

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

CITY OF FOND DU LAC EMPLOYEES,

and

CITY OF FOND DU LAC

Case 94  
No. 42574  
MA-5738

Appearances:

Mr. James L. Koch, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,  
on behalf of City of Fond du Lac Employees, Local 1366, AFSCME, AFL-CIO.

Mr. Bruce K. Patterson, Labor Relations Consultant, on behalf of the City of  
Fond du Lac.

ARBITRATION AWARD

City of Fond du Lac Employees, Local 1366, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Fond du Lac, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. 1/ The City subsequently concurred in the request and the undersigned was designated to arbitrate in the dispute. A hearing was held before the undersigned on December 7, 1989 in Fond du Lac, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by January 18, 1990. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to agree on a statement of the issues. The Union would frame the issues as follows:

Did Management have proper cause to refuse Employee David E. Costello to return to active employment on May 9th, 1989, and if not, what is the appropriate remedy?

1/ The parties agreed to waive the thirty-day time limit for issuing an award.

The City would state the issues as being:

Did the Employer violate the collective bargaining agreement when it utilized the provisions of Article XX, Personal Leave of Absence Without Pay for Illness, for the grievant, David Costello, upon receipt of medical statements indicating the grievant was not to drive or operate equipment for a period of six months, and if so, what is the appropriate remedy?

The Arbitrator concludes that the issues to be decided may be stated as follows:

Did the City violate the parties' Agreement by not permitting the grievant, David Costello, to return to regular work on May 9, 1989 and thereafter, and by placing him on Personal Leave of Absence Without Pay for Illness from May 25, 1989 to October 19, 1989, rather than providing him with work he was able to perform during that period. If so, what is the appropriate remedy?

#### PERTINENT CONTRACT PROVISIONS

The following provisions of the parties' 1989 Agreement are cited: 2/

THIS AGREEMENT is entered into to be effective January 1, 1988 by and between the City of Fond du Lac, Wisconsin, hereinafter referred to as "City" and Fond du Lac City Employees Union, Local 1366, AFSCME, AFL-CIO, hereinafter referred to as the "Union".

WHEREAS, in order to increase general efficiency, to maintain existing harmonious relationship between the City and its employes, to promote the morale, well-being, and security of said employees, to maintain a uniform minimum scale of wages, hours and working conditions among the employees and to facilitate a peaceful adjustment to all grievances and disputes which may arise;

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1/ The parties agreed to waive the thirty-day time limit for issuing an award.

We, the contracting parties, have arrived at this Agreement governing working conditions for Public Works, City Hall, Inspection Department and Police Department employees, and that this Agreement shall supersede all previous ordinances or agreements referring to these groups, and therefore we set forth the following as our will and Agreement:

...

## ARTICLE II COOPERATION

Section 1 - The City and the Union agree they will cooperate in every way possible to promote harmony and efficiency among all employees. The City agrees to maintain certain amenities of work (e.g., coffee breaks, etc.) not specifically referred to in this Agreement.

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## ARTICLE XV SICK LEAVE

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Section 5 - In order to qualify for sick leave payment, an employee must:

- A. Report his absence prior to the start of his workday to his department head.
- B. Keep his department head informed of the conditions if the absence is of more than three (3) working days.
- C. Submit a doctor's certificate for such absence, if in excess of three (3) working days. The certificate must state the kind and nature of the sickness or injury and whether the employee has been incapacitated for

such period of absence.

- D. Apply for such leave according to the procedure established by the City.

Sick leave should be regarded by all supervisors and employees as a valuable fringe benefit to be used for the purpose it is intended.

...

Section 7 - Department heads will arrange for the medical examination of any employee with doubtful health qualifications. Medical examinations by a physician of the City's choosing may be required after prolonged, serious, or repetitious illness, major surgery, or injury not incurred on the job. Return to duty after prolonged sick leave and medical examination depends on the decision of the appointing authority, based upon advice of the department head, medical information supplied by the employee's physician, and a physician of the City's choosing. If the two physicians concerned are unable to agree on the employee's condition, a third physician shall be chosen by them. The parties shall each pay the cost of their own physician and share equally in the cost of the third physician.

