BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**LOCAL 366, AFSCME, AFL-CIO, DISTRICT COUNCIL 48**

and

**MILWAUKEE METROPOLITAN SEWERAGE DISTRICT**

Case 302
No. 59585
MA-11343

**Appearances:**

Podell, Ugent, Haney & Miszewski, S.C., by **Attorney Robert E. Haney,** 611 North Broadway Street, Suite 200, Milwaukee, Wisconsin 53202-5004, appearing on behalf of Milwaukee District Council 48.

**Attorney Harold B. Jackson, Jr.,** Senior Staff Attorney, Milwaukee Metropolitan Sewerage District, 260 West Seeboth Street, Milwaukee, Wisconsin 53204-1446, appearing on behalf of Milwaukee Metropolitan Sewerage District.

## ARBITRATION AWARD

Milwaukee Metropolitan Sewerage District, hereinafter Employer, and Local 366, AFSCME, AFL-CIO, District Council 48, hereinafter Union, are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. A request to initiate grievance arbitration was filed with the Commission on or about January 18, 2001. Commissioner Paul A. Hahn was appointed to act as arbitrator on January 25, 2001. The parties initially scheduled an arbitration hearing on February 5, 2001, but asked the arbitrator to hold the matter in abeyance while the parties attempted to settle the grievance. Following notification from the parties that they were unable to achieve settlement, the parties scheduled and held the hearing on April 30, 2001 and May 11, 2001. The hearing took place at the Midway Motor Lodge in Blue Mounds, Wisconsin. The hearing was transcribed. The parties were given the opportunity and filed post hearing briefs. Post hearing briefs were received by the Arbitrator on October 29, 2001 (Employer) and October 30, 2001 (Union). The parties were given the opportunity and declined to file reply briefs. The record was closed on November 9, 2001.

**To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this Award.**

## ISSUE

**Union**

The Union states the issue as follows:

1. Regarding grievance 00-12, was there just cause for a one-day suspension of the grievant? If not, what is the appropriate remedy?

2. With regard to grievance 00-13, did the employer violate the terms of the parties' collective bargaining agreement by failing to provide proper notice to the Union regarding notices sent by the employer? If not, what is the appropriate remedy?

3. With regard to grievance 00-14, did MMSD violate the terms of the parties' collective bargaining agreement by requiring the grievant to undergo a mental health fitness for duty evaluation in the absence of any type of policy or procedures outlying the circumstances under which that type of activity can be performed? If so, what is the appropriate remedy?

**Employer**

The Employer states the issue as follows:

1. Grievance No. 12: Employer withdraws the previous imposed one-day suspension of grievant.

2. Grievance No. 13: Failure to give all the notices to the Union required by the contract; since the employer has withdrawn the one-day suspension the issue as to whether the one-day suspension should be declared null and void because the Employer failed to give the Union notice of the disciplinary one-day suspension renders the grievance moot. The Employer agreed at step 3 of the grievance to provide proper notice in the future on all grievances.

3. Grievance No. 14: Whether the absence of any language in the agreement governing fitness for duty psychological evaluations mandates the denial of this grievance. If that question is answered "no", then the second issue to be determined is whether the record in this case demonstrates that MMSD's decision to require the Grievant to submit to a fitness for duty psychological evaluation was a reasonable exercise of its authority under the Management Rights Clause.

**Arbitrator**

Whether the Employer violated the Collective Bargaining Agreement when it ordered the Grievant to take a fitness for duty psychological evaluation. If so, what is the appropriate remedy?

## RELEVANT CONTRACT PROVISIONS

### PART I

. . .

**H. SUBORDINATE TO STATUTES, ETC.** This Agreement shall in all respects, wherever the same may be applicable herein, be subject and subordinate to the Statutes of the State of Wisconsin, session laws, and regulations of State agencies.

### PART II

. . .

**C. MANAGEMENT RIGHTS.**

1. Except as otherwise specifically provided herein, the management of the plant and direction of the work force, including but not limited to the right of hire, the right to discipline or discharge for proper cause, the right to decide employee qualifications, the right to lay off for lack of work or other reasons, the right to discontinue jobs, the right to make reasonable work rules and regulations governing conduct and safety, the right to determine the methods, processes and means of operation are vested exclusively in the employer. The employer in exercising these functions will not discriminate against any employee because of his or her membership in the Union.

