

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TEAMSTERS UNION LOCAL NO. 695

and

CITY OF STOUGHTON

Case 21
No. 52702
MA-9078

Appearances:

Ms. Naomi E. Soldon, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C.,
Attorneys at Law, appearing on behalf of the Union.

Mr. Steven C. Zach, Boardman, Suhr, Curry & Field, Attorneys at Law, appearing on
behalf of the City.

ARBITRATION AWARD

The Union and the City named above are parties to a collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to resolve a dispute involving Jon Onsrud. The undersigned was appointed and held a hearing on August 9, 1995, in Stoughton, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by February 9, 1996.

ISSUE

The parties stipulated that the Arbitrator would frame the issue. Based on the record, the undersigned determines that the issue is properly stated as:

Did the City of Stoughton violate the collective bargaining agreement when it refused to return Grievant Jon Onsrud to work after he was released for work by the doctor who performed his foot surgery? If so, what is the appropriate remedy?

CONTRACT LANGUAGE:

ARTICLE 3 - MANAGEMENT RIGHTS

Section 1. Teamsters Union Local No. 695 recognizes the prerogatives of the City of Stoughton to operate and manage its affairs in all respects in accordance with its responsibility and powers of authority which the City has not officially abridged,

delegated or modified by this Agreement and such powers or authority are retained by the City. These management rights include, but are not limited to the following: the rights to plan, direct and control the operation of the work force, determine the size and composition of the work force, to hire, to layoff, to discipline or discharge for just cause, to subcontract after notifying the Union, to establish and enforce reasonable rules of conduct, to introduce new or improved methods of operation, to determine and uniformly enforce minimum standards of performance subject to the provisions of this Agreement.

. . .

ARTICLE 13 - SICK LEAVE

. . .

Section 2. In order to be granted sick leave with pay, the department head or supervisor or employee must adhere to the following:

. . .

- c) Submit medical certificate for any absence of more than three (3) working days certifying as to inability to work.

BACKGROUND:

The Grievant is Jon Onsrud, an employee with the City since 1981. Grievant's most recent position with the City is as a Wastewater Treatment Facility Operator. Grievant was disabled from a car accident in his youth and has memory problems and seizure activity. He was previously terminated by the City in 1991 but was reinstated with back pay in an arbitration award.

In April of 1994, Grievant went on a medical leave to have foot surgery. Grievant was released by his foot surgeon, Dr. Frank Nichols, to return to work in July of 1994. The release to work form was signed by Dr. Nichols on July 15, 1994, and it released him to come back to work on July 18, 1994. The City did not get this form until sometime in March of 1995. However, the City wanted more than a release form from the foot surgeon -- it wanted a neurological report before it would return Grievant to work, and that is the source of this dispute.

Grievant's job is to perform maintenance at the plant and in the sewer system. He maintains pumps, performs electrical or carpentry work, and does a variety of tasks. He climbs ladders and works with electrical equipment on tanks that have waste in them. Wastewater

Systems Supervisor John Lynch considers the wastewater profession to be a dangerous job in general. He was aware that Grievant had an accident in the past that caused him memory and seizure problems. Mr. Lynch feared that if Grievant had a seizure, he could fall into a vat or that he could fall while working with electrical equipment or fall down stairs. Mr. Lynch was also concerned that with Grievant's memory problems, he might forget to do something to prevent himself from getting hurt, such as turning off an electrical connection before working.

Mr. Lynch first became aware of Grievant's seizures when Grievant had one in the break room in 1988. Mr. Lynch wrote Grievant on August 19, 1988 the following letter:

Reference is made to the circumstances which occurred yesterday morning in the City of Stoughton Wastewater Treatment Facility conference room during which you were conveyed to the Stoughton Community Hospital.

We are extremely concerned about your well being and desire to provide you with a safe working environment. Accordingly, I am requesting that you contact your physician and obtain certification as to the effectiveness of any medication that may currently be prescribed for you. Such certification should also address any anticipated side effects.

I am further requesting that your physician certify that you are capable of performing all assigned duties required of a sewage plant Operator 3. Such certification should also address any limitations to such duties.

Please provide these certifications to me upon returning to work. 1/

On August 29, 1988, Dr. Warren Olson sent Mr. Lynch a letter and certified that Grievant would be capable of performing all duties required of him.

