BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**GENERAL TEAMSTERS UNION, LOCAL 662,
AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO**

and

**SCHOOL DISTRICT OF NEW RICHMOND,
NEW RICHMOND, WISCONSIN**

Case 50
No. 60182
MA-11555

Appearances:

Ms. Jill M. Hartley, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, for General Teamsters Union, Local 662, affiliated with the International Brotherhood of Teamsters, AFL-CIO, referred to below as the Union.

Ms. Kathryn J. Prenn, Weld, Riley, Prenn & Ricci, S.C., Davis & Kuelthau, S.C., Attorneys at Law, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, for School District of New Richmond, New Richmond, Wisconsin, referred to below as the District, or as the Employer.

ARBITRATION AWARD

The Union and the District are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as Arbitrator to resolve a grievance filed on behalf of Rick Spinks, who is referred to below as the Grievant. Hearing on the matter was held on November 7, 2001, and on February 12 and 13, 2002, in New Richmond, Wisconsin. No transcript was made of the hearing. The parties filed briefs and reply briefs by April 23, 2002.

ISSUES

The parties stipulated the following issues for decision:

Did the District have just cause to terminate the Grievant?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 5

SENIORITY

Section 1. Seniority. For purposes of this Agreement, seniority shall be determined by length of continuous regular employment with the District in this bargaining unit. Seniority status shall not be lost for reasons of vacation, leave of absence, temporary layoff due to lack of work, or other economic reasons, conscription or reserve military service, illness, accident or any other reason mutually agreed upon.

. . .

Section 3. Loss of Seniority. Seniority shall be forfeited if:

(a) An employee is absent due to illness or accident for more than one (1) year and did not secure a leave of absence.

. . .

(c) The employee quits or is terminated for just cause.

. . .

ARTICLE 9

DISCIPLINE AND DISCHARGE

Section 1. The Employer will not discipline, suspend, or discharge an employee without just cause.

Section 2. The normal disciplinary procedure is:

1.- Verbal warning
2.- Written warning
3.- Suspension
4.- Discharge

The above procedure need not be followed in cases of serious misconduct.

The number of warnings or length of suspension shall be determined by the Employer in accordance with the gravity of the violation, misconduct, or dereliction involved, taking into consideration that such steps are intended to be corrective measures.

. . .

ARTICLE 24

LEAVE OF ABSENCE

Section 1. Sick Leave. An employee who misses work due to illness or accident for up to sixty (60) days shall be considered on leave of absence and shall be required to provide Employer with written documentation of inability to work and expected date of return. Any employee who anticipates being absent for more than one (1) year shall obtain a written leave of absence from the Employer by the eighth (8^{th}) month to be accompanied by a doctor's certificate of inability to perform duties, and explaining why employee cannot reasonably be expected to return to work. Failure to comply with this Section will result in loss of seniority.

Section 2. Any employee desiring a leave of absence from his/her employment for more than seven (7) days (other than that referred to in Section 1), shall secure written permission from both the Local Union and the Employer. Failure to comply with this provision shall result in the complete loss of seniority rights.

BACKGROUND

Dr. Jim Wold, the Employer's District Administrator, issued a letter of termination to the Grievant dated May 9, 2001, which states:

> In a letter dated May 18, 2000, you were advised that your medical leave time would be counted toward the time to which you were entitled under the state and federal Family Medical Leave laws, a maximum of 12 weeks. Those 12 weeks have expired. In addition you have exhausted your accrued vacation and sick leave.
>
> According to your most recent medical report, you are still subject to significant work restrictions. Based on the District's review of that information, the District has determined that there is no work available within those restrictions. Therefore, since you have exhausted your available leave, this letter is to advise you that your employment with the District will be terminated effective May 10, 2001.
>
> Your name will, however, be placed on a preferential rehire list should your medical condition improve and should there be a position for which you are qualified. Thank you for your years of service to the School District of New Richmond. We wish you well in the years ahead.

The Union filed a grievance on May 11.

At the November 7, 2001 hearing, the District added additional bases for the termination, asserting newly discovered evidence. After discussion, the parties agreed to hear the entire matter as a single grievance. Wold summarized the discussion in a letter to the Union dated November 8, 2001, which states:

> This letter confirms that the District advised Mr. Spinks during the November 7, 2001, session with Arbitrator McLaughlin that his employment with the District was being terminated for two reasons, each of which the District believes independently supports termination.
>
> The first reason is that the District has verified that Mr. Spinks was convicted of a felony on August 31, 1989, for the manufacture/delivery of cannabis in an amount greater than 500 grams. Yet, when Mr. Spinks applied for employment with the District on December 2, 1992, he stated on the application form filed with the District that he had not been convicted of a felony within the last seven years.
>
> The second independent reason for termination is that the District has determined that Mr. Spinks misrepresented the circumstances of his knee injury on or about September 12, 1999, and that his worker's compensation claim arising out of that injury is fraudulent in that the injury did not occur while at work.

> This letter will also confirm that the District has agreed to waive both of these additional independent causes of termination directly to arbitration and to consolidate them with the case currently pending before Arbitrator McLaughlin.

The background unique to each basis for the termination will be set forth separately, with undisputed matters prefacing an overview of witness testimony.

The District employed the Grievant as a full-time Custodian from December 22, 1992 until his discharge. Prior to December 22, 1992, the Grievant worked as a part-time Custodian for the District. While employed as a full-time Custodian, the Grievant filed twelve Worker's Compensation (WC) claims. In August of 1994, the Grievant injured his back. In August of 1995, he underwent a "Functional Capacities Evaluation" (FCE) that determined he had limitations on his ability to bend, kneel, lift and carry. The Grievant experienced varying levels of restrictions due to his back from this time until his discharge.

The Knee Injury

Sometime in August or September of 1999, the Grievant injured his left knee and foot. The Grievant worked Sunday overtime on September 12, 1999, and left a voicemail message for his supervisor, Jerry Davis, that he had stepped into a hole and twisted his left knee and foot. He reported to work on September 14, and consulted a physician on September 15. On his doctor's instructions, he did not return to work. On September 15, he filed a written work injury report on that stated the injury occurred at "East Side High School" while he was "taking out broken chairs."

The injury did not improve, and the Grievant went to a specialist, A. Hamid Khan, who determined the Grievant had "sustained some ligament and cartilage damage." Kahn placed him in a leg brace, and informed him to take four weeks off from anything other than sit-down work prior to another evaluation. The Grievant did not return to work, and learned at the subsequent evaluation that he would undergo knee surgery. The surgery took place on October 28, 1999. In a letter to Davis dated November 16, Kahn released the Grievant for light duty. On Kahn's recommendation the District placed the Grievant in a work hardening program summarized in a November 16 letter from Kahn to Davis that states:

. . .

> He should not keel, squat, pivot, climb, crawl, stand and or walk for long periods of time. He should be allowed to ambulate & sit during his work hours. He may, at times, need to apply ice to the left knee. He will continue with physical therapy and will be evaluated again on/or about 12/2/99 at which time his restrictions will be addressed. Work hardening hours:

11/17/99 through 11/23/99 2 hours/day
11/24/99 through 11/30/99 3 hours/day
12/1/99 through 12/7/99 4 hours/day
12/8/99 through 12/14/99 5 hours/day
12/15/99 through 12/21/99 6 hours/day
12/22/99 through 12/28/99 7 hours/day
12/29/99 through 01/01/00 8 hours/day

The schedule listed above will be in effect as long as the patient is able to tolerate his work duties. As previously noted he will be checked again on 12/2/99 and any changes in his activity levels will be addressed at that time.

. . .

