BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CITY OF KIEL	Case 41 No. 47359 MA-7243
and	
CITY OF KIEL POLICE DEPARTMENT EMPLOYEES UNION, LOCAL 1362, AFSCME, AFL-CIO	

Appearances:
Godfrey & Kahn, S.C., by Mr. Paul C. Hemmer, on behalf of the City.
Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, on behalf of the Union.

ARBITRATION AWARD

The above-captioned parties, hereinafter, the City and the Union respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to said agreement, the parties requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear the instant dispute. The undersigned was designated by the Commission to hear the matter. Hearing was held on July 22, 1992, in Kiel, Wisconsin. No stenographic transcript was made. The parties concluded their briefing schedule on October 2, 1992. Based upon the record herein and the arguments of the parties, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to an issue or issues at hearing.

The Union proposed the following:

> Did the City violate the contract, and/or Wisconsin Family and Medical Leave Act, when it placed Lee Pasket on unpaid medical leave without guaranteeing him a position to return to? If so, what is the appropriate remedy?
>
> Did the City violate the contract and/or the Wisconsin Family and Medical Leave Act, when it denied Lee Pasket the opportunity to return to work to his former position on March 9, 1992? If so, what is the appropriate remedy?
>
> Did the City violate the contract when it denied Lee Pasket the opportunity to return to work in his former position, and continued to use full-time probationary and part-time officers on the schedule? If so, what is the appropriate remedy?

The City objects to the arbitrator's consideration of whether the Wisconsin Family and Medical Leave Act was violated but in all other respects concurs with the Union's statement of the issues.

RELEVANT CONTRACT ISSUES

ARTICLE II - MANAGEMENT RIGHTS

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend or otherwise discharge for just cause is vested exclusively in the Employer. The Employer may adopt reasonable work rules and amend the same from time to time. Each employee shall be given a copy of current work rules.

ARTICLE III - PROBATIONARY PERIOD

The first twelve (12) months of employment for new employees shall constitute the employee's probationary period.

Such probationary employees may be disciplined or discharged without recourse to the grievance procedure contained in this Agreement. Continued employment beyond the probationary period is hereby defined to be evidence of satisfactory completion of probation.

The seniority of an employee who has satisfactorily completed probation shall date from his original date of employment, and he shall then be entitled to all benefits accruing to regular employees.

A regular full-time or part-time employee is hereby defined as a person hired to fill a regular position. A part-time employee is a regular employee who is scheduled to work a regular schedule, but for fewer hours than the normal work week as hereinafter defined.

Regularly scheduled part-time employees who work six hundred (600) hours or more per year shall be eligible for all fringe benefits on a pro-rated basis.

Part-time, seasonal or temporary employees shall not be employed as a means of displacing regular full-time employment.

A temporary employee is a person hired for a specified period of time not to exceed ninety (90) days and who will be separated from the payroll at the end of such period.

A seasonal employee is one who is on the active payroll only during the season in which his services are required.

Part-time (fewer than six hundred (600) hours per year), temporary and seasonal employees are not entitled to the fringe benefits as provided in this Agreement.

ARTICLE IV - SENIORITY

1. Definition - It shall be the policy of the

Employer to recognize seniority. Seniority shall consist of the total calendar time elapsed since the date of original employment provided, however, that no time prior to a discharge for just cause or a quit shall be included and provided that seniority shall not be diminished by temporary layoff or leaves of absence.

. . .

3. Layoffs - When a reduction in personnel is necessary, the last person hired shall be the first person laid off and the last person laid off shall be the first person rehired provided said person has the ability to perform the work available.

. . .

ARTICLE V - GRIEVANCE PROCEDURE

Any dispute arising out of the terms of this Agreement shall be resolved in the following manner:

. . .

The arbitrator shall have no authority to modify, add to, subtract from or change any of the terms or conditions of this Agreement or any amendments or supplements hereto.

The arbitrator shall hold a hearing as promptly as possible and shall render his decision in writing, and the decision shall be final and binding on both parties.

The fees and expenses of the arbitrator shall be divided equally between the Employer and the Union.

. . .

ARTICLE XIV - HOURS OF WORK

1. The normal work day shall consist of eight (8) hours.

2. The normal work period shall consist of an alternate (6/2), (6/3) schedule. Effective March 15, 1985 the normal work period shall consist of an alternate (6/3), (6/3) schedule.

