BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

RICHFIELD EDUCATION ASSOCIATION

and

RICHFIELD JOINT SCHOOL DISTRICT #1

Case 21
No. 65319
MA-13193

Appearances:

Mary Pitassi, Legal Counsel, Wisconsin Education Association Council, appearing on behalf of the Association.

Joel Aziere, Attorney at Law, Davis & Kuelthau, appearing on behalf of the District.

ARBITRATION AWARD

The Union and Employer named above are parties to a 2003-2005 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint the undersigned to hear and resolve the grievance of Diane Wagner. A hearing was held on June 29 and 30, 2006, in Richfield, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on October 20, 2006.

ISSUES

The parties did not stipulate to the framing of the issues. The District framed the issues as:

1. Whether the Grievant lacked standing to bring the grievance because she was not an employee of the District, making the grievance not arbitrable.

2. Whether the Grievant abandoned her teaching position by failing to provide updated medical documentation to the District and failing to return to work when physically able to do so.

The Association frames the issues as:

1. Did the Richfield School District constructively terminate the employment of Diane Wagner?

2. If the District constructively terminated Wagner's employment, did it have just cause to do so?

3. If the District did not have just cause to constructively terminate Wagner's employment, what is the appropriate remedy?

The Arbitrator accepts and adopts the issues as framed by the Association and intends to address the District's issues as part of the decision.

CONTRACT LANGUAGE

ARTICLE III – PROFESSIONAL ACTIVITY

B. Continued Employment

. . .

8. All bargaining unit members shall serve a probationary period of employment during the initial twenty-four (24) months of employment following the last date of hire of each employee by the Board. During the twenty-four (24) months of the probationary period, an employee may be discharged, suspended with pay or disciplined in a manner causing a reduction or loss of compensation only for just cause, and may be non-renewed or otherwise disciplined if the District's action is not arbitrary or capricious. After completion of the probationary period of employment, employees may be non-renewed, discharged, disciplined in a manner causing a reduction or loss of compensation or suspended with pay, only for just cause, and no other form of discipline shall be imposed that is arbitrary or capricious.

ARTICLE VI – LEAVE POLICIES

. . .

D. Medical Leave

1. A teacher, upon written request of a Doctor, shall be granted a medical leave for the time the teacher is physically unable to perform the teacher's regular duties due to a non-occupational disability. At the time of the request, the Board shall be provided

2. with sufficient information about the leave request in order to plan for the teacher's absence. The teacher shall notify the District if any part of this leave is to be granted under either state or federal medical leave laws. The teacher will, at the teacher's option, be paid the teacher's salary during such absence up to the number of unused sick leave days credited to the teacher's reserve pursuant to paragraph A1 of this Article as of the date of the leave. These days shall be charged against the number of accumulated days of sick leave.

3. As soon as the teacher knows of a need for medical leave the teacher shall notify the District of the nature of the disability and the approximate time the teacher expects to being and end the leave. The District may refuse to grant a leave of absence to any teacher who knows of the need for a leave of absence and does not notify the District of this fact within a reasonable time after the teacher learned of that fact. If the disability is such as to require an accommodation by the District the teacher shall notify the District as soon as possible of the limitations on the teacher's ability to work and the teacher's proposed accommodation.

4. Upon commencing his/her leave of absence, the teacher must sign an affidavit indicating that he/she is physically unable to perform his/her regular duties and that as soon as he/she is again physically able to perform his/her regular duties he/she intends to return to work. Upon commencing his/her leave of absence, every teacher must also provide a statement signed by a doctor indicating that the teacher is physically unable to perform his/her regular duties and the approximate date the doctor believes the teacher should again be physically able to perform his/her regular duties. During the course of a teacher's leave of absence, the District may request, at reasonable intervals, a similar statement from the teacher's doctor.

5. The District reserves the right, at any time, to require any teacher to be examined by a doctor of the District's choosing or to provide a statement signed by the teacher's own doctor indicating that he/she is physically able to perform his/her regular duties.

6. In the event that a teacher fails to return to work as soon as he/she is physically able to perform his/her duties or as per Paragraph F, he/she shall be deemed to have resigned his/her teaching position with the District and waived any and all rights to further employment by the District.

BACKGROUND

Diane Wagner, the Grievant in this case, is a Spanish teacher. She taught at the District from August of 1990 to September of 2002. She was hired at 50 percent and eventually worked full-time. She taught kindergarten through eighth grade Spanish. She also engaged in a lot of sporting activities and worked nearly full time at Michael's House of Prime, a bar and restaurant near Pewaukee. In September of 2002, she became ill with viral meningitis and viral encephalitis.

Wagner had started to work for the 2002-2003 school year when she got sick over the Labor Day weekend in 2002. After Labor Day, she tried to come back to work three times but she was not able to continue working. She was experiencing violent pain, severe headaches, body aches and could not tolerate sunlight, artificial light or noise. She was sleeping 18-20 hours a day. After about eight weeks, she was diagnosed with viral meningitis and viral encephalitis. In the fall of 2002, she applied for long-term disability with the WEA Trust and it was approved.

Dr. Thomas Dougherty was one of Wagner's doctors and he signed a note on October 8, 2002, stating that she was under his care and she was unable to work. Wagner sent the note to the District with a note saying "let me know if you want anything more." Scott Sarnow was the District Administrator/Principal at the time Wagner went out on medical leave. On November 19, 2002, Sarnow sent Wagner a letter asking for medical documentation from her physician stating that she was presently suffering from a medical ailment and was required to stay home as a result of that ailment. Sarnow's letter said that the documentation must include a full description of her medical condition, the manner in which it prevented her from working, the limitations it placed on her ability to perform major life functions, the expected duration of the condition and her expected return date. He warned that failure to comply could result in cancellation of her leave of absence and appropriate disciplinary action.

