BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE CITY OF MAUSTON

and

**MAUSTON CITY EMPLOYEES UNION,
LOCAL 569-A, AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO**

Case 45
No. 53637
MA-9403

(Grievance of Bob Peters)

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Madison, Wisconsin 53717-1903, appeared on behalf of the Union.

Mr. Peter L. Albrecht, Godfrey & Kahn, S.C., Attorneys at Law, 131 West Wilson Street, Madison, Wisconsin 53703, appeared on behalf of the City.

ARBITRATION AWARD

On December 28, 1995, the City of Mauston and the Mauston City Employees Union, Local 569-A, American Federation of State, County and Municipal Employees, AFL-CIO, requested that the Wisconsin Employment Relations Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between those parties. Scheduling of the hearing was held in abeyance. Ultimately, a hearing was conducted on August 6, 1998, in Mauston, Wisconsin. A transcript of the proceedings was made and distributed by August 28, 1998. Post-hearing briefs were submitted and exchanged by October 27, 1999.

This Award addresses the termination of employe Bob Peters.

BACKGROUND AND FACTS

Bob Peters, the grievant, began employment with the City of Mauston in 1968. Peters worked for approximately nine years before he quit to work construction. Peters was re-employed by the City in 1978, and worked as an Equipment Operator until he was terminated on March 15, 1995.

Peters injured his right shoulder in 1992. He was off work beginning in June, 1992, had surgery on his shoulder in August of 1992 and returned to regular duties in the late fall of 1993. While plowing snow in the winter of early 1994, Peters was thrown against the windshield of his plow, aggravating a deteriorating left shoulder. The shoulder ultimately required surgery in June of 1994, causing Peters to miss work from June of 1994 through the date of his termination, March 15, 1995. In the 36-month period immediately preceding his discharge, Peters had worked a total of seven months. Peters testified that following his snowplow injury, his shoulder bothered him considerably. He complained to co-workers and to his employer. Peters testified that he was advised that that if "you go for surgery, you might as well forget about your job" by management officials.

Mr. Peters' surgery, and post-operative care, was provided by Dr. Thomas G. Hoeft. As of October 6, 1994, Dr. Hoeft described Peters condition as follows:

> "No lifting over 30 pounds, no repetitive shoveling or overhead use of left hand. Follow-up in four weeks."

Peters had been sent for an independent medical examination by the insurance company which provided the worker's compensation insurance for the City of Mauston. The independent medical examination was provided by Dr. Ronald C. Rudy on September 1, 1994. According to Peters, Rudy's examination lasted for approximately five minutes. Rudy's six-page typewritten report of September 22, 1994 provides an extensive assessment and background on Peters. He concludes as follows:

> "The claimant may return to work as a heavy equipment operator following completion of his physical therapy. He should avoid heavy overhead lifting, excessive carrying of weights over 50 pounds. After one month, he may return to full duties without any restrictions."

Given the conflicting reports, and Peters' history of shoulder injuries, the City was uncertain as to how to proceed during the fall of 1994. On Thursday, November 17, Peters stopped in to visit Patrick Geisendorfer, the Director of Public Works. Geisendorfer advised Devin Willi, City Administrator, that Peters advised him that he had been released for work by

the insurance company doctor, and could report for work on November 15. Geisendorfer reports that he advised Peters that he needed to secure a release from his own physician, who was still indicating that Peters had work restrictions. According to a memo authored by Geisendorfer on November 18, 1994, "in other conversations, without questions from me, Robert volunteered that he had painted three rooms in his house, varnished the floors in his house, cleaned out his garage, and was building deer stands. He stated that he had been 'working hard'."

Willi responded to Geisendorfer's memo by writing a letter to Peters and another to Hoeft, both dated November 21, 1994. Willi's letter to Peters requests that Peters secure a full release from Dr. Hoeft, that Peters keep the employer abreast of his ongoing medical treatment, and that Peters undergo a physical capacities exam, and report its results to the employer. Willi's letter to Hoeft requests the doctor to forward his determination of Peters' work capabilities, that Hoeft indicate any work restrictions that exist, and perform a physical capacities assessment of Peters.

A follow-up examination had been scheduled for November 10, and was postponed to November 17. On November 17, Dr. Hoeft indicated "Recommend continuation of present duty restrictions pending functional capacity evaluation." The functional capacity test was scheduled for December 14. Willi sent Hoeft a letter dated December 2, 1994, seeking confirmation of Peters' status and scheduled functional capacity evaluation. By letter of December 6, 1994, Hoeft confirmed Peters' status.

On December 28, Willi wrote Hoeft as follows:

> "The City of Mauston still has not received any report on the physical capacities evaluation ordered for Robert Peters, an employe of the City of Mauston. The evaluation was scheduled on December 14, 1994. . ."

