BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
FOND DU LAC COUNTY HIGHWAY DEPARTMENT LOCAL 1366-B, AFSCME, AFL-CIO	Case 118 No. 45095 MA-6501
and	
FOND DU LAC COUNTY (HIGHWAY DEPARTMENT)	

Appearances:
Mr. James L. Koch, Staff Representative, appearing on behalf of the Union.
Mr. Richard Celichowski, Director of Administration, appearing on behalf of the

ARBITRATION AWARD

The Employer and Union above are parties to a 1989-90 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the termination grievance of Jerrold Patt.

The undersigned was appointed and held a hearing on February 15, 1991 in Fond du Lac, Wisconsin at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs and the Employer filed a reply brief, and the record was closed on May 13, 1991.

ISSUES

As proposed by the Union:

1. Did the Employer have just cause to terminate Jerrold Patt on November 12, 1990 effective November 7, 1990?

2. If not, what is the appropriate remedy?

As proposed by the Employer:

1. Did the Employer discriminate against Mr. Patt or treat him unfairly or arbitrarily and/or did the Employer violate the terms of the collective bargaining agreement when Mr. Patt was terminated on November 12, 1990?

2. If the Employer did, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE V. DISCIPLINE, DISCHARGE AND SUSPENSION

5.01 No regular employee shall be disciplined or discharged except for just cause. Written notice of the suspension, discipline or discharge and the reason or reasons for the action shall be given to the employee with a copy to the Union within twenty-four (24) hours if reasonably possible. Any grievance that may result from such action shall be considered waived unless presented in writing within seven (7) calendar days of the receipt of the notice by the employee. The grievance may be started at Step 2 or Step 3.

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ARTICLE XIII. TERMINATION

13.01 Termination reports shall be in triplicate and signed by the Employer and the Employee, when an employee is separated from the Department for any reason except sick leave, vacation, or other legitimate leave. One copy shall be retained by the Employer, one filed with the Union, and one given to the terminated employee. Any employee leaving the Department except for legitimate reason, such as sickness, vacation or granted personal leave, shall be considered a terminated employee. Any unexplained absences from work for more than three (3) days shall

> be construed as voluntary termination from employment. It is, however, understood that on any work day any employee unable to perform his duties shall advise his foreman or patrol superintendent or shop superintendent prior to the commencement of said work day if possible.
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> . . .

FACTS

Jerrold Patt had been employed as a truck driver by the County's Highway Department for seven and half years when, on November 12, 1990, he was terminated. It is undisputed that the quality of his work performance was not an issue in his termination; rather, the issues revolve around whether the grievant could or could not work without restrictions following a work-related injury which occurred early in August, 1989.

On August 14, 1989 the grievant was cleaning out the dump truck to which he was regularly assigned when he slipped and fell out of the truck's box. There is no dispute that he was taken to the emergency room at St. Agnes Hospital in Fond du Lac, and was subsequently examined by two other doctors. A Dr. Haffar performed a myelogram and tomography on the grievant during the ensuing week and discovered that there were ruptures in the grievant's neck vertebrae. A bone fragment was found which threatened nerve damage, and the grievant was off work for an extended period during these tests.

On October 25, the grievant was instructed to present himself at the Employer's selected doctor, Dr. Schaefer of Lakeland Clinic in Sheboygan. The grievant testified without contradiction that Dr. Schaefer gave him a brief examination, but did not appear to take the grievant's complaints seriously until after he received a telephone call with the results of the grievant's myelogram. After that, the grievant testified, Dr. Schaefer gave him advice essentially consistent with the advice he received from Dr. Haffar, and this included the choice between "working and suffering" and getting the problem fixed through surgery. The grievant was subsequently referred by Dr. Haffar to Dr. K. S. Paul, a neurologist and surgeon. Dr. Paul performed surgery on December 11, 1989, and removed a herniated disk as well as fusing two vertebrae together. The grievant was then off work for several months until April 30, 1990, at which time he met with Dr. Paul, and was told that there was a possibility of a "non-malunion." This referred to bone slippage, resulting in the bone graft not adhering, and Dr. Paul recommended that the grievant not go back to work as of that time. The County was informed of this recommendation, as it had been of all prior recommendations from the grievant's doctors.

