BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
GENERAL TEAMSTERS UNION LOCAL NO. 662	
and	Case 23 No. 46676 MA-7041
TOWN OF WESTON	

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Ms. Naomi E. Eisman, on behalf of the Union.
Kelley, Weber, Pietz & Slater, S.C., by Mr. Richard J. Weber, on behalf of the

ARBITRATION AWARD

The above-captioned parties, herein the Union and the Town respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration before a Wisconsin Employment Relations Commission Arbitrator. Pursuant thereto, I heard this matter on January 29, 1992 in Weston, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on March 30, 1992.

ISSUES:

The parties were unable to stipulate as to the issues. The Arbitrator, therefore, frames the issues as follows:

1. Is the grievance arbitrable?

2. If so, did the grievant, Gary Wistrom, quit his employment with the Town by failing to show up for work when requested to do so, or was he unjustly terminated in violation of the collective bargaining agreement?

3. What is the appropriate remedy?

FACTUAL BACKGROUND:

The Town of Weston hired the grievant, Gary Wistrom, as a truck driver in March of 1973.

Due to a work-related injury to his back, the grievant has been out of work on worker's compensation. The last date the grievant performed work for the Town was September 13, 1989.

On September 10, 1991, the Town Administrator, Randy J. Bukas, sent the following letter to the grievant:

> The Town of Weston has been advised by our worker's compensation carrier, Wausau Insurance, that you are able to return to work. In order to discuss your work duties, I have scheduled a meeting with you, Mark Thompson, Robert Koss, Barbara Ermeling and myself for Friday, September 13, 1991 at 10:00 a.m. in the Town Board room.

I look forward to meeting you.

On September 13, 1992, the aforesaid representatives of the Town met with the grievant and his wife. Randy Bukas testified that the grievant stated at the meeting that Wausau Insurance was recommending that he have additional surgery, and that he asked the grievant on two separate occasions at this meeting if he was refusing to return to work, and in both instances the grievant stated "yes". The grievant, on the other hand, testified that he made no such statements with respect to surgery being authorized by Wausau Insurance, only that said company wanted to put him on a weight reduction diet called New Directions. The grievant also testified that the Town told him he should come back to work under Dr. Gay Anderson's restrictions. The grievant further testified that he told representatives from the Town at the meeting that he would only work under the restrictions of his attending physician, Dr. Buechel. At this meeting the grievant provided Bukas with progress reports from Dr. Buechel and two other doctors who had recently treated the grievant. All three of the reports indicated a strong possibility that the grievant would undergo surgery in the near future. In his report dated April 17, 1991, Dr. Buechel stated, in relevant part, the following:

> The first question is whether he would be able to return to work for the town of Weston. Dr. Flatley and I both felt that he would not be able to return to that type of work either now or in the future because of his pain and the worsening sciatica and his discomfort he is having. As far as what he should do, basically he has pain after sitting for less than an hour, standing for less than an hour or lying for less than an hour. He certainly could use his hands for hand controls. He could use his feet for foot controls for a limited period of time. His lifting would be limited at 30 pounds maximum. I really don't think he can go back to work for the town of Weston. I feel that rehabilitation would be very beneficial. He has a high school education and then went into the military service after that. There certainly is a possibility that even with retraining surgery still may be necessary. This presents somewhat of a difficult problem. He went through work hardening. That really did not help him at all. He has had other forms of therapy but he continues to have low back pain and persistent sciatica. My feeling would either be to proceed with surgery or consider retraining into some light type of work which would fall within the criteria that have been listed above. I feel these restrictions are permanent. I feel that even with surgery he never will be able to return to his job working for the Town of Weston because of his multiple level involvement of the spine, his nature of his work, his weight and the persistent pain that he is having.

Bukas followed up the meeting of September 13th with a letter to John Lopour, Claims Adjuster, Wausau Insurance in which he stated that he was shocked that the grievant had been scheduled for surgery. The letter was followed by a phone call on September 16 between Bukas and Lopour at which time Lopour told Bukas that the grievant's physician had recommended a weight loss program which Wausau Insurance had not authorized.

On September 17, 1991, Bukas again wrote to the grievant stating "The Town of Weston has a job for you to do." and enclosed a list of duties which

Bukas felt were within the restrictions placed upon his return to work by Dr. Gay Anderson's report of June 28, 1991. The letter went on to state:

> You are to report to the Street Superintendent, Robert Koss, at his office in the Weston Municipal Center, 5500 Schofield Avenue, Schofield, Wisconsin, on Friday, September 20, 1991, at 7 a.m.
>
> If you refuse to go back to work, please call me before September 20, 1991.

In response to the Town's September 17th letter, the grievant's Attorney, James Kurth, advised the Town in a letter dated September 19, 1991 that the grievant "is willing to attempt a return to work, but can only (sic) so within the restrictions imposed by Dr. Buechel, his treating physician. Accordingly, any such work you offer him must be within those restrictions if you expect him to return to work." Kurth also stated in his letter: " . . . please advise Mr. Wistrom as to whether or not the work you are offering him is within the restrictions imposed by Dr. Bueschel." Attached to Attorney Kurth's September 19th letter was the most recent progress report of Dr. Buechel noted above.

