BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PORTAGE COUNTY COURTHOUSE, HEALTH CARE CENTER, DEPARTMENT OF HEALTH AND HUMAN SERVICES AND LIBRARY SYSTEM EMPLOYEES LOCAL 348, AFSCME, AFL-CIO

and

PORTAGE COUNTY

Case 175
No. 62088
MA-12151

Appearances:

Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 35, Plover, Wisconsin 54467-0035, appearing on behalf of the Union.

J. Blair Ward, Assistant Corporation Counsel, Portage County, County-City Building, 1516 Church Street, Stevens Point, Wisconsin 54481, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which provides for final and binding arbitration. Pursuant thereto, the parties jointly requested that the Wisconsin Employment Relations Commission provide a panel of Commission-employed arbitrators from which the parties selected Dennis P. McGilligan to resolve the dispute set forth below. Hearing was held on February 25 and March 31, 2004. The hearings were transcribed. The parties completed their briefing schedule on June 21, 2004.

After considering the entire record, I issue the following decision and Award.

STIPULATED ISSUES

1. Did the Employer violate the collective bargaining agreement when it refused to allow Kathleen Prior to return to work starting July 24, 2002 and ending on October 15, 2002?

2. If so, what is the appropriate remedy?

FACTUAL BACKGROUND

Kathleen Prior ("Grievant") was hired by the Portage County Clerk of Courts, Bernadette A. Flatoff ("Flatoff"), as a Deputy Clerk I, in 1997. Since 1999 she was a Deputy Clerk II Traffic.

As a Deputy Clerk II Traffic, the Grievant's duties included "clerking all types of court cases." In addition, the Grievant was "responsible for maintaining and monitoring all City of Stevens Point and Village of Plover traffic citations filed with the Clerk of Courts Office." There was also counter work, customer assistance, answering phones and file maintenance. The Grievant spent about half her time doing office work and the other half her time in courtroom-related work.

In February, 2002, the Grievant suffered an injury, the cause and place of which are in dispute. Following her injury, the Grievant filed a worker's compensation claim and therefore, pursuant to County policy, her injury was treated as a work related injury. Under the return to work policy for work related injuries, the County brings employees back to work "under what restrictions we're able to accommodate."

As a result of this injury, the Grievant was placed on work restrictions by her doctor. She was allowed to return to work on March 18, 2002 for four hours per day of sedentary work. She was not allowed to perform any above the shoulder work and had a lifting restriction of no more than ten pounds. Her duties at that time were typical of a Deputy Clerk II. Work given to other deputy clerks was work that she would need a full eight hour day to do. She did not do filing because that was what had "apparently" harmed her.

Her work restrictions changed somewhat over the next couple of months. On April 3, 2002 her restrictions included four hours a day, a 10 to 15 pound lifting limit and no lifting over the shoulder level. On April 9, 2002, her restrictions included not more that four hours a day, no repetitive above shoulder height work, lifting 10 pounds maximum and occasionally lifting and/or carrying such articles as dockets, ledgers, and small tools. On April 25, 2002, her doctor continued the same restrictions. Starting May 8, 2002, the Grievant could work six hours a day with no other restrictions.

On June 12, 2002, the Grievant had anterior cervical fusion surgery. Her physician gave the Grievant a "Return to Work Recommendation" on July 18, 2002, which allowed her to work with restrictions starting July 24, 2002, as follows: sedentary work, four hours a day, occasional bending and squatting, no climbing or twisting, no overhead activities, lifting ten pounds maximum and occasionally lifting and/or carrying such articles as dockets, ledgers, and small tools. The Grievant could sit for one to three hours, drive for one to three hours and could use her hands for single grasping, fine manipulation, but no pushing and pulling.

By letter dated July 3, 2002, the County's worker's compensation Attorney James Nowakowski sent a letter to the State Department of Workforce Development, Worker's Compensation Division, denying that the Grievant's injury arose out of her employment. That letter impacted the County's decision how to treat her. The County now applied its "Return To Work/Light Duty Policy-(Non Work Related Disability)" policy to the Grievant. This policy provides that once an employee's physician certifies that an employee "is safely capable of performing 100% of the duties of their position for at least half of the regular hours of their position, the employee may be eligible for a light duty schedule."

On July 24, 2002, the Grievant asked Flatoff if she could return to work. However, the County did not allow the Grievant to return to work because of its policy noted above and the restrictions contained in the aforesaid "Return to Work Recommendation" dated July 18, 2002.