Immediately after receiving this communication, however, the County requested that the grievant be examined again by Dr. Schaefer, and the grievant was so examined on May 22, 1990. The grievant testified that he was given very cursory testing, involving only squeezing a kind of grip called a Ja-Mar Dynamometer, and that Dr. Schaefer gave him an X-ray only upon his express request. Immediately afterwards, the grievant testified, Dr. Schaefer said "you're all right" and sent him home. Shortly thereafter the grievant received a copy of a letter from Dr. Schaefer stating that he was able to go back to work. The grievant checked with Dr. Paul, and he described Dr. Paul as being upset at this recommendation. The grievant testified that Dr. Paul, and also the grievant's attorney, recommended that the grievant not return to work. But, the grievant testified, the letter he had received indicated that he had to go back to work if he wanted to keep his job; so he went back to work. On June 4, Dr. Paul gave the grievant a certification not to return to work.

On June 7, the grievant returned to work pursuant to a letter from the County requesting that he do so. The grievant was assigned work within the terms of certain restrictions identified by Dr. Schaefer, as follows:

> . . .
>
> I would recommend that this patient return to work. Initially it would be best if this patient returned with limitations on a medium work status which would allow him to lift a maximum of 50 pounds and repeated lifting up to 25 pounds. He is fit for truck driving at the present time. This limitations should be maintained for 4 weeks following his return to work. He may bend and twist occasionally combined with the lifting. He is capable of doing overhead work up to 25 pounds.
>
> The patient does not believe he is able to return to work. He feels that he may hurt someone driving a car, but I don't think there is any physical basis to consider him a threat to himself or to anyone else. He is free of any significant physical findings other than the surgical scars. . . .
>
> . . .

Dr. Paul's letter of June 4, which was delivered to the County by the grievant, stated as follows:

> Please be informed that we have seen and examined Jerry on this date: At this time he continues with post operative pain. We have advised him not to return to work until further notice. We will be re-evaluating him again in approximately 3 weeks, we will keep you abreast of his progress following that appointment.

As soon as he went to work on June 7, the grievant was put on a truck as a helper, sitting in an ordinary truck seat on a dump truck, which then proceeded to go past a construction area including some railroad tracks. The grievant testified that he had shooting pains in the ears, neck, shoulders and head as soon as the truck went over the tracks, but took pain pills and, when the pain subsided, concluded that this might be simply from not being in shape. The following day, however, the grievant was also assigned as a helper and encountered the same pains when the truck again went over a rough double set of railroad tracks which were under construction. This time, the grievant testified, the pain did not go away for the balance of the day, and he filed a report with the timekeeper at the end of the day and then went to the emergency room. A Dr. Plueddeman at the emergency room informed the grievant that he had a spinal inflammation of the neck muscles, and gave him a cervical collar with instructions to wear it as needed. The grievant returned to work on the following day, and worked until June 14.

The grievant then went through a period during which he took pain killers at work and, on various days, took vacation time for the purpose of sick leave in order to avoid arguments with the County, but continued to go to work as often as possible. On June 25, the grievant was again examined by Dr. Paul, who made the following notation:

> He says that he still gets some pain in his neck & shoulder, and instant headaches as well. He returned to work on June 7. He was a passenger on a truck & he sprained his neck and had a lot of headache & pain. He was seen in the emergency room. Repeat x-ray of C-spine flexion extension showing good fusion.
>
> PLAN: Send him to Functional Capacity Evaluation. Depending upon the results we'll send him with the restrictions back to work. He has started to work, but I'll relieve him officially once we have all the information.

