BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WAUPUN CITY EMPLOYEES UNION,
LOCAL 1112, AFSCME, AFL-CIO

and

CITY OF WAUPUN

Case 57
No. 56608
MA-10349

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 639 West Scott Street #205, Fond du Lac, Wisconsin 54937, appearing on behalf of Waupun City Employees Union, Local 1112, AFSCME, AFL-CIO, referred to below as the Union.

Mr. James R. Korom, vonBriesen, Purtell & Roper, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53202-4470, appearing on behalf of City of Waupun, referred to below as the Employer or as the City.

ARBITRATION AWARD

The procedural background to this matter is noted in CITY OF WAUPUN, MA-10349 (MCLAUGHLIN, 10/98). Under the terms of the Award in that decision, further hearing was conducted in Waupun, Wisconsin on January 28, 1999. The hearing was not transcribed. The parties agreed that the attorney representing Kim St. George could attend the hearing, and could make a statement on her behalf. Her attorney, Stephen A. Ditullio, made a statement on her behalf at the close of the January 28 hearing. The Union and the Employer filed briefs and reply briefs by April 13, 1999.

In a letter dated April 19, 1999, the Employer's counsel stated the following:

> I am in receipt of the Union's April 9, 1999 Reply Brief in the above-entitled matter. That Brief makes reference on page 5, in footnote 12 to a day shift clerical

> position, and repeats reference to that position on the top of page 7. I have searched my notes, and believe there is no evidence in the record concerning this position. Any reference to that position in the Union's Brief is inappropriate. The City respectfully requests the Arbitrator to strike any such references from the Union's Reply Brief, award appropriate sanctions for citing facts not in the record, and to seriously consider whether this Arbitrator can fairly proceed to a decision in this case without being inappropriately biased by the inclusion of such a reference in the Union's Brief.
>
> Thank you in advance for your cooperation.

In a letter to the parties dated April 30, 1999, I stated:

> If the Union has any comment to Mr. Korom's letter of April 19, 1999, it should be filed as soon as possible.
>
> If the City believes the matter is so prejudicial that I should withdraw from the case, then the matter should be briefed. Please let me know if this is necessary.

In a letter dated May 6, 1999, the Union's representative stated:

> I am writing in response to your letter of April 30, inquiring if the Union had any comment on Mr. Korom's letter of April 19, 1999. The Union has no objection to the Arbitrator disregarding any argument made by either party that was not part of the record during the two hearings in this matter. The Union believes that such actions are part of the normal responsibilities of any arbitrator as that person examines a record in the course of reaching a decision.
>
> I believe the Arbitrator will be capable of reaching a decision in this matter without being influenced by arguments not based upon the evidence in this proceeding.

Neither party filed any other response to my letter of April 30, 1999. In a letter to the parties dated May 17, 1999, I noted the following:

> I wish to confirm the status of the record in the above-noted matter. I consider the record closed, and do not anticipate further argument regarding Mr. Korom's letter of April 20, 1999.
>
> I will proceed to consider the record. As highlighted by your letters, I will not consider evidence not submitted at hearing.

If either of you has any questions, please contact me.

Neither party filed any response to this letter.

ISSUES

The parties stipulated the following issues for decision:

Did the Employer violate the collective bargaining agreement when it changed the shift selections for the Communication Operators in June of 1998, assigning Kim St. George to the day shift and requiring the remaining Communication Operators to select shifts different from those they selected by seniority for the calendar year 1998?

If so, were the City's actions "necessary" within the meaning of Section 15.05 because required by the ADA?

If the first issue is answered in the affirmative, and the second issue is answered in the negative, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE III
FUNCTIONS OF MANAGEMENT

3.01 Except as hereinafter provided, the management of the work and the direction of the working forces, including, but not limited to, the right to hire, assign work and duties, transfer and promote . . . and the rights to determine the Table of Organization, the number of employees to be assigned to any job classification and the job classifications needed to operate the Employer's public jurisdiction are vested exclusively in the Employer**. . . .**

. . .

ARTICLE X
SENIORITY

10.01 It shall be the policy of the Employer to recognize seniority. There shall be separate seniority classification lists for . . . Part-Time Communication Operators, and Full-Time Communication Operators,

for the purpose of this article and Article XIII. Seniority shall be by these classifications, and shall consist of the total calendar time elapsed since the date of original employment . . . On a yearly basis, by classification seniority, starting with the senior employee first, Communication Operators shall be allowed to bump up or down as it relates to changes in shift assignment within their classifications, (i.e., part-ttime employees may bump other part-time employees, but not the full-time employees). . . .