When Wagner received that letter, she took it to her doctor's office and asked for medical documentation. She called the District on November 21, 2002 and said she would be sending medical forms to the school via fax machine. She called again to make sure the District got the fax.

Dr. Dougherty sent a letter on November 21, 2002, stating that Wagner had major difficulty with her ability to function, that her attention span had been decreased, and she was chronically on medication to treat pain. The combination of conditions led to a good deal of fatigue and exertional intolerance, and her status was being followed by a neurologist. His letter said it was impossible to know the duration of her condition or her expected return date. The neurologist was Dr. Darryl Prince, who also sent a letter on November 21, 2002, stating that Wagner had complained of severe daily headaches and extreme fatigue. Those symptoms were at a point where she was unable to function as a teacher.

On December 10, 2002, Wagner signed an affidavit stating that she was currently suffering from viral encephalitis and viral meningitis, that she was under the care of Dr. Thomas Dougherty and Dr. Daryl Prince, and that her medical condition made her physically unable to perform her regular duties as a teacher. She stated that she had chronic headaches, sensitivity to light, sensitivity to noise, low concentration level, weakness, exertional intolerance, and fatigue. She stated that she would return to work as soon as she was physically able to perform her job duties.

Sarnow asked Wagner on January 9, 2003, to have Dr. Prince give him direction regarding her expected return date. While Wagner called the District and said she had faxed the neurologist's report to the District, it apparently didn't arrive, and Sarnow asked for it again on January 28, 2003. On February 3, 2003, Wagner sent a letter from Dr. Prince to the District. In this letter, dated January 9, 2003, Dr. Prince could not give a return to work date and said only he would be re-evaluating Wagner in February.

Every time Wagner got a letter from the District asking for something, she took it to a doctor and asked the doctor to provide the information and send it to the District. She acted within a day of receiving the letters. She called the doctors' secretaries to make sure that it had been done. She was not able to drive at this point and relied on other people to give her rides. Wagner said she always asked her doctors when she would be able to go back to work, and she was told that it was unpredictable because she had a brain injury, there was no cure, and the only thing to do was to treat the symptoms.

The next communication was from Sarnow to Wagner on March 28, 2003, asking to have her doctor contact him about when she could return to work and any accommodations she would need when she returned. On May 6, 2003, Wagner called the District to see if Sarnow had received a call from Dr. Prince. On June 9, 2003, Sarnow wrote Wagner the following letter:

> You have been out of school since September 24, 2002. Since that time, I have sent you numerous correspondence directing you to provide medical documentation substantiating your claimed medical condition. You have repeatedly failed to respond to these directives, the last of which was sent to you on or about March 28, 2003.
>
> The only item we have received from any health care provider was a letter from Dr. Darryl Prince, dated January 9, 2003. In his letter, Dr. Prince stated that you were suffering from viral meningitis and that you would be reassessed at the beginning of February regarding your condition and progress. Dr. Prince stated that, following the February evaluation, he would be able to advise as to an expected date for your return to work. However, we have received nothing from either you or Dr. Prince since this January 9 letter.

> You called the school on or about May 6, 2003 and advised that Dr. Prince would be contacting the District to provide an update regarding your medical condition. We have received nothing.
>
> You have been absent for over 8 months now. Therefore, you have exhausted the 12 weeks of unpaid medical leave afforded to you under the Family and Medical Leave Act. You currently remain on a medical leave of absence provided for in the collective bargaining agreement.
>
> I direct your attention to Article VI of the Master Contract between the Richfield Board of Education and the Richfield Education Association. According to Section D(2) of Article VI, you are required to provide the District with your expected date of return from medical leave. Pursuant Section D(3), upon request by the District, you are to provide medical documentation from your health care provider substantiating your claimed medical condition and your expected date of return.
>
> Please be advised that, according to Article VI, Section D(5), in the event a teacher fails to adhere to the requirements set forth above, "he/she shall be deemed to have resigned his/her teaching position with the district and waived any and all rights to further employment by the District."
>
> I have decided to provide you one last opportunity to comply with the requirements set forth above. You have until June 20, 2003 to provide me with medical records from your health care provider detailing your medical condition. This documentation must include a full description of your medical condition, the manner in which this medical condition prevents you from working, the limitations this medical condition places upon your ability to perform major life functions, the expected duration of your condition, and your expected return date.
>
> Should you fail to provide this documentation by June 20, 2003, you will be deemed to have resigned your teaching position with the District and waived any and all further rights you may have to employment by the District.

After receiving the above letter, Wagner contacted UniServ Director Sam Froiland, who then tried to call Sarnow. Sarnow did not return Froiland's calls, so Froiland wrote a letter to Sarnow on June 18, 2003. He noted that there have been efforts by Wagner to provide the necessary documents.

On June 17, 2003, Dr. Prince wrote a letter stating that due to Wagner's symptoms of severe headaches and fatigue, she was unable to work as a teacher. He stated that the symptoms had been improving with medications and physical therapy, and he estimated that

she could return at the start of the school year in September. Also on June 17, 2003, Physical Therapist Karen Ellefson wrote a letter to Sarnow stated that Wagner had been under her care since February 11, 2003, and had a set back in March when she experienced numbness on the right side of her head, right arm and leg. Dr. Prince had Wagner hold off on therapy until April 28, 2003.