. . .

### PART III

**A. GRIEVANCE AND ARBITRATION PROCEDURE.**

. . .

Only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance under the provisions set for the (sic) below.

. . .

> The arbitrator shall neither add to, detract from, nor modify the language of this Agreement in arriving at a determination of any issue presented that is proper for arbitration within the limitations expressed herein. The arbitrator shall have no authority to grant wage increases or wage decreases.
>
> The arbitrator shall expressly confine himself/herself to the precise issues submitted for arbitration and shall have no authority to determine any other issue not so submitted to him/her or to submit observations or declarations of opinion which are not directly essential in reaching the determination.
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> . . .
>
> The arbitrator so selected shall hold a hearing at a time and place convenient to the parties within ten (10) working days of the notification of his/her selection, unless otherwise mutually agreed upon by the parties. The arbitrator shall take such evidence as in his/her judgment is appropriate for the dispute. Statements of position may be made by the parties and witnesses may be called. The arbitrator shall have initial authority to determine whether or not the dispute is arbitrable under the express terms of this Agreement. Once it is determined that a dispute is arbitrable, the arbitrator shall proceed in accordance with this article to determine the merits of the dispute submitted to arbitration.

## STATEMENT OF THE CASE

This grievance involves the Milwaukee Metropolitan Sewerage District and Local 366, AFSCME, AFL-CIO, District Council 48. (Jt. 1) The Union alleges that the Employer violated the parties' collective bargaining agreement by giving the Grievant a one-day suspension without pay from his position as a full-time lab technician for the Employer, by failure to notify District Council 48 Staff Representative of notices sent by the Employer to the Local and by requiring the Grievant to submit to a psychiatric exam prior to returning to work from his one-day suspension and a simultaneous 30-day paid administrative leave of absence. (Jt. 2, 3 and 4)

Grievant is a lab technician with the Employer and has been so employed since 1990. Among others, Grievant worked with three women technicians: Pam Bechler, employed as a lab technician for approximately 12 years; Roxanne Starks, employed as a lab analyst for approximately 18 years; and Nicole Wiesinger, employed as a lab technician for approximately 11 years, and hired on the same day as Grievant. During the course of their employment, all three of Grievant's aforementioned colleagues agreed that Grievant has been known for his "temper tantrums" and for his complaints about Employer management and complaints by Grievant that other employees "stole" his ideas and failed to give him credit for ideas that made improvements in the Employer's work environment and mission. While

argumentativeness among employees was not unusual, the three aforementioned employees stated that after August of 2000 Grievant's attitude toward them, rather than being argumentative, seemed more personal as he directed his arguments and "rantings", which they regarded as often being out of control, at them personally because they were made part of teams or felt that Grievant perceived them getting ahead and he was not.

On December 1, 2000, Pam Bechler was in her office and Grievant stopped by and began to complain about Ms. Bechler, a conversation that Bechler testified scared her. Some of this conversation was witnessed by acting supervisor John Wiesinger who passed on the conversation to Roxanne Starks and Nicole Wiesinger. Nicole Wiesinger, who admitted to an argumentative and conflicting personal relationship with the Grievant since the date of their hire, had in July of 2000 asked not to work in the same lab area as Grievant and was transferred to a different section of the lab. She had little interaction with the Grievant since.

John Wiesinger suggested to Bechler and Starks that they should discuss Grievant's behavior with Director of Operations Sylvan Leabman. Bechler, Starks and Wiesinger met with Leabman on December 5, 2000 and related to Leabman their concerns regarding Grievant's seemingly uncontrolled anger and more personal attacks on them, although admitting that the Grievant had never actually threatened them with any bodily harm.

Prior to that meeting, Leabman had a number of conversations with the Grievant during the year 2000 regarding Grievant's attitude and interaction with employees in the lab. (Er. 11) In their meeting with Leabman, Bechler, Starks and Wiesinger expressed their "fear" of the Grievant as to what he might do since he could not seem to control his anger and suggested Grievant receive some "time off" to think about his anger and relationship with employees with whom he worked in the lab and try to get himself under control.