ARTICLE XII
GRIEVANCE PROCEDURE

. . .

12.05 . . . The Arbitrator's jurisdiction shall be limited to disputes over the interpretation or application of specific provisions of the Collective Bargaining Agreement. . . .

ARTICLE XV
NORMAL WORKDAY AND WORKWEEK OVERTIME
COMMUNICATION OPERATORS

15.01 Work Schedule for the Communication Operators:

a) Workday and Workweek Schedule. The normal workday for communication operators shall be eight (8) consecutive hours. The normal workweek schedule shall be six (6) consecutive duty days followed by three (3) consecutive off days. This cycle shall then be repeated. The standard shift selection shall be by seniority. . . .

15.05 Work schedules shall be posted for two (2) months in advance. Communication Operators may, upon request, check the work schedules further in advance. If changes in the posted schedules are necessary, Communication Operators shall be notified as far in advance as possible, but in no event less than eight (8) hours in advance except in the case of sickness or emergency. . . .

ARTICLE XIX
SICK LEAVE

19.01 The Employer agrees that all regular employees shall be entitled to sick leave of twelve (12) days per year with pay, which such sick leave shall accumulate at the rate of one (1) day per month. Employees may accumulate unused sick leave. (sic), however, the maximum accumulation shall be one hundred twenty (120) days.

. . .

19.06 An employee who exhausts his sick leave credits and is still unable to return to work due to a continuing illness or injury shall be granted a medical leave of absence until such time as his physician or chiropractor certifies his fitness to return to work. Said medical leave of absence shall run no longer than a maximum of six (6) calendar months from the date the employee exhausts his sick leave credits.

a) A Communication Officer who exhausts his sick leave credits and is still unable to return to work due to a continuing illness or injury may be granted a medical leave of absence until such time as his physician or chiropractor certifies his fitness to return to work.

BACKGROUND

The Initial Decision

In CITY OF WAUPUN, MA-10349 (MCLAUGHLIN, 10/98), I stated:

. . .

ISSUES

The City, contrary to the Union, asserts that the record poses the following threshold issue:

Is the grievance timely?

The parties stipulated the issues posed by the grievance on its merits:

Did the Employer violate the collective bargaining agreement when it changed the shift selections for the Communication Operators in June of 1998, assigning Kim St. George to the day shift and requiring the remaining Communication Operators to select shifts different from those they selected by seniority for the calendar year 1998?

If so, what is the appropriate remedy? 1/

1/ The parties stipulated that if I found a violation of the labor agreement, then the remedy would be to restore the status quo regarding calendar year 1998 shift selection.

. . .

AWARD

The grievance is timely.

The Employer violated the collective bargaining agreement when it changed the shift selections for the Communication Operators in June of 1998, assigning Kim St. George to the day shift and requiring the remaining Communication Operators to select shifts different from those they selected by seniority for the calendar year 1998. This violation, however, presumes that the assignment was for a term so indefinite that it must be considered permanent.

As the remedy appropriate to this violation, the City shall, upon Union request, meet to determine whether the accommodation made for Kim St. George can be effected for a fixed term not violative of Section 10.01. If agreement on this point cannot be reached, further hearing will be conducted to determine the date for the restoration of the status quo regarding calendar year 1998 shift selection. Hearing on the impact of the ADA on the grievance may be conducted if the parties mutually agree to do so.

Because of the uncertainty inherent in this remedy, I will retain jurisdiction over the grievance for a period of not less than forty-five days from the date of issuance of this Arbitration Award.

Hearing under the terms of the final paragraph of the Award took place on January 28, 1999. At that hearing, the parties stipulated that "the arbitrator is authorized to examine the Americans With Disabilities Act (ADA) and related cases to determine Issue 2." The parties also adduced evidence beyond that received at the September 1, 1998, hearing. That evidence is best set forth as an overview of witness testimony.

Darlene Vossekuil

Vossekuil has worked as a Communications Operator for the City for roughly twelve and one-half years. In 1992, she missed work from February 4 through April 1 due to a heart ailment, which necessitated heart surgery on February 6. Prior to her absence, she worked the second shift, from 3:00 p.m. until 11:00 p.m., on the City's 6-3 work schedule. Prior to her absence, her days off were covered, typically, by Marge Raube, a part-time employe. At the time of her leave, the City staffed the dispatch center with three full-time and three part-time employes. Ellen Redecker was, at that time, a part-time employe who regularly worked first shift.

