BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration<br>of a Dispute Between<br><br>NEW LISBON SUPPORT STAFF<br><br>and<br><br>NEW LISBON BOARD OF EDUCATION | Case 34<br>No. 53778<br>MA-9457 |

Appearances:

Ms. Melissa A. Cherney, Staff Counsel, and Mr. Chris Galinat, Associate Counsel, appearing on behalf of the Union.

Lathrop & Clark, Attorneys at Law, by Ms. Malina R. P. Fischer and Ms. Jill Weber Dean, appearing on behalf of the District.

## ARBITRATION AWARD

Pursuant to a request by New Lisbon Support Staff, herein the Union, and the subsequent concurrence of New Lisbon Board of Education, herein the District, the undersigned was appointed Arbitrator by the Wisconsin Employment Relations Commission pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on May 14, 1996, at New Lisbon, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on July 17, 1996.

After considering the entire record, I issue the following decision and Award.

## ISSUES:

The parties stipulated to the following issues:

1. Whether the District has violated the negotiated agreement between the New Lisbon Support Staff and the Board of Education when it terminated the grievant, Evelyn Young?

2. If so, what is the remedy?

FACTUAL BACKGROUND:

The District hired Evelyn Young, hereinafter the Grievant, as a bus driver on August 23, 1979. The Grievant had a good driving record, and had nothing more than minor complaints by students or parents during her period of employment with the District. She had not received any reprimands, suspensions or other discipline during this time.

In early April, 1995, the Grievant began to experience problems with her shoulder, which made it difficult for her to drive a school bus. She initially went to a chiropractor in an unsuccessful attempt to treat the problem.

On May 10, 1995, the Grievant went to Dr. John L. Olson of the Marshfield Clinic for shoulder pain. At that time, she began a course of medical therapy related to rotator cuff tendinopathy and was treated with local steroid injections since her shoulder had failed "to respond to simple local therapy."

At the beginning of the summer, District Administrator Roger Derrickson called the Grievant and asked if she would do some extra driving in the summer because he was having trouble finding summer drivers. The Grievant, who had driven previous summers, agreed to drive. This driving lasted through June 22, 1995.

In mid-July, 1995, the Grievant again visited the doctor due to continued pain in her shoulder. She was referred to Dr. Chu of the Marshfield Clinic's Physical Medicine Department "who suggested probable impingement syndrome." Thereafter, the Grievant had an MRI scan that suggested thinning with possible fraying or partial tear of the supra spinatus tendon. During this entire time, the Grievant was "relatively disabled from the standpoint of her ability to drive a school bus."

On August 14, 1995, the District held its regular annual meeting with bus drivers prior to the commencement of the school year. The Grievant attended the meeting and informed District Administrator Derrickson that she was having shoulder problems and would not be able to start driving at the start of the school year.

The Grievant did not talk again to District Administrator Derrickson about her shoulder condition either on the phone or face to face after the August 14, 1995 bus driver meeting. However, she did provide some completed "Return to Work Notice" forms to the District. On August 16, 1995, the Grievant's physician, Dr. Scott Cameron, indicated on said form that the Grievant "is to stay out of school/work until further notice." He further scheduled the Grievant for a follow-up appointment in one month.

On August 23, 1995, the Grievant began taking sick leave from her position with the District.

On September 15, 1995, Dr. Cameron again indicated on the aforesaid form that the Grievant was "to stay out of school/work until further notice." This time, however, Dr. Cameron did not indicate that he had scheduled any follow-up appointments with the Grievant.

On September 26, 1995, the Grievant ran out of accumulated sick leave. Neither at this time nor at any time thereafter until November 20, 1995, did the Grievant apply for any other type of leave of absence from her employment with the District. She did not communicate further with the District in September or October, 1995, regarding her medical condition or her employment status. Commencing September 27, 1995, she was absent without pay or leave from her job. However, she was still considered an employe by the District.

Sometime in September, 1995, prior to running out of accumulated sick leave, the Grievant applied for long-term disability benefits with the District's insurance carrier. She did not communicate with the District regarding her application.

On September 27, 1995, the Grievant's application for long-term disability benefits was approved. A copy of this approval was sent to the District. Based on information provided by the Grievant in her application, the insurance carrier indicated that her disability began on July 1, 1995. The carrier further noted that her application indicated "that you may be off work for an indefinite period of time." The carrier added that as of September 29, 1995, the Grievant had satisfied the ninety-day waiting period provided for under the District's long-term disability policy, and that she would receive her first benefit payment on October 29, 1995.

During this time, District Administrator Derrickson continued to treat her as an employe, and the District continued to pay her health insurance benefits.