On or about October 10, 2002, the County received a return to work slip from the Grievant's physician indicating that she could work four hours per day with no restrictions. Following receipt of this return to work recommendation, the County allowed the Grievant to return to work four hours per day. The Grievant worked four hours a day from October 15, 2002 until she terminated her employment on or about November 5, 2002.

POSITIONS OF THE PARTIES

The Union argues that the County violated the collective bargaining agreement by refusing to let the Grievant return to work because she "was able to perform the essential duties of her position"; because an LTE was available to assist her with filing; because there was another employee (a bailiff) to assist her in carrying heavy files and objects; because there was other equipment available to assist her in performing her job; because no other job duties exceeded the limitation put on the Grievant by her doctor; because the issue of allowing the Grievant to return to work was previously decided in her favor by Arbitrator Amedeo Greco and this dispute is no different; and because the County had a contractual obligation not to discriminate against the Grievant because of her disability. For a remedy, the Union requests that the Grievant be "paid for the work hours she was not allowed to work between July 24, 2002 and October 15, 2002", and otherwise "be made whole."

The County argues that it was not obligated to allow the Grievant to return to work because she was not able to perform all the duties required of a Deputy Clerk II; because it is not required to let employees work with medical restrictions that can result in further injury; and because the Greco Award is inapplicable to the instant dispute. The County asks the Arbitrator to dismiss the grievance.

DISCUSSION

At issue is whether the Employer violated the agreement when it refused to allow the Grievant to return to work.

A key factual issue centers on whether the Grievant could perform most of the duties of Deputy Clerk II Traffic during the period of time in question.

After being provided with the return to work recommendations by the Grievant's physician, the County determined that she was not able to perform 100% of her job duties as required by the "Return to Work/Light Duty Policy-(Non Work Related Disability)." Following the Grievant's surgery, she was limited to sedentary work. This is the category of work which has the greatest restriction in performing job duties.

One such restriction was that the Grievant was prevented from lifting more than ten pounds. The Grievant repeatedly testified that she never had to lift more than ten pounds. (February 25, 2004 Tr. pp. 34, 46; March 31, 2004 Tr. p. 141). In support of this contention, the Union cites the testimony of Deputy Register in Probate II Sandy Gagas ("Gagas"): "*Prior and Deputy Clerks never carried anything over 15 pounds*." (Emphasis in the Original). However, that was not exactly her testimony. She testified that a person in the Grievant's position would not have to lift "on a routine basis over ten pounds". (Emphasis added). (February 25, 2004 Tr. p. 79).

Gagas also admitted that employees in the Clerk of Courts office sometimes lifted boxes ten pounds or more as part of their regular duties. *Supra*, p. 88. She further admitted Deputy Clerk IIs would have to handle docket books. *Supra*, p. 94. However, the Grievant has not lifted docket books as a Deputy Clerk II Traffic, (March 31, 2004 Tr. p. 125). Nor has she lifted the heavy "banker's boxes" in her three years in that position. *Supra*, p. 124. Therefore, while the Grievant might be expected to retrieve docket books upon request that could weigh more than ten pounds, *supra*, pp. 9, 22, 34-35, or move heavy boxes, *supra*, pp. 77-78, this does not happen frequently. *Supra*, pp. 68, 84. See also February 25, 2004 Tr. pp. 104, 109-110.

The County cites the testimony of several County employees for the proposition that lifting over ten pounds was a normal part of the Deputy Clerk II's job duties. (Deputy Clerk IIs Alan Leonhardt and April Stank, Baliff Max Rutta and Flatoff). It is true, as pointed out by the County, that banker boxes filled with files are routinely stored in the Clerk of Court's office. (February 25, 2004 Tr. p. 111). However, Leonhardt also testified that the work duties that require him to lift over 10 pounds were not standard routine duties of the Clerk of Courts office. *Id*. Leonhardt also lifts heavy objects of ten pounds or more when people need help; he is the person people go to when they need assistance lifting. (Emphasis added). *Supra*, pp. 109-110. Maintenance employees are also available to assist in moving banker boxes. *Supra*, pp. 111-112.

Stank performs the same Deputy Clerk II Traffic duties that the Grievant would have performed during her employment with the County. (March 31, 2004 Tr. p. 100). She has never handled the heavy dockets or ledgers. *Supra*, p. 68. She has handled the heavier banker boxes but only between ten and fifty times during the year that she has been employed by the County. (Emphasis added). *Supra*, pp. 59, 84.