Director of Operations Leabman called a meeting with the Grievant and the Union on December 12, 2000. The meeting was attended by the Grievant and Leabman as well as Human Resource representatives of the Employer and Meredith Welling, the Union Vice President and Steward. Prior to the December 12 meeting, Welling attempted to learn the identification of the employees who brought Grievant's situation to the attention of Leabman but was told by Employer management that such information was not to be released ". . . out of concern for their safety and well being." (U. 7) The Grievant was not informed of who had complained to Leabman at the December 12 meeting. He was told by Leabman that the concerns were his continual problems of interaction with employees and complaints by employees about his lack of control over his anger. Following the December 12th meeting, the Employer, by Leabman, gave the Grievant a one-day suspension without pay and a 30-day paid leave of absence during which the Grievant was to obtain a psychological exam paid for by the Employer and with a physician selected by the Employer to determine whether he was fit to return to work. (U. 8)

The Grievant, on advice of Council 48 representative Radtke, refused to take the psychological examination, and the Union filed the three aforementioned grievances. The Grievant has been on paid administrative leave at least through the date of the arbitration hearing.

During the course of his employment in 2000, the Grievant was involved in counseling with a psychologist at the Wauwatosa Counseling Center in order to cope with stress he was under as he worked on his Masters thesis. A December 20, 2000 to whom it may concern memorandum from the psychologist approved Grievant's return to work. (U. 17) Also during the administrative leave, the Grievant saw a psychiatrist who, on March 6, 2001, stated that based on her psychiatric evaluation of Grievant and her review of his records with the psychologist that she saw no reason why the Grievant could not return to work. (U. 18)

The parties processed the three grievances through the grievance procedure of the parties' collective bargaining agreement. The matter was appealed to arbitration and hearing in the matter was held by the Arbitrator on April 3 and May 11, 2001 in Blue Mounds, Wisconsin. No issue was raised as to the arbitrability of the grievance prior to the hearing or at the hearing but was raised by the Employer in its post hearing brief.

## POSITIONS OF THE PARTIES

### Position of the Union

"Since the time of the arbitration, the Union has been informed that the MMSD has withdrawn its one-day suspension of the grievant; therefore, there is no need to address grievance 00-12 in this brief. The Union has also been informed that with regard to grievance 00-13, the employer is maintaining its position as expressed in the third step disposition; that is, it will provide proper notice in the future. The Union had contended that the appropriate remedy with regard to this grievance was for the grievant's suspension to be withdrawn. Clearly, given the employer's position with regard to grievance 00-12, there is no additional remedy, other than the one in the third step disposition, to be obtained. Therefore, 00-13 is moot and will not be addressed." (U. Brief pps. 2-3)

As to Grievance 00-14, the ordering of a mental health fitness for duty examination, the Union takes the position that the Employer did not have reasonable rules and procedures in place regarding mental health fitness for duty examinations and, therefore, the Employer violated the collective bargaining agreement. The Employer may not order the Grievant to undergo a mental health fitness examination.

Citing Federal Law and the Equal Employment Opportunity Commission Enforcement Guidelines, the Union takes the position that the Employer can require a medical examination of an employee only if it is job-related and consistent with business necessity. The EEOC, the Union argues, has made clear that the prohibition against medical examination is not limited to disabled persons but covers all employees.

Citing EEOC Guidelines, the Union submits there are seven factors that an employer must follow to determine an appropriate medical examination:

> (1) Whether the test is administered by a health care professional; (2) whether the test is interpreted by a health care professional; (3) whether the test is designed to reveal an impairment of physical or mental health; (4) whether the test is invasive; (5) whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task; (6) whether the test is normally given in a medical setting; (7) whether medical equipment is used.

The Union also argues that the United States Supreme Court in MERITOR SAVINGS BANK VS. VINSON, stated that an examination ordered by an employer must be restricted to covering whether the employee can continue to fulfill the functions of the job. Federal law, the Union submits, is also found under the Wisconsin Fair Employment Act. The Union points out that the Wisconsin Law is incorporated as part of the parties' collective bargaining agreement and that therefore the Employer in this case could not order Grievant to undergo a mental health fitness for duty examination merely because Grievant is perceived to present a possible future risk, but only if Grievant demonstrates an inability to perform the essential functions of his job duties. The Union argues that no documentary or testamentary evidence was introduced at hearing regarding the nature of the examination the Employer would have the Grievant undergo. Further, no evidence was introduced regarding the criteria used for determining whether the Grievant, after submitting to a mental health evaluation fitness for duty test, would be fit to work and finally that there was no documentary or testamentary evidence introduced whether the Grievant, if found to be unfit to perform his present job, would be able to return to work.