The Grievant continued to experience pain. The District, unconvinced he could return to the full-time requirements of his job, requested the Grievant to undergo an FCE. The FCE, dated January 26, 2000, states the following:

Activity	Abilities	Job Demand	Match?
12 " to waist lift -- 46"	**38 lbs (Occas.)**	**75 lbs**	**No**
Waist to eye level lift -- 72"	**62 lbs (Occas.)**	**25 lbs**	**Yes**
Two handed carrying	**68 lbs (Occas.)**	**50 lbs**	**Yes**
One handed carrying	**55 lbs (Occas.)**	**25 lbs**	**Yes**
Pushing	**50 lbs (Occas.)**	**10 lbs**	**Yes**
Pulling	**50 lbs (Occas.)**	**10 lbs**	**Yes**
Sitting	**F**	**N**	**Yes**
Standing	**O**	**C**	**No**
Work arms over head-standing	**O**	**O**	**Yes**
Work bent over-standing/stooping	**O**	**F**	**No**
Work kneeling	**O**	**O**	**Yes**
Work bent over-sitting	**O**	**O**	**Yes**
Work squatting/crouching	**N**	**N**	**Yes**
Work arms over head-supine	**F**	**N**	**Yes**
Climbing stairs	**O**	**RARE**	**Yes**
Repetitive squatting	**N**	**O**	**No**
Walking	**F**	**C**	**No**
Crawling	**F**	**O**	**Yes**
Climbing a ladder	**N**	**O**	**No**
Repetitive trunk rotation-standing	**N**	**F**	**No**
Repetitive trunk rotation-sitting	**F**	**O**	**Yes**

N = Never **O**=Occasionally **F**= Frequently **C**=Constantly

The District permitted the Grievant to return to work. He continued to experience knee problems, however, and his last shift of work occurred on March 22, 2000.

The Grievant underwent a second surgical procedure on his knee that necessitated an extended rehabilitation. In a letter to the Grievant dated May 18, 2000, Brian Johnston, the District's Director of Fiscal & Building Operations informed the Grievant that his continuing absence from work "is being considered an approved leave under the federal and state Family and Medical Leave Act."

In a letter to the Grievant dated December 20, 2000, Johnston addressed the Grievant's "Medical Leave/Employment Status" thus:

. . .

> The District's records indicate that your eighth month of continued leave occurred on or about November 23, 2000. As of this date, the District has not received nor acted upon a request from you for a leave of absence. It is the District's understanding that your absence will exceed the one-year limit. If that is the case, you have failed to comply with the eight-month timeline set forth in Article 24, Section 1, and as a result of that failure, your seniority will have been lost and your employment relationship with the District will have been severed.
>
> Before taking any final action in this regard, the District wishes to provide you the opportunity to present any evidence you may have which would indicate that your absence will not exceed the one-year limit. If you have such information, that documentation must be provided to the District Office within seven calendar days of the date of this letter. If no such information is provided, it will be the District's understanding that you will be unable to return to work within the one-year timeline.

. . .

After receiving this letter, the Grievant gave the District the following note, dated "Oct 24 2000", that states:

> To whom it may concern I Rick Spinks am letting the district know that I do not anticipate being off more then a year. But at any time I find that I'll exceed the one year I'll let the district know at that time if this is not sufficient please let me know.

The Grievant and Johnston met sometime after this, and the Grievant gave Johnston a copy of a document entitled "Rehabilitation Protocol For Opening Wedge Proximal Tibial Osteotomy With Allograft Bone Graft." The protocol stated Robert LaPrade as the doctor, and was a form document that covered the goal of the surgery and gave an overview of the standard post-operative rehabilitation procedure. The protocol anticipated "return to full low impact activities as tolerated" five to six months after the surgery.

Johnston responded to the Grievant in a letter dated January 16, 2001, which states:

> Upon review of your documentation I find the doctors information leads me to the conclusion that you will be off for more than one year. If you are unable to return to your normal duties within the one year timeline I will recommend to the board that the contract language be followed and that your employment with the district be terminated.

On January 25, LaPrade issued a "Work Restrictions/Report of Workability" form that noted the Grievant needed crutches, and should not work through March 15. In a letter to the Grievant dated February 23, Johnston stated that "I would expect you to return to work on or before March 23rd, 2001." The Grievant obtained a work release from LaPrade dated March 15 that released him to work without restriction beyond "ice at breaks as needed" and "No repetitive outstretched reaching."

The District doubted whether the March 15 release established the Grievant was capable of returning to work. Johnston placed the Grievant on paid administrative leave effective March 23, and scheduled an FCE exam for the Grievant. The Grievant performed the exam on April 27. The FCE report, dated May 2 and signed by Gwen K. Jensen, a physical therapist, states the following:

Activity	Abilities	Job Demand	Match?
Floor to waist lift (46")	**62 lbs (Occas.)**	**75 lbs**	**No**
Waist to shoulder level lift (69")	**82 lbs (Occas.)**	**25 lbs**	**Yes**
Two handed carrying	**82 lbs (Occas.)**	**50 lbs**	**Yes**
One handed carrying- Right	**55 lbs (Occas.)**	**50 lbs**	**Yes**
Pushing	**95 lbs (Occas.)**	**10 lbs**	**Yes**
Pulling	**83 lbs (Occas.)**	**10 lbs**	**Yes**
Sitting	**F**	**O**	**Yes**
Standing	**F**	**F**	**Yes**
Work arms over head-standing	**F**	**O**	**Yes**
Work bent over-standing/stooping	**O**	**F**	**No**
Work kneeling	**C**	**O**	**Yes**

Work bent over-sitting	**F**	**O**	**Yes**
Work squatting/crouching	**O**	**O**	**Yes**
Work arms over head-supine	**C**	**N**	**Yes**
Climbing stairs	**F**	**O**	**Yes**
Repetitive squatting	**F**	**O**	**Yes**
Walking	**F**	**F**	**Yes**
Crawling	**F**	**O**	**Yes**
Climbing a ladder	**F**	**O**	**Yes**
Repetitive trunk rotation-standing	**F**	**F**	**Yes**
Repetitive trunk rotation-sitting	**F**	**O**	**Yes**

N = Never **O**=Occasionally **F**= Frequently **C**=Constantly

Johnston provided the job description that was used as the basis for these conclusions. The position description then in effect for Custodian demanded a lifting requirement of fifty pounds. Jensen added the following "**Impressions and Recommendations:**"

1. According to job description for Custodian . . . Mr. Spinks' tolerances for low level lifting (floor to waist) and for stooping did not meet job requirements. Participation in a short term aggressive work hardening program may assist Mr. Spinks in increasing tolerance for these activities to meet job demands.
2. Several activities in the mobility section were heart rate limited and may be indicative of reduced cardiovascular endurance and deconditioning. An aggressive work hardening program would also promote overall reconditioning through aerobic strengthening activities.
3. Mr. Spinks reported low back pain as his primary symptom during testing. Work hardening participation may also be beneficial in assisting Mr. Spinks in learning techniques to manage symptoms related to performance of functional activities.

After consideration of the FCE, the District determined to issue the termination letter. The background sketched to this point is undisputed. The balance of the background is best set forth as an overview of witness testimony.

James Ohlfs

In the summer and fall of 1999, Ohlfs and the Grievant worked the same shift as Custodians. During the summer, they worked from 6:00 a.m. until 3:00 p.m. With the start of the school year, each moved to the 3:00 p.m. until 11:00 p.m. shift.

Ohlfs testified that on a Monday during the summer, the Grievant came into work with his leg noticeably swollen. During a morning break, the Grievant sought to ice it. The swelling in the left knee area was so bad that the Grievant could not raise his pants over the knee, and had to drop his pants to ice it. The Grievant stated that the injury occurred when someone pushed him during a grueling basketball game the prior weekend. Ohlfs was "absolutely" sure this incident occurred while they worked the day shift, most probably in August. The swelling continued for "quite a long time" after this.

