BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
GENERAL DRIVERS, DAIRY EMPLOYEES, WAREHOUSEMEN, HELPERS & INSIDE EMPLOYEES UNION, LOCAL NO. 346	Case 222 No. 53743 MA-9448
and	
DOUGLAS COUNTY (HIGHWAY DEPARTMENT)	

Appearances:

Mr. Donald L. Bye, Attorney at Law, on behalf of General Drivers, Dairy Employees, Warehousemen, Helpers & Inside Employees Union, Local No. 346.

Mr. John Mulder, Personnel Director, on behalf of Douglas County.

ARBITRATION AWARD

General Drivers, Dairy Employees, Warehousemen, Helpers & Inside Employees Union, Local No. 346, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Douglas County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on March 28, 1996 in Superior, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by April 29, 1996. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to agree on a statement of the issues and agreed that the Arbitrator will frame the issues to be decided.

The Union would state the issue as being a claim for restoration of the Grievant's vacation and sick leave when the County would not allow the Grievant to work and the Grievant felt he was able and capable of working.

The County would frame the issues as follows:

> "Did the County violate the contract or an established past practice when it refused to return used sick leave and vacation when Mr. Doskey was unable to work because of medical reasons? If so, what is the appropriate remedy?"

The County also raises a procedural arbitrability issue as to timeliness.

The Arbitrator frames the issues as follows:

> Is the grievance procedurally arbitrable?
>
> If so, then:
>
> Did the County violate the parties' Collective Bargaining Agreement or established past practice when it placed the Grievant, Eugene Doskey, on sick leave and vacation and would not permit him to return to work until June 19, 1995? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1994-1995 Agreement are cited:

ARTICLE 4.

> MANAGEMENT RIGHTS: The management of the County and the direction of the working force, including the right to hire, to suspend, or discharge for cause, to lay off employees because of lack of work, and all other rights relating thereto, except only as may otherwise be provided herein, are vested exclusively in the Employer.

ARTICLE 5.

> GRIEVANCE PROCEDURE: Section 1. Crucial to the cooperative spirit with which this Agreement is made and in the sense of fairness and justice brought by the parties to the adjudicator of employee grievances, should an employee feel that his rights and privileges under this Agreement have been violated he shall consult with his Union Steward. The Steward shall arrange for a meeting

with the Union Grievance Committee to act on the case.

Section 2. The Grievance Committee shall, within five (5) days, present the facts to the employee's immediate supervisor.

Section 3. Should the Union feel that the reply of the supervisor is unsatisfactory, the Grievance Committee shall, within five (5) days or less, submit the facts in writing to the Highway Commissioner. The Commissioner, in consultation with the Personnel Director, shall, within five (5) days or less, reply to the Union in writing, giving his decision.

Section 4. Should the Union feel that the reply of the Highway Commissioner is unsatisfactory, the Grievance Committee shall immediately submit the facts in writing to the Highway Committee. The parties shall arrange for a meeting between the Union representatives and the Committee within five (5) days or less for negotiation of the issue. If, after sincere and earnest effort in good faith, the issue remains unsettled, the matter shall be submitted to arbitration.

Section 5. A request for arbitration shall be submitted to a staff member of the Wisconsin Employment Relations Commission (WERC). The cost of the WERC filing fee shall be paid by the party requesting arbitration. The results of the arbitration proceedings shall be final and binding on both parties to this agreement. Costs incurred through arbitration shall be shared equally by both parties except that each party shall bear the expense of its own witnesses.

. . .

ARTICLE 8.

PHYSICAL EXAMINATION: A. Physical, mental or other examinations required by a government body or the Employer shall be promptly complied with by all employees, provided, however, the Employer shall pay for all such examinations. Examinations are to be taken at the employee's home terminal and are not to exceed one (1) in any one (1) year, unless the employee has suffered serious injury or illness during the year. Employees will be required to take examinations during their working hours and

receive compensation for all hours spent during such examination.

. . .

ARTICLE 20.

VACATIONS: Section 1. For the purpose of this paragraph and Agreement a vacation week is described as a standard week provided for in this Agreement. Vacation pay is defined as a regular rate of pay at which an employee is employed for a standard week or a standard day. Each employee shall receive a vacation with pay as follows:

. . .

