BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHAWANO-GRESHAM EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION

and

SHAWANO-GRESHAM SCHOOL DISTRICT

Case 24
No. 61271
MA-11876

(Paul White Termination Grievance)

Appearances:

Mr. David A. Campshure, UniServ Director, Northeast United Educators, on behalf of the Shawano-Gresham Educational Support Personnel Association.

Davis & Kuelthau, S.C., Attorneys at Law, by **Mr. Dennis W. Rader**, on behalf of the Shawano-Gresham School District.

ARBITRATION AWARD

The Shawano-Gresham Educational Support Personnel Association, hereinafter the Association, and the Shawano-Gresham School District, hereinafter the District, jointly requested that the Wisconsin Employment Relations Commission appoint David E. Shaw, a staff arbitrator, to hear and decide the instant dispute in accord with the grievance and arbitration procedures contained in the parties' labor agreement. The undersigned was designated to arbitrate in the dispute and a hearing was held before the undersigned in Shawano, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by September 24, 2002. 1/

1/ By letter of September 17, 2002, the Association requested to reopen the hearing to submit additional evidence, which was opposed by the District. The request was denied.

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

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 decision.

ISSUES

The parties were unable to agree on a statement of the issues and stipulated that the Arbitrator will frame the issue to be decided within the parameters of the parties' respective statements of the issues.

The District would state the issue as being:

> Was Paul White properly terminated from employment with the Shawano-Gresham School District in accordance with 10.06 and 14.09 of the Collective Bargaining Agreement when he failed to report for work at the end of an approved leave of absence and failed to provide requested information regarding his employment status?

The Association would state the issues as follows:

> Did the School District have just cause to discharge the grievant, Paul White? If not, what is the appropriate remedy?

The Arbitrator concludes that the issues to be decided are as follows:

> Did the District violate the parties' Collective Bargaining Agreement when it terminated the Grievant, Paul White, from employment? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The provisions of the parties' Agreement cited by the parties are, in relevant part, as follows:

ARTICLE I – AGREEMENT

Section 1.01: This Agreement is entered into by and between the Shawano-Gresham School District, hereinafter referred to as the "Board," and the Shawano-Gresham Educational Support Personnel Association hereinafter referred to as "Association." The purpose of this document is to record the complete and full agreement between the Board and Association on wages, hours and conditions of employment.

. . .

ARTICLE III – MANAGEMENT RIGHTS

Section 3.01: Management retains all rights of possession, care of, control of, and management of the District that it has by law, and retains the right to exercise these functions except to the precise extent such functions and rights are restricted by the express terms of this Agreement. These rights include, but are not limited by enumeration to, the following rights:

. . .

4. To suspend, discharge and take other disciplinary action towards employees: for just cause;

. . .

7. To take whatever action is necessary to comply with State or Federal law;

. . .

ARTICLE VII – PROGRESSIVE DISCIPLINE PROCEDURE

Section 7.01: The District shall utilize progressive discipline in dealing with the nonprobationary employees, except when the alleged conduct giving rise to the disciplinary action warrants a stronger penalty. Progressive disciplinary action is defined as the following:

(1) Oral reprimand (with the option of inserting a statement outlining the oral reprimand into the employee's personnel file)

(2) Written reprimand

(3) Suspension (either paid or unpaid)

(4) Discharge

. . .

Section 7.03: No non-probationary employee shall be suspended, discharged or otherwise disciplined without just cause. Any such action asserted by the District or any agent or representative thereof shall be subject to the grievance procedure of the Agreement.

. . .

ARTICLE IX – GRIEVANCE PROCEDURE

9.01 Purpose: The purpose of this procedure is to provide an orderly method for resolving differences arising during the term of this agreement. A determined effort shall be made to settle any such differences through the use of the grievance procedure, and there shall be no suspension of work or interference with the operations during the term of the agreement.

. . .

9.08 Binding Arbitration.

9.08.1 Procedure. In order to process a grievance to Binding Arbitration, the following must be complied with:

1. Written notice of a request for such arbitration shall be given to the Board within ten (10) days of receipt of the Board's last answer.

2. The matter must have been processed through the grievance procedure within the prescribed time limits.

3. The issue must involve the interpretation or application of a specific provision of this agreement.

. . .

9.08.4 Duty of Arbitrator. The arbitrator shall meet with the representative of both parties, hear evidence and give an opinion within thirty (30 days of the closing of the hearing). 2/

2/ The parties agreed to waive this provision.

9.08.5 Decision of the Arbitrator. The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to the interpretation of the contract in the area where the alleged breach occurred. The arbitrator shall not modify, add to or delete from the express terms of the Agreement.

. . .

ARTICLE X- SENIORITY

10.01 Seniority shall be defined as the continuous and uninterrupted length of service within the District as measured from the last date of hire. Accumulation of seniority shall begin from the employee's first working day since the last date of hire. A paid holiday shall be counted as the first working day in applicable situations. In the event that more than one individual employee has the same starting date of work, position on the seniority list shall be determined by drawing lots.

. . .

10.06 Loss of Seniority. Previously accrued seniority shall be lost if an employee:

1. Quits.

2. Is discharged;

. . .

5. Fails to report for work at the termination of an approved leave of absence.

. . .

ARTICLE XIV – MISCELLANEOUS WORKING CONDITIONS

Section 14.09: The employment relationship shall be terminated if an employee (1) voluntarily quits; (2) is discharged; (3) fails to report for work at the end of an approved leave of absence; (4) is retired; (5) exhausts all recall rights; or (6) fails to report to work within five calendar days, excluding Saturdays, Sundays and holidays, after having been recalled from layoff unless employed elsewhere and subject to termination notice restrictions under another employer.

Section 14.09.1: Employees who absent themselves from work without notification to or approval by the District may subject themselves to discipline up to and including discharge.

. . .

ARTICLE XVII – SICK LEAVE

Section 17.01: Employees will accumulate sick leave according to the following schedule:

Employee Category	No. of Sick Leave Days/Years Accumulated One (1) Per Month of Employment	Maximum Accumulation
1820+ hour employees	12	95
school year employees (720 or more hours per year)	10	95

Sick leave will be kept in hours based on the employee's normal workday.

All employees must report for work, while recouping from accident or injury if appropriate work is provided for the employee. All employees absent from work due to an accident or injury are to have their doctor provide a description of their injury, the prescribed treatment, and what the employee can do.

Section 17.02: Employees who are absent from work for three (3) or more consecutive work days may be required to submit a physician's certificate of illness to the District Administrator before returning to work.

Section 17.03: With the approval of the employee's health care provider, employees may be required to report for work while recuperating from an accident or injury if appropriate work is provided for the employee.

. . .

ARTICLE XVIII – OTHER LEAVE

. . .

Section 18.07: All leave requests under this Article are subject to verification.

Section 18.08: Family Medical Leave Act – The District agrees to pay all leave benefits under Wisconsin Family Medical Leave Act, Section 103.10 Wis. Stats., as it may be amended from time to time. The benefits provided in this contract shall run concurrently with any required leave under Section 103.10 Wis. Stats. It shall be the obligation of the District to notify employees each time such leave benefits provided under this contract run concurrently with leave under Section 103.10 Wis. Stats. Nothing in this paragraph shall be interpreted to increase or decrease an employee's statutory leave rights.

Section 18.09: Unpaid Leaves: Application –- Employees who wish to absent themselves from employment must make application for a non-paid leave of absence from the Employer.

