BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	Case 79 No. 47707 MA-7361
MENASHA MUNICIPAL EMPLOYEES UNION, LOCAL 1035, AFSCME, AFL-CIO, and affiliated with the WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES	Case 80 No. 47708 MA-7362
and	Case 81 No. 47709 MA-7363
CITY OF MENASHA, WISCONSIN	

Appearances:

Mr. Bruce F. Ehlke, Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, Attorneys at Law, 217 South Hamilton, P.O. Box 2155, Madison, Wisconsin 53701-2155, and Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, for Menasha Municipal Employees Union, Local 1035, AFSCME, AFL-CIO, and affiliated with the Wisconsin Council of County and Municipal Employees, referred to below as the Union.

Mr. James R. Macy, Godfrey & Kahn, S.C., Attorneys at Law, 100 West Lawrence Street, P.O. Box 2728, Appleton, Wisconsin 54913-2728, for City of Menasha, Wisconsin, referred to below as the City or as the Employer.

INTERIM ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes by an Arbitration Panel. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to serve as Chairperson of an Arbitration Panel to resolve a dispute reflected in three grievances filed on behalf of Kristen J. Erickson, referred to below as the Grievant. The Commission, on July 16, 1996, assigned Richard B. McLaughlin, a member of its staff, to serve as Chairperson of the Arbitration Panel. In a conference call held on September 3, 1996, the parties agreed to, among other things, submit a series of procedural issues to the Arbitration Panel based on the submission of certain documents and briefs. No hearing was conducted on these procedural issues. The parties filed briefs by November 25, 1996, and, by December 5, 1996, formally requested that the ruling on these issues be issued in writing. The Panel met, by conference call on December 20, 1996, and on February 13, 1997, to discuss the procedural issues.

RELEVANT CONTRACT PROVISIONS 1/

ARTICLE II - MANAGEMENT RIGHTS RESERVED

. . .

B. Work Rules: The employer may adopt and publish reasonable rules which may be amended from time to time. Except for rules, regulations and directives from the State of Wisconsin, or any other governmental agency having jurisdiction over the Employer, such rules and regulations shall be submitted to the Union, if possible prior to their effective date, for its consideration.

. . .

ARTICLE VII - SUSPENSION, DEMOTION AND DISCHARGE

. . .

D. Dismissal: No employee shall be discharged except for cause. An employee who is dismissed, except probationary and temporary employees, shall be given a written notice of the reasons for the action, and a copy of the notice shall be made a part of the employee's personal history record, and a copy sent to the Union. An employee who has been discharged may use the grievance procedure by giving written notice to his steward and his department within five (5) working days after dismissal. Such appeal will go directly to the appropriate step of the grievance procedure.

. . .

ARTICLE XI - AUTHORIZED ABSENCE

. . .

C. Worker's Compensation: Except for Bridge Department

1/ The cited provisions are taken from the 1991 labor agreement, which is attached to the City's brief dated 9-11-96 as Exhibit 1.

employees an injured employee receiving Worker's Compensation Benefits shall receive the wage differential between his normal take-home pay and Worker's Compensation. Employees injured on the job shall report to the City Garage for light duty as required as soon as the employee's doctor certified that such injured employee may perform light duties.

. . .

G. Leave of Absence Without Pay:

1. Requests: Requests for leave of absence without pay for justifiable reasons shall be made in writing at least forty-eight (48) hours prior to the leave as follows:

. . .

b) More than Three Days: For a leave of absence of three (3) consecutive days, the request shall be made to the Director of Public Works through the superintendent of the department. However, for employees of the Park & Recreation Department requests shall be made through the Park & Recreation Director.

2. Approval: Requests for leave of absence without pay may be granted subject to the work requirements of the City. Leaves of absence shall not be granted to an employee for the purpose of engaging in other employment. The employee shall be obligated to pay for the cost of his/her health and dental care benefits if such leave exceeds one calendar week.

. . .

ARTICLE XV - GRIEVANCE AND ARBITRATION PROCEDURE

. . .

C. Time Limitation: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing.

D. Settlement of Grievance: Any grievance shall be considered settled at the completion of any step in the procedure. If all parties concerned are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next.