The letter goes on to request that the doctor immediately advise the City of the results of the evaluation and Peters' ability to work. On January 24, 1995, Willi wrote Peters indicating that the City had yet to receive a response from either Peters or Dr. Hoeft for a copy of the physical capacities evaluation, and further advising Peters that his vacation and sick leave would be exhausted as of January 25, 1995. On January 26, Willi called Hoeft's office in an effort to get a response. On January 30, Peters came to Willi's office to advise him that he (Peters) had talked to Hoeft and had made an appointment to meet with Hoeft on February 9, 1995. Willi again called Hoeft's office on February 10, 1995, seeking follow-up information. He was again told that Peters' report was on Hoeft's desk awaiting completion.

Willi wrote Hoeft a letter dated February 20, 1995 seeking a medical report regarding Peters' condition. Willi's letter included the following:

> "I want to emphasize the urgency of this matter. Mr. Peters has not worked for the City since May of 1994."

The next day, February 21, 1995, Willi sent Peters the following letter:

> "Dear Mr. Peters:
>
> Three months have now passed since you came into my office and told me that you were ready to return to work. On November 17, 1994, you stated that you were ready to return to work, and I asked you to obtain a copy of your doctor's report which released you to return to work, which identified your physical limitations, if any. Since then, I have made numerous attempts, in writing and over the telephone, to obtain a copy of your doctor's report. You and I have discussed this on several occasions.
>
> The purpose of this letter is to inform you that the City cannot continue to wait and wait to obtain your doctor's report, and at the same time continue to pay you benefits. It is <u>your</u> responsibility to get <u>your</u> doctor to supply the City with this necessary information.
>
> The information from your doctor is of critical importance to the City. Your doctor will be able to tell us whether you have any physical limitations which must be observed to avoid further injury. As you know, this is your second shoulder injury allegedly arising out of work. The City is ready and willing to have you return to work, but we must know whether you are able to perform the duties of your job, or whether the City needs to make some reasonable accommodations so that you can safely perform your job.
>
> In view of the foregoing, the City will continue to wait until the end of February, 1995, to obtain your doctor's report. However, if you have not provided us with the necessary report from your doctor by the end of the working day on February 28, 1995, your failure to provide the City with this information will be treated by the City as an application for a "leave of absence" under Article XIX of the union contract. This means that your fringe benefits and seniority will stop accruing after 14 days. The City will give you a leave of absence until you obtain your doctor's report or until the end of April, whichever comes first. If your doctor's report is received, the City will review

it to determine whether you can return to work. If a doctor's report is not received by the end of April, the City may terminate your employment. I wish to impress upon you that it is your responsibility (not the City's) to get your doctor's report.

Please contact me if you have any comments or questions regarding the foregoing. I have again written to Dr. Hoeft, a copy of which is enclosed. We certainly hope that a report will be forthcoming before February 28.

Very truly yours,

Devin Willi

Hoeft sent the functional capacity evaluation over a cover letter dated February 22, 1995. That letter provides the following:

Dear Mr. Willi:

Enclosed please find the functional capacity evaluation of Robert Peters, performed at Divine Savior Hospital. There are several points of interest. First, Mr. Peters' co-operation was satisfactory during this test. It is notable that there are limitations in lifting from the level of knuckle to shoulder, and shoulder to overhead, not to exceed 27 pounds, and limitations of lifting floor to knuckle or 12 inches to knuckle in the vicinity of 55 to 65 pounds. Additionally, there are some limitations in bending or stooping, reaching overhead, and crawling in terms of frequency. The grip and pinch strength are normal. The patient falls within the medium demand classification by the standards on the functional capacity evaluation test. I have discussed the nature of Mr. Peters' job requirements with him in some detail, and there is some concern that the variable nature of his work might put him in a position to exceed his capacity from time to time, and that this may be unforeseeable. It is my feeling that he may be expected to work reliably within the limitations noted on the functional capacity evaluation, however, if he were likely to have additional demands placed on him, and in an unpredictable way, he might be better served by seeking another occupation.

Sincerely,

Thomas G. Hoeft

The physical capacities evaluation document indicates that the patient should never lift in excess of 50 pounds, should never carry in excess of 50 pounds, and that the patient is free to use his "right shoulder/right arm" (sic) continuously for a period of two hours in an eight-hour workday and could use them for six hours out of an eight-hour day. It also indicates that the restrictions are permanent in nature.

Following receipt of Hoeft's assessment, Willi met with Peters and Geisendorfer on February 28, 1995. Willi's summary of the meeting indicates that Peters expressed a desire to return to work if he was capable of performing his job, expressed concern about performing certain of the work-related functions and indicated that he was unaware of any accommodation that could be made to help him perform his duties.

