BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 569-A, AFSCME, AFL-CIO

and

CITY OF MAUSTON

Case 24
No. 46907
MA-7101

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.

SUPPLEMENTAL ARBITRATION AWARD

The Union and the City named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear grievances 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. The Arbitrator ruled on January 14, 1994, that the grievances were denied as not being arbitrable.

On September 16, 1995, Circuit Court Judge John W. Brady ordered that the Arbitration Award be vacated and remanded for further proceedings not inconsistent with the Decision issued by the Circuit Court in a proceeding on January 26, 1995. The Arbitrator then contacted the parties to determine whether supplemental briefs were necessary or whether the parties would stipulate to a framing of the issue, and the parties responded by filing supplemental and reply briefs which were all received as of December 4, 1995.

First, the original Award:

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.

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

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 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 tendinitis. 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 tendinitis 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

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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.

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 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/

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

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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.

established by LaCrosse County. 4/

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

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.

> 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 denied.

SUBSEQUENT COURT RULINGS:

The Wisconsin Supreme Court reversed the Court of Appeals' decision in LaCrosse County on March 15, 1994. The high Court concluded that the exclusive remedy provision of the Worker's Compensation Act, Sec. 102.03(2), in conjunction with the provision on refusal to rehire, Sec. 102.35(3), does not bar an employee who suffered a work-related injury from seeking arbitration under a collective bargaining agreement to determine whether termination or layoff following that injury violated the agreement. The portion of the Worker's Compensation Act, Sec. 102.35(3), which provides a remedy for a refusal to rehire, does not bar an employee from seeking arbitration.

In reviewing the history of the Worker's Compensation Act, the Supreme Court noted that nothing in the Act's purpose, history or application suggested that the legislature intended the Act to abrogate any contractual obligations between employer and employee that might affect an employee with a work-related injury. The purpose of the Act was to preempt tort actions by injured employees against their employers.

The Supreme Court also found in LaCrosse County that the alleged harm -- termination or layoff without proper cause -- was a second and separate harm from the back injury suffered by the employee. While the back injury was compensable through worker's compensation, the harm from the possible violation of contract did not come within the purview of the exclusive remedy provision of Sec. 102.03(2). The Schachtner and Norris cases (relied upon by the City in the

instant case) were not dispositive.

The Court further determined that there is no reason for a collective bargaining agreement to explicitly state that Sec. 102.35(3) not be an exclusive remedy, and the parties to a bargaining agreement may agree to a contract that governs termination of an employee that has a work-related injury without any reference to the Worker's Compensation Act.

Following the Supreme Court's decision, Circuit Court Judge John W. Brady issued an order vacating the arbitration award. The order noted that ". . . said Arbitration Award did not draw its essence form the collective bargaining agreement that was before the arbitrator, but, instead, was based on external law and not on the terms and provisions of said collective bargaining agreement and that the Arbitration Award was contrary to public policy enunciated by the Wisconsin Supreme Court." Thus, the case was remanded to the Arbitrator for further proceedings.

THE PARTIES' SUPPLEMENTAL BRIEFS:

The Union points out that in reversing the appellate court in LaCrosse County, the Supreme Court ruled that the statutory exclusive remedy provision applies to the physical or mental injury which might otherwise be the subject of a tort action by an injured employee. The Court view an alleged breach of a labor contract as a separate harm, not subject to the exclusive remedy provision of the Worker's Compensation law. The Court further rejected the appellate court's notion that a grievance would be arbitrable only if a contract contained a provision which explicitly waived the remedies contained in the Worker's Compensation law.

The Union further notes that other arbitrators have held that just cause is the appropriate standard of review in cases such as this, such as Dane County, A/P M-94-312, where Arbitrator Michelstetter wrote that the just cause standard applies to some non-disciplinary situations as well as disciplinary situations, and that would include situations in which an employee is discharged for physical inability to perform his or her work. The City bears the burden of proof that its refusal to employ Ms. Bosgraaf on January 6, 1992 to this date meets the just cause standard, and it has failed to carry this burden of proof.