3. Shifts.

   a. Normal work scheduled shifts shall be:

7:00 a.m. to 3:00 p.m.
3:00 p.m. to 11:00 p.m.
11:00 p.m. to 7:00 a.m.

   b. Relief shifts shall be:
   7:00 p.m. to 3:00 a.m. (Summer time

during daylight savings time)
6:00 p.m. to 2:00 a.m. (Winter time before daylight savings time)
12:00 p.m. to 8:00 p.m.

c. Shift rotation and assignment shall remain on the same basis as the past practice.

4. Employees shall have an opportunity to pick their preference as to shifts on a seniority basis no later than November 1 for the subsequent year. The employee picking such shift shall work that shift except for emergencies or by mutual agreement between the officer and the Chief of Police. The Chief will have discretion to make temporary assignments to a scheduled shift for absences due to vacation, compensatory time, holidays, funeral leave, illness, and training of department officers. Such time will not cut into an employee's off time.

5. Officers will be allowed to change shifts and/or days off with one another if mutual agreement exists between officers, and approval by the Police Chief, or, in his absence, the Police Chief's designee is obtained. The officer trading who will be scheduled for duty after the approval will be responsible for his/her presence at the tour of duty.

ARTICLE XV - SICK LEAVE

No sick leave is accumulated or available during the first six (6) months of employment. Upon completion of said six (6) month period, each eligible employee has six (6) full work days credit. Further sick leave credit accumulates at the rate of twelve (12) scheduled work days per year (one (1) day per month) up to a maximum accumulation of one hundred (100) days. Effective July 1, 1983, employees may accumulate up to one hundred ten (110) days of sick leave. Use and payment for sick leave shall be on the following basis:

1. Sick leave may be used only for absences during which the employee is unable to perform his duties or for "medical appointments or medical treatments for employees with the department head's approval".

2. The department head, city clerk or department committee reserves the right to require a doctor's statement or other reasonable proof of illness. Such exercise of the reserve right shall be at no additional medical expense to the employee.

3. No payment will be made to the employee for unused sick leave time. Accrued vacation time can be applied to sick leave periods where the employee so desires to supplement sick leave.

4. No payment will be given for sick leave unless the employee notifies his supervisor at least one (1) hour before his scheduled work is to begin and keeps his supervisor informed of continuation of absence and when he will return to work.

a. If the supervisor cannot be informed, the Alarm Center shall be informed.

b. All sick leaves within a pay period must be reported to the City Clerk by the supervisors.

5. Sick leave terminates on the date of employee termination.

ARTICLE XVI - HOLIDAYS

1. All employees shall earn the following days off with pay - New Years Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, the day before Christmas and the day before New Years.

2. All employees shall be entitled to two (2) floating holidays to be taken at the employee's discretion with the approval of the department head.

3. When a holiday falls during a vacation or sick leave, the holiday will be used as equivalent time off.

4. When a holiday occurs during any period of ten (10) or more days of unpaid absence, no equivalent time off shall be given.

5. When an employee is absent without prior approval on the day before or after a holiday, no equivalent time off will be allowed. This shall not apply to cases of illness when the employee gave proper notice.

BACKGROUND

The grievant, Lee Pasket, had been employed by the City as a full-time officer for approximately two years prior to incurring a non-duty related back injury. Pasket had, however, worked part-time for the City previous to his full-time employment. In September of 1991, he sustained a serious back injury which his physician initially treated conservatively by prescribing bed rest and various medications. The grievant faithfully produced doctor's slips after each doctor's visit, approximately one slip every two weeks. These slips merely noted that he was suffering from lumbar disc herniation or lumbar radiculopathy and stated that he was totally incapacitated at the time. Because he had only been employed as a full-time employee for two years he used up sick leave during the first month of his convalescence and utilized his vacation days thereafter. From the second month, October, through December, the City carried him on the payroll and granted him a day of sick leave each month and holiday pay for Thanksgiving, Christmas, and New Year's Day.