Sometime shortly after the start of the school year, the Grievant stated that he had stepped in a hole near a dumpster at the back of the high school building. Ohlfs was familiar with the hole, which was caused by washout from a downspout. The Grievant stated that he had stepped in the hole while carrying broken chairs to the dumpster. The injured area was the same as that Ohlfs had observed the Grievant icing during the summer. Ohlfs was unconvinced that the Grievant had stepped in the hole, but did not report the incident until the subject came up in a conversation with Davis, well after the injury.

Ernest Spinks

Ernest Spinks, referred to below as Spinks, is a mechanical engineer, and the Grievant's brother. Spinks testified that the Grievant's wife phoned him during an altercation between the Grievant and his daughter on September 9, 1999. The Grievant's wife told him that the Grievant had attacked their daughter. In a phone conversation sometime after this, the Grievant informed Spinks that he had injured his knee during the altercation. Perhaps two weeks later, Spinks visited the Grievant, and noticed the knee was still swollen. Sometime between September 9 and this visit, the Grievant informed Spinks that he was going to see if the hole near the dumpster had been filled. If not, he would report that he had stepped in it and injured his knee. He knew another employee had fallen in the hole, and thought this would create a sufficiently plausible account for the injury to permit him to collect WC benefits. He repeated this story to Spinks in a phone conversation sometime after Spinks visited the Grievant's home. Spinks was unsure when the Grievant filed a WC claim, but thought these conversations preceded the filing.

Spinks knew well before his brother's felony conviction that the Grievant was selling drugs. The Grievant openly admitted it, claiming to have made a sale of over two hundred pounds of marijuana. Spinks informed a friend, who is a manager in the FBI, of the matter. The agent asked Spinks to assist in an investigation. Spinks did so, accompanying the Grievant to Arizona to purchase drugs, then informing law enforcement of the transaction.

The Grievant informed Spinks that he could have passed the final FCE he took, but held back on the exercises that affected his back. He knew he risked "shooting himself in the foot", but did not want to expose himself to heavier duties, such as shoveling snow, if returned

to work. The back injury was a pre-existing condition, and he thought he needed only to "pass" the portions of the test relating to the knee injury.

Spinks acknowledged that he and the Grievant had differences regarding the sale of their mother's home in West Virginia during the summer of 2001. The sale predated Spinks' contact with the District concerning his brother's felony conviction and the WC claim. He acknowledged that he and his brother do not share a friendly relationship, but added that this was "not on my choice."

Brian Johnston

Johnston serves as the District's Director of Fiscal and Building Operations. He noted that after perhaps two weeks in the 1999 work hardening program, the Grievant complained of knee pain, and stopped working. The District's WC insurance carrier requested the January, 2000 FCE.

The Grievant and Johnston met regarding his condition sometime after Johnston issued the December 20, 2000 letter. The Grievant supplied Johnston the handwritten note and the rehabilitation protocol summarized above. Johnston noted to the Grievant that his rehabilitation appeared to require more than the year permitted under Article 24. The Grievant did not comment, and offered no insight on when the second surgery had occurred or when the rehabilitation could be expected to be complete.

Johnston continued to follow through regarding the one-year leave, and was "surprised" to receive the LaPrade's general work release dated March 15, 2001. LaPrade's January 26 report increased Johnston's skepticism regarding the quick recovery, and prompted Johnston, in a letter dated March 21, to put the Grievant on paid administrative leave and direct another FCE. The FCE exam took place in late April, and was the third appointment. The reluctance of one of the Grievant's physician's to provide a release of certain information put off one appointment, and the Grievant cancelled another.

After receiving the final FCE, Johnston and Wold concluded that the Grievant could not return to work within one year. Johnston did not discuss the matter with the Grievant. The District discharged the only other employee who missed more than one year of work. Johnston acknowledged that the District had worked with the Grievant's back restrictions. It modified his duties to exclude vacuuming, snow removal and certain bathroom cleaning duties. These duties had to be assigned to other employees. The District faces hundreds of thousands of dollars in budget cuts, and no longer has the ability to carry an employee incapable of performing all of a position's duties.

Johnston supplied the job description used by Jensen in the final FCE. It lists the relevant lifting requirement at fifty pounds. In a phone conversation with Jensen, Johnston supplied the weight demands noted in the table set forth above. Johnston thought the seventy-five pound entry reflected the current demands of the position, which demands the lifting of lunch tables weighing at least seventy pounds.

Spinks approached him sometime before the WC hearing to assert that his brother's claim was bogus. Johnston considered the Grievant's injury record to reflect a "moving target." The Grievant never seemed to improve. Rather, the nature of his injuries would change. In his view, it was always difficult to figure out what he could do and what he could not. The Grievant's WC file is perhaps one and one-half inches thick.

Jerry Davis

Davis is the direct supervisor of custodial staff. The Custodian job description states twenty-nine "Essential Functions." The Grievant was incapable of performing the following of those functions:

. . .

3. Shovel, plow, and sand walks, driveways, parking areas, and steps, as appropriate. . . .
6. Scrub, clean down, and disinfect toilet floors and clean drinking fountains and sinks (as) needed. . . .
9. Assist with loading and unloading of trucks. . . .
11. Perform such yard keeping chores as grass cutting, tree trimming, and the like, as necessary, to maintain the school grounds in a safe and attractive condition. . . .
20. Move furniture or equipment within buildings as requested for various activities. . . .
25. Load, transport, and unload hot lunch storage containers.
26. Transport mail and deliveries between buildings.
27. Assist food service staff in maintaining well-organized freezer and storage areas. . . .

Beyond this, the Grievant could not perform any duty demanding bending and stooping. These limitations were evident from the time of the Grievant's back injury as well as during the work hardening program in November of 1999. The work hardening program consisted of the Grievant performing lighter duties taken from other custodial employees. The Grievant left the program, but did return to work between January and March of 2000. He did try to do his job and did improve somewhat during this period. He could, on some days, do his work, but

could not on a consistent basis perform all of the required duties. He complained often of knee pain, stated he could not stand for eight hours, and could not bend or squat. He left work in mid-March of 2000.

On March 15, 2001, the Grievant met with Davis at 9:00 a.m., prior to an appointment with LaPrade at 10:00 a.m. They discussed what he needed to be able to accomplish to return to work. Davis' notes of that meeting read thus:

> He stated that he is coming back to work no matter what. He is not going to (lose) his job. He also stated that he cannot stand 8 hrs. a day, his leg hurts too much. He said his leg muscles are sore.
>
> He asked when his year is up and when he had to be back to work. He stated he would be back with a Dr. slip saying he could go back to work on that day, implying that he will tell the Dr. what to do instead of the Dr. making the decision??

The following day, the Grievant gave Davis the release stated above. Davis asked how he got it and the Grievant responded that after being informed his job was in the balance, LaPrade responded that he did not want to cost the Grievant his job.

Two other employees successfully completed work hardening programs after injuries. The only other employee to miss more than one year was discharged. Davis has responded to budget restrictions by reducing the full time equivalent custodial positions at the high school from 4.5 to 4.0.

Davis does not believe the Grievant injured his knee at work in mid-September of 1999. He stated he saw the Grievant limping for two to three weeks prior to September 15, although he could not recall which leg he limped on. He overheard the Grievant complaining about a rough basketball game on break on a Monday. Davis acknowledged, on cross-examination, that he was out of the District from September 3 through September 12. He thought the District had attempted to work with the Grievant's restrictions as long as possible, but could not continue to do so. Three other employees complained about having to perform the Grievant's duties, and the District is not staffed to indefinitely allow it to farm out the duties he cannot perform.

Sarah Canfield

Canfield is the Grievant's daughter, and a Unit Administrator in the National Guard. On September 9, 1999, she and her father had a fight, "a push and shove kind of thing" that lasted about ten minutes. She may have hit his knee at some point, but not enough to injure it.

