436 So 2d 987 (Fla App 5th 1983), or as guardian of an incompetent, *Browning, supra*; *In re Guardianship of Barry*, 445 So 2d 365 (Fla App 2nd 1984).

In light of common knowledge about the hereditary component of many diseases and the fact that Grievant is an emergency medical technician, his reluctance to answer questions about his family medical history looks irresponsible. More importantly, unless he legitimately can assert one of the exceptions mentioned, there is nothing in the collective bargaining agreement that allows him to refuse to answer reasonable questions about his family medical history, if posed during the course of a physical examination required by the CBA. Implicit in the Employer's right to require physicals is an employee's duty to cooperate reasonably with the medical examiners, else the putative right would be of no benefit.

V.C. What Grievant Was Told About the Forms

The fire chief testified that, about 4:30 on the afternoon of September 15, 2008, he received an email from BayCare stating that the problem was not with Grievant's refusal to sign the TB form but with Grievant's refusal to authorize a physical "for this visit". The chief informed the Union that the TB form was not the problem, but he did not tell Grievant. The chief admitted that BayCare asked Grievant to sign the TB form. The chief did not know whether anyone ever told Grievant that he did not have to sign the TB form.

The assistant chief of operations testified that he did not tell Grievant that the TB form was unnecessary. Grievant testified that no one told him that he did not have to sign the form. Thus, there is no evidence that Grievant knew about BayCare's reversal of its policy with respect to the TB form. For all Grievant knew, he had to sign both forms unmodified in order to take his physical.

VI. The City's Obey Now-Grieve Later Defense

In its effort to justify Grievant's suspension, the City points to his duty under CBA § 5.1.J to obey orders first and then to grieve later. According to the leading arbitral treatise,

> It is a well-established principle that employees (1) must obey management's orders and carry out their job assignments, even if such

> assignments are believed to violate the agreement; and (2) then turn to the grievance procedure for relief. An exception to this "obey now-grieve later" doctrine exists where obedience would involve an unusual or abnormal safety or health hazard. (Footnotes omitted.)

Elkouri & Elkouri, *How Arbitration Works* (ABA/BNA 6th ed 2003) @ 1023. The treatise notes, however, that there are other exceptions to the rule. *Id.* @ 263-264. In its brief @ 7, the City cites an earlier edition of the Elkouri treatise and concedes:

> The only exceptions to this principle are instances where management's orders are believed to be unlawful or unreasonable to the safe, orderly, and efficient operation of the organization. Only in such cases may an employee's refusal to comply with a direct order not be considered insubordination.[7]

There are a number of perspectives from which it can be seen that Grievant is not guilty of insubordination.[8] The orders he stands accused of violating did not promote "the safe, orderly, and efficient operation of the organization". To the contrary, they brought to a head a simmering, substantive dispute over BayCare's dubious forms. Under all of the circumstances, the orders were unreasonable.

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[7] In his Response (JX 6 @ 3), the City's senior labor relations officer wrote: "Exceptions to this principle include instances where management's orders are believed to be unlawful or unreasonable to the safe, orderly, and efficient operation of the organization. In these types of cases, an employee's refusal to comply may not be considered insubordination."

[8] There are sound reasons for stating alternative rationales for a decision, or at least for setting forth facts upon which alternative rationales may be founded. As the Sixth Circuit explained in *Merrill Lynch. v Jaros*, "[i]f a court can find any line of argument that is legally plausible and supports the award then it must be confirmed. Only where no judge or group of judges could conceivably come to the same determination as the arbitrators must the award be set aside." 70 F3d 418, 421 (6th Cir 1995) (citations omitted). See also *Zayas v Bacardi Corp*, 524 F3d 65, 70 (1st Cir 2008) ("[A] court may uphold an arbitral award 'on grounds or reasoning not employed by the arbitrator himself.'") (citations omitted).