The functional capacity evaluation was performed on July 2, 1990 by Therapist Jean Koch. Her conclusions and recommendations were as follows:

> CONCLUSIONS:
> With tested activities, the patient tolerated approximately 15 minutes of steady work with the tested tasks. He then required a few minutes break. Feel that going past 2 hours on one activity even with breaks would be tolerated poorly by him. He appears to be limited by onset of headaches, tingling in the left upper extremity, general fatigue and discomfort.
>
> RECOMMENDATIONS:
> Patient is to contact the physician in approximately one week to discuss the results of testing. He appears to need some limitations in some of his job activities if he is to continue with work. If not, work hardening program would be beneficial.
>
> Short term goal met being to complete the physical capacity evaluation and provide data to physician. Long term goal would be restrictions provided to employer to allow the patient to complete his job as he is currently able.

By letter on July 5, 1990, Dr. Paul released the grievant with a restriction from driving more than eight hours per day. But on July 16, Dr. Paul added the following restrictions:

> To Whom It May Concern:
>
> Please be informed that I have recently seen Mr. Jerrold Patt in my office. He has gone through Functional Capacity Evaluation, and in accordance with that I am putting him on a restriction of frequent lifting 30 pounds, and infrequent lifting about 1-4 times in eight hours 130 pounds. Overhead lifting, one repetitive maximum or 1-4 times in an hour 30 pounds and frequently 5 pounds. These restrictions apply

> indefinitely, and he may continue to work with these restrictions as he has already resumed work.

And on August 6, 1990, Dr. Paul added the following:

> Please be informed that we are recommending that Mr. Patt drive a truck that is equipped with an air seat. This will help lessen the jolting type movement that causes his cervical spine discomfort.
>
> Please feel free to contact our office if you require additional information.

The grievant testified that he was given another "cursory" evaluation by Dr. Schaefer in early September. Dr. Schaefer's recommendations made to Wausau Insurance include the following:

> The patient has many complaints. His complaints, however, do not follow anatomic pathways and are not compatible with any known cervical spine pain syndromes. His physical findings of diminished sensation also do not follow anatomic patterns. Strictly from a physical standpoint and on the basis of his x-rays, I find this patient to be fully recovered. I think he is capable of working overtime. In my opinion he is not in need of any further work restrictions.

The grievant then went to see Dr. Paul again, and Dr. Paul performed another myelogram, finding, according to the grievant, another rupture between vertebrae as well as a fragment of bone up against the spinal column. Dr. Paul identified his opinion of the grievant's condition to the County in two notes, both dated October 2:

> Please be informed that Mr. Patt was last seen by our service on 9/18/90. AT that time it was felt that he could return to work with the same restrictions as we had previously placed on him in our letter dated 7/16/90, a copy is attached for your convenience.
>
> We are writing to clarify the fact that even though Mr. Patt was allowed to return to work prior to July 9, 1990, this was against my medical advice. Apparently Mr. Patt was evaluated by another physician who felt that he could resume working and was, therefore, returned to work at the advice of that physician, not myself.
>
> We hope this clears up any misunderstanding that you may have had concerning this matter.

On Friday, November 2, the grievant was hauling material in his dump truck across a construction area back and forth, and during the course of the day he began to feel more and more pain, until eventually he parked and requested an ambulance. The grievant was taken to hospital in Oshkosh, and was held over the weekend until the following Tuesday afternoon. The diagnosis he received, according to the Mercy Medical Center discharge instructions, was "nerve root compression", and he was released on November 6 with a notation from Dr. Paul that "he may return to work 11/7/90 with restrictions to lift weight over 20 pounds, can drive truck with air cushion".

On November 7, when the grievant attempted to return to work, he was given the following letter signed by Richard Bakken, Highway Commissioner:

> It is the Counties (sic) position that you must return to work under no restrictions. The County is basing its position on Dr. W. W. Schaefer's re-evaluation report dated September 4, 1990. In the report, Dr. Schaefer states: "I find this patient to be fully recovered. I think he is capable of working overtime. In my opinion, he is not in need of any further restrictions."
>
> The medical restrictions recommended by Dr. K. S. Paul dated 11-6-90 do not agree with the recommendation of Dr. Schaefer. Dr. Schaefer is the Counties (sic) insurance company's doctor and we must follow his recommendation stated in his letter dated September 4, 1990.
>
> There is work available for you with no restrictions. If you refuse to work and you do not have an approved excuse, it will be assumed that you are refusing work and are subject to termination after

three (3) days.