On June 24, 2003, Sarnow wrote Wagner thanking her for following through on his request for a medical update. He included the 2003-2004 school year calendar for her and noted that all staff would receive correspondence in August with details on the in-service and record days. However, on August 25, 2003, Wagner called the District to say that her doctor was writing a letter and that she was not coming back to work. A letter dated September 5, 2003 from Dr. Prince stated that Wagner would be unable to work until further evaluation.

On September 22, 2003, Sarnow wrote Wagner telling her the District received information on her long-term disability medical report stating she would possibly be returning to work in one to three months, and that the District also received Dr. Prince's letter from early September. Sarnow said the District needed an update about when she would be returning to work and any accommodations she would need. Wagner sent Sarnow a copy of the physical therapy status report dated September 17, 2003. On October 1, 2003, Dr. Prince wrote a letter stating that Wagner was under his care for viral meningitis complicated by chronic daily headaches, cognitive difficulties and fatigue. He stated that she had no significant change in her condition, and he was unsure as to when she would be back to work.

Wagner started sending Sarnow regular medical reports used for her long term disability status. One was sent on November 1, 2003. The following reports were dated January 12, February 12, March 16, April 9, June 21, September 27, all in 2004. When Wagner exhausted her maximum disability benefits in September of 2004, she no longer got forms from the WEA Trust to fill out and no longer sent them to the District.

On March 10, 2004, Wagner sent Mike Mierow a notice that she accepted the renewal of her teaching contract for the 2004-2005 school year.

Sarnow wrote Dr. Prince on June 4, 2004, asking for a forecast from him about when, if ever, Wagner would be able to return to work. Craig Baker became the District Administrator/Principal in June of 2004. Wagner was on leave when he started and he did not know her. Baker was aware of Sarnow's June 2004 request to Dr. Prince but there was no response from the doctor. The first medical report Baker saw was provided by Physical Therapist Christine Schaefer, who wrote Baker on September 27, 2004. Part of her letter stated:

> Diane has muscle spasms and neck pain which limit her ability to turn her head either direction. She is also unable to hold her head upright for long periods forcing her to lie down often. Her headaches are constant and can be very debilitating causing, at the very least, an inability to concentrate or keep her eyes open. Due to these symptoms and limitations, Diane spends much of her

time lying down and would be unable to work as a teacher or even as a tutor.

Dr. Prince sent a letter on October 18, 2004 in which he estimated that Wagner would be able to return to work during the second semester in January of 2005, and he recommended part time work at first with a gradual advancement to full time hours as tolerated.

Wagner did not return to work in January of 2005. On January 17, 2005, Baker sent her a letter that stated:

> This letter is in response to your voicemail message regarding your employment status with the Richfield School District. Accordingly to Article VI, Section D(1) of the Master Contract, "A teacher, upon written request of a Doctor, shall be granted a medical leave for the time the teacher is physically unable to perform the teacher's regular duties due to a non-occupational disability. At the time of the request, the Board shall be provided with sufficient information about the leave request in order to plan for the teacher's absence."
>
> You have failed to comply with that provision. Despite repeated requests, you have failed and refused to provide medical documentation supporting your medical leave and/or indicating when you would be able to return to perform your duties. Therefore, the District was forced to retain a teacher to cover your classes. Said teacher has been retained for the duration of the 2004-2005 school year.
>
> Article VI, Section D(2) of the Master Contract states, "As soon as the teacher knows of a need for medical leave the teacher shall notify the District of the nature of the disability and the approximate time the teacher expects to begin and end the leave." As stated above, you have refused to comply with this requirement. Section D(2) continues, "The District may refuse to grant a leave of absence to any teacher who knows of the need for a leave of absence and does not notify the District of this fact within a reasonable time after the teacher learned of the fact."
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> Article VI, Section D (3) of the Master Contract provides as follows:
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> Upon commencing his/her leave of absence, the teacher must sign an affidavit indicating that he/she is physically unable to perform his/her regular duties and that as soon as he/she is again physically able to perform his/her regular duties he/she intends to return to work. Upon commencing his/her leave of absence, every teacher must also provide a statement from a doctor indicating that the teacher is physically unable to perform his/her regular duties and the approximate date the doctor believes the teacher should again be physically able to perform his/her regular duties. During the course of a teacher's leave of absence, the District may request, at reasonable intervals, a similar statement from the teacher's doctor.
>
> You have failed to comply with this requirement.

On September 7, 2004, I sent you a letter detailing the charges supporting my recommendation of termination of your employment. In that letter, I directed you to comply with Article VI, Section D of the Master Agreement. You failed to do so.

On September 23, 2004, I sent you a follow-up letter. That letter concluded as follows:

> You have indicated your intent to return to the classroom as soon as possible. However, you have failed to demonstrate that you possess a valid teaching license and have failed to provide adequate medical documentation supporting your current leave and/or showing your ability to return to teach. Therefore, no later than **September 30, 2004,** you are directed to provide the following:
>
> 1. Evidence that you have obtained a one-year teaching license extension.
>
> 2. Evidence of your ability to complete, by June 30, 2005, the six credits necessary to renew your five-year teaching license.
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> 3. Medical documentation, including a full description of your medical condition, the manner in which this medical condition prevents you from working, the limitations this medical condition places upon your ability to perform major life functions, the expected duration of your condition, and your expected return date.
>
> 4. Medical documentation evincing your ability to return to the classroom and perform the functions of your job on the return date specified in #3.
>
> The charges supporting my recommendation of your termination shall be held in abatement pending your response by the designated deadline. Your failure to respond by this date shall result in my filing said charges with the Board and the scheduling of a termination hearing.

