BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
LOCAL 569-A, AFSCME, AFL-CIO	:	Case 24 No. 46907 MA-7101
and	:	
CITY OF MAUSTON	:	

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Jon Anderson, Godfrey & Kahn, S.C., Attorneys at Law, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear a grievance filed by Susan Bosgraaf regarding returning to work following an injury covered by Worker's Compensation. A hearing was held on October 29, 1992, in Mauston, Wisconsin, and the parties were given full opportunity to present their evidence and arguments. The parties completed filing briefs by October 21, 1993.

BACKGROUND:

The Grievant is Susan Bosgraaf, who has been employed as a utility clerk with the City for 15 years. Her main responsibility was to handle water and sewer bills. Her job entailed handwriting, filing, entering data on computers, typing, 1/ duties at the office window, taking complaints, receiving payments, researching bills, etc.

Utilities were billed on a monthly basis, and meter readings were entered into the computer for roughly one-third of the customers with the other two-thirds being estimated for usage. The Grievant estimated that it took about two hours to put in all the new meter readings every month. That estimate of two hours per month was for work done on the City's IBM computer, and not the current Unisys computer used by the City. She estimated that it took anywhere from one day to one week to enter address changes on the computer. She estimated that she spent about a day or a little more on writing in long-hand changes on meter cards. The Grievant used a typewriter about a half day or a whole day per week to type assessments, resolutions, ordinances, and matters for her supervisor, the Director of Public Works.

During January and February of 1991, the Grievant was asked by her supervisor to work continuously on the computer to get the utility billing up and running on a new Unisys computer. The Grievant was instructed in early 1991 to do nothing else but get the utility billing on the new computer system, and her other duties were taken away and given to other personnel. This was the only period of time when her duties required that she work full time on a keyboard.

After working on the computer continuously for approximately three

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1/ The term typing as used here will include both typing at manual or electric typewriters as well as typing on a computer keyboard.

months, the Grievant experienced pain in her right wrist and thumb area. She saw an orthopedic specialist, Dr. Michael Plooster, who told her she had tendonitis. The Grievant filed a Worker's Compensation loss report, noting the injury date as April 19, 1991, and the date she returned to work as April 22, 1991. Initially, Dr. Plooster placed no restrictions on the Grievant's working conditions.

On May 7, 1991, the Grievant saw Dr. Plooster and was returned to work with no limitations. On May 21, 1991, Dr. Plooster stated on a return to work recommendations form that the Grievant was totally incapacitated and would be re-evaluated on May 29th. The Grievant did not work again until May 30, 1991.

On May 29th, Dr. Plooster placed certain limitations on the Grievant's work -- stating that she was allowed sedentary work, no keypunching, lifting, typing, pushing, pulling, or repeated grasps with her right hand. However, in another area of the form, he checked off boxes which stated that the patient (grievant here) could frequently use her hands for repetitive grasping, turning, pushing, pulling, reaching, and fine manipulation.

When the Grievant returned to work on May 30, 1991, she was asked by the former City Administrator Bruce Bierma to go through reports that the City generated in her absence to see if they were correct. She worked on May 30th and May 31st with no problems. She did not use a typewriter or computer during those two days. About 4:00 p.m. on May 31st, Bierma gave the Grievant the following letter:

> The purpose of this letter is to inform you that when you are finished with your current task of reviewing the utility bills, you need not return to work until one of the following events occurs:
>
> 1. You receive a full release from your doctor to return to work, without any of the current limitations; or
>
> 2. The City contacts you to perform work within your current limitations.
>
> As you know, you were released to return to work by your doctor, but with extensive limitations. These limitations do not permit you to do the duties of your job position. The City currently does not have a job position that fits within the limitations imposed by your doctor. We had you return to work on Thursday and Friday, May 30 and 31, for the purpose of reviewing the utility bills, which were within the limitations set by your doctor.
>
> We have notified the City's worker's compensation insurer of the foregoing and we understand that you will continue to receive worker's compensation benefits while you are off from work, subject to any legal limitations or defenses available to the City or its insurer.

The Grievant testified that she requested to use vacation time which apparently was refused.

Sharon Krell is a claims correspondent for Heritage Insurance and handled the Grievant's worker's compensation claim. On June 5, 1991, Dr. Plooster

advised Krell that the Grievant's diagnosis was cumulative trauma disorder, right upper extremity with sub type de Quervain's tendonitis of the wrist, a condition that came about due to repetitive hand labor at her job.

The Grievant remained off work on worker's compensation until June 13, 1991. On June 11th, Dr. Plooster recommended she return to work defined as light medium work, with some limitations on repetitive use of her hands for grasping, pushing, pulling and reaching. On June 12th, Bierma gave the Grievant a note stating that the City had evaluated her doctor's statement and that she could return to work on June 13th.