If Grievant could be punished for refusing to sign BayCare's forms, then his statutory rights under the Firefighters' Bill of Rights, expressly incorporated into the collective bargaining agreement by CBA § 3.5, would be impinged. There thus would result a conflict between § 3.5 and § 5.1.J. Under standard rules of contract interpretation, § 5.1.J should not be interpreted and applied in such a way as to create a conflict with § 3.5. The way to avoid a conflict is to not read § 5.1.J as applying to this situation.

In the arbitrator's opinion, the better principle to apply here is one drawn from administrative law, which holds that exhaustion of administrative remedies is not required if resort to them would prove futile. *NLRB v Industrial Union of Marine & Shipbuilding Workers of America*, 391 US 418, 426 n 8 (1968) ("Exhaustion is not required when the administrative remedies are inadequate." Citing, *inter alia*, 3 K. Davis, *Administrative Law Treatise* § 20.07 (1958)); *Flo-Sun, Inc v Kirk*, 783 So 2d 1029, 1038 (Fla 2001) ("Florida courts have consistently held that parties need not resort to administrative remedies where agency errors are so 'egregious or devastating that the promised administrative remedy is too little or too late.'") (citations omitted); *Bruce v City of Deerfield Beach*, 423 So 2d 404, 406 n 2 (Fla App 4th 1982), *reh den* (1983) ("The doctrine of exhaustion of administrative remedies is subject to the broad limitation that

no person is required to take a step which is futile.") (citations omitted).

In *Johnson v District of Columbia*, 552 F3d 806, 812-813 (DC Cir 2008), the United States Court of Appeals for the District of Columbia explained the exception to the exhaustion rule in the arbitration context in these words:

> *See Myers*, 652 A.2d at 645 ("employee may be able to bypass administrative remedies under a collective bargaining agreement by showing that pursuit of these remedies would be futile") (citing *Glover v. St. Louis-S.F. Ry.*, 393 U.S. 324, 330, 89 S. Ct. 548, 21 L. Ed. 2d 519 (1969); *Winter v. Local 639, Int'l Bhd. of Teamsters*, 186 U.S. App. D.C. 315, 569 F.2d 146, 149-50 (D.C. Cir. 1977)); *see also Univ. of Dist. of Columbia Faculty Ass'n v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 333 U.S. App. D.C. 325, 163 F.3d 616, 624 (D.C. Cir. 1998) ("Under prevailing D.C. and federal law, an employee may bypass the agreed-upon arbitration procedures only by showing that the 'grievance procedures are unreasonable or that the hostility of union officials makes a fair hearing impossible' or that 'pursuit of [administrative] remedies would be futile.'" (quoting *Jordan v. Wash. Metro. Area Transit Auth.*, 548 A.2d 792, 797 (D.C. 1988); *Myers*, 652 A.2d at 645)) (alteration in original). This exception, however, requires "a clear and positive showing of futility," *Winter*, 569 F.2d at 149 (internal quotation omitted), giving rise to a "'certainty of an adverse decision,'" *Randolph-Sheppard Vendors of Am. v. Weinberger*, 254 U.S. App. D.C. 45, 795 F.2d 90, 105 (D.C. Cir. 1986) (quoting K. Davis, Administrative Law Treatise § 20.07 (1958)).

See also Elkouri & Elkouri, *How Arbitration Works* (ABA/BNA 6th ed 2003) @ 269 ("Nor must the grievance procedure be exhausted where to do so would be 'futile,' or a 'useless and idle gesture' ... .") (footnotes omitted).

The Union correctly argues that wading through the CBA's grievance procedure would be an exercise in futility because BayCare, a necessary party to any resolution of Grievant's complaints about its forms, is not a party to the collective bargaining agreement and so cannot be forced to participate in the grievance procedure, including arbitration. In effect, Grievant has no remedy under the CBA, so it would be utterly futile for him to file a grievance over BayCare's forms.[9] In particular, there is no procedure under the CBA that would enable him to retract any release in favor of BayCare which he previously had signed. Union brief @ 12. For any one or more of the foregoing reasons, Grievant may not be found guilty of insubordination.