In January of 1989, Grievant had another seizure in the break room. Mr. Lynch sent the following letter on January 10, 1989, to Grievant:

Reference is made to the circumstances which occurred yesterday morning in the City of Stoughton Wastewater Treatment Facility conference room during which you lost consciousness and fell to the floor. This also occurred on August 18, 1988 and it reportedly

1/ Throughout this Award, any obvious spelling errors in all original documents have been corrected.

occurred May 11, 1988. In all cases, EMS teams were contacted.

We are extremely concerned about your well being and desire to provide you with a safe working environment. Accordingly, I am requesting that you contact your physician and obtain a report for me outlining why you lost consciousness, and including certification as to the effectiveness of any medication that may currently be prescribed for you. Such certification should also address any anticipated side effects.

I am further requesting that your physician certify when it is safe for you to return to work and that you are capable of performing all assigned duties required of a sewage plant Operator 3. Such certification should also address any limitations to such duties.

Please provide these certifications to me upon returning to work.

On January 31, 1989, Dr. Stanley Boyer, Grievant's neurologist, wrote Mr. Lynch, stating that it was safe for him to return to work.

In 1990, there was another incident, when Mr. Lynch found Grievant to be acting in a peculiar manner. Mr. Lynch followed him around closely, and Grievant was doing work that had already been done, then forgot his way home, and later that day was in a car accident. On May 1, 1990, Mr. Lynch sent Grievant the following letter:

On Friday, April 27, 1990, I expressed my concern to you that you may have experienced an alteration of consciousness while performing your duties at work. The subsequent car accident later that same day indicates to me that there was something wrong with you.

We are extremely concerned about your well being and desire to provide you with a safe working environment. Accordingly, I am requesting that you contact your physician and obtain a report certifying the effectiveness of any medication that may currently be prescribed for you. Such certification should also address any anticipated side effects.

We also need you to assure us that you are taking your medication as prescribed by your physician. In our discussion on April 30, 1990, you stated that you made some modifications to this medication on your own accord. As stated by you on February 7, 1989, you are to regulate your medication to avoid additional medical emergencies. I feel that any changes in your medication should be done by your physician and that we should be informed of any of these changes and the possible side effects. Please review the August 29, 1989, letter relative to dose related side effects.

I am also attaching a list of duties that you should provide to both Dr. Schammel and Dr. Boyer and have them certify that you are able to complete these tasks. Please have them certify that you can perform all the duties or specific tasks and bring such certifications with you when you return to work.

We are anticipating your timely recovery. Please keep us informed of your condition until you return.

Dr. Boyer released Grievant to return to work on May 16, 1990, with some restrictions -- he was not to operate a motor vehicle for three months following his last spell in April of 1990, and he was not to perform certain duties in the job description for at least three months. Those job duties were hauling sludge to farms, driving large trucks with 1700 gallon tanks, climbing ladders to fill the trucks, and operating loaders and backhoes.

Mr. Lynch had further cause for concern in 1991 when Grievant had some memory loss. On October 1, 1991, Mr. Lynch sent Grievant the following letter:

On September 30, 1991, I asked you to tell me what work was completed by Johnson Control during the previous week while I was on vacation. You could not tell me what Johnson Control did, or when they were here, even though you worked with them on Wednesday, September 25, from 1:00 pm to 5:00 pm. I also asked you if you worked overtime and you could not tell if you did or did not. This incident, coupled with many previous conversations concerning your inability to remember to complete work orders leads me to believe there is something wrong with you.

To assure your safety and ability to work competently at the Wastewater Treatment Plant, I am requiring that your Doctor certify that your medication is working well and that you are physically and mentally able to perform your duties as a Wastewater Operator 4.

You will be allowed to continue working until October 11, 1991, while the necessary certifications are being obtained. If these certifications are not obtained by October 11, further action will be taken.

If it turns out that this forgetfulness is not a medical problem, you must find a way complete your work completely and correctly, and respond to questions concerning the work that you perform.

The record shows that the next response came from Union Business Agent Ruth Ann Stodola, who wrote to Mr. Lynch on July 24, 1992, stating that Grievant would provide him with

a statement from his doctor stating his ability to perform his job. The letter apparently followed an arbitration award involving Grievant.

Then on December 11, 1992, Mr. Lynch sent Grievant the following letter:

On Tuesday, December 8, 1992, you called in and reported to me that you had left work the previous day due to problems that were the result of a change in your medication. I was informed by plant staff that you had experienced an alteration of consciousness at work Monday, December 7, 1992.