The grievant did not report to work on Friday, September 20, 1991.

The Town responded to Attorney Kurth's letter on September 25, 1991, as follows:

> This letter is (sic) response to your letter of September 19, 1991, regarding Gary Wistrom returning back to work. The duties that were outlined to Mr. Wistrom are within the restrictions as set forth by Dr. Gay Anderson. We have work available based on Dr. Anderson's restrictions and we do not recognize Dr. Bueschel's restrictions. This matter has been forwarded to our workers compensation carrier and we believe that Dr. Anderson's restrictions shall govern in this matter. Mr. Wistrom has been previously instructed to report to work. He has failed to report to work as instructed.

On October 2, 1991 the Town sent another letter to the grievant as follows:

> It has come to our attention that Wausau Insurance Company has terminated your workmen's compensation salary. Likewise, effective September 20, 1991, the Town of Weston has terminated the salary difference we have been paying.
>
> The Town has work and work for you to do. You are to report to work on Monday, October 7, 1991 at 7:00 a.m. Your failure to report on October 7, 1991 at 7:00 a.m. will result in your termination from the Town effective that date and time.

After receiving the Town's October 2nd letter, the grievant had his attorney write the following letter dated October 3, 1991 to the Town:

> Mr. Wistrom has advised me that you have indicated an inclination to terminate him if he does not comply with

> your request that he return to work based on Dr. Anderson's restrictions. We have already indicated to you that he will return to work under the restrictions imposed by his treating physician if you have such work available.
>
> Mr. Wistrom does not need ultimatums from you. You have not even made a good faith effort to discuss his restrictions with his treating physician. Now you are looking to terminate him as well as denying him the contract benefits that are clearly spelled out. Should you follow through with this threat, be advised that we will make a claim directly against the Town of Weston under Sec. 102.35, Wis. Stats., seeking a penalty for your unreasonable refusal to rehire. Further, I think your absolute failure to even consult with a treating physician is an act of bad faith on your part.
>
> Finally, you have known for some weeks that I am representing Mr. Wistrom. Would you kindly observe the ordinary courtesy of sending me a copy of any correspondence you send to Gary and vise versa?

The grievant did not show up to work on October 7, 1991. Instead, he filed a grievance against the Town on that date alleging violation of "Article 5, 9, 14, 16, 19 and 24, and other pertinent articles" of the agreement. The nature of the grievance is stated that "The employer unjustly terminated me in violation of the above articles, therefore, I am claiming all lost wages and benefits."

Finally, the Town sent another letter to the grievant on October 9, 1991, in which it stated:

> This letter is in response to your grievance attached hereto which was received by the Town of Weston on October 7, 1991 at 5:25 p.m. The Town of Weston has offered you employment. Your spouse has cleaned out your locker and returned your work key prior to the date that you were to return to work. We have had no communication on your part. Therefore, we have deemed your absence from work without leave and we have considered that you have vacated your job. In other words it is our opinion that you have quit your position with the Town of Weston. Therefore, your grievance is denied.

The Town Administrator (Bukas) on November 12, 1991, sent a letter to Gerald Allain, business agent for the Union, with a copy to Gary Wistrom, advising that the Town Board would hear the appeal of Gary Wistrom's grievance on Tuesday, November 26, 1991, at 6:30 p.m. at the Weston Municipal Center. Said letter did not indicate whether the meeting would be open or closed.

On November 26, 1991, at 6:30 p.m., the Town Chairman of the Town of Weston called the special Town Board meeting to order. Present at the meeting, in addition to the Town Chairman, were the four supervisors, the Town Clerk, Randy Bukas, Mark Thompson, the Director of Public Works, Richard Weber, the Town Attorney, Mr. and Mrs. Gary Wistrom and Gerald Allain. The Town, through its attorney, recommended that the hearing proceed by taking up the alleged violation of each article separately with each side indicating their respective positions. The Union representative, Gerald Allain, at that point, asserted

that "It is the Union's position at this meeting that it be a closed session." A lengthy discussion ensued wherein the parties discussed whether the meeting ought to be open or closed. The Union stated its willingness to proceed with the meeting if the Town changed it to a closed session. Allain also stated: "I'm suggesting we set another date and if it is found out after there were some other changes of statutes or whatever that these sessions are required to be open, I guess then we live by the book." The Town refused to proceed in accordance with the Union's request. The Town Chairman made the following statement at the conclusion of the meeting:

> The chair would entertain a motion to adjourn this Town Board meeting to address the grievance filed by Mr. Wistrom represented by Mr. Jerry Allain at this time and on not hearing the grievance, because of a difference in opinion on closed or open session, the Board was willing to hear the grievance -- Mr. Allain was not -- in an open session and, therefore, it was recommended by our attorney, Mr. Weber, that if we adjourn and do not hear the grievance in an open session of which we're entitled to, then we'll consider the grievance denied and not set a new hearing date.

Motion passed and the meeting then ended with no discussion having been held on the merits of the grievance.

