BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MENASHA MUNICIPAL EMPLOYEES UNION, LOCAL 1035, AFSCME, AFL-CIO, and affiliated with the WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES

and

CITY OF MENASHA, WISCONSIN

Case 79
No. 47707
MA-7361

Case 81
No. 47709
MA-7363

Appearances:

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.

Godfrey & Kahn, S.C., by **Attorney James R. Macy**, 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.

ARBITRATION AWARD

The procedural history of these cases up to April 17, 1997, is noted in CITY OF MENASHA, MA-7361, MA-7362 AND MA-7363, (MCLAUGHLIN AS PANEL CHAIR, 4/97). This decision is referred to below as the Interim Award. Hearing as directed by that decision was conducted in Menasha, Wisconsin on July 10 and July 11, 1997. The evidentiary record was held open to permit the submission of portions of a transcript of a Worker's Compensation hearing. After reaching a stipulation on that point, the Union and the City filed briefs and reply briefs by March 24, 1998. At the request of the Arbitration Panel, the parties supplied the transcripts underlying their stipulation on May, 21, 1998. The Panel met, by conference call, on July 10 and by telephone after that date to determine what, if any, issues could be resolved by consensus.

ISSUES

The parties were unable to stipulate the issues for decision regarding the two cases captioned above. The panel has determined the record poses the following issues:

Case 79

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If Grievance 1991-4 was timely filed at Step 2, has it been withdrawn?
If Grievance 1991-4 was either untimely or withdrawn, is Grievance 1992-2 a separate grievance?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?
If the panel has jurisdiction to determine the merit of either Grievance 1991-4 or Grievance 1992-2, did the City violate Article XI, Section C, by denying the Grievant light-duty work or by denying the Grievant the wage differential between her normal take-home pay and Worker's Compensation?

Case 81

Did the City violate the collective bargaining agreement by terminating the Grievant effective January 6, 1992?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II - MANAGEMENT RIGHTS RESERVED

A. General: Unless as otherwise herein provided, the management of the work and the direction of the working forces, including but not limited to, the right to hire, promote, demote, suspend or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer.

. . .

ARTICLE V - SENIORITY AND SERVICE

A. Definitions: Seniority refers to the rank order of employees relative to other employees determined by reference to the time of continuous service in the department. . . .

E. Loss of Seniority: An employee shall lose all seniority and service if he:

1. Quits;
2. Is discharged for cause;
3. Is absent three (3) consecutive working days without notice or permission;
4. Is laid off prior to attaining one year of service; or
5. Is laid off for a period of one year or more.

An employee who has one (1) year or more of service at the time of layoff and who returns to work within one (1) year shall have his service prior to such layoff included in computing continuous service. . . .

ARTICLE VI - JOB POSTING PROCEDURE

A. Definitions:

. . .

3. Department: A department is defined as Street Department, Sanitation Department, Park department (sic) and Bridge Department. (Note: This is a clarification of the practice.)

. . .

ARTICLE VII - SUSPENSION, DEMOTION AND DISCHARGE

Suspension is defined as the temporary removal without pay of an employee from his designated position.

A. Suspension for Cause: The Employer may for disciplinary reasons suspend an employee. An employee who is suspended, except probationary and temporary employees, shall be given written notice of the reasons for the action, and a copy of such notice shall be made a part of the employee's personnel history record, and a copy shall be sent to the Union. No suspension for cause shall exceed thirty (30) calendar days.

B . Suspension During an Investigation: During an investigation, hearing or trial of an employee on any civil or criminal charge, when suspension would be in the interest of the City, an employee may be suspended by the Employer for the duration of the proceedings. The suspension shall terminate within ten (10) days after completion of the cause for which he was suspended, by reinstatement or by other appropriate action, by resignation or dismissal of the employee.

C. Voluntary Demotions: An employee may request or accept voluntary demotion when the position he occupies is allocated to a lower class or when assignment to less difficult or responsible work would be to his advantage.

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 personnel 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.

E. Usual Disciplinary Measures Shall Be:

1. Oral Reprimand
2. Written Reprimand
3. Suspension
4. Dismissal

The Union shall be furnished a copy of any written notice of reprimand, suspension or discharge. A written reprimand sustained in the grievance procedure or not contested, shall be considered, a valid warning. In the case of serious infractions prior warnings are not a prerequisite for disciplinary action that includes suspension or dismissal. Written and oral reprimands shall not be used as the basis of suspension or dismissal after twelve (12) months.

. . .

ARTICLE XI - AUTHORIZED ABSENCE

. . .

C. Worker's Compensation: Except for Bridge Department 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

A. Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of this contract.

B. Subject Matter: Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, the relief sought, the date the incident or violation took place, the specific section of the Agreement alleged to have been violated and the signature of the grievant and the date. Matters involving a union grievance shall be signed and processed by a Union officer or representative.

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.

Step 3: If the grievance is not settled at the second step, the employee and/or his representative may appeal in writing to the Department Head within five (5) working days of the Step 2 decision. If the Department Head is the immediate supervisor, Step 3 shall be omitted. The Department Head will further investigate the grievance and submit his decision to the employee and his representative in writing within five (5) working days after receiving notice of the grievance.

Step 4: If the grievance is not settled at the third step, the Union may appeal in writing to the Chairman of the Personnel Committee, with a copy to the Personnel Director, within five (5) working days after receipt of the written decision of the Department Head. The Personnel Committee shall discuss the grievance, within ten (10) working days of the appeal, with the employee, and the Union representative shall be afforded the opportunity to be present at this conference.

F. Arbitration:

1. Time Limit: If a satisfactory settlement is not reached in Step 4, the Union must notify the Chairman of the Personnel committee in writing within ten (10) working days that they intend to process the grievance to arbitration. . . .

6. Decision of the Arbitration Board: The powers of the Arbitration Board are limited as follows: Its function is limited to that of interpreting and applying the provisions of this Agreement. It shall have no power to add to, subtract from or modify any of the terms of this Agreement. The decision of the majority of the Board shall be rendered promptly following the hearing and if exercised in

accordance with the terms of this Agreement and consistent with federal, state and local laws, shall be final and binding upon both parties.

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.

. . .

ARTICLE XXII - ENTIRE AGREEMENT

A. Amendments: This agreement constitutes the entire Agreement between the parties and no verbal statements shall supersede any of its provisions. Any amendment or agreement supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto.

B. Waiver: The parties further acknowledge that, during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the areas of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and the opportunities as set forth in this Agreement. Therefore, the City and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter specifically referred to in this Agreement, or any subject or matters that arose during bargaining, but which were not agreed to by the parties.

BACKGROUND

The Parties' Stipulation of Fact

At hearing (Transcript, Day One [Tr. 1] at 9-10), the parties stipulated to the following facts, which underlie both Grievance 79 and Grievance 81:

1. On August 22, 1990, the Grievant . . . was an employee of the City assigned to the position of Sanitation Worker.

2. On August 22, 1990, the Grievant injured her ankle which prevented her from performing any work for the City and resulted in her being absent from work

commencing August 22, 1990.

3. From August 22, 1990 through May 23, 1991, the Grievant was restricted by medical opinion from performing any work for the City.

4. On May 23, 1991, the Grievant's physician changed the Grievant's medical restrictions from that of no work to that of allowing the Grievant to return to work limited to light, sedentary work for an indefinite period of time. The Grievant presented the updated medical information to her immediate supervisor, Tim Jacobson, at his home that evening and requested light duty.

5. On May 24, 1991, the Grievant submitted a request for light duty to the City's Personnel Department.

6. Beginning May 13, 1991, the Grievant began a period of paid leave utilizing available vacation and sick leave. The Grievant's pay status continued until September 5, 1991, at which time her accrued paid leave benefits expired. The Grievant submitted a request for an unpaid leave of absence dated August 20, 1991.

7. The City granted the request for a leave of absence through October 4, 1991.

8. On September 30, 1991, the Grievant submitted an additional request for leave. Her request for leave was granted through October 25, 1991.

9. On October 23, 1991, the Grievant submitted an additional request for leave. Her request for leave was granted through November 22, 1991.