There was no medical justification for sending the Grievant home, the Union contends, and Boyer's statement that the Grievant's condition worsened every time she returned to work is contrary to the evidence in the record. Aside from one instance in which the Public Works Director ordered the Grievant to type up an 18-page document that was always handwritten in the past, the Grievant never had any flare-up of symptoms after her surgery that resulted from her work. Her continuing discomfort was not caused or exacerbated by work. She missed work in December of 1991 for medical or therapy appointments, and her doctor was not concerned that her work was a problem. The medical professionals involved in this case repeatedly stated that a return to normal clerical duties would not present problems for her condition.

The Union contends that since there was no medical reason for sending the Grievant home indefinitely, the City's refusal to permit her to continue to work lacks just cause. Not only was there no medical reason -- there were no performance reasons either. The City provided no evidence that the Grievant was unable to perform her normal duties. The City Administrator was

not credible, as a review of the record shows that Boyer did not have the

dictations from the doctor's office until January 27, 1992, and not on January 3, 1992, as she testified. While Boyer saw the problem of the Grievant's status as so significant that Boyer spent her first morning on the job mapping it out, all Boyer had to go on was the worker's compensation reports. Only later did Boyer get the narratives which make up Exhibit 29. Boyer's memorandum dated January 28, 1992 shows that she requested the doctor's office to forward the notes during a telephone conversation on January 27, 1992. Yet she testified that her January 3rd document contains a notation that came from a review of Exhibit 29, which she did not have at that time. Therefore, the Union finds that Boyer's testimony that she created Exhibit 49 on January 3, 1992, is not credible because it could not have been created until after January 28, 1992, or more likely, May 13, 1992. If the City Administrator were confident that her decision was a sound one based on her concern for the Grievant's health, why would she feel the need to come up with an after-the-fact document to support her decision?

The Union asserts that the City failed to carry its burden of proving that the Grievant was unable to perform her duties or that the continued performance of her duties would represent a serious and imminent hazard to her or others. The Union asks that the Grievant be restored to her former position and be made whole for all losses.

The City asserts that the original award also addressed the merits of the grievances in light of the language of the collective bargaining agreement, and that the Arbitrator found no contractual basis for any of the grievances. Therefore, the grievances were denied on their merits. While the Supreme Court's decision in LaCrosse County warranted the setting aside of the January 14, 1994 decision as it pertained to the issue of arbitrability, it is the City's position that findings with respect to merits of the grievances should remain undisturbed. The original decision found that even if the grievances were arbitrable, they should be denied on their merits, and there is no reason to change that original holding.

Accordingly, the City asks that the Arbitrator abide by the findings reached in her original decision and dismiss the instant grievances on their merits.

The Union replied by stating that the Court overturned the original award only as it pertains to the question of arbitrability. The City has ignored the findings of the Arbitrator that there was no contractual basis for the grievances in light of the Court of Appeals' decision in LaCrosse County. In that decision, the Appeals Court had ruled that grievances such as the instant matter cannot be said to fall under the ambit of the collective bargaining agreement unless the parties explicitly stated in the contract that grievances such as these could be addressed under the grievance procedure. Since the legal basis for the Arbitrator's previous finding has been reversed by the Supreme Court, it is not logical to argue that the Arbitrator's ruling should not change.

The Union admits that whether the City's action constituted a constructive discharge may be debatable. However, there is no doubt that the Grievant was suspended from her employment at the time the grievances were filed, and therefore, the just cause standard is applicable. The just cause standard would have little meaning if the Employer could remove an employee from her

position with impunity.

The Union contends that the removal of the Grievant from her position constituted a suspension without just cause. There was no increase in symptoms when the Grievant returned to work in December of 1991 until the time of her indefinite suspension in January of 1992. The City Administrator's claim that she was concerned for the Grievant's health is incredible, and Boyer made her decision on her very first day of employment without having even spoken to the Grievant's doctor about the affect of continued work on the Grievant's condition.