Consider this action being taken according to Article XIII of the 1990 Union contract.

See attached documentations regarding the doctor's evaluation reports.

The grievant testified that he was offered a medical leave of absence by the County, and first filled out the following request form for medical leave:

REQUEST FOR MEDICAL LEAVE OF ABSENTS. (sic)

I RESPECTFULLY REQUEST MEDICAL LEAVE OF ABSENCE FROM FOND DU LAC HIGHWAY DEPT. UNTIL PHYCIALLY ABLE TO RETURN TO MY DUTYS AS TRUCK DRIVER.

But the grievant stated that immediately after filling out this request, he began to feel annoyed that he had been refused the opportunity to work, feeling that other employes had been allowed to work with similar restrictions to his. He thereupon filled out the following:

REQUEST FOR LAYOFF SLIP

I JERROLD L. PATT REPORTED TO WORK AT 6:45 AM 11-7-90 WITH A DOCTORS REQUEST FOR LIMITATION AND WAS TOLD THERE WAS NO WORK AVAILABLE WITHIN THESE RESTRICTIONS. I WAS TOLD I COULD RETURN TO WORK WHEN THESE RESTRICTIONS WERE LIFTED.

THIS LETTER NULIFIES THE PREVIOUSLY WRITTEN LETTER WRITTEN THIS MORNING REQUESTING MEDICAL LEAVE OF ABSENCE. AS I WAS HERE FOR WORK AND WAS REFUSED TO BE ALLOWED TO WORK UNDER MY DOCTORS RESTRICTIONS.

The grievant was subsequently terminated for failure to return to work within three days without valid excuse. On November 12, the grievance was filed on the grievant's behalf by the Union's steward John Wagner, and also on that date Dr. Paul made the following notation:

To Whom It May Concern,

Please be informed that at this time Mr. Patt is under my care suffering from a herniated cervical disc at the level of C5-6. I believe that this herniated disc is a result of an incident taking place on 6/8/90 when, while working, he was required to ride in a jolting highway truck and do some work with sod along the highway. Following this he developed severe neck pain. He was subsequently seen in the emergency room at Mercy Medical Center and also followed by my service. He underwent cervical myelography on 10/29/90 which was positive for herniated cervical disc at the level of C5-6.

We hope this information is of benefit to both you and Mr. Patt. Please feel free to contact our office if you require further information.

On November 21, 1990, the County's Personnel Director, Richard Brzozowski identified to the grievant's wife the reason why the grievant was no longer working in the following terms:

The other day you stopped in my office and asked to be notified as to the reason that Mr. Patt is no longer working for Fond du Lac County.

Mr. Patt failed to report for work on three consecutive days, November 8, 9 and 12 and voluntarily terminated his employment on November 13th. You may wish to review the union contract regarding such resignations. I believe Mr. Patt has one in his possession.

Feel free to call me if you have any further questions.

The grievant, through attorneys, has continued to contend that he was entitled to worker's compensation status from his original injury and also from the new injury referred to in Dr. Paul's November 12, 1990 letter. As of the date of the hearing, both questions were still pending. There is no dispute that the County has declined to submit the disagreement between Drs. Paul and Schaefer to a third physician; Ruth Eiring, the County's purchasing officer, testified that Dr. Schaefer has been used for examinations of seven or eight employes of the County over the years and there has never been any previous problem involving disagreements between him and another physician. Eiring

testified that the County relies on the judgment of Wausau Insurance in these matters and is satisfied with Wausau's choice of Dr. Schaefer.