The May 18, 1990 letter you received, stated that you must report any changes in your medication to your employer, this is a condition that you agreed upon to remain employed and to provide you, as well as the other employees, with a safe working environment. I am again reminding you of this condition of your employment.

Lastly, according to the Union Contract, you must supply your employer with a doctors slip as to your absence because you have been away for more than three days on sick leave. I will need this slip before you return to work. If you have any questions, please call.

Dr. Boyer wrote a note to excuse Grievant from work between December 4 and December 13, 1992, while his medications were being adjusted.

Toward the end of 1993 and the beginning of 1994, Grievant's foot problems were getting worse and he could barely make it up the stairs. He had been off work quite a bit during that period of time, and Mr. Lynch wrote him on March 4, 1994:

On February 28, 1994, I called to ask about the progress concerning your foot. I also asked that you keep me informed of your progress and when you believe that you would be returning to work. You stated that you did not know what else needed to be done with your foot. I asked you to find out from your Doctor and report back to me. As of March 4th I have not heard from you. Article 13 - Sick Leave of the agreement between the City of Stoughton and Teamster Union Local No. 695 states: In order to be granted sick leave with pay, the department head or supervisor or employee must adhere to the following:

- A) Report reasons for absence from work promptly.
- B) Keep Employer informed on one's condition.
- C) Submit medical certificate for any absence of more than three (3) working days certifying as to inability to work.

I expect to be informed at least one time per week on your progress and when you expect to return to work or your paid sick leave will not be granted.

After receiving the letter quoted above, Grievant called Mr. Lynch at least once. Grievant later went on a medical leave of absence to have foot surgery on May 16, 1994. Dr. Frank Nichols performed the surgery and released him to return to work on July 18, 1994.

On the morning of July 18, 1994, Grievant called Mr. Lynch and told him that he was going to be getting a doctor's certification from Dr. Nichols. Grievant also told Mr. Lynch that he did not have his driver's license because he was having problems, which Mr. Lynch understood to mean seizure problems. Grievant did not need a driver's license on the job and his father usually drove him to work. Mr. Lynch told Grievant on the phone that he would have to bring in a slip from Dr. Nichols, and that he would have to go to Dr. Boyer to be checked out, as he had done in the past. Grievant never brought Mr. Lynch a slip from Dr. Nichols.

On July 18, 1994, Mr. Lynch wrote Grievant the following letter:

Before you may return to work you must obtain a letter from your doctor stating that you are physically able to perform all the duties from the Operator 4 job description. The doctor must address all areas in the job description with special emphasis on the physical requirements. Included in this letter, I would like to know the last date you experienced the seizure you discussed with me this morning and when you expect to regain your drivers license. All of this must be completed before you may return to work. If you have any questions please call me.

City Attorney Michael Skibinski was also aware of Grievant's memory and seizure problems and his history with the City. On July 22, 1994, Mr. Skibinski wrote a letter to Dr. Boyer:

I am writing on behalf of the City of Stoughton Wastewater Utility regarding its employee Jon Onsrud.

I understand Mr. Onsrud is under your continuing care regarding head injuries he received some years back. We understand Mr. Onsrud may soon be cleared to return to work, and we want to make sure that the clearance is made based upon understanding of

the type of work Onsrud would need to do upon his return.

Mr. Onsrud's supervisor, John Lynch, provided Mr. Onsrud with a letter dated July 18, 1994, which requires him to obtain a letter from his doctor stating that he is physically able to perform his duties. A copy of that letter along with a copy of Mr. Onsrud's job duties are enclosed for your reference. In reviewing those duties and assessing whether or not Mr. Onsrud is capable of performing them, you should keep in mind that he will be cleaning, greasing, repairing and working around aeration and other tanks which are 13-18 feet deep and filled with sewage in varying states of processing. In several of the tanks the hydraulics of the processing are such that if somebody fell in the tank, they would not be able to swim back to the surface. Several of the tanks needed to be drained and cleaned, and will be slippery during that process. Work on the tanks is quite often outside subject to the elements. The machinery has exposed moving parts, running water, open flames, and high heat. The work requires handling dangerous chemicals such as chlorine. He would also be working on the Wastewater Plant sludge delivery trucks, changing the oil and making minor repairs.

We are concerned that this environment, which is by nature hazardous, might be especially dangerous for Jon because of his physical and other limitations. Your comments on Mr. Onsrud's ability to carry out the duties on his job description, as well as the duties outlined in this letter are necessary, prior to him returning to work. Please call me if you have any questions and please provide me with a copy of your comments on Mr. Onsrud's capabilities.