Willi took the doctor's report and the results of his February 28 meeting to the City's personnel committee. The committee directed him to meet with Peters and walk through every element of Peters' job description in order to determine Peters' view as to his own ability to perform the various duties, including any accommodations that could be made.

According to Willi, on March 8, Peters came to the City Hall and met briefly with Willi. It was Willi's testimony that Peters made inquiry as to whether the City would be willing to offer him a settlement of his claim. Willi replied that he was in no position to pay such a settlement and scheduled a meeting for he, Peters and Geisendorfer to review Peters' work capacity relative to his job description.

Willi summarized the March 13, 1995 meeting by memo. Willi proceeded through the Operator and Laborer job descriptions which contain 14 groupings of tasks and duties. His approach was to ask whether Peters believed that he would have difficulty or be unable to perform any of the tasks included within the groupings, and to further ask what, if any accommodations might allow Peters to perform the particular duty. Peters' responses were either that he believed he could do the work and saw no problem or that he was uncertain, and would only know if he attempted to do the work. As to accommodations, Peters indicated that there either were none, or that he could think of none that would prove helpful.

Following a review of the job duties and responses, Willi indicates that the conversation turned to the following:

> "When I completed the job duties, Bob asked, 'What are the two-hour and six-hour restrictions you keep talking about?' I told him that these restrictions were placed on his job duties by Dr. Hoeft and showed him the evaluation sheet where these restrictions were listed. He looked at the sheet. I also discussed the restrictions on lifting and shoveling that were placed on his performance by

> Dr. Hoeft. He stated, 'Yeah, but my shoulder will probably get better over time.' I then showed him on the evaluation sheet where it stated that the restrictions were permanent. He said, 'Oh, I didn't realize it said that.'
>
> I then asked him if he understood that the doctor had restricted his lifting over 20 pounds to 11-30 percent of the day. He said, 'I haven't really lifted anything over 20 to 25 pounds, as I didn't want to do any more damage to my shoulder.' I then asked him how the City could accommodate this lifting restriction. He said, 'Someone else would probably have to do the lifting for me, if it got too heavy.'"

Willi reports that Peters then raised the possibility of a settlement relative to the worker's compensation claim. He indicates that neither Geisendorfer nor he commented. The meeting then adjourned.

Willi reported the results of the interview to the Common Council the following evening. The Council determined to terminate Peters. It was Willi's testimony that the factors influencing the Council to terminate Peters included their belief that his injuries were permanent, that the relatively small workforce and the unpredictable nature of the work made accommodation difficult, and the Council was concerned about the risk of additional injury to Peters, or co-workers.

On March 15, 1995, Peters came to the City Hall. Willi invited Peters and Pat Geisendorfer to his office where he reviewed the following letter of termination with Peters:

> Mr. Robert Peters
>
> . . .
>
> Dear Bob:
>
> The Common Council met last evening to review your case, to discuss the physical capacities evaluation issued by Dr. Hoeft and to relate these issues to your ability to perform the duties of the Operator position.
>
> The Common Council has regretfully made a determination that they don't see how you can safely, reasonably, and effectively perform the duties of a public works operator. It is beyond the scope of this letter to recite all of the reasons and factors considered in this decision. In short, the decision was based on a careful and lengthy review of the permanent restrictions placed on your shoulder

concerning lifting, carrying, and shoveling, and the limitations placed on the number of hours you can use your shoulder on a continuous basis. A majority of the duties related to the operator's position require lifting, carrying, and extensive use of your shoulders, and the Council is convinced that your restrictions prohibit the safe and efficient performance of these duties. The Council is also concerned about your personal health as well.

It is with regret that I inform you that the City of Mauston is therefore terminating your employment with the City effective March 15, 1995.

. . .

Devon Willi

A grievance was filed on March 28, 1995, protesting the termination of Peters.

It was Peters' testimony that Dr. Hoeft did not see him during his physical capacity evaluation at Divine Savior. Rather, according to Peters, some women evaluated him and forwarded their report on to Hoeft. Hoeft's conclusion, set forth in his February 22 letter, was a product of the work-up of other individuals.

Following his termination, Peters went on unemployment compensation and subsequently went to work for a local contractor, Leo Fronk. While working for Fronk, Peters ran a backhoe, a Bobcat, helped install underground water sprinkler lines, laid sod, planted trees, busted and poured concrete. He used a jackhammer in the concrete operation and also did a lot of digging. Peters left Fronk to go to Chicago to do long-haul over the road truck driving. He worked at that job for a year. He thereafter returned home to Mauston to take a job with Herbeck Construction. He worked for Herbeck operating equipment, installing septic tanks, digging basements, operating backhoes and bulldozers. Peters also reported that his work consisted of a lot of manual labor. Following his layoff from Herbeck Construction, he did driving from Mauston to Chicago and back. After doing that, he returned to Leo Fronk to do construction work. It was Peters' testimony that his shoulders are now better than they were before his surgeries. On February 13, 1996, Dr. Hoeft's office released Peters without restriction.