As noted previously, the Town had been advised, on or about September, 1991, by its worker's compensation carrier, Wausau Insurance, that the grievant was able to return to work.

On September 23, 1991, Wausau Insurance sent the following letter to the Town and to the grievant:

> We are at this time conceding 5 percent of permanent partial disability due to your injury of September 28, 1987 as follows:
>
> | | | |
> |---|---|---|
> | $30,158.93 | - | For temporary total disability from September 28, 1987 to October 5, 1987 and September 16, 1989 to September 20, 1991, for a total of 105 weeks and 3 days |
> | 5,850.00 | - | Permanent partial disability due (5 percent total) |
> | $36,008.94 | - | Total |
> | 32,594.58 | - | Previously paid |
> | $ 3,414.36 | - | Balance for which our check is attached |
>
> Keep in mind this is only a conceded amount. We will contact you when a final determination has been made as to the extent of your injury.

On or about September 26, 1991, the grievant applied for a Wisconsin Retirement System disability benefit. As part of the application process, the Department of Employe Trust Funds asked the Town to certify the grievant's benefit eligibility. The Town's agent refused and instead responded by indicating: "The injury/illness is work-related," and by marking the box "The applicant's employment ceased for a reason other than disability."

On October 4, 1991, Wausau Insurance wrote a letter to the grievant's Attorney which stated:

> Oops! Our mistake. Will pay 10% of body as a whole and hold 20% attorney fees. A worksheet will be done and a letter sent to all parties re this.

In follow-up to the October 4th letter, Wausau Insurance sent the following letter to the Town and grievant:

> It has been brought to our attention that our letter of September 23, 1991 was in error. Therefore, we will now be paying you an additional 5-percent permanent partial disability as per the independent medical evaluation of Dr. Gay Anderson. Our computations are as follows:
>
> | | | |
> |---|---|---|
> | $30,158.94 | - | For lost time from work from September 28, 1987 to October 5, 1987 and from September 16, 1989 to September 20, 1991, a total of 105 weeks and 3 days at $285.87 per week |
> | 11,700.00 | - | Permanent partial disability (10 percent of total) |
> | $41,858.94 | - | Total amount due |
> | 36,008.94 | - | Previously paid |
> | 2,340.00 | - | Attorney fees being withheld pending approval from the Workers Compensation Division |
> | $ 3,510.00 | - | Balance Due |
>
> Attached please find our check in the amount of $3,510 which is the final amount due you for the above.

By letter dated October 4, 1991 the grievant's attorney made the following request of the Town:

> Randy Bukas has indicated that he does not want to receive my letters anymore. Accordingly, would you please check into Mr. Wistrom's status with the Town of Weston clerk. Mr. Wistrom has been found eligible for an annuity through the state pension plan. The only thing that is holding up that annuity is the Town's failure to return a form to the state verifying that it is not paying Mr. Wistrom wages at this time. That form was mailed to the town back on September 26, 1991. Since the town of Weston believes it has terminated Mr. Wistrom, there should be no question but that he is not receiving wages from the town.

During this period, progress reports on the grievant by Doctors Buechel and Spatz indicate that "Gary returns with a flareup of low back pain for 2 weeks now . . . He is taking Flexeril and Darvocet as needed for pain. . . . The patient will return for a follow up in 4-6 weeks to reassess his condition."

On November 6, 1991, the grievant's attorney sent the following letter to the Town's Attorney:

It has come to my attention that Weston's administrator, Randy Bukas, has disseminated medical records concerning

> Mr. Wistrom at least to the Department of Employee Trust Funds and possibly others. Mr. Wistrom was not even aware that Mr. Bukas had any medical records on him. Certainly there has been no authorization for disclosure. Would you please advise me as to which statute or contract provision Mr. Bukas relied on in making such disclosure?
>
> I look forward to your response.

(The grievant, when he made his application with the State of Wisconsin Department of Employee Trust Funds for total disability payments, did not provide the Department with a copy of Dr. Anderson's report. When the Town was asked to certify the grievant's disability and his inability to work the Town indicated the grievant was still considered an employe, and provided the Department with a copy of Dr. Anderson's report.)

By letter dated December 11, 1991, the Town's worker's compensation insurance carrier was advised by its attorneys to allow the grievant to seek an opinion from a physician at the Mayo Clinic for further evaluation. Said letter stated as follows:

> I have completed my review of the medical records in this case and have concluded, as no doubt Attorney Kurth has concluded, that there is a great disparity in the medical opinions.
>
> In his clinic note of September 25, 1991, Dr. Buechel, the primary treating physician, suggested that, "I feel that Wausau Insurance may want to consider an assessment by someone other than Dr. Anderson in this case . . ." Apparently, Dr. Anderson agrees, having stated in his report dated June 28, 1991, "I have recommended he consider paying a visit to Dr. Burton Onofrio at the Mayo Clinic for another opinion on further surgery to his lumbar spine." In light of the fact that Drs. Buechel and Anderson seem to agree that a further evaluation might be of assistance, I am requesting that the Department give the respondents permission to send Mr. Wistrom to Dr. Onofrio at the Mayo Clinic for further evaluation. Of course, the respondents will pay all necessary expenses for lodging, mileage, meals, and any other reasonable expenses set forth by Mr. Wistrom. These funds can be provided in advance, if necessary.
>
> Kindly advise as to your position on this matter. Thank you for your consideration.