She and her mother left home for a while, then returned. She did not see her father limp, and was not aware of any injury to his knee until he injured it several days later, when he informed her that he had hurt it at work.

She acknowledged that the fight left her with a black eye, and that she consulted a specialist regarding it. Her brothers and father play basketball competitively. The Grievant played in "3 on 3" tournaments that summer, typically on weekends. She could not recall her father complaining about a basketball injury. She denied that she or her mother spoke with Spinks as a confidant. Neither like him, and Canfield does not speak to him. She acknowledged the police were called, and that she filed a written statement regarding the incident. She noted she was upset at the time of the statement, dated September 15, 1999, and thought it might be somewhat exaggerated. The statement reads thus:

> . . . I heard my brother crying and asking my dad why he had hit him. I knew right away that he was going to hit my brother again – which he has done in the past. My brother was running from him and I stepped in front of him & told him to stop it. He said "get out of my way or I'll hit you." I said no – you hit me I'll throw this hot chocolate at you." He hit me & then I threw the hot chocolate at him. Then he started hitting me in the head back and forth . . .

The statement notes that the fight continued outside of the house, where she again attempted to get between the Grievant and her brother. She and the Grievant then confronted each other by her car. The statement alleges he hit her in the head, punched her in the stomach and kneed her in the crotch before the incident ended.

The Grievant

The Grievant noted that the back injury in 1994 was to his lower back. Prior to the injury, he worked at an elementary school that had predominately carpeted floors. Vacuuming hurt his lower back. At roughly the same time as the injury, he successfully posted to a position at the High School, which has tile floors. To his knowledge, the District made no accommodations regarding the back injury. The move to the High School effectively addressed the back injury. He could not perform heavy snow removal. He could effectively lift, unless he had to stoop to do so. This meant the only lifting he could not do was of objects closer than two feet to floor level. Beyond these, he could not perform repetitive vacuuming. At no point from the time of his back injury did any District representative ask him for an unrestricted release to work.

On September 12, 1999, he worked a Sunday, from 7:30 a.m. until 2:00 p.m. A church group used the High School. To prepare the facility, he turned the alarm system off, then went to open the choir and band rooms, and to turn lights on. While doing so, he noted

two cracked chairs. He decided to take them to a dumpster at the rear of the building. He left the building through an unlit entry near the science lab, with the two chairs over his left shoulder. The dumpsters were located along the same wall as the door he exited through, roughly fifty feet away. Between the lab doorway and the dumpster was the downspout that had a roughly one foot wide and one foot deep area of washed out ground surrounding it. He was, at the time, unaware of the hole. The day was sunny, but he was looking straight ahead and did not see the hole before his left foot dropped into it. He did not experience any pain immediately, but the right knee hurt more as the day wore on. At sometime between 8:30 and 9:00 a.m., he called Davis, leaving a voice mail concerning the incident.

He reported for work the next day, and the knee was "a little sore." He told other workers of the accident. The more he worked, the more pain he felt. He attempted to work on September 14, but by the end of the day was limping badly. The following day he went to his doctor, who found nothing broken, but told him to take a week off and come back for another exam. As noted above, the knee did not get better and required surgery.

Spinks returned to work, and was able to successfully perform his duties as before, after a period of work hardening. He submitted to the FCE in January of 2000, and returned to work. Swelling and pain in his knee, however, led his physician to prescribe further surgery. A dispute between his physician and the District's WC insurer put the surgery off for a period of time.

He acknowledged Johnston had informed him of the one-year period set by Article 24 well before he issued the December 20 letter. The Grievant, however, never anticipated that the rehabilitation would take the time it did. After receiving the December 20 letter, he gave the October 24 note to the District receptionist, and was surprised the District had not received it in October. He kept the District informed of his progress after each visit to the doctor. He did require crutches for some time, but was off of them well before March 15, 2001.

As of March 15, 2001, the knee was effectively healed. He did not have full flexibility in the joint, and could not bend as deeply as before the injury, but outside of swelling when the knee was worked too hard, it was functional. He did not influence LaPrade's opinion on March 15, but did tell him of the need for him to return to all of his duties on a full-time basis or lose his job. He gave LaPrade's release to Davis, who agreed that he should be ready to work the following Monday or Tuesday. He had no further discussions with District representatives prior to being placed on administrative leave and being asked to undergo another FCE.

He noted at the first FCE that the 75 pound lifting requirement did not match the job description's requirement of fifty pounds. The evaluator consulted Johnston, noted the absence of a physician's release, and the first appointment thus ended. The final FCE noted that the

Grievant was out of shape, but a subsequent stress test demonstrates that this concern has no bearing on his ability to work.

The Grievant denied showing his knee to Ohlfs, and denied telling anyone he suffered it during a basketball game. He denied telling his brother that he made a bogus WC claim to cover his absence, or manipulated the FCE results. He has long term disability insurance, and did not need to worry about pay during the rehabilitation. He did inform his brother that he hurt the knee by stepping in a hole at work.

Spinks, with one of their brothers, sold their mother's home in West Virginia in June of 2001, then misappropriated the proceeds. The Grievant holds power of attorney for their mother, and made formal complaints to officials in West Virginia regarding Spinks' actions. Spinks has complained to Wisconsin officials about the Grievant's care for their mother. The relationship has broken down over these issues, and the Grievant and one other brother are suing Spinks and the other brother over their handling of their mother's property.

The Employment Application

The Grievant first worked for the District as a part-time Custodian in October of 1990. In 1992, a full-time District Custodian suffered a stroke, and when it became apparent he could not return to work, the District started the hiring process to fill the position. The Grievant applied for the opening, completing a four-page written application form dated December 2, 1992. The first page of the four page application form directed applicants to give a "Yes" or "No" response to a series of questions, including the following: "Have you been convicted of a felony within the last 7 years?" The Grievant's application includes an "x" in a box adjacent to the "No" response. The original four page application form is in the possession of the hearing examiner in the WC proceeding. The copy submitted into evidence in the arbitration proceeding includes only the first and third pages. This reflects that the form is a two page form, copied on both sides of each page, while the copy made for the arbitration hearing is a one sided copy of the two page form. The fourth page of the form states the signature line for an applicant.

In September of 1988, the Grand Jury for Cook County, Illinois indicted the Grievant for possession of more than five hundred grams of cannabis with intent to deliver. This resulted in a judgment, dated August 31, 1989, based on a finding of guilt. The judgment, signed by the Grievant, placed him on probation for four years, assessed him $2,500 in fines and court costs, and directed him to perform five-hundred hours of community service.

After an interview process, the Board approved hiring the Grievant as a full-time custodian. A memo from Johnston to the Board dated December 15, 1992 states his formal recommendation that the Board hire the Grievant to fill the full-time vacancy.

Brian Johnston

Johnston started his position with the District on November 16, 1992. At the time of his hire, Thomas Kleppe was the District's Superintendent and Johnston's immediate supervisor. Mark Christianson was Johnston's predecessor.

Spinks supplied Johnston copies of Cook County Circuit Court records establishing the Grievant's felony conviction on the first day of the arbitration hearing. Spinks had informed Johnston earlier that his brother had a criminal record, but Johnston informed him the District could find no documentation of his allegation. Spinks responded by supplying the court documents. Johnston had also received, via an interdepartmental mail envelope, an inmate ID card for the Grievant. Johnston does not know who mailed him the card, but he did give it to a law firm to determine its origin. The Grievant ultimately asked for the ID card, and Johnston returned it to him. The Grievant did not mention what it was.

On redirect examination, Johnston stated that Christianson's last day with the District was October 9, 1992. Johnson produced a letter from Kleppe to Christianson dated August 24, 1992, that states:

> This is to officially notify you that at their August 17, 1992 meeting the Board of Education approved your resignation. Per our discussions your last day on the job will be October 9, 1992. . . .