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**ARTICLE XX**  
**PERSONAL LEAVE OF ABSEW-E WITHOUT PAY FOR ILLNESS**

Section 1 - Leave of absence without pay for illness will be granted by the City Manager for any employee who requests such leave after having used all available sick leave and vacation leave and who has satisfactory proof of his illness. Such leave shall be without pay and for a maximum of sixty (60) calendar days in any twelve (12) consecutive months. An extension of the leave without pay will be approved by the City Manager for a maximum of sixty (60) days if the employee's physician confirms that the employee will be able to return to work within the sixty (60) day period. A maximum of one hundred twenty (120) calendar days of leave without pay for illness may be granted within a twelve (12) month

period. During the initial sixty (60) day leave without pay for illness, the City shall continue to pay the Health and Life Insurance premiums normally paid by the City. Any additional amounts not covered by this Agreement and any premiums after the initial sixty (60) day period shall be paid by the employee while he is on leave without pay status. If the employee is able to return to work within the one hundred twenty (120) days without pay for illness, he shall be returned to his former job with continuous seniority rights. However, no sick leave or vacation leave will have accrued during the period of leave without pay.

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## ARTICLE XXV GRIEVANCE PROCEDURE

D. . .

Step 4 - Within ten (10) working days of completion of Step 3, the grievance may be submitted to arbitration. Selection of an arbitrator by the Wisconsin Employment Relations Commission may be requested by either party. The arbitrator shall meet with both parties in the grieved matter within thirty (30) days of the date of his selection. The arbitrator in arriving at his determination shall rule on only matters of application and interpretation of this Agreement. The findings of the arbitrator shall be final and binding on both parties, providing such findings are delivered to the City and the Union within thirty (30) days of the hearing or the filing of briefs, whichever is later. If such findings are not filed within the stated time limit, the arbitrator shall lose jurisdiction. In the event an arbitrator loses jurisdiction, the parties shall select another arbitrator in accordance with the provisions of this section. Costs of the arbitration shall be borne equally by both parties.

. . .

ARTICLE XXVII  
MANAGEMENT RIGHTS

Except as otherwise specifically provided herein, the Management of the City of Fond du Lac and the direction of the work force, including but not limited to the right to hire, to discipline or discharge for proper cause, to decide initial job qualifications, to lay off for lack of work or funds, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine schedules of work, to subcontract work, (no employee shall be laid off due to subcontract provisions) together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management.

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BACKGROUND

The Grievant, David Costello, has been employed in the City's Refuse Division for approximately twenty years and at the time in question held the position of Waste Collection Driver and drove a two-man truck. Including the Grievant, the City has six Waste Collection Drivers and three two-man trucks. The following is the job description for the position of Waste Collection Driver:

CITY OF FOND DU LAC

Waste Collection Driver

Characteristic Work of the Class

Nature: Under general supervision to operate a garbage packer truck, to collect refuse and to perform related work as required.

Examples:

1. Drives and operates garbage packer truck and assists collection crew in picking garbage and loading truck as required.
2. Performs routine maintenance on assigned vehicle such as checking and adding oil and water, checking and filling tires, and washing windows and

- mirrors, and fueling.
3. Participate in scheduled washing of vehicle.
  4. Drives to landfill and dumps load.
  5. Keeps records and makes reports.
  6. May operate brush chipper and brush truck.

### Qualifications

#### Essential Knowledges and Abilities:

1. Working knowledge of proper packer truck operation and the ability to drive and operate packer truck in a safe and efficient manner.
2. Working knowledge of packer truck maintenance procedures and the ability to consistently perform routine maintenance according to an established schedule.
3. Working knowledge of collection routes, schedules, collection points and efficient routes to disposal sites.
4. Working knowledge of traffic rules and ordinances.
5. Thorough working knowledge of the City's residential refuse handling requirements.
6. Thorough knowledge of safety hazards and safe work practices and ability to consistently apply that knowledge in the performance of daily work.
7. Ability to courteously explain refuse packaging and collection requirements in response to citizen questions.
8. Ability to perform heavy manual labor under varying weather conditions and temperature extremes for extensive periods of time.