10. On November 1, 1991, the Grievant submitted medical verification of her continued inability to return to full work. In addition, the Grievant requested a further leave of absence.

Case 79

When the Grievant met Jacobson to request light duty work on May 23, 1991, she was not accompanied by any Union representative. On May 23, 1991, Gary J. Eklund, the City's then-incumbent Personnel Director, issued a letter to the Grievant which stated:

> We received a copy of the May 13, 1991 letter from . . . Wausau Insurance Companies relating to the on-going problems with your lower left leg. Due to the determination of Wausau Insurance that the difficulties you are experiencing are not work related, the City has placed you on sick leave effective May 13, 1991. . . .

The record does not establish when the Grievant received this letter.

On May 24, 1991, the Grievant brought her request for light duty to City Hall. Her request was denied by the City, either through Eklund or its Director of Public Works, Mark Radtke. Her request prompted, on May 24, a discussion involving Eklund, Radtke and Jacobson. That discussion did not produce any modification of Jacobson's denial of light duty. It did, however, prompt another meeting which took place sometime in late May at the City's sign shop. Radtke, Eklund, Jacobson and the then-incumbent President of the Union, Jim Card participated in this meeting. The purpose of the meeting was, at least in part, to determine whether the Grievant could work on signs for the City and remain seated while doing so. Sometime, in all probability in late May or early June, 1991, Radtke contacted the Grievant's physician, Luther M. Strayer III, to determine the specific nature of the restrictions she would have to work under if she worked. Radtke contacted the Grievant prior to talking to Strayer.

The City's denial of light duty prompted the filing of a grievance captioned by the parties 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." Jacobson responded to the written grievance in a memo dated June 18, 1991, which states: "This grievance is denied at this step of the procedure provided by contract agreement."

The Union advanced Grievance 1991-4 to Step 3 in a form dated June 25, 1991. Radtke received the form on June 26. Radtke issued a written response to the grievance in a letter to Card dated July 2, 1991, which states:

> Grievance 1991-4 is inconsistent with 1035 Grievance 1990-001 dated March 27, 1990 at Step 2 of the Grievance procedure and resolved at Step 3 on April 30, 1990.
>
> Grievance 1991-4 is denied as it was untimely filed; is denied as there is no violation of the contract on its merits; and, is denied because it is not arbitrable on its merits. . . .

Card responded in a letter dated July 9, 1991, to Donald Griesbach, the Chairman of the City's Personnel Committee. That letter states:

> This letter is to inform you that we are currently proceeding to Step #4 of the Grievance Procedure.
>
> If it is agreeable we would like to hold this grievance in abeyance pending the eligibility determination of the Workers Compensation claim filed by (the Grievant). If this is not agreeable, please contact Mr. Gregory N. Spring . . .

Eklund did contact Spring and the two of them discussed Card's letter. Eklund summarized their conversation in a letter to Spring dated July 17, which states:

> . . . Due to the indeterminate length of such workers compensation appeals, along with other considerations, it is not agreeable to the City to hold this grievance in abeyance at Step 3. We understand you are proceeding to Step 4 of the Grievance Procedure. . . .
>
> In a good faith effort to resolve this matter, the City is willing to meet with Local 1035 representatives to discuss a procedure for light duty work assignments for any member of Local 1035 who has a medical restriction resulting from a non-work injury or illness. Please contact me if you have any interest in arranging such a meeting.

The parties agreed to conduct the fourth step meeting on Grievance 1991-4 and several other grievances on August 20, 1991, which had previously been set for a meeting of the Personnel Committee. Eklund summarized the results of this meeting in a letter to Spring dated August 26, 1991, which states:

> On Tuesday, August 20, 1991, the City of Menasha Personnel Committee, in conference with the grievants and Union Representatives, discussed four Local 1035 Step 4 grievances in accordance with Article XV.E. of the bargaining agreement and decided as follows:
>
> 1. 1035 Grievance 1991-4 . . . Light Duty Work Grievance denied for the reasons stated in the Department Head's written response at Step 3. . . .

Spring responded in a letter to Griesbach dated September 6, 1991, which states:

> 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. . . .

Eklund 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.

He concluded thus: "The City rejects the Union's claim to a retention of any right to file a new grievance in the future. . . ."

During at least the first three steps of the processing of this grievance, the parties were involved in collective bargaining for a labor agreement covering 1991. That contract was executed in late July of 1991.

During or sometime after the negotiation of a 1991 labor agreement the Union and the City met separately to determine whether the City would modify its policy concerning the provision of light duty. Those discussions occurred sometime after the execution of the 1991 labor agreement, probably in the fall or early winter of 1991. These discussions did not produce any modification of the City's policy on light duty.

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.

The Union filed a grievance dated January 17, 1992, which repeated the "applicable violation" and "Adjustment required" sections of Grievance 1991-4. Jacobson responded in a letter to Card dated January 21, 1992. 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.

The parties processed this grievance through the steps of the Article XV grievance procedure without any resolution of the conflicting positions noted above.

On February 19, 1992, the parties executed a labor agreement in effect from January 1, 1992, through December 31, 1994. The parties did not make any change in the language of Article XI, Section C.

Case 81

The Events Leading to the Grievance

As noted above, the City placed the Grievant on sick leave effective May 13, 1991, after the carrier of its Worker's Compensation insurance took the position that her injury was not work related. The Grievant's August 20 request for a medical leave of absence reads thus:

> I am applying for a medical leave of absence to be made effective Monday, August 19, 1991. This request is being made because I am unable to perform my normal job functions and the City will not allow me to return on a light duty basis.

Radtke responded to this letter in a letter to the Grievant 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. . . .

Radtke ultimately approved the Grievant's request for an unpaid leave in a letter to the Grievant dated September 4, 1991. In that letter, Radtke conditioned the approval on the exhaustion of the Grievant's "paid leave allowances." The letter noted that "this will occur at 2:15 P.M., Thursday,

September 5, 1991." The leave thus granted commenced at that time and was continued "through

Friday, October 4, 1991." Radtke also noted that: "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."

The Grievant requested an extension of her leave in a letter to Radtke dated September 30, 1991, which states:

> As per your instructions dated in a letter September 4, 1991, I am required at this time to request an extension of my medical leave of absence, as my initial request for medical leave expires October 4, 1991.
>
> I would also like to advise you as I did in a previous phone conversation, that I no longer am covered under any health or dental plan, as my financial situation doesn't render this feasible.
>
> I will await your approval of my medical leave.

Radtke responded in a letter dated October 11, 1991, which states:

> Your request for an extension of your leave of absence without pay for medical reasons as provided for in Article XI-G of the Labor Agreement is approved for the term through Friday, October 25, 1991.
>
> 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. . . .

In a letter to Radtke dated October 23, the Grievant requested an additional extension of her unpaid leave. That letter states:

> I am requesting an extension of my unpaid medical leave of absence, which expires October 25, 1991.

> As per our phone conversation dated 10/22/91, I explained to you that I am enclosing the updated medical report from Dr. Strayer that was utilized at the Unemployment Compensation Hearing. This report was dated 9-30-91, and is in fact updated from the report presented to you in September. Due to the restricted time frame that you imposed, I also explained that this information will have to be sufficient. As soon as my attorney receives further updated information from Dr. Strayer, copies will be forwarded to you.
>
> As I stated before, it is unfortunate that I can no longer rely on your verbal agreements. It seems regardless of what is agreed to, a different outcome is demanded. . . .

Radtke responded in a letter dated October 24, 1991, which states:

> Your October 23, 1991 letter requesting an extension of leave of absence without pay as provided in Article XI-G of the Labor Agreement is approved, with the below conditions, for a term through Friday, November 22, 1991.
>
> 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. . . .

The Grievant responded to this letter in a letter dated November 1, 1991, which states:

> As per your instructions in your letter dated October 24, 1991, I am enclosing a copy of Dr. Strayer's notes, dated October 18, 1991. This is an updated prognosis, as you have requested. I also believe it states that I will be unable to perform my full duties on or before December 30, 1991.
>
> Hopefully this will be sufficient for you. My next appointment is scheduled for January 20, 1992. . . .