The Union argues that the collective bargaining agreement in this matter gives the Employer the right to establish reasonable work rules that are consistent with State and Federal Law but, in this case, the Employer has not established any reasonable work rules regarding when, how and why an examination would be ordered of an employee, in this case the Grievant. The Union submits that without set standards, guidelines or policies established in a nonarbitrary manner by the Employer in its work rules, evaluation or determination of mental

health is arbitrary insomuch as there is nothing against which to measure it. Therefore the mental health examination in this case is an arbitrary exercise of authority by management as opposed to the exercise of authority consistent with established work rules.

The Union further points out that while it recognizes there may be emergency situations where concerns over worker safety are so paramount that an Employer must act even if that authority is not set down in established work rules, in this case not even the Employer submits that Grievant's situation is an emergency. Testimony established that the three women complainants did not ask Director of Operations Leabman to remove Grievant from the lab or that the Employer isolated the Grievant and the three complainants from the time the complainants met with Leabman on December 5, 2000 and the time of Grievant's suspension on December 18, 2000. The Union takes the further position that even if the Employer were to have the authority to have an unknown person conduct an unspecified examination to measure an undetermined level of fitness that would qualify an individual to be fit for duty, that there is no need for the Employer in this case to order the Grievant to undergo such an examination because the Grievant has a letter from a physician stating that he is mentally fit for duty. (U. 18) The Union also submits to the Arbitrator that there exists ample testimony in the record to prove that there was no question regarding Grievant's work and in fact Grievant was an excellent lab technician. Therefore there was no demonstrated inability proved by the Employer for Grievant to be able to perform his work.

In conclusion, the Union submits that as Grievances 00-12 and 00-13 are conceded by the Employer to the Union, the Arbitrator should, in his award, indicate that the Employer did not have just cause to suspend the Grievant for one day and that the Employer should provide proper notice to the Union in the future. In regard to Grievance 00-14, the Union requests the Arbitrator find that in light of the nonexistence of reasonable rules and procedures regarding a mental health examination, the Employer has violated the parties' collective bargaining agreement and the Employer may not order the Grievant to undergo a mental health fitness examination. Therefore, because of the absence of reasonable rules and regulations regarding a fitness for duty examination, the Employer has exercised its authority arbitrarily and has violated the collective bargaining agreement.

**Position of the Employer**

The Employer submits two arguments. The first is that the labor agreement between the parties reveals no language that addresses the subject of fitness for duty psychological examinations. The Employer argues that the agreement between the parties restricts the authority of the arbitrator from modifying, interpreting or harmonizing existing provisions of the contract to the factual situation presented to him. In the absence of any language in the agreement covering or referring to fitness for duty psychological examinations, the Employer

submits that if the arbitrator chooses to exercise his authority in this dispute he will not be interpreting the words of the parties and will not be making a determination which draws its essence from the collective bargaining agreement. The Employer argues that an action like this would be legislation of the contract rather than interpretation. Citing arbitration case law the Employer submits that the arbitrator cannot give meaning or treat a subject that is not covered by the labor agreement, in this case fitness for duty psychological evaluations, and therefore the matter is outside the grant of authority to the Arbitrator.

In the alternative, the Employer submits that the management rights clause of the labor agreement, Joint 1, gives the Employer ". . . the right to make reasonable work rules and regulations governing conduct and safety, . . .". The Employer takes the position that it has not bargained away its authority to regulate areas of employee conduct and safety and that the exercise of this authority is subject only to the requirement of reasonableness. In the case before the Arbitrator, the Employer takes the position that when informed of the conduct of the Grievant, and having determined that it was threatening to co-employees and then examining other troubled conduct by the Grievant in the workplace, the Employer reached the reasonable conclusion that the employee should be placed upon paid leave until the completion of a fitness for duty psychological evaluation.