In its reply, the City takes issue with the Union's citation of Dane County to support its position, because that decision can be distinguished on the facts. The Dane County decision arose from a situation in which an employee was discharged due to the employee's physical inability to perform the work. The Arbitrator found that the just cause standard should apply. However, in the instant case, the Arbitrator has already found that the Grievant was not discharged and that the just cause standard did not apply, nor did any other provision on the labor contract.

DISCUSSION:

Contrary to the City's assertions, the merits of the grievances were not considered in the underlying arbitration award, because I held at that time that the grievances were not arbitrable. The City confuses my discussion regarding the Union's theory of constructive discharge to mean that I ruled on the merits. 5/ To the contrary, I was searching the contract for the appropriate section on which the grievances were based. Because of the state of the law at that time, I found the grievances not to be arbitrable. That has all changed now, and the grievances are arbitrable -- and the applicable section of the contract is still Article II, Section 1. One more time -- here's the language:

> 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.

I also noted in the original arbitration award that the City's right to relieve employees "for any

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5/ The original arbitration award cannot and should not be read to state that even if the grievances were arbitrable, they should be denied on their merits. This Arbitrator generally frowns upon making any such determinations on the merits when a case is found not to be arbitrable. The discussion on pages 15 and 16 of the original award, where I found that the Grievant had not been constructively discharged at that time, was made to determine whether the claim was appropriately placed under the just cause clause of the contract. I found the grievances fell more appropriately under the language about relieving employees from duty for any reason in Article II.

reason" must be exercised in a manner consistent with the concept of good faith and fair dealing implicit in every contract. The City could not, for example, relieve an employee from duty as a subterfuge in order to escape the just cause standard of the last sentence in that contract section. The clause, as well as the contract, must be read as a whole, and these employees are not "at-will" employees. Therefore, it is appropriate to review whether the City exercised good faith and fair dealing in relieving the Grievant from her duties on the allegation that the Grievant had not reached a healing plateau following a worker's compensation injury, and that allowing her to continue to work would jeopardize her own recovery and subject the City to liability, as well as slow down the office work.

The action being grieved is most properly considered to be a medical layoff, and while not falling within the layoff language of Article VI, it does fall within the language of Article II. Arbitrators often scrutinize an employer's action in this area of not allowing an employee to come back to work, because an employer's indefinite layoff for medical reasons could amount to a suspension or discharge and circumvent the just cause provisions of a labor contract. Thus, arbitrators look to see if the employer's conduct or action was arbitrary or capricious, or done in good faith for legitimate and rational reasons.

For example, in Safeway Stores, 96 LA 304 (Arb. Coyle, 1990), the Arbitrator noted that the decision of the employer to judge the ability of an employee to perform safely and without aggravating a pre-existing condition cannot be arbitrary or capricious, and must be made for reasons based on facts. In cases cited by the City, such as Mercy Convalescent Center, 90 LA 405 (Arb. O'Grady), the Arbitrator found that the employer's action was not arbitrary, that the employer acted on a rational basis. Similarly, in Union Oil Co. of Calif., 87 LA 613 (Arb. Nicholas, 1986), the refusal to reinstate an injured employee was done in good faith, according to the Arbitrator. In Consumers Market, 94 LA 24 (Arb. Thornell, 1990), the Arbitrator found that despite a 20 percent permanent partial disability, the pivotal question was whether a grievant was reasonably capable of physically doing the customary duties of his job so that he should be reinstated from an occupational injury leave to a duty status. These are the standards by which this case will be judged. As the City cites in its initial brief:

> ". . . unless management is specifically limited by contract, the employer is the sole judge of ability to perform work, except only that such prerogatives may not be exercised arbitrarily or discriminatorily." 6/