The notes referred to in this letter read thus:

6-4-91: Discussed her employment with Mark Radtke at City of Menasha and felt that (the Grievant) could do light sedentary work which he (sic) might have to get up and walk short distances infrequently, but have advised that she should not have to be climbing up and down or walking long distances rapidly or doing anything which requires frequent rapid push off with her sore tendoAchilles (sic). I think reason might prevail. . . .

10/18/91 . . . (The Grievant) is doing better. Today she has 10 degrees of dorsiflexion of both ankles. She reports that the tenderness is improving. She has less discomfort going up and down steps. Squatting however still gives her some discomfort in the calf. She continues to use warm compresses and cold and Bufferin as needed. She is able to walk now 15 or 20 minutes before she gets some burning discomfort in the region of the tendo Achilles. A couple hours of rest will then improve her to the point where she can continue walking. All in all she is gradually improving, slowly as expected. We might expect her to continue improving for the next year or so.

Whether she can return to the jumping, running type activities which have brought this on is problematical. We know that Marathoners with this type of a problem are often able to return to running within 2 to 3 years after this type of injury, however it may take them a year to get back up to speed and they probably never have quite the same speed as they had had prior to injury. We are going to ask (the Grievant) to take 1/2 inch of raise out of both of her heels, both heel raises. Now she will have a little greater excursion of the triceps while walking and as she continues to improve, we may be able to take out another 1/2 inch in the next 3 months, at which time we will ask her to schedule an appointment and we will re-examine her.

. . .

Radtke responded to the Grievant's request for an extension of unpaid leave in a letter dated November 26, 1991, which states:

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. . . .

The Grievant responded in a letter dated December 30, 1991, which states:

> In response to your letter dated November 26, 1991, I am attaching my current restrictions from Doctor Strayer.
>
> I guess since we were all aware that my physician would not release me free from all restrictions, I have no choice but to submit this to you and request that you notify me when you have work available that I can do within my work restrictions. . . .

The attachment to this letter included notes from her physician in addition to those dated "6-4-91" and "11-18-91" which are set forth above. The added notes are dated “12-19-91” and state:

> (The Grievant) now has 15 degrees of dorsiflexion of both ankles. She still has tenderness at her achilles tendon on the left but I don't palpate as much swelling as I remember here in the past. Plus I think she is making slow, steady, gradual improvement as we thought she might.
>
> Apparently there is a push for her to be either restored to the ability to do her normal job on the garbage truck or to be dismissed. At the present time, I think it would not be in the patient's best interest to have her jumping up and down, on and off the truck, as this activity as well as stair climbing still gives her discomfort. Plus I think we have to keep her physical limitations the same as those that were described in the letter of 4, October, to Mark Sewall.

Sewall was then the Grievant's attorney. In a memo dated January 2, 1992, Sewall forwarded to the City a copy of the October 4, 1991 letter referred to in Strayer's notes. That letter states:

> I have received your letter of October 1 and hope I can answer your questions:

> 1) (The Grievant) has probably reached a healing plateau, but I do not know if you can point to a specific date and say when this has occurred. It certainly does not seem to have gotten much better or substantively worse after May up through July, but I have not seen her since June of this year.
>
> . . .
>
> Certainly with her jumping on and off the sanitation truck involves a lot of repetitive use of the Achilles tendon and such occupational injury is probably the cause of her present problem as well as the persistence of the problem as she continued to work with this discomfort before taken out of the work place.
>
> 3) (The Grievant's) permanent physical limitations at the present time would involve not permitting those activities which require rapid forceful push-off of the left leg which would be rapid walking, stair climbing, getting on and off a garbage truck specifically or any other similar type of activity.
>
> . . .

Radtke and Eklund met to discuss whether the Grievant's leave should be extended beyond January of 1992.

They determined that the leave should not be further extended and confirmed this conclusion in a letter to the Grievant dated January 6, 1992, which states:

> The extension for your leave of absence due to medical reasons expired on January 3, 1992. The work requirements of the City require that the Sanitation Worker position be filled. Because you did not comply with the conditions specified in my letter to you dated November 26, 1991, your employment with the City of Menasha has been terminated, effective January 6, 1992.
>
> Thank you for the time and effort you have provided the Department of Public Works during your years of service.

Evidence Regarding the Basis for the Termination

Eklund and Radtke testified that they concluded from the documentation submitted on the Grievant's behalf that she would be physically unable to perform as a Sanitation Worker for an indefinite period. She had already received the longest unpaid leave of absence they were aware

of,

and they were reluctant to set the precedent of granting an unpaid leave of indefinite duration. Neither of them considered the termination disciplinary in nature. It is undisputed that the Grievant had no record of discipline at the time of her termination.

Eklund and Radtke testified that the termination helped maintain staffing levels within the Sanitation Department. Since February 14, 1991, the City had operated under an Executive Order in which the Mayor froze "all budgeted capital purchases and any hiring." Under the terms of the order, any proposed expenditure covered by the freeze had to be cleared by the Mayor's office before it could be implemented.

On January 13, 1992, an Administrative Law Judge determined that the Grievant's injury was work related. Hearing on that matter had been conducted sometime in November of 1991. Eklund testified that he did have some doubt concerning the City insurer's decision that the Grievant's injury was not work related. Eklund and Radtke testified that the pendency of this matter played no appreciable role in their decision to terminate the Grievant.

Throughout the period from the Grievant's injury until her termination, the table of organization for the City Sanitation Department had six positions designated for employes classified as Sanitation Worker. During the Grievant's absence the City would staff the Sanitation Department by drawing the least senior available member of the Common Laborer classification in the Streets Department to perform in the Grievant's place as a Sanitation Worker. Radtke testified that he felt this arrangement could not be continued indefinitely without exposing the department to a loss of the Grievant's position or unwanted overtime costs. He feared that the department's ability to cover the loss of the position would backfire if the City determined it could staff the department with five Sanitation Workers. The loss would, he stated, reduce the level of service or increase overtime costs.

The position vacated by the Grievant's termination was not posted until March or April of 1992, and not filled until perhaps May or sometime that summer.

Evidence Regarding Past Practice

The Arbitration Panel ruled that evidence on this point could include testimony presented during the litigation of the dispute underlying the Grievant's eligibility, under Chapter 102, Stats., to receive Worker's Compensation. The parties jointly submitted portions of transcripts developed during the course of that litigation before the Worker's Compensation Division of the agency then known as the Department of Industry, Labor and Human Relations.

Card has been employed by the City as its Sign Technician since October of 1983. Broadly speaking, Card's position requires him to fabricate and install street signs. The fabrication of the signs is done in a sign shop. Some of that work is performed in a seated position, and is thus amenable to assignment as light duty.

Over the years, Card has worked with a number of City employes assigned to the sign shop while they recovered from work related injuries. Card estimated that between 1982 and 1992, roughly a dozen employes had been assigned to the sign shop while they healed from a work related injury.

Throughout this period, the City maintained a policy of not providing light duty work for employes who had suffered a non-work related injury. None of the employes for whom the City assigned light duty work during this period had an injury in which there was no foreseeable return to work date. The Grievant was assigned to light duty at one point in her employment when her return to work date was uncertain. That injury was expected to fully heal, however. The uncertainty concerned the precise date a return to work without restrictions would be possible.

The City attempted to alter its policy sometime in 1990 concerning what it then viewed as the non-work related injury of Mike Resch. When it became aware that the City was considering assigning Resch to light duty for what it perceived as a non-work injury, the Union filed a grievance. The Union's grievance asserted that any change in the implementation of the City's light duty policy should be bargained with the Union and that the City had wrongfully bargained with Resch as an individual. As a result of this grievance, the Union and the City attempted to bargain a change in the City's light duty policy. Those negotiations proved unsuccessful, and no change in the policy was effected. Resch was not assigned to light duty during his recovery from this injury. He returned to work after his injury had healed.