ISSUE

The parties could not stipulate to the issue. The Union proposes the issue as follows:

1. Did the Employer have just cause to discharge the grievant?

2. If not, what is the appropriate remedy?

The Employer sets forth the following as its proposed issue:

> Did the City act reasonably under Article II, Section 1 of the collective bargaining agreement when it relieved Mr. Peters from his duties as an Operator due to his medical inability to perform the functions of that position?

I believe the issue to be:

> Did the City violate Article II, Section 1 of the collective bargaining agreement when it terminated Mr. Peters due to his medical condition?
>
> If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE II
MANAGEMENT RIGHTS

Section 1 – Management's Rights: Except as expressly and precisely provided in this Agreement, the management of the City and the direction of the working forces, shall remain vested exclusively in the City. Such management and direction shall include all rights inherent in the City, including, among others, rights to hire, recall, transfer, promote and to relieve employes from duty because of lack of work or for any other reason. The City shall have the right to discipline or discharge for just cause. Further, the City shall have exclusive prerogatives with respect to promulgation of reasonable work rules, classification of occupations, assignments of work including temporary assignments.

POSITIONS OF THE PARTIES

City

The City contends that it had legitimate reasons for relieving Peters from his duties as an Operator. The City contends that the just cause standard of the collective bargaining agreement is inapplicable. The City contends that it need only show that it had legitimate reasons for the discharge. Specifically, the City contends that it need only show that its reasons for relieving Mr. Peters from his job duties were not "arbitrary, capricious or disciminatory". The City cites two prior arbitration awards, CITY OF TWO RIVERS (Honeyman) and SHEBOYGAN COUNTY (Jones) for the proposition that relieving an employe from work due to the employe's physical inability to perform the work is not a disciplinary action, subject to the just cause standard. The City urges particular attention to the CITY OF TWO RIVERS case, which it contends is strikingly parallel to the case presented in this Award.

The City notes that the parties spent a good deal of the evidentiary record advancing their competing views as to whether the Operator's job contained tasks which the grievant was not released to perform. The record clearly establishes that certain tasks that an Operator is expected to perform require those physical abilities. Those tasks include loading brush on trucks, using the hand-held jackhammer, using the fencepost driver, loading and installing storm sewer castings and grates, lifting and carrying bags of concrete, loading buckets of sand out of sewers, and operating the snowplow and other heavy machinery. The City notes that certain of these tasks arise in an unpredictable, and at times emergency fashion, compromising the employer's ability to make meaningful accommodation. Peters was asked what suggestions he might have relative to an accommodation, and he offered none. Finally, the City points out that it relied upon the opinion and recommendations of Peters' doctor.

It is the City's contention that Peters' post-employment activity is irrelevant. The City had to make a decision based upon the information it had before it at the time of termination. The fact that subsequent employers chose to ignore Hoeft's restrictions does not require that the City take a similar risk.

The City contends that assuming the just cause standard applies to its termination of Peters, it had just cause for terminating Peters. Citing authority, the Employer contends that Arbitrators routinely recognize that management has a right to terminate an employe whose physical condition renders him unable or unfit to perform his job. Peters had permanent physical restrictions which prevented him from performing his job. In the three-year period immediately prior to his termination, Peters had been at work for only seven months. The City contends that working barely half a year out of the preceding three years itself constitutes excessive absenteeism which establishes just cause for termination.

In its conclusion, the City acknowledges receipt of a report from the insurance carrier doctor that was contradictory to Peters' own doctor's earlier recommendation. The City's response to that report was to ask Peters' own doctor to provide clarification. There was considerable delay on the part of Mr. Peters' doctor in providing written response, but the City patiently sent him repeated letters requesting his cooperation. Peters' own physician ultimately concluded that Peters' physical restrictions were permanent. He further recommended that under the circumstances, Peters should not continue to work as an Operator. It is in that context that the City terminated Mr. Peters.

Union

The Union takes the position that the parties' Agreement required the City to have "just cause" in order to terminate Peters' employment and that it failed to meet that standard.