When she was re-evaluated by the doctor on July 2, 1991, he put her back to sedentary work instead of light medium work, but she was allowed less of a restriction on the repetitive use of hands for reaching -- she was allowed to use hands frequently for reaching, instead of occasionally as in the previous report. The Grievant continued to work through July and August without missing work except for doctor's appointments or vacation time off. On August 13, 1991, she saw Dr. Plooster who then changed the sedentary work restriction to light work and left repetitive hand usage the same as in the previous recommendation.

On August 27, 1991, 2/ the Grievant was examined by Dr. Plooster who changed her restrictions to light medium work, allowed fewer repetitive hand motions, and made a notation of "tendon release right wrist on 9-5-91" which indicated that the Grievant was to have a surgical procedure done on her wrist on that date.

The Grievant had this surgery performed on September 5, 1991, and Dr. Plooster indicated that she was totally incapacitated. She remained totally incapacitated when re-evaluated on September 13th. On September 25, 1991, Dr. Plooster allowed her to return to work on September 30th, light work, with a couple of restrictions on repetitive use of hands occasionally for grasping and pushing and pulling. The Grievant returned for a couple of days.

On October 2, 1991, the Grievant signed an injury report describing a reinjury to her right wrist, with the following description of what happened to cause the injury:

> I was back to work on Monday 9-30-91 writing and keypunching computer to correct water/sewer bills. On 10-2-91 my supervisor, Ken Tulley, instructed me to type an approx 18 page report. During the course of typing my arm was getting cold and numb. I called my

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2/ The top portion of the doctor's report indicates the date as August 27, while the date by his signature shows a date of August 21st. In a report prepared by the City, the City used the date of August 21st, while the City's attendance records show that the date was more likely the 27th. There are several inconsistencies in the doctor's reports, none of which are dispositive of this dispute, but which create some confusion to anyone reading this record.

> Dr. and he talked to my supervisor, Ken Tulley. My Dr. instructed me to leave work & rest my wrist and see him on 10-3.

The Grievant described the 18 page report as a handwritten document that she had prepared and that Tulley wanted typed. She did not complete the typing of that report.

When the Grievant saw her doctor on October 3, 1991, he found her to be totally incapacitated. She was treated again on October 9, 1991, and Dr. Plooster allowed her to return to work but limited typing to 1/2 hour sessions and two hours maximum per day, with the use of her hands for repetitive motions occasionally. On October 11, 1991, Mayor Larry Taylor wrote the following letter to the Grievant:

> The City is in receipt of your of your doctor's report dated 10/9/91. As you know, your doctor authorizes you to return to work on 10/14/91 but with various restrictions regarding typing. Because these restrictions will prevent you from performing a substantial portion of your job duties, you are hereby notified that you need not return to work until these restrictions are lifted by your doctor, or until the City contacts you.
>
> If you have any questions regarding the foregoing, feel free to contact Mr. Tulley or me.

Despite the City's determination noted above, the Grievant believed that she could both follow the doctor's restrictions and perform her job. Although the Grievant is right handed and her injury was in her right wrist, she felt she could use her left hand for typing, albeit not at the same speed as with both hands in motion.

The Grievant saw the doctor on October 30, 1991, and he recommended that she return to sedentary work with typing limited to 1/2 hour sessions and no more than two hours a day. The recommendation was similar on November 20, 1991. Since the City did not agree that the Grievant could return to work, she remained off duty during October, November and the first part of December, 1991.

An occupation therapy initial evaluation was performed by Kirsten Oleson, and in Oleson's report dated November 26, 1991, she stated that the Grievant was instructed to change her work environment to decrease the chance of reinjury, and that the Grievant and the therapist discussed proper work height, an adjustable chair, a wrist rest for the keyboard and typewriter, a wrist splint, a built-up handle for pens and pencils, taking rest breaks, and exercises. The Grievant asked her supervisor, DPW Director Kenneth Tulley, and deputy treasurer Eileen Powers to provide her with a wrist rest for the keyboard and typewriter. The Grievant did not see it while she was still at work.

On December 4, 1991, Dr. Plooster recommended that the Grievant return to work, with the only restriction listed as sedentary work. Mayor Taylor called the Grievant at home and asked that she return on December 9th. She asked him to put it in writing, and he wrote the following:

> The City is in receipt of your doctor's report dated December 4, 1991.
>
> As you know, your doctor has authorized you to return to work under the restriction of sedentary work

as per your doctor's release form.

In our opinion, sedentary work doesn't conflict with your normal duties.

Unless you feel that there is any reason you cannot fulfill your normal work duties, you may return to work December 9, 1991, and resume your normal duties.