D. Employees with seventeen (17) years' seniority shall be entitled to five (5) weeks vacation with pay at the regular rate of pay.

Section 2. Seniority as provided for in this contract shall prevail in selecting vacation periods. Arrangements for dates and times of vacation shall be made between the Employer and the employee.

A. All vacations earned must be taken by employees and no employees shall be entitled to vacation pay in lieu of vacation except where agreed to by the Employer.

B. Should the requested vacation time interfere with the operation, the Employer and the employee shall arrange vacation nearest to the desired time expressed by the employee that will not interfere with the operation.

. . .

ARTICLE 29.

SICK LEAVE: Section 1. All employees who have had one (1) year or more of service and after six (6) months' continuous service in any one (1) year, will be allowed sick leave with pay for illness or injury other than in the line of duty, according to the following schedule:

a. One (1) day paid sick leave per month of service up to a total of twelve (12) days per calendar year.

b. Unused sick leave shall carry over to the following year until a maximum of one hundred twenty (120) days' paid sick leave has been accumulated.

. . .

BACKGROUND

The Grievant, Eugene Doskey, has been employed in the Douglas County Highway Department since 1968 and for most of that time, including at the time of the grievance, has been employed as a truck driver. The Grievant is a diabetic; however, he is able to control his diabetes by taking medication, diet and exercise and has not taken insulin since 1992. Since 1990, the Grievant has been treated by a Dr. Swanson.

Since 1991 County policy has required the employes in the Highway Department to have a Commercial Driver's License (CDL). All employes were required to take the written test and obtain a medical card, which is required for interstate driving beyond a 25-mile range. Present employes were "grandfathered" from having to take the driving test. Every two years, employes are required to take a physical exam in order to retain their CDL. The County pays for the physical examination and it is done on County time.

On March 22, 1995, a Wednesday, the Grievant went for his daily five-mile walk after work. Near the end of his walk, the Grievant suffered a blackout and fell. A short time later, the Grievant regained consciousness and returned home. The Grievant had no memory of the blackout or his falling, but his wife noticed the mud stains on his clothing and they realized that he must have blacked out. The next day the Grievant's wife took him to the hospital for examination. The Grievant had a prior history of seizures in 1991 caused by a brain tumor, which had been subsequently removed. The Grievant was in the hospital for tests Thursday and Friday and released. The results of the tests were inconclusive as to whether the blackout was caused by a seizure or by low blood sugar or some other cause. The Grievant was placed on an anti-convulsant medication.

The Grievant returned to his job on the following Monday, March 27, 1995, and completed his work day without incident. At the end of the day, the Grievant's supervisor, Victor Wester, informed the Grievant that he could not return to work without a doctor's release. The Grievant was in communication with his physician, Dr. Swanson, and followed his instructions with regard to treatment of his diabetes. The Grievant's medication was reduced by one-half due to a concern that it was causing a low blood sugar condition in the Grievant. The Grievant was placed on sick leave for the rest of March and the month of April and when his sick leave ran out,

he was placed on vacation. During the Grievant's absence from March 28 until June 19, 1995, when he was allowed to return to work, the Grievant used 25 1/2 days of sick leave and 31 days of vacation.

On April 27, 1995, the Grievant was directed to report for his physical for CDL licensure with a Dr. Sellers, the County's designated physician for that purpose. The Grievant passed his physical, however, because he had indicated on the exam form that he had suffered a loss of consciousness on March 22, Dr. Sellers advised him that he would not sign the health card required for interstate driving. Dr. Sellers apparently based his refusal to sign the Grievant's health card upon his interpretation of Section 391.41(a) and (b)(8), which provides:

> 391.41 Physical qualifications for drivers.
>
> (a) A person shall not drive a motor vehicle unless he is physically qualified to do so and, except as provided for in 391.87, has on his person the original, or a photographic copy, of a medical examiner's certificate that he is physically qualified to drive a motor vehicle.
>
> (b) A person is physically qualified to drive a motor vehicle if that person:
>
> . . .
>
> (8) Has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a motor vehicle.

Apparently, Dr. Sellers was under the impression that a health card was required in order to have a CDL and to drive for the County. Apparently, both Dr. Sellers and the County were also under the impression that federal regulations required that a driver have a health card in order to do any interstate driving, regardless of whether it was within a 25-mile range. The Grievant continued to possess his Wisconsin CDL, but not an ICC health card.