You failed to comply with this directive by failing to provide the medical documentation required.

This letter shall constitute your final warning. No later than **January 21, 2005**, in accordance with Article VI, Section D, you are hereby directed to provide the medical information set forth above. Your failure to do so shall result in my initiation of action to sever your employment with the District.

On January 20, 2005, Wagner spoke to the Associate Administrator/Guidance Counselor, Dr. Laura Jean Maher. Wager said she did not understand what Baker wanted and asked how much documentation he wanted to have. Maher told her that Baker would be out of the office for an undetermined amount of time due to surgery, and encouraged her to get in touch with the school lawyer. Wagner said she had difficulty talking to Baker, that he never returned her phone calls. Baker did not return to work until late February or early March of 2005.

On January 19, 2005, Wagner faxed Baker documents that she stated were sent previously in September and October of 2004. One document was her current teaching license issued July 1, 2004 and would expire June 30, 2005. The other was the September 27, 2004 note from Schaefer regarding Wagner's condition. Dr. Prince sent a letter on January 28, 2005, stating that Wagner was still under his care for post viral meningitis and was still unable to return to work.

During the winter of 2004-2005, Wagner had discussions with her physical therapist and Dr. Prince about a plan to get back to work. After having been sick for a long time, she would not be able to jump back into anything half time or full time right away but would need to have a gradual return. She needed to build up her strength, be around people, and be awake for more than several hours at a time. She started by walking out to the end of her driveway, then around the block. Her medical team thought it would be beneficial to her health to start working in an environment with fewer responsibilities, fewer hours, more flexibility, and the ability to rest and take breaks as needed.

Wagner described Michael's House of Prime as a small supper club with 16 tables and 19 or 20 stools in the bar. It is a family operated business with an older clientele. The bar is primarily a waiting area for a table. Wagner had owned a bar across the street from Michael's House of Prime between 1989 to 1996. After she closed her bar, she started working at Michael's as a bartender and then as a bar manager until she became ill in 2002. She knew the staff and the workings of the restaurant well. When she returned to Michael's, she was not capable of teaching. At Michael's, she was not in charge of a classroom of children and working under fluorescent lights. She did not have far to drive and she was never there alone. If she felt ill or tired or in pain, there was always someone who could cover for her. The level of concentration was lower than teaching. She did not have to write any lesson plans or grade any papers. She came in, served people, and that was about all. When she first came back to Michael's, she did not have to count cash in her register or drawer. There was always a second bartender, four waitresses, two cooks, bus help, dishwashers or the owners around.

When Wagner came back to Michael's in December of 2004, she worked a little more than she did after the holiday season. On the average, she worked only five or ten hours a week, and not every week. She did not work more than two days in a row. She was able to rest while at Michael's when she got tired. There was a recliner in the office and lounge chairs in the back yard. Depending on the weather, she would go to the office or outside on the porch. The restaurant and bar had low level lighting, and it did not bother Wagner. The noise level would bother her sometimes, but the music was usually kept on a low level in the bar.

Wagner continued to have pain while she was working at Michael's. She took medication and some of the side effects were drowsiness and dizziness. The staff around her would ask if she needed to rest or sit down. She was able to get rides to work and was still uncomfortable driving at that time. She still had trouble concentrating and she doubted that she could have created effective lessons for children. At Michael's, she did not have to do any heavy lifting, and other people were willing to carry things for her. She occasionally lifted a case of beer or moved bottles of liquor around.

In the fall of 2004, Wagner entered a pain management treatment center at Waukesha Memorial Hospital. She started getting treatments to kill nerve endings in the early part of 2005. The treatments she received there eventually helped lessen her pain. As the pain decreased, she was able to stay awake for a longer period of time during the day. She was gaining a little more energy and stamina. She started to take steps to return to teaching. She called Baker for direction on how to get back to work, but he did not return her phone calls.

Baker was told that Wagner was working at Michael's House of Prime. On April 1, 2005, he went there to see for himself whether or not Wagner was tending bar. She was. When he arrived, Wagner was serving drinks, carrying trays, ringing up the register while people were smoking, music was playing, and the bar was loud and crowded. Baker saw Wagner carry bottles of liquor without trouble. He did not see her having trouble turning her head from left to right or trouble holding her head upright or keeping her eyes open. He saw her smoking and dancing or moving to the music. He did not see that she was physically restrained in any way. He wrote up a note regarding his observations, dated April 1, 2005, which states:

> On Friday evening about 9:30, I went to Michael's House of Prime near Pewaukee. Earlier in the day, Mrs. Hamilton said that she had talked to Ms. Wagner in the morning. During the conversation, Ms. Wagner reportedly mentioned something about her employment at the aforementioned establishment; thus, I decided to see if Ms. Wagner was working.
>
> I entered the bar at 9:30 P.M., and immediately noticed that Ms. Wagner was bartending. I ordered a beverage from her and sat near the wall, as the bar was exceptionally crowded at that time. While I was seated near the wall, an elderly couple was preparing to leave, and the female dropped a styrofoam container of food on the floor (apparently a doggie-bag). The lady picked up the scraps and placed the container on the bar and left.
>
> At about 9:40, some patrons left their seats at the bar so I then took a seat there. Ms. Wagner asked if the container was mine so I explained about the elderly lady's mishap. Ms. Wagner thanked me for the info and procured another beverage for me.
>
> From about 9:45 – 10:20, I observed the following:

1. Ms. Wagner appeared to have no difficulty waiting on customers. I did not see any limp, grimacing, or anything that might lead one to think that she was ill or remotely incapacitated. The bar was still quite busy, thus she was also busy as she served them.
2. At one point, Ms. Wagner lit up a cigarette and was "dancing" while she smoked. The song on the radio was "Wishing and Hoping." (Dusty Springfield)
3. I also observed Ms. Wagner "moving to the music" on a second occasion. The song was "Groovin." (Young Rascals)
4. Toward the end of my stay, a woman (appeared to be a waitress) came into the bar and sat down. Ms. Wagner appeared to be balancing the cash register at the time. The waitress stated, "Di, do you want to come home and help me hang some dry wall, or would you rather go out and party tonight?" Ms. Wagner replied, "That sounds good." The waitress also asked Ms. Wagner if she had finished her homework yet, and Ms. Wagner said that it was "all done."