After consulting with the Board and the District's attorney, District Administrator Derrickson sent a letter to the Grievant dated November 7, 1995, in which he noted the Grievant's extended absence from work and the fact her sick leave had run out. Derrickson noted "You have not requested (nor do I believe you are entitled to) any further leave of absence." He added "You have given the District no indication when, if ever, you may be able to resume the duties of that position."

In his November 7 letter, District Administrator Derrickson explained to the Grievant the District's need for continuity of service in bus driver positions in order to assure student safety and further explained the difficulty the District had with locating qualified drivers. For these reasons, Derrickson indicated that the District was unable to hold the Grievant's position open indefinitely. Derrickson concluded by advising the Grievant that on November 15, 1995, "I intend to declare a vacancy in your bus driving route," and fill it on a permanent basis unless "you have previously requested special leave according to the terms of . . . the bargaining agreement," or been certified to resume your bus driver routes by that date.

On or before this same time, District Administrator Derrickson was discussing another matter with Coulee Region United Educators Executive Director Gerald Roethel, hereinafter Roethel, when Derrickson mentioned to Roethel that "things in the self-funding may be getting better soon," because individuals whose coverage was costing a lot would no longer be covered. Roethel asked what he meant by this, and Derrickson responded "something to the effect of problems in the bus area." Teacher Don Rosine, hereinafter Rosine, testified to a similar conversation around the same time in which Derrickson told him that there might be a possibility of getting out of self-funding in the near future.

District Administrator Derrickson testified that when he spoke with Rosine as noted above, it was in the context of explaining changing attitudes and personnel on the school board regarding an interest in looking at alternatives to the self-funding insurance plan. Derrickson also testified that his comments to Roethel related to Mr. Young's condition and the possibility "that he may not be with us a whole lot longer." (The Grievant's husband has been terminally ill with emphysema for a significant period of time. Three years ago, he was given eight weeks to live. The Grievant has been caring for him at home most of that time. The medical bills have been astronomical.)

On November 10, 1995, Roethel responded to District Administrator Derrickson's November 7, 1995 letter on behalf of the Grievant. In his letter, Roethel admitted that the Grievant was unable to perform her previous bus driving functions for the District. Roethel also said that the Grievant was having surgery for her shoulder pain on November 30, 1995. Roethel further said that the Grievant's doctor "will be providing documentation that will indicate a projected date for Mrs. Young's return to work."

Roethel requested that, in the meantime, the Grievant be placed on a special leave pursuant to Article VI of the Agreement. He also rebutted the District's position that leaves for extended periods of time had not been granted under this provision noting "Mrs. Young had a heart attack in December of 1983 and was off work for over a year before returning to work in January of 1985." Roethel stated the Union was aware of at least one other employe who was also granted an extended period of time to recover. He explained that the Grievant was aware that she would be responsible for health insurance premium payments during the period of unpaid leave, if leave was granted.

On November 13, 1995, the District received a letter, faxed from Phillips Drug Store, from Dr. John Olson regarding the Grievant's medical condition. Dr. Olson repeated that the Grievant was relatively disabled from the standpoint of her ability to drive a school bus. His correspondence did not, however, indicate whether the Grievant would be able to drive a bus again, and if so, when she might return to work. Dr. Olson added that she had been seeing members of the orthopedics department on a regular basis. Dr. Olson added: "It is hoped that this information is acceptable and sufficient, but should you have any further questions or concerns please do not hesitate to contact my office or the office of Dr. Scott Cameron."

On November 14, 1995, Roethel forwarded to the District a letter from the Grievant's regular doctor, Dr. Scott Cameron. In his covering letter, Roethel promised to provide the District with a return date as soon as it was available from the Grievant's doctor. Dr. Cameron's letter states:

> Evelyn Young is a patient of mine who has had right shoulder pain for quite some time now. On November 30, 1995 my intentions are to take her to the operating room and perform a procedure called an acromioplasty. Although I do not own a crystal ball, I see no reason why Evelyn will not be able to return to her job as a bus driver. Some people do extremely well after this procedure, some people have not quite as good a result. Again, I do not have the ability to predict how she will do, but I see no reason why she won't do well.

On November 15, 1995, the District forwarded a letter to the Grievant informing her of her COBRA rights to benefit continuation.

On November 28, 1995, District Administrator Derrickson, following the District Attorney's advice, forwarded a second letter to the Grievant terminating her employment status. Derrickson informed the Grievant that she was terminated effective November 15, 1995, that he had declared a vacancy in her bus driving route and had posted the position. Derrickson indicated that the action was taken because the Grievant was not entitled to additional leave under the agreement. Derrickson explained that he considered Dr. Cameron's letter to be insufficient to provide him with information he needed to determine whether to hold the Grievant's position open. Derrickson summarized Dr. Cameron's letter as follows:

> . . . the letter contains no projected date whatsoever for your return to work. Indeed, Dr. Cameron states you are scheduled for surgery on November 30, 1995. He gives no estimate of how long it will take to recover from that surgery, let alone how much longer it will take, assuming the surgery is successful, for you to regain your ability to drive a school bus. Furthermore, Dr. Cameron's letter does not project with any real certainty whether you will be able to resume bus driving at all. He expressed no more than guarded optimism that you will ultimately--at some completely unknown future date--recover your capacity to drive a school bus.
>
> The only thing that is really clear from Dr. Cameron's letter is that your disability will extend for more than five months, not just four

months. And there is still no end in sight.