Vossekuil did not know she would undergo heart surgery until the day before the surgery. After the surgery, and after leaving the hospital, she discussed her condition with the Police Chief. She was aware, at the time, that she could recover and return to work, but was unsure how long it might take. Sometime around February 19, 1992, the City and the Union agreed to extend Vossekuil twenty days of sick leave. Raube and Redecker ultimately covered her 1992 absence by working full-time.

In 1994, she experienced difficulty with her hands, which ultimately required carpal-tunnel surgery. She was aware of the need for the surgery long before it occurred. Her physician originally informed her the surgery would be performed sequentially, with the first surgery requiring from six weeks to three months of recuperation before the second could be attempted. She required, however, only five weeks of recuperation after the first operation before the second took place. Her 1994 absence ultimately kept her from work from June 17 through October 8. At the time she left work, she did not know how long she would need leave, but provided the City a return to work date as soon as her doctor felt confident enough to give it to her. The City covered her 1994 absence by hiring a temporary replacement. At the time shifts were bid for 1994, Vossekuil had more seniority than Robin LeMieux, and as a result, Vossekuil chose second shift, while LeMieux took the third. LeMieux volunteered to assume Vossekuil's shift and did so while she recuperated.

Vossekuil stated that, to her knowledge, no Communications Operator had been required to switch shifts. Changes in shifts were made with the consent of the employe.

Ellen Redecker

Redecker has worked for the City as a Communications Officer since May of 1986. She and Raube covered Vossekuil's 1992 absence. Raube assumed full-time status and then became eligible for fringe benefits. Redecker essentially worked a full schedule of hours, but was paid on an overtime basis for those hours she assumed outside of her regular schedule.

Redecker does not like to change shifts, but has volunteered to do so on occasions other than Vossekuil's 1992 absence. When the City took on two trainees, she moved to full-time status on the night shift, at straight time rates, to permit training to occur. She could not specifically recall, but believed this change lasted from two to three months.

From Redecker's perspective, shift selection occurs once annually. She was not aware of any involuntary shift changes made by the City. She stated that posted shifts can be changed, but seldom are. She felt that part-time employes "have always risen to the occasion" when the City needed to alter shifts to respond to unforeseen contingencies.

John Belsma

Belsma has scheduled for the City for eighteen years. In 1992, when he was advised that Vossekuil would need a leave, he was not aware how long she would need or if she could return. From his perspective, Vossekuil's position would remain hers until it became apparent she could never return. If the absence proved of sufficient duration, he felt the City would hire a temporary replacement. As always, the City tried to work the situation out with the Union. Ultimately, an agreement was reached, and Raube and Redecker covered the absence.

In 1994, Belsma again confronted a situation in which he was not aware how long Vossekuil would be absent or when, if at all, she would return. Vossekuil provided the City with a return to work date as soon as her doctor provided it, but until that point, Belsma viewed the absence as indefinite.

Belsma noted that the situations requiring the City to change employe shifts are rare, and typically resolved consensually. The contract does permit him to call-in the least senior Communication Officer if he can find no other available employe in this or the law enforcement unit. He estimated this happens from twelve to fifteen times a year. The situation underlying the grievance is, however, the first long-term shift schedule alteration which has not been accomplished by consensus.

Stephen Ditullio

Ditullio is St. George's attorney, and did not testify, but did give a brief statement on her behalf at the close of the January 28 hearing. He noted that St. George has a disability within the coverage of the ADA. As such, the City is under a duty to afford St. George a reasonable accommodation. What constitutes a reasonable accommodation is based on a case by case analysis. In this case, the Multiple Sclerosis causing St. George's difficulty is a long-term illness quite distinct from the absences noted above. Thus, her situation poses facts not previously confronted by the City. Her situation thus must be assessed differently than the situations noted above to determine what constitutes a reasonable accommodation for her.

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

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the evidence and the prior decision, the Union contends that the "answer to Issue #1 was determined after the initial hearing in this matter," and that the second issue questions whether schedule changes "were necessary under the language of Section 15.05" because "required by the Americans with Disabilities Act." The Union contends that "the relevant cases in regards to the ADA will show that the courts have held that the ADA does not require an employer to disregard or violate an existing *bona fide* seniority system in order to agree to a legitimate request for accommodation under that law." Since "a less senior employee was given a position that she could not have picked by using her seniority date," the Union concludes the second issue must be answered in the negative.

More specifically, the Union argues that Sections 10.01 and 15.01, viewed in light of past practice, establish a *bona fide* seniority system for shift selection. Alterations in schedules due to employe illness were made through employe agreement "to temporary schedule changes that met the staffing needs of the employer."