Rutta admitted that he has seen clerks carrying files that might weigh more than ten pounds. (February 25, 2004 Tr. p. 116). However, "mostly the people that are going to trial" carry the heavy exhibits in and out of the courtroom. *Supra*, pp. 113, 117. In addition, bailiffs help with the heavy exhibits and files. *Supra*, pp. 114-115, 118. Clerks usually handle small exhibits and the paperwork. *Supra*, p. 114.

Flatoff testified that in her experience someone in the position of Deputy Clerk II would be required to lift more than ten pounds. (March 31, 2004 Tr. p. 21). She stated that this would include carrying the cases they are responsible for in and out of the courtroom. *Id*. However, the traffic files the Grievant lifts are not typically the heavier files. *Supra*, p. 60. They "are usually a lot smaller." *Id*.

Flatoff also testified that someone might have to retrieve docket books and help unload supplies. However, as noted above, the Grievant has never retrieved a docket book at any time relevant herein. Nor has she helped unload supplies. *Supra*, p. 125.

Flatoff further testified the Deputy Clerk IIs had to keep their files in large cumbersome boxes. *Supra*, p. 21. However, the Grievant maintained her files at her desk where she could reach them and/or could otherwise retrieve files without moving large boxes. *Supra*, p. 126. Inserting or retrieving papers from files also does not include moving large boxes. (February 25, 2004, Tr. p. 42).

Finally, Flatoff testified that one might have to carry copy paper. (March 31, 2004, Tr. p. 22.) However, a ream of paper only weighs five pounds. *Supra*, p. 52. There is no

reason the Grievant would have to replace more than one ream of paper in the copy machine at any one time. Nor is there any indication in the record that she has been called upon to do so.

Based on the above, the Arbitrator finds that the Grievant could do most of the lifting associated with her job of Deputy Clerk II Traffic. Assistance was available for the heavier lifting.

Another restriction was that the Grievant was limited to occasional bending and squatting and prohibited entirely from pushing, pulling, climbing or twisting. As part of the Grievant's job duties, she was required to file Court papers and other documents on a regular basis. (February 25, 2004 Tr. p. 102). Most of the bending/squatting in a Deputy Clerk II's job involves filing. (*Supra*, pp. 20, 22; March 31, 2004 Tr. p. 86). The Union argues that the bending in question is *de minimis*. The Arbitrator agrees. This is particularly true where, as here, the amount of time spent filing was minimal. In this regard, the Arbitrator notes that filing regularly only took about an hour a week. (February 25, 2004 Tr. pp. 21, 79-80, 99; March 31, 2004 Tr. pp. 94). Occasionally, more filing (a couple of hours here and there) during the year was required. (February 25, 2004 Tr. pp. 53-55). However, filing could be spread out over the entire week so that you didn't have to do the whole hour at a time. *Supra*, pp. 21-22. The additional filing required during the year also could be spread out. *Id*. Based on the foregoing, it is clear that filing was not a large component of the Grievant's work load, and the Grievant was capable of doing some filing that included occasional bending. *Supra*, pp. 24, 50, 65, 79-80. See also March 31, 2004, Tr. p. 81.

The Grievant was also prohibited from twisting and climbing. The Grievant testified that she did not have to twist her body at work. (February 25, 2004, Tr. p. 67). Gagas testified that you could twist if you chose to but "you could stand up and turn your entire body also." *Supra*, p. 80. She also testified that you could hand a file to a judge in the courtroom without twisting. *Supra*, p. 93.

Flatoff testified to the contrary that twisting was definitely required of a Deputy Clerk II. (March 31, 2004 Tr. p. 31). She gave numerous examples of the twisting involved starting at the employee's desk, moving to the service counter and into the courtroom. *Supra*, pp. 31-33. The Grievant, however, stated that twisting wouldn't be a problem; "I just wasn't supposed to like rapidly turn my body." *Supra*, pp. 128-129. The Grievant also didn't have to twist and bend to put files on the floor and pick up them up because she had a new work station and more room to put files. *Supra*, pp. 125-126. Nor did the Grievant have to twist in the performance of her courtroom duties. (February 25, 2004 Tr. pp. 35-37, 93). She could stand, turn around and hand a file or exhibit to the judge. *Supra*, pp. 36-37. She could also move her chair to look at different angles. *Supra*, p. 35. Flatoff stated that she didn't believe it was acceptable to have a Deputy Clerk II stand up every time he or she would hand a file to a judge. (March 31, 2004 Tr. pp. 36-37). However, other witnesses, including the County's

own witness, admitted that standing and handing something to a judge was not a problem. *Supra*, pp. 76-77, 132. See also February 25, 2004 Tr. pp. 86-87.