Derrickson rebutted Roethel's argument for leave by noting he had not found "a single example of approval of special leave for extended (especially indeterminate) periods of employees who have exhausted their sick leave." He reiterated that it was not the practice of the District to grant such leaves.

Finally, Derrickson emphasized that the Grievant's employment had been terminated because of her prolonged inability to perform the essential functions of her bus driving job, not for misconduct of any kind. He further indicated that if the Grievant were released to resume employment, she should feel free to submit a job application to the District.

The District posted the Grievant's position. Eligible drivers were required to apply in writing on or before November 28, 1995. The District eventually hired a full-time bus driver to replace the Grievant. (Prior to this time, a substitute driver had covered the Grievant's route for the District.) At no time material herein, has the Grievant informed the District of her ability to return to work. Nor has she inquired into any bus driver positions with the District.

On November 30, 1995, the Grievant had the aforesaid surgery. She gave Power of Attorney to her brother before surgery. Her brother went to the District by December 1 and paid the insurance premium for the month of December before it was discontinued.

On December 1, 1995, District Administrator Derrickson confirmed in writing that the District had continued to provide the Grievant with insurance through the end of the month of November, 1995. Derrickson's letter also confirmed that the District had received the Grievant's monthly payment for health benefits for the month of December, 1995.

On December 4, 1995, the Grievant filed a grievance with the District in accordance with the Agreement, which is the basis of this proceeding. The grievance provided:

> The District's termination of my employment is a violation of Article IV, which provides that terminations can only be made for just cause. The District does not have just cause in this instance. The District's denial of my request for leave also violates Article VI, D. I wish to have my termination rescinded and to be placed on special leave.

At all levels of the grievance procedure, the District denied Grievant's grievance.

The grievant was released by her insurance carrier to return to work on March 1, 1996.

PERTINENT CONTRACTUAL PROVISIONS:

## ARTICLE II

BOARD FUNCTIONS

A. It is recognized that the Board has and will continue to retain the rights and responsibilities to operate and manage the school system and its programs, facilities, properties and activities of its employees.

B. Without limiting the generality of the foregoing (paragraph A), it is expressly recognized that the Board's operational and managerial responsibility includes:

-- The right to determine the location of the schools and other facilities of the school system, including the right to establish new facilities and to relocate or close old facilities.

-- The determination of the financial policies of the District, including the general accounting procedures, inventory of supplies and equipment procedures and public relations.

-- The termination of the management, supervisory or administrative organization of each school or facility in the system and the selection of employees for promotion to supervisory, management or administrative positions.

-- The maintenance of discipline and control and use of the school system property and facilities.

-- The determination of safety, health, and property protection measures where legal responsibility of the Board or other governmental unit is involved.

-- The right to enforce the reasonable rules and regulations now in effect and to establish new rules and regulations from time to time not in conflict with this Agreement.

-- The direction and arrangement of all working forces in the system, including the right to hire, refuse to renew, suspend, discharge, discipline, or transfer employees.

-- The right to relieve employees from duty on

recommendation from the administrative staff for poor or unacceptable work or for other legitimate reasons.

-- The creation, combination, modification, or elimination of any support staff position deemed advisable to the Board.

-- The determination of the size of the working force, the allocation and assignment of work to employees, the determination of policies affecting the selection of employees, and the establishment of quality standards and judgment of employee performance.

-- The determination of the layout and the equipment to be used and the right to plan, direct, and control school activities. The determination of the processes, techniques, methods and means to be used.

Nothing in this Agreement shall limit in any way the District's contracting or subcontracting of work or shall require the District to continue in existence any of its present programs in its present form and/or location or on any other basis.

C. The foregoing enumerations of the functions of the Board shall not be considered to exclude other functions of the Board not specifically set forth; the Board retaining all functions and rights to act not specifically nullified by this Agreement.

. . .

**ARTICLE IV**

EMPLOYEE DISCIPLINE

A support staff employee who has successfully completed the trial period shall not be disciplined, suspended or discharged except for just cause.

. . .