In a follow-up letter dated December 27, 1991, the grievant's Attorney again wrote the Town's Attorney. Attorney Kurth stated in said letter. "The explanation provided in your letter of December 17, 1991 is not acceptable." Attorney Kurth concluded in said letter that the Town, through its Attorney, had not responded to his inquiry as to the basis under which Mr. Bukas undertook to disclose such medical information and "absent any explanation, we will have no alternative but to believe Mr. Bukas had no such authority for that release." Attorney Kurth also claimed "It appears to me that the Town of Weston and its worker's compensation insurance carrier cooperated to deprive Mr. Wistrom of both his job and his worker's compensation benefits, both of which he is clearly entitled to."

On December 18, 1991, the Union made the following request of the Town:

> On behalf of Gary Wistrom I am requesting again that the Town of Weston pay him the vacation pay that is due and owing him. On my prior request you stated to me that if Gary requested that he wanted his vacation pay it would be paid. He has complied with your request.
>
> Mr. Bukas, I feel your integrity in this matter will prevail.

PERTINENT CONTRACTUAL PROVISIONS:

> THIS AGREEMENT has been made and entered into between the Town of Weston and its Town Board, hereinafter referred to as the Municipal Employer, and General Teamsters Union Local No. 662, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Union, for the purpose of maintaining harmonious labor relations and to maintain a uniform minimum scale of wages, hours, and working conditions among the employees, members of the Union and the Town of Weston and its Town Board, and to facilitate a peaceful adjustment of all grievances and disputes which may arise between the Employer and the Union.
>
> ARTICLE 7 - GRIEVANCES
>
> SECTION 1. A grievance shall be processed as follows:
>
> 1. The grievance shall be presented to and discussed with the employee's supervisor, within ten (10) work days from the date the grievant learned of or became knowledgeable of the grievance, by the employee and steward if requested.
>
> 2. If not settled satisfactorily within ten (10) working days of Step 1, it shall be referred to the Town Board and the Union.
>
> 3. If not settled satisfactorily in the discussion, either party may notify the other within ten (10) working days after a deadlock in Step 2 of their desire to arbitrate.
>
> ARTICLE 9 - DISCHARGE
>
> SECTION 1. Any employee violating the terms of this contract and/or ignoring verbal and written orders of management shall be subject to discharge under the following procedure:
>
> 1st Step - Verbal Warning
>
> 2nd Step - Written Reprimand

3rd Step - Written Reprimand with time off (One (1) to ten (10) days, depending on seriousness of offense.)

4th Step - Discharge

The maximum time period between the 1st and 4th Step shall be nine (9) months, i.e. if an employee receives the 1st Step and does not receive another warning within nine (9) months, any subsequent warning shall be construed as 1st Step.

Any employee shall have the right to grieve the 1st through 4th Steps in the manner indicated in Articles 7 and 8 of this contract.

Discharge or suspension shall be in writing with a copy to the Union and the employee affected.

SECTION 2. Any employee desiring an investigation of his discharge, suspension or warning must file his protest in writing with the Employer and the Union within ten (10) working days of the date the employee received such discharge or warning notice. The discharge, suspension or warning notice shall then be discussed by the Employer and the Union as to the merits of the case. Should it be found that the employee has been unjustly discharged or suspended, he shall be reinstated and compensated for all time lost at his regular rate of pay plus such overtime as he may have worked.

ARTICLE 14 - SICK LEAVE & FUNERAL ALLOWANCE OR JURY DUTY

SECTION 4. Any employee receiving Workers' Compensation benefits shall be reimbursed by the Employer the difference between said benefits and the regular weekly salary that the employee would have earned had he been able to work. The difference between said employee's Workers' Compensation benefit and the regular weekly salary will not be taken from the employee's sick leave accumulation. Employees shall not suffer a loss in earnings because of required medical examinations or doctor appointments due to work-related illness or injury. Reasonable effort shall be made to make medical appointments during non-working hours.

SECTION 5. Wellness Days: If an employee does not use any sick leave in any contract year an employee shall receive two (2) Wellness Days with pay that can be used by the employee at sometime during the following contract year. The employee shall give a forty-eight (48) hour advance notice to their supervisor of the day they wish to take off. Other arrangements can be made if approved by the supervisor. Workers' Compensation time off will not interfere with this Section.

ARTICLE 16 - VACATIONS

SECTION 1. * * *

Every employee having completed eighteen (18) years of service shall be entitled to five (5) weeks vacation with pay.

* * *

SECTION 8. Employees will accrue time toward vacation while on Workers' Compensation or an approved Leave of Absence.

UNION'S POSITION:

The Union initially argues that the grievance is arbitrable. In this regard the Union claims it participated in the Step 2 meeting as required by the contractual grievance/arbitration procedure. However, the Union feels it properly refused to discuss the merits of the grievance because it had no notification that the meeting was going to be an open meeting. The Union notes that at the onset of the meeting it stated its willingness to proceed with the meeting if the Town changed it to a closed session, but that the Town refused to proceed in accordance with the Union's request. The Union maintains that the Town's refusal to go into a closed session should not now prevent the grievant from having his grievance decided by an arbitrator.