VII. The City's Right To Require Physicals

The fire chief testified that firefighting is a physically demanding job. As a result, both the fire department and the firefighter himself need to know that he is healthy. The Elkouri treatise states:

> Management's good-faith right to require job applicants to submit to a physical examination is so basic that it rarely has been an issue in arbitration. The utility of physical examinations obviously is not ended once the applicant has been hired and has commenced service with the employer—situations arise to warrant physical examinations during the employment relationship. (Footnotes omitted.)

Elkouri & Elkouri, *How Arbitration Works* (ABA/BNA 6th ed 2003) @ 825.

[9] The same objections would apply to the City grievance procedure available under Section 8 of the Rules & Regs (§ 8-1.B).

In this case, the collective bargaining agreement expressly authorizes such exams.

Nothing in this opinion should be construed as forbidding the City from requiring firefighters to take physical exams. The point is worth emphasizing, because the fire chief testified that, at the consultation held August 22, 2008, the Union proposed eliminating physicals. In the hearing officer's Response (JX 6 @ 3), he went so far as to write, "Lt. Martin's actions suggest that he attempted to achieve through the grievance process what he could not achieve through the negotiation process." The City continues this theme in its brief @ 6, 9. Emphatically, the City retains the right to require firefighters to take physical examinations, as it always has done.

VIII. Award

The arbitrator concludes that the City has failed to bear its burden of proving by a preponderance of the evidence that it suspended Grievant for just cause and therefore SUSTAINS the grievance. Grievant is to be made whole, to receive back pay and benefits, and to be put in the same position he would have enjoyed had he not been suspended. The City, as the losing party, must bear "the full cost of the award and FMCS fee."

The arbitrator retains jurisdiction to resolve any issues which may

arise over implementation of his award. Elkouri & Elkouri, *How Arbitration Works* (ABA/BNA 6th ed 2003) @ 333-337; *2008 Supplement* @ 138-140, citing *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, Part 6, § E.

IX. Toward a Final Resolution

There appears to be a great deal of confusion about the BayCare forms; in opening statement, City counsel herself described them as "confusing". The assistant chief of operations is a Jehovah's Witness and testified that he writes "non-blood medical management only" on BayCare's forms. Employer brief @ 9. A person's right to refuse a blood transfusion is well established under Fla Const Art I, § 23. *Public Health Trust v Wons*, 541 So 2d 96 (Fla 1989) (cited in Union brief @ 9); *Dubreuil, supra*; *Dept of Health and Rehabilitative Services v Privette*, 617 So 2d 305 (Fla 1993); *Harrell, supra.*

The fire chief testified that an attorney for BayCare opined that its forms are legal, but the City presented no evidence as to the specifics of, or the bases for, that opinion. In its brief @ 4, the City states:

> Management reviewed the consent form utilized by the health care facility (BayCare Occupational Health) with the legal departments of both the City and BayCare.

With all due respect, the arbitrator is firmly convinced that the exculpatory

clauses in the forms are void and unenforceable, but his ultimate decision in the case does not turn upon that issue but rather upon the City's lack of authority under the collective bargaining agreement. Most assuredly, Grievant cannot be compelled to accept medical treatment from BayCare personnel in the event that complications arise during a physical exam.

To clear up the confusion and to resolve differences of opinion, respective counsel for BayCare, the City, and the Union should be able to come up with forms acceptable to all parties, perhaps ones for use with City employees only. Until acceptable forms are produced, there may be a stalemate over physical examinations, with firefighters refusing to sign the existing BayCare forms and BayCare refusing to conduct physicals.

Throughout its brief @ 5, 6, 8, the City repeatedly attempts to shift responsibility for problems with the forms to Grievant or the Union but cites no provision of the CBA or any other authority which would place responsibility with either of them. It is the City that hired BayCare and which pays BayCare's bills. It therefore would appear that the City has a great deal of leverage with BayCare and is in a position to bring all remaining forms issues to a swift conclusion. Above all, it would not seem to be in the City's interest to offer firefighters little alternative other than to file suit to enforce their rights under the Florida Constitution and Statutes.

Dated March 9, 2009

E. Frank Cornelius

E. Frank Cornelius, Arbitrator