The letter quoted above was also sent to Dr. Nichols on September 7, 1994. The letter to Dr. Nichols also mentioned that Grievant would work with electronics and electrical equipment at 20 millivolts to 480 volts. Otherwise, the content was the same. Dr. Nichols called Mr. Skibinski after receiving the above letter and expressed some reservations about Grievant returning to work because of neurological concerns that he, the doctor, had.

Mr. Skibinski wrote the following letter to Grievant on September 19, 1994:

. . .

We have received word, second-hand, that you have been cleared by your orthopedist, Dr. Frank Nichols, to return to work. We also have heard, again second-hand, that your neurologist, Dr. Stanley Boyer, believed your situation with respect to continuing effects from your head injury, was unchanged. Because we were and are concerned about your ability to work in the hazardous environment

of the Wastewater Plant, I sent out letters on September 7, 1994, requesting written opinions from the doctors. Since that time, I have been called by Dr. Nichols, who felt you should not return to work, but felt so because of your head injury effects. We have not heard from Dr. Boyer.

We should not reach conclusions regarding your ability to do the work based upon the incomplete information that we have. We also would like to get these issues resolved one way or another in the near future. Therefore, we would like you to undergo an independent medical examination at the University of Wisconsin Hospitals and Clinics. You would be seen by a neurologist there, who would review your records, do an exam and issue a report. In order for this work to be done, we need Consents for Release of Health Care Information to be signed by you and both Dr. Boyer and Dr. Nichols. Those forms are enclosed; they need to be signed by you and returned to me in the envelope provided. After we receive the Consents back, we will obtain your records and then set up an appointment at UW Hospital.

. . .

The Union was concerned that the City was not returning Grievant to work, despite the doctor's release. During September of 1994, Mr. Skibinski told Ms. Stodola that the City wanted a release from a neurologist because Dr. Nichols told Mr. Skibinski that he, as an orthopedic surgeon, was not qualified to make an evaluation of Grievant's head injuries.

Then on October 18, 1994, the Union's Attorney, Marianne Goldstein Robbins, wrote Mr. Skibinski, notifying him that the Union understood that Grievant was fully recovered from his surgery and able to return to work, but that the City had sought an evaluation of his cognitive capability. Ms. Robbins pointed out that the City's questions in that regard were answered by an evaluation performed by Rehabilitation Psychologist Ross Lynch on November 10, 1993, and she enclosed a copy of that evaluation. The Union sought reinstatement of Grievant again at that time.

Attorney Paul Hahn was retained by the City and notified Ms. Robbins that the matter was being reviewed. On November 4, 1994, Ms. Robbins wrote Mr. Hahn, urging the City to promptly reinstate Grievant because the Union had just been informed that the disability carrier had discontinued Grievant's compensation retroactive to his release to work.

However, on November 14, 1994, Mr. Hahn responded that the City still wanted Grievant to have an independent medical examination by a neurologist, but to resolve the matter, it would accept a current examination by Dr. Boyer. The City insisted that Dr. Boyer should examine Grievant based on the current and proposed job descriptions and take into account Mr. Skibinski's description of the job in his earlier letters. Ms. Robbins replied the following day that the Union

did not agree with Mr. Skibinski's description of the job, since the letter implied that an employee could fall into a vat when there are railings all around the vats which would make such a fall impossible. Also, the Union noted that Grievant did not work with electricity or high voltages in the manner described by Mr. Skibinski.

Ms. Stodola met with Grievant's supervisor, John Lynch, as well as another wastewater operator and Union steward and the City to review a job description. When Ms. Stodola brought the matter of Grievant's financial plight to the attention of Mr. Hahn, he told her that Grievant should have been continuing to receive disability payments, that the City paid a premium for such insurance and his benefits should have continued until he returned to work. The collective bargaining agreement provides for a program of income continuation insurance, or disability insurance. Mr. Hahn asked Mr. Skibinski to look into it, and Mr. Skibinski later told Ms. Stodola that the disability carrier learned that Grievant was released to work, so it terminated his benefits.

On November 14, 1994, Mr. Hahn wrote to Ms. Robbins proposing that Dr. Boyer examine Grievant and provide a medical opinion as to Grievant's fitness.