The grievant and three other employes all testified that various employes had been allowed to work with restrictions similar to the grievant's at various times, and that there was a history in the Department of employes helping each other out when they had physical difficulties. None of the Union's witnesses, however, was able to identify any of the instances of working under restriction as lasting as long as the grievant's had. Chief Patrol Superintendent Willard Brown testified that the County's policy was that employes were allowed to come back if restricted work was available, but not otherwise, and that most restrictions of employes were both shorter in duration and easier to accommodate than the grievant's. Brown testified that to follow Patt's restrictions involved allowing him to switch trucks with another employe twice during the day, and that he had to work around the time this involved. And Richard Rabe, the Highway Department's administrative assistant, testified that no other employe had worked under restrictions for more than a month or two. Rabe also testified that the reason the grievant was put in the passenger's seat on his first day returning to work on June 7 was for his sake, because the County was not certain that he should be put on driving a truck immediately.

THE EMPLOYER'S POSITION

The County contends that the grievant was not terminated for just cause under Article V of the collective bargaining agreement, but rather under Article XIII of that Agreement. The County contends that the grievant was informed by Wausau Insurance that the insurance carrier would take no further responsibility for his being off work due to a work related injury and that he would have to assume his regular duties. The County argues that as the grievant did not request sick leave, vacation or any other approved leave of absence, the highway commissioner had no recourse under the collective bargaining agreement but to invoke the Termination Article. The County notes that Commissioner Bakken had been willing to grant Mr. Patt a leave of absence, but the grievant refused to request it.

The County contends that the grievant was refusing to work unless he was allowed to work with the restrictions imposed by his own doctor, and that the Union cannot reasonably contend that an employe should be allowed to dictate what kinds of work he will do. The County also notes that there is nothing in the collective bargaining agreement requiring the County to make work available for an employe who can only work with restrictions. The County also notes that it relied on medical advice that the grievant was fully recovered. In this respect, the County cites prior arbitration decisions to the effect that company physicians' opinions are entitled to great weight.

With respect to the past practice concerning other employes, the County argues that the other employes who have been allowed to work on restrictions have been allowed this only for a short term and with work being available, and contends that the record demonstrates that in this instance the restrictions were not only long term but also increasing, while a substantial imposition resulted to the County in its attempt to accommodate the grievant.

As to relying on the judgment of Dr. Schaefer, the County notes that it has used Dr. Schaefer's opinions without problems in the past, and that it is paying a very substantial premium to Wausau Insurance for their expertise and should therefore rely on it, particularly since Wausau Insurance is a large and reputable company. The County questions the accuracy of Dr. Paul's opinions, on grounds that Dr. Paul first was inaccurate by some 14 weeks in his estimation of how long it would be after surgery before the grievant could return to work, and then reversed himself as to whether the grievant could work with restrictions or could not work at all. The County also attacks the grievant's work record as being "marked with an unusually high number of instances of sick leave and worker compensation", and contends that the grievant showed an attitude of unwillingness to work on some occasions.

In its reply brief, the County argues that the Union erroneously identifies the County as not following the grievant's various restrictions as of the date they were identified, and that there is no credible evidence that the grievant was reinjured on June 8, 1990 as the result of being forced to return to work too early. The County notes that contrary to the Union's contention, it never claimed to have terminated the grievant under the "just cause" provision, but rather under Article XIII, which states that "any employee leaving the department except for legitimate reasons, such as sickness, vacation, or granted personal leave, shall be considered a terminated employee". The County argues that the grievant left the Department without such legitimate reason, since he was warned that the Employer did not consider his doctor's restrictions to be a legitimate reason for not being at work without restrictions. The County notes that the grievant refused to take a personal leave so that the Employer would not be forced to implement the terms of that Article. In conclusion, the County argues that its treatment of the grievant was fair and reasonable and based on expert advice, that further efforts to accommodate the grievant's work restrictions would be impractical or impossible, and that it followed the dictates of the collective bargaining agreement.

The County requests that the Arbitrator deny the grievance.