The Grievant worked four hours on December 9th, she was sick on December 10th, she worked three hours on December 11th, five hours on December 12th, and five and one-half hours on December 13th. Except for December 10th, the hours missed were compensated as worker's compensation, as the Grievant had therapy scheduled two to three times a week. She missed a few hours of work on December 16th, 18th and 20th, again for therapy sessions. On December 27th, 1991, she saw Dr. Plooster again, who noted that she could return to sedentary work with occasional repetitive use of her hands and intermittent use of her right wrist, and the same restrictions remained on January 3, 1992.

The Grievant was also examined by another doctor at the request of Heritage Insurance. Dr. John Siegert performed the examination, and recommended that the Grievant be allowed to return full time doing secretarial duties, but recommended a maximum of three hours of typing and/or computer data entry work per day as temporary restrictions.

Joan Boyer started her position as City Administrator on January 3, 1992. Boyer immediately looked at the operations of the office and the office staff on the morning of January 3rd. Boyer was aware that the Grievant had a worker's compensation injury. She gathered up records on the Grievant and listed them in a chronological order to chart out the pattern of work, injury, and doctor's restrictions.

Boyer's analysis of the Grievant's condition showed that every time the Grievant returned to work, she became worse and that work was causing and making the problem worse. Boyer decided that the Grievant should not work until she was completely released by the doctor with no restrictions. Boyer testified that she thought the City was taking too great a risk by allowing the Grievant to come back to work and was concerned about the City's liability as well as the Grievant's injury. Boyer also needed to have a full staff available, due to the work needs of the office.

On January 6, 1992, Boyer gave the Grievant the following letter.

John Orton, City Attorney, has spoke with your doctor on Friday, January 3, 1992, regarding the injury to your right wrist. Subsequent to that conversation Mr. Orton contacted me to fill me in on the history of your injury and the City's past and present concerns, late Friday afternoon.

Dr. Plooster described your injury as "cumulative trauma disorder" and your limitations as not doing repetitious work without breaks. Based upon your physicians findings and the fact that your job duties require consistent repetitive work, beginning at 12:00 P.M. today you should not return to work until Dr. Plooster removes the restrictions that the City of Mauston finds objectionable.

> I am very concerned for your health; however I must also assure that the duties of your position be accomplished uninterrupted. If you should have any questions, do not hesitate to contact me immediately.

The Grievant has not worked for the City since January 6th, 1992. She had not worked for any other employer at the time of the hearing.

On January 28, 1992, Boyer sent the Grievant the following memorandum:

> I contacted Dr. Plooster's office on 1-27-92 in an attempt to discuss the restrictions he has placed upon your release to return to work. The doctor's office manager was the only person I was able to speak with as your doctor refused to speak with me regarding your injury. I was also told that he had decided he would not talk to me in the future either as this was now going to be his set policy. This of course leaves me with no choice but to require that you continue to remain off work until such time that your doctor releases you back to work with no restrictions.
>
> The office manager did say that your condition had not improved. She agreed to send me the dictation from your office visits. I received that dictation; and, it confirms her statement.
> It is my understanding that you will return to see Dr. Plooster on March 18, 1992. I will consider your status again following that appointment.

Dr. Plooster signed return to work recommendations on January 24, February 19, May 13, June 1, July 6, and October 5, all in 1992. The January 24th form indicated the Grievant could perform sedentary work, that she could use her hands for repetitive motions occasionally, with intermittent use of her right hand. The February 19th form indicated only sedentary work and listed no other limitations. The May 13th form again indicated sedentary work, and occasional use of hands for repetitive motions, and the June 1st form indicated sedentary work could be performed. The July 6th recommendation was to perform light medium work with a notation to avoid rigorous work with the right hand.

Dr. Siegert, who performed the independent medical examination requested by the Heritage Mutual Insurance Company, saw the Grievant on September 9, 1992. He concluded that the Grievant was capable of work but that he believed she would not be capable of full time keyboard duties nor capable of highly repetitive strenuous activity involving the right hand, such as gripping, pinching, etc. He recommended that a function capacity examination be carried out, which was done on September 30, 1992, by a physical therapist, Vicki Graziano. Graziano recommended that the Grievant should be able to function with a minimum of an increase in symptoms in a clerical position as limited by her doctor.

The Grievant filed three grievances -- on June 21, 1991 and on January 20th and March 6th of 1992 -- all of which grieved not being allowed to work and are the subject of this arbitration.

On March 30, 1992, Dr. Plooster sent Krell a letter stating that the Grievant was on work restrictions as outlined in his return to work recommendations record, and that she had not reached a healing plateau.