He did not formally request to be placed on a leave of absence at any

time although he did try to speak to Chief of Police Ricky Sloan about his job security on at least one occasion. The record indicates that Pasket did not have many face-to-face conversations with either Sloan or Village Administrator Tom Karls about when he would be able to return to work. However, it is clear from the documents adduced at hearing and the testimony of Pasket and Sloan that whenever Pasket was aware of some change in his medical condition, he informed the City. The uncertainty which existed was largely due to Pasket's physician's inability to predict a recovery date for Pasket.

Pasket's condition did not improve dramatically in October and November. The City attempted to gain a status report from his doctor on November 8. Dr. Livermore confirmed the severity of the low back problems and stated that Pasket would be unable to be fully active in court proceedings for at least another six weeks and that his ability to return to work would be pending evaluation at that time. Partly at his urging, Pasket was scheduled for surgery on December 6, 1991.

At the time of Pasket's injury, and for the past ten years, the City has had only five full-time officers, although Sloan has attempted to secure permission for hiring an additional full-time officer. In addition to the five full-time officers, the City also utilizes approximately six part-time officers, one of whom asked the City to limit his work unless there was an emergency. The City, by early November, was having difficulty staffing around Pasket's absence. The testimony of Lieutenant Ronald Meyer established that it was very difficult to schedule work around Pasket's injury. One part-time employe, Jeff Hebl, offered to secure a leave of absence from his regular employer to address the City's staffing problem. He was granted the leave and became available in November.

December staffing had additional complications because of the holidays and vacations and the need for two officers on the street on New Year's Eve. Meyer was working on the January schedule in early December and could not fill Pasket's hours. He brought this to the attention of Chief Sloan by submitting a schedule with large blanks where Pasket would have been working. Sloan filled out another schedule slotting the four full-timers remaining in the first two weeks. Hebl then advised that he could get an extension on his leave of absence for another two weeks.

These actions prompted Sloan to discuss the scheduling difficulties with the City Council. Administrator Karls, at the direction of the City Council, wrote to Pasket's physician pointedly requesting a diagnosis of Pasket's injury, the prognosis concerning probable course of the injury and chances of recovery, a realistic date for Pasket to return to work, and any limitations which Pasket may have upon return. Dr. Livermore, by letter dated the same date, December 19, 1991, responded as follows:

> 1. Diagnosis: Lumbar 4-5 disc herniation.
> 2. Currently Mr. Pasket's recovery is going according to plan. General recovery from lumbar disc surgery is a minimum of 3 months of activity limitation. Depending on the patient's physical status, weight and motivation, this may vary. Typically recovery from lumbar disc surgery is complete and people are back to full activity including running, jumping and twisting activities in a 3-6 month period. Again, this is dependent on the patient's level of motivation, weight and ability to pursue a therapy regimen following resolution of the acute surgical change.

3. Hopefully within 3 months Mr. Pasket may be back to work.
4. Initially he would be limited from heavy bending, lifting and twisting, but by 6 months after surgery should be back to full activity without any permanent limitations.

The City Council met in special session on January 7, 1992. They decided that Pasket would be placed on unpaid medical leave. During the leave of absence Pasket would not receive salary or employment benefits. Upon recovery from a non-duty related back injury, Pasket will be recalled to fill the next available vacant police officer position within the Police Department. This decision was communicated to Pasket by letter dated January 7. It stated in pertinent part:

> Dear Patrol Officer Pasket:
>
> The City of Kiel requested and received a report from your physician regarding your non-duty related back injury of September, 1991. We appreciate your cooperation and that of Dr. Livermore throughout the past months.
>
> Dr. Livermore has advised us that your recovery from surgery is likely to take a minimum of three months. He has also estimated that your fitness for full activity without any permanent limitations could take six months. Dr. Livermore has indicated that these estimates are contingent upon a patient's level of motivation, weight and ability to pursue a therapy regimen.
>
> You are a valued member of the Police Department and the City wishes to fully cooperate and assist you in the course of your recover. It is now evident, however, that your return to duty as a patrol officer within the City of Kiel Police Department will not occur for an extended period of time. In view of the extended nature of your absence to date, the Police Department is no longer capable of meeting staffing requirements on the basis of a temporary replacement.
>
> The Common Council and Department Administration have considered a series of options through which to provide police protection within the City, during your recovery. Upon final consideration of the options, during its meeting of January 7, 1992, the Common Council voted to place you on an extended, unpaid medical leave of absence, pending your recovery and ability to return to unrestricted duty. Another full-time police officer will be hired and assigned to the vacancy, caused by your absence. Upon recovery, you will be recalled to fill the next available police officer position within the Police Department.
>
> Effective immediately, you are placed on unpaid medical leave. During the leave of absence you will not receive salary or employment benefits. However, you may continue your health insurance coverage during the leave of absence through payment of the applicable