Resch was the beneficiary of the assignment of light duty for an injury which occurred sometime between 1989 and 1992. At the time, Resch was on crutches, and could only perform sedentary work. The City assigned him light duty in the sign shop until he was able to return to his normal duties. His recovery from the injury was of a short duration. This is the only example of City-assigned light duty for an employe unable to walk as a normal facet of job performance.

In 1990, the City and the Union confronted another situation which tested City policy regarding the assignment of light duty. In that case, Ray Fank injured his wrist and was assigned to light duty work in the sign shop. His only work restriction was that he could not plow snow. Sometime shortly after Fank had been assigned to light duty in the sign shop, the City's insurer took the position that the injury was not work related. Fank asked Jacobson to continue him in light duty because of his limited restrictions. The City agreed to do so, and assigned him light duty, including training of new employes in snow plowing. The City did not agree to continue Fank on light duty until after it had reached an agreement on the point with the Union.

In testimony concerning City practice, Card noted that there was always work available in the sign shop, but not necessarily always available for an employe unable to walk. He also noted the workload in the sign shop was very heavy in May of 1991. That workload included, by his estimate, a backlog of sedentary work sufficient for one to two months. The Union supported the Grievant's individual request for light duty throughout 1991 and 1992, even though, as Card

acknowledged, the Union's position on the Resch grievance and the Grievant's grievances were arguably inconsistent and the Union was unable to reach agreement with the City on the general policy governing the assignment of light duty for non-work related injuries.

Radtke, Jacobson and Ecklund testified during the Worker's Compensation litigation. They testified that the City did not assign the Grievant to the sign shop because there was no City/Union agreement to vary City policy to extend to a non-work injury; there was no reason to believe she would recover sufficiently to return to work; City management believed accommodating her physical restrictions in the sign shop would detract from the efficiency and safety of the sign shop; and assigning her to the sign shop would restrict the City's ability to assign full-time workers to such duties on inclement weather days.

It is undisputed that the Grievant was qualified to perform work in the sign shop.

The Grievance

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

> Article VII Suspension, Demotion, & Discharge
> Section D
> 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."

The parties processed the grievance, without any resolution, through the steps of the grievance procedure. Eklund's written statement of the City's denial of the grievance at Step 4, dated February 28, 1992, reads thus:

> . . . 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. . . .

Finally, please also note that in the event (the Grievant's) 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.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The City's Initial Brief

The City states the issues for decision thus:

Case 79

1. Was Grievance 1991-4 timely processed in accordance with the timelines of the collective bargaining agreement?

2. Does Grievance 1992-2 represent a grievance distinguishable from that of Grievance 1991-4?

Case 81

1. Did the City's decision to terminate the Grievant violate the collective bargaining agreement?

The City contends, initially, that Case 79 should be dismissed as untimely filed and not arbitrable. Grievance 1991-4 was untimely filed at several steps. The Grievant advanced that grievance by requesting light duty from her supervisor on May 23, 1991 and by requesting light duty from the City's personnel office on May 24, 1991. Each request was denied on the day of the request. The City argues that "(i)f those dates do not represent the dates of Step 1 grievances, then there are none." The Union's filing of a Step 2 grievance on June 13, 1991, cannot, according to the City, be considered timely under Article XV, Sections C and E.

Even if the Step 2 filing could be considered timely, the City argues that the Union's Step 3 filing on June 26, 1991, violates Article XV, Sections C and E. Beyond this, the City argues that the Union's attempt to unilaterally hold the grievance in abeyance establishes a violation of

Since Grievance 1992-2 "represented exactly the same grievance earlier abandoned by the Union," the City concludes that it is no more arbitrable than its predecessor. Even if the grievance could be considered arbitrable, the City contends that it has no merit: "there simply was no available work for the Grievant; therefore, requiring light duty would not be logical."

Beyond this, the City contends that Article XI, Section C, unambiguously states a make whole provision for certain injured employes and a light duty requirement which turns on the City's determination that such work exists. Since the evidence establishes that the City made the Grievant whole as required by Worker's Compensation, and since it also establishes the City did not require the Grievant to report for light duty work, it necessarily follows that there can be no violation of Article XI, Section C. Nor can there be a violation of Article XI, Section G, since "leaves without pay are discretionary to the City." To the extent any ambiguity can be found in these provisions, "the bargaining history supports denial of these grievances." The Union unsuccessfully attempted to limit the City's authority to "provide light duty and leaves without pay in negotiations for the 1991 bargaining agreement." There is no applicable past practice on either issue and Article XXII strictly limits the role practice can play in the interpretation of the labor agreement. A contrary conclusion violates Article XV, Section F, 6.

Nor did the City violate the labor agreement by terminating the Grievant's employment. Since the termination was not disciplinary in nature, Article VII does not govern it. The termination was reasonably based on the City's desire to preserve its table of organization and to avoid unnecessary overtime costs. Thus, the termination "was not disciplinary, but for the viable economic needs of the City."

Even if Article VII could be applied to the termination, the City had cause to discharge the Grievant. Due to the Grievant's medical inability to return to work, the termination did no more than "relieve (her) from duty . . . (for) legitimate reason" as provided in Article II, Section A. This assertion is, the City asserts, firmly rooted in arbitral precedent.

The City concludes that each grievance should be denied.

The Union's Initial Brief

The Union phrases the issues for decision thus:

1. Did the Employer have just cause to discharge the Grievant on January 5, 1992?

2. Did the Employer violate the terms of the collective bargaining agreement by

failing to extend the Grievant's leave of absence beyond January 5, 1992?

3. If either 1. and/or 2. is yes, what is the appropriate remedy?

After an extensive review of the evidentiary background, the Union argues that the Grievant's termination is governed by Article VII. This, the Union contends, is rooted in the language of the agreement and in arbitral precedent. Because the termination is governed by a cause standard, the Union asserts that the Grievant was entitled to progressive discipline, reasonable investigation and a conference prior to the imposition of discipline.

The Union also argues that the City is limited, under the cause standard, to the reasons for the termination listed in the Grievant's letter of discharge. This means that the discharge must be proven traceable to "the work requirements of the City." The evidence will not, however, support such a link. The City faced no budget crisis at the time of the discharge, and had more than adequately covered for the Grievant's absence. Beyond this, the Grievant's "sanitation position was budgeted for both 1991 and 1992," thus belying the assertion that the City's table of organization faced any imminent threat.

A review of the evidence establishes, according to the Union, that the City "has fabricated a crisis to expel the Grievant." That fabrication is intended to mask that "the City was concerned with (the Grievant's) eligibility for benefits under the contract." That the City acknowledged the weakness of the challenge to the Grievant's eligibility for Worker's Compensation benefits underscores this assertion. The termination decision was dictated not by City operational needs, but by the progress of the Grievant's Worker's Compensation action and by evidence of her gradual healing.

That the Grievant has experienced a permanent partial disability cannot, under arbitral precedent, be considered to thwart the application of just cause principles. Neither arbitral precedent nor contract language can support an interruption of the Grievant's seniority prior to her exhaustion of paid vacation, leave and temporary total disability leave on September 5, 1991. Beyond this, the Union argues that even if the Grievant's seniority can be considered to have been interrupted, she "is entitled to at least the same seniority considerations as laid off employees." No termination of seniority can be considered for cause if it occurs within the contractually specified period for recall rights under a lay off.

Nor has the City proven how the Grievant can be considered not to qualify for the make whole provisions of Article XI, Section C. That the City failed to provide light duty for her has no bearing on their liability to make up the difference between her normal weekly wage and any Worker's Compensation payment. Nor has the City demonstrated any hardship demanding it to terminate the Grievant's employment.

The Union concludes that "the Arbitration Board (should) sustain the grievance and order appropriate remedy."

The City's Reply Brief

The City argues that the Union's review of the evidentiary background inappropriately and inaccurately cites evidence not of record. This violates fundamental notions of due process, the terms of the Interim Award, and exacerbates the "(l)engthy, unfortunate but necessary litigation (which) has already occurred in this case to protect the City's rights."