While the Grievant was still working in City Hall, there were two and a

half secretarial positions -- her own as utility clerk and secretary to DPW Director, a deputy clerk-treasurer position (Powers' position), and a part-time HUD secretary. Powers performed the confidential labor relations secretarial work. The Grievant was active in the Union, serving as vice-president and active in contract negotiations.

Boyer was concerned about the lack of a check and balance system in the front office, because the City Administrator was allowed to decide what was to be purchased, take bids, write purchase orders, approve them, write and sign the checks and do the books. It took approximately six months after Boyer started for her to restructure the office and give certain duties to the deputy treasurer to create more accountability in the office.

The Grievant received a letter that the City was implementing certain changes in the office on August 31, 1992, to create the position of deputy clerk, deputy treasurer and confidential secretary. The City further notified the Grievant that her position no longer existed and that she was being laid off as of August 31, 1992. The Grievant received severance pay. The Grievant filed a grievance challenging the layoff. The Grievant also filed a grievance over the City's refusal to allow her to bump into another position. The parties have other ongoing litigation, such as a unit clarification procedure, over the reorganization of the city office positions.

ISSUES:

The Union frames the issue as follows:

> Did the Employer violate the collective bargaining agreement when it refused to permit the Grievant to return to work or to continue to work? If so, what is the appropriate remedy?

The City raises the following issues:

> Are the grievances subject to arbitration under the labor contract?
>
> If the answer to the first issue is yes, did the City violate Article XXII of the labor contract when it refused to return the Grievant to work following a Worker's Compensation injury?
>
> If so, what is the appropriate remedy?

THE PARTIES' POSITIONS:

The Union:

The Union asserts that the City constructively discharged the Grievant from her job on January 6, 1992, when the Grievant was told at about noon that day to go home and not to report for duty until all restrictions on activities were removed by the physician placing such restrictions. The City did not take into consideration just what the restrictions were, and how they related or failed to relate to the Grievant's work. The Union further contends that the City's intent to sever the Grievant's employment on a permanent basis is confirmed by its later restructuring of City Hall office positions so that the Grievant's position no longer existed, as well as the City's action in issuing the Grievant severance pay and its refusal to allow the Grievant to bump into any other position with the City. The Union submits that the just cause standard found in Article II of the bargaining agreement must be applied, since

this is a discharge whether or not the City wants to call it a discharge.

The Union argues that the City must prove that the Grievant was either unable to perform her duties or that the performance of her duties represented a hazard to herself or to others. The City used the latter reason, stating that it believed that permitting the Grievant to continue to work would make her condition worse.

The Union notes that while the City submitted an exhibit (#49) to support its claim that it made a reasoned decision, the new City Administrator, Boyer, could not have relied on that exhibit to make her decision because that exhibit could not have been created until after Boyer sent the Grievant home on January 6, 1992. Boyer took most of the morning of January 3, 1992, to prepare the first page of the document. An entry on that document, referring to October 2, 1991, contains knowledge that Boyer would not have known until three weeks later when she received the doctor's dictation referring to the October 2nd problem. The Union suspects that Boyer wanted to get rid of a "troublesome" employee, who was the vice president of the Union and the source of numerous pending grievances.

There was no justification to send the Grievant home based on medical evidence, the Union asserts. The original injury occurred when the Grievant was given a work assignment that was markedly different from her normal duties. It was not clear how long it would take her to recover. After her surgery, DPW Director Tulley assigned the Grievant an unusual typing task which required her to sit at a typewriter for a long period of time without a break. After several hours, the discomfort returned to the Grievant's hands and she asked for a different assignment, but Tulley refused. The Union contends that there was no purpose in having this list typed, and that Tulley never had anyone finish the typing project after the Grievant left work, leading to the conclusion that it was a phony assignment cooked up by Tulley to cause the Grievant pain.

Furthermore, the Union points out that from the time the Grievant returned to work in December of 1991 until she was sent home in January of 1992, there was no sign that she suffering any recurrence of problems due to her work. The medical professionals stated that a return to normal clerical duties would not present any problems to her condition. Dr. Siegert recommended on December 13, 1991, that the Grievant return to full time secretarial work with three hours typing work per day, which was consistent with her duties. This was the most thorough assessment of the Grievant's condition prior to the decision to send her home. The Grievant could also take her breaks in accordance with the bargaining agreement and never exceed two hours of typing. While Boyer concluded from Dr. Plooster's notations that the Grievant's condition was swinging from better to worse and back again, it is obvious that the doctor occasionally neglects to fill out the form completely.

The Union concludes that the City's actions amount to a constructive discharge, and there is no cause for this discharge. The Union asks that the Grievant be restored to her former position and be made whole for all losses incurred as a result of the City's violation of the contract.