ECKLES V. CONSOLIDATED RAIL CORPORATION ET. AL., 5 AD CASES 1367 (CA 7, 1996) governs the issue posed here. The Union states the effect of ECKLES thus:

> (A)n employer is required to make every effort to comply with legitimate accommodation requests under the ADA, but they cannot require unions who have negotiated legitimate seniority systems to abandon or change those seniority provisions to make these accommodations.

Further judicial and arbitral precedent underscore this conclusion, and "show the same analysis of the relationship of accommodation requests and the seniority rights of employees, evident in this grievance."

It follows, according to the Union, that "the actions of the City to change . . . schedules were not necessary within the meaning of Section 15.05 of the contract and were not required by the ADA." The Union concludes that "(t)he arbitrator must require the City of Waupun to reinstate the schedule in effect in July of 1998, and allow for the full use of seniority in the selection of future schedules."

The City's Initial Brief

After a review of the prior decision and the evidence, the City contends that the "schedule change is not permanent, only indefinite." Past practice highlights the significance of this point regarding the first stipulated issue. Vossekuil's absences in 1992 and in 1994 produced Employer granted leaves of indefinite duration, which "only in hindsight" could be given a fixed duration. St. George's move to first shift is similar to this, since her "working first shift is also temporary." The temporary nature of the move is dictated by the nature of her illness as well as City policy on the point. Beyond this, St. George may acquire the contractual right to bid for first shift work, or the Employer may alter the shift schedule in a fashion which addresses its obligations under the ADA. The nature of collective bargaining, in any event, makes the alterations of schedules less than permanent, "because the contract is not permanent." The parties could, in short, mutually repair the dispute regarding what "necessary" connotes under Section 15.05. Such mutual action is vastly preferable to "the unilateral action of the Arbitrator."

Section 19.06 bears on the interpretation of "necessary" in Section 15.05. Section 19.06 "reflects the intention of the parties that non-Communication Operators in this bargaining unit can get a maximum of six months of unpaid leave after exhausting their sick leave, but Communication Operators receive an indefinite period of leave, as set by their physician." Read in light of relevant bargaining history, this difference underscores that Communication Operators can be afforded leave for indefinite periods. Section 10.01, which grants shift selection by seniority, is similarly limited by Sections 15.05 and 19.06. Read together, these sections mean that when the "necessity" standard is met, shifts may be altered for an indefinite period.

To conclude that the ADA made changing shifts "necessary" does not require the conclusion that the ADA must be interpreted to over-ride the parties' labor agreement. Even though the law in this area cannot be considered settled, relevant case law and EEOC regulations establish that a labor agreement "is only one factor in determining undue hardship," and cannot be considered "an automatic defense." Since it is undisputed that St.

George suffers from a disability and since "the only reasonable accommodation identified by anybody was moving (her) to the first shift," it follows that the shift change was necessary under the labor agreement. The City adds that it is not required to create a new position for her or to create light duty work "on a permanent basis" for her. That this makes a shift change necessary does not, in light of Section 15.05, pose a conflict between the labor agreement and the ADA. To conclude otherwise exposes the City to significant potential liability under the ADA.

The City concludes by requesting "the Arbitrator to determine that the City did not violate the collective bargaining agreement when it decided it was necessary to temporarily place Ms. St. George on the first shift to accommodate her disability."

The Union's Reply Brief

The Union contends initially that "(t)here were no Employer mandated job shift changes" during Vossekuil's absence for heart surgery. Beyond this, the Union contends that the absence of a grievance for shift changes voluntarily made by unit members says no more than that the Union views "voluntary and mutually agreed to" shift changes as contractually permissible. To characterize either of Vossekuil's absences as "indefinite" is "surreal," since it "has to be obvious that in many illnesses or accidents that would require an employee to be off of work, that it may not be possible to immediately give an exact return to work date." That "there were no mandated shift changes for any of the employees" regarding Vossekuil's absences distinguishes them from St. George's situation.

Nor can the City's reading of Section 19.06 be credited. The difference between its application to Communication Officers and to other unit members is simply that "a Communication Officer has no guarantee of receiving such a leave, while other employees cannot be denied a six month leave upon using all of their sick leave." Even if the City's view of the language is correct, leave granted a Communication Officer "rather than being endless, is in fact always finite" depending on a physician's opinion on the employe's fitness to work.

That the arbitrator can review the ADA cannot obscure that ECKLES is the governing law. That the City rejected alternatives other than shift changes cannot be held against the Union. Nor can the City's failure to place St. George in "a day shift clerical position" which "was recently created" be held against the Union (*Note*: This and a related reference prompted the City's April 19, 1999 letter). The evidence is "pretty clear in showing that the City has not had a need to use Section 15.05 in order to fill temporary vacancies among the Communication Officers, because of voluntary transfers on the part of the remaining employees." Prior unit employe absences did not exceed four months, while "the transfer of Kim St. George to the day shift position has lasted approximately nine months and continues."