On November 15, 1994, Ms. Robbins responded by sending Mr. Hahn the following letter:

This letter is in response to your correspondence dated November 14, 1994. The Union is agreeable to resolving this matter on the basis of a current examination of Mr. Onsrud by Dr. Boyer in light of Mr. Onsrud's current job duties.

However, the Union does not agree that Mr. Skibinski's description of the job in his letter to Drs. Boyer and Nichols, dated September 7, 1994 with attachments, is accurate. Specifically, we note that the letter implies that an employee could fall into a vat when, in point of fact, there are railings all around the vats which make such a fall virtually impossible. Additionally, Mr. Onsrud does not work with electricity or high voltages in the manner described. We suggest that a representative of the Union meet with a representative of the City to prepare a mutually agreeable description of Mr. Onsrud's job.

Please let me know if this is acceptable and who, from the City, the Union should contact concerning the job description submitted to Dr. Boyer.

The parties met in December of 1994 to talk about the job description, and worked until March, 1995 to develop a mutually acceptable job description. On March 9, 1995, a letter was

sent to Dr. Boyer stating:

Jon Onsrud has been off work since approximately January of 1994, due to foot injuries. For those injuries, he has been under the care of Dr. Frank Nichols of the Dean Medical Center located in Stoughton. It now appears that treatment of those foot injuries will allow Mr. Onsrud to return to work. However, since Mr. Onsrud has been away from his employment for a year, and since it has been over a year since you have examined him, the City of Stoughton believes Mr. Onsrud should be examined to determine whether he can return to his employment. Mr. Onsrud, Teamsters Local 695 and the City of Stoughton have agreed that you should perform this examination. We understand that you examined Mr. Onsrud on February 24, 1995 and that this exam may be adequate for you to provide the information sought.

You should consider Mr. Onsrud's duties in making your determination whether he is fit to return to work. Therefore, we have enclosed, as Exhibit A, a class Operator 4 job description for the duties Mr. Onsrud performs and has basically performed since his employment in 1981 as an Operator 4. A second document entitled "Further Information Concerning the Duties of Jon Onsrud" (Exhibit B) is also being forwarded to you with agreement of Mr. Onsrud and the City and Union, and you are requested to consider this information as well. Photographs of the job site, to aid you in your consideration, are included, also with agreement of the parties. We have also enclosed a City prepared document describing the duties of another employee, Brian Erickson, marked as Exhibit C. This document does not reflect Mr. Onsrud's duties prior to his injuries, except as it overlaps with Exhibit A. We regret we could not forward these materials to you before your February 24 examination of Mr. Onsrud, and hope this will not cause a problem in your consideration of Mr. Onsrud's return to work status.

Following your examination and review of these materials, the parties, including Mr. Onsrud, request that you give a written opinion or certification to the City regarding Mr. Onsrud's ability to return to work, based on the aforementioned job duties and information set forth in Exhibits A and B and the photographs. Exhibit C, Mr. Erickson's description, is not reflective of Mr. Onsrud's prior duties and, therefore, should not be the basis for your certification.

Lastly, the parties would like to know if there are additional duties found on Exhibit C, which are not included in Exhibit A which Jon Onsrud can also do. If there are such duties, it may enable Mr. Onsrud's job to be upgraded.

While the parties were waiting for Dr. Boyer's response, Ms. Stodola notified Mr. Hahn that the United Wisconsin Insurance Company discontinued Grievant's income continuation insurance when the claims administrator was advised by an unknown person that Dr. Nichols released Grievant to return to work without restrictions in the summer of 1994. Additionally, the State of Wisconsin Department of Employee Trust Funds was demanding that Grievant repay \$1,489.88 for an income continuation insurance overpayment. Ms. Stodola reminded the City that the Union maintained that Grievant was entitled to disability payments because the City refused to allow him to work.

Mr. Skibinski replied to Ms. Stodola on April 5, 1995, that the "unknown person" was Grievant himself who gave the information to the insurance carrier. According to Mr. Skibinski, Grievant returned a form to the insurance carrier, which had Dr. Nichols' release on the back of the form, and the release indicated that Grievant was released to return to work. According to the insurer, income continuation coverage ends when an employee is capable of returning to work, released to return to work, or actually returns to work, whichever comes first. The release was signed by Dr. Nichols on July 15, 1994, and stated that he could return to work on July 18, 1994.