The City has argued that its contractual authority for its action is found in Article II, Section 1; specifically, the provision stating the City has the right to "relieve employes from duty because of lack of work or for any other reason," and that its decision should be sustained provided it is not shown to be "arbitrary, capricious or discriminatory." The Union asserts those arguments should be rejected. Although it is Article II, Section 1 of the Agreement that is applicable, the appropriate provision is the "just cause" provision which states that, "The City shall have the right to discipline or discharge for just cause." Peters was discharged. As to awards cited by the City in support of its decision, neither involved the discharge of an employe and are therefore distinguishable from this case. In the one case, the employer did not discharge the grievant, but simply did not permit him to return to work until he was medically fit. While Peters was similarly relieved of his duties temporarily due to his injury, that action was not grieved; rather, it was the ultimate action of the discharge that was grieved, an action which did not occur in the case cited by the City. The Union then cites awards wherein it was found that the just cause provision in fact did apply to non-disciplinary situations such as the situation in this case.

Having established that the proper standard of review in this case is "just cause", the question is whether the City has established by clear and convincing evidence that it had just cause to discharge the Grievant. In that regard, the City's letter of discharge indicates that the City's decision relied heavily on the Physical Capacities Evaluation (CPE) conducted by Peters' physician, Dr. Hoeft. The Union notes that the lead paragraph of that evaluation concerns the ability of Peters to use his "right" shoulder in various activities, while it was the injury to his left shoulder that led to his discharge. Further, Dr. Hoeft did not personally observe Peters during the PCE; rather, it was conducted at a hospital in Portage by non-physician staff members of the hospital. The PCE also did not directly address the question of whether Peters could return to his duties. Thus, the PCE cannot be taken as authoritative evidence regarding Peters' abilities. In contrast, the independent medical examination (IME)

conducted by Dr. Rudy, at the direction of the City's worker's compensation carrier, involved Peters actually being observed by the doctor. Dr. Rudy correctly identified the injury, recited Peters' medical history relating to the injury and the resulting surgery, and recited the diagnostic tests that have been performed and/or reviewed by Dr. Rudy in arriving at his conclusion. The latter included an X-ray taken in April of 1994 which Dr. Rudy termed "entirely negative except for some minimal narrowing of the AC joint." Dr. Rudy also noted that Peters had "good range of motion" similar to that of the right shoulder, determined that Peters could grip the dynamometer only somewhat less with his left hand as opposed to his right hand, he being right-handed, and found no sensory deficit in the shoulder. The most significant aspect of the IME was the answer to question 7 regarding whether Peters was capable of working only with restrictions and asking to describe such restrictions if so and to state whether they were permanent in nature. Rudy responded as follows: "The claimant may return to work as a heavy equipment operator following completion of his physical therapy. He should avoid heavy overhead lifting, excessive carrying of weights over 50 pounds. After one month, he may return to full duties without any restrictions. The restrictions given to him for one month upon returning to work will be temporary."

While the City claims there were numerous tasks it believed Peters could not perform, and that much of the work would be difficult to perform with one arm, the Union is not arguing that Peters could have performed those functions using just one arm. Instead, the Union would point out that Peters is never required to work with just one arm. While Dr. Hoeft recommended a series of lifting restrictions on the one arm, Peters had no such restrictions on his other arm and was able to use both. The argument that when Peters is lifting, using both arms, weight in excess of 50 pounds he is violating Hoeft's proscriptions amounts to a medical conclusion that the City is not qualified to make. This question was not put to Dr. Hoeft and it defies logic to conclude that lifting with one arm is equal to lifting with two arms. There simply is no medical evidence in the record that Peters, using both arms, is unable to perform the duties required of an Operator. Finally, Dr. Hoeft only considered Peters to have a "permanent" disability of 5 percent, while Dr. Rudy considered there to be no restrictions. In either case, Peters' "disability" is slight, and hardly sufficient to terminate an employe with 30 plus years of service to the City.

The Union concludes that the claim that Dr. Hoeft's view of the matter should be given greater weight because he was Peters' doctor is spurious. Dr. Rudy's credentials are at least as good as Dr. Hoeft's and the IME involved considerably more detailed and factual review of Peters' medical condition, as well as correctly identifying the limb in question, and involved a personal examination of Peters. Rudy's report directly addressed the issue of whether Peters could return to work, while Dr. Hoeft did not personally examine Peters as part of the PCE, and his report has the appearance of "a slapdash review of the matter" that referenced the wrong limb and did not directly address the issue of whether the doctor felt Peters could

perform the work of an Operator. Dr. Hoeft's personal opinion that Peters might be better served by finding other work hardly rises to the level of a medical opinion that he is unable to perform the duties of an Operator. Thus, it should be concluded that the City did not have just cause to discharge Peters and that he should be restored to his position of Operator with the City and made whole.

City Reply

In its reply brief, the City contends that what occurred after Peters' termination is irrelevant in this case. All that matters here is whether the City acted reasonably in making its decision and one may only look at the information the City had at its disposal at the time. Peters was terminated because the permanent medical restrictions imposed by his own doctor prevented him from safely and competently performing his job.