Desirable Training and Experience:

1. Graduation from high school or equivalent.
2. Previous truck driving experience.



Special Requirements:

1. Possession of a valid Wisconsin Driver's License.
2. Possession of a valid Wisconsin Chauffeur's License within 90 days of appointment.
3. Previous safe driving record.

In May of 1988, while at home, the Grievant experienced an episode of temporary blurred vision in his left eye for 2-3 minutes followed by numbness on the left side of his leg and left hand that subsided after approximately five minutes and which was followed by a mild headache and ringing in his left ear along with "wooziness" and an upset stomach. He experienced another episode in August of 1988 and was taken to a local hospital for tests and subsequently discharged. He experienced similar episodes in January, February and March of 1989 and two such episodes in April of 1989.

After the last episode in April of 1989 the Grievant went on paid sick leave for a few days and then took vacation from April 26 through May 9, 1989. On April 27, 1989 the Grievant received the following slip from Dr. Fownes, which he gave to the City:

For David Costello Date 4-20-89

Address \_\_\_\_\_

Rx The above named patient is off  
work until indefinite.

Diagnosis: "Spells", not yet diagnosed.

\_\_\_\_\_/s/ D.R. Fownes M.D.

On May 8, 1989 Dr. Fownes issued the following in response to a request from the City regarding the duration of the Grievant's limitations:

For City of FDL Date 5-8-89

Address \_\_\_\_\_

Rx Re: David Costello

BTW 5-9-89

No driving x 6 months.

/s/ D.R. Fownes M.D.

The Grievant returned to work on light duty from May 10, 1989 to May 22, 1989 in the City's Garage. During that time, the City requested a clarification as to what Dr. Fownes meant by "no driving". In response, the City received the following from Dr. Fownes on May 22, 1989:

Personnel Dept. 5-22-89  
City of Fond du Lac  
Re: David Costello

Approved for full employment effective 5-9-89 without any restrictions except for operating heavy equipment or driving. Review will take place after 6 months.

D.R. Fownes, M.D.

The Grievant was informed at the end of the day on May 22nd that he was off work since he was unable to perform his job and there were no other vacancies available. The Grievant took a day of vacation on May 23rd and met with the City's Personnel Department and had his options explained to him with regard to the leave he had available. The Grievant was on paid sick leave status on May 24, 1989 and for one and one-half hours on May 25th. Effective 8:30 a.m. on May 25, 1989, the Grievant was placed on "Personal Leave of Absence Without Pay for Illness" (PLOAWPFI), his paid sick leave having been exhausted.

On May 25, 1989 the City received the following further clarification from Dr. Fownes with regard to the restrictions on the Grievant's ability to work:

City of FDL 8-25-89 Re:  
David Costello

Restriction of "Heavy Equipment" and "Truck Driving" for 6 months means operating and driving equipment such as graders, backhoes and tractors. There is no restriction on physical activity or use of any muscle group. Thanks for clearing up this misunderstanding.

D.R. Fownes, M.D.

The Union requested that the City permit the Grievant to work as a Waste Collector at the lower rate of pay, but the City rejected the request. A grievance was filed May 30, 1989 regarding the City's placing the Grievant on PLOAWPFI. The Grievant applied for unemployment compensation benefits and the City challenged his eligibility. By letter of June 8, 1989 the City advised the Grievant that arrangements had been made for him to be evaluated by Dr. Wong on June 20, 1989 in accordance with Article XV, Section 7, of the parties' Agreement.