On March 2, 1995, Ms. Stodola sent Mr. Hahn a letter with a copy of the release to work from Dr. Nichols dated July 15, 1994. Ms. Stodola got a copy of the release to work certificate from Grievant after learning that the City either did not have a copy or it could not find a copy. Ms. Stodola also sent a copy of the release to work certificate to Mr. Skibinski.

On March 31, 1995, Dr. Boyer provided Mr. Hahn and the parties with the following letter:

Thank you for your recent letter of 3-9-95 in regards to Mr. Jon Onsrud and I also thank you for your willingness to discuss the matter with me on the telephone on 3-27-95. I have reviewed the documents that you provided for me. I believe that Jon's medical status has returned to baseline and, in my opinion, he can return to work at any time in his previous capacity. I also reviewed two other documents that you provided for me, listed as Exhibit B and Exhibit C. Most of the tasks listed have already been performed by Jon. Since he does not operate motor vehicles or heavy equipment at work this would probably preclude him from hauling sludge. Although the item under "Essential Duties and Responsibilities," performs electrical and electronics duties, is not listed on his job description, Exhibit A. He evidently has been performing these tasks as noted in Exhibit B. Under physical requirements I doubt that he has ability to repair complex equipment

and machinery, although if well-trained he may be able to do some of these functions. Also I do not believe that he should operate heavy equipment.

It is my understanding that Jon's foot surgery has now healed and that Dr. Nichols, orthopedic surgery, has cleared him to return to work. I believe that he is now medically and neurologically stable and, as indicated above, can return to work in his previous capacity at any time.

Grievant was returned to work shortly after the receipt of the above letter.

On April 12, 1995 the Union grieved the City's earlier refusal to return Grievant to work. That grievance was denied and is the subject of this award.

THE PARTIES' POSITIONS:

The Union:

The Union contends that the City's refusal to return Grievant to work amounted to a suspension requiring just cause. Where the basis for a discharge or suspension is a disability and not a disciplinary action, the employer has the burden of proving just cause. Even if the action is not technically a suspension, the just cause standard applies. In all cases where an employee is removed from the job without pay, the employer has the burden of establishing just cause and showing that the removal was not arbitrary, capricious or discriminatory.

The Union asserts that the City's justification for refusing to return Grievant to work is improper because it was unrelated to his medical leave. The City is attempting to discharge him for his head injury, as it tried to do in the past. A medical condition unrelated to the condition which caused the medical leave cannot justify refusing to return an employee to work. The City's insistence on the neurological evaluation is unrelated to the reason for the absence. The City already had a neurological evaluation, and the City should make Grievant whole for all time lost while securing the unnecessary neurological evaluation.

Also, the Union argues that the City's safety concerns are unfounded and unreasonable. While the City assumes that Grievant is mentally unfit, his mental fitness has been revealed by his neurologist's recent and past evaluations. The City presumed that his condition was deteriorating, but such presumptions are not enough without substantive facts which tend to prove that it would be unsafe for him to continue working. Arbitrator Daugherty required a fair investigation and substantial evidence to justify a medical disqualification, and arbitral opinion rejects refusing all risks in the name of safety. The Union asserts that future risk of injury is an especially inappropriate basis for a medical disqualification when the employee's condition has existed for a

long period of time during which the employee was able to work safely. The City knew about Grievant's disability when it hired him and he has worked safely for more than 15 years.

Moreover, the Union points out that the City knew that Grievant was without income but left him unemployed without disability insurance even though it could have made reasonable accommodation. The Union believes that the City's absolute refusal to accommodate him reveals a callous attempt to terminate him, and such callousness is a far cry from the just cause or reasonableness which the Agreement requires. Even if the City were justified in demanding the neurologist's evaluation, it should have accommodated him in the interim.

The City:

The City asserts that Grievant is not entitled to wages for the period between July 18, 1994 and April 11, 1995, because he did not provide the City with a return to work release from his physicians until shortly before April 11, 1995. The City was not obligated to return Grievant to work when it did not have a medical authorization permitting it to do so. The City claims it never got the written release from Dr. Nichols until March 2, 1995, and it did not get the written release from Dr. Boyer until March 31, 1995.

The City was following a consistent practice by requiring Grievant to provide documentation that he was fit to return to work. This practice existed since Grievant began to work with the City and it had not been challenged in the past. Nothing in the labor agreement prohibits the City from requiring a medical release or exam before allowing employees back to work, and in the absence of a contrary provision in the labor agreement, it has routinely been held that an employer has the right to request verification of fitness to work prior to allowing an employee to come back to work.