More specifically, the City contends that the Union inappropriately expands Grievance 1991-4 from an issue of "the Grievant's request for light duty," to "an issue regarding the difference between workers compensation pay and regular pay." Beyond this, the Union has cited material from companion litigation as if that material was evidence in this proceeding. The citation of this "evidence" is inaccurate, improper and egregious.

The City then contends that the Union willfully failed to establish "whether Grievance 1991-4 was timely filed at Step 2 on June 13, 1991," because it recognizes that the answer to that issue dooms its grievance. A review of the record establishes "that Grievance 1991-4 was definitively denied at least by May 24, 1991." Beyond this, the City contends that Grievance 1991-4 was withdrawn by the Union and must, therefore, be denied here.

The City notes that the Union never contended that Grievance 1991-4 and 1992-2 constituted "continuing grievances" until the filing of its initial brief, and concludes that the Panel's consideration of this argument flies in the face of the Interim Award and the parties' agreements underlying parts of that award. Even if this contention could be considered posed on this record, the grievances cannot be considered "continuing grievances." The labor agreement has language precluding such a conclusion and arbitral precedent does not support it. Since Grievance 1992-2 duplicates Grievance 1991-4, it deserves the same denial. The Grievant has been made whole as required by Article XI, Section C, and the City is under no contractual obligation to create work for her. Neither language nor practice can support the remedy the Union seeks.

Nor has the Worker's Compensation Division decision of January, 1992, been shown to have any bearing on the Grievant's termination. That decision does no more than confirm that the Grievant had no reasonable expectation of returning to work as a sanitation worker. Nor has the Union demonstrated how the City could have saved money by terminating the Grievant. The record establishes only that the City's operational needs dictated that the position once occupied by the Grievant needed to be filled by a worker capable of performing the required work.

Arbitral precedent may indicate some arbitrators have refused to permit the termination of seniority of injured workers, or have conditioned such a termination on contractual recall rights. This precedent also establishes that it is appropriate for an employer to sever the employment relationship of an employe incapable of performing their job. More significantly here, the implication of such rights would void existing contract provisions and would fly in the face of the parties' bargaining history. Article V, Section E, Subsections 2 and 3 specifically provide for the

termination of the Grievant's seniority. Beyond this, the evidence shows the Union tried and failed "to bargain recall rights and limit the City's ability to determine light duty assignments and determine leaves of absence."

The City concludes that "these grievances are without merit and should be denied."

The Union's Reply Brief

The Union notes that the City improperly failed to question the timeliness of the filing of the Step 3 grievance until the filing of its initial brief. Since the burden of proving a procedural defect "rests totally with the City," the Union concludes that any lack of clarity on the date of the filing of the light duty grievance must be resolved against the City. Beyond this, the City's arguments ignore that at the time the City contends a grievance should have been filed, "the parties were supposedly attempting to find light duty for" the Grievant. Thus, the City's contention does no more than encourage "premature and unnecessary litigation."

The same effect can be noted regarding the City's attempt to characterize the Union's stated desire to hold the grievance in abeyance pending the outcome of Worker's Compensation Division litigation. Thus, Grievance 1991-4 must be considered properly before the Arbitration Panel and should be sustained, with the award of an "appropriate remedy."

Beyond this, the Union asserts that the City "has not correctly analyzed the circumstances presented in the instant case nor properly applied material contract provisions and arbitral precedent." The termination posed here is more than a denial of an unpaid leave. It represents the severance of the employment relationship. It must, then, be treated under the principles of just cause. That the parties engaged in negotiations concerning light duty shows no more than an attempt to resolve a grievance which, as an offer of compromise, "cannot be considered in arbitration." That the language was unchanged does not defeat the Union's grievance because the grievance seeks that the language be enforced as written.

The City has also mischaracterized the scope of the contractual provisions governing the grievance. Citations to the layoff portions of Article II have no bearing on the grievances. The attempt to read Articles V and VII as inapplicable because discipline is not at issue is unpersuasive. Beyond this, the City has taken provisions within Article VII out of context in a vain attempt to obscure the direct impact of that provision on the grievances. Nor does Article V fare any better under the City's view. Subsection E, 2 is clearly applicable, but the City's attempt to employ Subsection 3 is, at best, a strained reading of that provision and is in any event irrelevant since the discharge letter contains no citation to it.

A review of the evidence cannot support a conclusion that the City's operational needs support the Grievant's discharge. Those needs, according to the Union, manifest no more than an after-the-fact attempt to shield the City from the appropriate application of the principles of just

cause. The evidence establishes that the City deferred to the weak case of its insurance carrier and

in so doing allowed the Grievant to be cut off from supplemental benefits and light duty work. Beyond this, the City treated the Grievant's use of paid leave as if it was a request for unpaid leave. These egregious actions, the Union concludes, demand that the Arbitration Board "sustain the grievance and order appropriate remedy."

DISCUSSION

Case 79

The first five issues stated above are drawn from the Interim Award. The sixth issue poses the merits of the two grievances, and reflects that evidence was taken on the procedural and substantive issues posed by the grievances.

The Interim Award noted that the first three questions turn on the date "of the Step 1 decision." Jacobson denied the Grievant's request for light duty on May 23 and his denial was confirmed by Eklund or Radtke on May 24, 1991. The Union questions whether either response can be considered a denial of a Step 1 grievance, particularly when the City met later that month to determine whether it had light duty work which could be assigned to the Grievant. Beyond this, the Union asserts any uncertainty on this point must be resolved against the City.

The Union's contentions cannot, however, establish any date for the Step 1 denial. The Union filed a Step 2 response on June 13. Contending the grievance was still being discussed cannot explain why it advanced to Step 2. It is, on this record, impossible to reject the City's contention that its May 24 confirmation of Jacobson's May 23 denial is the latest date fixing the Step 1 meeting.

Step 2 of Article XV, Section E, demands that a Step 2 response be filed "within five (5) working days of the Step 1 decision." The Union filed the Step 2 response on June 13, well beyond the five working day time limit. Grievance 1991-4 was not, then, timely filed at Step 2 on June 13, 1991.

The City also questions whether the grievance was untimely filed at Step 3 on June 26. This contention poses no issue beyond that noted above. If Jacobson's June 18 response is considered the date triggering the five day time limit, the City's contention must be accepted. However, Article XV, Section E, Step 3 states that "the employee and/or his representative may appeal in writing." Jacobson addressed his June 18 response to the Grievant "c/o Jim Card." It is not clear when either Card or the Grievant received this response or when, if at all, the two of them met to consider it. Nor is it apparent whether the two of them could have met within the time limits asserted by the City. Against this background, it is impossible to apply the time limits as the City urges. Doing so could read the employee-representative conference permitted by Step 3 out of existence.

The next issue is whether the untimeliness of the Step 2 filing precludes arbitral consideration of its merits. Article XV, Section C states that time limits "may be extended by mutual consent in writing." No such writing has been submitted into evidence and an award by this Panel cannot make up for its absence. Section C does not, however, expressly preclude arbitral consideration of the merits of a grievance. Section D notes "(d)issatisfaction is implied in recourse from one step to the next," and the parties continued to discuss the grievance. This does not establish arbitral jurisdiction to hear an untimely grievance, but would indicate the propriety of such review should be weighed on the facts of each case. Because of the lengthy and tortured history of this grievance, a review of the merits of the grievance should not be lightly denied. It is, then, the opinion of the Panel that the procedural defect of the grievance at Step 1 should be considered part of the review of its merits rather than a rejection of such review.

The next issue is whether Grievance 1991-4 has been withdrawn subsequent to Step 1. The withdrawal is contractual, not factual in nature. Spring's letter of September 6 establishes that the Union never withdrew the grievance. Spring's letter could be read to indicate either that the Union hoped the matter could be held in abeyance as sought in Card's letter of July 17, or that the Union considered the issue one which could be re-asserted after the Worker's Compensation Division addressed the matter as a statutory matter. Eklund's September 17 response establishes that the City rejected both interpretations.