> Section 18.09.1: All requests for an unpaid leave of absence shall be made in writing at least ten (10) work days prior to the start thereof. In the event of extenuating circumstances, the ten (10) day notice may be waived at the discretion of the District Administrator/designee. The request must state the specific reasons and length of time requested for such leave.
>
> Section 18.09.2: The granting of unpaid leave of absence, the length of time for such leave, and the number of employees taking such leave shall be solely within the discretion of the District Administrator/designee.

> Section 18.09.3: Abuse or fraudulent use of any of the various leave provisions of this Agreement shall result in loss of pay, suspension without pay, or discharge, for proper cause. Employees must receive prior approval of the District Administrator before absenting themselves from work.

BACKGROUND

The Grievant, Paul White, had been employed by the District as a custodian for 16 years with a clean work record.

On August 17, 2001, the Grievant was in a non-work related auto accident resulting in head and neck injuries. The Grievant was off work on paid leave (sick leave and vacation) from August 20 through September 25, 2001. From September 26 through December 20, 2001, the Grievant was off work on unpaid leave under the Family Medical Leave Act (FMLA).

The Grievant submitted slips from his regular physician, Dr. Thatcher, dated August 20, 2001, August 27, 2001, September 5, 2001, September 17, 2001, September 28, 2001, October 12, 2001, October 26, 2001 and November 9, 2001. On those slips, Dr. Thatcher indicated that the Grievant "Should remain off work . . . due to injury." Each slip covered an indicated time period that varied from 7 days up to 14 days.

On October 8, 2001, the District sent the Grievant a letter which read, in relevant part, as follows:

> Dear Paul,
>
> This letter is to explain your employment status and your eligibility for any unpaid leave.
>
> Your paid vacation and Sick Leave ran out on September 25, 2001. According to the Family Medical Leave Act regulations, you can request up to twelve weeks of Unpaid Family Medical Leave Act. You need to request this leave in writing using the enclosed form.
>
> If you want to continue your health insurance, you will need to pay the same rate as if you were employed on a full time basis. Your currently monthly cost is $52.38.

If you have any questions or concerns, please contact me at 715-526-3194 Ext. 4005.

Sincerely,

Gail M. Moesch
Business Manager

On October 9, 2001, Moesch sent the Grievant a letter which read, in relevant part, as follows:

Dear Paul,

According to your last Doctor's statement, you should remain off work until October 12, 2001.

When you have your next appointment and thereafter until you can return to work, please have your doctor complete the "Attending Physicians Return to Work Recommendations Record". If you are able to work with restrictions, we need to know those so we can make the proper accommodations.

If you have any questions or concerns, please contact me at 715-526-3194 Ext. 4005.

Sincerely,

Gail M. Moesch
Business Manager

The Grievant submitted an "Attending Physicians Return to Work Recommendations Record" from Dr. Thatcher dated October 12, 2001, on which Dr. Thatcher indicated that the Grievant was "totally incapacitated at this time", indicating the Grievant's medical condition as "neck strain", and that the restrictions remained in effect until he was reevaluated on October 26, 2001.

The Grievant submitted FMLA leave request forms on October 12, 2001 (requesting FMLA leave from September 26 until October 29, 2001), November 9, 2001 (requesting FMLA leave from November 9 until November 16, 2001), November 20, 2001 (requesting FMLA leave from November 26 until December 4, 2001), and December 12, 2001 (requesting FMLA leave from December 5 until December 20, 2001).

On November 14, 2001, the Grievant was seen by a specialist, Dr. Wilson, and a form dated November 14, 2001 was submitted to the District from Dr. Wilson's office which indicated the Grievant had left shoulder myofascial pain, headaches and neck pain and was unable to work until December 3, 2001 due to "loss of grip strength." The form also indicated the Grievant was to have an MRI done on his left shoulder, that the doctor would then review the MRI, do a "phone consult" and see the Grievant again on December 19, 2001.

On December 5, 2001, Dr. Wilson's office faxed the District a form dated December 5, 2001 with the box marked which indicated the Grievant "May Return To Work With Restrictions" and listing that date as December 10, 2001. The form indicated the Grievant "May lift up to 10 pounds" and "May push/pull up to 10 pounds." The Grievant testified that he was not provided with a copy of the form that was faxed to the District and that it was his understanding based on a phone conversation with someone at Dr. Wilson's office on December 7th, that he was to be off through December 10, 2001, and return with restrictions on December 11th.

The Grievant did not return to work on December 10th. According to the Grievant, on December 10, 2001, he called Dr. Thatcher and indicated his unhappiness with Dr. Wilson and asked that Dr. Thatcher arrange to have him seen by another specialist. The Grievant also testified that Dr. Thatcher told him he should not return to work until he was seen by another specialist. Dr. Thatcher's office faxed the District a slip, dated December 11, 2001, and signed by Dr. Thatcher, which indicated the Grievant "Should remain off work through 12/18/01 due to injury." The Grievant testified that Dr. Thatcher advised him that the slip would be faxed to the District. On December 11, 2001, the District's Superintendent, Richard Hess, sent the Grievant a certified letter which read, in relevant part, as follows:

> Dear Paul:
>
> The District received a fax from your doctor indicating that you were to return to work on Monday, December 10, 2001. As of today's date, you have not returned to work nor have you informed the District of your employment plans.
>
> Per the Shawano-Gresham Educational Personnel Support Contract, Article XIV – Miscellaneous Working Conditions, it states in Section 14.09 – The employment relationship shall be terminated if an employee (3) fails to report to work at the end of an approved leave of absence. If we do not hear from you by Monday, December 17, 2001 regarding your employment status with the Shawano-Gresham School District, you will be terminated for failing to report to work.

Sincerely,

Richard Hess /s/
Richard Hess, Ph.D.

The Grievant's mailing address is a post office box in Cecil, Wisconsin. The Grievant picked up the letter from Hess on December 12, 2001.

On December 12, 2001, the Grievant also came to the District's offices to fill out an FMLA leave request form requesting FMLA leave from December 5 through December 19, 2001 with a return date of December 20, 2001.

On or about December 14, 2001, the Grievant had a telephone conversation with Hess regarding Hess' December 11th letter, during which Hess reminded him that he needed to keep his slips from his doctor up to date. Hess did not state during the conversation that the Grievant would be terminated if he did not submit the slips from his doctor on time.

On December 17, 2001, Dr. Thatcher's office faxed the District a slip from Dr. Thatcher stating that the Grievant "Should remain off work 12/17 – 1/2/02 due to injury." The Grievant had not actually been seen by Dr. Thatcher since early November of 2001.

On December 18, 2001, Moesch sent the Grievant a certified letter which read, in relevant part, as follows:

> Dear Paul,
>
> The last day that you worked for the Shawano-Gresham School District was August 17, 2001. From August 20 thru September 10, 2001 you were on paid sick leave. From September 11 thru September 25, 2001 you were on paid vacation. From September 26, 2001 thru December 20, 2001 you were on unpaid Federal Family Medical Leave Act (FMLA). As of that date you have exhausted all of your available paid or unpaid leave.
>
> By December 26, 2001, we need to receive a doctor's statement indicating the nature of your injury, when you are expected to be fully healed or if there are any long-term complications.
>
> If you have any questions, please contact me.

Sincerely,

Gail Moesch /s/
Gail M. Moesch
Business Manager

Moesch drove to Cecil over the noon hour and mailed the letter at the Cecil post office on December 18th.