April Stank also testified that you have to twist while at your desk and while filing. (March 31, 2004 Tr. pp. 80-81). It's something that can't be avoided. *Supra*, p. 86. However, twisting could be avoided if the employee chose. (February 25, 2004 Tr. pp. 35-37, 93). A review of the job functions performed by the Deputy Clerk II reveals few, if any, functions that require twisting in order to be performed. (Joint Exhibit No. 3). Twisting is not even listed among the "physical demands" required to perform the Deputy Clerk II job. *Id*.

The Grievant admitted that she would have to climb a small step stool to do her filing at the higher shelves. (February 25, 2004 Tr. p. 23). Assuming *arguendo* that climbing a step stool consisting of one or two steps, *supra*, pp. 98-99, is prohibited by the Grievant's work restrictions, this would not prevent her from performing most of her job duties. Filing at the upper levels of the filing shelves occupied only a very small proportion of the Grievant's filing responsibilities, less than fifteen minutes a week. *Supra*, pp. 28-29. As noted below, assistance was available for filing in the higher shelves.

Another limitation on the Grievant was "no overhead activities." (Joint Exhibit No. 4a).

The Union argues that there was an LTE to help with filing for the staff to help the Grievant file above shoulder level. In 2002, there was an LTE available to assist with filing during the period of time in question. (February 25, 2004 Tr. p. 109). At least one other Deputy Clerk II was available to assist the Grievant in filing at the higher levels. *Supra*, p. 99. The Grievant could file in the first five levels of shelves without going over her head. *Supra*, p. 24. The Grievant would need assistance filing above her shoulders but this would comprise only a *de minimis* amount of her work time.

The Grievant would not have to do any work above her shoulders in the courtroom. *Supra*, p. 37. There is no indication in the record that the Grievant had to do any above the shoulder work in any of her office, counter, copying, or telephone work.

Based on all of the above, the Arbitrator finds that the Grievant could perform most of her job duties both in the courtroom as well as the office as of July 24, 2004, notwithstanding the medical restrictions imposed by the Grievant's physician. The Grievant could perform her job duties for four hours a day. This is the same amount of time that the County allowed the Grievant to return to work with similar restrictions on March 18, 2002, at which time the Grievant performed her Deputy Clerk II job duties, except for filing, like any other clerk. (March 31, 2004 Tr. pp. 11-12). The County had work for the Grievant to perform on July 24, 2002. *Supra*, p. 18.

The Union argues that because Article 31 of the parties' collective bargaining agreement precludes the County from discriminating against the Grievant because of her disability it should have made an LTE "available to file for Ms. Prior as for any other deputy in that office."

Article 31 provides that the "parties to this Agreement agree not to *discriminate* against any employee because of . . . disability." (Emphasis added). Article 31 goes on to reference the definition of "disability" as defined in Sec. 111.32 Stats., as well as "applicable Federal and State statutes" dealing with discrimination.

Sec. 111.32 (8)(a) Stats., defines an "Individual with a disability" as an individual who "has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work." (Emphasis added). There is no dispute that the Grievant was an "individual with a disability" within the meaning of the statute from July 24, 2002 to October 15, 2002 based on the medical restrictions placed on her as a result of the "Attending Physician's Return to Work Recommendations Record" dated July 18, 2002. (Joint Exhibit No. 4a).

The Wisconsin Fair Employment Act ("WFEA") referenced by the aforesaid contractual provision declares as a matter of public policy that "the practice of unfair discrimination against properly qualified individuals by reason of their" disability "substantially and adversely affects the general welfare of the state." Sec. 111.31 Stats. The WFEA is a "remedial statute . . . [and] should be broadly interpreted to resolve the problem it was designed to address." MCMULLEN V. LIRC, 148 Wis.2d 270, 275, (Ct.App 1988)

Sec. 111.34 (1)(b) Stats., states with respect to "Disability, exceptions and special cases" that employment discrimination because of disability includes "refusing to reasonably accommodate an employee's or prospective employee's disability unless the employer can demonstrate a hardship on the employer's program, enterprise or business." A reasonable accommodation is not limited to that which would allow the employee to perform all of his or her job duties. CRYSTAL LAKE CHEESE FACTORY V. LIRC, 2003 WI 106, 264 Wis.2d 200, 230, 664 N.W. 2d 651 (2003). A change in job duties may be a reasonable accommodation in a given circumstance. *Id*.