The Employer argues that it has a duty to provide a safe working environment for its employees and to create an environment where its employees feel safe. The Employer cites the testimony of employees Pam Bechler, Roxanne Starks and Nicole Wiesinger to support a factual finding that Grievant during the course of his ten years of employment was known for having temper tantrums and yelling and screaming at people on the job. Regarding Ms. Bechler's testimony, the Employer states that at first Ms. Bechler was merely someone that the Grievant talked to and became angry regarding work frustrations, but that it was not directed at her and that she tried to calm him down, but that after August 2000, when she became a team leader on the metals process team, it seemed to her that he resented that and became adversarial toward her.

Employer submits that Bechler became scared after a December 1, 2000 meeting with the Grievant when he stopped by her office and accused her of being an "ass kisser", trying to get ahead of others and that his conduct upset her and that she became scared. The Employer submits that the testimony of Roxanne Starks supports its argument that Starks became fearful of Grievant after August of 2000 when his anger seemed to be out of control. The Employer submits that the testimony of Nicole Wiesinger supports its argument that employees were fearful of the Grievant and that she had been advised by a fellow employee that she should watch her back and be careful.

The Employer submits that Director of Operations Leabman testified about several meetings with the Grievant regarding complaints about the Grievant creating a hostile working environment for Grievant's co-workers. On that basis, the Employer submits that when it had

three employees fearful of the Grievant it felt that it had an obligation to require Grievant to submit to a fitness for duty psychological evaluation as the only option available to it. The Employer posits that while the quality of Grievant's work was never at issue, his conduct with his co-workers was unacceptable. Grievant's displays of emotional intensity and anger had increased to a level of threatening conduct where the three complainants feared for their safety.

The Employer submits that its action requiring the Grievant to submit to a psychological evaluation, by providing the Grievant with a paid leave up to the time the results of the evaluation were available, is reasonable and that therefore the grievance is without merit and should be denied.

## DISCUSSION

This is a case involving three grievances filed by the Union for alleged violations of the parties' labor agreement. (Jt. 1) The grievances relate to a one day suspension without pay, failure by the Employer to provide Council 48 with notice of the suspension and placing the Grievant on administrative leave with pay for thirty days and ordering him to take a psychiatric exam to determine his fitness to return to work. In its post hearing brief, the Employer advised the Arbitrator that it was withdrawing the one day suspension and was agreeing that it would provide proper notice to the Union as required by the parties' labor agreement. The Union in its post hearing brief accepted this action by the Employer and therefore, I will not address these two grievances in my decision nor comment on them further. Before me is grievance 00-14 relating to the administrative leave and ordering Grievant to take a fitness for duty examination. (Jt. 4)

However, I must first consider the Employer's argument and position that I cannot decide the remaining grievance because there is no language in the labor agreement that speaks to the taking of a psychological exam. The Employer argues that if I consider this issue I will be legislating new language into the labor agreement in violation of the grievance procedure that prohibits me from doing so, as well as in violation of applicable arbitration case law. The Employer raised this issue for the first time in its post hearing brief.

Initially, I find that by not raising the arbitrability issue before its post hearing brief, the Employer has waived its right to make this argument. I do not subscribe to the theory that arbitrability issues can be raised at any time before the record is closed. To raise the issue any time later than the hearing puts the Union in this case at a distinct disadvantage to respond. But in this case there are other reasons why I find that I have the authority to decide this issue even if psychological exams are not covered by any language in the agreement. I note in the parties' agreement the arbitration clause authorizes the arbitrator to decide arbitrability issues; it is not limited to either procedural issues or substantive issues. Since the courts favor

arbitration, I interpret this clause to allow me to make a decision as to this substantive arbitrability issue. I also find it significant that the Employer in its opening statement on the record argued that the Management Rights clause in the contract gave it the right to order the exam. (Tr. 1, p. 6) Further, Director of Operations Leabman testified that he believed the Management Rights clause gave him the authority to order the exam. (Tr. 2, p. 127) [Tr. 1 refers to the April 30, 2001 testimony; Tr. 2 refers to the May 11, 2001 testimony]

There are few clauses in a labor agreement that are subject to more interpretation by arbitrators than a management rights clause. I also note that in essence the Employer made its arbitrability argument in the alternative, stating that if I determined the matter arbitrable the next issue was whether the Employer, given the record facts, violated the agreement by ordering Grievant to take a psychological exam. Therefore, I rule that I have the authority to proceed to decide whether in ordering the exam the Employer violated the parties' labor agreement.