According to the Grievant, on or about December 18, 2001, Dr. Thatcher called the Grievant and informed him that he had an appointment with a specialist on January 2, 2002, and that Dr. Thatcher would notify the District that he should be off through January 2, 2002. The Grievant received a copy of the December 17th slip in the mail on or about December 18th, that Dr. Thatcher's office had faxed to the District.

On December 24, 2001, someone the Association asserts was the Grievant's girlfriend picked up the December 18th certified letter from Moesch to the Grievant. The Grievant testified that this did not mean he had not picked up his mail in the meantime, just not that letter. The Grievant testified he assumed that Dr. Thatcher had already informed the District that he was to be off work through January 2nd, and that he (the Grievant) could not have informed the District of anything more until after he saw the specialist on January 2nd. The Grievant did not contact the District after he received the December 18th letter from Moesch until January 3, 2002, when he reported for work.

On December 27, 2001, Moesch sent the Grievant a certified letter which read, in relevant part, as follows:

Dear Paul,

> On December 18, 2001, I sent you a letter stating, "By December 26, 2001, we need to receive a doctor's statement indicating the nature of your injury, when you expect to be fully healed or if there are any long-term complications."
>
> Since you failed to respond, your employment with the Shawano-Gresham School District will be terminated today, December 27, 2001.
>
> Sincerely,
>
> Gail M. Moesch
> Business Manager

The Grievant picked up the certified letter on January 9, 2002.

The Grievant saw a specialist, Dr. Robinson, on the afternoon of January 2, 2002. Dr. Robinson completed a "Practitioner's Return To Work Recommendations Record" form on January 2nd on which he indicated the Grievant was able to return to work on that date with the following restrictions indicated:

> [X] **Sedentary work**. Lifting 10 pounds maximum and occasionally lifting and/or carrying such articles as dockets, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required only occasionally and other sedentary criteria are met.

The restrictions were to remain in effect until January 9, 2002, or until the Grievant was reevaluated in 7-10 days.

The Grievant reported to the District for work on January 3, 2002 and was informed he had been terminated. The termination was subsequently grieved and the grievance was processed through the steps of the parties' contractual grievance procedure. The parties were unable to resolve the matter and proceeded to arbitration of their dispute before the undersigned.

POSITIONS OF THE PARTIES

District

The District takes the position that its termination of the Grievant was consistent with the terms of the parties' Agreement. In that regard, it asserts that this case involves the interpretation of the Agreement, viewed within the context of the State and Federal Family Medical Leave Act and the Americans With Disabilities Act.

The District first asserts that the Arbitrator should give meaning to the clear and unambiguous language of the Agreement and that the clear, specific terms of the Agreement are controlling. The District cites arbitral precedent for the principle that an agreement should be interpreted in a fashion that gives meaning and effect to all of its terms. The primary rule in construing a written contract is to determine not alone from a single word or a phrase, but from the contract as a whole, the true intent of the parties and to interpret the meaning of a question, word or part with regard to the connection in which it is used, the subject matter, and its relation to all the parts or provisions. If alternative interpretations of the clause are

possible, one of which would give meaning and effect to another provision of the agreement, while another would render the other provision meaningless or ineffective, the former interpretation which would give effect to all provisions should be used. An arbitrator is bound to the specific language of the agreement when the words are clear and not ambiguous. It is only when the specific general language fails to be clear, that an arbitrator can delve into such areas as bargaining history to ascertain the intent of the parties. LAWNLITE CO., 69 LA 238 (1977).

Here, the clear and specific contractual language defines "cause" in the very circumstances in this case, and justifies the Grievant's termination. Section 14.09 of the Agreement states:

"The employment relationship shall be terminated if an employee . . .

(3) fails to report for work at the end of an approved leave of absence; . . ."

(Emphasis added).

The Grievant was informed by Dr. Hess' letter of December 11, 2001, that if he failed to report or contact the District by December 17th, 2001, under the terms of the contract he would be terminated. The Grievant both failed to report and failed to contact the District regarding his status. Given the rules of contract construction set forth above, the Arbitrator should find that the District followed the clear, unambiguous and specific terms of the Agreement in terminating the Grievant. Thus, it is inappropriate to look beyond the contract to past practice, or to interpret the Agreement so as to alter or render meaningless Section 14.09.

Next, the District asserts that Secs. 10.06 and 14.09 of the Agreement define "cause" within the context of these circumstances. Under the exact circumstances in this case, Sec. 14.09 does not require any other warning or progressive discipline prior to termination. The parties' intent is also manifested in the clear language of Section 10.06, which states that "Previously accrued seniority shall be lost if an employee: . . .5. Fails to report for work at the termination of an approved leave of absence; . ."

The Arbitrator should give meaning to this language, as to do otherwise would render the clear and unambiguous language meaningless. The District asserts that it has more than extended itself in the spirit of assisting the Grievant. It did not terminate him after the initial December 11, 2001 certified letter warning him of possible termination, but continued to make additional requests for information to determine if he could return to work in any capacity, including a light duty assignment, and/or to determine if he was disabled within the context of the Americans With Disabilities Act (ADA) so as to require the consideration of possible accommodations. In light of the December 11 and December 18, 2001 certified letters, the

extended period of the leave, and the District's continuous requests for information, it is unreasonable for the Grievant to claim that he thought Dr. Thatcher's note stating that the Grievant was to be off work until January 2, 2002, was sufficient to advise the District of the information it had requested in its December 18th letter.

According to the District, the Grievant had another agenda in December of 2001. The Theda Care Center for Rehabilitation notified the Grievant on December 5 or 7 regarding his ability to return to work with a lifting limitation on December 10, 2001. The District asserts that the Grievant "fiddled with the truth" when he said that somebody from that office told him he could be off through December 10th. How long he was to be off was not the focus of the conversation, rather, it was when he was to return to work. However, the Grievant needed a story about being off through the 10th so that when his December 11th excuse was received, he would not have failed to return to work by not being there on December 10th. The District asserts that there was a deliberateness to the Grievant's actions and inactions in December and that it is not credible for the Grievant to think that his health care provider was providing a detailed explanation of the questions which were his responsibility to answer.

The Grievant was given the maximum amount of FMLA leave, vacation and sick leave under the Agreement. Under both the state and federal FMLA, an employee can request medical leave for his/her own serious health condition for the period of time the employee is unable to perform his/her job duties. Sec. 103.10(4), Stats. However, the state and federal FMLA do not allow for an employee to take unlimited leave. Under state law, the employee may take no more than two weeks of medical leave during a 12-month period. Under federal law, the analogous provision provides employees with 12 weeks of leave. Employers may, by policy, run the state and federal FMLA leave concurrently, which the District did in this case. In addition, Sec. 18.08 of the Agreement provides that the parties agree to run concurrently the contractual leave benefits with the leave benefits under the state FMLA. However, in this case, the Grievant was given the greatest leave benefit possible, more than required under the Agreement, because he was allowed to use both his vacation and sick leave first, rather than concurrently with the FMLA leave. Thus, the District extended the leave benefit to him to an extent greater than the Agreement provided prior to invoking Sec. 14.09.

The District had the right under both the Agreement and the FMLA to request information regarding the Grievant's ability to return to work. Under the FMLA, the employer may require medical certification as to the date the serious health condition commenced, its probable duration, the medical facts regarding the condition, and an explanation of the extent to which the employee is unable to perform his duties. Employers can request certification every 30 days, or more frequently if the employee requests an extension of the leave. Here, the District granted the Grievant FMLA leave multiple times up to the full twelve (12) weeks of job-protected leave under the combined state and federal law. The District lawfully requested the information regarding the probable duration of the leave

and an explanation of the extent to which he was unable to perform his job duties. Both Sec. 103.10, Stats. and the Agreement require the employee to communicate with the employer to schedule leave (Secs. 18.08, 18.09 and 18.09(1)-(3).) Sec. 18.09.3 of the Agreement provides:

> Abuse or fraudulent use of any of the various leave provisions of this Agreement shall result in loss of pay, suspension without pay, or discharge for proper cause. Employees must receive prior approval of the District Administrator before absenting themselves from work.