The Grievant returned to his personal physician in an attempt to get the matter cleared up as far as his loss of consciousness, so that he could regain his health card. Dr. Swanson was in communication with Dr. Sellers and with the County's Assistant Personnel Director, Candace Fitzgerald, with regard to the Grievant's condition. The Grievant also returned to Dr. Sellers on May 11, 1995 in an attempt to regain his health card. Dr. Sellers contacted the Department of Transportation in Madison and was sent a copy of the regulations. Dr. Sellers gave a copy of the regulations to the Grievant and informed him that he interpreted the regulations as stating that if

any person has a history of loss of consciousness, they can no longer drive or qualify under the safety regulations. Dr. Sellers was under the impression that the Grievant's physicians, Dr. Swanson and a Dr. Freeman, felt that it was okay for the Grievant to drive an automobile and Dr. Sellers disagreed.

On May 16, 1995, Dr. Swanson sent Fitzgerald the following letter:

> Dear Ms. Fitzgerald:
>
> This is a letter to describe to you the recent episode of apparent loss of consciousness that Mr. Eugene Doskey suffered on March 22, 1995. He had been out for a walk. He then came into the home after about an hour or so and his wife noted that he had mud stains on the entire right side of his clothing. He himself could not remember falling into the mud. He had a headache at the time. The following day he was brought into the hospital by his wife for evaluation. Because of his prior history of seizures in 1991, he was restarted on Dilantin. We do not know for a fact, that he had a seizure. His EEG was not consistent with an epileptic disorder. The seizure in 1991 was on account of a brain tumor which has been subsequently removed. He is also diabetic and was thinking that his blood sugars were running low, or at least feeling tired. Since that time we have decreased his diabetic medication.
>
> At this time I cannot say for sure whether the incident in question was caused by a seizure or some other episode such as transient low blood sugar. At any rate, he is back on an anti-convulsant at a level that is considered to be adequate. Additionally, his diabetic medication should be in better control at this point as well.
>
> This information is being provided to you at the patient's request. If you have any further concerns, please let me know.
>
> Sincerely,
>
> Brian C. Swanson /s/
> Brian C. Swanson, M.D.

During this time the Grievant also contacted his supervisor, Wester, in an attempt to find out if he needed the health card in order to return to work. Wester told him to contact the State

DOT and gave him a phone number to call in that regard. The Grievant was also in contact with Dr. Swanson and had him call Dr. Sellers on his behalf in an attempt to regain his health card. Dr. Sellers advised Dr. Swanson of his interpretation of the safety regulations and his conclusion that the Grievant would no longer be qualified to drive according to those regulations and advised that the Grievant should go on disability. At the Grievant's request, on May 23rd, Dr. Swanson sent Fitzgerald the following letter:

Dear Ms. Fitzgerald:

This letter is in follow-up to my previous letter dated May 16th. Mr. Doskey was in for recheck again today in the clinic. He reports a recent episode of lightheadedness similar to the episode of March 22nd. With this one, though, there is no unexplained loss of consciousness. He did take his blood sugar, though, at the time and it was low. I suspect that this incident, as well as the one on March 22nd, would be most logically explained by low blood sugar secondary to his diabetic medication. His diabetic pills will be stopped and I don't believe he should have any further spells of hypoglycemia. We will, of course, be watching his blood sugar to be sure it doesn't go too high, but he has now refined his diet better than in the past and I don't think that will be a problem. At this point I think the possibility of a seizure on March 22nd is even less likely. I think the more likely explanation would be a hypoglycemic spell which hopefully will not now be recurring due to change in medication.

If you have any further questions or concerns, please give me a call.

Sincerely,

Brian C. Swanson /s/
Brian C. Swanson, M.D.

On May 26, Dr. Sellers' office called the Grievant and informed him that Dr. Sellers would not release a CDL card to him pursuant to State regulations. The Grievant contacted Dr. Swanson and asked him again to talk to Dr. Sellers on his behalf. On June 5, 1995, Dr. Swanson contacted the Grievant after talking to Dr. Sellers and advised him that he could not get a CDL and that he should apply for disability. The Grievant then contacted the Highway Commissioner, who sent him to the County's personnel office to see Fitzgerald regarding applying for disability. On June 7, 1995, the Grievant talked to a Mr. John Alberg regarding the procedures for applying for disability he had gone through. Alberg advised the Grievant that he too had been turned down for the health card because of physical reasons, but had still received his CDL with a "K" restriction on it. Shortly thereafter, the Grievant went to Wester's home and informed him of the possibility of receiving a CDL with a restriction when one does not qualify for the health card. Wester advised the Grievant that he would talk to the Commissioner about the matter.