The Union takes the position that because the Employer did not exercise its right under the labor agreement to establish a work rule providing for under specific guidelines the taking of a psychological exam (hereinafter exam) the Employer's action was arbitrary and the grievance should be sustained. The Union discusses federal law, Wisconsin law and case law to the effect that while nothing prohibits an employer from ordering an exam, it is only legal if the exam is necessary to determine if the employee can continue to fulfill the essential functions on the job. The Union cites EEOC guidelines as to the proper nature of a medical exam which the EEOC considers necessary to determine an individual's mental impairment.

The first issue I need to decide is whether the Union is right that the Employer needed to establish reasonable rules and guidelines before it could order Grievant to take the exam in December of 2000. (Jt.8) The Employer does not argue that it established any rules for taking the exam in this case, and the record would not support such an argument. The Employer argues that it retained that right under the Management Rights clause of the Agreement to order the exam.

The Management Rights clause reads ". . . the right to make reasonable work rules and regulations governing conduct and safety," is invested "exclusively" in the Employer. This provision is not mandatory; in other words, the Employer can make reasonable rules but is not required to do so. Is the Employer obligated to make a rule before it can act? I do not believe a proper interpretation of the Management Rights clause requires that the Employer in this case must establish a work rule for every matter it wishes to address related, in this matter, to conduct and safety, before it can act. There simply is no requirement in the clause itself or in this labor agreement that requires such an interpretation and finding.

I regard a management rights clause to be a clause of residual rights. 1/ It is well recognized in the labor arbitration field that the parties to a collective bargaining relationship cannot adopt contract language to cover every possible eventuality of their relationship; the

same is true for work rules and regulations. I therefore find that the Employer did not have to establish a work rule before it could order Grievant to take an exam. At the same time, such an exam cannot be ordered arbitrarily because it could be used in an improper manner against an employee for reasons having nothing to do with the employee's fitness for duty and everything to do with various forms of discrimination. To meet the requirements of arbitration law, the exam has to be for cause; there have to be legitimate and substantial reasons to order a psychological exam and that is true in this case with the Grievant. 2/ In essence, I believe this is what the federal and State law requires. 3/

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***1/ The Common Law of the Workplace, Theodore J. St. Antoine editor, BNA, chap. 8, Safety and Health, SS 8.9, p. 283 (1998).***

***2/ CATERPILLAR TRACTOR COMPANY, 36 LA 104, 105-106, DAUGHERTY (1961); CONAHEMCO, INCORPORATED, 55 LA 54, 57 RAY (1970); SOUTHERN CHAMPION TRAY COMPANY, 92 LA 677, 679, WILLIAMS (1988); CITY OF MONMOUTH, ILLINOIS, 105 LA 724 WOLFF (1995).***

***3/ BUCYRUS-ERIE CO. V. ILHR DEPARTMENT, 90 WIS.2D 408, 421 (FN 6), 1979.***

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I also find that it would have been difficult under the circumstances in this case for the Employer to have previously established guidelines for a mental fitness for duty exam. Normally, such exams deal with an employee's physical ability to do the essential duties of his job. Here, the Grievant was certainly fit to do the essential duties but his interaction with fellow employees caused them concerns for their safety. It would be difficult to have guidelines in place for such a situation, which is why "cause" seems to be the better standard. As for the criteria to establish when the Grievant would be fit to work whether found to be fit or unfit, as the Union argues, this seems to logically be up to a psychiatrist or psychologist to decide, setting the criteria or program Grievant would have to follow to be able to return to work.