In order for the District to maintain the efficient operation of the schools, the notice requirements are essential, as demonstrated by multiple clear and unambiguous contract sections. The Grievant failed to comply with these essential notice requirements under both the Agreement and the FMLA and was appropriately terminated.

Although the FMLA provides for job protection, it only extends to the period of the qualifying leave. There is no dispute, nor evidence to the contrary, that the entitlement to job-protected leave ceased on December 20, 2001. State law is clear that nothing under the FMLA entitles a returning employee to a right, employment benefit or employment position to which the employee would not have been entitled had he or she not taken family or medical leave. The Grievant apparently argues that the District should have ignored state statutes and given him greater rights to a job simply because his doctor's last note stated he could not return to work until January 2, 2002. Under that theory, the District should hold his job open, despite the lack of information regarding whether or not he could even perform his duties, and the complete exhaustion of all of his contractual and statutory benefits.

Further, the Agreement requires employees to seek approval for additional leave time. The Grievant failed to seek any additional leave approval after December 20, 2001. He was aware through the December 11 and 18, 2001 certified letters, of the serious concerns the District had over his extended absence and the uncertainty of his ability to return and perform his job duties. Rather than request additional leave under the Agreement, as he had done in the past, or simply provide the information requested by the District numerous times, the Grievant incredibly ignored the certified letters when he picked up the rest of his mail.

The District also asserts that it appropriately sought information regarding whether the Grievant may have been "disabled" and required "reasonable accommodations" under the ADA. Under both the case law under the ADA and under the provisions of the Agreement, it is contemplated that there will be an interactive communication process between the employee and the District in this regard. The situation in this case is analogous to that considered in BECK V. UNIVERSITY OF WISCONSIN BOARD OF REGENTS, 75 F.3D 1130, 1134 (7th Circuit, 1996). There, the Court of Appeals found that by failing to sign a release for the employer to

obtain the information from her doctor, and failing to respond to a memorandum from the employer requesting information, the employee caused the breakdown in the interactive process. The Court found that where the employer did not upset the process, but instead made reasonable efforts to communicate with the employee and provide accommodations based on information it possessed, but was unable to obtain an adequate understanding of what action it should take, the employer should not be held responsible for failing to make "reasonable accommodations". BECK at 1137. Here, the Grievant knew that in December of 2001 he was seeking a second opinion regarding his return to work restrictions, but failed to respond to the District's inquiries for information. He also failed to request additional leave time under the Agreement. Given the District's numerous requests and his failure to communicate the information regarding his status, it is clear that the interactive process between the District and the Grievant broke down due to the employee's inaction. Accordingly, the District appropriately utilized the contract provision which permitted it to terminate the Grievant.

Last, the District asserts that Union Exhibits 1-3 from the WEA Insurance Trust (WEAIT) are hearsay, not relevant nor reliable, and are of no probative value. Over the District's objection, the Association entered documents which were created by unidentified WEAIT employees from telephone voice messages and conversations with District employees. Moesch testified that whatever message was given to WEAIT employees was within the context of the District having been given two conflicting return to work statements on December 10 and 11, 2001 and the Grievant's failure to provide the necessary information to the District.

What is relevant is the testimony of the witnesses. The Grievant acknowledges that the District was seeking information and that he knew of the certified letters, but chose not to respond. His claim that he believed his doctor explained everything to the District begs the question of why he did not tell the District the reason his leave was extended by Dr. Thatcher and why he did not request additional leave after December 10, 2001. However, the answer is clear from the Grievant's own testimony, i.e., he was shopping for doctor's opinions. The Grievant disagreed with the one doctor's assessment that he could return to work on December 10th and called his general practitioner, Dr. Thatcher, and asked Dr. Thatcher, without being seen, to write additional notes to remain off work until he could be seen by a different specialist. The Grievant could have informed the District of his dissatisfaction with the first specialist's assessment and could have requested leave until January of 2002, but he did not. Submitting a doctor's statement that he should not come to work is not an excuse for being absent when he has exhausted all leave and has not requested additional leave. It also does not answer the District's request of December 18, 2001 for a doctor's statement indicating the nature of his injury, and when he would be expected to be fully healed or if there were any long-term complications.

It is not the District's problem that the Grievant chose not to pick up his mail until December 24th, and he still could have contacted the District on December 26th to explain his situation, but did not do so. Left without any other information and obligated to provide for the continued operation of the school buildings, the District appropriately utilized the contractual provision which squarely addresses the situation, Sec. 14.09. No progressive discipline was required under that provision as the contract defines as cause for termination when an employee fails to return from an approved leave of absence.

In its reply brief, the District first asserts that the Association fails to even mention the provisions of the Agreement which define cause in the specific event that an employee fails to return to work after an approved absence. (Secs. 10.06 and 14.09.) The reason for this tactic is to avoid having to admit that the parties have clear and unambiguous contract language which defines cause when an employee fails to return to work and which governs the parties' actions within these exact circumstances.

The District disputes the claim that it "accepted Dr. Thatcher's excuse and Mr. White was not terminated or otherwise disciplined." District witnesses testified repeatedly that they continued to ask for the relevant medical information which had not been provided by the Grievant even at the date of the arbitration hearing. Moreover, no discipline was taken for the failure to return to work on December 10, 2001, because the Grievant had made an appropriate request for additional FMLA leave. The District did not terminate the Grievant prior to December 20, 2001 in recognition of his right to job-protected FMLA leave and its sincere and continuing effort to direct the Grievant to obtain the information required for the District to determine if he was going to be able to return to his custodial position. No additional leave time was ever requested by the Grievant after December 18, 2001.

The District also disputes the claim that the Grievant was somehow prejudiced because he did not retrieve the certified letters. The Grievant testified that he knew of the certified letters' existence. Yet, even after receiving the December 11th letter, he waited to retrieve the subsequent certified letters. The Grievant understood that the December timeframe was a critical period, and that his leave would soon be exhausted. He understood that the specialist thought he should be returning to work and, as the Association's brief points out, he was shopping for another medical opinion which might allow him to do less work than the previous return to work required. The Grievant should be seen for what he was – i.e. an employee trying to manipulate additional leave by ignoring the notice for the certified mail, and then claiming that it was too late for even a phone call to the District to explain why he had not returned.

The Grievant demonstrated that he could pick up the mail when it suited him. When motivated not to return to work on December 10th, he picked up his mail on December 11th, 2001 and received Dr. Thatcher's note that was dated and sent on December 11th. Moreover,

certified mail is unusual for most people to receive, and before the person picks up the certified letter they are given a notice of its existence. It is not credible, given the Grievant's own testimony, to claim that he did not know of the certified letters' existence. The Grievant testified as follows:

> Q. When you received the letter of December 18 --- and you received that on the 24th, so that means you didn't pick up your mail for several days?
>
> A. Not necessarily, no. That was when I picked *that letter up, yes*. (Tr. p. 78.) (emphasis added).