The City asserts that the grievance should be denied under either the "reasonableness test" or the "just cause analysis". It is undisputed that this was not a disciplinary termination; however, regardless of which analysis is used, the grievance should be denied, as the discharge was fair and reasonable.

The City asserts that it was reasonable to rely upon Peters' own doctors' determination. Dr. Hoeft performed the PCE on Peters and provided a separate letter interpreting his medical opinion into layperson's terms. In that letter, Dr. Hoeft stated, in part, "I have discussed the nature of Mr. Peter's (sic) job requirements with him in some detail, and there is some concern that the variable nature of his work might put him in a position to exceed his capacity from time to time, and that this may be unforeseeable . . . (I)f he were likely to have these additional demands placed on him in an unpredictable way, he might be better served by seeking another occupation." While the Union makes much of the fact that Dr. Hoeft's evaluation referenced the wrong shoulder, the obvious truth is that the PCE merely contained a typographical error, as Dr. Hoeft's first medical restrictions for Peters correctly identified the injured shoulder. The City had no reason to question Dr. Hoeft's thoroughness. At issue is only whether the City reasonably relied on his medical opinion at the time of the termination. If an after the fact inquiry has indeed uncovered shortcomings in his analysis, Peters' gripe is with his doctor, not with the City for relying upon his own doctor's expertise. The Union faults the City for relying upon one doctor over another; however, that is misleading as it totally ignores the sequence of events as they occurred. Originally, Dr. Hoeft said that Peters was so restricted he could not return to work. Subsequently, Dr. Rudy's IME indicated Peters could return. At that point, the City was faced with conflicting medical opinions. In order to resolve that conflict, the City turned to Peters' own doctor and asked him to issue a definitive opinion. The tests that formed the basis of Dr. Hoeft's PCE were actually conducted in order to settle the medical uncertainty. The City asked and relied upon Dr. Hoeft to clear up the conflict,

and this he did by issuing the PCE and the accompanying letter in February of 1995. At that point, the City had to make a pragmatic decision and did so based upon its intimate understanding of Peters' job duties, the asserted permanent medical restrictions, the availability of accommodations, and most importantly, the safety of Peters and his co-workers. The City was required to act upon one of the doctor's recommendations, and made the safety and health conscious decision based upon Peters' own doctor's examination and imposition of permanent restrictions. Thus, in terminating Peters, the City acted reasonably.

The City also asserts there is no basis for the Union's reading Dr. Hoeft's 50 pound lifting restriction to mean Peters was not to lift more than 50 pounds with *one arm*. That reading defies common sense, and surely is not a reasonable reading of the PCE. When the City interpreted the restriction using common sense, the Union referred to it as a "medical conclusion" the City was not qualified to make. The City asserts that was not a medical conclusion, but merely a commonsense interpretation of the PCE and was more reasonable and correct. The Union's conjecture that Peters could perhaps have lifted more than 50 pounds using both hands is refuted by his own physician. The medical restrictions were that Peters could only "use his right shoulder/right arm for the following functions in the following amounts: lift 51-100 pounds, never; carry 51-100 pounds, never." Thus, even if he used both hands to lift more than 50 pounds, he would still be using his injured shoulder and arm to perform the function, a clear violation of the limitations. While the Union's brief also implies the City should have given Dr. Rudy's opinion greater consideration because Dr. Hoeft did not personally examine Peters, that is not the case. In fact, Dr. Hoeft's opinion was accorded considerable weight by the City because, as the record shows, he <u>did</u> examine Peters several times.

The City also notes that it has previously catalogued the many required tasks Peters would not be able to perform under his permanent medical restrictions. It also points out a number of concerns that Peters, himself, expressed about his physical capabilities. In his February 28, 1995 meeting with the City Administrator and Director of Public Works, he expressed concern about lifting manhole covers, climbing out of sewers, and shoveling. When asked about continuous driving and snowplowing, Peters indicated he "gets tired driving to Madison, and that his shoulder hurts after an hour drive." Further, neither he nor the City were able to come up with any accommodations that would allow him to successfully and safely perform his duties. If Peters experienced pain and discomfort after only one hour of driving, he could not be expected to endure and successfully perform the required snowplowing in a blizzard. Attempting to perform those duties beyond one's physical capabilities is extremely dangerous to all workers on site. Peters' testimony about nearly killing a co-worker with the shovel of a backhoe is a perfect example. (Tr. p. 139). It would have been unconscionable to place Peters back to work, considering his descriptions of his capabilities and the permanent medical limitations imposed by his own doctor.