E. Steps in Procedure:

Step 1: The employee, alone or with his representative shall orally discuss his complaint to his supervisor no later than five (5) working days after he knew or should have known of the cause of such complaint. The employee shall perform his normal work task and present his complaint later unless safety is an issue. If the issue is not resolved during the discussion the employee may file a written grievance as described in Step 2 of this article.

Step 2: If the grievance is not settled at the first step, the employee and/or his representative shall prepare a written grievance and present it to the supervisor within five (5) working days of the Step 1 decision.

. . .

G. General Provisions:

1. Past Grievance: Past grievances may not be filed under the provisions of this procedure and all grievances filed which bear a filing date which precedes or is the same as the expiration date of this Agreement must be processed to conclusion under the terms of this procedure.

. . .

BACKGROUND

The City's brief dated September 11, 1996, includes a section headed "**BACKGROUND FACTS**." Included in that section is the following, which will serve as the general background to an examination of each grievance:

> On August 22, 1990, the Grievant injured her leg and could not perform any work for the City. The Grievant received worker's compensation supplemented with pay until May 13, 1991. Therefore, during that period, the Grievant collected the equivalent of full pay.
>
> On May 13, 1991, the City's insurance company concluded that the Grievant's injury was not work related and discontinued her worker's compensation benefits. The Grievant was notified of this determination.
>
> Pursuant to the grievance filed in Case 79 No. 47707 MA-7361 (Light Duty), the Grievant submitted a request for light duty on Friday, May 24, 1991. Her request was denied on that date . . .
>
> In the absence of light duty, the Grievant began a period of pay leave from May 13, 1991, pursuant to accrued sick leave and vacation. The Grievant's paid leave status then continued until August 19, 1991, at which time her accrued paid leave benefits expired. Following the exhaustion of paid leave, it was then necessary for the Grievant to request leave without pay in that she was still medically unable to return to work.

The remaining background will track each grievance, and is based on documents submitted with the parties' briefs. It is undisputed that the Grievant has brought actions against the City with the Worker's Compensation and the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations. She has also brought an action against the City in the District Court for the Eastern District of Wisconsin.

Case 79

This grievance was originally filed as Grievance 1991-4. It was filed with the City at Step 2 on June 13, 1991. The grievance form states the "applicable violation" thus:

> Article XI Authorized Absence, Section C Worker's Compensation. On Friday, May 24, 1991 (the Grievant) reported for work, in accordance with Article XI, Section C, with a doctor's certification for light duty. (The Grievant) was not allowed to return to work.

The form states the "Adjustment required" thus: "Make employee whole." 2/

In a letter to Donald Griesbach, Chairman of the City's Personnel Committee, Gregory Spring, the Union's Staff Representative stated the following:

> Be advised that the Union does not intend to proceed to arbitration on the above-noted grievance. However, if it is later determined that (the Grievant's) injury is work related, the Union retains the right to file a new grievance in the event that the City does not make her whole for any and all losses. Based upon the City's representations at the Step 4 meeting, the Union is hopeful that there may be no dispute on this issue . . . 3/

Gary J. Eklund, the City's Personnel Director, responded in a letter dated September 17, 1991, which states:

> The City of Menasha considers the above-referenced grievance to be satisfactorily settled with prejudice pursuant to the arbitration and grievance procedures of Article XV of the current collective bargaining agreement.
>
> The City rejects the Union's claim to a retention of any right to file a new grievance in the future . . . 4/

In a decision dated January 13, 1992, an Administrative Law Judge for the Worker's Compensation Division of the Department of Industry, Labor and Human Relations, determined that the Grievant's injury was compensable under the Worker's Compensation Act. 5/

2/ Exhibit 2 of the City's brief dated 9-11-96.

3/ Exhibit 3 of the City's brief dated 9-11-96.

4/ Exhibit 4 of the City's letter dated 9-16-96.

5/ Exhibit 2 of the Union's brief dated 11-8-96.