Dr. Wong examined the Grievant on June 20, 1989 and sent the City the following report on that date:

Re:RE:DAVID COSTELLO  
Waste Collector Driver  
City of Fond du Lac

Dear Ms. Hisel:

I had the opportunity of seeing Mr. David Costello today and the results of my neurological evaluation is as follows:

Mr. David Costello is a 60-year old, right-handed, white male, previously asymptomatic until May of 1988, while sitting at home, he suddenly experienced blurred vision from his left eye, lasting about two to three minutes; followed by numbness of the left side of his lips and left hand. This subsided after about five minutes. This was then followed by a mild, aching headache in his left, temporal occipital region, associated with ringing in his left ear, the feeling of "wooziness" and upset stomach. This episode lasted about one-half hour. This was the only episode he had that day.

He remained asymptomatic until August of 1988, when he again developed an episode of blurring vision of his left eye, lasting from two to three minutes. This subsided and was followed by numbness of the left side of his mouth and left hand. Again, this lasted approximately five minutes and was followed by a headache. The headache (sic) subsided after approximately one-half hour. He was taken to St. Agnes Hospital, Fond du Lac, WI and was admitted for a workup. The work-up included a CT scan, EEG, and he also had a carotid Doppler study which showed moderate plaquing in the region of the carotid arteries but with no significant flow disturbance. The patient was then subsequently discharged.

The patient developed several episodes of transient, blurring vision, followed by the numbness of his left lip, mouth, and hand. This was followed by headaches. At times, during the headache, there was also shaded ringing of his left ear. The patient felt "wooziness" and had an upset stomach. He denied any vertigo, feeling of faintness or unsteady gait. He also had episodes in January, 1989, and February, 1989, March, 1989 and two episodes in April, 1989. He was off of work and on May 15, 1989, he returned back to work with a release by his doctor, and he was not to do any driving. The patient was taking Aspirin during all of this time. Because of the driving restriction, the patient was taken off of work by the City of Fond du Lac.

Since that time, Mr. Costello has been off of work. He has remained asymptomatic.

Past history: Except for a history of hypertension for the past two years, taking Sectral, 400 mgs. once daily, and Aspirin, two tablets, once daily, the patient has no other complaints. The patient denied having diabetes mellitus, previous history of stroke or seizures, migraine headaches. The patient did complain of arthritis in both knees.

Family history: His family history is positive for a stroke in his mother. No history of migraine headaches, seizures, or hypertension.

Social History: The patient smokes about three cigars daily. He does not drink alcohol.

Neurologic examination revealed his blood pressure to be 160/80. He is an alert, friendly white male, who is not a good historian. Pupils were equally reactive. Fundoscopy showed distinct margins. Grossly intact visual fields. Extraocular muscle movement was full. No nystagmus. Grossly intact touch. No facial asymmetry. The patient has good gag reflexes. The tongue was in the midline. Motor examination showed normal muscle strength, muscle bulk and reflexes were 2+ in both upper extremities. Sensory examination shows intact touch to pinprick, position sense, and vibration sense. Coordination shows normal heel to shin test. Gait

examination shows normal gait, normal heel and toe walking, and normal tandem gait. Negative Brahmsberg. The patient can squat and stand up. Examination of his heart reveals a regular rhythm. No heart murmur. Negative carotid or vertebral artery bruit. Examination of the scalp was unremarkable with no palpable nodularity.

IN ASSESSMENT: The patient' s history is consistent with vertebral-basilar insufficiency. The clinical history is not suggestive of migraine headache or seizures. Because of the patient's history of hypertension and with the patient being a poor historian, I would hesitate to start him on anti-coagulation medication. The patient should continue with the anti-platelet medication consisting of; 80 mgs. Aspirin, once daily and Persantine, 50 mgs. T.I.D. He is to continue on his anti-hypertensive medication consisting of Secretal, 400 mgs. once daily.

It is my opinion, within reasonable amount of medical probability, that this patient can return to work. However, if episodes of vertebral-basilar insufficiency occur, I would recommend a non-driving job, such as working in the garage or on the road crew. We shall see him again in three months at which time we will reassess him.

If we can be of any further help in this matter, please do not hesitate to call me.

Sincerely \_yours,

Walter K. T. Wong, M.D.