UNION'S POSITION:

The Union initially argues that the District did not have just cause to terminate the

Grievant. In this regard the Union first maintains, contrary to the District's assertion, that the Grievant has just cause protection and that it is well established in arbitral case law that a temporary disability does not constitute just cause for discharge. The Union adds that in the instant case the arguments against finding just cause are particularly strong because there was no legitimate or compelling reason to terminate a long-time excellent employe and because her termination was fraught with procedural irregularities and "unanswered important questions." With respect to the former argument, the Union notes all relevant factors discussed by the arbitrators in the cited cases mitigate in favor of the Grievant. These include the Grievant's 16 years of excellent service with the District without discipline of any kind, the fact that this was not a situation of an employe with a chronic absenteeism problem, for which the current situation was simply the last straw, the fact that this was not a permanent disability but instead the Grievant enjoyed a positive prognosis for being able to return to work, and the fact the District was not having any difficulty finding a temporary replacement for her. With respect to the latter argument, the Union questions the motives of the District including alleging retaliation for the Grievant's protected activity and the District's desire to get rid of two individuals (the Grievant and her husband) who were costing the District a lot of money on their medical claims. The Union adds that the District treated the Grievant different from other employes when it came to granting unpaid leaves, and that the District Administrator exceeded his authority in his haste to terminate the Grievant's employment.

In its reply, the Union adds that the District's repeated assertions the Grievant could not perform the "essential functions" of her job are irrelevant since it was "undisputed" that she was temporarily unable to drive a school bus at the time she was terminated. These circumstances, according to the Union, did not give the District the absolute right to terminate her employment while ignoring other factors that would mitigate for continued employment. In addition, the Union argues the term "essential functions" is "presumably a reference to the Americans with Disabilities Act (ADA)" and claims any arguments based on ADA are of limited relevance since this case arises under the just cause provision of the parties' collective bargaining agreement. Moreover, the Union adds that the District's use of ADA concepts is skewed since the District ignores another ADA term of art, which is "reasonable accommodation," something which could encompass herein granting of unpaid leave to allow the Grievant to recover.

The Union also argues, contrary to the District's argument, that Derrickson never asked the Grievant for information from her regarding her medical situation, "rather he provided her with an ultimatum."

The Union further argues that the District's position that one of its main concerns was the safety of students is not borne out by its actions. The Union adds that based on the Grievant's excellent safety record it is clear that Derrickson's hostility to her "overcomes his concerns for student safety, not vice versa."

The Union rejects the relevance of the cases cited by the District because they are distinguishable from the instant dispute.

Finally, the Union argues that the District's arguments with respect to remedy are without support. In this regard, the Union notes, contrary to the District's assertion, that the Grievant was released by her doctors to return to work on March 1, 1996, and the District was informed of this. The Union rejects the District's argument that it would be inappropriate to order immediate reinstatement because such an order would bump "an innocent employee" out of a job as "outrageous" while noting that reinstatement is clearly a necessary part of any "make whole" remedy.

Based on all of the above, the Union requests that the Arbitrator sustain the grievance and order the District to reinstate the Grievant with back pay and benefits retroactive to March 1, 1996.

DISTRICT'S POSITION:

The District initially argues that the agreement does not mandate it to provide the Grievant with an Article VI (D) special leave.

The District next argues that it acted in accordance with the terms of the agreement when it terminated the Grievant's employment based upon her disability since said disability "rendered her unable, for an indeterminate period of time, to perform the essential functions of her bus driver position." In this regard, the District states the Arbitrator should recognize that the action taken by it with respect to the termination of the Grievant's employment with the District was for the legitimate reason that she was disabled for an indeterminate period of time and unable to perform the essential functions of her job, rather than for misconduct of any sort. For this reason, the District concludes that Article II which provides that Board has "the right to relieve employees from duty on recommendation from administrative staff for poor or unacceptable work or for other legitimate reasons," governs the outcome of this dispute, and Article IV governing just cause for discipline should be given no consideration whatsoever. (Emphasis supplied)

The District also argues that in addition to its contractual right to terminate employes for legitimate reasons it acted in accordance with generally recognized labor standards in terminating the Grievant's employment in November, 1995. In this regard the District claims it had just cause to terminate the Grievant's employment because prolonged absence from work, even due to illness like the Grievant, clearly constitutes just cause for termination. In determining just cause, the District would have the Arbitrator apply a two-pronged standard set forth by numerous arbitrators and Arbitrator Richard McLaughlin in General Teamster's Union, Local 662 and Clayton School District, Case 19, No. 51215, MA-8531 (McLaughlin, 1995) rather than the seven-point test developed by Arbitrator Daugherty in a 1966 grievance arbitration award. According to the District, McLaughlin set forth a just cause standard as requiring only two steps. First, the employer must establish the existence of conduct by the grievant in which it has a disciplinary

interest. Second, the employer must establish that the discipline imposed for the conduct reasonably reflects its disciplinary interest. The District concludes that it had just cause to terminate the Grievant's employment in November, 1995, due to excessive absences even where an extended disability was involved citing numerous cases in support thereof.