Johnston recommended, by written memo dated December 15, 1992, that the Board hire the Grievant to fill the full-time vacancy. Neither Kleppe nor Christianson played any role in the hire of the Grievant to fill the full-time vacancy. Kleppe formally stated a recommendation at a Board meeting, but did not interview applicants for the vacancy. Johnston interviewed five to seven applicants before determining to recommend the Grievant. Johnston developed the application form filled out by the Grievant for the full-time opening. He did so because the form used by the District prior to his involvement asked applicants for their age and marital status which Johnston felt was a violation of state and federal law. The "No" response to the felony question was completed when Johnston reviewed the application. Breault never asserted to Johnston that the Grievant had been convicted of any crime. The District and Breault have a long history of conflict that predates Breault's termination.

Roger Breault

Breault is a building engineer for the Osceola Medical Center, and worked for the District from 1978 through 2000 as a Custodian. From 1986 through 1995, he worked as a Leadman. He was, throughout his employment, a member of the bargaining unit and he served the Union as a Steward and as a member of its bargaining team. At the time the Grievant applied for full-time

employment, Breault, as Leadman, played a role in the hiring process. At that time, applications would go to the main office, then would be routed to Christianson and Breault, who would meet with other District employees and conduct interviews with the applicants.

The Grievant came to Breault to discuss his application for full-time employment. Breault reviewed the four page form with him. The Grievant advised Breault that he was on probation for a felony and was concerned with the impact this might have on his application. Breault did not think the Grievant had made a response to the printed question concerning a conviction for a felony. They discussed the matter, and specifically the Grievant's prior experience with the District as a part-time employee. Breault informed the Grievant that he would take his application to the administration building and discuss the matter with Christianson and Kleppe. They asked Breault about the quality of the Grievant's work. Breault responded that the Grievant was a good worker, then checked with another school district for which the Grievant worked on a part time basis to verify his opinion. Breault informed Kleppe and Christianson that the Grievant was on probation for a drug-related offense, but was willing to refer them to his probation officer for a reference. Breault left the application with Christianson and Kleppe. They interviewed the applicants, and ultimately recommended to the Board that the Grievant fill the vacant full-time position. Breault could not recall being on the interview panel.

When asked if he had filled in the "No" response to the printed application form's question regarding a felony conviction, Breault responded "not that I am aware of." He added that there was "no doubt" in his mind that he had spoken with Kleppe and Christianson regarding the Grievant's application. Sometime in 1995 the District terminated the Leadman position, created a Maintenance Mechanic position and moved Breault to a custodial position. The Union unsuccessfully grieved the matter, including Breault's desire to fill the Maintenance Mechanic position. The District terminated Breault in 2000 because he was off work for more than one year. At the time of hearing Breault and the District were in litigation over the termination.

The Grievant

The Grievant discussed the felony question on the application form with his probation officer, who recommended that he discuss the matter with the District. The Grievant approached Breault, informing him that he was on probation for "possession of marijuana." Breault advised him that Breault would take the matter to the administration. Breault did not take the application with him. Breault ultimately informed the Grievant that the District had no problem with the conviction, and that it was no one's business in the District beyond those who needed to know. Breault then asked him what he wanted Breault to do, and he responded that he wanted Breault to complete the answer to the felony question so that the Grievant would not be put in a position of lying. Breault said "I'll mark it" and did so.

On December 22, 1992, the Board of Education hired him. Prior to his hire, Kleppe interviewed him as one of the top three applicants at the District's old Board Room. He noted that he learned of the vacancy by word of mouth, which is how part-timers then were advised of full-time openings. Johnston never interviewed him. Christianson was the Business Manager at all times during his hire. At a going-away breakfast at a local café, Christianson and Kleppe noted that there had been stiff competition for the openings, and Kleppe welcomed the Grievant to the District.

Sometime in 2001, the Grievant lost an inmate ID card that he had in a briefcase. The briefcase was stolen from the Teachers' Lounge. He kept the ID card as a constant reminder that "I messed up." Johnston called the Grievant and advised him that he had received the card in an inter-departmental mail envelope.

On cross-examination, the Grievant stated that until he saw the Cook County Circuit Court documentation at hearing, he had thought his sentence rested on a charge of possession not on possession with intent to sell. He did not dispute the accuracy of the court documents. He has never discussed the felony with Johnston.

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

THE PARTIES' POSITIONS

The District's Brief

After a review of the evidence, the District contends that the Grievant had been off work for nearly fourteen months as of the date of his discharge. Under Article 24, Section 1, the District thus had just cause to terminate, since he had failed to obtain the required written leave of absence. Article 5, Section 3 underscores this conclusion.

In its letter of December 20, 2000, the District afforded the Grievant "the opportunity to present any evidence that his absence would not exceed the one-year limit." The Grievant responded with a post-dated handwritten note and a physician's protocol. Neither undermines the District's action to terminate. The protocol in fact affirms that the Grievant could not be expected to return to work within the contractual time limits. Nor will events following the District's letter support a challenge to the termination. The March 15, 2001 work release confirms that the Grievant could not perform the necessary duties of his job. The April 27, 2001 FCE supports this, as does the Grievant's physician's June 1, 2001 statement. At all points in his injury history, the Grievant has presented a "moving target" to the District.

An examination of the evidence affords reason to believe the Grievant manipulated the results of his rehabilitation documentation. The District's lengthy attempts to rehabilitate the Grievant had no effect. The District's financial position precludes "carrying" an employee who cannot perform all the duties of a position. Beyond this, the District terminated the only other custodian who took a medical leave exceeding one year, and "has no duty to continue to provide . . . light duty assignments."

Significantly, the Grievant's claim to have been injured at work on September 12, 1999, cannot be credited. Ohlfs' testimony establishes that the Grievant was injured off the job, well before his report of a workplace accident. Davis' testimony confirms this. The Grievant's brother's testimony establishes that the Grievant lied on the injury report. Significantly, none of these witnesses, unlike the Grievant, had "anything to gain by shading the truth." The falsification of the District's injury report and the WC claim constitute cause for immediate termination as a matter of common sense as well as arbitration precedent.

Nor is this the sole falsification warranting summary termination. The Grievant lied on his employment application, by checking "no" to answer whether he had been convicted of a felony. At the first day of hearing, the District learned that the Grievant had been convicted "of a felony on August 31, 1989, in Cook County, Illinois, for the possession of cannabis with intent to deliver." The Grievant's attempt to explain this lie "were incredible." The lie "was not just any lie," since the Grievant attempted to obscure that he was a convicted drug dealer, a crime of self-evident significance to the operation of a school district.

Arbitration precedent establishes that the District was well within its rights to terminate the Grievant without benefit of progressive discipline. It necessarily follows "that the Arbitrator (should) dismiss the grievance in its entirety."

The Union's Brief

After a review of the evidence, the Union argues that the District based the discharge on the assertion that it had no work within the Grievant's physical restrictions. Since the evidence establishes that it had such work available, the discharge cannot stand. The evidence establishes that the Grievant's physical restrictions had improved "as compared to those he had worked under for the previous five to six years." The 1995 FCE established notable limitations on his ability to work. In spite of this, the District returned him to full-time work as a custodian in 1995. After a back injury in 1997, the Grievant was again returned to work even though he had suffered permanent restrictions to his ability to work. He worked at the essentially the same duties from 1995 through the date of his discharge. The District's failure to inform him at any time during this period that he was at risk of termination dooms its claim to have just cause for the termination.

The remaining bases for discharge turn on allegations of a severity demanding proof beyond a reasonable doubt to support summary termination. Arbitration precedent establishes that allegations of "moral turpitude, such as dishonesty or falsification . . . generally require the criminal standard of proof."