The asserted withdrawal of the grievance turns on the provisions of Article XV, Section G, 1, which states that "all grievances . . . must be processed to conclusion under the terms of this procedure." There is no dispute that Grievance 1994-1 was filed in June of 1991 and that the contract has an expiration date of December 31, 1991. Thus, grievance 1991-4 falls within the scope of Article XV, Section G, 1. Since there was no joint agreement to hold grievance 1991-4 in abeyance, the issue becomes whether the Union's unilateral action can effect this result.

The most troublesome aspect of this issue is the City's contention that the grievance cannot be held in abeyance coupled with its contention that Worker's Compensation issues cannot be resolved in arbitration. The assertion that Article XV, Section G, 1 requires prompt arbitral adjudication of grievances is irreconcilable to the assertion that an arbitrator cannot resolve Worker's Compensation based issues. If the Grievant's entitlement to compensation or light duty under Article XI, Section C, turns on whether her injury was work-related; if only the Worker's Compensation Division can determine this issue; and if such a determination could not be made within the term of the 1991 labor agreement, then strict application of Article XV, Section G, 1 is incompatible with the assertion that Worker's Compensation issues must be resolved outside of arbitration.

This dilemma cannot, however, affect the application of Article XV to Grievance 1991-4. To permit the Union to unilaterally hold that grievance in abeyance is not reconcilable to the admonition that "all grievances . . . must be processed to conclusion under the terms of this procedure." Grievance 1991-4 must, therefore, be considered withdrawn under the terms of Article XV, Section G, 1. After receiving Eklund's September 17 letter, the Union could have

chosen to force the matter to arbitration under the terms of the 1991 agreement or to refile the matter after the Worker's Compensation Division had addressed the underlying statutory issues. The contract cannot persuasively be read to grant the Union the authority to unilaterally hold a grievance in abeyance beyond the effective term of the governing labor agreement.

The issue thus becomes whether Grievance 1992-1, which restates the allegations of 1991-4, is a new grievance and, if so, whether it can be considered timely filed. The City contends that because it restates an abandoned grievance, it must meet the same fate.

The City's contention cannot be considered persuasive. During the processing of Grievance 1991-4, the City asserted the matter was not arbitrable. This may mean not arbitrable because untimely or not arbitrable because an arbitrator cannot determine the statutory entitlement to Worker's Compensation. While the reassertion of Grievance 1992-1 cannot cure the untimeliness of Grievance 1991-4, this does not make it possible for the City to unilaterally deny interpretation of the terms of Article XI, Section C. If the City's arbitrability concerns are that an arbitrator cannot determine the statutory issue whether an injury is work-related, then its interpretation of Article XV becomes a bar to arbitral enforcement of Article XI. This an unpersuasive reading of Article XV. That the statutory determination could not be made within the term of the 1991 labor agreement is not traceable to any act or neglect on the Union's part. To accept the City's assertion would be to permit it to unilaterally determine, under the contract, if the Grievant's injury was compensable as a Worker's Compensation matter. The City's May, 1991 change in view on the underlying cause of the Grievant's injury affected her entitlement to light duty and to supplemental pay under both the 1991 and the 1992 contracts. To say the second grievance is the same as the first is to say the City can unilaterally preclude the Grievant's entitlement to contractual benefits under the 1992 contract by asserting that events beyond the control of the Union did not occur in 1991. This effectively renders the rights of Article XI, Section C meaningless.

Thus, when the Worker's Compensation Division overturned the City's determination that the injury was not compensible, the Union faced a situation unlike that posed in 1991. In 1991, the Grievant's eligibility for light duty posed the disputed fact whether her injury was work related. The 1992 grievance posed no such disputed fact. In light of the City's challenge to the arbitrability of Grievance 1991-4, Grievance 1992-1 must be considered a separate grievance. The Worker's Compensation Division's Examiner's decision is dated January 13, 1992. The Union filed Grievance 1992-2 on January 17. It was, then, timely within the meaning of Step 2 of Article XV, Section E.

Article XI, Section C consists of two sentences, each addressing a separate right. The first sentence addresses payment of a "wage differential," and the second addresses the possibility of light duty work. The light duty component poses no issue addressable here. The provision of light duty would appear discretionary with the City in light of the reference to "as required" in the second sentence of Article XI, Section C. Even if this was not the case, the City discharged the Grievant on January 5, 1992. Thus, the issue of light duty begs the question of the propriety of

the discharge.

Grievance 1992-2 poses no apparent interpretive issue concerning the provision of a wage differential based on the first sentence of Article XI, Section C. This issue must also be addressed regarding Case 81. It should be noted here, however, that there is no persuasive evidence to overturn the City's contention that the parties discussed Grievance 1992-2 as an issue of entitlement to light duty. Nor is there any persuasive evidence to overturn the City's contention that the Grievant's compensation period for Worker's Compensation payments ended in May of 1991. Against this background, it is impossible to find a City violation of Article XI, Section C.

The path to the merits of Grievances 1991-4 and 1992-2 is tortuous, but does not lead to a City violation of Article XI, Section C.

Case 81

The issue adopted above broadly addresses the Grievant's "termination." This term is drawn from the Grievant's discharge letter. The issue is broad to reflect that the parties dispute what portion of the contract governs it. The first interpretive issue is, then, to determine what portion of the contract governs the Grievant's termination.

The Union's contention that the cause provision of Articles II and VII must be applied to the termination is persuasive. Article II refers to "cause" while Article VII refers to the "proper cause." This does not, however, introduce an ambiguity requiring resolution concerning the cause standard: "The term 'just cause' is generally held to be synonymous with 'cause,' 'proper cause,' or 'reasonable cause.'" HILL & SINICROPI, MANAGEMENT RIGHTS, (BNA, 1986) AT 99.

There is no dispute that the termination is not disciplinary. Thus, the application of cause to the termination is debatable, since it is typically applied as a standard of discipline. The City's contention that Article II, Section A, establishes a distinguishable, non-disciplinary standard governing the termination by authorizing it to "relieve employees from duty because of . . . legitimate reason" is not, however, persuasive. Article V, Section E, is a comprehensive listing of the events by which an employee's seniority can be terminated. Unless the final clause of Article II, Section A is read as the authority to lay off, it is not sufficient to terminate the Grievant's seniority. It is apparent that the City regards the termination as a severance of the employment relationship. Its citation of Article II, Section A is inconsistent with this view, and its assertion that the final clause of that provision can support a permanent severance of the employment relationship is unpersuasive. Nor does Article XI, Section G, 2, afford a standard other than cause. That the City cannot be compelled to grant a leave without pay stops short of establishing when or how the employment relationship is severed.

That the cause standard is more typically applied to disciplinary situations may be granted,

but cannot obscure that the labor agreement points to broad applicability of the standard. Discharge for cause is included in Article V, Section E. Applying it to the Grievant thus avoids creating a gap

in a provision structured to have comprehensive coverage. Beyond this, breadth of coverage is apparent in Article VII. Section D refers not only to "discharge" but also to "dismissal." Beyond this, Section D does not expressly tie a reference to "disciplinary" to either term. The disciplinary measures of Section E are "Usual Disciplinary Measures," not exclusive steps. Reading Article VII in this fashion is consistent with Article V and Article II. The "legitimate reason" clause would thus appear to govern relief from duty for periods of time not constituting a complete severance. "Proper cause" thus addresses the distinct authority to sever the employment relationship.

Applying the cause standard to the Grievant requires, in the Panel's opinion, that the City establish that the Grievant was unable to work at the time of her discharge; that the City had no reasonable expectation that she could return to work; and that the discharge did not undermine other agreement provisions. The record establishes that the parties' dispute focuses on the latter two of these factors, particularly the third.

As reflected in the Interim Award, litigation prior to this proceeding establishes that the Grievant was not physically able to perform the duties of her job as sanitation worker on January 5, 1992. While the Union contends the Grievant's condition was improving, the evidence affords scant basis to conclude the City had, in January of 1992, any reasonable expectation she could return to work as a sanitation worker. The Union points to Strayer's notes of October 18, which do note the Grievant "is doing better." That report, however, is guarded at best about her prospects of returning to work. She is noted to be "gradually improving, slowly as expected." This improvement, however, is expected over "the next year or so." Nor is the improvement pegged to a level sufficient to return her to work: "Whether she can return to the . . . activities which have brought this on is problematical." Strayer then speculates that such a return may never occur, or may take two to four years to happen. The December 30 notes add nothing to this prognosis. The injury prompting this course of treatment dates to August of 1990. The City's conclusion that it had no reasonable expectation that the Grievant could return to work cannot, against this background, be viewed as unreasonable.