The City received the report on June 27, 1989.

On July 3, 1989 a "Medical Report to Determine Unemployment Compensation Eligibility" was completed by a Dr. Lound that indicated that the Grievant was able to work "full-time without restrictions" as of May 22, 1989. The Grievant prevailed on his Unemployment Compensation claim.

During the period the Grievant was on PLOAWPFI the City assigned another Waste Collector Driver to drive the two-man truck and assigned another Waste Collector Driver who had lost his driver's license for driving while intoxicated to ride on the garbage truck to pick up garbage. The City also subsequently used seasonal help and temporary employes to pick up garbage on the Grievant's truck while another Waste Collector Driver drove the truck.

On October 6, 1989 Dr. Fownes issued the following slip regarding the Grievant:

For City of FDL Date 10-6-89

Address Re: David Costello

Rx Fit and approved to work regular job as sanitation engineer. Advised to avoid Driving till 12-89.

/s/ D.R. Fownes M.D.

The City received a copy of that slip on October 17, 1989.

The Grievant continued on PLOAWPFI until October 19, 1989 when he returned to work by agreement of the parties as a Waste Collector until the restriction on driving would be removed.

The parties were unable to resolve their dispute as to the period the Grievant was off work and proceeded to arbitration before the undersigned on that dispute.

#### POSITIONS OF THE PARTIES

##### Union:

The Union takes the position that the City should have allowed the Grievant to work in the position of Waste Collector during the period he was restricted from driving due to medical problems. The Union notes that the doctor's release dated May 8, 1989 indicated that the Grievant was able to return to work but should refrain from driving for six months and that the "clarifications" dated May 22 and May 25, 1989 clarified that the Grievant was able to do all of the physical work necessary in order to function as a garbage collector with the exception that he was to refrain from driving the garbage truck or heavy equipment such as graders, backhoes and tractors. The City, however, still did not allow the Grievant to return to work, but instead kept him on leave of absence without pay for 117 days. The Union asserts that the limitation on the Grievant's operation of heavy equipment is irrelevant since in his entire twenty years with the City he has only driven garbage trucks and has not operated heavy equipment. The Union further asserts that during the 117 days that the Grievant was off work due to the restriction on his driving he was replaced by employees who were not required to drive, but only to ride along and pick up garbage. The Union notes that even the physician selected by the City reached the same conclusion as the Grievant's personal physician, i.e., that he was able to return to work with the

recommendation that he be given a non-driving job.

The union asserts that the Grievant drove a two-man truck, which meant that at any given time only one of the employees would be driving the truck and the other employee would be assisting in picking up garbage. The Union points out that the parties stipulated that the City has three two-man trucks that are operated by Waste Collector Drivers and that City Exhibit 5 lists six Waste Collector Drivers, one of which was the Grievant. The Union concludes that since there are still five Waste Collector Drivers available to drive there would have been no need for the Grievant to drive a truck during the period in question and again notes that the employees who were used to replace him were not required to drive, but only to help load garbage.

The Union notes that there are two different rates for Waste collectors, i.e., Waste Collector Driver at \$10.62 and Waste Collector at \$10.23. The Union also notes that it offered to settle the grievance in May of 1989, requesting that the Grievant be allowed to return to work on May 9, 1989 as a Waste Collector at that rate of pay until such time that he would be able to resume driving the garbage truck. The City, however, refused that offer.

The Union asserts that the City is attempting to make it look like the Grievant requested to be placed on the medical leave of absence without pay in accord with Article XX of the Agreement; however, a review of the leave form and the testimony given at hearing does not indicate that the Grievant ever made such a request. Rather, it indicates that the Grievant was placed on a medical leave of absence by the City and that the Grievant wanted instead to work. The Union asserts that the Grievant was not on a medical leave of absence, but was instead refused employment despite the fact that he had a doctor's release to return to work, not only from his own doctor, but from the doctor selected by the City. The Union also relies on the decision of the appeal tribunal in the matter of the Grievant's unemployment compensation eligibility wherein the administrative law judge indicated that a medical opinion had been rendered that the employee was not able to drive any vehicle or operate heavy equipment for a temporary period and that an individual restricted from driving or operating a vehicle would still be able to physically perform the duties associated with 90% of the jobs in the labor market that applied to the Grievant.