On January 17, 1992, the Union filed a grievance which repeated the "applicable violation" and "Adjustment required" sections of Grievance 1991-4. 6/ The City responded to this grievance in a letter dated "1/21/92" from Tim Jacobson, the City's Street & Sanitation Superintendent to Jim Card, the Union's President. That letter, headed "RE: Grievance 1992-2 (1991-4)" states:

> There is no violation of the contract. This grievance is not timely filed. This matter is not arbitrable. This grievance is denied. 7/

Case 80

In a letter to the City's Personnel Committee dated August 20, 1991, the Grievant requested "a medical leave of absence to be made effective Monday, August 19, 1991." 8/ Mark C. Radtke, the City's Director of Public Works, responded to the Grievant in a letter dated August 29, 1991, which states:

> This letter serves as confirmation of our telephone discussion two days ago regarding your request for a leave of absence without pay. I indicated to you that your August 20, 1991 written request for leave of absence to be effective August 19 did not comply with the 48 hour advance notice required by the labor agreement. It was also indicated that our Department policy is such that no unpaid leave of absence will be granted unless all of the employee's applicable paid leave allowances have been utilized.
>
> Should you wish to pursue a leave of absence without pay to be effective upon the exhaustion of all your paid leave time, please submit your request in writing at least 48 hours in advance of the effective date. In your request . . . please indicate the duration of your requested leave and provide an updated prognosis for your unrestricted return to work. My response to your request will be provided in a timely manner to allow you to plan accordingly. 9/

6/ Exhibit 5 of the City's brief dated 9-11-96.

7/ Exhibit 6 attached to the City's brief dated 9-11-96.

8/ Exhibit 7 attached to the City's brief dated 9-11-96.

9/ Exhibit 8 attached to the City's brief dated 9-11-96.

In a letter to the Grievant dated September 4, 1991, Radtke confirmed that the City had granted her a leave of absence without pay. That letter states:

> Your request for a leave of absence without pay for medical reasons is approved with the following conditions:
>
> > 1. The leave period shall commence at the time all paid leave allowances have been exhausted (our records indicate this will occur at 2:15 P.M., Thursday, September 5, 1991) and continue through Friday, October 4, 1991; and,
> >
> > 2. In accordance with the labor agreement, you shall meet your obligations should your leave exceed one calendar week. Please coordinate arrangements with the Menasha Personnel Office for payment of health and dental premiums.
>
> The need for extending your leave of absence beyond the approved leave period will be reviewed at that time and a determination will be made based on the needs of the City. 10/

In a letter to the Grievant dated October 11, 1991, Radtke confirmed that her leave had been extended through October 25, 1991. Radtke also stated the following:

> In order to consider extensions for leave of absence beyond that date, the City must receive a complete written prognosis from your physician or a City chosen physician, as to the expected return date for unrestricted duty as a Sanitation Worker. Such prognosis shall be submitted to the Personnel Director, Gary Eklund, or me prior to October 25, 1991. The need for further extending your leave of absence will be reviewed at that time and a determination will be made based on the needs of the City. 11/

10/ Exhibit 9 attached to the City's brief dated 9-11-96.

11/ Exhibit 10 attached to the City's brief dated 9-11-96.

In a letter to the Grievant dated October 24, 1991, Radtke confirmed the City's extension of her leave "for a term through Friday, November 22, 1991 . . . with the below conditions." His letter states those conditions thus:

> In order to consider any leave of absence extension beyond November 22, 1991, the City must receive a detailed written medical prognosis from your physician on or before November 15, 1991. This medical prognosis must specifically indicate whether or not you will be able to perform the full duties of your Sanitation Worker position without any restrictions on or before December 30, 1991 or a date certain when you will be able to perform the full duties of the Sanitation Worker position without restriction. The City retains the right to require a second medical examination and opinion from a physician chosen by the City. 12/

The Grievant filed a written grievance on October 28, 1991, which states the following as the "applicable violation":

> Article II, Section "B" - Work Rules, and Article XI, Section "G" - Authorized absence
>
> The City is not being reasonable when requiring me to continue to update then (sic) on a monthly basis or less, when the physician has dictated that I'm not to be seen for several months.

The grievance form states the "Adjustment required" thus: "Cease and dissist (sic) this practice, and promote reasonable rules." 13/

Case 81

12/ Exhibit 11 attached to the City's brief dated 9-11-96.

13/ Exhibit 12 attached to the City's brief dated 9-11-96.