The Union adds that the Town's refusal to hold the meeting in a closed session is a break from past practice and is at odds with industry practice. The Union maintains its refusal to discuss the merits of the grievance in such a meeting is warranted given the personal nature of much of the subject matter (i.e. the grievant's medical condition) combined with the fact that the Union had no notice that the discussion would be at an open meeting.

The Union concludes it complied with the technical requirements at Step 2 of the grievance procedure in that the grievance procedure provides for arbitration after deadlock at Step 2 which is in fact what happened after the parties could not agree upon the manner by which the grievance should be discussed.

With respect to the merits of the dispute, the Union argues that the grievant did not vacate his job. In this regard, the Union maintains that "the mere fact that Mr. Wistrom's wife cleaned out his locker can in no way constitute a quit by Mr. Wistrom." The Union adds that the grievant's wife never told anyone from the Town that the grievant was quitting.

In addition, the Union points out:

> Furthermore, in response to the Town's October 2, 1991 letter to return to work, Mr. Wistrom advised the Town, via his attorney, that he could not return to work under Anderson's restrictions (Jt. Exh. 8). The Town's assertion in Mr. Wistrom's termination letter that Mr. Wistrom failed to communicate with the Town after October 2, 1991 is therefore patently false.

The Union also argues that the Town violated the discharge procedures set forth in the collective bargaining agreement. In this regard, the Union claims:

> Interpreted in the light most favorable to the Town,

> the Town's letter of October 2, 1991 (Jt. Exh. 7) could constitute the second step procedure, with the meeting of September 13, 1991 being the first step. Thus, at best, the Town conformed with the first two steps in the procedure. However, the contract requires more than a verbal and written reprimand before a discharge. That is, the Town would have to have given the grievant a written reprimand with time off before a discharge would be appropriate.

The Union adds that "events after the Town discharged the grievant lend further support for the Union's position that the discharge violated the Contract." In this regard, the Union states:

> While the Town relied exclusively upon Dr. Anderson's opinion, and was completely unwilling to consider the advice of Mr. Wistrom's treating physicians, in devising a job for Mr. Wistrom to return to, as of December 25, 1991, even the Worker's Compensation Division has granted Mr. Wistrom permission to seek another medical opinion. Indeed, the worker's compensation insurance company itself was finally advised by its attorneys to allow Mr. Wistrom to seek an evaluation from a physician at the Mayo Clinic for further evaluation at the expense of the Worker's Compensation Division (Jt. Exh. 25). Thus, clearly Dr. Anderson's evaluation is not conclusive.

With respect to the issue of the conflicting doctors' opinions, the Union cites a number of arbitration awards for the proposition that the grievant had the right to rely on his own doctor's advice regarding conditions under which he would return to work. The Union adds that the grievant had sufficient reason to disobey the Town's order to report for work since it would have endangered his health. The Union also claims the Town improperly terminated the grievant when it refused to consider the grievant's physician's opinion and made no effort to reconcile the differences between the opinions of the grievant's treating physicians and Dr. Gay Anderson. In fact, the Union believes Dr. Anderson's examination of the grievant was "cursory," "limited" and insufficient in comparison to the three orthopedic specialists' opinions relied upon the grievant. The Union would discount the medical opinion of Dr. Anderson as "suspect" and rely instead on the opinions of the grievant's physicians.

Based on all of the above, the Union asks the Arbitrator to reinstate and make whole the grievant. In the alternative, the Union asks if the termination is upheld, the Arbitrator should still award damages to the grievant including prorated vacation, prorated wellness days, and the difference between the grievant's worker's compensation payments and his regular rate for 100 weeks past the day of his termination as required by Article 14, Section 4.

TOWN'S POSITION:

The Town initially argues that the Union violated the agreement by refusing to follow Step 2 of the grievance procedure. In this regard, the Town argues that Article 7 of the agreement provides a mandatory procedure for the processing of a grievance which the Union failed to comply with. The Town adds that the grievant and Union "must exhaust their contractual remedies in the form and manner prescribed by the Union contract" before the Arbitrator has jurisdiction to decide the merits of the dispute citing Hanson v. Madison Service Corp., 150 Wis.2d 828, 443 N.W. 2d 315 (Ct.App, 1989) in support

thereof.

More specifically, the Town maintains the agreement "clearly contemplates and, in fact, mandates a Step 2 procedure in which a discussion takes place relating to the grievance with the expectation . . . such discussion will 'facilitate a peaceful adjustment' of the grievance." The Town feels it "is entitled to the benefits of such discussion, and it has the right to explore with the grievant and the Union representative the nature of the grievance and the possibility of getting it settled harmoniously." The Town points out that it was present at the 2nd Step meeting on November 26, 1991, and ready to discuss the grievance, but that the Union refused "after erroneously asserting the right to a closed session."