The City:

The City asserts that the grievances are not subject to arbitration under the labor contract. The Grievant's claims are exclusively premised on the City's refusal to permit the Grievant to return to work with work restrictions. These issues relate to a refusal to rehire following a worker's compensation injury and are governed by state law pertaining to worker's compensation. The Grievant's injury arose as a result of her job duties and is the type of injury that the Worker's Compensation Act was enacted to address. In passing the

Worker's Compensation Act, the legislature provided that the Act would be the exclusive remedy for complaints arising out of injuries covered by the Act in Sec. 102.03(2), Wis. Stats. A refusal to rehire is addressed in Sec. 102.35(2), Wis. Stats. In Norris v. DILHR, 155 Wis.2d 337 (Wis.Ct.App. 1989), a plaintiff claimed that an employer refused to rehire him because of his back injury incurred on the job and mental retardation. The Court found that the Worker's Compensation Act provided the exclusive remedy for the refusal to rehire because of a job related injury, even if the injury is perceived as a handicap. This case mirrors the grievance, where the Grievant has alleged discrimination. The Norris case was confirmed in Schachtner v. DILHR, 144 Wis.2d 1 (Wis.Ct.App. 1988), where again the Court made it clear that the only remedy for job related injuries lies in the worker's compensation system.

Additionally, the City submits that the Grievant has not demonstrated that the labor contract provides employees with any recourse other than the worker's compensation law. The contract language does not address an employee's return to work following an injury. In County of LaCrosse v. WERC, 174 Wis.2d 444, an employee filed a grievance alleging termination without just cause after being injured on the job and the employer relieved her from her position due to her inability to fulfill her job description. The Court found that the employee's complaint was not subject to arbitration, that the exclusive remedy was under the Worker's Compensation Act, and while nothing prevents an employer and employee agreeing by contract about rehires following job injuries, the worker's compensation law is the exclusive remedy in the absence of such a contractual provision.

The City points out that the Court in LaCrosse also stated that a matter pertaining to an issue not relating to the labor agreement was not subject to arbitration under the contract language. The arbitration clause in the contract at issue here provides a similar limitation, that the grievance must relate to the interpretation or application of the agreement. The Court in LaCrosse found that the management rights clause allowed the employer to discharge for proper cause, but since proper cause was not defined in the labor contract, termination of an employee injured on the job did not fall within the definition of proper cause. The Court concluded that while the parties could have bargained for such protection or benefit, it was not to be inferred in the contract. The contract language before the arbitrator is similar to that in LaCrosse. Therefore, the arbitrator is without jurisdiction.

The City declares that it has not violated Article XXII, and there was no testimony at the hearing dealing with this claim. The City fulfilled its obligation by contract for covering employees for worker's compensation and paying a supplement, which is not at issue here. Moreover, the City argues that it was within its reserved management rights to tell the Grievant not to come back until she was able to perform her duties. Article II allows the City to relieve employees from duty because of lack of work or for any other reason. The City determined that to allow the Grievant to continue working could jeopardize her healing and expose the City to liability should she be reinjured on the job. When the grievances were filed, the City had no indication that work restrictions had been removed and had not received a return to work form without restrictions from the Grievant's doctor.

The City asserts that arbitration cases state that an employer has the final say in whether an employee is ready to return to work, unless restricted by contract. Arbitrators hold employer's decisions to a reasonableness standard. The Grievant was not able to adequately perform her regular duties, based on work restrictions placed on her by her doctor. It put a burden on other employees in a small office. The City was concerned about the Grievant reinjuring her wrist and what liability the City would then have. Unless limited by contract, the City is the sole judge of the Grievant's ability to

return to work. There is no contractual language limiting the City's prerogative to determine when an employee is able to return from a worker's compensation injury. The City's decision was reasonable, given the doctor's letter stating that the Grievant had not reached a "healing plateau" and the City had no satisfactory return to work form ensuring that the Grievant would not further injure her wrist.

New allegations raised at the hearing are untimely and without merit, according to the City. The Union alleged that the City constructively discharged the Grievant, due to the subsequent layoff of the Grievant which resulted from a restructuring of the City office. The Union further alleged that the City failed to provide the Grievant with a reasonable accommodation under the American with Disabilities Act (ADA). These allegations were not raised or discussed at the lower levels of the grievance process, and are without merit.

While the Union relies on a reorganization of positions within the City's office to support its allegation of constructive discharge, the reorganization plan was not presented to the public works committee until June of 1992, well after the grievances in this matter were filed. Moreover, the Grievant was laid off, not terminated, and the Grievant told the unemployment office that she was laid off.

The City had no obligations to the Grievant under ADA, which did not become effective for employers with 25 or more employees until January 26, 1992, after the timing of these grievances. The City's reason for not allowing the Grievant to come back was not that she was disabled and needed an accommodation, but that she had not reached a point of healing where continuing to work would not reinjure her.