On June 8, 1995, the Grievant contacted the Federal Department of Transportation and was advised that a CDL and health card is not required in order to be a driver for a county. The Grievant then contacted the Wisconsin State Patrol who confirmed that information. The Grievant then contacted the Highway Commissioner and informed him that federal and state regulations do not require the CDL and health card in order for him to drive for the County.

On June 9, 1995, at the Grievant's request, Fitzgerald sent Dr. Swanson the following letter explaining the County's policy with regard to the CDL requirement:

> Dear Dr. Swanson:
>
> This letter is in response to a request by Eugene Doskey to communicate to you the Douglas County CDL policy. Please be advised that upon hire the County requires all new employees to have a CDL and health card. During employment the employee is required to keep a current Wisconsin Approved CDL, even though during the course of his/her employment they may experience poor health and temporarily lose their health card. Therefore, if the employee maintains a Wisconsin Approved CDL license even though they may temporarily lose their health card we considered them employable.
>
> On the other hand, in the event the employee does experience a health problem or any other problem that affects their CDL in anyway, the employer might not be aware of it, therefore, the employee does have a responsibility under the statutes to take the responsibility to comply with the laws that govern CDL licensing.
>
> If you have any further questions, or if I can assist you in any way, please feel free to call me at your convenience at extension 394-0464.
>
> Sincerely,
>
> Candace Fitzgerald /s/
> Candace Fitzgerald
> Assistant Personnel Director

Also on June 9, 1995, at the Grievant's request, Dr. Swanson sent the following letter to the Highway Commissioner:

Dear Sirs:

Mr. Doskey is a 55-year-old gentleman who I follow as his primary care physician. He has had a recent episode of altered consciousness which appears to have been secondary to hypoglycemia or low blood sugar. This was apparently a medication-induced problem which should now be avoided as he is off of the medication that caused the problem. At this point I think it would be okay for him to go back to work. It is my understanding that he will not qualify for a Federal Driver's card, but I have now been informed that this will not be necessary for him to perform his usual duties with the Highway Department. From my standpoint, though, I think it is okay to drive. If you choose to give him a waiver from his Federal ICC card, that obviously is your decision.

Thank you.

Sincerely,

Brian C. Swanson /s/
Brian C. Swanson, M.D.

Within a few days, the Grievant was contacted by the County and informed that the County would waive the health card requirement and allow him to return to work. On June 16, 1995, the Grievant received a call from the County informing him that he should return to work on June 19, 1995. The Grievant in fact returned to work on June 19 without incident and requested that his sick leave and vacation be reinstated from the date of April 28, 1995 to June 16, 1995 on the basis that the CDL and health card was not required by state or federal regulations, but only by County policy and the County could have waived the health card requirement sooner before he exhausted his sick leave and vacation. The County denied the Grievant's request for the reinstatement of his vacation and sick leave he had used during that period and on July 5, 1995, the Grievant filed the instant grievance in writing which the County's personnel office received on July 7, 1995. The County and Union met to discuss the grievance on August 1, and again on August 10, 1995.

At the Grievant's request, Dr. Swanson sent the County's Personnel Director, John Mulder, the following letter dated August 14, 1995:

Dear Mr. Muellner (sic):

I am writing to you at the request of Mr. Doskey. On the 19th of May I had recommended that he discontinue a medication that I think was responsible for his previous episode of diminished consciousness. He has been fine since that time. In the interim we were then deliberating trying to figure out exactly what to do with his work card. Apparently he was given a waiver on that by the county. I feel that he would have been capable of returning to his current work position within a couple of days after the 19th of May.

Thank you.

Sincerely,

Brian C. Swanson /s/
Brian C. Swanson, M.D.