The Union concludes that there is no demonstration in the record that the Grievant was unable to perform the duties and responsibilities performed by both Union and non-Union employees who were allowed to fill in for him while he was off work. Rather, the evidence supports the Union's position that there was no legitimate reason not to permit the Grievant to return to work as a Waste Collector. The Union notes in that regard that after reviewing the doctor's slip of October 6, 1989, which was very similar to the May 8, 1989 release, the City agreed to allow the Grievant to return to work as a Waste Collector at that lower rate of pay. The Union questions why the City could not agree to that in May of 1989. The Union cites the introductory paragraph to the parties' Agreement and Article II, Cooperation, which states that the City and Union agree they will cooperate in every way possible to promote harmony and efficiency among all employees. The



Union concludes that the City's actions in this case did not attempt to meet those goals.

The Union requests that the grievance be sustained and the Grievant made whole for the losses he suffered during the 117 day period he was off work.

City:

The City takes the position that it appropriately utilized the provisions of the Agreement in its handling of the Grievant's temporary disability. The Grievant utilized his available paid leave for his personal illness and when that paid leave expired and his restrictions left him unable to perform the duties of his job, he was placed on PLOAWPFI, pursuant to Article XX of the Agreement. The City asserts that that provision has been utilized by other employes in the past under similar circumstances, including the Grievant in 1988. The City asserts that the Union is attempting to gain through arbitration something other than what it possesses in the Agreement and that the remedy requested is outside the scope of the Arbitrator's authority to grant.

In support of its position, the City contends that Article XX states that leave of absence without pay for illness will be granted by the City Manager to any employe who requests such leave after having used all available sick leave and vacation leave and who has satisfactory proof of his illness. It is asserted that this was the case with the Grievant and when his paid leave expired and he was still unable to perform the duties of his job, he was placed on the PLOAWPFI. It is argued that a formal written request from the employe is not required, but that the employe does receive a copy of the personnel action form indicating the employe's status. In this case, the alternative to the PLOAWPFI would have been termination, since the Grievant was unable to perform his duties for an extended period of time. This was discussed with the Grievant and it was explained to him that he had been placed on the leave of absence without pay rather than terminated.

When the Union contended that the Grievant's restrictions were minor and that he ought to be allowed to return to work, the City utilized its option to obtain a second medical opinion under Article XV, Section 7. The medical report obtained from that examination supported the statement from the Grievant's physician stating that he ought not drive or operate heavy equipment. The Grievant remained on the PLOAWPFI since the City felt it was unsafe for him to return to work as a Waste Collector Driver. The City cites an arbitration award, United States Steel Corporation, American Bridge Division, Gary Plant and United Steelworkers of America, Local 1117, 61 L.A. 1202, where the arbitrator concluded that the evidence supported findings that premature reinstatement would have involved an undue hazard to the employe due to his job duties and that the employer is not obligated to select special assignments or create special conditions in order to utilize the employe on his regular job.

The City also asserts that Article XXV, Grievance Procedure, Section D, Step 4, of the

Agreement, limits the authority of the arbitrator in the following manner:

The Arbitrator in arriving at his determination shall rule on only matters of application and interpretation of this Agreement.

It is contended that there is no provision in the Agreement that requires the City to make work for employes who are unable to perform their job duties due to a temporary medical restriction, rather, it provides for use of paid leave time and if that expires, a PLOAWPFI in order to maintain employment status until the temporary restrictions are lifted.

The City concludes that the issue in this case is significant in that the Union is challenging the right of the City to utilize a provision in the Agreement relative to employe status and ability to perform job duties in a safe and effective manner. It asserts that a ruling sustaining the Union's position would require the City to keep employes on paid status regardless of whether or not they were able to safely perform the duties of their job. It is asserted that this would erode the City's ability to provide "full and effective service for the City" in direct conflict with Article XXVII, Management Rights, of the Agreement. Therefore, the City requests that the grievance be denied.