The City reasserts that Peters' subsequent work history is totally irrelevant in this case. While the personal benefits of Peters' unexpected recovery are profound, their legal significance is nil, as all that matters in this case is the information that the City had at the time it made its decision to terminate Peters. While the fact that his personal physician later removed the medical restrictions that had been initially, and for a substantial length of time, classified as "permanent", must be of considerable frustration to Peters, the source of that frustration is his doctor, not the City. While it elsewhere asserted that the City was not qualified to make the "medical" determination that Dr. Rudy's opinion is less weighty than Dr. Hoeft's, the Union appears to claim that somehow the City was qualified to recognize the formal evaluation conducted by Dr. Hoeft as being "slap-dash". In truth, the City was forced to make a decision, i.e., one doctor's opinion had to be credited, while the other's had to be discounted. The City made a prudent, reasonable and safety-conscious decision and had no way of knowing that Dr. Hoeft's permanent restrictions would not prove to be permanent. In light of what the City knew and could have known at the time of its decision, it clearly acted reasonably in terminating Peters' employment.

Finally, the City disputes the Union's assertion that the award cited by the City in its initial brief is distinguishable from this case because the grievant in that case was not discharged, but merely not permitted to return to work until he was medically fit, whereas Peters was terminated. The Union's assertion ignores the fact that at the time of the discharge, Dr. Hoeft's medical restrictions upon Peters were permanent. It would be illogical to wait until someone who has permanent restrictions is medically fit to return to work. Therefore, Peters was terminated. Thus, the reasoning and analysis employed in the prior award directly applies to the case at hand, and provides a useful rationale in this case.

DISCUSSION

The first issue is whether the standard to be applied in reviewing the City's decision to terminate the Grievant is the "just cause" standard for discharge, or, as the City asserts, the"legitimate reasons" standard for relieving him from his job. Both are pursuant to Article II – Management Rights, Section 1, of the Agreement. While the City's action did not have a disciplinary basis, it nevertheless discharged the Grievant from his employment. This distinguishes this case from the situation in the TWO RIVERS award cited by the City, as there the emloyer placed the injured employe on a leave of absence, i.e., relieved him from his duties on the basis he was unable to perform the work.

In truth, however, there is little or no difference between the two standards as they apply to this type of a situation. Under either standard, it must be decided whether the City had a reasonable basis for its decision to terminate the Grievant. In making that determination, it is necessary to decide whether the City reasonably concluded that the Grievant was physically unable to perform the duties of his position and that he would remain unable to do so for the foreseeable future.

As previously noted, the Grievant was an Equipment Operator in the Streets Division of the City's Department of Public Works. In its letter of March 15, 1995 notifying the Grievant of his termination, and in the City's March 28, 1995 response to the grievance, the City asserted that the "majority of the duties" of the Operator position requires one to perform lifting, carrying, shoveling and the continuous use of one's shoulders on an "extensive basis each day", and that the Grievant's own doctor placed permanent restrictions on his performing such functions.

With regard to the Grievant's ability to safely and satisfactorily perform the duties of his position, it is noted that the position also requires the incumbent to perform Laborer duties, and that it is primarily those duties that can require the lifting and carrying of heavier items and shoveling. The record does not support a conclusion that a "majority of the duties" involve the carrying or lifting of heavy objects (in excess of 50 pounds), nor does the record support a conclusion that the position requires the performance of such on an "extensive basis each day." At most, the record indicates that an Operator may, at times, be required to do some lifting or carrying of heavy items and may at times be required to do some shoveling, possibly for the better part of a day. Torkelson, another Operator, credibly testified that in many of the situations offered as examples of where heavy lifting or carrying could occur, employes usually do not do such work alone and, as much as possible, use the power equipment on the backhoe or trucks to do the heavy work. While situations obviously still do occur where an Operator would have to lift or move heavy objects, it does not appear such work is involved in a majority of an Operator's duties, nor does it occur on a daily basis.

The City relies on the "Physical Capacities Evaluation" (PCE) and Dr. Hoeft's accompanying letter to establish that it reasonably concluded that the Grievant could not perform the lifting, carrying, shoveling and continuous use of his shoulders required to perform Operator duties. There are several problems in that regard. First, while the PCE indicated the Grievant should "never" lift or carry items weighing 51 pounds or more, it also indicated that in an 8-hour day he could use his shoulder/arm 11%-30% of the time to lift or carry items weighing 21-50 pounds, 31-70% of the time to lift or carry 11-20 pounds and continuously lift or carry items 1-10 pounds, could shovel 11-30% of the time, and could use his shoulder/arm continuously for 2 hours at a time or for 6 hours out of the 8 hour day. The PCE indicated no restrictions on grasping, pushing and pulling, fine manipulating or machine operation.