This makes the reassignment "for a term so indefinite that it must be considered permanent." To characterize it as "indefinite, as opposed to permanent" is "simply playing with words."

The Union has consistently argued that the City is not required by the ADA "to make an otherwise reasonable accommodation if that accommodation would violate the provisions of a *bona fide* seniority system." ECKLES establishes the persuasiveness of this argument. The City has cited no authority warranting a different conclusion.

The Union concludes that the evidence establishes that "(t)he City chose to agree to the accommodation requested by Kim St. George, and ignored the seniority system contained in the contract." This violated the labor agreement, and the Union asks that the violation be stopped.

The City's Reply Brief

The City contends that the Union's brief "completely misses the issue to be decided by this Arbitrator" since it presumes the City seeks to over-ride the contractual seniority system. The authority cited by the Union thus falls short of the mark, because that authority addresses situations in which the ADA conflicts with a labor agreement. Section 15.05 in this case precludes such a conflict. Recently published EEOC guidelines establish that "undue hardship" cannot be established by the existence of a labor agreement violation. Since the accommodation posed here falls within Section 15.05, no such "undue hardship" exists. The Union, under the ADA, "may also be called upon to bend a little" to "bear the burden and cost of accommodating the disabilities of American workers."

The City contends that the burden of proof in this case falls on the Union "to demonstrate the contract was clearly violated by the City's actions." The City asserts that the term "necessary" in Section 15.05 cannot, necessarily, be considered ambiguous, but must in any event be considered broad enough to include the City's duty under the ADA. At a minimum, the inclusion of the ADA changes the nature of the first stipulated issue from that posed on the original record.

A review of the evidence establishes that the duty to accommodate an ADA covered disability must be found to invoke Section 15.05. To the extent the term "necessary" is ambiguous, it does not call for arbitral "gap-filling," but for the ambiguity to "be construed against the party filing the grievance." Arbitral precedent supports broad interpretation of clauses making employer exercise of its management rights to meet "necessary" exigencies.

The City then challenges the Union's view of relevant practice. Whether the schedule changes were voluntary or not, the evidence establishes that "in two circumstances employees worked different schedules than those they originally bid for by seniority to accommodate the needs of the employer when someone was completely unable to work for an indefinite period of

time."

To accept the Union's view of the grievance would, paradoxically, grant the City the right to modify schedules if the Grievant's doctor had required her to take a leave, but deny the City the same right where the doctor suggested a less radical alternative. This poses an interpretive "flaw that the Union cannot ignore." It is "illogical and unsustainable" to contend that the City can permanently alter schedules to accommodate a request for an indefinite leave but cannot temporarily alter schedules to accommodate an ADA based request.

The City concludes that "the contract and the ADA are in harmony" and requests that the grievance be denied. Doing so honors "the legislative intent of the ADA, the exception provided for in the contract, and common decency."

DISCUSSION

The issues are stipulated, but their resolution poses a nettlesome maze. The necessary preface to an examination of the issues is the October 8, 1998 award. The Union's contention that the earlier award resolves the first stipulated issue is in a sense correct, but oversimplifies the complexity the grievance poses.

The complexity posed is that the contractual and factual basis for resolving the first issue has changed. Further complicating the resolution of the stipulated issues is that a statutory dimension to the grievance, absent in the first proceeding, is directly posed by the second stipulated issue.

In the initial award, the resolution of the stipulated issue on the merits turned on the labor agreement, see MA-10349 (10/98) AT 18-19. I summarized the conclusions dictated by the record thus:

> In sum, even though the parties assert two conflicting and absolute contractual rights, the evidence will not support an unlimited scope to either. Section 15.05, viewed in light of practice, will permit the City to alter schedules to accommodate, for a limited term, the medical infirmity of a unit employe. That section cannot, however, be read to grant the City the ability to read the seniority and shift selection provisions of Section 10.01 out of existence. The Employer's accommodation of St. George violates the labor agreement to the extent it is an indefinite suspension of the operation of Section 10.01.
>
> This conclusion poses and complicates the determination of an appropriate remedy. The Award entered below addresses the complication through a retention of jurisdiction. An indefinite suspension of Section 10.01 calls for the restoration

> of the pre-change shift selection. The issue becomes at what point the accommodation

> passes from a short-term adjustment permitted under Section 15.05 into an indefinite reassignment of shifts which violates Section 10.01. MA-10349 AT 19.