> monthly premium. If you elect to continue your health insurance coverage, the first monthly payment is due on January 20th, 1992, for the month of February, 1992.
>
> . . .
>
> During your medical leave of absence it is important that you keep the Chief of Police and Common Council informed as to the status of your recovery, to include periodic reports from Dr. Livermore. We would appreciate hearing from either you or your physician at least once a month. As stated herein, at such time as your physician certifies that you are fit to return to duty, without limitation, you will be recalled to the next available vacant police officer position within the Police Department. If you have any questions regarding this matter, please contact either the undersigned, City Administrator, Thomas Karls, or Chief of Police, Ricky Sloan.

Hebl was then hired to work the 3-to-11 shift formerly worked by Pasket. Pasket grieved the City's action. He did, however, continue to submit medical slips regarding his medical condition per the City's request. The City, by letter dated January 30, denied the grievance and said in pertinent part:

> Please be advised, that it is the position of the City of Kiel that pending the unrestricted release of Officer Pasket to return to duty, further processing of this grievance is premature.

On February 19, Pasket's physician released him to return to work with a thirty-five pound lifting limit and no heavy repetitive bending. The City informed Pasket that it did not have any light duty work for him. On March 6, Pasket was released to return to work without limitations. He requested that he be returned to active duty. The City on or around March 12, denied said request and asked him to come in and clean out his locker and to return the Police Department's property. Pasket complied, having filed a second grievance contending that he was able to return on March 9. The City maintained its position that it was not required to reemploy Pasket at that time.

In May of 1992, the City did offer Pasket employment as a part-time officer at the rate of $8.90 per hour and without benefits. Pasket accepted such employment pending disposition of the instant grievances.

The parties consolidated both grievances for hearing before the undersigned.

POSITIONS OF THE PARTIES

City

The City argues that the Arbitrator is without substantive jurisdiction to determine the issues in this case. It claims that the parties have limited the authority of the Arbitrator to any dispute arising out of the terms of this agreement and that a dispute which does not arise out of the express terms of

the labor agreement is not subject to the grievance procedure, noting that the Arbitrator has no authority to modify, add to, or subtract from or change any terms of the agreement. Because the collective bargaining agreement is silent with regard to employment status after an employe exhausts sick leave benefits and is unable to work, the City alleges that it has no obligation to the grievant to return him to the position which he held prior to his extended absence. Given the lack of any such provision, the alleged wrongs of which the grievant complains, according to the City, do not arise under the terms of the agreement; and therefore, the arbitrator has no jurisdiction over the grievance under the terms of the limited authority conferred by the parties. In this regard, the City points to two published decisions of other arbitrators to support its contention.

The City maintains that the collective bargaining agreement did not restrict the authority of the City of Kiel to place the grievant on an uncompensated medical leave of absence. In taking this action, the City acted in a reasonable manner. It points out that the grievant's back injury caused him to use all available sick leave and that the City permitted him to receive additional days plus holiday pay which it was not required to do pursuant to the agreement. Prior to the decision of the City Council to place the grievant on an unpaid medical leave of absence, it stresses, a substantial degree of uncertainty existed as to the medical prognosis of the grievant and his likely return to duty, if ever.

Moreover, the City was experiencing considerable difficulty in temporarily filling Pasket's 3-to-11 shift. It asserts that by December 20, 1991, the City could not continue to operate without a fifth full-time police officer assigned to the regular work schedule. Because of these factors, the City urges the Arbitrator to find that the City Council acted reasonably in assessing the options available in reaching a decision with regard to the employment status of the grievant.

It strenuously disputes the Union contention that it was required to immediately reinstate the grievant upon receiving a medical release to return to duty. According to the City, its authority to adhere to a series of decisions taken on January 7, 1992 was unfettered by the collective bargaining agreement, and it has scrupulously adhered to the terms of the January 7, 1992 City Council action because the grievant remains available for appointment to the next full-time officer position.