The Union's Reply:

The Union disputes that the cases cited by the City -- particularly the Norris and Schachtner cases -- are relevant, because those cases did not address the issue here, whether a grievance under a labor agreement is arbitrable where the claim is that a grievant was refused the right to return to work following a work related injury. The Union further notes that the labor agreement in the LaCrosse County case is substantially different from the labor agreement in Mauston.

In LaCrosse, the Court found that the parties did not necessarily intend that all grievances be arbitrable, and that the question of whether the case before it was arbitrable hinged on whether an interpretation of any part of the agreement could support a conclusion that the termination of the grievant violated the contract. The LaCrosse contract provided for laying off employees "due to lack of work or economic cutbacks," which did not apply to disability layoffs. Thus, the layoff language did not vest the arbitrator with the

authority to rule in that case. The language here applies "when it becomes necessary to lay off employees." Therefore, the arbitrator may determine whether the layoff was "necessary" and if so, whether the City gave the Grievant the benefits of that procedure.

The Union points out further differences in the language of the instant contract and the language of the LaCrosse contract -- differences in the seniority clause, the just cause standard, and the termination clause. The Court in LaCrosse did not say that there must be a specific provision stating that a grievant is entitled to protection beyond that given in the Worker's Compensation law, but that the right to such protection may not be inferred from that particular bargaining agreement. If the Court had found that a

grievance related even inferentially to a provision of the agreement, the Court would have reached the opposite conclusion.

While the City has argued that it was within its management rights to refuse to allow the Grievant to return to work until she was able to perform her duties, the Grievant was able to perform her duties and was satisfactorily performing her duties for about one month at the time she was sent home. The City Administrator decided to get rid of a "trouble" employee in the most expedient manner. Her first act as Administrator was to analyze the situation in great detail. It is suspicious that the Administrator would make this her first priority. And while she testified that she prepared a document the first morning on the job, she did not have such information at that time.

The Union believes that the evidence does not add up. The Grievant returned to work in December of 1991 and was performing all her duties well, until the new City Administrator came in and decided to get rid of her.

The City's Reply:

The City notes that the claim of constructive discharge was not raised by the Grievant at any time before the hearing, and such new contentions raised at such a late time require a denial of the grievance. Also, the Grievant was not discharged but was laid off pending a doctor's lifting of the restrictions placed on her which affected her ability to perform her job.

The City wishes to address the Union's accusation that the City Administrator lied when she testified that she had prepared Exhibit 49 on January 3, 1992, and she made her decision to send the Grievant home relying on this document. The Union believes that the 10/2/91 entry of doctor's notes was not received by the Administrator until after she sent the Grievant home and the summary could not have been prepared on January 3rd as the Administrator claimed.

However, the line of questioning in the record does not establish that it was the doctor's notes that prompted the 10/2/91 entry. The Administrator's answer to multiple questions regarding that entry was that the Grievant said it to her doctor and it was in the doctor's report. A reasonable inference is that somehow the Administrator's 10/2/91 entry was the result of some other document or discussion with the Grievant, and when the Administrator received the doctor's notes, those notes confirmed the earlier findings. The City states that Exhibit 33 clearly states the substance of the 10/2/91 entry, and this was in the Administrator's possession when she made her summary on January 3, 1992.

Moreover, the Administrator was asked to testify to a document she prepared 10 months prior to the hearing based on a review of over 35 documents. The Administrator could have made a mistake in the heat of testimony, and it is more plausible that the 10/2/91 entry came from the comment section of the worker's compensation form (Ex. 33) rather than the doctor's notes. The City asks that the Union hold its concern for truth and integrity up to the Grievant, who claimed she was laid off when filing for unemployment compensation, but now claims she was discharged.

The City also objects to the Union's attempt to show there was no justification to send the Grievant home by the Independent Medical Evaluation and Functional Capacity Evaluation, both done in September of 1992, several months after the City's January 3, 1992 decision to send the Grievant home.

DISCUSSION:

The first issue to be determined is the issue of arbitrability, as raised by the City which contends that these grievances are governed by the Worker's Compensation law. The Arbitrator will review the provisions of the labor agreement to see whether any of them have any application to these grievances. Article IV, Section 1, defines a grievance as ". . .a dispute between the City and employee within the bargaining unit or the City and Union relating to the interpretation or application of this Agreement."

The Grievant filed three grievances. The first one, dated June 21, 1991, lists the applicable violation as: "Not being allowed to work within limitations. Article XXII and any other article which may apply." The second grievance, dated January 20, 1992, states the same thing. The third grievance, dated March 6, 1992, states: "Not being allowed to work. Article XXI, Sec. 3(b), Article XXII Sec. 1; Article VII; Article II Sec. 3 and any other Article which may apply."