In a letter to the Grievant dated November 26, 1991, Radtke stated the following:

> Your request of November 1, 1991 for extension of leave of absence due to medical reasons is hereby granted for a period to expire at the end of the scheduled work day on Friday, January 3, 1992. Granting this leave of absence is in accordance with the provisions of Article XI.G. of the City/Local 1035 bargaining agreement.
>
> A leave of absence may be granted subject to the work requirements of the City. Your medical condition does not include a prognosis from your physician that appears optimistic that you will be able to return to unrestricted work in your job as a Sanitation Worker at any definite date in the future. The work requirements of the City require that the position of Sanitation Worker be filled. Therefore, you are expected to report to regularly scheduled work on Monday, January 5, 1992 with a medical release to perform your normal job duties as a Sanitation Worker with no restrictions. Such medical release must be presented to me in writing on or before January 2, 1992. Your employment with the City of Menasha will be terminated effective January 5, 1992 should you fail to report to work on that date under the conditions specified herein. 14/

On January 7, 1992, the Grievant filed a written grievance numbered 1992-1. The grievance form states the "applicable violation" thus:

> Article VII Suspension, Demotion, & Discharge
> On Jan. 5, 1992 (the Grievant) was discharged without just cause.

The grievance form states the "Adjustment required" thus:

> Make employee whole for any & all losses. Reinstatement at previous position. 15/

14/ Exhibit 13 attached to the City's brief dated 9-11-96.

15/ Exhibit 14 attached to the City's brief dated 9-11-96.

In a letter to Spring dated February 28, 1992, Eklund responded to the grievance thus:

> This letter is to notify you that after full review of the above-noted grievance in a Step 4 grievance meeting on February 20, 1992, the Personnel Committee voted to deny the grievance. The grievance is denied as not timely filed, not arbitrable, and that there has been no violation of the bargaining agreement. Please also note that since there is a dispute pending pursuant to section 102.35(3), Stats., the worker's compensation remedy represents the exclusive recourse regarding this matter.
>
> Please also note that (the Grievant's) termination was not for disciplinary reasons. As you know, the termination resulted based upon (the Grievant's) continued unavailability for work, her continued inability to perform her job as well as her having no reasonable expectation as to when she would be able to return to work. Both you and (the Grievant) confirmed at the 4th step grievance meeting that this was still the case now and in the foreseeable future.
>
> Finally, please also note that in the event (her) condition changes, she should contact the City and she will be considered for priority rehire based upon her qualifications to perform available, open positions within the City and within her medical restrictions. 16/

THE CITY'S MOTION AND ACCOMPANYING BRIEF

The City filed a motion on August 16, 1996, asserting that processing of the grievances should be suspended until the Arbitration Panel determined whether the grievances should be dismissed or, if heard, should be heard only to the extent material not subject to prior litigation was produced.

More specifically, the City advanced four bases to support a dismissal of the grievances. First, the City contended that the Grievant had already had a "full hearing" by the Worker's Compensation Division under Sec. 102.35(3), Stats. Second, the City urged that "as a

16/ Exhibit 15 attached to the City's brief dated 9-11-96.

discrimination matter, a number of the Grievant's same claims were dismissed" by the Equal Rights Division under "Section 111.31, et. seq., Stats." Third, the City urged that "as a federal court matter, issues of law and fact concerning light duty, medical verification and termination . . . have already been determined by the federal court." Fourth, the City urged that its request "to update an employee's medical condition . . . is a matter required by law."

If the asserted grounds for dismissal were rejected, the City sought "that the Arbitration Panel adopt the Findings and Determinations already made by the State of Wisconsin and the federal court . . . and . . . limit the scope of the grievance hearings in this case."

In its supporting brief, the City argues that case law clearly establishes that the doctrines of res judicata and collateral estoppel should be applied to these grievances. After a review of the law underlying this assertion, the City notes that the doctrines "conserve judicial resources and encourage reliance on adjudications by preventing inconsistent decisions." It follows, according to the City, that "Complainant should be collaterally estopped from relitigating any and all issues of fact and law already determined in the prior proceedings."

The same principles support, the City contends, a dismissal of the grievances. The Worker's Compensation Division has already heard and determined her light duty and termination claims. Noting that "the Grievant had full opportunity to offer any and all evidence" concerning these claims, and contending that the "Union participated" at these hearings, the City concludes the Union must be bound by the conclusions of the Worker's Compensation Division. Similar considerations govern her litigation of claims before the Equal Rights Division and federal court.

This motion prompted the September 3, 1996 conference call noted above.

THE CITY'S INITIAL BRIEF ON PROCEDURAL DEFECTS

The City contends that the labor agreement "is clear and requires that specific time lines be met," and that "those time lines can only be extended by mutual consent in writing." Beyond this, the City argues that "the contract is clear that in the event the Union pursues a grievance, it must pursue it to finality or else it is waived."