The Town next contends that the grievant quit his employment by failing to report for work when requested to do so. In support thereof, the Town argues that it tried very hard to get the grievant back to work, and "was willing to work with Mr. Wistrom to give him employment within his capabilities had he been willing to come back to work." Instead of trying to perform the tasks the Town was willing to give him or communicating with the Town Administrator or others when letters were sent requesting that he report to work, the Town points out that the grievant "initiated an action before the State of Wisconsin, Department of Industry, Labor & Human Relations, Workers Compensation Division, charging that Weston has violated Section 102.35, Wis. Stats., in failing to rehire him" while at the same time applying to the Wisconsin Department of Employee Trust Funds and asking for disability benefits.

To illustrate the efforts that it put forth to assist the grievant and to get him back to work, the Town makes reference to a series of letters and meetings it sent to and had with the grievant. The Town claims the grievant made no response to its letters; refused to indicate under what conditions he would come back to work under except those set forth by his own physician and refused to report to work when ordered to do so by the Town. Moreover, the Town points out that when the grievant was supposed to return to work on October 7th, that instead the grievant's wife came down early in the morning on Friday and cleaned out his locker.

The Town also feels the grievant did not act in good faith toward it and the State. In this regard, the Town cites its unsuccessful efforts to get the grievant to return to work while at the same time the grievant was suing the Town through the Department of Industry, Labor and Human Relations, Worker's Compensation Division, for failing to rehire him. In support of this claim, the Town also argues that the grievant attempted to keep Dr. Anderson's "work capacity classification" from the State Department of Employee Trust Funds to make it appear to the Department that he was totally disabled. The Town maintains it has been improperly threatened by the grievant for having provided the Department of Employee Trust Funds with a copy of Dr. Anderson's report following the grievant's demand that the Town certify the grievant's disability status to the Department. The Town believes the grievant's behavior (particularly his lack of fairness in dealing with the pertinent parties) dictates dismissal of his grievance.

With respect to the issue of damages, the Town contends that it has paid the grievant in full the difference between the worker's compensation benefits that he was receiving and his regular weekly salary that he would have earned had he been able to work. The Town also contends that since the grievant was paid in full for the entire time he was on Worker's Compensation and listed as a Town employe, there is no "vacation" pay due him, nor is there anything in the contract which requires the Town to pay an individual for withdrawals from his pension or retirement account. Finally, the Town also takes the position

that there are no "wellness days" due the grievant because, again, he was compensated in full during the entire period of time that he was unable to work due to his compensable injury.

Based on all of the above, the Town requests that the Arbitrator deny the grievance and dismiss the matter.

DISCUSSION:

THE ISSUE OF ARBITRABILITY

The Town initially argues that the grievance is not arbitrable because the Union failed to comply with Step 2 of the grievance procedure. Article 7, Section 1, sets out a procedure for processing grievances. Step 2 provides: "If not settled satisfactorily within ten (10) working days of Step 1, it shall be referred to the Town Board and the Union." (emphasis added) Step 3 makes reference to Step 2 as follows: "If not settled satisfactorily in the discussion, either party may notify the other . . . after a deadlock in Step 2 of their desire to arbitrate." (emphasis added)

The Arbitrator agrees with the Town's contention that the contractual grievance procedure must be exhausted before the instant dispute is properly before the Arbitrator. However, the Arbitrator is of the opinion that the Union and grievant complied with the technical requirements of Step 2 of the grievance procedure and exhausted the contractual grievance procedure. Pursuant to Step 2, the grievance was referred to a meeting of the Town Board and Union on November 26, 1991. The Town Board, its attorney, the grievant, and his Union representative "discussed" the grievance at this meeting. More specifically, the parties "discussed" a procedure for taking up the grievance but without success. Since the parties were unable to settle this procedural dispute in a satisfactory manner, the parties "deadlocked" over the grievance, and the matter was referred to arbitration at the next step. The Town makes no claim that the Union failed to comply with the requirements of Step 3 of the grievance procedure.

The Town essentially argues, contrary to the above, that the Union and grievant should have discussed the merits of the grievance in an "open" meeting on the date in question. The Town believes a meaningful discussion could have taken place with all parties present which would have led to a possible peaceful resolution. The Town feels the Union acted improperly by "erroneously asserting the right to a closed session," and refusing to discuss the merits of the dispute at that meeting.

The parties' agreement, however, sets out no specific procedure for Step 2. It simply says that the grievance "shall be referred to the Town Board and the Union" which it was. The parties got into a dispute at a Step 2 meeting over whether the meeting ought to be "open" or "closed". The Town insisted, as

apparently is its right under Section 19.85, Wis. Stats., that it was not required to go into a closed session to discuss the grievance. 1/ The Union refused to discuss the merits of the grievance in an open meeting given the nature of the grievant's injury and the issue of medical information involved. The parties were unable to resolve this procedural dispute. Obviously, if they had it might have facilitated "a peaceful adjustment" of the grievance as well as "harmonious labor relations" between the parties as called for by the "Preamble" to the parties collective bargaining agreement. However, there is nothing in the contract requiring the parties to agree upon a procedure for discussing grievances at Step 2. Nor did the Town offer any persuasive evidence of past practice, contract or statutory language that the Union was required to discuss the grievance in an "open" meeting as demanded by the Town.