The City contends that Grievant is estopped from arguing for back wages from November 15, 1994 to April 13, 1995 by his agreement to submit to an examination by Dr. Boyer. While the Union may claim that the City knew at an earlier date that Grievant was given a return to work release as of July 18, 1994, the City had no first-hand information from Grievant's treating physicians that he was medically cleared to return to work until shortly before the City returned him to work. The City had not been given a written return to work by Dr. Nichols, and Dr. Nichols told Attorney Skibinski his belief that Grievant would not be able to handle the job duties. All the City knew was that Grievant was going to be getting a release to work from Dr. Nichols, which contradicted what Dr. Nichols told Mr. Skibinski. On November 15, 1994, Grievant and the Union agreed that the City would not be obligated to take Grievant back to work until Dr. Boyer concluded that he was able to return. This agreement was not conditioned on retroactive pay if the doctor found he could return to work. Therefore, the City had secured an agreement from the Union that it would not be required to bring him back until Dr. Boyer cleared him, and Grievant is estopped from arguing he is entitled to back wages from November 15, 1994 to April 11, 1995.

While the Union has suggested that the City is responsible for income continuation payments which were stopped by the insurer in July of 1994, the City cannot be held liable for payments not made by a third party pursuant to a contract to which the City was not a party. The Union has made no factual or legal showing which creates liability on the City for the actions of the insurer. It does not automatically follow that if Grievant does not receive wages from the City, he should receive income continuation benefits. Both sources of funds require him to comply with procedural requirements before being eligible for either benefits or pay. The insurer made its determination to cease income continuation payments based on information it received from Grievant, and it was his responsibility to appeal that determination to reflect the fact that he had not returned to work.

In Reply:

The Union:

The Union objects to the City's statement that once it received the foot surgeon's release in March of 1995, it promptly returned Grievant to work and is therefore not accountable for his nine month loss of pay. It is disingenuous for the City to maintain that it would have returned Grievant to work in July of 1994 if it had the orthopedic release, where it knew that he had been released and did not ask him or the Union for the work release during the entire nine months. Also, the City's attempt to establish a past practice regarding documentation of Grievant's neurological health must fail, and the Union has promptly grieved the City's disciplinary action resulting from those and secured his reinstatement. The City previously allowed him to continue working while he was obtaining medical certifications.

The Union also takes issue with the City's estoppel argument and contends that the City has the sole responsibility for Grievant's delay in returning to work. The City insisted on the neurological exam from the outset, and the Union only engaged in efforts with the City to see that the job description was more accurate for the neurological review. However, the Union never believed that the exam was necessary to return Grievant to work. The City ignores the purpose of income continuation benefits by refusal to accept responsibility for the loss of income. The City cannot, asserts the Union, refuse to return him to work claiming he is unfit and then look the other way when confronted with the results of its unjustified actions.

The City:

The City claims that Grievant and not the City has the burden of proof as this is not a discharge or discipline case. The cases cited by the Union in its initial brief show that arbitrators have found that employers have the right to request medical examinations in the appropriate circumstances. Grievant had not been examined by a neurologist for a year, he had been off work for about six months, and he reported recent seizure activity to his supervisor, who was also aware that he had been seen in a confused state in the area. Those circumstances warranted an up-to-date

clearance from his neurologist, as had been required in the past. The lack of evidence from Grievant as to his inability to promptly obtain a release as he had done in the past suggests that he was not neurologically fit to work as the City suspected and that he was not able to procure a release as he had done in the past.

The City objects to the Union's suggestion that it was using the return to work policy as an underhanded means to terminate Grievant where it was not able to do so at an earlier time. The City did nothing more than it had in the past when it learned of seizure activity. All Grievant had to do was provide the City with a written statement from his doctor that he was

cleared to return to work. The City did not cause the delay to comply with this request. In fact, materials were sent to the Union on December 14, 1994, and the Union did not respond until February 21, 1995. Finally, the City did not have the ability to appeal the denial of income continuation benefits, as that right belonged solely to Grievant.

DISCUSSION:

This dispute concerns whether the City improperly declined to allow Grievant to return to work on July 18, 1994 when the doctor who performed his foot surgery released him to work.

The City's refusal must be closely examined, for if it acted improperly, it, in effect, suspended him in violation of the just cause provision of the contract.