The City did not show good faith and fair dealing back in early October of 1991. On October 2, 1991, DPW Director Ken Tulley instructed the Grievant to type an 18-page report. This assignment was made right after the Grievant had just returned to work following wrist surgery. She typed for approximately three hours and reported that her arm was so sore that she

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6/ Mobile Video Services, LTD, 83 LA 1009 (Arb. Hokenberry, 1984).

could hardly move her fingers. She asked for a different assignment, but Tulley refused. She called Dr. Plooster, who talked with Tulley and found him to be unsympathetic. In Exhibit 28, Plooster states: "Her boss was unsympathetic with her condition and stated that there was nothing he could do to lighten her duty." Plooster's notes in Exhibit 29 also state:

> I personally talked to her supervisor and he basically was not interested in working it through her complaints and was taking a hardline approach to her problem. He suggested that I visit with the mayor or city attorney and I informed him that I would be happy to correspond with them in writing rather than verbally on the phone at this time.

Plooster's description of Tulley as taking a "hard line approach" and being unsympathetic certainly undermines the City's allegation that it was concerned about the Grievant's recovery and the City's liability. Moreover, the City never showed that the report was important, or that it was important that it be done at that specific time. The Grievant had just returned to work following wrist surgery for an injury caused by repetitive stress -- and was given a lengthy typing assignment. If the City were concerned about the Grievant's injury, it certainly did not show it by this example.

Boyer testified that it was "totally" her decision to send the Grievant home (TR - Page 90). This places most of the emphasis on Boyer's credibility and testimony.

Boyer's first order of business was to deal with the Grievant. She spent the morning of her first day at work outlining the Grievant's injury and return to work records. She was also in contact with City Attorney John Orton on January 3, 1992, as noted in Exhibit 41. If this matter were of such concern to Boyer, would not good faith and fair dealing have meant that she would sit down with the Grievant to find out what the Grievant could or couldn't do, how functional the Grievant was with her left hand? It is possible for people to become as proficient with one hand or even one finger on a keyboard as those who use both hands and ten fingers. There is nothing on the record to show that the Grievant had reached such a proficiency level with one hand; neither is there anything on the record to show that Boyer knew what the Grievant could do with her injury. Boyer had Orton make inquiries of Plooster but never asked the Grievant about her limitations, her expectations for her recovery. There is no indication that Boyer even saw the Grievant type anything.

Boyer's memorandum to the Grievant dated January 28, 1992 (Exhibit 42) states that because the doctor refused to talk to her, Boyer had "no choice" but to require that the Grievant remain off work until released with no restrictions. The fact that the doctor refused to speak with Boyer should not be held against the Grievant by the City. This was apparently the doctor's choice, and he did disclose written information by sending the notes from his dictation from office visits to Boyer. The doctor was not being completely uncooperative, and even if he were, it should have no bearing on the City's dealing with the Grievant.

Boyer seemed in part to be concerned about the amount of time the Grievant missed work because of her therapy and doctor's appointments. Her note on Exhibit 49 for December 10, 1991, stated that the Grievant works less than half time, and the note for January 3, 1992 says that the Grievant is still at work part time. But then, Boyer stated that she only meant that the Grievant was available part time or less than part time because the restrictions on typing were no more than four hours a day. Boyer's testimony is confusing -- it is not clear whether Boyer was really

concerned about the amount of time the Grievant was absent from work, or whether she was really concerned about the amount of time that the Grievant was allowed to perform

typing duties. (TR, pages 96-98, 109-113). Her notations on the side of Exhibit 49 tend to indicate she was dismayed at the amount of time the Grievant was working, the amount of time absent for doctor's appointments and therapy sessions. The City should bear in mind that the Grievant was absent for appointments due to a work-related injury.