The Employer in this case was placed in a difficult position when three female employees came to Director of Operations Leabman on December 5, 2000 and stated that they were fearful of the Grievant. (Tr. 2, p. 73) The incident that touched off this matter between the parties occurred on December 1, 2000 when Grievant had a discussion with Pam Bechler, a colleague, in her office at the end of the work day. (Tr. 1, p. 27) This was not an unusual occurrence as Grievant often talked with Bechler, mainly to complain about the workplace in general and management in particular. In this conversation, Grievant complained about Bechler being an "ass kisser" relating to her participation on a team. (Tr. 1, p. 29) Grievant denied he said it, but I credit Bechler's testimony that different than most conversations with

her, where she just listened and tried to calm Grievant, in this meeting he was confrontational with her and was losing control when their supervisor walked in for a period of time. And it was their acting supervisor John Wiesinger who recommended that Bechler talk to Leabman, which she did on December 5th with the support of Starks and Nicole Wiesinger. (Tr. 1, p. 34)

In showing whether it had cause to order the exam, I find that the Employer through its witnesses showed that Grievant had problems controlling his anger. (Tr. 1, pp. 15, 89 & 129) Most of that anger seemed to be directed at management though in the form of complaints to fellow employees rather than in face to face confrontations with Grievant's superiors. (Tr. 1, p. 130) It is also apparent that Grievant often argued loudly with his colleagues and clearly felt that he was superior in his knowledge and abilities. Grievant complained that others stole his ideas or used them without giving him credit. (Tr. 1, p. 90) And it is clear that this verbal conduct by the Grievant was ongoing almost from the time that he was employed. (Tr. 1, p. 77) Grievant also was alleged to have a "file" at home to use in case something was done to him at work. (Tr. 1, p. 86) To Leabman, the three women expressed a fear for their safety as it seemed that Grievant's anger was now directed at them after August of 2000 where it had not been personal to that time. The three women testified that they were perhaps more concerned now about retaliation from Grievant given the length of time he had been off work as of the date of the arbitration hearing. (Tr. 1, pp. 45, 46 & 172)

It is also clear from the testimony, or lack of it, that Grievant never threatened the three women or anyone else. (Tr. 1, pp. 86, 97 & 175) Grievant never physically assaulted or touched any of his fellow employees. While Grievant owned guns and hunted and on occasion discussed hunting with fellow employees, this would hardly be unusual in any Wisconsin place of employment. While Grievant had a terrible relationship with Nicole Wiesinger who was hired on the same day as Grievant, the two, by Wiesinger's testimony, lacked any chemistry but Grievant had never threatened her. (Tr. 1, p. 175) It is also apparent that in their arguments, Wiesinger gave as good as she received and she and Grievant often apologized to each other. (Tr. 1, p. 143) Wiesinger further had no contact with Grievant since July of 2000 when she moved to a different part of the lab. Grievant was also the employee who helped Wiesinger when she spilled acid on herself. (Tr. 1, p. 167) Wiesinger did not fear Grievant's return to work. (Tr. 1, p. 172)

I find that the testimony further establishes that it was not all that unusual for employees to argue with each other and complain about management. Further, Grievant's actions had been ongoing but no one had complained before, although Leabman had spoken with Grievant on several occasions in 2000 about his attitude and relationship with fellow employees. (Tr. 2, pp. 55, 67 & 69) The testimony also revealed that only Wiesinger asked to work away from the Grievant to which management agreed. It is also established by the record that the three women only asked in their December 5, 2000 meeting with Director of Operations Leabman, that Grievant be given a couple of days off to "think about it (his behavior)". (Tr. 2, p. 107) (Tr. 1, p. 37) The women did not ask that Grievant be discharged or that he not be returned to work.

The Employer representatives met with Grievant and his Union representatives on December 12, 2000. At that pre-disciplinary meeting, the Grievant and his representatives were not told the names of the employees who complained to Leabman that brought about the consideration for discipline of the Grievant. While it is understandable that the Employer wanted to protect the three women's identities, I find that the Grievant and Union had an overriding right to know those names and the nature of the complaints in order to defend the Grievant as part of just cause and due process. It is not enough to tell the Union that it should be able to figure out who the employees were. Nothing that the Grievant had done or said could override his and his representative's right and need to know the names and complaints. In fact, Grievant thought he was there for other reasons. (Tr. 2, p. 203) It is not unreasonable to assume that had Grievant and the Union been told names and circumstances, the Grievant might have been able to offer a response that would have satisfied the Employer enough to take less drastic action than ordering an exam. As it is, the Grievant agreed to mediation with his colleagues in an attempt to work things out, a suggestion made at the December 12th meeting by a representative of the Employer. (Tr. 2, p. 133)