This set the stage for the January 28, 1999 hearing.

Because Section 10.01 sets "a yearly basis" as the effective period for seniority based shift selection, the remedial issue posed by the initial award was the point at which the City had to restore the 1998 seniority based shift selections. The Union persuasively notes that the initial award found that, as a matter of contract, the City could not deny seniority based shift selection without violating Section 10.01. The Union understates, however, the complexity of this determination, since the violation found in the initial award "presumes that the assignment was for a term so indefinite that it must be considered permanent." MA-10349 AT 20.

Section 10.01 makes the "term" of the shift changes which can be addressed within my authority under the 1995-97 labor agreement one year. Thus, the first issue questions, from the City's perspective, whether it violated the contract by continuing its alteration of shifts until the 1999 shift selection, which has been held in abeyance pending this decision. From the Union's perspective, the issue is at what point prior to the 1999 shift selection the 1998 seniority based selections should have been restored. The Union understates the complexity of the determination by its assumption that the City could not have continued the June, 1998 alteration of shifts through the next annual posting of the shifts for selection. That determination was left open by the initial award to be determined on evidence to be adduced in the remedial hearing.

The evidence adduced at the January 28 hearing, with one exception, establishes that the parties have altered shifts to permit a healing period for medical conditions which were, at the time the City granted leave, of an indefinite duration. The exception is the alteration of shifts to accommodate the training of new dispatchers. Redecker estimated such alterations took from two to three months.

From the perspective of the initial award, this evidence indicates two different conclusions. The alteration of shifts to accommodate training has a predictable, if indefinite, duration. If this had been the only evidence submitted, the City's alteration of schedules for a period exceeding three months would have had a debatable, if not tenuous basis.

This was not, however, the only evidence submitted. Vossekuil's 1992 and 1994 absences were, at the point the City granted her leave, for a duration that could not be considered predictable. The 1992 absence stretched for roughly two months, while the 1994 absence stretched for roughly four. The duration of each absence eventually turned on her healing powers,

but in each case the duration was unknowable until well into the healing period.

The factual significance of this evidence is debatable. Its significance does not, however, stand alone, because the second hearing brought the provisions of Article XIX into the record. The precise scope of Section 19.06 a) is not posed for determination here, and the Union forcefully contends that the City's expansive view of that the section is colored by the result it seeks in this grievance. However, it is not necessary to accept the City's contention to conclude that the section affords a right to leave potentially extending from the employe's exhaustion of "sick leave credits . . . until such time as (a) physician or chiropractor certifies (the employe's) fitness to work." Under Section 19.01, sick leave can accumulate to one hundred twenty days. On the face of Section 19.06 a), leave does not commence until an employe's sick leave is exhausted. Thus, if the reference to "days" in Section 19.01 is to working days, a leave under Section 19.06 a) could conceivably not commence for roughly six calendar months. Even if it is assumed that St. George lacked the full amount of bankable sick leave, the City and the Union agreed in 1992 to extend Vossekuil's apparently exhausted sick leave. This indicates the parties treat the length of leaves, including paid leaves, as alterable on a case by case basis. Thus, the evidence submitted at the second hearing establishes past shift alterations have a contractual and factual significance beyond that acknowledged by the Union.

Against the background of the evidence produced at the second hearing, Section 19.06 a), read in light of the evidence of Vossekuil's leaves, affords persuasive support for the City's contention that it had contractual authority to alter the 1998 shift selection from June of 1998 until the following selection cycle. The basis of this conclusion is best set forth by more closely addressing the Union's contentions.

The Union's arguments have force, but cannot be considered to establish that the City lacked the authority to alter the shift selection process, under Section 15.05, to accommodate St. George's request. The Union argues that past alterations of shifts were consensual, and that the City cannot rely on them to alter schedules without the consent of the affected employes. That past alterations of schedules have been consensual falls short of establishing that the agreement precludes the alteration posed here. The Union's contention in a sense puts the factual cart in front of the contractual horse.

The contract unambiguously permits schedule alterations, but is less than clear on how those alterations are made. As noted in the initial award, Section 15.05 authorizes schedule changes where "necessary." Section 15.01 underscores that such changes can occur by stating "(t)he standard shift selection shall be by seniority." "Standard" connotes that deviations can occur. These provisions do not, however, clearly specify the allocation of management or unit input in the decision. Presumably, this reflects the City's practice of involving unit employes.