The evidence fails to establish that the District proved that the Grievant "intended by his answers on the application to defraud or deceive the District." That the District failed to provide the complete employment application dooms its case standing alone. Among the missing pages is that containing the Grievant's signature. Beyond this, the Grievant informed his Leadman of the dilemma the application posed regarding his felony. The evidence establishes that the Grievant notified his Leadman of the conviction, who informed District administrators. Breault did not specifically advise the Grievant how to fill out the application, but he did inform the then incumbent Superintendent and Business Manager, who informed Breault that they would consider the matter. At most, this establishes that the Grievant filled out the form incorrectly, and neither attempted "to hide anything from the District" nor intentionally misrepresented his criminal background.

A detailed examination of the evidence fails to discredit either Breault's or the Grievant's testimony. Even if the Grievant falsified the application, the District did not demonstrate that it suffered any harm, and thus "discharge was too harsh and (the Grievant) should be reinstated and made whole." The evidence fails to even "suggest that (the Grievant) was a poor employee or that he was dishonest with regard to any other aspect of his employment." That Johnston was aware that the Grievant had a prison I.D. card roughly a year before the termination establishes the difficulty of concluding that the District felt the Grievant had been improperly hired.

Even assuming the evidence establishes the need for discipline, arbitration precedent requires that the reasonableness of the discipline be reviewed. The evidence establishes that discharge is too harsh a penalty. That the Grievant feared the impact of the conviction is understandable, and should not obscure that he afforded the District eight years of full-time employment "without incident."

The evidence will not establish that the Grievant falsified any injury claim. The District supplied two theories to establish he did not suffer the injury at work. It proved neither. Ohlfs' testimony is vague regarding when he observed swelling around the Grievant's knee. Beyond this, it fails to undercut the Grievant's claim to have injured the knee by stepping in a hole during work hours. Davis' testimony is even less reliable concerning the date of the injury since he claimed to have observed the Grievant limping at work when Davis was in fact at a fishing tournament. Nor is the assertion that the Grievant injured his knee during an altercation with his daughter any more credible. The testimony of the Grievant's brother is "completely incredible" and not reconcilable to reliable evidence, such as that of the

Grievant's daughter. Nor will an assessment of the "incentive to lie" support the District's views. That attributed to the Grievant is entirely speculative, but the Grievant's brother's incentive to lie to cover up his wrongful handling of their mother's financial affairs is proven.

The Union concludes that the discharge lacks just cause. As the appropriate remedy, the Grievant "must be reinstated immediately and made whole for all lost wages and benefits suffered as a result."

The District's Reply Brief

The evidence establishes that, if anything, the District "can be faulted for trying too hard to work with the grievant over the course of several years and through multiple and various injuries." The evidence indicates "that during the grievant's last two years of employment he was off work nearly as much as he was on the job." Thus, there is no support for an assertion that the Grievant worked since 1995 in the same position without warning that his employment was at risk. Rather, he "did not work at all for his last fourteen months of employment" and he learned no later than December 20, 2000, that his job was at risk.

The evidence establishes that the Grievant set a "moving target" by which he manipulated tests to establish just enough capability to work without having to perform onerous tasks. Whatever "the grievant's true physical capabilities may be" the District had a right to rely on the April, 2001 FCE, which establishes that he could not perform significant parts of his job.

Arbitration precedent will not support the Union's assertion that the basis for the discharge must be proven beyond a reasonable doubt. In any event, the evidence establishes that the Grievant falsified his employment application. Nor is his intent relevant. Even if it is, his deliberate checking of a "no" response to a question regarding prior felony convictions establishes all that is necessary for just cause.

A detailed review of the testimony affords no support for the Union's defense. The Grievant's testimony regarding the employment application is incredible and stands in marked contrast to Johnston's. Breault's testimony, even if credited, fails to reliably demonstrate that the District administration knew anything regarding the conviction. Nor does arbitration precedent require the District to prove harm from the falsification. Johnston attempted, without success, to determine why the Grievant had a prison I.D. card. The Grievant afforded no assistance on the point.

The evidence establishes that "discharge is not too harsh." Rather, it "is the appropriate penalty."

The Union's Reply Brief

The District cannot credibly assert that the Article 24 supports the discharge, since it failed to make this claim at the time of the discharge. Even if the claim can be considered, it lacks merit. The Grievant never anticipated being off work as long as he was. Thus, he was under no obligation to supply the District the written notice the District claims was untimely filed. The contention masks that the District had no evident basis to issue the December 20, 2000, letter, and that the letter itself misstates the requirements of Article 24.

To the extent the District lacked faith in the Grievant's physician's statement releasing him to work without restriction, it failed to demonstrate its faith had a factual basis. It refused to let him return to work, placing him on administrative leave. In any event, the termination letter fully states the basis for discharge, and the stated basis does not include Article 24, Section 1. To conclude otherwise violates fundamental concepts of due process.

The District's assertion that the April 27, 2001 FCE establishes that the Grievant could not perform his job is false. At most the FCE establishes a minimal difference "between (the Grievant's) ability and the stated job demand." No other documentation supports District claims that the Grievant could not perform effectively as a full-time employee. The assertion that the District permitted the Grievant to work "for four to five years with the thought that he would eventually recover and be able to return to his regular job is disingenuous." In fact, the Grievant was in better condition in April of 2001 than he had been in years.

It follows that the discharge is "without just cause." The Grievant "must be reinstated immediately and made whole."

DISCUSSION

The issue on the merit of the grievance is stipulated, but requires some discussion. It presumes the termination is disciplinary, while the operation of Article 24, Section 1 arguably is not.

As the Union points out, Article 24, Section 1 does not, standing alone, support the discharge. The section is procedural, and the evidence does not establish that the District demanded strict compliance with it. The District acknowledged granting the Grievant a leave in Johnston's letter of May 18, 2000. His letter of December 20 cites Article 24, Section 1, but does not demand strict compliance with it. Rather, it affords the Grievant an opportunity to comply within "seven calendar days". In any event, the final sentence of Article 24, Section 1 does not in itself extinguish seniority. Rather, it highlights the operation of Article 5, Section 3(a). Under that section the Grievant "forfeited" his seniority if he was absent "for more than one year" and "did not secure a leave of absence." Johnston's

December 20, 2000 letter establishes that the District did not extend the leave beyond one year. The letters of January 16 and February 23, 2001 underscore this, whether or not they demand strict compliance with Article 24, Section 1. The decision not to grant a leave beyond one year terminated the Grievant's seniority under Article 5, Section 3(a). The reasonableness of that decision is source of the dispute. On this record, the plainly disciplinary assertion that the Grievant misrepresented the cause of his knee injury and the existence of his felony record is indistinguishable from the decision to deny a leave exceeding one year. Thus, the discussion below follows the stipulated issue and treats each basis for the termination as discipline.

In my opinion, when the parties do not stipulate the standards defining just cause, two elements define it. First, the employer must establish conduct by the Grievant in which it has a disciplinary interest. Second, the employer must establish that the discipline imposed reasonably reflects its interest.

The procedural background is somewhat tortuous, but the District asserts three areas of conduct in which it has a disciplinary interest. As noted above, two are plainly disciplinary as stated in Wold's November 7, 2001 letter. The first is that the Grievant misrepresented fact on his employment application. The second is that he misrepresented the cause of his knee injury. As noted above, the third is less plainly disciplinary, and traces from Johnston's letters of May 18 and December 20, 2000 through the termination letter. It is that the Grievant was absent for work beyond one year without an approved leave of absence.

That the District has a disciplinary interest in a truthful response from the Grievant regarding his felony record demands little discussion. The District has an interest in the Grievant's conviction for possessing, with the intent to deliver, a significant amount of drugs, if only to consider its impact on its policies and on its students. Beyond this, the District has a disciplinary interest in employee misrepresentation of fact.

The evidence establishes that the Grievant misrepresented fact on the employment application. The Grievant's and Breault's testimony together form the defense to the District's allegations. That testimony does not stand in the absence of refutation and is not reconcilable to established fact.