I left at approximately 10:20.

It was at this point in April of 2005 that Baker determined that Wagner had abandoned her job, that she was physically able to work but had not returned when she was physically able to do so. He considered her to have resigned.

On April 5, 2005, Wagner sent Baker a letter telling him she would like to return to her teaching position half days in the afternoons as soon as possible, and to let her know what documentation she would need. She sent him the same information via e-mail on April 6, 2005.

Teachers usually get their forms to renew their contract for the next school year sometime in the spring and had to return them by April 15th. Wagner did not receive a form for the 2005-2006 school year. She called Baker on April 7, 2005 and was able to get through to him after asking the receptionist or secretary to not announce who was calling. She told him she wanted to come back on a pat-time basis and wanted to sign her letter of intent. He said he was not offering her that, and when she asked why, he said he did not feel obligated to explain anything to her. Wagner contacted Froiland, who told her that she could write her own letter and send it, which she did on April 11, 2005.

On April 12, 2005, Wagner sent an e-mail to Mierow telling him she talked to Joel Aziere, the District's attorney, and Froiland. She stated that Baker failed to forward the medical letter from her doctor and her teaching license to Aziere, that she had sent Baker the information in August and again in January. She stated she had also sent Baker a letter about her intent to return to work immediately and to renew her contract for the 2005-2006

school year. She said she was going to the Mayo Clinic in May to see another neurologist about the spinal fluid leaking outside of her spinal column. Her own neurosurgeon said it was a very rare side effect of meningitis, and it made her legs numb and weak all the time. Mierow wrote back and noted he was having a difficult time understanding whether or not she was cleared by a physician to return to work, that he would hate to see her trying to teach and be in such pain. Mierow asked if she was sure she could come back under the circumstances she had described about the spinal fluid leaking outside of her spinal column, and whether she related all of that to Froiland.

Baker visited Michael's House of Prime again on Friday, April 29, 2005 and was there between 8:35 p.m. and 9:10 p.m. He saw Wagner tending bar, carrying boxes or cases of beverages, stocking floor level coolers, waiting on customers, and cleaning and wiping down the bar. His notes from that observation state that there were about 10 – 13 patrons, another person also tending bar, and the environment was relatively fast paced.

Baker did not consult with the members of the school board after his visits to Michael's. He alone determined that Wagner was able to work and therefore had abandoned or resigned her job with the District. The District never asked Wagner to submit to an independent medical examination.

Close to the end of the 2004-2005 school year, Wagner found out that the Spanish position was possibly going to be reduced to about 50 per cent. Both she and her doctor thought it would be good to return on a part-time basis. A friend called her and told her to look at the DPI website, where she found that her old job had been posted

In July of 2005, there was a bargaining session and Froiland asked Baker to speak to him privately after it. Froiland was concerned about reports that Wagner was making efforts to communicate with Baker and that he was refusing to talk to her. Froiland wanted to resolve the matter rather than end up in litigation, and Baker said that there was more to the story than Froiland knew. Froiland told Baker that he needed to communicate that more clearly to Wagner, and Baker responded that he would not talk to her.

On August 4, 2005, Dr. Prince sent a letter stating that Wagner could return to work for the school year. On August 25, 2005, Baker wrote Wagner and told her that he did not consider her as a current employee in the District. He stated that he was perplexed that Dr. Prince was just now releasing her for employment, in light of the fact that she had been employed for an extended period of time at Michael's House of Prime and been there for several years, perhaps even while she was on medical disability. He said that given the fast-paced duties and strenuous nature of bartending, she could understand why he was uncertain or confused about her inquiry about a recently advertised teaching position.

A grievance was filed on August 26, 2005, and on August 29, Baker wrote Mierow denying his request to proceed to step 2 of the grievance procedure. Baker stated that "Ms. Wagner has de facto resigned from the District per Article VI, Section D...." He said he would meet at step 1 but did not acknowledge that Wagner was a current employee. The parties met on September 12, 2005, and Baker denied the grievance in a letter to Mierow on September 16, 2005. The parties had a third step grievance meeting on October 5, 2005. Wagner was asked in this meeting how long she was working at the bar, and she said since 1996, but not the entire time. She said she went back to work there in April of 2005, that she worked four, five or six hours tending bar, that she was not required to carry cases of alcohol but to stock the bar.

Jill Shilbauer is the disability, life and long-term care director at the WEA Trust. The records show that Wagner went on long-term disability on September 2, 2002. Her long-term disability benefits ended on September 2, 2004. Wagner was on a waiver of premium status whereby she was allowed to remain in the group health plan between November 1, 2002 and May 31, 2005, when the waiver of premium ended because the number of months allowed had been met. After June 1, 2005, Wagner was allowed to stay in the group health plan under a direct billing status. Shilbauer testified that once the waiver of premium ended, Wagner's only opportunity was to continue under the disability provisions of the health policy, which she did. The Trust considers individuals to be disabled from their occupation if they are unable to perform the material and substantial duties of their regular occupation they held when they ceased working.