The City makes additional arguments to address the stipulated issues posed to the Arbitrator. Nothing in the agreement, it alleges, restricts the authority of the City to continue to employ part-time patrol officers during the period of time that the grievant is not employed on a full-time basis. It argues that neither the terms of the contract nor any past practice between the parties requires that the work, assigned to part-time officers be reassigned in order to create a new full-time position. The employment of part-time officers, it asserts, has continued for so many years that it must be recognized as a matter of past practice within the labor relations context. Nothing in the contract establishes a priority on the part of full-time employes in the matter of assignment of work, nor does it require that all full-time employes be guaranteed forty hours of work per week before hours may be assigned to part-time employes.

Citing additional arbitral precedent, the City avers that the majority view among arbitrators is that an employer may act with regard to absenteeism, even when such absence is the result of legitimate illness or injury in the interest of the operation of its business. It further argues that this grievance should not be decided on the basis of the Wisconsin Family and Medical Leave Act and that said act was not violated in any respect with regard

to the grievant.

In response to additional arguments advanced by the Union, the City claims that the sixth paragraph of Article VIII - GENERAL PROVISIONS, is inapplicable and does not control the issues in this case; specifically, it does not confer jurisdiction on the arbitrator. The City notes that the grievant did not submit a request for additional leave and that, in any event, leave under Article VIII is discretionary. Furthermore, according to the City, had the grievant applied for additional leave, this would not have guaranteed. It submits that the grievant was not disciplined or discharged through the decisions of the City Council nor was he guaranteed his position by the Chief of Police or the City Administrator. The City maintains that it was not required to undertake the series of actions identified by the Union, necessary to hold the grievant's position open. It requests that the grievances be denied and dismissed in their entirety.

Union

The Union makes basically two arguments. It claims that the City violated Article VIII - General Provisions, the personal leave provision. Claiming that, from September to the end of December, Pasket was assured by his department head, Sloan, and the City Administrator that there was a job for him, the Union argues that ipso facto, Pasket applied for a leave of absences and was granted one. Citing the ordinary meaning of the term "leave of absence", the Union stresses that clearly a leave of absence denotes a job at the end of such a leave. It argues that, pursuant to Article VIII, the City is required to give such a leave unless it has deemed it unjustifiable. The Union maintains that the leave set forth in Article VIII is not discretionary if it is justifiable, noting that recovery from back surgery is justifiable.

According to the Union, almost immediately after the operation, without granting any healing time, the City in effect discharged Pasket, which it may not do under the just cause provision of the collective bargaining agreement. It claims that the City placed the grievant in the same position as if he were a person from the outside who is promised an opening. This, it asserts, is not the intent of a leave of absence.

The Union contends that Pasket cooperated in all respects with the City's request for information and made extreme attempts to recover, including losing forty-five pounds. It submits that the City cannot justify its action to leave Pasket without a job saying it had no options. It points out that there were other options and the City chose the wrong one, an option which violated the agreement. To support this argument, the Union stresses that the 3-to-11 shift is an easier shift to fill because part-time personnel are almost done with day jobs and still have time to sleep. Any limitation on part-time hours worked to keep an employe from working in excess of 600 hours is self-limiting, it asserts. According to the Union, a choice was made not to offer Pasket's hours to full-timers as overtime. It also notes that because there is no limit on the number of part-time personnel that the City could hire, the City could have hired additional part-time employes. It takes approximately one month to train these employes. The Union also points to the fact that the department has had an unfilled sixth position for years which it could have filled or it could have requested Hebl to try to secure another leave from his regular employer until Pasket could return on light duty. The Union feels that keeping Pasket on a true leave of absence was not unreasonable. This is especially true in light of the City's past treatment of another officer, Tony Miller.

The Union's second argument involves the interpretation of a clause in Article VIII which provides part-time, seasonal or temporary employes shall not be employed as a means of displacing regular full-time employment. It is the

Union's position that Pasket should have immediately been returned to his job on March 6, 1992 and that the City violated the contract when it continued to have part-timers work hours that could have been given to Pasket.