In his letter, Dr. Hoeft indicated that the Grievant should not exceed 27 pounds in lifting items "from the level of knuckle to shoulder, and shoulder to overhead" and should not exceed 55-65 pounds in lifting items from "floor to knuckle or twelve inches to knuckle". The latter is somewhat at variance with the limitation indicated on the PCE of never carrying items over 50 pounds. While Dr. Hoeft noted his concern that the nature of the Grievant's duties might unpredictably require him to "exceed his capacity from time to time", in which case he

might be better served by finding another job, Dr. Hoeft also indicated on the PCE that the Grievant had a 5% permanent disability in his shoulder/arm. (While Dr. Hoeft does refer to the Grievant's "right shoulder/right arm", that presumably is an inadvertent error on his part.) Dr. Hoeft's findings must be compared with the findings of Dr. Rudy in his IME of a 3% permanent disability, and a conclusion that the Grievant could return to work without further restrictions after one month from the date of the IME. In other words, both doctors reached a relatively similar conclusion as to the percentage of the Grievant's permanent disability in his shoulder, but reached different conclusions about whether restrictions on lifting and carrying were to be temporary (Rudy) or permanent (Hoeft).

Faced with the conflicting opinions of the doctors, Willi and the then Director of Public Works did meet with the Grievant just two days before the Council made its decision to terminate him and asked him whether he thought he could perform various duties and what accommodations he might suggest. Willi's own summary of that meeting (Employer Exhibit 20), indicates that the Grievant either responded that he did not see a problem with performing the duty or that he would not know until he tried. With regard to heavy lifting, Willi's summary indicates the Grievant responded, "I don't see a problem with lifting, but I really haven't lifted anything heavy."

The assertion that there was no point in placing the Grievant on a leave of absence since Dr. Hoeft indicated the restrictions were permanent, is not persuasive. That assertion overstates the frequency of heavy lifting in the job, ignores the conflicting opinion of Dr. Rudy, ignores the Grievant's belief he could do the work and his willingness to try, and ignores the history with regard to the Grievant's previous shoulder injury which resulted in a full recovery. At this point, the City had an IME from Dr. Rudy stating that the Grievant could have been returned to his job without restrictions in the fall of 1994, the PCE from Dr. Hoeft indicating some permanent restrictions on lifting and carrying, and the Grievant who felt he could return to his duties and was willing to try it. The City was also aware of the fact that the Grievant was working hard, performing physical labor.

It was at this point, and in this context that the City acted to terminate the Grievant. The City's actions contrast with its behavior in 1992, when the Grievant injured his right shoulder, had an operation in August, and was able to return to work eventually without restrictions in late 1993, well over a year. This time, the Grievant had surgery on his shoulder in June of 1994 and within only six months (December, 1994), the City was pushing for a final conclusion on whether the Grievant could return to work without restrictions. The City does not persuasively explain the need to terminate the Grievant at this time, nor why it chose to disregard the IME. The City did not replace the Grievant after it terminated his employment and eventually eliminated the position, and so it cannot reasonably assert that it was necessary to reach a final decision so as to get someone else to perform the work.

The Grievant missed a considerable amount of work as a consequence of his injuries. The City's concern over that fact is legitimate. The record establishes that the City made continuous efforts to get Dr. Hoeft to update the Grievant's status, and became frustrated with the lack of response. The quality and timing of the medical assessments influence this matter greatly. Dr. Rudy produced the predictable IME report, an impressive document emanating from a 5-minute physical exam. Dr. Hoeft repeatedly ignored inquiry by the City, leaving his patient without medical advocacy. Ultimately, Hoeft did complete and send his report, which identified the wrong shoulder. Its prognosis was wrong.

It is not the City's fault that medical opinion was divided, that Hoeft procrastinated, and that Hoeft's prognosis proved wrong. Neither is it Peters' fault, though Hoeft was Peters' attending physician. However, the City was on notice that Dr. Rudy believed Peters fit to return to work. It was also aware that Peters felt capable of a return to work and sought the opportunity to do so. Peters is a long-time employe whose injury was work-related. The record does not indicate the existence of an urgent need to make a final decision.

Under all of the foregoing circumstances, I do not believe just cause exists for the termination of Bob Peters.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is sustained. The City is directed to immediately reinstate the Grievant to his position in the City's employ, and to adjust his seniority date appropriately. I am not directing backpay. The City's termination relied heavily upon Hoeft's diagnosis, which was wrong. As the Grievant's subsequent work record demonstrates, he was fit to return to work. Hoeft was the Grievant's physician, and I believe the Grievant must bear the wage loss cost of Hoeft's initial prognosis.

JURISDICTION

I will retain jurisdiction over this matter for a period of sixty (60) days for the purpose of resolving any dispute over remedy which may arise.

Dated at Madison, Wisconsin this 7th day of March, 2000.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

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