Wagner was in a car accident in January of 1991 and took a medical leave for surgeries. She was out on leave for two weeks initially, then weeks or months as she had surgery to reconstruct her face. She filled out forms for the leaves of absence. When she was ready to return, she called Sarnow and they picked a date for her return. She had another medical leave in 1996 when a student threw a ball at her face.

The Spanish teacher's schedule for 2005-2006 was part time or 50 percent, five days a week, from 10:30 a.m. to 2:30 p.m. each day. During the 2005-2006 school year, Wagner taught Spanish on a 40 percent schedule at St. Joseph's in Big Bend.

THE PARTIES' POSITIONS

The District

The District contends that the grievance is not arbitrable because Wagner was not an employee of the District when the grievance was filed, and she had no standing to bring the grievance. She was a former employee. She filed the grievance in the summer of 2005, which was after the time she was seen working at Michael's House of Prime. She abandoned her employment with the District when she went to work as a bartender and failed to inform the

District of this development and failed to provide medical documentation clearing her to work at Michael's but not at the District. The medical leave provision in the collective bargaining agreement explicitly states that an employee who does not return to work when physically able to do so is deemed to have resigned his/her teaching position with the District and waived any and all rights to further employment by the District. A teacher who resigns from his or her position has no right to use the grievance procedure in the collective bargaining agreement and has no right to a hearing before the school board. The District has continuously maintained its position that Wagner does not have standing to bring the grievance.

The District also asserts that the grievance should be dismissed because Wagner did not provide medical documentation as required under the bargaining agreement. When she began her leave, she swore under oath in an affidavit that she was suffering from viral encephalitis and viral meningitis, and that her medical condition made her physically unable to perform her regular duties as a teacher. She swore that she suffered from chronic headaches, sensitivity to light and noise, a low level of concentration, weakness, exertional intolerance and fatigue. And finally, she swore that she would return to work as soon as she was physically able to perform her job duties. Under the bargaining agreement, the District could request updates from her and she was required to provide a doctor's statement indicating she was still unable to perform her duties and estimating a date to return to work. The District maintains that Wagner violated the terms of her medical leave by repeatedly failing to provide the District with an estimated date of her return. During the 2002-2003 school year, Sarnow sent Wagner six letters asking that she provide the District with information about when she would return to her teaching position. Each time, she failed to do that.

The Grievant's failure to comply with the collective bargaining agreement continued in the 2004-2005 school year. Baker's letter on January 17, 2005, quoted the requirements of the medical leave provision, but Wagner did not include a date of return in the information she finally faxed to him. At no time between October 18, 2004 and August 4, 2005, did Wagner give the District any medical documentation estimating when she could return to her teaching position. Thus, Wagner had continually violated the bargaining agreement by failing to provide the District with any information on her expected date of return. Even when she provided a doctor's statement with an estimated return date of January 2005, she violated the bargaining agreement by failing to return to work when she was expected or even notifying the District she was unable to return.

The District argues that Wagner further violated the terms of her medical leave by failing to provide the District with medical updates on her condition. In December of 2004, when she began working as a bartender, her condition had apparently improved enough to allow her to return to work but she did not give the District current information on her symptoms. Wagner testified that she and her doctor developed a rehabilitation plan in which she would slowly build up her stamina by working at Michael's, but she never sent anything to the District about this plan, despite her testimony that she would take everything she had and send it to the District. When Dr. Prince sent the District a letter on January 28, 2005, he did

not mention anything about the rehabilitation plan. Wagner admitted that no documents existed to support her claim that her return to Michael's was part of any plan of rehabilitation. The only information the District has about the alleged rehabilitation is Wagner's testimony at the arbitration hearing, which is unsubstantiated by any evidence.

The District also takes issue with Wagner's testimony that she did not know what documentation she was supposed to give to the District. This was not her first time taking medical leave. Both Sarnow and Baker wrote her letters quoting language from the collective bargaining agreement. The language clearly calls for a statement signed by a doctor indicating that the teacher is physically unable to perform his/her regular duties and the approximate date the doctor believes the teacher should again be physically able to perform those duties. While Wagner testified that the District never told her the medical information she provided was inadequate, that was not the District's responsibility. Furthermore, the District had no way of knowing that the information she was providing was inaccurate and outdated. When Baker asked for an update in January of 2005, the Grievant provided the September 2004 letter from her physical therapist and later provided a letter from Dr. Prince. As far as the District knew, the Grievant was still experiencing the same symptoms and was still unable to return to work. The District had no way of knowing that these letters were inaccurate because it did not know that Wagner had begun working at Michael's until Baker saw her there in April of 2005.

The District urges the grievance be dismissed because Wagner failed to return to work when physically able, thus abandoning her employment under the bargaining agreement. Because she started working as a bartender, she was physically able to work and should have returned to her teaching position. Wagner lied to the District during the Step 3 grievance meeting because she knew her ability to work at Michael's conflicted with her claim of physical limitations to the District. While Wagner claimed that she needed to slowly build up her stamina and start back to work extremely slowly, she worked 27.5 hours in her first two weeks of bartending.

While Wagner explained the difference between working at Michael's and teaching, those differences are irrelevant. The medical documentation she provided to the District never mentioned these differences. She never sent a doctor's note stating that she could not be around children or had difficulty with fluorescent lighting or that she could not drive. Her failure to make the District aware of these distinctions and of her rehabilitation plan means that she did not return to work as soon as she was physically able. The truth of her claim that she could tend bar but not teach is irrelevant because she violated the bargaining agreement by failing to give this information to the District, as required by the medical leave provision.