The Union offered to meet at another time in closed session to discuss the grievance but to no avail. The Town claims it could not go into closed session on the date in question due to the notice requirements of Section 19.84 Wis. Stats. It did not offer a persuasive reason why it couldn't adjourn to a different date and comply with said notice requirements. Given the nature of the parties dispute, and the conflicting medical information involved, a closed session on this matter would seem appropriate. Indeed, the Statute, as indicated in Footnote 1, recognizes certain situations where it might be appropriate, even desirous, from a public policy point of view, to go into closed session. These circumstances, as delineated therein, specifically include disciplinary matters, personnel issues, and situations where "medical

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1/ Section 19.85, Wis. Stats. provides in Section 1 that "Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. Exemptions to the open meeting requirement, under this section, include the following:

> (b) Considering dismissal, demotion, licensing or discipline of any public employe or person licensed by a board or commission or the investigation of charges against such person, or considering the grant or denial of tenure for a university faculty member, and the taking of formal action on any such matter; provided that the faculty member or other public employe or person licensed is given actual notice of any evidentiary hearing which may be held prior to final action being taken and of any meeting at which final action may be taken. The notice shall contain a statement that the person has the right to demand that the evidentiary hearing or meeting be held in open session. This paragraph and par. (f) do not apply to any such evidentiary hearing or meeting where the employe or person licensed requests that an open session be held.
>
> (c) Considering employment, promotion, compensation or performance evaluation data of any public employe over which the governmental body has jurisdiction or exercises responsibility.
>
> (f) Considering financial, medical, social or personal histories or disciplinary data or specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons except where par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.

data" of specific individuals is discussed. A closed meeting might also have facilitated a peaceful resolution of this dispute which the Town in its brief stressed the importance of.

Consequently, based on all of the above, the Arbitrator rejects the arbitrability claim of the Town and finds that the answer to the first issue as framed by the undersigned is yes, the instant grievance is arbitrable.

THE ISSUE OF QUIT

When an employe voluntarily resigns, concepts associated with discharge are not generally applicable. Thus, where the employe evidenced clear and unequivocal intent to resign arbitrators have refused to treat the matter as discharge. Moreover, where the facts and circumstances are such as to lead management reasonably to conclude that intent to resign exists, the matter may be treated as resignation even though the individual never actually states any intent to resign.

However, if intent to resign is not adequately evidenced or if the circumstances are such that management cannot reasonably conclude that the employe intended to quit, an alleged resignation will be treated as discharge for purposes of arbitral review. 2/

In the instant case, the record is clear that the grievant did not evidence a clear and unequivocal intent to terminate his employment. To the contrary, the grievant never indicated directly that he wished to quit his employment. A question remains whether the Town could reasonably conclude from the circumstances that the grievant intended to quit his employment.

The Town maintains that because the grievant's wife cleaned out his locker after the grievant received the Town's order to report to work, the grievant intended to vacate his position. However, while cleaning out the locker, there was no communication between the grievant's wife and anyone representing the Town. The mere fact that the grievant's wife cleaned out his locker under the strained circumstances involved herein 3/ can in no way reasonably be interpreted by the Town as a quit by the grievant.

Furthermore, in response to the Town's October 2, 1991 letter to return to work, the grievant advised the Town, via his attorney, that he could not return to work under Anderson's restrictions. In said letter the Town was also advised: "We have already indicated to you that he will return to work under the restrictions imposed by his treating physician if you have such work available." The Town's assertion in the grievant's termination letter that the grievant failed to communicate with the Town after the October 2nd letter in which the Town ordered him to report to work is not supported by the record.

In fact, the grievant also told Town representatives in at least one meeting (September 13, 1991) that he would come back to work under the restrictions of his attending physician.

Based on all of the above, and absent any persuasive evidence to the contrary, the undersigned finds that the grievant did not quit his employment with the Town.

2/ See Elkouri and Elkouri, How Arbitration Works, Fourth Edition, 655 (1985).

3/ Tr. p.p. 111, 112, 115-117.

THE ISSUE OF CONSTRUCTIVE DISCHARGE

Where there is no voluntary quit, the employer's subsequent refusal to let the employe continue his status constitutes a discharge rather than a resignation.

As noted above, the grievant did not intend to quit his job. Nor was it reasonable for the Town to conclude from the circumstances that the grievant intended to quit his employment. To the contrary, except for his application for permanent disability, the record generally supports a finding that the grievant wished to remain employed by the Town with the caveat that it be in a job he could perform within the restrictions set forth by his attending physician.

Since the undersigned has found that the grievant wished to continue working for the Town doing work he was capable of but was denied same by the Town, the undersigned concludes that said action constitutes a constructive discharge of the grievant rather than a voluntary termination.

THE ISSUE OF JUST CAUSE

Article 9 clearly sets out a procedure for discharging an employe. This procedure involves four steps including verbal warning, written reprimand, suspension and discharge. The agreement contains no exceptions to this four step process. The record is undisputed that the Town failed to follow the parties' agreed-upon procedure for discharging employes.