Regarding Case 79, the City argues that the Grievant requested light duty on May 24, 1991, "and was denied that request." Since the second step grievance was not filed until June 13, 1991, the City concludes that "the grievance was untimely filed." Even if it was timely filed, the City argues that Article XV, Section G mandates the conclusion that the Union withdrew the grievance in its September 6, 1991 letter. This withdrawal makes the grievance "not arbitrable."

Regarding Case 80, the City contends that the underlying grievance must be denied as untimely or must be found not arbitrable as a matter of law. The Grievant's failure to complain about the requested medical verification between August and October of 1991 makes it impossible, according to the City, to find the grievance timely. Since statutes governing Worker's Compensation require the City to seek the verification subject to the grievance, the City adds that the grievance must be found not arbitrable. As the City puts it "the employer did no more than what is generally required by law."

Regarding Case 81, the City contends that "the Grievant was placed on notice on November 26, 1991" that she would receive no further leaves of absence and that if she was unable to work at the completion of her then approved leave, "it would be necessary to sever

her employment." Since the Grievant had then "indicated to the City . . . that she already knew that her medical condition would not change," and since she failed to grieve the November 26, 1991 letter until her discharge, the City concludes the grievance cannot be considered timely.

THE UNION'S REPLY BRIEFS

The Union's Response to the Issues of Res Judicata and Collateral Estoppel

After a review of the case law underlying these doctrines, the Union argues that "none of the conditions necessary for the application of these rules are present." Initially, the Union notes that it was not, "nor could it have been," a party to the litigation concerning the Grievant's statutory rights as an individual. The Union's "participation" in those hearings consisted of no more than the testimony of the Local's President. Appearance as a witness cannot, the Union concludes, make it "a party to that case."

That all of the prior litigation concerns the Grievant's rights as an individual also preclude finding an identity of claims between the items of litigation. The Union further contends that since there is no "allegation here that the breaches of contract . . . were prompted by the City representatives' unlawful consideration of (the Grievant's) sex," there can be no identity of claims between the various proceedings.

Since "just cause" is not reducible to the statutory rights enforced by the Equal Rights or the Worker's Compensation Division, the legal doctrines cited by the City are inapplicable. The Union further contends that the labor agreement "provides protections that legally are independent of and supplemental to any rights that may be provided for an individual by the Wisconsin Statutes." Arbitral precedent further underscores that the just cause standard is a distinguishable obligation from those cited by the City to govern this proceeding as a matter of res judicata or collateral estoppel.

The Union concludes by asking for the dismissal of the City's motion.

THE UNION'S RESPONSE TO THE ALLEGED PROCEDURAL DEFECTS

The Union contends that the City has "omitted certain basic facts," regarding the arbitrability of the grievances, and that the City has the burden of proving the agreement demands the forfeiture it seeks.

Regarding Case 79, the Union contends that the grievance "was withdrawn conditionally" on September 6, 1991. If the City did not accept this conditional withdrawal, then it necessarily follows, according to the Union, that the January resubmission of the grievance "should be

accepted." Since "the Grievant did not have a valid grievance claim until such time as she was

determined to be eligible for Worker's Compensation," and since that eligibility was not determined until January 13, 1992, the Union concludes that the January 17, 1992 grievance must be considered timely.

Beyond this, the Union contends that the City's arguments potentially pose "an affront to common sense and reason." The City cannot, the Union argues, be permitted to argue on one hand that the Worker's Compensation Division has the sole authority to determine entitlement issues and to argue on the other hand that the Grievant should have brought a grievance before that entitlement determination had been made. The Union's conditional withdrawal of the grievance was "reasonable under the circumstances."

Regarding Case 80, the Union argues that the grievance was filed within four days of the alleged infraction. The Grievant did no more than question the City's need, in October, to claim another update when the attending physician had not scheduled her for a reevaluation. That question must, the Union concludes, be considered timely asserted and reasonable. The Union then characterizes the City's claim that the grievance "should be denied as a matter of law" as "absurd." The grievance makes contractual, not legal, claims and those claims cannot be denied until heard.