On September 14, 1995, Mulder responded to the Union's representative, Colin Hayes, again denying the grievance. Near the end of October, 1995, the Union's attorney, Don Bye, went to Mulder's office in an unsuccessful attempt to discuss settlement of the grievance. On December 19, 1995, the Union notified the County in writing that it was requesting arbitration on the grievance. Mulder responded to that notice by the following letter of December 21, 1995 to Hayes:

Dear Mr. Hayes:

I have received your letter dated December 19, 1995 regarding the filing for arbitration in the above referenced case. I am writing to let you know of my concerns about the timing of this issue. While the County has not been strict with its grievance process in the past, I am concerned about the lateness of this petition for arbitration. Generally, if I feel that we are making progress or continuing to discuss an issue, I do not have a problem with time limits. However, this particular grievance, was filed on July 7, 1995. The County and Union met on this issue on August 1st and 10th. The County provided you with additional information on September 14 and denied the grievance in writing at that time.

> I did not hear any response from the Union for over a month, until the week of October 30, 1995. Mr. Don Bye then stopped by my office requesting a settlement to the grievance. I was unwilling at that time and told him so.
>
> I then heard nothing more from the Union until your December 19th letter. The County's position on this issue has not changed since my correspondence with you on September 14th. This grievance is without merit. Mr. Doskey's health situation was unfortunate, but that is exactly why we have sick leave. As soon as we had medical documentation that he was able to return to work, Mr. Doskey did return to work. The County does not retroactively return sick leave if employees take sick leave and then later get a note from a Doctor saying that the employee could have returned to work.
>
> Sincerely,
>
> John Mulder /s/
> John Mulder
> Personnel Director

On January 10, 1996, the Union sent its request for grievance arbitration to the Wisconsin Employment Relations Commission, which was received on January 12, 1996. Mulder sent a letter to the Commission indicating that contrary to the request sent by the Union, it was not a "joint request" and indicated that "the County denies any contractual violation and feels that the request for arbitration is untimely."

The parties were unable to resolve their dispute and proceeded to arbitration before the undersigned. At the arbitration hearing, the County reiterated its position that the request for arbitration is untimely.

POSITIONS OF THE PARTIES

Union

With regard to the issue of arbitrability, the Union asserted the following at hearing: there is no claim that the grievance was not timely filed, the County took a month to hold a meeting on the grievance in violation of the contractual time lines, the parties waived the time lines during the processing of the grievance, there are no specific time lines after the meeting step, and the County

has not been prejudiced by the delay. The Union explained that it took the grievance to its attorney, who attempted to arrange a meeting with Mulder in order to resolve the matter. When the meeting with Mulder did not result in a settlement of the matter, the Union submitted the grievance to its Executive Board for a decision on whether or not to arbitrate the grievance.

With regard to the merits, the Union asserts that the County is, in essence, contending that the Grievant should pay for the County's mistake.

The Union asserts there is nothing in the Agreement that requires CDL licensure or an ICC health card. The County's establishment of a policy with regard to such a requirement was done unilaterally without the agreement of the Union. Further, when that policy was enacted in 1991 it was not retroactive as against long-standing employes. However well- intentioned the policy might be, it was not required by Wisconsin law or regulations. It is also noteworthy that another employe in this bargaining unit has been permitted to perform his work without restriction, even though he has a more serious diabetic condition.

While it was prudent that the Grievant consult his doctor and undergo tests following his loss of consciousness on March 22nd, that was done and no threatening condition was diagnosed during that process. The Grievant reported to work and worked the whole day without any problem. Although the County had complete access to the Grievant's medical history, diagnosis and treatment, instead of asking the appropriate questions and seeking answers, the County basically sat back and assumed that the Grievant could not work. That situation continued through most of April. The problem was compounded when the County refused to return the Grievant to work despite his good physical examination at the end of April. The County's doctor, Dr. Sellers, played lawyer and government regulations expert, and superficially concluded that the Grievant could not return to work and would be forever prohibited from CDL licensure due to his loss of consciousness on March 22nd. The County accepted and acted upon those unfounded conclusions without making further inquiry or judging the validity of Dr. Sellers' conclusions.

The parties' Agreement provides that employes may use sick leave for instances when they are sick or injured and does not permit the Employer to make a superficial determination that an employe is sick and arbitrarily place that employe on sick leave. Similarly, the Agreement permits employes, within limitations, to select their days of vacation and does not provide that the County can arbitrarily remove an employe from work status and place him on vacation status.