When Baker was at Michael's on April 1 and 29, 2005, he did not see her having a hard time holding her head upright, keeping her eyes open or engaging in other activities. He saw her carrying trays, serving drinks and dancing in a noisy, crowded bar. Wagner claimed that people at Michael's were "like family" and allowed her to lie down when she needed to rest. Again, she never provided the District with medical documentation indicating that she

could return to work if she was given the opportunity to lie down. It was her duty to tell the District she could work as long as she could rest when needed. The District contends that when Wagner began working at Michael's and did not provide the District with any medical documentation clearing her to work as a bartender and not as a teacher, she abandoned her employment.

For the Association

The Association asserts that the District's refusal to allow Wagner to return to her job constitutes a constructive discharge. Her employment was never actually terminated or non-renewed. The question then becomes whether this is a constructive resignation as the District claims or a constructive discharge. Arbitral decisions trying to determine whether an employee voluntarily quit or was constructively discharged almost always consider the intent of the employee in question. Unless the employee clearly intended to sever his or her employment relation, the action is most often found to be a discharge. Wagner's intent to return to the District was unequivocal. Arbitrators also have considered the employee's record, and it is undisputed that Wagner's employment record with the District was unblemished. Further, arbitrators have found an action to be a constructive discharge rather than a voluntary quit when the employer improperly executed its own procedure.

The Association contends that the District did not have just cause to discharge Wagner, and it needed just cause under Article III, Section B(6). Arbitrators have commonly focused on an employer's investigation, the notion that employees must have notice that what they are doing is wrong, and a chance to tell his or her story before discipline is imposed. The District offered Wagner absolutely no due process. The District has the burden of proving that the action it took against Wagner was for just cause. The employer has the burden to prove that Wagner failed to provide adequate medical documentation upon request and that she resigned her employment by not reporting to work when she was physically able to do so. The District did not fairly, objectively, and thoroughly investigate whether Wagner was physically able to return to work. A fair investigation includes hearing a grievant's side of the story before a disciplinary decision has been made.

Baker's correspondence of August 25, 2005 indicated for the first time that the District no longer regarded Wagner as a District employee. From the hearing, it is clear that Baker made the determination that Wagner was physically able to return to teaching based solely on his two brief, unscientific visits to Michael's House of Prime in April of 2005. This amateur detective work falls far short of the mark of an investigation. It apparently never occurred to him that Wagner might be able to work part time at one job but not full time at another. He made a flawed assumption about her ability. He had no idea what the terms and conditions of her employment at Michael's were. He did not know how many hours she worked in a week, how many consecutive days she worked, or whether her medical condition was being accommodated. He had no idea how a familiar, part-time job in a bar with others ready to help Wagner, no lessons to prepare, no children to teach, and no fluorescent light might differ from a full-time job teaching Spanish to students in bright lights every day of the week, with no respite, and with responsibilities that extended outside of the classroom. Baker never asked

The Association also notes that Baker acted alone and had no methodology or plan for his surreptitious visits to Michael's. His visits were brief – lasting 50 and 35 minutes. He had no idea whether Wagner needed to take a rest break and whether she was permitted to do so earlier or later than his observations. He had no idea how often she lifted a case of beer. His observations are his own subjective conclusions. Baker had never met Wagner, and he was unfamiliar with her mannerisms, energy level or the way she might express that she was in pain. He decided on his own that she had no difficulty holding her head upright, that she wasn't bothered by the noise, wasn't irritated by smoke, had no difficulty performing any physical activities and did not show any signs that she was ill or remotely incapacitated. His notes show that he did not see her limp or grimace, even those she never claimed to have those symptoms.

Further, the Association contends that Baker consistently misread Schaeffer's September 27, 2004 letter. He testified that Wagner was able to turn her head from right to left while working at Michael's. Schaeffer's letter never stated that Wagner could not turn her head at all, but that muscle spasms and neck pain limited her ability to turn her head in either direction. Baker also testified that he believed Wagner had no difficulty holding her head upright while working at Michael's. Schaeffer's letter stated that Wagner was unable to hold her head upright for long periods forcing her to lie down often. Since Baker was arguably never at Michael's for a long period of time, he never saw whether this was the case. He did not call Schaffer to ask what a long period of time meant. He also testified that Wagner was able to keep her eyes open the entire time he was at Michael's, and Schaeffer said that Wagner's headaches were so debilitating that at certain times she could not keep her eyes open. The District never used its right under Article VI, Section D(4) to have Wagner examined by a doctor of its own choosing.

The Association further argues that the District did not fairly investigate whether Wagner had complied with requests for medical documentation. If it had read its own file, it would have seen that Wagner complied with every request from the District she received. If her responses were inadequate, it was the District's responsibility to tell her that, and it did not do so. There is no indication in the record that between January 17, 2005 and August 25, 2005, anyone from the District contacted Wagner to tell her that the information she had sent in January was inadequate. She did not learn that there was a problem until she received a letter from Baker dated August 25, 2005 informing her that her failure to supply medical information in a timely manner was apparently a reason her employment had been terminated. Wagner made repeated attempts to contact Baker but he refused to speak with her. On a number of occasions, Wagner's doctor did not comply with information requests on a timely basis.