Regarding Case 81, the Union notes that the City fails to mention the date of the Grievant's discharge. That date "is crucial to the determination of what the actual time limitations were for filing a grievance." Since the discharge triggered the grievance, that date must trigger the date for the timely filing of a grievance challenging the termination. Even assuming the grievance was filed on January 9, 1992, the Union concludes that it was "filed promptly . . . well within the time limits as those time limits were then defined in the terms of the collective bargaining agreement."

Concluding that the City has failed to meet its burden of proof, the Union requests that the City's motion be denied.

THE CITY'S REPLY BRIEF

The City urges that the Union has inappropriately attempted to expand the scope of the three pending grievances. Contending that the Union "inappropriately cites irrelevant and sometimes completely inaccurate facts of events occurring not only months, but years, past the time period" covered by the pending grievances, the City requests that the grievances be limited to the events each refers to.

To ignore the application of res judicata or collateral estoppel is to ignore "the Circuit Court decision which applies to this case." Beyond this, the City argues that neither doctrine requires that the Union be a party to the previous litigation. The prior litigation "involved the same facts and the same essential individuals," and thus provides an appropriate basis for the application of the doctrines. The Union's choice not to participate in the prior litigation should not

permit it to relitigate matters already resolved.

Regarding Case 79, the City argues that "the Grievant simply did not timely file a grievance following the City's denial of the grievance request for light duty." Even if she had done so, the Union ultimately withdrew the grievance.

Regarding Case 80, the City argues that "the Union essentially offers no response to the plain fact that this matter has been determined as a matter of law."

Regarding Case 81, the City urges that it "gave full and clear notice" of its intent to discharge the Grievant in November. A grievance filed the following January cannot be considered a timely response.

DISCUSSION

The issues posed by the parties' conflicting contentions regarding Case 79 can be posed by the following series of questions:

> Was Grievance 1991-4 timely filed at Step 2 on June 13, 1991?
> If Grievance 1991-4 was not timely filed at Step 2, does the Arbitration Panel have any jurisdiction to consider it?
> If Grievance 1991-4 was timely filed at Step 2, has it been withdrawn?
> If Grievance 1991-4 was either untimely or withdrawn, is Grievance 1992-2 a separate grievance?
> If Grievance 1992-2 is separate from Grievance 1991-4, was it timely filed?

None of these questions can be definitively answered on the evidence submitted to this point. Under Step 2 of Article XV, Section E of the 1991 labor agreement, "a written grievance" must be presented to "the supervisor within five (5) working days of the Step 1 decision." The City's brief alleges that decision occurred on May 24, 1991. There is, however, no documentation to support this assertion. In the absence of such evidence, the first three issues cannot be definitively resolved.

The latter two issues can arguably be addressed without regard to the resolution of the first three. These two issues require, however, an interpretation of Section G, 1 of Article XV. Grievance 1992-2 (Case 79) is dated, on its face, January 17, 1992. This arguably puts it outside of the scope of Article XV, Section G, 1, if the issuance of a Worker's Compensation Division determination on January 13, 1992 is considered "the cause of the complaint" under Article XV,

Section E, Step 1. On its face, however, Grievance 1992-2 (Case 79) restates the allegations of Grievance 1991-4 (Case 79). It appears to assert a right to light duty work in 1991. The Union's brief appears to argue the matter as an issue of entitlement to pay supplemental to Worker's Compensation payments. The material attached to the parties' briefs does not establish whether they processed the grievances as distinguishable matters. Whether they did or not, that material does not establish whether they addressed the dispute to pose an issue over light duty work or over supplemental payments. Evidence regarding what the parties have considered within the scope of that grievance may bear on the interpretation of Section G, 1 of Article XV. In the absence of this evidence, it is impossible to determine if the two grievances should be considered to pose separate issues which may make the processing of Grievance 1992-2 (Case 79) independent of any procedural defects involved in the processing of Grievance 1991-4 (Case 79).

In sum, to determine the procedural issues posed by Case 79, it is necessary to know the date of the "Step 1 decision." Beyond this, it is necessary to know if Grievance 1991-4 (Case 79) or Grievance 1992-2 (Case 79) were processed as distinguishable disputes. Whether or not they were processed as distinguishable disputes, it is necessary to know if either or both were discussed to pose a dispute concerning the Grievant's entitlement to light duty work or to contractual payments supplemental to her receipt of Worker's Compensation payments. Article XI, Section C addresses each type of dispute, but the evidence does not establish if the parties discussed either or both aspects of this provision. These facts can be established by the parties' stipulation. If no such stipulation is possible, evidentiary hearing becomes necessary.