This conclusion poses the most troublesome aspect of the termination, which is whether it undermines other agreement provisions. The Union contends the reasons stated for the termination in the January 6, 1992 letter are pretextual. The assertion that City work requirements required the filling of the Grievant's position is belied, according to the Union, by the City's delay in filling the position and by the fact that it had successfully accommodated her absence for some time. That her position was funded for 1991 and 1992 belies the assertion that the hiring freeze necessitated swift action to preserve the position in the City's table of organization.

The alleged improper motivation behind the termination is the City's desire to avoid contractual liability under Article XI, Section C. Under this view, the City's challenge to the Grievant's eligibility for Worker's Compensation froze its obligation to supply the wage differential between her normal wages and her benefit level. As the matter neared resolution by the Worker's Compensation Division, the City determined it had to be rid of her prior to any

order sustaining her eligibility for Worker's Compensation.

The Union's arguments, although forcefully made, are unpersuasive on this record. It is not apparent that the City faced an open-ended liability to pay the Grievant the wage differential provided in Article XI, Section C. The liability the City owed the Grievant for her period of temporary total disability is not disputed and apparently paid. It is not immediately apparent what the City may have owed the Grievant under that section for any period after she was found to have a permanent partial disability. The City's potential liability to the Grievant for contractual benefits thus would seem to afford it little incentive to fabricate the basis for her discharge. That Eklund openly admitted the potential weakness of the City Insurer's case makes it difficult to conclude the City acted in bad faith toward the Grievant. In any event, once its case had been lost, it is not apparent what liability it sought to forestall by discharging the Grievant. Whatever liability that decision put upon the City would have included its costs of litigation and it is not apparent that the City saved money by challenging the Grievant's claim.

Nor is it apparent that the City undermined Article XI, Section C by failing to offer the Grievant light duty work. Article XI, Section C, provides such duty for an employee "as required." The City never required such work of the Grievant, and it is unproven that it was obligated to do so. Evidence of past practice supports the City's claim that providing such work for the Grievant would have contradicted the resolution of a prior grievance. Beyond this, evidence of practice falls short of demonstrating the City had an obligation to create work for the Grievant. The City's assertion that her injury precluded her effective performance of light duty work in the sign shop stands unrebutted. That Card met with Eklund, Jacobson and Radtke to discuss this point at the sign shop makes it difficult to conclude that the City did not consider her request in good faith. The Union's contention that this consideration precludes finding Grievance 1991-4 untimely underscores this conclusion.

The record fails to establish what the City gained by terminating the Grievant prior to the January, 1992 decision of the Worker's Compensation Division. Whether the Grievant had been terminated immediately before or after that decision, the contractual issue remained the same. In either event, the issue turns on whether she could reasonably be expected to return to work.

The Union contends that the termination was precipitous, and undercuts the Grievant's rights under Article V. Under this view, the City's actions undermine the seniority rights of Section A, and the recall rights of Sections D and E. This contention assumes that these provisions create rights drawn from these sections, but distinguishable from the language of any one of those provisions. Thus, the one year recall period stated at Section E, read with the "continuous service" reference of Section A establishes that the City should not have terminated the Grievant prior to one year past the date of her exhaustion of any contractual paid leave benefit. This is something other than a strict recall right, since such a right would, under Section D, have been extinguished at any time when the Grievant failed "to return upon being recalled."

This contention is the most troublesome raised by the Union. It is apparent the City could have applied the contract as the Union asserts. The fundamental problem posed by the argument is

that the issue before this Panel is whether the City can be compelled to so interpret the contract.

The cited agreement provisions fall short of establishing an enforceable right. The City did pay the Grievant her accrued leave benefits. It offered leave without pay which is, under Article XI, Section G, discretionary with the City. She was in fact afforded an unprecedented level of leave. The result sought by the Union would require the Panel to create a right not previously agreed to by the parties. Such a result is unpersuasive under Article XV, Section F, 6.

That the City did not swiftly fill her position and has not definitively established an unwarranted amount of overtime traceable to her absence are troublesome facts. As the Union contends, these facts afford reason to question the City's citation of pressing work requirements demanding the Grievant's termination. However, no less troublesome is the Union's contention that the Grievant's individual rights warrant actions up to and including threatening staffing levels within the sanitation department. Presumably, the City's management of its enterprise involves an assessment of staffing beyond that necessary to make day to day adjustments to cover the Grievant's absence.

The Grievant cannot be faulted for her injury or for its unpleasant aftermath. However, compelling the City to indefinitely extend the employment relationship cannot make the injury or its effects go away. The contract permits the City to discharge for cause. The record supports the conclusion that the Grievant was unable to work as a Sanitation Worker on January 6, 1992; that the City had no reasonable expectation that she could return to work; and that the termination did not undermine other agreement provisions.

THE MAJORITY VIEW OF THE DISSENT

The delay in the issuance of this decision reflects the Panel's attempt to reach a consensus on the grievances. The effort has not, as could be expected, generated consensus. Hopefully however, the effort has resulted in the full airing of long-litigated issues. The following comments are offered not to refute the well-stated positions of the dissent, but to clarify why, in the majority's opinion, they are not persuasive on this record.

Case 81

That the terms of a labor agreement must be harmonized to give each their effect must be granted, as must the assertion that the labor agreement does not give the City the unilateral authority to terminate the Grievant's seniority at whim. The strength of these broad contentions cannot, however, obscure that the Grievant was afforded longer to heal than a laid off employe is contractually afforded to reclaim a position. Nor can it obscure that the Grievant received the longest leave afforded by the City. The assertion that her "layoff" period should have begun no earlier than January of 1992 is difficult to read as anything other than an assertion that she had an indefinite period to reclaim employment. This conclusion

creates, rather than harmonizes, contract provisions. More significantly, it is not apparent how the conclusion can be harmonized with the provisions of Article XI, Section G or with those provisions of Article V which restrict recall rights to one year.

Case 79

The dissent's position on Case 79 is closely intertwined with Case 81, and is the most troublesome aspect of this case. Roughly speaking, the dissent argues that the City cannot terminate the Grievant's seniority based on a compensable injury, then deny her the benefit of the Article XI, Section C wage supplement for employes "receiving Worker's Compensation Benefits."

The strength of the dissent is that the City, having contended Worker's Compensation issues are statutory, cannot now deny that the January, 1992 decision statutorily invoked the pay differential provisions of Article XI, Section C. The dissent properly notes that the Interim Award questioned whether Grievances 1991-4 and 1992-2 litigated the Grievant's entitlement to light duty, to a pay supplement, or to both. The dissent urges that any Worker's Compensation payment, whether for temporary total disability or for permanent partial disability, entitled the Grievant to a pay supplement.

The interpretive issue is whether, within the meaning of Article XI, Section C, the Grievant was "receiving" benefits during the period between May 24, 1991 and her termination. The City appears to view the Grievant's Article XI, Section C entitlement to have ended when her right to temporary total disability became a right to permanent partial disability. The latter entitlement, if paid as a lump sum, arguably does not fall within the meaning of "receiving" benefits over time as contemplated by Article XI, Section C.

The factual and contractual issue is whether the Grievant was "receiving" Worker's Compensation between May 24, 1991 and January 5, 1992. From the perspective of the majority, the weakness of the evidence on this point requires the denial of the grievance.

Indicative of this weakness is Ecklund's testimony that the City complied with the Examiner's decision by paying temporary total disability through May 23, 1991 (Tr. I at 72). He added that the City has not made payments to the Grievant for the period following May 23, 1991. Whether the Grievant was "receiving" benefits in this period thus rests on arbitral inference, not proven fact. The basis for this inference is tenuous on a general and on a specific basis.