The parties disagree on how many hours of typing is required in the Grievant's job. It was never a full-time typing job for most of her career with the City, except for special projects such as putting information into a new computer system in the spring of 1991, which aggravated an old injury that was seen in 1990. Moreover, Boyer was in no position in the beginning of January to assess the Grievant's duties or determine what they were. To the contrary, the Grievant had been doing this job for 15 years, and her testimony is credited over Boyer's as to the amount of typing that the job entailed at that time. Boyer had no chance to reorganize work assignments by the time she put the Grievant on leave. The Grievant's estimates of the time she spent on the computer keyboard or typewriter amount to no more than 50 percent of her time. If Boyer were truly concerned that the Grievant was restricted to typing no more than four hours a day, it should not have imposed much burden on the City, because the Grievant's duties appear to be consistent with her restrictions (TR, pages 20 -23). Boyer, however, testified that the Grievant's job required full-time keyboarding (TR, page 116). Boyer would have had no way of substantiating that comment because she had just arrived at the City. Boyer's letter on January 6, 1992, to the Grievant stated: "Based on your physicians findings and the fact that your job duties require consistent repetitive work…." The job duties did not in fact require consistent repetitive work. Few jobs do, and the Grievant's description of her job, which she did for 15 years, did not fall into that category. The City's stated reasons for the medical layoff do not match with the facts.

From the Union's standpoint, the dispute over Boyer's credibility centers on Exhibits 29 and 49, and the question is, what did Boyer know and when did she know it? Exhibit 29 is Dr. Plooster's dictation notes which were received by the City sometime after January 28, 1992, after the City requested them. Exhibit 49 is the document prepared by Boyer on January 3, 1992, which she claimed to have outlined that day in reaching her decision that the Grievant should not be allowed to come back to work because she got worse every time she returned to work. Then the credibility question centers on a notation on Exhibit 49 for an entry that states:

> 10/2/91 Sue's report, typing made it much worse.

In the margin next to this entry, a hand written note says "Dr. rept?" Boyer testified that all she had available on January 3, 1992, were the worker's compensation reports and other City documents, not the doctor's notes. She would not have had those notes available for at least another month. Under cross examination (TR, page 107), Boyer stated that the October 2, 1991 entry was what the Grievant had said to the doctor, and that it was in his report.

The problem with Boyer's testimony and Exhibit 49 is that Exhibit 49 has had things added to it, such as the back page that includes hand written entries up through February 19, 1992. Boyer had enough information from Exhibit 33, the Employer's first report of injury dated

October 2, 1991, to make the type-written entry, and it is not clear when the hand-written

entry next to it was placed there. Boyer may have been confused as to the timing. If she did not produce the document called Exhibit 49 on January 3, 1992, the City's case would look worse because it would mean that Boyer lied and had other motives in sending the Grievant home from work.

Of more concern to the Arbitrator in assessing the City's good faith and fair dealing as well as Boyer's credibility is her testimony during cross examination by Union Representative David White on page 106 of the transcript:

> Q: The Grievant's injury involves her wrist, right, is that correct?
>
> A: I don't know. I think so. At times I wonder. But yes, I think so.

More than three years after the hearing in the matter, the Arbitrator clearly remembers this exchange taking place at the hearing. Boyer's tone of voice and testimony indicated that she thought the Grievant's injury was all in her head! She stopped just short of saying so in this remark, but the implication was clearly there.

By that remark, Boyer either thought that the Grievant's injury was not as significant as the Grievant had portrayed it to be, or that the Grievant was malingering, or that the Grievant had no injury at all. Usually, when an employer suspects that an employee has malingered following an injury to avoid coming back to work, the employer puts pressure on the employee to return to the job. Here, the opposite is happening. The employer is preventing the employee from coming back to work. Therefore, it would follow that Boyer did not believe that the Grievant was malingering. It would further follow that Boyer did not believe that the injury was a minor one, or Boyer would be trying to get the Grievant back to work. Instead, it appears that Boyer's true belief is that the Grievant had no real injury at all.