The ambiguity grants force to Union arguments regarding past practice, but those arguments cannot establish the veto power the Union asserts. The issue posed here is whether unit employes, by withholding their consent, can veto the June, 1998 schedule change. No evidence of practice supports this view. That the City granted Vossekuil the 1992 and 1994 leaves is undisputed. These leaves were facilitated, but not created by the acts of unit employes. More significantly, the contract does not support the right asserted by the Union. The Union cites no contract provision to afford unit employes the veto it asserts. The City, however, can point to Section 3.01 to authorize its action.

The precise scope of Section 3.01 is not posed for decision here, and it must be stressed that the alteration of schedules for St. George draws upon established practice and related contract provisions. Thus, the conclusion stated above cannot be read to permit any unilateral schedule alteration. Rather, the conclusion establishes that past practice does not afford unit employes the ability to veto the June, 1998 schedule alteration by denying it their consent.

At the January hearing and in its post-hearing argument, the Union asserts that it has been denied a remedy. This is, in a sense, correct. The initial award noted that Section 10.01 cannot be read out of existence. This does not, however, mean Section 10.01 grants the Union a unilateral right to veto unwanted schedule changes. At the conclusion of the initial hearing, the length and type of past schedule alterations was not clear. It was not, for example, apparent whether any schedule change had lasted more than a few shifts. Beyond this, the scope of potential rights under Article XIX had not been argued. As noted above, the evidence submitted at the remedial hearing altered this. The conclusion stated above rests, in significant part, on the evidence submitted at the remedial hearing.

This should not obscure that the initial award also rejected the Union's assertion of the unlimited veto right it asserts here. At no point in either proceeding has the Union unequivocally indicated that the City could act in any fashion to accommodate St. George. The assertion that the Union could veto any alteration of schedules under Section 15.05 was rejected in the initial proceeding.

In sum, the City's accommodation of St. George, from the June, 1998 changes until the next shift selection process authorized by Section 10.01 cannot be considered, under Articles III, X, XV and XIX "for a term so indefinite that it must be considered permanent." The City has not, then, committed a violation requiring a remedy here. This permits the selection process to be made again. A violation of Section 10.01 must turn on the facts of that process.

This conclusion may moot the second issue. It may not if the Union's arguments mean that past practice cannot be applied to St. George because Vossekuil could be expected to heal. In any event, the parties have addressed the ADA in some detail and their argument warrants a response. The original accommodation was neither factually nor legally the City's sole available response. The parties do not, however, focus on the propriety of St. George's first shift assignment as the core of their dispute regarding the ADA. Rather, they dispute the scope and applicability of ECKLES. This examination of the dispute reflects that focus.

The parties do not dispute that ECKLES is good law in the sense that it governs this case. There is, however, reason to believe that it is good law in a broader sense. The ECKLES court examined relevant legislative history and precedent to conclude that: "collectively-bargained seniority rights have a pre-existing special status in the law and that Congress to date has shown no intent to alter this status by the duties created under the ADA." 5 ADA CASES AT 1375. The "special status" of collectively bargained rights reflects public policy permitting parties to a collective bargaining relationship to address employment problems as a matter of contract. This puts decision-making authority in the hands of parties most intimately familiar with them. Nor can it be presumed that collectively bargained rights are antithetical to individual rights, or that legislative or judicial enforcement of individual rights is inherently better suited to weigh the impact of collective and individual rights than is the bargaining process.

More to the point here, the ECKLES court faced a fact situation fundamentally different than that posed here. It noted: "The parties properly acknowledge that the legal question at issue has little to do with the specific facts of this case." 5 ADA CASES AT 1368. The court then concluded that the employe seeking a reasonable accommodation could not use the ADA to infringe upon "the bona fide seniority rights of other employees." 5 ADA CASES AT 1373. Here, however, the grievance poses a fact driven case that does not clearly pit St. George against "the bona fide seniority rights of other employees."

As noted above, the shift selection process created under Section 10.01 does not give absolute preference to seniority. The alteration of schedules based on seniority is recognized at Sections 15.01 and 15.05. Also as discussed above, past practice establishes that the parties have permitted shift alterations to address the medical infirmity of certain employes. Beyond this, it should be noted that both part-time and full-time Communication Operators signed the grievance. Section 10.01, however, distinguishes between the seniority rights of part-time and full-time operators. This underscores that the grievance, unlike the situation in ECKLES, does not clearly pit the expectations of an ADA claimant against unequivocal seniority rights of unit employes. As concluded above, St. George has sought no more than any other unit employe could seek under relevant past practice and Article XIX.