THE UNION'S POSITION

The Union contends first that the grievant clearly had compensable injuries at work on August 14, 1989 and the following year, citing numerous doctors' statements to that effect. The Union contends that the evidence supports the Union's contention that the grievant was reinjured on June 8, 1990 as a result of being forced to return to work too early, and that the County could have prevented that injury had it equipped the grievant with an air ride seat as his own truck would have provided. The Union points to testimony by several employes that any given truck driver is generally assigned a single truck, but that the grievant was not given his own truck when he returned to work, and was placed in a passenger seat which did not have air support.

The Union argues that in all previous cases the County has returned employes to light duty as early as possible and has accommodated the attending physician's restrictions. The Union contends that in this instance, the Employer refused to so, and that there was no justifiable work related reason for this refusal.

The Union contends that Dr. Schaefer's own notations support the Union's contention that the grievant was reinjured at work, but that Dr. Schaefer's examinations were cursory and not credible by comparison to Dr. Paul's thorough examinations of the grievant, citing a prior arbitration case in which the grievant's physician was credited over the company's physician because the grievant's physician had based his opinion and prognosis on prescribed laboratory and clinical procedures while the company physician had not. The Union points to the Employer's refusal to be bound by a third opinion as indicating unreasonableness on the Employer's part.

The Union contends that the grievant was discharged without just cause under Article V of the Agreement, because he was not given a reasonable order to follow on November 7, 1990. The Union argues in this respect that ordering him to return to work without restrictions was not reasonable in view of persuasive medical testimony, and that the grievant was the first and only employe ever given such an order. The Union contends that the overwhelming evidence supported the grievant's contentions but that the Employer chose to follow Dr. Schaefer's recommendations instead, and that this was not an objective evaluation because Dr. Schaefer was retained to represent the interests of the insurance company. The Union contends that the grievant has violated no rule, committed no offense, and has no past record of discipline. In the Union's view, he has therefore not engaged in any conduct that would constitute just cause for termination.

With respect to Article XIII, the Union contends that a herniated cervical disc and floating fragment constitutes a "a legitimate reason" for failure to be at work within the meaning of that clause. The Union argues that the grievant's absence was certainly not unexplained, that he did not voluntarily quit, and that he did inform the Employer by written notice from his neurologist that he could report to work with restrictions. The Union contends that there is nothing in Article XIII that would justify the termination of the grievant.

The Union requests that the Arbitrator order the grievant reinstated with full back pay, benefits and seniority.

DISCUSSION

Upon review of the record in this matter, including lengthy medical exhibits, I conclude that the issues in dispute can most appropriately be identified in the following terms:

1. Did the Employer have the obligation to accommodate the grievant's restrictions, as stated by Dr. Paul, as of November 7, 1990?

2. Did the Employer have just cause to discharge the grievant?

3. Did the grievant terminate his employment by his conduct on and after November 7, 1990; and if not, what remedy is appropriate?

I note that the parties have entered into the record a quantity of medical data and arguments, and have argued in part that the grievant did or did not have a medical condition preventing him from returning to work and compensable under the worker's compensation system. As the grievant and the Employer are proceeding independently in the Worker's Compensation forum provided for such disputes, however, I need note only that there is no provision in this collective bargaining agreement for an arbitrator to resolve such disputes. Furthermore, it is not necessary to resolve that issue in order to address the issues which have been brought before me.

1. Did the Employer have the obligation to accommodate the grievant's

restrictions, as stated by Dr. Paul, as of November 7, 1990?

I find that the Employer has made a persuasive case that the grievant, by November 7, 1990, had been accommodated in his restrictions to a greater extent than any prior employe. The Employer's contentions have merit, both when it avers that these restrictions resulted in notable inconvenience to management and when it contends that no prior employe had ever had restrictions which increased over a period of time. It is clear, contrary to the Union's contentions, that the County had honored all of the restrictions given the grievant as of the date they were first articulated. The fact that the grievant was not given an air-ride seat as of June 7, 1990 cannot be laid at the County's door as a liability, because that restriction was not identified clearly to the County until two months later. The entire record satisfies me that the County did in fact make substantial efforts to honor such restrictions as were identified to it by the grievant.