The Grievant unwittingly acknowledges by his testimony that he did pick up mail between December 18th and December 24th, 2001. Thus, he knew of the existence of the certified letter, and chose deliberately not to pick it up until December 24th. The true issue regarding the notice to the grievant is when the certified letters were sent by the District and when the Grievant had notice to pick them up. His own testimony was clear that he had notice, but was manipulating the receipt of the letters. If he had wanted to inform the District of his medical concerns, he could have, but chose not to. He did not call or even mention his dispute with the specialist's opinion when he was engaged in a conversation with Dr. Hess on or about December 14, 2001. Hess testified that the Grievant did not utter a word in that regard. Most people in that situation would have felt compelled to explain at least minimally the problems the Grievant claims were occurring. It is incredible given the District's concerns, specifically expressed to the Grievant in writing to ensure that he understood the serious nature of the situation, that he did not at least attempt to explain the situation to Dr. Hess.

The District reasserts that Union Exhibits 1, 2 and 3, the documents from the WEAIT, are classic hearsay and should not be given any weight. Further, Moesch testified that Union Exhibit 1 was only accurate in the context of the situation as it existed on December 10, 2001. If the Grievant had returned to work on that date under the work restrictions stated by the specialist, the District had another custodian available who could have worked with the Grievant at that point in time and given those restrictions. Moesch testified that the District did not accept Dr. Thatcher's note without further explanation, submitted after the specialist's, because the opinions were contradictory and because the Grievant's leave was exhausted after December 20, 2001. To the extent the Arbitrator considers them, Moesch clearly stated that any representations to individuals outside of the District as to whether or not the Grievant could be accommodated in sedentary work, was within the context of the December 10, 2001 release to work, and not the January 2, 2002 release.

The District asserts that it acted fairly by communicating in writing regarding the Grievant's injury and employment status. The Association attempts to cast doubt on whether

the District acted in good faith by sending certified letters, rather than simply telephoning the Grievant. However, the District's actions must be viewed within the context of the specific day and week, and in light of the Grievant's actions or non-responsive actions, and in view of the District's contractual and statutory obligations. Given what had occurred in the month of December, including conflicting doctor reports without explanation from the Grievant, and his failure to appear for work or to call on December 10 or 11, the District was left in a precarious situation. This warranted the District placing its concerns in writing, ensuring delivery and tracking through certified mail, and even going the extra mile by driving the letters directly to the Cecil post office to make clear to the Grievant the potential consequences of his failure to provide the requested information. In light of the District's obligation to seek information under the ADA, the knowledge that the Grievant did not have any job-protected FMLA leave after December 20, 2001 and that notice of leave status must be in writing under the FMLA, the District acted reasonably by placing in writing its requests for information, concerns, and the consequence for failure to respond.

The District asserts that the Association's reliance on the CITY OF MAUSTON and EAST HARTFORD BOARD OF EDUCATION arbitration awards is misplaced. Neither are cases in which arbitrators considered provisions such as the unusual, but clear and specific language of Secs. 10.06 and 14.09 of the parties' Agreement. The EAST HARTFORD case involved only a generic progressive discipline procedure and a leave provision which only regulated the order in which wages were paid and sick leave charged, and did not contain any contract provision even close to the provisions in this Agreement. The same is also true of the CITY OF MAUSTON case. The only relevant contract provision cited in that case was a management rights clause with the general language giving the employer the right to discipline or discharge for just cause. Further, unlike the instant case, the employee in CITY OF MAUSTON communicated with the employer about his status, actively engaged in the process of discussing accommodations, and repeatedly told the employer he believed he could do the job and was willing to try.

The District concludes that the Association has not met its burden of proof regarding the contract interpretation in this dispute. It has presented no evidence or argument of any kind that the clear, specific language of Secs. 10.06 and 14.09 do not apply. The Grievant's manipulative and evasive actions left the District with the exact circumstances contemplated and governed by those provisions. Accordingly, the grievance should be denied.

Association

The Association takes the position that the District did not have cause to terminate the employment of the Grievant. The initial question is what is the District's real reason for terminating the Grievant's employment? According to the termination letter, the Grievant was terminated for a failure to meet the December 26th deadline for providing additional medical information to the District. This was reiterated by District witnesses throughout the hearing.

Further, District officials informed the Grievant's long-term disability insurance carrier (WEAIT) that he was terminated for this reason, even going so far as to tell the carrier that but for his failure to respond, they would have had work available for him within his restrictions. This resulted in the Grievant losing benefits that he would have been entitled to had he been terminated for his inability to perform the functions of his job. (Union Exhibits 1, 2, 3, and 5). However, at hearing the District submitted substantial evidence regarding the fact that it could not have accommodated the Grievant's work restrictions and that it had no work available for him. It repeatedly made the point that the custodial work was more than the sedentary work allowed under the Grievant's restrictions. Based on these assertions, it would appear that the District is attempting to justify the Grievant's termination based upon the fact that his injury prevented him from performing the functions of his job. Neither reason given by the District justifies the termination of an employee with a 16-year record of satisfactory performance for the employer. However, the District's shifting stories raise real issues about its credibility and good faith in its treatment of the Grievant.

The Association asserts that under all the circumstances, the District did not have just cause to terminate the Grievant for failure to comply with the District's December 18, 2001 letter. Given the circumstances, the demand that the Grievant comply with the December 18th request was unreasonable. After the District contended that the Grievant was late with a doctor's excuse on December 10th, Dr. Hess discussed the matter with the Grievant by telephone on December 14th. Hess testified that during that conversation he told the Grievant, "My point was you've got to get your slips in on time, and that one was late." The Grievant provided the District with a slip excusing him from work through January 2, 2002. He was not aware of when that slip was faxed to the District, but was under the belief that it covered the December 18th request. The Grievant was not the only one that believed that to be the case. In a letter to the Grievant, Melissa Reed, disability supervisor for the WEAIT, stated: "I contacted the Shawano-Gresham School District and was told that they had accepted Dr. Thatcher's note excusing you from work until January 2, 2002, despite the lack of detail regarding your restrictions." (Union Exhibit 6). Thus, the District terminated the Grievant's employment for failing to provide a doctor's statement by December 26th, even though it accepted Dr. Thatcher's December 17 note releasing him from work through January 2, 2002.

On January 2, 2002, the Grievant saw Dr. Robinson, a specialist, who completed a "Practitioner's Return To Work Recommendations Record" which released him to perform sedentary work with a maximum weight restriction of ten pounds. The District, however, continued to tell different stories to different audiences. Both the Grievant and Association President, Joe Black, testified that in a meeting on or about January 9, 2002, Hess told them that the District had no sedentary work available. This testimony was unrebutted by Dr. Hess. Yet the WEAIT denied long-term disability benefits because of the District's assertion that it could have accepted the Grievant back full-time in a sedentary position. (Union Exhibit 1).

Notwithstanding the above, the District was unreasonable in applying its December 18th request. That request for additional information by December 26th, the day after Christmas, was sent by certified mail. A Ms. Mary Hoeff accepted receipt of the letter for the Grievant on Christmas Eve. Given the date on which the Grievant received the letter, it was blatantly unfair to expect him to obtain a detailed position statement on Christmas Eve, Christmas Day or the day after Christmas. The District's actions in terminating the Grievant after 16 years of satisfactory employment were hasty and unforgiving. Moesch told the WEAIT that, had the Grievant contacted the District prior to December 26th to say he needed more time, it would have been granted. (Union Exhibit 2). However, given that he did not receive the letter until December 24th, and that Christmas Eve and Christmas Day are paid holidays in the District, it was simply not possible for him to request an extension prior to December 26th. Even if there had been time, the Grievant was operating under the belief that the December 17th excuse fulfilled the District's request. While it would have been better in retrospect had the Grievant picked up the letter sooner or contacted the District before December 26th, given the time of year and the difficulty in contacting and getting responses from doctors, as well as his referral and pending January 2nd appointment with a second specialist, the Grievant's actions can hardly be characterized as serious enough misconduct to warrant discharge, particularly since the delay in the District receiving information was only two or three business days.