Here, the Grievant could do most of her Deputy Clerk II Traffic job duties. As long as the Grievant could perform some or most of her duties a question arises as to whether there were reasonable accommodations that could and should have been made to allow her to perform those duties. CRYSTAL LAKE CHEESE FACTORY V. LIRC, *supra*, p. 234. In particular, the question is whether the County could have made modifications to the Grievant's job duties that would have allowed her to return to work as a Deputy Clerk II Traffic. CRYSTAL LAKE CHEESE FACTORY V. LIRC, *supra*, p. 211. The only job duties that she could

not perform were filing at the higher shelf levels and lifting of heavy objects and/or files. These activities occupied a *de minimis* amount of her work time and assistance in performing these tasks was available to her from LTE employees, other Deputy Clerk IIs and the bailiffs. Consequently, the County cannot make an argument that it would have posed a hardship on it to accommodate the Grievant's disability so that she could perform her job duties. CRYSTAL LAKE CHEESE FACTORY V. LIRC, *supra*, p. 237. This is particularly true since the County accommodated the Grievant's disability under similar conditions on March 18, 2002.

The County's refusal to modify the Grievant's job duties to exempt her from performing the heaviest physical tasks and from doing work over her shoulders constituted the denial of a reasonable accommodation, which could have been provided without hardship. CRYSTAL LAKE CHEESE FACTORY, *supra*, p. 205. Consequently, the County violated WFEA when it refused to reasonably accommodate the Grievant's disability without demonstrating that the accommodation would be a hardship on it. Sec. 111.34 (1)(b) Stats.

The Court's decision and analysis in CRYSTAL LAKE CHEESE FACTORY V. LIRC, *supra*, was followed in HUTCHINSON TECHNOLOGY V. LIRC, 2004 WI 90, 02-3328, 682 N.W.2d, 343 (2004)

When the County discriminated against the Grievant as noted above, it violated Article 31 of the agreement which prohibits discrimination against any employee because of disability.

Unless the parties specifically limit the powers of the arbitrator in deciding various aspects of the issue submitted, it is often presumed that they intend to make the arbitrator the final judge on any questions that arise in the disposition of the issue, including not only questions of fact but also questions of contract interpretation, rules of interpretation, and questions, if any, with respect to substantive law. (Emphasis added). Elkouri and Elkouri, *How Arbitration Works*, (BNA, 6th Ed., 2003), pp. 517-518. One of the circumstances where an arbitrator might consider external law is when, like here, the agreement itself incorporates various laws, or requires or authorizes an arbitrator to consider them. Elkouri and Elkouri, *supra*, p. 530. As noted above, Article 31 expressly incorporates various laws prohibiting discrimination, including WFEA, into the agreement.

Based on all of the above, it is clear, contrary to the County's assertion, that the previous grievance filed in this area by the Grievant and addressed in PORTAGE COUNTY, Case 160, No. 60532, MA-11652 (Greco, 9/02) is relevant to the outcome of this proceeding. Arbitrator Amedeo Greco stated therein that "the larger question is whether the County, as a matter of policy, must make reasonable accommodations for employees who are not injured on the job and who have medical restrictions placed on their ability to return to work to their regular job duties." PORTAGE COUNTY, *supra*, p. 5. He agreed with the County's argument

that it had the "right and responsibility to protect the safety of employees by refusing to allow the employee to work where there is a question about the employee's ability to perform the required work safely" so long as the employee "cannot perform his/her regular duties because of a medical restriction." *Id*. However, like here, Arbitrator Greco found that the Grievant "could perform her regular duties, which is why her grievance is being sustained." (Emphasis in the Original). *Id*. The record is clear that the Grievant was capable of performing her Deputy Clerk II Traffic job responsibilities adequately with reasonable accommodation and without hardship to the County. As noted above, the County pursuant to the contract and WFEA had a responsibility to make reasonable accommodations for the Grievant so that she could have returned to her regular job duties.

Based on all of the foregoing, the Arbitrator finds that the answer to the issue as stipulated to by the parties is YES, the Employer did violate the collective bargaining agreement when it refused to allow Kathleen Prior to return to work starting July 24, 2002 and ending on October 15, 2002.

In view of the above, and the entire record, it is my

AWARD

That the grievance filed in the instant matter is sustained. The County is ordered to make the Grievant whole for lost wages and benefits for the work hours that she was not allowed to work between July 24, 2002 and October 15, 2002.

The Arbitrator will retain jurisdiction over the application of the remedy portion of the Award for at least sixty (60) days to address any issues over the remedy that the parties are unable to resolve.

Dated at Madison, Wisconsin, this 14th day of September, 2004.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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