I am therefore persuaded that the County did not have an obligation to allow the grievant to work under restrictions of Dr. Paul's choosing, at least by November 7. It had already allowed the grievant to work for a considerable period of time, and the grievant had experienced repeated injuries according to his own doctor's summations. The fact that the County's doctor disagreed with some of these findings does not affect this particular conclusion, because up to November 7, the only occasion on which the County did not act in accordance with Dr. Paul's communications was when the grievant was requested to return to work on June 7. The merits of the requirement that he return to work as of that date are at issue in the parallel Worker's Compensation proceeding, and need not be addressed here.

The conclusion that the County did not have an obligation to allow the grievant to work with a 20-pound lifting restriction and the other restrictions identified by Dr. Paul, however, does not mean that the County necessarily had any right to consider the grievant to have surrendered his employment.

2. Did The Employer have just cause to discharge the Grievant?

This question is addressed solely because the Union has identified it as a significant issue in this proceeding. But it is answered simply, in the negative, by noting that neither the Employer nor the Union believes that such just cause exists under Article V of the Agreement. The County half-heartedly argues in its brief that the grievant had a substantial sick leave record, but there is nothing in the testimony or exhibits to justify any conclusion that this was not legitimate sick leave, and there is no other allegation or evidence of misconduct or unsatisfactory work by the grievant. It is therefore clear that this is not a case in which the grievant could be found to be discharged for just cause, nor indeed does the Employer make that contention.

3. Did the Grievant terminate his employment by his conduct on and after November 7, 1990, and if not, what remedy is appropriate?

When the County presented the grievant with the choice between taking a medical leave, returning to work without restrictions, and being terminated, the grievant acted unwisely. His refusing the medical leave, however, does not in my opinion prejudice the Union's case. In this instance, it is clear that the County was relying on its doctor and the grievant was relying on his doctor, but neither doctor was contending that the grievant would not at some point be able to return to work without restrictions. The grievant attempted to force the issue of being allowed to return to work with the restrictions identified by his own physician, and I have found above that he did not have the right to compel the Employer thus to return him to work. I find, accordingly, that the grievant was in unpaid status as of November 7.

But it is a long step from concluding that an employe may justifiably be denied the opportunity to work under conditions of his choosing, to the conclusion that he may be considered terminated because he does not agree with that decision. There is nothing in the record that shows that the grievant was not relying on his doctor's opinion in good faith. It is clear that the grievant intended to continue his employment. The usual purpose of a "three-day" clause, i.e. that an employer be free to consider a position vacant if an employe does not report in for a period of time without reason or notice, is clearly met in an instance where all parties were already aware that the grievant intended to maintain his employment. And the grievant had substantial justification for not being prepared to return to work on the Employer's terms on November 7, since it was at least arguable that he had been reinjured by following Dr. Schaefer's prescriptions previously. I therefore find that a good-faith difference of opinion existed as to the grievant's medical condition. Meanwhile, the language of Article XIII, by using the term "such as", makes express provision for "legitimate reason" to include reasons that are not specifically laid out in the ensuing list of examples. Thus the fact that the grievant did not possess a specific medical leave of absence is not dispositive, as I find that a good-faith difference of expert medical opinion independently constituted legitimate reason for the grievant to refuse to work without restrictions. Since the unresolved medical dispute constitutes a "legitimate reason" for leaving the department within the meaning of Article XIII, the grievant could not be considered a terminated employe. Back pay,

however, is appropriate only if and when the grievant has subsequently been available to work without restrictions and has been refused such work.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the Employer did not have the obligation to accommodate the grievant's restrictions as of November 7, 1990.

2. That the Employer did not have just cause to discharge the grievant.

3. That the grievant did not terminate his employment by his conduct on and after November 7, 1990, and is therefore entitled to return to work as of the date when he can do so without medical restrictions pursuant to the Employer's requirement.

4. That the undersigned retains jurisdiction for at least sixty days from the date below, in the event of a dispute concerning the interpretation of this Award.

Dated at Madison, Wisconsin this 8th day of July, 1991.

By _____
Christopher Honeyman, Arbitrator