The Association finds the District's actions and the manner in which it made the demand for information to be more consistent with an employer attempting to create a paper trail for discharge, than with an employer attempting to obtain reliable medical information. If the District was genuinely seeking information, it could have picked up the phone and called the Grievant. Had it done so, it would have learned that the information it sought would be available the following week, when the Grievant saw the specialist. Instead, the District went to the trouble of having someone drive to Cecil to deliver a certified letter demanding the information. The timeline for providing information was calculated to prevent the Grievant from being able to comply. Even if he had received the letter on December 19th (the soonest he could have possibly received it), the Grievant would have only had two business days to obtain the detailed information the District was demanding. This would have been obviously impossible, particularly since those were the last two business days before Christmas.

Further evidence of the District's eagerness to rid itself of the Grievant is provided by an unemployment compensation determination which shows that the Grievant was denied unemployment benefits for the week ending December 15th, because the District stated he had quit for failure to return to work on December 10th. The record shows that was clearly not the case. If the District truly questioned the severity of the Grievant's injuries or his ability to work, it could have required that he be evaluated by a doctor of its or the WEAIT's choice. It made no such demand or request. There is little question that the District acted in a heartless and irresponsible manner when it dismissed a long-term employee with a clean employment record, and provided misleading information to the Division of Unemployment Insurance and the WEAIT that resulted in denial of both unemployment and disability benefits.

Apparently recognizing that the reason given in its termination letter would not likely withstand scrutiny, at hearing the District attempted to bolster its reasons for terminating the Grievant by presenting considerable evidence that as of January 2, 2002, it simply had no work available with the Grievant's restrictions. There is no dispute that the Grievant still had significant restrictions on his ability to work as of January 2, 2002. However, in light of his long record with the District, his temporary, though lengthy, disability does not justify his permanent termination by the District. If it had no work for him within his restrictions, he could have remained on disability, and the District could have continued the arrangement it had been using for the past four months. The District presented no evidence that the arrangement in place during the Grievant's absence was creating any problems for the District. In similar cases, arbitrators have held that an employer is not justified in terminating employment based on a temporary disability, particularly where the employee has a long tenure with the employer. In EAST HARTFORD BOARD OF EDUCATION, 81 LA 769 (Johnson, 1983), the employer had requested that the employee's doctor describe his prognosis. The doctors were unable to provide a definite date or state if he could return. Based on that, as well as some serious performance problems, the employer terminated the employee. The arbitrator held that the employer had acted prematurely in terminating the employee. In CITY OF MAUSTON (Houlihan, 2000), a long-time employee sustained a shoulder injury that caused him difficulty over a three-year period, only being able to work seven months during that three-year period. The employer spent months trying to get a clear medical assessment before making its decision to terminate the employee. Despite these factors supporting the employer, the arbitrator ordered the employee reinstated. Here, there was no need for the District to act abruptly and terminate the Grievant based on his inability to return to work without restrictions.

The appropriate remedy in this case is contingent upon whether the District had work available within the Grievant's restrictions. Based on the record, it is still unclear whether or not the District had work available within the Grievant's restrictions. It depends on whether the District was telling the truth when it responded to the WEAIT, or whether it was telling the truth when it gave testimony at the arbitration hearing. Regardless, arbitral authority and common sense equity suggest that the Grievant's termination should be overturned. The remedy will, however, depend on the District's truthful answer to the question. If the District had no work available, as contended at hearing, the Grievant should have received disability benefits until the time there was work available within his restrictions, at which time he should be returned to employment. The District should bear responsibility for either correcting the error with the long-term disability carrier, or compensating the Grievant for the loss he suffered as a result of the District providing misinformation to the carrier. If there was work available within the Grievant's restrictions on January 2, 2002, as the District contends to the WEAIT, then the Grievant should be entitled to back pay for that period of time.

In its reply brief, the Association first asserts that the question as to the District's real reason for terminating the Grievant, remains unanswered. The December 27th termination

letter cites failure to respond to the District's December 18th request for additional medical information. However, at hearing, the District submitted substantial evidence that it had no work available, and could not have accommodated the Grievant's medical restrictions. In its brief, the District advances yet two additional reasons for dismissing the Grievant. First, it argues that termination was for "cause" under Section 14.09 of the Agreement because the Grievant failed to report to work at the end of an approved leave of absence. Secondly, the District spends a great deal of time arguing that it was justified in discharging the Grievant because he had exhausted all contractual paid leave, as well as unpaid leave under the FMLA.

Addressing each of the reasons offered by the District for terminating the Grievant, the Association asserts that the District did not have cause to terminate the Grievant. With regard to the reasons set forth in the December 27th termination letter, that letter clearly states failure to respond to the request made in the December 18th letter as the reason for the Grievant's dismissal. Consequently, all of the additional post-termination reasons offered by the District are "after the fact cover-ups" that should not be taken into account in determining whether there was just cause for the dismissal.

In its recitation of facts in its brief, the District stated that by its letter of October 9th it requested the Grievant provide an "Attending Physician's Return To Work Recommendations Record" after each doctor statement. He provided such a statement from Dr. Thatcher following his October 12th appointment. In the space provided for an explanation of the diagnosis or condition, Dr. Thatcher simply wrote, "neck strain." He also indicated the Grievant was totally incapacitated at this time. Thus, the information contained in that recommendation record was arguably no more specific than that provided by the notes Dr. Thatcher subsequently wrote excusing the Grievant from work through a certain date. The District further states that the Grievant must have understood the District's request for more information following each visit to a physician, because he provided one following the October 12th appointment. However, when the Grievant provided the District with slips from Dr. Thatcher excusing him from work following the appointments on October 26th, November 9th and December 11th, the District took no action to inform him those slips were insufficient. In fact, after the District contended that the Grievant was late with a doctor's excuse on December 10th, he discussed the matter by telephone with Dr. Hess on December 14th. Dr. Hess could have reiterated the District's need for a more specific medical information in future excuses at that time. Dr. Hess testified that instead he stated in that exchange that "My point was, you've got to get your slips in on time and that one was late."

The District's claim that it made "continuous requests for information" from the Grievant is absurd, as the record clearly shows otherwise. On October 9th, the District requested a completion of an "Attending Physician's Return To Work Recommendations Record"; while the December 11th letter only requested that the Grievant inform the District of his employment status. The only request for additional medical information was contained

in the December 18th letter. The District in fact devotes little of its brief to justifying its decision to discharge the Grievant for the reasons stated in the December 27 letter, which is the only issue before the Arbitrator.

The Association also asserts that the District had not determined that the Grievant was permanently unable to perform the work required of his position. Whether the District could have accommodated the Grievant's restrictions is still not clear. It told the Grievant and the Association that it had no work available, whereas it informed WEAIT that it could have accommodated the Grievant in a full-time, sedentary position. Notwithstanding its conflicting stories, the District did not have just cause to discharge the Grievant for inability to work. Numerous arbitrators have held that in order to meet such a burden, the employer must show that it has determined that the employee would be unable to perform the duties of a position permanently, or at least in the foreseeable future. BROWN COUNTY (MENTAL HEALTH CENTER), (Arbitrator Gratz, 1990). In this case, the Grievant was seriously injured in an automobile accident in August, and on December 18th, a mere four months later, the District made a single request of the Grievant for a doctor's statement. That was the extent of the District's efforts to determine his ability to perform the duties of a custodian or the expected duration of his disability.