The initial award established that the City could not use the ADA to read Section 10.01 out of existence. This conclusion stands, and falls squarely within ECKLES. The difficulty posed is when the accommodation offered St. George guts Section 10.01. This issue, unfortunately, cannot be answered in the abstract. Rather, the shift selection process must again proceed, and the result of that process must be assessed on its own merit.

It does not follow from this that the word "necessary" in Section 15.05 incorporated the ADA into the contract. My view is that the parties can consider the impact of the ADA in determining the need to alter shifts. This does not mean the ADA contractually requires a specific alteration. It is not necessary to conclude that the term "necessary" in Section 15.05 fully incorporated the ADA into the labor agreement to conclude that the City can consider the potential impact of the ADA in reviewing individual employe requests for accommodations in shift work which could adversely impact contractual seniority rights.

Nor can this conclusion be viewed to fall outside of ECKLES:

> We emphasize that our conclusion is limited to individual seniority rights and should not be interpreted as a general finding that all provisions found in collective bargaining agreements are immune from limitation by the ADA duty to reasonably accommodate. The ADA does not lack force in the unionized workplace . . . IBID.

Due to the web of contract and past practice posed here, the 1998 alteration of shift schedules cannot be considered to defeat the bona fide seniority interests of unit employes and thus violate the holding of ECKLES. If the Union's argument is that the nature of St. George's medical condition put her at a disadvantage to Vossekuil regarding a schedule change, that argument has dubious support in ECKLES.

In my view, the present conflict between circuits and the EEOC is less than fundamental. Courts will ultimately reconcile the conflict between individual and collective rights by balancing the asserted rights on a case by case basis. Current EEOC guidelines point in that direction. It cannot be assumed that ECKLES is irreconcilably opposed to the EEOC guidelines. Rather, the ECKLES court strikes the inevitable balance after greater deference for the collective bargaining process than the EEOC guidelines may envision. In any event, it is not necessary to scrap collective rights to police their occasional abuse. Indicative of this is judicial enforcement of the duty of fair representation. Such considerations are not, however, posed in this case.

In sum, the conclusion that the City has the authority under Section 15.05 to accommodate St. George by altering the 1998 shift choices until the following selection process under Section 10.01 does not violate ECKLES, the ADA or the parties' labor agreement.

Before closing, it is necessary to touch on certain arguments posed by the parties. The Union's view that the first award demands a remedy has force, as noted above. That this decision permits the City to continue the accommodation until the next shift selection process arguably solves nothing. The finality of arbitration cannot, however, be purchased at the cost of exceeding contractual authority. The remedy the Union seeks cannot be squared with the provisions of Article XIX and record evidence on prior leaves. Having concluded it is no violation to alter schedules pending the next selection process, it is beyond my authority to specify the violation further. Not reinstating the prior selection process may impact the "status quo" which governs the parties' rights pending agreement on a successor contract. It is not, however, apparent where those negotiations stand. More significantly, speculation beyond this record would make arbitration, not bargaining, the forum for addressing the underlying issues.

This award similarly falls short of the finality the City seeks. This reflects that the contract provisions at issue do not support the unlimited rights asserted by either party. Shift selection under Section 10.01 is an annual process. Under that section "the policy of the Employer . . . shall be . . . to recognize seniority." Reasonable accommodation under the ADA turns on the facts of each case. Against this background, it is impossible to extend the conclusions stated here beyond the 1998 shift selection process. Whether the City posts the same shift structure; whether St. George can, through seniority, select a shift that accommodates her; and whether the City offers St. George other employment are but some of the possible changes surrounding the next shift selection process. Such potential changes make it impossible to extend this Award beyond its facts.

That the Union's reply brief mentioned a vacant position that was not addressed at evidentiary hearing plays no role in this decision. The Union persuasively characterizes the City's statement of concern on this point as hyperbole. Much of the argument in this case concerns points difficult to characterize as founded in the evidentiary record. The City's arguments, in several areas, question the Union's motives in bringing the grievance and the arbitrator's fidelity in keeping focused on the record. How much evidence is necessary to support such argument? I have concluded the process is best served by treating the entire matter as a rhetorical point not impacting the merits of the case.

AWARD

Because the Employer's assignment of Kim St. George was not for a term so indefinite that it must be considered permanent, the Employer did not violate the collective bargaining agreement when it changed the shift selections for the Communication Operators in June of 1998, assigning Kim St. George to the day shift and requiring the remaining Communication Operators to select shifts different from those they selected by seniority for the calendar year 1998. This conclusion,

however, addresses only the 1998 shift selection procedure.

Because no remedy is appropriate beyond the findings entered in this and the prior proceeding, I am, through this Award, relinquishing jurisdiction over the grievance.

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

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
5909