For several years, the City had shown a concern for Grievant's safety in light of his seizure experience, other apparent cognitive lapses and the safety hazards at the workplace. When Grievant telephoned his supervisor, Mr. Lynch on July 18 to tell him of his release to work, he said he did not have a drivers' license because he was having problems, a comment which Mr. Lynch could reasonably infer meant Grievant had experienced recent seizures. Given Grievant's medical history, the City could reasonably ask for medical confirmation of his fitness. Additionally, the City's history of monitoring his fitness indicated a long-standing concern for his health and safety.

Considering Grievant's medical condition, and the City's concern for his safety, the City was justified in its July 18 request for the neurologist's evaluation. This conclusion does not, however, end the inquiry, for it remains to be determined whether the City was justified in preventing Grievant from working until the evaluation was complete.

On several occasions prior to July 18, 1994, the City questioned Grievant's neurological fitness and requested a physician's statement. The record indicates that on August 19, 1988, January 10, 1989, May 1, 1990 and October 1, 1991 the City made similar requests. Nevertheless, it is significant, that at no time did the City prevent him from working during the

pendency of a request. This is true in spite of the fact that several of these episodes involved seizures, the event which appears to have triggered Mr. Lynch's concern on July 18.

Reviewing these past requests, the undersigned concludes that the City's own practice indicates that it was unnecessary to prevent Grievant from working while waiting for a response from a physician regarding Grievant's neurological fitness.

The fact that Grievant had already been off work for a medical reason does not change the basic considerations involved. Although Article 13, Section 2-C of the collective bargaining agreement explicitly gives the City the right to request a doctor's certificate from an employee who is returning to work, that right does not extend to demanding a certificate from a doctor for a condition unrelated to the employee's reason for having been absent. Dr. Nichols, the doctor who performed the foot surgery, the condition causing Grievant's absence from work, had returned him to work.

The City's action in denying Grievant the right to return to work for a reason unrelated to his absence went beyond the right conferred to the City by Article 13, Section 2-C. The City's action could be understood as the equivalent of allowing him to return to work after the foot surgery but immediately suspending him until a neurologist cleared him for work. As previously noted, the City had for several years been able to address and resolve its concerns over Grievant's neurological fitness without preventing him from working during the process. Preventing Grievant from work was therefore unnecessary, even in light of the City's right to take action to provide a safe workplace. The undersigned finds that the City did not have the right to deny Grievant the right to work while it sought medical confirmation of his neurological fitness for work.

In its defense, the City argues that it was not required to return Grievant to work because he did not present the actual letter from his surgeon to Mr. Lynch. However, the City was fully aware of the letter's existence and did not choose to ask Grievant to present the document. Presumably, it did not make that demand because it had already concluded that the letter itself would be irrelevant. It had already determined it would not put him back to work until it had a letter from the neurologist. Similarly, Grievant cannot be held responsible for presenting the surgeon's letter since the City had stated its intention to wait until it had the neurologist's letter and therefore presentation of the surgeon's letter would be futile.

Consequently, the City cannot be relieved of its obligation to return Grievant to work because he did not bring the document from the surgeon.

The City also argues that any liability for back pay should be ended on November 15, 1994 when the Union agreed to subject the dispute to a medical opinion. As Ms. Robbins said in her letter to Mr. Hahn: "The Union is agreeable to resolving this matter on the basis of a current examination of Mr. Onsrud by Dr. Boyer in light of Mr. Onsrud's current job duties."

However, the City has mischaracterized the nature of the Union's agreement. In effect, the Union was agreeing with the City as to the choice of a third party whose judgment would settle the dispute. That was an agreement as to a process, but that was not tantamount to the Union's dropping its challenge to the City's action in not previously returning Grievant to work. The distinction between agreeing to a procedure and conceding a position is an important one which must not be lost. If the two were taken as the same, few parties, unions, and employers, or sovereign nations would be willing to sit down to settlement or peace discussions.

Accordingly, the City's liability for backpay is not limited by the Union's November 15, 1994 agreement.

In the light of the record and the above discussion, the undersigned issues the following

AWARD

1. The City of Stoughton violated the collective bargaining agreement when it refused to return Grievant Jon Onsrud to work after he was released for work by the doctor who performed his foot surgery.
2. The City shall make Grievant whole for all wages and benefits lost as a result of its contract violation noted above.

Dated at Madison, Wisconsin this 22nd day of October, 1996.

By Jane B. Buffett /s/
Jane B. Buffett, Arbitrator