In its reply brief, the Union makes several additional arguments. It asserts that the arbitrator has the authority to resolve all issues before her, citing the personal leave provision referred to in Article VIII above. It claims that the Union has never waived, by past practice, the use of part-time officers instead of full-time officers, pointing out that this is the first time a full-time officer is completely unscheduled while part-time officers are working. It argues that what the City has done is improperly lay-off the grievant while retaining the probationary employe, Hebl, who replaced him. This, it avers, is contrary to the seniority clause of the agreement. The Union, citing arbitral precedent, argues that if the contract has seniority provisions, a worker returning from an approved sick leave may be entitled to a job over the person hired to replace him. The Union submits that the layoff provision in the agreement should apply.

The Union distinguishes the cases cited by the City to support its contention that the arbitrator has no substantial jurisdiction as not pertinent to the instant situation because these cases refer to employes with more than one episode of absence from work.

Finally, the Union alleges that under the Family Medical Leave Act, the grievant would have been guaranteed a job at the end of a medical leave. It requests that the grievances be sustained and that the grievant be reinstated and made whole for all losses incurred.

DISCUSSION

The Union requests the undersigned to consider whether or not the City by its actions violated the Wisconsin Family and Medical Leave Act. The City expressly refused to stipulate to the issue of whether or not the Family and Medical Leave Act was violated. It objects to the arbitrator's consideration on any basis other than whether the collective bargaining agreement has been breached. Absent some stipulation by the parties empowering the arbitrator to consider the public policy or other statutory issues, arbitrators generally decline to consider auxiliary issues of this nature. Because the undersigned draws her authority expressly from the parties' collective bargaining agreement, which provides that the "arbitrator shall have no authority to modify, add to, subtract from or change any of the terms or conditions of the Agreement", the arbitrator expressly declines to consider whether or not the City violated the Wisconsin Family and Medical Leave Act. She limits her discussion to determining whether or not the collective bargaining agreement has been violated.

The City, citing two arbitration decisions, Atlantic Building Systems, Inc., 80 LA 369 (1983) and Southside Electric Cooperative, Inc., 80 LA 1136 (1983), argues that the undersigned is without jurisdiction to determine the substantive merits of the dispute. In Atlantic Building Systems, Inc., the arbitrator found that very narrow language which restricted arbitration to disputes involving the interpretation and application of the agreement existed. Upon examination of the applicable agreement he concluded that there were no language provisions which would limit the employer in any way from what generally has been held to be an inherent right of management, namely the right to require medical certification including physical exams, of employes returning from sick leave, absent language restricting such a right. Based on these findings, he concluded that he had no substantive jurisdiction to hear the dispute. In Southside Electric Cooperative, Inc., another arbitrator, again looking at narrow language defining a grievance and being unable to find

any specific provisions which the Union had alleged to be violated, held that he had no jurisdiction because the act aggrieved was not controlled by the labor agreement.

The instant case can clearly be distinguished from these cases cited by the City. While the Arbitrator is limited in her consideration to the terms of the agreement as noted above, Article V subjects any "dispute arising out of the terms of the agreement to the grievance procedure." Moreover, unlike the two cases cited above, the instant collective bargaining agreement contains two specific provisions, the interpretation of which will affirmatively decide the dispute. From the briefs of the parties, it is clear that they disagree as to the meaning and application of both of these provisions; namely, Article IV, 1. and 3., and Article VIII. The parties also disagree as to their application to the instant dispute. Given the existence of the two provisions, the interpretation of which will likely resolve the instant dispute, the undersigned finds that she possesses substantive jurisdiction to entertain the merits of the dispute.

Turning to the merits, the dispute focuses upon the City's decision to place the grievant upon involuntary unpaid medical leave, fill his position, and promise him the next available job should he become able to return to his employment. The undersigned agrees with the assertion of the City that prior to the decision of the City Council to place the grievant on leave, a substantial degree of uncertainty existed as to the grievant's medical prognosis. At the time of its December inquiry, the grievant's physician was unable to say with specificity when the grievant would be able to return, estimating that recovery could take up to six months. Given the small number of full-time employes comprising the police force in the City of Kiel, the undersigned concurs with the City's contention that it was experiencing difficulties filling Pasket's shift.