The District adds that the remedy requested by the Union is inappropriate because "there is no evidence that the Grievant is currently capable of safely operating a school bus," because no full-time bus driver positions are currently open and bumping a current employe out of a job would not be proper.

In its reply, the District reiterates that it acted in accordance with the collective bargaining agreement when it terminated the Grievant because it is not required to give a totally disabled employe unlimited medical leave of absence. The District adds that the record does not support the Union's contention that the Grievant's disability was temporary. The District claims that the Union presented the Arbitrator with a subterfuge rather than focusing on the District's legitimate reason for termination. In this regard the District claims issues like the Grievant's prior grievances, unemployment compensation claim, the District's self-funded insurance plan and Derrickson's knowledge of Mr. Young's medical condition, etc., had nothing to do with her termination. Finally, the District argues that the "newly requested remedy of back pay, added for the first time to this dispute" by the Union's initial brief is an inappropriate remedy because the District did not have an opportunity at hearing to fully address the back pay issue in presenting its case. The District adds that there is insufficient evidence in the record to support the Grievant's alleged ability to resume her former bus driving position.

The District requests that the Arbitrator uphold its decision to terminate the Grievant and deny the grievance.

DISCUSSION:

At issue is whether the District violated the collective bargaining agreement when it terminated the Grievant.

Appropriate Standard

The Union argues that the District did not have just cause to terminate the Grievant. The District, on the other hand, argues that because the Grievant was terminated for reasons other than disciplinary, Article II governs the outcome of this dispute. The District claims that because the Grievant was disabled for an extended and indeterminate period of time and was unable to perform the essential functions of her job it had a "legitimate reason" for relieving the Grievant from her job pursuant to the language of Article II. Alternatively, the District argues that it had just cause

to terminate the Grievant's employment.

Article II of the agreement provides that the Board has "the right to relieve employees from duty on recommendation from the administrative staff for poor or unacceptable work or for other legitimate reasons." (Emphasis supplied) The District feels that it is important for the Arbitrator to note that the board functions described in Article II of the agreement are not expressly limited by the terms of other provisions of the agreement, with one exception: Article II (B), paragraph 6, which reserves to the Board the "right to enforce the reasonable rules and regulations now in effect and to establish new rules and regulations from time to time not in conflict with this Agreement." (Emphasis supplied) The remaining enumerated Board rights, according to the District, are not restricted by the other clauses of the agreement unless "specifically nullified." by the agreement. (Emphasis supplied)

The District explains this line of reasoning as follows:

> For example, under paragraph 8, the Board's right to relieve employees from duty for legitimate, nondisciplinary reasons is not specifically nullified by any other Agreement language. By contrast, under paragraph 7, the Board's right to discharge employees for disciplinary reasons without cause is specifically nullified by Article IV, Id. at 2. Thus, the right to determine District safety measures and the right to relieve employees for legitimate reasons must be given a broad reading.

The Arbitrator does not agree with the District's conclusion that it should be given broad authority to terminate employes for legitimate reasons under Article II, Section B, paragraph 8. Assuming arguendo that the District's argument that except for Article II, Section B, paragraph 6 the remaining Board rights enumerated in Article II are not restricted by the other clauses of the agreement unless "specifically nullified" by the agreement is correct the District's contention regarding the appropriate standard to apply still must fail. For example, the District argues that under paragraph 8, its right to relieve employes from duty for legitimate, nondisciplinary reasons is not specifically nullified by any other agreement language while, in contrast, under paragraph 7, the Board's right to discharge employes for disciplinary reasons without cause is specifically nullified by Article IV. However, the contract does not specifically say this. Nor did the District offer any other persuasive evidence or argument that said paragraphs should be treated differently for purposes of enforcing Article IV.

In addition, Article II, Section B, paragraph 8 does not specifically state that its provisions are limited to terminations of a nondisciplinary nature. To the contrary, said contract clause permits the District to relieve employes from duty "for poor or unacceptable work" which is clearly disciplinary in nature. It follows, in the opinion of the Arbitrator, that the District's other

right enunciated therein to relieve employes of work "for other legitimate reasons" could include both disciplinary and nondisciplinary reasons.

Finally, applying Article IV to the Grievant's termination is not inconsistent with the provisions of Article II, Section B, paragraph 8. That section, as noted above, gives the District the right to relieve employes from duty "for other legitimate reasons." One such reason could be just cause under Article IV. Such an interpretation harmonizes the provisions of Article II, Section B, paragraph 8 with the just cause language of Article IV.

Based on all of the above, the Arbitrator finds that the Grievant is entitled to the just cause protections of Article IV. A question remains as to the exact nature of the just cause standard to be applied herein.