The Union also disputes the County's claim that it did not have any medical information upon which it could return the Grievant to work until it received Dr. Swanson's letter in August of 1995. The Union contends that the only problem with the Grievant's returning to work was caused by Dr. Sellers' erroneous conclusion that an ICC health card and CDL licensure was required. The County did nothing to learn whether that was true or to alter its position until after the Grievant personally obtained the correct information. While the Grievant's doctors were somewhat deferential to the County's doctor for some period, they did provide reporting to the

County whenever requested by the Grievant or the County. Dr. Swanson advised Mulder in August of his belief that the Grievant "would have been capable of returning to his current work position within a couple of days after the 19th of May." While the Union does not believe it is required to provide specific medical reporting, that document would have required that the Grievant should have been returned to work as of May 22nd, saving him 19 days of vacation. Even before that, however, the County's Assistant Personnel Director had communications from both the Grievant and his doctors. On May 16, 1995, Dr. Swanson wrote Fitzgerald and explained the changes in the Grievant's medication and although stating that he could not be absolutely certain as to future incidents, he concluded that "his diabetic medication should be in better control at this point as well. . . ", and that the Grievant was also taking an anti-convulsive medication "at a level that is considered to be adequate." On May 23rd, Dr. Swanson sent Fitzgerald a report in which he indicated the lack of potential further spells of hypoglycemia with the Grievant watching his blood sugar and diet and concluded "I don't think that will be a problem" and that with regard to the question of seizures that "is even less likely." Dr. Swanson offered to respond to any questions or concerns the County might have. That report was also sent to Dr. Sellers, who had no contrary response. Finally, on June 9, 1995, Swanson specifically indicated "At this point I think it would be okay for him to go back to work. . .I think it is okay to drive." Those medical reports answered any legitimate questions the County might have, and they could have been obtained earlier than mid-May. Further, the reports should not even have been required in view of the Grievant having passed the physical examination in late April. Thus, the Grievant's demonstration that he was physically able to work, the good result on the physical examination in late April and his doctor's medical reports all validated a much earlier return to work. The Union requests that the Grievant be made whole by having his sick leave and vacation days restored.

County

The County takes the position that the grievance was not timely processed. Article 5, Section 4, of the Agreement provides that an issue may be submitted to arbitration after a sincere and earnest effort. The County denied the grievance in writing on September 14, 1995. The County heard nothing from the Union until the end of October when it approached the County in an effort to settle the grievance. The County again heard nothing from the Union until it notified the County on December 19th that it was going to file for arbitration. The County cites the following from Elkouri and Elkouri, How Arbitration Works:

> "Some cases hold there is no time limit for filing grievances where the agreement does not specify any. But some arbitrators have held that even though the contract does not state a time limit for filing, a requirement for filing within a reasonable time is inferred by the establishment of a grievance procedure." 1/

1/ 3rd Ed., at pp. 147-148.

The County asserts that the Union has failed to proceed with the grievance in a timely manner.

As to the substantive issue, the County summarizes its view of the events in the case. On March 22, 1995, the Grievant suffered a loss of consciousness. On March 23 and 24, the Grievant sees his doctor and goes to the hospital for tests. On March 27, the Grievant returns to work and is told by his supervisor not to return. On April 27, 1995, the Grievant takes the required physical for his CDL license and Dr. Sellers will not sign the health card due to the March 22nd episode of unconsciousness. On May 16, 1995, the Grievant's doctor, Dr. Swanson, states with regard to the March 22nd loss of consciousness that he "cannot say for sure whether the incident in question was caused by a seizure or some other episode such as transient low blood sugar." On May 23rd, Dr. Swanson states in his letter that the Grievant reported a recent episode of lightheadedness similar to the episode of March 22nd, but that there is no unexplained loss of consciousness with this incident. On June 9, Dr. Swanson states in a letter "From my standpoint, though, I think it is okay to drive." On June 16, 1995, the Grievant returns to work.