Having concluded that substantial uncertainty did exist as to when the grievant could be expected to recover and that the City was experiencing difficulty in filling Pasket's shift, the City's action must, nevertheless, be viewed in light of the applicable contract language. The Union argues that the Article VIII provision entitled "Personal Leave" mandates that additional leaves be granted if the employe has a justifiable reason for the leave, strenuously asserting that recovery from a back operation is justifiable under the circumstances. The Union is incorrect in this assertion. The Personal Leave provision merely permits employes to apply for additional leave if they have justifiable reasons, but does not mandate that the department head approve or grant additional personal leave. Nothing in Article VIII restricts the City's discretionary right to place the grievant voluntarily or involuntarily on unpaid medical leave nor compels the City to grant same. Nor can the undersigned find any other provision of the agreement which requires the City to grant such a leave.

Absent express language either requiring the employer to grant an unpaid leave or restricting it from doing so, the City's action of placing Pasket on an unpaid medical leave did not violate any provision of the agreement.

The City's decision to hire another employe to work on Pasket's shift is, likewise, well within its prerogative pursuant to Article II, the Management Rights clause. Because there is nothing in the agreement inhibiting the City's right to hire additional employes, there was nothing wrong with its decision to hire Hebl to work Pasket's shift. The first grievance and subsequent second grievance really center around whether or not the City could, at the time it placed Pasket on unpaid medical leave, also deprive Pasket of his seniority if and when he was fully released to return to work. (Emphasis added.) The first issue posed by the parties is "whether the City violated the contract by

placing Pasket on an unpaid leave without guaranteeing him a position to return to?" If the phrase "without guaranteeing him a position to return to" means "without holding open a position for Pasket to fill if/and/or when, he becomes able", the City did not violate the contract by filling Pasket's shift with Hebl. It did not need to "guarantee" Pasket a position at that time because the needs of the department were great and the date for Pasket's return was speculative. It does not, however, follow that the City was free to disregard Pasket's seniority in future contemplation of a date when he might be released to return to work.

The City, in its January 30, 1992 grievance response essentially admits just how premature this decision was in the last paragraph. It stated that until Pasket had an unrestricted medical release to return to duty, it believed further processing of the grievance to be premature.

The City did not elect to terminate Pasket, and that question is not before the undersigned. It is clear from the City's January 7 letter instructing Pasket to continue to advise City officials of his medical status that he was placed upon a medical leave and retained as an employe. The agreement anticipates just such an action and contemplates situations where employes will be granted leaves of absence by the City. Article IV - the seniority provision, in defining seniority, provides that "it shall be the policy of the Employer to recognize seniority. Seniority shall consist of the total calendar time elapsed since the date of original employment provided, however, that no time prior to a discharge for just cause or a quit shall be included and provided that seniority shall not be diminished by temporary layoff or leaves of absence." (Emphasis added.) This provision has particular meaning in the instant contest in that it preserves seniority rights for employes on leaves of absence vis-a-vis newer hires. Having opted to keep Pasket in employe status, the City was not free to deprive him of his seniority rights vis-a-vis a newly-hired employe, without violating Article IV, Section 1.

Unless or until Pasket secured a full release to return to work from his doctor, any action on the City's part was speculative. However, once Pasket notified the City that he was fully released and able to return to work, he was no longer on medical leave and still in employment status. The City then had six full-time personnel for five full-time positions. By refusing to permit Pasket to return to a full-time position on March 9, 1992, the City laid him off out of order. It was not free to disregard Article IV, Sections 1. and 3. in making its decision. The City was obligated to recognize Pasket's seniority once he presented himself as fully able to return to work with medical certification. Any implied commitment of fairness to Hebl, the replacing officer, is subordinate to the dictates of the agreement.

In light of this determination that the City violated the collective bargaining agreement by denying Pasket the opportunity to return to a full-time position to which he held prior to his injury, it is unnecessary to address the third stipulated issue and the undersigned expressly declines to do so.

Based on the foregoing, it is my decision and

AWARD

That the City of Kiel did violate the terms of the collective bargaining agreement by denying Patrol Officer Lee Pasket on March 9, 1992, the opportunity to return to a full-time position which he held prior to his injury of September 1, 1991.

The City is ordered to reinstate the grievant immediately to a full-time officer position and to make him whole for any loss of wages and benefits which he suffered as a result of the City's failure to reinstate him on March 9, 1992, less interim earnings.

Dated at Madison, Wisconsin this 10th day of November, 1992.

By Mary Jo Schiavoni /s/
Mary Jo Schiavoni, Arbitrator

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