Article XXII, non-discrimination, states that the City and Union shall comply with federal and state law as to non-discriminatory employment. While the Grievant is an active union member and officer, there is no clear evidence that she was discriminated against because of her union activity. The Union has its suspicions that such is the case, because the Grievant had filed numerous grievances and is active as vice president of the Local. However, the Union has not offered proof to sustain such a charge. The Union's theory is that the new City Administrator, Boyer, used the Grievant's injury as a ruse to get rid of an employee who was active in the Union and who had filed numerous grievances. However, Boyer was not the only person to relieve the Grievant of her duties
-- former City administrator Bierma did so on May 31st, 1991, and Mayor Larry Taylor did so on October 11, 1991, both before Boyer's arrival. The Union does not claim that the Grievant was discriminated against because of sex, race, age or religion. While the Union brings up the issue of the federal law, Americans with Disabilities Act (ADA), the Arbitrator cannot determine if the Grievant has any rights under either state or federal laws pertaining to disabilities, only whether the Union has made a claim under the collective bargaining agreement. The Union does not show how the Grievant was discriminated against due to her injury. It does not show that other employees similarly situated have been given light duty or accommodations which were not afforded to the Grievant.

Article VII is Work Week and Hours. It establishes a normal work week of 40 hours, spells out the hours for each department (the Grievant's hours would be 8:00 a.m. to 5:00 p.m.), provides for coffee breaks and work assignments, as well as higher rates of pay and the pay periods and pay days. There is nothing in this article that applies to the three grievances. The third grievance also notes a violation of Article II, Section 3, which says that the City will not subcontract work if it results in reduction of an employee's guaranteed work day or work week or results in layoffs. There is no allegation that the City contracted out the work of the Grievant.

Article VI, Section 4, Lay-offs, states:

> When it becomes necessary to lay off employees, employees shall be laid off in the order of the shortest length of service in the division, provided the remaining employees are qualified to perform the remaining work. Employees shall be eligible, within ten (10) working days, to bump less senior employees in the bargaining unit, provided they are qualified to perform the work.

This section does not apply to the Grievant, despite the Union's notation of how this language differs from the contract language in the LaCrosse County case. The language in LaCrosse County referred to layoffs due to lack of work or economic cutbacks, and the Court found that the language did not apply to disability layoffs. The language in the instant bargaining agreement would not apply to employees laid off of work due to injury, because the language provides for the least senior employee to be laid off first. The least senior employee would not necessarily be the one injured. Accordingly, this provision cannot be interpreted to apply to the Grievant's particular situation. Moreover, the Grievant was laid off after the filing of the three grievances -- on August 31, 1992, when her position was eliminated through a reorganization process, and this section would apply to that subsequent layoff.

Article XVI, Severance Pay, states that: "If the employee dies, retires, voluntarily terminates, or is laid off for a two (2) year period, the employee shall be paid accumulated sick leave as severance pay . . ." Section 2 of Article XVI says that: "Severance pay shall be paid to all employees whose employment is terminated, except those employees who are discharged for just cause." The Grievant testified that she received severance pay sometime in September of 1992, shortly after her layoff notice. The Union takes note of this fact to show that the Grievant was indeed being constructively discharged instead of not being allowed to return to work due to her injury. The layoff and bumping rights are subjects of other grievances and not before me. More on the constructive discharge theory in a moment.

Article XIX, Leave of Absence, provides in Section 2:

> A period of up to but not more than six (6) months shall be granted as leave of absence due to personal illness or for disability due to injury, whether work related or not work related, provided, a physician's certificate is furnished from time to time to substantiate the need for continuing the leave. Additional time may be extended in such cases by mutual consent of the employee and the personnel committee.

The Grievant makes no claim for time off -- just the opposite.

Article XXI, Insurance, provides in Section 3(a), that employees shall receive worker's compensation coverage, which has occurred here. The next paragraph, (b), provides the differential pay language, and there is no dispute regarding the payment of worker's compensation and differential pay to the Grievant.

Article II, Management Rights, states in Section 1:

> Except as expressly and precisely provided in this Agreement, the management of the City and the direction of the working forces shall remain vested exclusively in the City. Such management and direction shall include all rights inherent in the authority of the City, including among others, rights to hire, recall, transfer, promote and to relieve employees from duty because of lack of work or for any other reason. The City shall have the right to discipline or discharge for just cause.