The County notes that it has required its Equipment Operators to possess a CDL and a health card since 1990. While existing employes were grandfathered as to the driving test, the County has consistently required that employes pass a physical portion of the CDL license. Employes are required to maintain a current Wisconsin CDL, but are still considered employable if they temporarily lose their health card. Waivers of the health card requirement are not granted outside of the context of the employe's health condition and are not granted without a demonstrated need, nor if it is unsafe for an employe to work. The County asserts that it has the right under Article 8 of the Agreement to select its own physician and that the Union has a right to select a different physician to have the employe re-examined. The County's doctor, Dr. Sellers, concluded that the Grievant was unable to hold a CDL. At that point, the Union and the Grievant had the right to have the Grievant examined by a doctor of their choice and the Grievant's supervisor testified that he encouraged the Grievant to see if his doctor would release him to work. While the Grievant claims that his doctor was ready to release him to go back to work near the end of April, the County was given no formal release from that doctor. On May 16th, Dr. Swanson stated he was unsure of the cause of the Grievant's loss of consciousness, and a week later, stated that the Grievant had reported a recent episode of lightheadedness. Not until June 9, 1995 did Dr. Swanson state that in his opinion it would be "okay" for the Grievant to drive. As soon as the County received that release from the Grievant's doctor, he was put back to work.

The County notes that Dr. Swanson stated in a letter on August 14, 1995, that he felt that the Grievant could have reported to work shortly after May 19, and in hindsight, the Grievant did not have any further health problems. However, the County had to make a decision on the Grievant's ability to work with the information it had at the time, and did so in good faith. The County cannot permit an employe to use sick leave and then get a doctor's note after the fact stating that he could have worked.

The County concludes that based on the information it had at the time, it did not act inappropriately or unfairly toward the Grievant, but acted prudently to protect both the Grievant and the general public from a potential unsafe condition. The Grievant was able to use his sick leave and vacation while unable to work for those medical reasons. The purpose of sick leave is to provide continuing income for an employe who is physically unable to work due to medical reasons, as was the case here, and unfortunately the Grievant had to use vacation time as well due to his relatively low bank of sick leave. The County requests that the grievance be denied.

DISCUSSION

Procedural Arbitrability

As both parties note, Article 5, Grievance Procedure, of their Agreement, does not specify a time limit for submitting a grievance to arbitration after the meeting of the Grievance Committee and the Highway Committee has been held. Section 4 of Article 5 not only does not specify a time limit for filing for arbitration, it states, ". . .If. . .the issue remains unsettled, the matter shall be submitted to arbitration." Article 5 also does not contain any language stating what happens if time limits are not met, e.g., the grievance is to be considered dropped or settled.

The Arbitrator agrees with those arbitrators who have held that the absence of specific time limits for processing a grievance to the next step does not mean that the grievance will necessarily be considered timely no matter how long the delay. Especially given the parties' recognition of the need to deal with such disputes promptly by the inclusion of the relatively short time limits in the earlier steps, there is an obligation to process the grievance to arbitration within a reasonable time. What is to be considered "reasonable" depends upon the circumstances of each case, as well as what the parties have considered to be a reasonable length of time in the past.

In this case, the Union turned the grievance over to its attorney to have him contact the County and attempt to resolve the dispute. Although the six weeks between the County's written denial on September 14th and the time of the meeting at the end of October seems over long, there is no evidence as to what or who caused the full extent of the delay. After that meeting did not result in a settlement, there was another delay of approximately six weeks before the Union notified that County that it was going to submit the grievance to arbitration. It was at that point that the County first objected to the length of time the Union was taking in processing the grievance. While the Union explains the delay was the result of having to submit the grievance to its Executive Board for a decision on whether to proceed to arbitration on the dispute, six weeks again seems overly long. It is noted, however, that there is no background against which to judge that length of time, i.e., there is no evidence as to how long the Union has generally taken in the past to file for arbitration so that a comparison can be made, nor is there evidence that the County has objected to such a delay in the past.

Given the foregoing, the County's failure to put the Union on notice at the meeting at the

end of October that it considered six weeks to be too long, and the lack of any prejudicial impact on the County caused by the delay, the Arbitrator cannot conclude that the time the Union took to process the grievance to arbitration so exceeded the parties reasonable expectations 2/ that it resulted in a waiver of its right to proceed to arbitration.

Merits

It is first noted that the Grievant testified he was informed by his supervisor at the end of the work day on March 27, 1995, that he could not work without a doctor's "okay". The first question that must be answered is whether the County had the right to refuse to permit the Grievant to return to work until he obtained a release from his doctor. Given the County's rights under Article 4, Management Rights, to manage and direct its work force, the Grievant's prior medical history of seizures from a brain tumor, the Grievant's job as a Truck Driver, and the absence of a provision expressly limiting the County's rights in this regard, that question is answered in the affirmative. Under the circumstances, it was not an unreasonable exercise of its management rights for the County to require that the Grievant obtain a release to return to work from his doctor upon learning he had experienced a loss of consciousness.