Their accounts fail to establish an internally consistent account of the application process. Breault's account leaves the application, perhaps completed, perhaps not, in either Christianson's or Kleppe's hands. The Grievant's account leaves the application in the Grievant's hands, with the felony question unanswered until after Breault's consultation with the administration, when Breault completed it.

The incompatibility of these accounts on this point is compelling. Under the Grievant's view, he did not answer the felony question to avoid lying and its complications. Breault's testimony does not support this and manifests the same reluctance to assume responsibility for

the misrepresentation. This shared unwillingness to state personal responsibility for completing the form establishes that they understood the fraudulent nature of the act. It undermines the credibility of their accounts, and magnifies the significance of other conflicts. For example, the Grievant testified that Breault participated in the interview process. This is consistent with Johnston's recall, but not Breault's.

Beyond this, the accounts fail to establish a plausible explanation of why the form was filled out with a "No" response to the felony question. Breault's account implies the form was filled out by one or both of the departing administrators. It affords no insight on why they would do so. Its claim to plausibility is that they discussed the Grievant's work and agreed the conviction should not stand in the way of his hire. Assuming they were willing to hire the Grievant in spite of the conviction, why would they misrepresent fact to do so? The Grievant's account affords no greater insight. Under either view, the administrators effectively authorized a fraudulent statement of fact to permit the Grievant an interview. Why the administrators would authorize the misrepresentation of fact to permit an interview is troublesome, for it assumes the existence of other applicants. Presumably, need for applicants does not account for the misrepresentation. Principle is no better an explanation. Why would the "principled" administrators authorize a lie, then pass on the risk of the lie? It is of some significance that both Breault's and the Grievant's accounts assert that the Grievant never addressed the matter with the administrators who actively advanced his interests. Each thus fails to account for how the "conspirators" developed the bond that warranted misrepresenting fact.

In sum, without regard to conflicting evidence, Breault's and the Grievant's accounts establish their active involvement in an effort to misrepresent material fact on the Grievant's application.

Other evidence establishes the incredibility of their accounts. It is undisputed that the Board hired the Grievant in late December of 1992. The Grievant's account has the hiring process wired at least in part by a Business Manager who left the District in October of 1992. It denies any role to Johnston, who supplied, in mid-December, the written recommendation that the Board acted on. Johnston's account is reconcilable to the documentary evidence, including the date of the application form. The Grievant's and Breault's are not.

Other bases cited by the parties to guide the determination of the credibility of witness testimony do not offer meaningful assistance. The District points to Breault's history of difficulties with it. Without determining the merit of that conflict, it is unpersuasive to conclude anything other than the District and Breault had differences. The record in this case affords no basis for anything beyond speculation on the merit of the conflict.

The District's inability to supply the complete application form has no determinative bearing on this issue. The Grievant does not dispute that he signed the form, or that it contained a material misrepresentation of fact. Rather, he disputes his responsibility for it. Standard indicators of credibility such as the demeanor of witnesses underscore the conclusions reached above.

In sum, the record establishes that the Grievant, at a minimum, engineered the misrepresentation of fact on his employment application. In my opinion, whether Breault or the Grievant completed the form is inconsequential. His active and causal role establishes the existence of conduct in which the District has a disciplinary interest.

The evidence on the second basis for the discharge is sufficiently troubling that the District acknowledges it is probably impossible to determine when and how the Grievant injured his knee. There is no evident basis to discredit Ohlfs' testimony, and sound reason to credit it. He has no evident interest to lie, and no evident malice toward the Grievant. The lack of detail in his testimony does not undercut his credibility. However, he did wait a considerable time to come forward. In any event, his testimony affords little clarity on when the injury occurred. Was the Grievant obviously limping around the District for a month waiting for a chance to fake an injury? Davis' testimony affords some corroboration to Ohlfs, but affords no more clarity on when the injury occurred. Beyond this, Davis testified that he observed swelling in the Grievant's knee during a period of time he later acknowledged he was absent from the District. Spinks' testimony complicates this milieu. Spinks had difficulty dating the conversations during which he alleges his brother informed him of his intent to lie about stepping into a hole. His testimony puts the conversations well past the date the Grievant made the injury report with the District, which undercuts his assertion that the Grievant spoke to him prior to making a bogus claim. However, the Grievant did file a WC injury report in late October which is consistent with Spinks' recall of the timing of the conversations. Canfield's testimony arguably corroborates Spinks' by establishing the incident that gave rise to the conversations that led to the Grievant's admissions. However, it undercuts the account to the extent she is credited, since she denies her mother would speak to Spinks. Beyond this, it clouds the attempt to isolate the time of injury, since the District implies the knee injury may have occurred at that point. These complications are a pale reflection of the difficulty of sorting out the conflicting interests of the Grievant and his brothers.

The Grievant's testimony affords little greater insight. The accident occurred on a Sunday when the Grievant was working alone. It is difficult to understand why he chose that Sunday to remove the chairs, why he chose his path to the dumpster, or how on a sunny morning he could not see a one foot wide and one foot deep hole.

On balance, the record is sufficiently opaque that reliable conclusions are difficult, if possible, regarding when and how he injured his knee. This conclusion makes it arguably impossible to conclude that the District has proven that he misrepresented the source of the injury. The "arguably" reflects that definitive conclusions on this point are not necessary to evaluate the District's discharge decision. The record developed concerning the reporting and treatment of the injury has a direct and significant bearing on the final asserted basis for the discharge, and this precludes the need to make a definitive conclusion on when or how the Grievant injured his knee. For purposes of this record, this means the District has not proven that the Grievant misrepresented the source of the injury.

As touched upon above, the third reason for the discharge turns on the reasonableness of the District's decision not to extend the Grievant's leave beyond one year. Whether or not the Grievant misrepresented the cause of his knee injury, his conduct during the leave bears directly on this reason. Johnston testified that the Grievant presented a "moving target" regarding the reporting and treatment of the knee injury.

The record supports Johnston's view. The point is subtle, but significant. The determination of a lie poses a vexing point. This is true on many levels, including when a fixed "truth" is definable. For example, the Grievant's back injury either does or does not cause him sufficient pain to limit his activities. Only the Grievant can know this. His testimony is evidence, or an assertion of the truth. Other evidence can exist such as Spinks' statement that the Grievant admitted he held back on the test to avoid strenuous assignments. The determination of which account to credit, and thus take for "true" is one level of difficulty even when a fixed "truth" is at issue. Another level of difficulty is that perception inevitably colors "truth." For example, the Grievant, perceiving past back pain could hold back on a test due to perceived symptoms of the past pain. If this perception is inaccurate in the sense that he could have performed the test without re-injury, his testimony would be "true" in the sense that he stated an honest perception, but "not true" in the sense that the perception does not correspond to physical reality.

The record in this case poses both levels of difficulty and more. Davis stated that he thought the Grievant tried to rehabilitate. Davis also stated that the Grievant lied about the cause of the knee injury. Johnston's point on the "moving target" nature of the Grievant's conduct is subtle in the sense that it does not turn on whether the Grievant "lied" in the "misrepresentation of known fact" sense. Rather, it asserts that whether based on misrepresentation or perception, the Grievant's conduct during and after the knee injury is uncooperative and unhelpful. This is a significant point regarding the provision of a leave beyond one year. Article 24, Section 1 need not demand the automatic extinguishment of the Grievant's seniority to put his employment at risk, since it and Article 5, Section 3 demand that the District authorize leave beyond one year to permit the Grievant to keep his

employment status. It is unnecessary to determine whether the Grievant "lied" in the "misrepresentated fact" sense to conclude his conduct did not warrant the extension of a leave.