In addition, the record indicates that there is a dispute between the Town and the grievant over under what conditions the grievant could return to work. The Town relied almost exclusively on Dr. Anderson's evaluation 4/ while the grievant relied solely on his physicians. In essence, the Town was not willing to consider Dr. Buechel's (the grievant's primary physician) restrictions in fashioning a job for the grievant (In a letter dated September 25, 1991 to the grievant's attorney the Town stated: "We have work available based on Dr. Anderson's restrictions and we do not recognize Dr. Buechel's restrictions . . . we believe that Dr. Anderson's restrictions shall govern in this matter.")

As the Union points out in its brief, arbitrators accept that an employe has the right to choose his own doctor's advice regarding a return to work even when faced with conflicting points of view. As one arbitrator put it, "it would be foolhardy for any patient to do otherwise." International Harvester Corp., 22 LA 138, 139 (Platt, 1959) Employers may not refuse to consider opinions issued by an injured employe's handling physician. St. Regis Paper Co., 75 LA 737, 740 (Anderson, 1980) Failure on the part of the Employer to attempt to reconcile a difference in medical opinions may result in an overturning of the termination. Mobil Corp., 81 LA 1090, 1095 (Taylor, 1983).

The Town also argues that the grievant did not deal with it and the State in good faith. In particular, the Town alleges that the grievant attempted under false pretense to get a permanent full disability from the state while at the same time refusing to return to work for the Town. (While also at the same

4/ While the Town Administrator testified that he also considered the report of Dr. Buechel dated April 17th in bringing the grievant back to work Tr. p. 49, he placed almost exclusive reliance on the evaluation of Dr. Anderson. See, for example, Exhibit Nos. 2 and 6.

time suing the Town for failing to rehire him). The Arbitrator agrees with the Town that some of the actions taken by the grievant raise issues of good faith. On the other hand, the record contains evidence of a great deal of posturing by both parties. The evidence is not persuasive either way. Therefore, the Arbitrator rejects this claim of the Town.

Thus, based on all of the above, the undersigned finds that the Town's discharge of the grievant violated the just cause provision of the agreement.

THE ISSUE OF REMEDY

A question remains as to the proper remedy.

The Union requests that the grievant be reinstated and made whole. Because the grievant was unjustly terminated, he should be made whole for all wages and benefits lost as a result of the Town's action. This make whole remedy should run at least until a determination is made as to whether the grievant is able to return to work. However, it is not clear when or under what conditions the grievant is able to return to work. In addition, there is a genuine dispute over whose medical opinion to rely on regarding a return to work. Some arbitrators have held that where there is a conflict of opinion between the Employer's doctor and grievant's doctor there should be examination by a neutral doctor. See, for example, Kenney Mfg. Co., 37 LA 456, 458, (Donnelly, 1961). The Supreme Court upheld such an approach in Gunther v. San Diego & Arizona Eastern Railway Co., 382 U.S. 257, 60 LRRM 2496 (1965) when it found that an arbitration board did not exceed its jurisdiction in appointing a medical board to decide the question of fact relating the employe's fitness. Therefore, the Arbitrator will order the grievant to be evaluated by a third, disinterested doctor to be used as a tie breaker. In order to avoid issues of acceptability, promote "harmonious labor relations," and "to facilitate" a resolution of this dispute, the Arbitrator orders the parties to select a new third doctor by joint stipulation and share the cost of same. (Unless the parties agree to some other procedure for selecting a doctor to act as a tie breaker.) The parties should communicate with the third doctor jointly and avoid ex parte communications. Finally, the Town deserves a timely answer to the questions of if and when and under what conditions the grievant is able to return to work. Therefore, the parties should select a new third doctor pursuant to the procedure discussed above as soon as possible, and no later than thirty (30) days from the date of this Award. The grievant must complete the examination process on a timely basis or face possible termination. Once the examination process is completed, the third doctor can make the determination whether the grievant is able to return to work and under what conditions. If he is found competent then the Town should return the grievant to any available work immediately and make him whole for all lost wages and benefits. If the grievant is found not able to return to work or the Town does not have appropriate work available for him, then the Town may terminate the grievant pursuant to the procedure found in the parties' collective bargaining agreement. 5/ If the Town eventually terminates the grievant because he is unable or unwilling to return to work or because appropriate work is unavailable, the make whole remedy ordered will only run to that date. Any differences over make whole remedies should first be addressed by the parties and hopefully resolved through negotiation. The Arbitrator will, however, retain jurisdiction over the application of the remedy portion of the Award for

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5/ The Union concedes in its brief that "the Town conformed with the first two steps in the procedure."

at least sixty (60) days to address any issues over remedy that the parties are unable to resolve

In light of the foregoing and the record as a whole, it is my

AWARD

That the grievance of Gary Wistrom is hereby sustained. The Town is ordered to reinstate and make the grievant whole as set forth in the remedy portion of this Award. The Arbitrator will retain jurisdiction over the remedy portion of this Award as noted above.

Dated at Madison, Wisconsin this 23rd day of June, 1992.

By _____
Dennis P. McGilligan, Arbitrator