## Just Cause

The Union makes no reference to a specific test or standard for just cause in its written arguments. The District, on the other hand, rejects the "seven-point test." This is an analytical framework developed by the late Carroll R. Daugherty, a Professor of Labor Economics and Labor Relations at Northwestern University and well-established arbitrator. It was his attempt at defining just cause. His approach has its critics 1/ and its shortcomings.

The District instead would have the Arbitrator apply a two-pronged standard in determining just cause as noted above. Based on the facts of this particular dispute, the Arbitrator agrees with such an approach.

This Arbitrator believes there are two basic and fundamental questions in any case involving just cause. One is whether the employee is guilty of the actions complained of, which, as noted above, the District herein has the duty of so proving by clear and convincing evidence. If the answer to the first question is affirmative, the second basic question is whether the punishment is contractually appropriate, given the offense.

Applying the above standard to the instant case, the Arbitrator first turns his attention to the question of whether the Grievant is guilty of the actions complained of.

The District argues that it had just cause to terminate the Grievant because she was disabled for an indeterminate period of time and was unable to perform the essential functions of her job. The record is undisputed in this regard. The Grievant was off work during the time in question due to a shoulder problem and was unable to drive her bus route.

The District also argues that the Grievant was totally disabled, and it had no obligation to

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1/ See, for example, John E. Dunsford, "Arbitral Discretion: The Tests of Just Cause," Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington, D.C.: BNA Books, 1990), 23.

give her an unlimited period of time off. It may be true that the District is under no obligation to provide an unlimited medical leave of absence to the Grievant. However, the record contains no persuasive evidence that the Grievant was totally and permanently disabled at any time material herein 2/ or that she needed or requested an unlimited leave of absence. 3/ (Emphasis supplied) Therefore, the Arbitrator rejects this allegation of the District.

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2/ To the contrary, the Grievant drove bus during the school year as well as during summer school while she had shoulder problems. She was released to return to work on March 1, 1996.

3/ She did request an extended leave of absence which was denied by the District.

Based on the above, the Arbitrator finds that there is some basis for the District to take action against the Grievant. The remaining question is whether termination is contractually appropriate. For the reasons listed below, the Arbitrator finds that it is not.

The Grievant worked for the District for over sixteen (16) years with an excellent work record and no prior discipline of any kind. She safely drove a school bus during this period of time with only minor complaints from parents and/or students.

In addition, the Grievant did not have a chronic absenteeism problem, for which the current situation was simply the last straw. The Grievant had one other long-term illness (heart attack), which occurred more than ten (10) years ago and for which she received an extended unpaid leave of absence from the District.

More importantly, the District did not give the Grievant a sufficient period of time to return to work or to face termination of her employment. In particular, it was unjust for the District to give the Grievant a deadline of November 15, 1995, to resume her bus driving duties or face termination when it knew that she was scheduled for surgery on November 30, 1995, to correct her shoulder problem. The Union informed the District that the Grievant wanted "to return to work as soon as her doctor releases her to do so." The Union also informed the District that although the doctor performing the surgery did not have a crystal ball he did not see any "reason why Evelyn will not be able to return to her job as a bus driver." The District, in the opinion of the Arbitrator, should have at least waited until after the operation to see if it was successful. Then it could have made a decision whether it was appropriate to hold her position open for an additional period of time.

This is a close call. The District is entitled to the services of its employes and too much absence, even for a legitimate reason like a disability, is potential grounds for termination. However, as noted above, there is no persuasive evidence that the Grievant was permanently disabled at the time of discharge. To the contrary, the record evidence supports a finding that the Grievant likely would be able to return to her job and wanted to do so. In addition, the District had a long-term substitute in place who was performing the Grievant's job in a satisfactory manner, and there is no indication that the District was in danger of losing said driver. 4/ Finally, there were no openings in bus driver positions except for substitutes, and there is no evidence in the record that qualified substitute bus drivers were not available to fill the Grievant's position on a temporary basis, despite the District's claim that it was always looking for bus drivers. 5/ The District simply presented no persuasive evidence that it had to act for business or any other legitimate persuasive reasons when it did.

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4/ He was ultimately hired to permanently replace the Grievant.

5/ Tr. at 42-43.

The District cites a number of cases in support of its position that excessive absences even for an extended disability is grounds for discharge. However, these cases are distinguishable from the instant dispute.

The District first notes that the right to terminate employes for excessive absences, even where they are due to illness, is widely recognized by arbitrators citing Elkouri and Elkouri, How Arbitration Works, 578 (4th Ed., 1985) in support thereof. The District cites one arbitrator's explanation of this reasoning:

> At some point the employer must be able to terminate the services of an employee who is unable to work more than part-time, for whatever reason. Other arbitrators have so found, and this Arbitrator has upheld termination in several appropriate cases involving . . . extended absences due to illness. 6/

However Elkouri at 579 also states "that there is no fixed or generally accepted rule as to when the 'excessive' absence point is reached -- the particular facts and circumstances of the given case often will be considered along with the number of absences, the amount of time involved and the prospects as to future absences." According to Elkouri, at 579-580, "an arbitrator may require considerable tolerance on the part of management when the equities in favor of the employee are strong. (Emphasis added) That is the case here.