Boyer's remarks -- wondering whether Bosgraaf's injury was in her wrist -- undermined the rest of her testimony. Boyer went over many documents, including injury reports filled out for worker's compensation purposes, and doctors' reports for returning to work. All of these reports involved the Grievant's repetitive stress type of injury. These were the documents that Boyer used when testifying that she was concerned about the Grievant re-injuring herself on the job, the potential liability to the City. What need for concern if Boyer thought the Grievant was not truly injured? Boyer's remarks here clearly show that there was a lack of good faith in sending the Grievant home and not allowing her to work.

Boyer particularly noted that Dr. Plooster put the Grievant on "all kinds of restrictions" on December 27, 1991 (TR - page 117), which was noted with an incorrect date in Exhibit 49 as December 22nd, and which Boyer relied upon to justify her assertion that when the Grievant came back to work, she got worse. However, the return to work recommendations on December 27, 1991 (Exhibit 19) compared to the previous one (Exhibit 18), show that sedentary work is marked

in both documents. On the latter date, the Grievant was allowed to stand or walk for six or more hours, drive for five or more hours. The form indicates that she may use

her hands for repetitive grasping, pushing and pulling, reaching and fine manipulation only occasionally. She could use them for repetitive turning frequently. She was able to perform work from waist to shoulder level with both hands.

Moreover, Boyer seemed to read the restrictions in a manner that justified her decision to not let the Grievant return to work, rather than in a complete and honest overview. For example, Exhibit 7, a return to work recommendation in June 11, 1991, shows some of the same limitations as Exhibit 19 -- the December 27th form, which Boyer stated had "all kinds of restrictions." Yet the June form was the same document that convinced the City to allow the Grievant to come back to work. More importantly, Boyer's document, Exhibit 49, states for that time:

> 6/12/91 City allows return to work after 6/11/91 doctor's statement, no limitations, light work (Emphasis added.)

What? Exhibit 7 is deemed by Boyer to mean "no limitations," while Exhibit 19 is deemed to mean "all kinds of restrictions" when they are almost the same? This is not logical or rational. Nor is it fair dealing. One cannot help but come to the conclusion that Boyer definitely wanted the Grievant out of the office. She set about trying to find a way to get rid of her, but the lack of good faith and fair dealing shines through the paperwork and explanations.

Also, Exhibit 22 shows that on February 19, 1992, the doctor placed no limitations except sedentary work, which had in the past allowed the Grievant to come back to work. Yet Boyer still refused to allow the Grievant to return to her job, which resulted in the filing of the last grievance in this case, the one filed March 6, 1992. If the lack of restrictions in late February and March of 1992 did not mean anything to Boyer, why would she have justified her action earlier by claiming that it was all those restrictions placed on the Grievant. Boyer simply did not want the Grievant working in the office, restrictions or not.

Boyer knew that the Grievant had a work-related injury before taking the job as City Administrator. The record has no evidence whether Boyer knew that the Grievant had other grievances and had been active in Union affairs. 7/ It is possible that Boyer knew this, but it's only speculation without record evidence of some kind. It appears as if Boyer felt that the Grievant was a trouble maker, and her first order of business would be to find a way to get rid of her. Otherwise, why would it be her first priority to deal with an employee who was willing to work and able to work with minor limitations that could be fit into her duties? And why would she deal with in it a manner that precluded her from making a sound judgment based on personal observation? It takes time for new managers and supervisors to assess any employee's duties and how well that employee performs them. Boyer had no such time to make this kind of

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7/ The instant grievances were heard by this Arbitrator at the same time as two other grievances involving the same Grievant. While the record in the instant case does not reflect the Grievant's active Union status and the filing of numerous grievances, the parties were all aware of her activity in this area.

determination. Therefore, there is no rational and legitimate basis for her decision.

Boyer also expressed a concern about the amount of staff available in the office. If the Grievant were coming to work on an irregular basis, because of therapy or doctor's appointments or the injury itself, it could be disruptive to the work flow. This is a legitimate concern for management. However, Boyer did not have enough experience with the Grievant, the work flow, the staffing of the office, or any relevant factors upon which to make a rational decision at the time she sent the Grievant home on leave. There is no evidence on the record that showed that the Grievant's absence, or her presence, slowed down the office work. There is no evidence that the Grievant's duties were falling behind, that others had to fill in to do them on overtime, that temporary help was brought in, or any fact that supports what is a legitimate concern for the City.