The Grievant, although in communication with his doctor and following his instructions, did not obtain an express release from his doctor until Dr. Swanson's June 9th letter. Dr. Swanson's May 23rd letter indicates that he felt the Grievant's loss of consciousness on March 22nd was the result of a low blood sugar level which he did not believe should reoccur. It appears, however, it was his understanding at that time, based upon what Dr. Sellers had told him and the Grievant, that the Grievant had to have a CDL and a health card in order to drive for the County and that his loss of consciousness on March 22nd disqualified him from obtaining the health card. The only change in circumstances between Dr. Swanson's May 23rd letter and his June 9th letter was his being advised that a CDL and a health card were not required by state or federal regulations to drive for the County and that the County still considered an employe employable even though they may have temporarily lost their health card as long as the employe maintains a Wisconsin CDL. Upon being given that information, Dr. Swanson sent his June 9th letter.

It was the County that required the Grievant to see Dr. Sellers for his physical examination, and it was Dr. Sellers' interpretation of federal regulations and his belief that the Grievant was no longer qualified to drive for the County based upon those regulations that began the confusion. In this case it was left up to the Grievant to find out what state and federal regulations actually required and then inform the County. The County has the obligation to administer its policies and work rules and to make clear what is required and when requirements

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2/ Such expectations are based upon their Agreement, their practice under that Agreement and the particular circumstances.

will be waived. The burden is on the County, not the employe, to be informed as to what is required and when those requirements apply. If there is confusion in that regard, the responsibility to obtain accurate information and to provide accurate information lies with the County.

While the County bears the responsibility for the confusion over what was required for the Grievant to return to work, and the effects of that confusion, that does not necessarily result in a conclusion that the Grievant could have returned to work on April 28th. Although he passed his physical examination on April 27th with Dr. Sellers, as of that date he still had not obtained a release from Dr. Swanson to return to work. The Grievant testified that Dr. Sellers made no diagnosis of his condition and relied solely on the Grievant's having indicated on the physical examination form that he had recently experienced a blackout. Dr. Swanson was the Grievant's treating physician and even as late as May 16th, his letter stated, "At this time I cannot say for sure whether the incident in question was caused by a seizure or some other episode such as transient low blood sugar." He also indicated in that letter that he had placed the Grievant back on an anti-convulsant. It was not until his May 23rd letter that Dr. Swanson indicated with some degree of certainty that the Grievant's loss of consciousness on March 22nd was the result of a low blood sugar level and was not a seizure, and that he did not believe the Grievant should have any further spells of hypoglycemia. As noted above, it appears that but for the confusion regarding the need for the health card, Dr. Swanson would have released the Grievant on May 23rd to return to work. This is confirmed by Dr. Swanson's letter of August 14th to the County's Personnel Director in which he stated, "I feel that he would have been capable of returning to his current work position within a couple of days after the 19th of May."

Since it was the County's responsibility to clear up the confusion with regard to the need for the Grievant to have a valid health card in order to return to work, the County must bear the consequences of its refusal to permit the Grievant to return to work when he would have been released by his doctor on May 23rd, but for that confusion. By not taking steps prior to June 9th to clear up the confusion and continuing to not permit the Grievant to return to work, thereby requiring him to use his accrued sick leave and vacation, the County exercised its rights under Article 4, Management Rights, of the Agreement, to direct its work force, in an unreasonable manner in violation of the Agreement. Therefore, the County will be required to immediately restore to the Grievant those sick leave and vacation days he was required to use from May 24 to June 19, 1995.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance of Eugene Doskey is sustained to the extent that Douglas County did not permit him to return to work as of May 24, 1995 and continued to require him to use his

accrued sick leave and vacation. Therefore, the County is directed to immediately restore to Doskey those sick leave and vacation days he was required to utilize beginning on May 24, 1995 until he was returned to work on June 19, 1995.

Dated at Madison, Wisconsin, this 14th day of August, 1996.

By David E. Shaw /s/
David E. Shaw, Arbitrator