The parties address Case 80 under a variety of legal and quasi-legal doctrines. It is, however, unnecessary to examine these doctrines in any detail to recognize that the underlying grievance does not pose any issue which can meaningfully be addressed in arbitration. The grievance seeks a cease and desist remedy, but the Grievant's subsequent discharge moots that. The grievance seeks the promotion of "reasonable rules" regarding the documentation of medical leaves. Arguably, this type of dispute could be repeated. The City, however, does not assert any right under the contract regarding this type of documentation. Rather, it asserts that it has acted as it must under the statutes governing Worker's Compensation. This means the City does not contend it has any right under the labor agreement greater than that allowed under the Wisconsin Statutes. This renders a decision from this Panel meaningless. What the City's obligations may be under Wisconsin Statutes can be effectively addressed only in a forum enjoying the appropriate jurisdiction. Arbitration can meaningfully be applied to statutory issues. To be meaningful, however, there must be some assurance that the exercise of contractual jurisdiction over a statutory issue can resolve a dispute. That assurance can come from language in a labor agreement requiring the application of statutory law, or from the bargaining parties' stipulation. In the absence of such assurances, an arbitral foray into external law can only add another level to a dispute. The parties' arguments make it apparent that an arbitral foray into external law is not a stipulated point.

The Union contends the requirement complained of in the grievance underlying Case 80

affords some insight into the Grievant's termination. This may or may not be the case. This contention points, however, to issues better addressed under Case 81. It serves no contractual purpose to treat Case 80 as if it has independent meaning.

The City's challenge to the timeliness of Grievance 1992-1 (Case 81) cannot be accepted. The November 26, 1991 letter put the Union and the Grievant on notice that her job was in jeopardy if she continued to be physically unable to work. The City contends the Grievant was then aware she had no possibility of recovering. This may or may not be the case, but cannot be determined from the evidence attached to the parties' briefs. Even if this is an accurate assertion of fact, the "cause of (the) complaint" underlying Grievance 1992-1 (Case 81) is a discharge. Under the terms of the November 26, 1991 letter, the discharge was not to be effective until January 5, 1992. The grievance is dated January 7, 1992. The language of Article VII, Section D underscores that the date of dismissal is crucial to a determination of timeliness.

To accept the City's argument would encourage unnecessary litigation. The November 26, 1991 letter set the final date the Grievant could claim her former position. To conclude she should have grieved prior to the final date would either encourage two grievances to be filed to challenge one termination or would establish that the final date set in that letter was meaningless. If the date set in that letter is meaningless, the purpose for issuing the letter becomes an issue. There is no reason to create multiple grievances. Case 81 challenges the Grievant's termination, and that termination was not effective until January 5, 1992. Under Article VII, Section D and under Article XV, Section E, Step 1, the discharge is "the cause of such complaint." There is, then, no basis to support finding Grievance 1992-1 (Case 81) untimely.

The final and most troublesome issue concerns the effect of prior litigation on the hearing necessary on Case 81, and, if necessary, on Case 79. The issue is troublesome because the pre-hearing motions call into question some of the fundamental procedural principles of arbitration. Arbitration is designed to provide a prompt, informal and expeditious means of resolving a dispute. Resolution of a pre-hearing motion inevitably delays the proceeding. Beyond this, pre-hearing motion practice poses a level of formality not typically brought into arbitration practice. In this case the motions also bring legal doctrines into play. Even if the motions did not bring legal doctrine into play, a pre-hearing motion necessarily forces the decision maker to become more involved in an advocate's presentation of a case than would appear desirable. Tactics are better entrusted to advocates than arbitrators. What an advocate deems the appropriate theme of a case should be left, as fully as possible, to the advocate.

These concerns cannot, however, obscure that Grievances 79, 80 and 81 are not typical. Even without the Circuit Court's admonition, it is impossible to ignore the litigation surrounding them. The concerns stated above highlight, however, that the Panel's role must be to establish, as narrowly as possible, what the litigation on the grievances can appropriately call into question. The parties have cited state, federal and arbitral precedent. The Panel sees its role to focus less on the formal evaluation of legal doctrine or precedent than to establish, hopefully, common sense

guidelines for the litigation.