It is difficult in these cases to find a standard that one could turn to for guidance. Under civil rights law a hostile environment has been found to be one where a reasonable person would find the work place hostile or abusive. The courts look to whether the actions of an employee or supervisor are physically threatening or humiliating or merely offensive utterances and whether the actions unreasonably interfered with the work performance of other employees. 4/ There is nothing in the record to indicate that Grievant's actions interfered with the Employer's work being accomplished or that Grievant was anything other than a good lab technician. This last point is seized on by the Union to argue that Grievant did not need a fitness for duty exam because management admitted that he did a good job and accomplished his duties. However, there is more to being fit for a job than just being able to do the tasks required of the job. An employee, in this case the Grievant, has to be able to work with his fellow employees at least enough to not cause turmoil in the work place or place employees in fear of their safety.

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***4/ HARDIN V. S.C. JOHNSON & SON, INC., 167 F.3D 340, 345 CA 7 (1999).***

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I find in this case before me that the Employer did not have cause to order a psychiatric fitness for duty exam of the Grievant. The Wisconsin Supreme Court has used "reasonable probability" and "substantial" as the necessary evidence needed to order such an exam. 5/ I do not find that test met in this record even under an arbitral preponderance of the evidence

standard. A significant factor in my decision is that Grievant remained on the job for several days before receiving his disciplinary notice and administrative layoff. (Jt. 8) Further there was not any real evidence presented, other than the testimony of the three employees, that Grievant was a danger to the employees in the work place and the three women only wanted the Grievant to have some time off to reflect on his behavior. Grievant never made any threats, and arguments, loud voices and complaints about management were not unusual in the work place.

As I said earlier, the Employer was not in an easy situation and it is readily apparent Grievant has some problems keeping himself under control, something that was apparent to me during the arbitration hearing. But I do not think that Grievant's actions warranted a psychiatric fitness for duty exam. I think in this case counseling and the Employer's first instinct of work place mediation would have been more appropriate based on the facts the Employer had as of the December 12th meeting with Grievant and the Union. I am not critical of the Employer. And I believe it is difficult in these types of cases to develop guidelines as to when to determine an employee needs a mental exam. Indeed, the Union never cited any guidelines in its EEOC citations other than the exam must be reasonably related to fitness for duty. I believe mental exams require more justification than a typical physical exam to see if an employee is fit to return to work. This is so because of the stigma attached to a mental exam and the opportunity for misuse of such an exam.

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***5/ BUCXRUS-ERIE CO. V. ILHR DEPARTMENT, SUPRA at 424.***

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I therefore find that the Employer violated the collective bargaining agreement by ordering the Grievant to take a psychiatric fitness for duty exam. The Union submitted reports from a psychologist, who Grievant had been seeing for stress management, and a report from a psychiatrist, who Grievant saw once. However, if I had found the Employer to have had cause to require an exam, I would not have found either report adequate as a fitness for duty report. (U. 17 & 18) Both are so general and uninformative that they would have been of little use to the Employer.

The three women employees who brought the complaint testified that they were concerned about retribution from the Grievant given the length of time he has been off work even though he has, to my understanding, been in a paid status. While this is a legitimate concern from their perspective, it seems more logical to me that Grievant would have more anger with the Employer for his long absence from work, particularly as the women did not

object to and were not concerned about Grievant coming back to work after a couple of days' absence to reflect on his behavior. Grievant clearly has some control and work place issues, and I recommend that the Union, Grievant and the Employer address those issues immediately upon Grievant's return to work. I have not ordered any monetary relief as it is my understanding that Grievant has been in a pay status while on administrative leave. Nor am I ordering the Employer to pay for the two aforementioned exams or reports as Grievant was already under the treatment of the psychologist and the psychiatric exam was at Grievant's and the Union's initiative, not the Employer's.

Based on the foregoing and the record as a whole, I issue the following

## AWARD

The Employer violated the collective bargaining agreement when it ordered the Grievant to submit to a fitness for duty psychiatric exam. The Grievance is sustained.

## REMEDY

The Grievant will be reinstated to his previous position with the Employer within fifteen calendar days of the date of this decision.

Dated at Madison, Wisconsin this 3rd day of December, 2001.

Paul A. Hahn /s/

Paul A. Hahn, Arbitrator

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