#### DISCUSSION

It is first noted that both Dr. Fownes' and Dr. Wong's statements indicated that the Grievant should be restricted from driving during the period in question due to his medical condition. Dr. Fownes reiterated that restriction in his statement of October 6, 1989, and both parties acknowledge that restriction. 3/ What the parties do dispute is whether the City was required to permit the Grievant to work. The Union asserts the Grievant should have been allowed to return to his job in a non-driving capacity, and argues that the employes used to replace him were not required to drive by the City. The Union also notes that there are three two-man trucks and six Waste Collector Drivers, including the Grievant. According to the Union, this must mean that there were Waste Collector Drivers available who could have driven the truck, thereby alleviating the need for the Grievant to drive.

The Union is essentially arguing that the City could easily have accommodated the Grievant's desire to return to work by not requiring him to drive the garbage truck. The problem with that contention is that it is based on a sense of what is "fair" or "equitable" and not on a contractual requirement. As the City points out, Article XXV, D, Step 4, of the parties' Agreement specifically limits the Arbitrator to ruling "on only matters of application and interpretation of this Agreement." The Arbitrator has no authority to impose his sense of equity in this case. Rather, it must be determined whether the City's actions violated a specific provision of the parties' Agreement.

The Grievant holds the position of Waste Collector Driver and the job description for that

position lists as one of the "Essential Knowledges and Abilities:" "Working knowledge of proper packer truck operation and the ability to drive and operate packer truck in a safe and efficient manner." There is no showing that driving the garbage truck is an insignificant part of the duties of a Waste Collector Driver and from the job's title and job description that would not appear to be the case. As noted previously, the physicians who examined the Grievant recommended he not drive due to his medical condition. Thus, he was restricted from performing a significant part of the duties of his regular job as a Waste Collector Driver.

The Union has not cited a provision in the Agreement that would expressly require the City to place the Grievant in a different position where driving is not required or to substantially modify the duties of his regular job in order to accommodate his medical restrictions. 4/ The Union does assert that the Grievant wanted to work and did not request to be placed on PLOAWPFI; however, given the medical restriction on his driving as of May 22, 1989 that continued and was reiterated by his physician in October of 1989 (Joint Exhibit No. 6B), the fact that all of his paid leave was exhausted as of May 25, 1989, and the City's unwillingness to place him in another job, there was not much of a choice. The union cites the preamble to the parties' Agreement and Article II, Cooperation, as having been violated by the City's refusal to permit the Grievant to work. The former merely states the purposes for which the parties entered into their Agreement and the latter states they agree to "cooperate in every way possible to promote harmony and efficiency among all employees.' Under the circumstances in this case, both parties could make valid arguments that their respective positions furthered those purposes by protecting the Grievant's interests or his safety. Such general statements of purpose contained in those provisions, however, are not sufficient to establish a requirement that the City must place an employe in another job or substantially modify the duties of his existing job in order to accommodate the employe's medical restrictions. To be imposed, such a requirement must be more expressly stated by the parties in their Agreement than is presently the case.

Therefore, it is concluded that, under the circumstances present in this case, the City did not violate the parties' Agreement by refusing to place the Grievant in a Waste Collector position after May 9, 1989 and by placing him on Personal Leave of Absence Without Pay for Illness for the period in question.

Based upon the above and foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

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3/ The Arbitrator agrees that restrictions on the operation of heavy equipment are not relevant, as that is not part of the duties the Grievant normally performed.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 22nd day of May, 1990.

By \_\_\_\_\_  
David E. Shaw, Arbitrator

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4/ The Arbitrator notes that while such an accommodation was made as to the Waste Collector Driver who lost his license for driving while intoxicated, it was done as part of the negotiated settlement of a dispute, much the same as what the Union attempted to arrange in this case.