The guidelines the Panel will set for the litigation focus on what cannot be considered in dispute. This should allow the advocates as much freedom as possible to define what is in dispute.

With this as background, the Panel has concluded that the prior litigation establishes that the Grievant was not physically able to perform the duties of her job as sanitation worker on January 5, 1992. The prior litigation further establishes that the City, on January 5, 1992, did not have, within the meaning of Chapter 102, Stats., suitable work available for the Grievant within her restrictions or open positions available for which she was qualified. This means evidence may be taken at hearing to determine whether the City violated the collective bargaining agreement by failing to extend the Grievant's unpaid leave of absence beyond January 5, 1992 and whether the City had just cause to terminate the Grievant's employment on January 5, 1992.

That the Grievant was not able to perform the duties of a sanitation worker at the time relevant to these grievances has been litigated before the Worker's Compensation Division in at least three cases. 17/ These points were also addressed in litigation before the Equal Rights Division 18/ and before the District Court for the Eastern District of Wisconsin. 19/ As noted above, the points cannot reasonably be considered in dispute. Beyond this, the availability of alternative work is addressed in two of the cases involving litigation before the Worker's Compensation Division.

That the Union was not a party to the litigation does not afford a persuasive basis to open these facts to further litigation. The Union's September 6, 1991 letter to Griesbach establishes that it viewed the Worker's Compensation Division as an appropriate forum to determine whether the Grievant's injury was work-related. The conclusions stated above do no more than follow this acknowledgment that the Worker's Compensation Division can determine fact within the scope of its jurisdiction which can be relied on in the parties' bargaining relationship. There is, on this record, no basis to conclude the Grievant failed to get a full hearing on these points. Beyond this, there is no reason to believe the Union has any interest distinguishable from the Grievant's. If the labor agreement afforded rights independent of those asserted by the Grievant in the litigation noted above, there was no reason for the Union to hold the grievance in abeyance. To place the facts noted above in dispute does no more than to encourage represented employes to pursue litigation in as many venues as possible, reserving collateral litigation under the labor agreement as the "last kick at the cat." The Union's reliance on the Worker's Compensation Division to determine certain facts was reasonable. For the Panel to rely on fact established there, and

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17/ See Exhibit 2 attached to the Union's brief dated 11-8-96; and Exhibits 3 and 4 attached to the City's brief dated 8-15-96.

18/ See Exhibits 6 and 7 attached to the City's brief dated 8-15-96.

19/ See Exhibit 8 attached to the City's brief dated 8-15-96.

confirmed in other litigation, is no less reasonable.

As noted above, however, evidence can be submitted on the contractual implications of the facts noted above or on other disputed facts which may bear on the contractual significance of the City's failure to extend the Grievant's leave of absence and the City's termination of her employment on January 5, 1992. Further discussion of the scope of the hearing can only draw the Panel further into tactical considerations than is appropriate. Whether facts beyond those noted above should be treated as established must be taken up as evidentiary rulings to be made on an issue by issue basis.

INTERIM AWARD

The grievance underlying Case 80 is denied as moot.

To the extent a stipulation of fact is not possible, hearing will be conducted on the grievances underlying Cases 79 and 81.

Absent the agreement of the parties, evidence concerning Case 79 will be restricted to that necessary to establish the date of the Step 1 decision regarding Grievance 1991-4; to establish whether Grievance 1991-4 and Grievance 1992-2 were processed as distinguishable disputes; or to establish whether the parties processed those grievances as a dispute broader than the Grievant's entitlement to light duty work.

Evidence regarding the grievance underlying Case 81 will not be received regarding whether the Grievant was physically able to perform the duties of her job as Sanitation Worker on January 5, 1992. Nor will evidence be received regarding whether, on January 5, 1992, the City had, within the meaning of Chapter 102, Stats., open positions available for which the Grievant was qualified or had other suitable work available for her within her restrictions. The parties may submit evidence on whether the City violated the collective bargaining agreement by failing to extend her unpaid leave of absence beyond January 5, 1992 or on whether the City had just cause to terminate her employment on January 5, 1992.

Dated at Madison, Wisconsin, this 17th day of April, 1997.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Chairperson
Arbitration Panel

I CONCUR:

David White /s/ 4/10/97
Date

Kathryn J. Prenn /s/ 4/15/97
Date