Boyer also stated that she was worried about the City's liability, even calling it "unbelievable liability" at one point. But what liability was there to the City? Worker's Compensation Act takes away any remedy an employee may have had in a tort action. The City has already incurred loss of time, productivity, supplemental wages, etc., for the injury. What more "unbelievable" liability and potential damage the City could have suffered was not explained. Also, an employer normally has an interest in minimizing the expense of Workers' Compensation by returning an occupationally disabled employee to work as soon as possible, not holding an employee on Workers' Compensation pay status indefinitely.

Boyer also noted several times in her testimony that the Grievant had not reached a healing plateau. However, this does not appear to be a rational basis upon which the City should have prevented the Grievant from working. Exhibits 31 and 32 show that Dr. Plooster was waiting for the Grievant to reach a healing plateau only to be able to assign a permanency rating to her injury under guidelines of Workers' Compensation directives. This did not interfere with his own judgment to recommend that the Grievant return to work. Therefore, it should have no bearing on the City's decision of whether the Grievant could return to work or not. This is another factor that shows the lack of sound rationale for the City's decision.

All in all, the City's stated reasons for not allowing the Grievant to work lack the ring of truth. There was more concern about keeping the Grievant away from work than allowing her to work. There was no real concern about the Grievant's well being, as shown by Tulley and Boyer's remarks. There was no sound rationale to determine that the Grievant could not do her job. There was no attempt at an accommodation of duties to see whether the Grievant could perform most or all of her duties within the restrictions on time of typing. There was no good faith assessment of the restrictions on the Grievant. There was no reassessment after the restrictions were lifted. There was no reason for the City to worry about a healing plateau. There was no evidence that the office work was being compromised by either the Grievant's presence or her absence.

In conclusion, the City violated Section 1 of Article II of the parties' collective bargaining agreement where it arbitrarily refused to allow the Grievant to continue working, without a good

faith, rational and legitimate basis for doing so.

THE REMEDY:

The first grievance -- filed in June of 1991 -- became moot when the City returned the Grievant to her job. The second and third grievances -- filed in January and March of 1992 -- are redundant for the purposes of a remedy, because the City never allowed the Grievant back to work between the filing of those two grievances. Thus, the second two grievances are considered to be one grievance for the purposes of a remedy.

The normal and usual remedy for a contract violation is to put a grievant in a position that he or she would have been in but for the contract violation. It is now more than four years after the fact, and the record shows that many things changed at the City during 1992 alone. The Arbitrator has disregarded the evidence of office reorganization, layoff, refusal to allow bumping, severance pay, and many of the offered evidence that occurred well after the filing of the grievances in reaching a decision on the merits of this case. However, there is a good chance that some of those events might have a bearing on any remedy ordered.

Accordingly, I will retain jurisdiction for the purpose of reaching a remedy. The parties are ordered to meet and attempt to reach a mutually satisfactory resolution. If they are unable to reach agreement on the remedy, I will establish a remedy. It may be necessary to convene a hearing to take additional evidence, or the parties may wish to file recommendations and briefs on the remedy phase alone. The parties should attempt to meet and reach an agreement on a remedy or the next procedure in a timely fashion, but I will not set a deadline. When either party notifies me that it wishes to proceed with a hearing or briefing schedule on the remedy phase, I will resume my role.

SUPPLEMENTAL AWARD

The grievances are arbitrable.

The grievances are sustained.

> The parties are ordered to meet for the purposes of reaching a remedy for this contract violation, and I will retain jurisdiction in accordance with the discussion above in the "Remedy" section of this Award.

Dated at Elkhorn, Wisconsin this 12th day of February, 1996.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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