The District next cites Crown Division of Allen Group, Inc., Lorraine, Ohio Plant No. 3, 92-1 ARB Paragraph 8151 (Curry, 1991) for the proposition that termination based upon an employe's disability which renders him or her unable to perform the job is sufficient cause. The District notes that in such cases, "the discharge of the employee is based not on wrongdoing . . . but upon the interest of the employer in efficiency and economy of operations." The District argues that this is the case before the Arbitrator.

However, as noted above, there has been no showing by the District that the Grievant's termination was necessary for the "efficiency and economy" of its operations. In addition, in Crown Division the employe had been involved in many on-the-job accidents during the previous 20 years and had missed 64 percent of available work days during the preceding five years. She had been out for approximately 10 months for her most recent injury when she was terminated. The arbitrator further noted that there was no indication that she would become a dependable employe in the future and every indication that she would continue the pattern already established. In contrast, the Grievant has been a dependable employe in the past. She has had only one other long-term illness and that occurred over ten (10) years ago. She only missed about two and one-

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6/ Cleveland Trencher Co., 48 LA 615, 618 (1967).

half (2 1/2) months of work before the District terminated her. And there was a good probability that she would become a dependable employe again in the future.

The District also argues that the concept that an extended disability constitutes just cause for termination is well established and longstanding in the public sector, particularly in the field of public education, in Wisconsin and elsewhere. However, the cases relied upon by the District again are not on point and/or do not support the District's position. For example, Hamilton School District, Dec. No. 16801-A (Greco, 1/80), aff'd by operation of law, Dec. No. 16801-B (WERC, 2/80), involved an employe who was not covered by a just cause standard. In addition, the parties' contract therein contained a provision permitting a teacher to be on sick leave for only one full school year following the year in which the disability occurred. In the instant case, as pointed out by the District in its brief, to grant or deny a special leave of absence pursuant to Article VI (D) of the agreement is a discretionary function specifically reserved to the District Administrator by the agreement. In addition, the District is obligated to have cause before discharging the Grievant. Finally, unlike Hamilton School District, the Grievant was off work for a relatively short period of time prior to her termination, and had a date certain within only a few weeks of her termination, when based on her surgery there was a good chance that she would know when, and if, she was able to return to work.

In City of Wauwatosa, Dec. Nos. 19310-B, 19311-B, 19312-B (Crowley, 11/82), mod'd, Dec. Nos. 19310-C, 19311-C, 19312-C (WERC, 4/84), the dispute also involved employes not covered by a just cause standard.

In Smith v. Board of Education, 293 N.W.2d 221 (Iowa, 1980), the Court reversed a school board's termination of a temporarily disabled employe, finding that the termination was without just cause. Supra at 225. While noting case law at the time supporting the proposition that just cause for termination of a teaching contract may be found as a result of mental or physical disability, the Court stated that among the appropriate factors to consider in determining just cause for termination of a teaching contract on such grounds were the nature and the extent of the duties required by the contract, the character and possible duration of the illness, the needs of the employer and the extent to which the duties could be performed by another. Supra at 224. Those factors support the Grievant in the instant case. For example, the District did not establish a persuasive reason for discharging the Grievant when it did. It had someone capably performing her bus driver duties at all times material herein. The Grievant was scheduled for surgery within about two weeks of the date of her termination, and her doctor was reasonably confident that her injury would be repaired and that she would be able to return to work. The District, without persuasive reason, did not wait to see the results of that surgery.

The District also cites Teamster's Local Union No. 714 and Kilsby Roberts Co., 90-2 ARB Paragraph 8580 (Winton, 1990) in support of the aforesaid standard. The facts of the case involved a fifteen-year employe who injured his back while unloading a truck during the normal course of his employment. The employe was seen by various physicians. The employer's

physician had released him to return to normal work, while his own physician released him for light-duty work. The employe refused an offer of regular work and was terminated. Although the arbitrator sustained the discharge, he further held that if any time in the next 12 months the grievant had clearance to return to his regular duties on an unrestricted basis and the employer had an available position, the employer must reinstate the individual. (Emphasis added)

Finally, the District cites Service Employees' International Union Local 150 and UniCare Health Facilities, Case 12, No. 43743, A-4609 (Jones, 1990) where the arbitrator held the employer had just cause for discharging the grievant where the employe was unable to fulfill her attendance obligations. The arbitrator found:

> The employment relationship is a two-way street. As a general rule, the employer is obligated, subject to the varying needs of the business, to provide employment on a continuing basis. In return, the employe assumes one basic obligation, namely that he or she will report for work in a reasonably timely and consistent fashion in order to uphold their end of the bargain. Thus, an employe has a fundamental obligation to show up for work. If the employe is unable or unwilling to do so, the employer is justified in terminating the relationship because of that employe's unwillingness or inability to provide the contracted for services. This is true even when there is no question as to the bona fide nature of the employe's illness or disability; the absenteeism and the impact on the employer are nonetheless severe. 2/ (Emphasis supplied) (Footnote omitted)

However, unlike the present dispute, the above case involved an employe of two years' tenure who, at the time of her discharge, had missed 42 work days on a sporadic basis out of the last nine months of employment. She had also left work early several times and was tardy nine times during that same period. The employer had counseled the employe and then followed progressive discipline. The arbitrator noted that the employer could reasonably conclude that her attendance would not improve in the future. The arbitrator sustained the termination.

The Arbitrator agrees with the District that the above cases demonstrate the fact that the inability of an employe to be on the job, even when based upon bona fide disability, in some instances provides an employer with just cause for termination of the employe. However, the above cases also demonstrate that an arbitrator must review each dispute on a case-by-case basis taking into consideration all the facts and circumstances involved before making a decision whether a particular discharge is for cause. Where as here, the District, without a legitimate business or other reason, discharged a long-time employe with a good work record and no prior

history of discipline over a single prolonged absence due to legitimate medical reasons and the Grievant wanted to return to work, was scheduled for surgery to correct the medical problem which prevented her from doing her job at or about the same time as her termination and where her prognosis for full recovery was good, the District lacked just cause for discharging the Grievant and violated Article IV of the agreement by said action. In reaching this conclusion, and based on the discussion below, the Arbitrator finds it unnecessary to make a determination regarding the District's obligation to provide the Grievant with special leave pursuant to Article VI (D) of the agreement.

A question remains as to the appropriate remedy.

## Remedy

This is a close question. The District has some basis to discipline the Grievant -- inability/unavailability to perform her job for an extended period of time. The Grievant also failed to personally notify the District that she was available to return to her job. 7/ On the other hand, the District failed to follow basic elements of fairness in discharging the Grievant. These include consideration of the Grievant's excellent work record in driving a bus for the District, her desire to return to work, the fact that the Grievant was only temporarily disabled, the fact that the District did not wait until after the Grievant's surgery to make a decision regarding her termination since said surgery was scheduled within a few weeks of her projected termination date, the physician performing the surgery had informed the District that he thought the surgery would be successful enabling the Grievant to be able to return to work, and that as a result of said surgery, the District would have had a good indication when, if ever, the Grievant would be able to return to work and could have made a decision then as to the Grievant's continued employment; and finally, the fact that the District did not have a sufficient business or other legitimate reason 8/ for discharging the Grievant when it did. The District argues that it would be inappropriate to order immediate reinstatement because such an order would bump "an innocent employee" out of a job. However, as pointed out by the Association, reinstatement is clearly and traditionally a necessary part of any "make whole" remedy. The Arbitrator is of the opinion that any remedy should take into consideration all the above factors. Therefore, in view of all of the foregoing, it is my

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7/ Her insurance carrier notified the district the Grievant would no longer receive "long term disability benefits payable to you as you are released to return to work on March 1, 1996." Union Exhibit No. 1.

8/ Contrary to the District's assertion, the Arbitrator finds that the District did not have a legitimate safety concern about having a qualified bus driver transporting students to and from school. The Grievant had an excellent driving record, and the District had a qualified substitute in place driving her routes. Although the District was always looking for substitute bus drivers, the District does not argue nor does the record support a finding that the District did not have qualified substitute drivers available to drive the Grievant's bus routes.

## AWARD

1. That the grievance is sustained.

2. That the District shall immediately reinstate the grievant to her former position with all seniority and rights she had under the collective bargaining agreement at the time of her discharge. 9/

3. That the District is not obligated to make the Grievant whole for any wages and benefits lost because of the discharge.

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9/ Contrary to the District's assertion, the Arbitrator finds that the Grievant is able to return to work. Union Exhibit No. 1, Tr. at 81.

4. That the Arbitrator will retain jurisdiction over the application of that part of the remedy portion of the Award relating to the Grievant's ability to return to work and the date of her return for at least sixty (60) days to address any issues over remedy that the parties are unable to resolve. 10/

Dated at Madison, Wisconsin, this 7th day of October, 1996.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

10/ The Union requested that the Arbitrator retain jurisdiction regarding the issue of whether the Grievant is currently capable of safely operating a school bus, or in the event that the parties are unable to resolve the date the Grievant would be able to return to work. The District did not object to the Arbitrator retaining jurisdiction.