The District also argues that because the Grievant was unable to perform the duties of his position, it need not show just cause. In a parallel case, an arbitrator found that the employer did indeed need to meet the just cause standard. CITY OF MAUSTON, *supra*. Here, the District expended little effort in trying to determine when the Grievant would be able to return to work or whether his disability was permanent. As a result, his termination for inability to perform the duties of a custodian position was premature and without just cause.

The Association also disputes the claim that the Grievant was terminated for failure to report on December 10th. In support of its decision to terminate the Grievant, the District cites Articles 10.06 and 14.09 of the Agreement which relate to failure to report for work at the end of an approved leave of absence. The only incident to which the District can be referring occurred on December 10th, when it contends the Grievant failed to return to work after being released to work with restrictions. Apart from whether the Grievant failed to report to work on December 10th or not, the District's December 11th letter demanded that the Grievant contact it prior to December 17th regarding his "employment status." He did just that, when on December 11th, Dr. Thatcher faxed the District a note excusing the Grievant from work through December 18th, and when he contacted Dr. Hess by telephone on December 14th. Significantly, the District also informed the WEAIT that it accepted the December 11th doctor's excuse. (Union Exhibit 2). The District asserts that the Union exhibits from the WEAIT are hearsay and not relevant. However, the documents were not entered as proof of the matter asserted, but to demonstrate that the District did accept the December 11th and 17th doctor's excuses, and that it did have sedentary work available on a full-time basis. The District's Business Manager, Moesch, testified that those documents

accurately reflected the District's position. Thus, the exhibits are reliable and relevant, and the record is clear that the District did not terminate the Grievant for failure to report to work on December 10th. Accordingly, any post-hearing arguments to that effect must be ignored.

The Association also asserts that the exhaustion of his leave under the FMLA did not give the District the right to terminate the Grievant's employment. The District devotes a significant portion of its brief to arguing the ADA and FMLA. However, the parties' Agreement provides rights beyond those provided by the ADA and FMLA. Specifically, Articles III and VII of the Agreement provide that non-probationary employees may not be discharged or otherwise disciplined without just cause. While the December 18th letter states that the Grievant would have exhausted all paid leave and unpaid FMLA leave as of December 20th, the letter does not specify any consequences for having exhausted all paid and unpaid leave. The arbitrator in BROWN COUNTY, *supra*, found lack of such warning significant.

Further, Moesch testified that the District requested additional information in its December 18th, 2001 letter so that it could assess whether it had any responsibilities under the ADA, and the District claims it "attempted to engage in the interactive process under the ADA." Yet the December 18th letter did not state any ADA concerns or any other reasons for the request. The Grievant understood that request to be already covered when Dr. Thatcher faxed the note excusing him from work through January 2, 2002. The District could have requested that the Grievant sign a medical release or that the Grievant see a doctor of its or the WEAIT's choice to get a second medical opinion regarding his condition and possible return to work. Instead, the District made an ultimatum that the Grievant provide them with information in a time period in which it knew he could not possibly comply. The Association finds the District's statement that "the District has more than extended itself in the spirit of assisting the Grievant" to be perverse and entirely contradicted by the record.

The Association also disputes the District's assertions regarding the pickup of the Grievant's mail. The District asserts that the Grievant testified that he picks up his mail on a daily, or almost daily basis. However, his actual testimony was that he picked it up "once a week or so." The District also claims that the Grievant knew of the certified letters that were sent to his post office box, but that he refused to receive them. The December 18th letter was picked up on December 24, five postal days after it was hand delivered to the Cecil post office. The second letter was sent on Friday, December 27th, and the Grievant reported to work three postal days later on Thursday, January 2nd, unaware of that letter or that he had been terminated. The letter was signed for on January 9th, just over a postal week from when it was mailed. Both are consistent with the statement that he picks up his mail approximately once a week. Thus, the District's accusation that the Grievant was intentionally dodging the certified letters that were sent to his post office box is totally baseless.

The Association also disputes the District's attempt to portray the Grievant as being untruthful and a malingerer, asserting there is no evidence to support either allegation. Rather, at worst, the Grievant was confused, which was understandable given the circumstances. The Association concludes that if any party in this case has been untruthful, it has been the District when it told contradicting stories regarding the availability of work for the Grievant.

The Association concludes that the District did not have just cause to terminate the employment of the Grievant, and requests that the grievance be sustained and that the remedy requested be awarded.

DISCUSSION

As can be seen from the parties' arguments, there is disagreement as to the reasons given for the Grievant's termination. The District asserts that the Grievant's employment was terminated because he failed to provide the medical information the District had requested by the deadline it had given him, and also had failed to report for work or to request additional leave after all of his leave time had run out as of December 20, 2001. The Association asserts that the December 27, 2001 letter informing the Grievant he was being terminated as of that date gave only failure to respond to the District's December 18th letter requesting medical information as the reason for his termination, and that no other reasons the District now offers should be considered.

The Association disregards the context of the December 27th termination letter. It was the third letter in a sequence that began with the District's December 11th letter warning the Grievant that termination is the consequence for failure to report to work at the end of an approved leave (which the District indicated had occurred when he did not report for work on December 10th) and that this would occur if the District did not hear from him by December 17th regarding his employment status. By the December 18th letter, the District notified the Grievant that all of his available leave would be exhausted as of December 20th, and that it needed to receive a doctor's statement regarding the nature of his injury, when he was expected to be fully healed or if there were any long-term complications. Read together, the letters put the Grievant on sufficient notice that he could be terminated if he did not report for work at the end of his approved leave, that all of his available leave would run out on December 20th, and that he had until December 26th to provide the District with the required information, or at least notify the District of what was occurring and when he would be able to provide that information. The merits aside, it is concluded that the District terminated the Grievant on the bases that he failed to provide the required information by the date specified, or in the alternative, report for work at the end of his leave, or request additional leave.

There is also a dispute as to what standard is to be applied in this case. The Association asserts that the just cause standard in the Agreement applies, as well as the requirement in Sec. 7.01 that progressive discipline be followed. The District asserts that Secs. 10.06, 5 and 14.09, in effect, establish that failure to report for work at the end of an approved leave is just cause for termination. The District is correct. By Sections 10.06, 5 and 14.09, the parties have agreed that the consequence of failing to report for work at the end of an approved leave is that the employment relationship is terminated, i.e., that it is just cause for termination. Thus, the question to be answered in this case is whether the Grievant failed to report for work at the end of his leave or, in the alternative, provide the information the District required.

In answering this question, it must first be noted that while there is a dispute as to whether the Grievant was to have reported for limited-duty work on December 10, 2001, that matter is not relevant beyond providing a part of the context in which the District took its final action. The record is clear that the District did not terminate the Grievant when he failed to report for work on December 10th; rather, it placed him on notice by its letter of December 11, 2001 that he would be terminated for that reason (failing to report for work) if they did not hear from him by December 17th as to his employment plans.