The Union claims that the Grievant was constructively discharged in order to bring these grievances within the confines of the labor contract and under the concept of just cause. Usually, the constructive discharge theory is used

when an employer has made working conditions so intolerable that an employee is in effect forced to quit. Resignations may be deemed to be involuntary under other circumstances as well. In this case, the employee has not quit, and the employer has not made working conditions intolerable, but has refused to allow the employee to work due to a work related injury.

The Union sows some seeds of suspicion that the City did indeed want the Grievant out of its work force permanently by outlining some of the events that occurred after the filing of the grievances, such as the reorganization of the front office, the eventual layoff of the Grievant, the pay out of severance pay in advance of the time due under layoff, and the refusal to allow the Grievant to bump into other positions.

Nothing indicates that the Grievant was in fact discharged, even constructively or without notice or knowledge of such a discharge, at the time of the filing of these grievances. It would be a reach for an arbitrator to find that the Grievant was constructively discharged based on events occurring well after the filing of the grievances. Arbitrators generally discount events or evidence occurring after a grievance to sustain the action of the party trying to demonstrate the reasons for its action by subsequent events. What counts here are events occurring before and up to the filing of these grievances. The fact is that the Grievant did suffer a work related injury. At the time of the filing of the last of these grievances, the Grievant still retained status as an employee. She was receiving worker's compensation pay and differential pay, her seniority rights were not terminated, and she continued to have status as an employee, although not allowed to work. The Employer may have severed those rights at a later point in time, and those actions -- such as the pay out of severance pay, the lay off, the refusal to allow bumping rights to the Grievant, the reorganization of the front office -- are not before me. I find that the Grievant was not constructively discharged only at the time of the filing of these grievances before me. What occurred at a later point in time may have significantly changed her employment status.

The City cites the language in Article II, Section 1, to point out that it may relieve employees from duty because of lack of work or for any other reason. The reason given by the City is that the Grievant had not reached a healing plateau, and the City determined that the Grievant's wrist injury was getting worse when she continued to work.

A refusal to rehire an employee following a work related injury is covered by the Worker's Compensation law. Sec. 102.35(3), Wis. Stats. provides:

> Any employer who without reasonable cause refuses to rehire an employe who is injured in the course of employment, where suitable employment is available within the employe's physical and mental limitations, upon order of the department and in addition to other benefits, has exclusive liability to pay to the employe the wages lost during the period of such refusal, not exceeding one year's wages. 3/

3/ As noted by the Court of Appeals in Schachtner v. DILHR, 144 Wis.2d 1 (Wis.Ct.App. 1988), this section of the Workers Compensation law does not deal with the exclusivity of the employer's liability but is intended to put the penalty solely on the employer for an unreasonable refusal to rehire, and an insurance carrier is prohibited from incurring liability for such acts. See footnote 4 in Schachtner.

The Court in LaCrosse County held that no public policy would be violated if the issue of reasonable cause for refusal to rehire an injured employee were made subject to grievance and arbitration. The Court further found that because Sec. 102.35(3), Stats., provides a remedy for an employee that the employer refuses to rehire after the employee is injured in the course of employment, bringing this circumstance within arbitration in a collective bargaining agreement must be done knowingly and explicitly.

The question here is whether any provision of the collective bargaining agreement knowingly and explicitly provides for the circumstance so noted above. There is nothing in the bargaining agreement that conforms to the "knowing and explicit" standard established by LaCrosse County. 4/

The language most applicable to this case is in Section 1 of Article II, which states:

> Such management and direction shall include all rights inherent in the authority of the City, including among others, rights to hire, recall, transfer, promote and to relieve employees from duty because of lack of work or for any other reason.

The language regarding just cause for discipline or discharge is not applicable for reasons noted earlier in this discussion. The City's right to relieve employees "for any reason" is the applicable language. Of course, the right to relieve employees for any reason must be exercised in a manner consistent with the concept of good faith and fair dealing which is implicit in every contract. The language in Article II does not conform to the requirements established by LaCrosse County. At this time, the LaCrosse County decision has the effect of finding that the Workers Compensation law has preempted the field, since no labor contracts in the area are likely to have the kind of language contemplated by the Court.

Having found no contractual basis for these grievances, they will be

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4/ The LaCrosse County case is the controlling and applicable law at the time this decision is being rendered. The Arbitrator considered waiting for a ruling from the Wisconsin Supreme Court which is hearing the case on appeal in January of 1994. However, the grievances in this case date back to 1991, the arbitration hearing was held in the fall of 1992, and it took another year for the briefing process to be completed. If I were to hold this case open, hoping for better guidance from the Supreme Court, it might be the fall of 1994 before a decision here could be rendered. The Grievant's recall rights may be cut off by the end of August of 1994. The parties are entitled to a more timely decision.

denied.

AWARD

The grievances are denied.

Dated at Elkhorn, Wisconsin, this 14th day of January, 1994.

By _____