The evidence establishes a manipulative and unhelpful course of conduct from the Grievant. This is true from the time of his application for employment. Crediting his account establishes that he approached Breault, the most likely District employee of influence who could be expected to be sympathetic. He informed Breault that he was on probation for the drug related offense of "possession." The Grievant's assertion that he was unaware that the offense was possession with intent to deliver is not credible. Even if he was not aware of the charge as a technical matter, he was aware of the offense and it is apparent he said no more than necessary to secure Breault's involvement. His assertion that he did not complete the form, but let Breault complete the answer to the felony question is similarly remarkable. Whether or not the account is true, it sets a tone underlying the Grievant's conduct and testimony. His responses were calculated, and became detailed to the degree necessary to achieve a desired result or to respond to specific, contrary fact.

This pattern is evident throughout the course of the knee injury. In testimony, the Grievant asserted he was able to work a full-duty eight hour shift during the work hardening effort of November and December of 1999. He similarly asserted he worked essentially as before the injury after the January 2000 FCE. This underscores his general contention that his work effort was consistently high without assistance from the District and was diminished only by pain. This supports his post-termination desire to prove fitness for work. However, it offers little insight on why he terminated the 1999 work hardening program, or went off work in March of 2000. It is not reconcilable to Davis' perception of his work performance and has no persuasive support in the documentary evidence of the injury and rehabilitation. Nor is his testimony internally consistent on details. On direct examination, he generally asserted that he neither required nor received light duty except in rare response to a direct order from a physician. However, when pressed on specifics on cross-examination, he acknowledged that he was unable to vacuum as a repetitive activity, perform tasks that involved deep bending or stooping, or shovel anything heavier than a "medium" snowfall. This reflects a consistent tendency in his testimony to make a general assertion, then back away from it as required when confronted with specific evidence.

This tendency is manifested in his conduct to secure a leave beyond one year. Johnston's December 20, 2000 letter notified him that his employment was in jeopardy, but allowed him to respond. The Grievant responded by supplying the handwritten note dated October 24, 2000, and a form stating a general rehabilitation protocol. The Grievant's assertion that he supplied the District this note prior to receipt of Johnston's letter is incredible, since it responds to Johnston's citation of Article 24, Section 1.

Even if the assertion is credited, the note and the document supplied with it are significant for how little they offer. The handwritten note does not seek a leave, and the documentation says nothing of his condition. Article 24, Section 1 demands "written documentation of inability to work and expected date of return" for injury based absences of "up to sixty (60) days." It further demands a "written leave of absence from the Employer" by the eighth month of an absence, and documentation "of inability to perform duties" as well as an explanation of why an injured employee "cannot reasonably be expected to return to work." The Grievant's response falls far short of the detail demanded, and thus manifests a continuing pattern of offering only sufficient detail to secure a personally desired result.

Johnston emphasized his intention to terminate the leave at one year in a letter of January 16, 2001. The Grievant supplied a report of workability dated January 25, 2001, that noted he needed crutches and should not work through March 15. In late February, Johnston confirmed that the one-year leave would end March 23. On March 15, the Grievant supplied a work release. His testimony acknowledges he was, at best, sufficiently healed to try to work. More to the point, his response underscores the pattern noted above. When forced, he acted to the degree necessary to secure a desired result. His testimony asserts that he was progressing steadily through rehabilitation and had no idea it would take more than one year. The absence of unprompted documentation of this effort is noteworthy. His conduct affords no reason to believe he would have responded at all absent Johnston's prompting.

Against this background, Johnston's conclusion that the Grievant afforded a "moving target" is reasonable, whether or not the Grievant misrepresented the cause of any specific injury. As a factual matter, the District has never afforded a leave exceeding one year. It has required other employees to successfully complete work hardening. As a contractual matter, Article 24, Section 1 and Article 5, Section 3 establish that extending a leave of absence beyond one year is a significant act of discretion. The Grievant's injury history is significant, and his attempt to document his rehabilitation effort is fitful at best. Nothing in the evidence establishes that the Grievant, through his work record prior to the knee injury or through his rehabilitation effort earned the exercise of discretion from the District that he asserts as his right in this proceeding. The District has undergone a partial layoff at its high school. Its conclusion that it could not afford to carry the Grievant beyond one year cannot be dismissed as unreasonable under any view of the facts.

That the Grievant secured a work release prior to the completion of the one year period does not alter this conclusion. Johnston's skepticism regarding the release is reasonable, and the Grievant's testimony acknowledges that his healing was incomplete. The final FCE at best establishes that he was capable of work hardening after the one year leave expired.

In sum, the District has a proven disciplinary interest in the first and third asserted bases for the discharge. The analysis thus turns to whether discharge reasonably reflects this proven interest.

The two asserted bases of discharge are similar in the sense that they turn on a pattern of manipulation, if not misrepresentation, of fact. The misrepresentation of fact on the employment application is, in my view, egregious. The felony is for conduct directly bearing on the provision of educational services. That a school district has a significant interest in assessing the significance of a conviction for possession of drugs with the intent to deliver for an employee assigned or assignable to a school facility demands, in my view, no proof of actual harm. This is not to say the District could not choose to hire the Grievant, knowing his record. Rather, it underscores the need to know and the egregious nature of the Grievant's conduct in masking the fact. The conviction could have served as a basis to make the hire, if the District concluded it made no difference or served to set an appropriate example. The Grievant chose not to risk that possibility. Under Article 9, Section 2, the progressive discipline procedure "need not be followed in cases of serious misconduct." Misrepresentation of an application form is conduct that cannot be corrected in the sense of Article 9, Section 2. Standing alone, the misconduct arguably warrants discharge.

The conduct does not, however, stand alone. Even if the Grievant did not misrepresent the source of the knee injury, his conduct reflects no more than an effort to manipulate the leave of absence process. He took no unprompted effort to secure the written leave required for an absence exceeding one year. When prompted, he first responded with documentation that does not meet the demands of Article 24, Section 1. When again prompted as the one year period ended, the Grievant responded with a general release of debatable worth. The District was under no contractual or factual compulsion to grant the Grievant a leave exceeding one year. The evidence establishes that its conclusion that the Grievant presented them a "moving target" regarding his injuries was reasonable, as was its conclusion that it could not afford to carry the Grievant beyond one year. Against this background, the discharge determination was reasonable and thus consistent with Article 5, Section 3 and Article 9, Sections 1 and 2.

Before closing, it is appropriate tie this conclusion more closely to the Union's arguments. Those arguments have persuasive force. The strength of the Union's case is that the District, contrary to the assertions of the May 9, 2001 discharge letter, had work within the Grievant's restrictions. The May 2, 2001 FCE appears an improvement over that of January 26, 2000, which appears an improvement over the 1995 FCE. Johnston's raising of the weight limitation for the May 2, 2001 FCE over that stated in the job description supports the assertion that the District wanted the final FCE to justify an already made decision to terminate rather than to evaluate the Grievant's ability to perform his job.

The difficulty with the Union's argument is that it ignores events following the letter of termination, which are significant under the stipulation to address all of the asserted bases for the discharge. It is evident that Johnston doubted the Grievant's sincerity well before evidence surfaced of the Grievant's falsification of his employment application or of possible misrepresentation of the cause of the knee injury. The termination letter turned solely on the District's attempt to enforce a one year limit to the leave of absence. The more plainly disciplinary bases for the discharge emerged after this.

More to the point, Article 24, Section 1 and Article 5, Section 3(a) establish that the provision of a leave beyond one year is a contractually significant exercise of discretion. The strength of the Union's argument is eroded by the Grievant's conduct. The difficulty of determining the cause of the Grievant's knee injury cannot obscure that his conduct regarding the employment application and his conduct to secure a leave beyond one year are marred by an evident effort to manipulate and to misrepresent fact. Work within the Grievant's restrictions outside of a one year leave is not a matter of right. The District's actions were reasonable and thus authorized by Articles 5 and 9.

AWARD

The District did have just cause to terminate the Grievant.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 8th day of July, 2002.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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