The District's December 11th letter set the stage for the subsequent events. It was the first of three certified letters the District would send to the Grievant regarding his employment status. Also on December 11th, the Grievant's regular physician, Dr. Thatcher, (as opposed to the specialist whose office had faxed the District a form on December 5th indicating the Grievant could return to work December 10th with restrictions) faxed the District a note indicating the Grievant "Should remain off work through 12/18/01 due to injury." On December 12th, the Grievant picked up Hess' December 11th letter. He came to the District's offices and filled out an FMLA leave request form for the period from December 5th through December 19th, with a return date of December 20th. On December 14th, he had a telephone conversation with Dr. Hess in which Hess told him he had to get his doctor's slips in on time, in reference to the District having not received a slip until December 11th, the day after he had been expected to return to work.

On December 17th, Dr. Thatcher's office faxed the District a statement that the Grievant "Should remain off work 12/17 – 1/2/02 due to injury." The Grievant did not, however, make any request for leave beyond the request he had submitted on December 12th for leave through December 19th. The Grievant testified that he was informed by Dr. Thatcher's office that they were faxing the District the doctor's slip and that he had an appointment to see a new specialist on January 2nd. The Grievant was sent a copy of Dr. Thatcher's December 17th statement that had been faxed to the District.

On December 18th, the District sent the Grievant a certified letter advising him that he would have exhausted all of his available leave, paid or unpaid, as of December 20th, and giving him until December 26, 2001 to provide the District with "a doctor's statement indicating the nature of your injury, when you are expected to be fully healed or if there are any long-term complications." As discussed previously, while this letter did not state that the Grievant would be terminated if he did not report for work when his leave ran out or failed to provide the information on time, the letter must be read in context with the December 11th letter from Hess which had made it clear that would be the consequence. It is undisputed that the Grievant did not report for work until January 3rd 3/ and did not provide the District with the information it had requested by December 26th, other than the December 17th slip from Dr. Thatcher, and did not request he be given additional leave.

3/ It is noted that the question of whether or not the District had light duty work available for the Grievant is not relevant to this issue. There is no contractual provision cited as requiring the District to provide such work in these circumstances. More importantly, however, the Grievant did not report for work, light duty or otherwise, at the end of his leave on December 20th.

The Association also claims that the District was telling its long-term disability insurance carrier one thing, and the Unemployment Compensation examiner another. However, the questions of whether the Grievant was entitled to long-term disability benefits or unemployment compensation benefits are not issues the Arbitrator has authority to resolve in this forum.

The Association makes a number of arguments regarding the reasonableness of the District's demand for the information by December 26th. The arguments are not particularly persuasive under the circumstances. First is the argument that the time given the Grievant to provide the information was unreasonably short, given the Christmas holiday and the fact that the Grievant did not actually receive the letter until December 24th. Moesch testified that she drove to the Cecil post office over the lunch hour on December 18th so as to make sure the Grievant could receive the letter as soon as possible. As it turns out, the Grievant did not pick up the letter until December 24th. While the Association argues that the Grievant only picks up his mail once a week or so, the Grievant conceded that this did not mean that he had not picked up his mail between December 18th and December 24th, only that he had not picked up the District's certified letter. Seemingly, that would have been a conscious decision on his part. The Grievant offered no explanation for not picking up the certified letter when he picked up his regular mail. Regardless, the fact that the Grievant did not pick up the certified letter until December 24th, almost a week after it was mailed at his post office, is not the fault of the District.

Upon receiving the District's December 18th letter notifying him he had exhausted all of his leave and that the District wanted the information by December 26th, the Grievant had a number of options, i.e., provide the information, report for work or request additional leave. At the least, the Grievant had an obligation to inform the District that he would be seeing another specialist on January 2nd and would have the information the District was requiring at that time.

Inexplicably, the Grievant made no attempt to contact the District after receiving the letter. The Grievant's claim that he was sent a copy of the slip Dr. Thatcher's office faxed the District on December 17th, and thought it already supplied that information, is unpersuasive. The District's letter is dated the day after the District was faxed the slip from Dr. Thatcher's office. Further, having seen the slip, the Grievant could not reasonably believe it supplied the information the District was requiring. Other than having different dates the Grievant should be off work, the slip was almost identical to the previous slips Dr. Thatcher had submitted to the District on the Grievant's behalf since the Grievant's injury in August of 2001, including the slip faxed to the District on December 11th. There would be no basis for the District's request in its December 18th letter if those slips had provided the information the District was seeking.

It is also noted that the District had no reason to believe that the information it was requiring was something that was not already available to the Grievant from his doctor. The Grievant had not informed anyone at the District that he had not kept his December 19th appointment with the specialist who had indicated he could return to work with restrictions on December 10th, or his intention to see another specialist. The District was also not aware at the time that Dr. Thatcher had not seen the Grievant since November.

The Association questions why the District needed the information as soon as it was demanding. As the District's December 18th letter pointed out, as of December 20th the Grievant would have exhausted all of his available leave. Ostensibly, at that point the District would have to make a decision as to the Grievant's employment status. While the Association cites an arbitration award in which an arbitrator did not find the fact that the employee had exhausted all of her leave under the FMLA to be significant, the case is distinguishable on a number of points. First, there is no indication that the labor agreement in that case contained a provision similar to Sec. 10.06, 5 or Sec. 14.09 in these parties' Agreement. Secondly, the employer in that case had not placed the employee on notice that exhaustion of her FMLA leave would have adverse consequences on her job security. Conversely, the District's December 11th letter provided the Grievant with notice that the consequence for failure to report for work at the end of an approved leave is termination and the December 18th letter placed him on notice that all of his leave was exhausted as of December 20th. Third, the employee in that case requested she be given additional leave, which the arbitrator found the employer had unjustifiably denied. Here, the Grievant simply assumed he could remain off work because his doctor had said that he should, and did not request that he be granted additional leave, even after being notified by the December 18th letter that he would have

exhausted all of the leave time he had coming as of December 20th, which date had already passed by the time he read the letter. 4/

4/ It is noted that Sec. 18.09.3 provides that prior approval of the District must be received before employees absent themselves from work on unpaid leave.

In sum, by its December 11th letter the District notified the Grievant that failure to report to work at the end of an approved leave of absence results in termination; after receiving Dr. Thatcher's December 17th slip that the Grievant should remain off work through January 2, 2002, by its December 18th letter, the District informed the Grievant that all of his leave would be exhausted as of December 20th and, as an option, gave him until December 26th to provide the District with information regarding the nature of his injury, when he was expected to be fully healed, and whether there were any long-term complications; the Grievant did not pick up the District's letter until December 24th, and made no attempt thereafter to contact the District until appearing for light duty work the morning of January 3rd.

Simply put, the District acted within its rights under the parties' Agreement when, after not hearing from the Grievant, it terminated his employment on December 27, 2001. As stated previously, Secs. 10.06, 5 and 14.09 of the Agreement, in effect, provide that failure to report for work at the end of an approved leave of absence is just cause for termination. The Grievant was notified of this in the District's December 11th letter and notified in the District's December 18th letter that his leave ended on December 20th, and he was then given the option of instead of reporting for work, to provide the information the District reasonably sought by December 26th. For whatever reason, the Grievant chose to ignore the letter, even knowing his leave had been exhausted on December 20th.

The Association is troubled, as is the Arbitrator, that the District was seemingly eager to terminate a 16-year employee with a clean work record. 5/ Nevertheless, the Agreement gives the District the right to make the decision it did under the circumstances.

5/ The Arbitrator is, however, also troubled by the seemingly lackadaisical response of the Grievant to the District's notice. The Arbitrator is not troubled by the District putting its notices to the Grievant in writing. That is simply good practice.

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

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 4th day of February, 2003.

David E. Shaw /s/
David E. Shaw, Arbitrator

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