On the most general level, Article XI governs light duty and pay supplement. Both grievances underlying Case 79 mention light duty, but neither mentions pay supplement. The

Interim Award noted the potential significance of the parties' discussions in processing the grievance, but the record contains no persuasive evidence of substantive discussion of the pay supplement issue. Thus, throughout the grievance process, the parties addressed light duty.

Even if this general weakness is ignored, more specific difficulties arise. The Grievant did not receive periodic Worker's Compensation payments between May 24, 1991 and her termination. What evidence there is on the point indicates the claim the Grievant could make for this period is based on the permanent partial disability payment ordered by the Examiner. Even ignoring the evidentiary dispute regarding the Examiner's decision cannot obscure the difficulties underlying the inference the dissent makes. Was this payment a lump sum payment? If not, what evidence rebuts Ecklund's testimony? If so, can "receiving" include a lump sum payment? Did she receive any payment? Can whatever payment she did receive or should have received be considered, within the meaning of Article XI, to cover the period from May 24, 1991 through January 5, 1992? The dissent, unlike the majority, is willing to make the inferences necessary to establish the factual existence and the contractual significance of these payments. From the majority's perspective, those inferences cross the line between interpretation and advocacy.

This should not be read to state the record was somehow deficiently developed. Rather, the record reflects how Case 79 was processed. Case 79 was processed as a light duty dispute. Presumably, this reflects the Union's significant and ongoing effort to preserve the Grievant's position in the unit. The difficulty is that this effort is not contractually reconcilable to the attempt to secure the pay supplement the dissent seeks here. The latter effort presumes a permanent disability while the former presumes a temporary disability. The City, after the exhaustion of the Grievant's paid leave, afforded her a series of unpaid leaves. There is no evidence that this conduct violated the contract. It must, then, be considered an appropriate exercise of Article XI, Section G. The position asserted by the dissent thus overturns conduct not shown to have violated the agreement. This is not an untenable position, but it needs a contractual basis. The dilemma posed by adopting the dissent's position is that the attempt to keep the Grievant in unit status as long as possible appropriately extended the healing period. Once the healing period proved unsuccessful, however, the dissent's position turns the provision of unpaid leave into a trap for the unwary since the pay supplement would be paid for the time the parties attempted to secure a healing period. This would appear to undercut the effort to secure unpaid leave for recovering workers, since refusing unpaid leave in questionable cases would insulate the City from retroactive pay supplement claims. The policy basis for this conclusion is less significant, as a matter of contract interpretation, than its contractual basis. The compensation the dissent seeks under Article XI, Section C, overturns unpaid leave appropriately granted under Article XI, Section G. This may be a defensible conclusion, but lacks an evidentiary basis in this record. If the City's assertion that the Grievant's injury was not work-related reflected bad faith, the

result could change. However, the City's determination, although controversial, was made in good faith. Ecklund's candid acknowledgment of his concern with the conclusion of the City's insurer reflects this.

It is important to restrict this conclusion to the facts posed here. Whether Article XI, Section C, can support a wage differential based on employe receipt of permanent disability payments must be left to the parties to bargain or to litigate on the facts of each case. Presumably, the ability of an employe to return to work has a direct and case-by-case bearing on the issue.

The majority opinion should not be read to imply that the City avoids Article XI, Section C payments by terminating an employe. The just cause provision and Chapter 102 preclude such action. More to the point, the majority does not deny the grievance in Case 79 because the City discharged the Grievant prior to the Examiner's decision. Rather, the majority denies the grievance because it lacks a proven factual basis. This does not imply such proof, although available, was not produced. Rather, it reflects the majority's view that the circumstances surrounding this grievance are insufficient to establish a contract violation.

AWARD

Grievance 1991-4 was not timely filed at Step 2 on June 13, 1991.

Although Grievance 1991-4 was not timely filed at Step 2, the Arbitration Panel has jurisdiction to consider it, provided that the untimeliness of the Step 2 filing is considered in the evaluation of the merits of Grievance 1991-4.

Grievance 1991-4 was, under the terms of Article XV, Section G, 1, withdrawn.

Grievance 1992-2 is a separate grievance from Grievance 1991-4.

Grievance 1992-2 was timely filed.

The City did not violate Article XI, Section C, by denying the Grievant light-duty work or by denying the Grievant the wage differential between her normal take-home pay and Worker's Compensation.

The City did not violate the collective bargaining agreement by terminating the Grievant effective January 6, 1992.

The grievances underlying the cases captioned by the Commission as Case 79, No. 47707, MA-7361; Case 80, No. 47708, MA-7362; and Case 81, No. 47709, MA-7363 are, under the terms of this and the Interim Award, denied.

Dated at Madison, Wisconsin, this 29th day of January, 1999.

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

I CONCUR:

Kathryn J. Prenn /s/ 1/19/99
Date

Date

I DISSENT:

David White /s/ 1/21/99
Date

Date

DISSENTING OPINION OF ARBITRATOR WHITE

Case 79

Since the parties were unable to stipulate to the issues, the Arbitration Panel determined that it should frame the issues before it. Among these issues is:

> If the panel has jurisdiction to determine the merit of either Grievance 1991-4 or Grievance 1992-2, did the City violate Article XI, Section C, by denying the Grievant light-duty work or by denying the Grievant the wage differential between her normal take-home pay and Workers' Compensation?

The Panel has determined that Grievance 1991-4 was not processed in a timely manner. However, it has also ruled that the untimeliness of this grievance does not preclude arbitral consideration of the merits of the grievance. Moreover, there is no reason to believe that any procedural defect exists, which precludes consideration of the merits of Grievance 1992-2. Therefore, the panel has determined that it will answer the question as to whether the City failed to meet an obligation under Article XI, Section C to either provide light duty work, or to provide a wage differential.

Apparently, there is no dispute that the Grievant properly received her XI-C wage differential prior to the City's determination (through its insurance carrier) that her injury was not one that qualified for Worker's Compensation benefits. This determination occurred on or about May 12, 1991. At this point, the XI-C differential payments stopped.

The question of whether the Grievant's injury qualified for Worker's Compensation benefits is a legal question. She pursued this matter through the proper channels, and on January 13, 1992, the Administrative Law Judge hearing the case determined that the injury was indeed work related and she was eligible for Worker's Compensation benefits dating back to May 12, 1991, it likewise had a retroactive liability to pay the XI-C differential dating back to May 12, 1991. To the extent that the City has failed to make the Worker's Compensation supplement payments, it has violated the labor agreement.

Case 81

Termination of employment is the labor relations equivalent of the death penalty. Its use has traditionally been supported by arbitrators when the basis of the employment relationship is broken beyond repair. In the case of the Grievant, this is not the case. It is true that she was not able to perform the full range of her regular duties at the time of her termination. While it was unclear how long her recovery would take, she was in fact recovering. She was a ten year

employe. The Union argued that the Grievant should have been placed on layoff status for a period

not to exceed the period of recall under the contract. While my colleagues on the panel state that the contract *could* be interpreted in the manner the Union described, there was nothing in the contract which *compelled* such interpretation. With all due respect to my colleagues, I take strong exception to this conclusion.

It is well established in labor relations that the terms of a labor agreement are to be harmonized to give effect to all provisions. The termination of the Grievant's seniority rights due to her workplace injury does violence to the Grievant's seniority rights. On the other hand, placing the Grievant on layoff, with recall rights as limited by the contract, preserves the Grievant's seniority rights, as well as the Employer's rights to have required work performed by employes qualified to perform the work.

There is nothing in the contract which compels the interpretation that an employe who is recovering from a workplace injury *must* be terminated if the employe will not be able to return to work within a time frame unilaterally determined by the Employer. The panel notes that the Grievant is not to be faulted for her injury or its aftermath. Yet by being terminated, she is being treated exactly as if her injury were her fault.

Thus, it is my view that the City violated the labor agreement when it terminated the Grievant's employment.

To the extent that the above diverges from the opinions of my colleagues, I respectfully dissent from those opinions.

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