The Association contends that Wagner never received adequate process before discipline was imposed. The District must be aware that Wagner can be deemed to have resigned only if the District is correct about her being physically able to return to her District job. If the District is incorrect in that assumption, than the employment action is a constructive

termination.

In Reply, the District

The District states that the Association has argued that it was the District's obligation to obtain updated information regarding Wagner's medical condition, to determine whether she was released to work at Michael's, and to obtain an independent medical examination. However, Froiland testified it was Wagner's responsibility to provide updates regarding her medical condition, and he recognized that it was of vital importance for her to advise the District of any developments regarding her medical status. The District agrees with Froiland.

Wagner's claim that her return to work at Michael's was part of her rehabilitation plan is disingenuous and unsupported by any facts. There are no documents that exist about this plan. No doctor would sign a written document stating that a patient was unable to work and then clear her to perform manual labor as a bartender. Wagner had from August 28, 2005 to October 5, 2005 to secure a letter from Dr. Prince explaining this rehabilitation plan, but never did. Wagner lied to the District about when she actually returned to Michael's. This deceptive behavior calls her credibility into question.

The difference between Wagner's job at Michael's and her teaching duties are irrelevant. She admitted that she never claimed she couldn't be around kids, never claimed to have difficulty around fluorescent lighting and never claimed she could not be alone. She admitted she never received any medical documents clearing her to work at Michael's but not work at the District. Wagner presented a list of physical limitations to the District. She now tries to argue that a new standard should be applied to determine whether she was physically able to return to work. She cannot have it both ways. If she is held to the new standards argued by the Association, then she has failed to provide updates regarding her medical condition and is in violation of the medical leave policy.

The Association's argument that Wagner never intended to resign and therefore was discharged is flawed because the contract states what constitutes a resignation, despite the intention of a teacher. The parties have agreed that a teacher shall be deemed to have resigned if he or she fails to return to work as soon as he or she is physically able to perform his or her duties. When Wagner was caught performing the physical activities she claimed she was unable to perform, she was in violation of Article VI, Section D(5). She had not returned to teaching, even though she was able to perform the physical tasks she previously claimed to be unable to perform. Even if her separation was considered a discharge, the parties have already agreed that there was just cause for the separation. The District did not take action under Article III, Section B. The District did not discharge Wagner and took no action. It merely accepted her resignation. Just cause is determined by the occurrence of the specific event – Wagner's failure to return to work when physically able to do so.

The District argues that it was Wagner's responsibility to provide updates regarding her medical condition. The Association points out things the District could have done, but it was

not the District's responsibility to go out and obtain the medical information. The affidavit

Wagner signed required her to provide updated and accurate information regarding her medical condition. So did the contract. Even Froiland agreed. She provided a list of physical limitations rendering her unable to teach, and the District accepted those limitations as the basis for her medical leave. If her medical condition had changed, it was incumbent on her to provide updates to the District. She failed to do so. When Baker informed Wagner that she was no longer considered an employee of the District, it was incumbent on her to provide an explanation for her ability to work at Michael's despite her professed physical limitations. She failed to do so.

The District maintains that Wagner was provided all due process to which she was entitled. An employee is only entitled to due process if the employee can establish that the employer deprived the employee of a property interest. An employee who resigned of his own free will cannot establish that his employer deprived him of his property interest. Moreover, the employee is still entitled to a full due process after the fact through the grievance arbitration process.

In Reply, the Association

The Association dispatches the District argument that the grievance is not subject to arbitration because the Grievant had quit by noting that this is true only if the District's position on the merits is sustained. The logical result of the District's position is nonsensical since all grievances challenging employee terminations would then be non arbitral.

Regarding the merits, the Association asserts that the District has no evidence that Wagner failed to return to work when physically able to do so. She was not released to return to work until August 4, 2005. The District's conclusion relies on Baker, who has no medical or vocational rehabilitation training and who saw Wagner working as a bartender at Michael's for a total of 85 minutes on two separate nights. He had never met her before and had no information about the details of her job at Michael's. This evidence is insufficient to prove a thing. The Association disputes Baker's conclusion that Wagner was engaging in every one of the physical activities she told the District she was unable to do. Wagner's testimony suggests that the reality was much different and more complicated than Baker saw on his brief anonymous visits.

The Association states that Baker should have conducted a real investigation but he didn't. The District was not obligated to get an independent medical examination, but as Froiland testified, the District can be as careless as it likes. The just cause standard required the District to undertake an investigation before terminating Wagner. The time for an investigation was in the spring and summer of 2005 after Baker's visits to Michael's, and not during meetings for the grievance filed as a result of Wagner's termination. The obligation to provide an investigation and due process is the District's, not the employee's. The District's attempt to shift the burden flies in the face of acceptable practice of labor law.

The District also tries to shift the onus of determining what medical records would be acceptable to the District onto Wagner. Her obligation to provide documentation about her medical condition stems from Article VI, Section D(3) of the bargaining agreement. There is no obligation for one on medical leave to provide details of a rehabilitation plan. There is no obligation to report every minor change in the medical condition, or even every major change. There is no schedule for the provision of updates. There is no obligation to report *de minimis* part-time employment to the District. The contract does not even require the teacher to provide any additional updates but gives the District the right to make requests. This is the point that the District has consistently misconstrued.

Article VI, Section D(3) does not establish a catch-all obligation for the employee on leave to continue providing any and all medical records and information to the District. Rather, it gives the District the option to ask for the records. If the District believes that an employee has not met his or her obligation to provide required information, it must give the employee and the Union notice that the information is inadequate. The District argues that Wagner was on medical leave before and knew what was expected of her. However, she had never been on a medical leave lasting three years, during which time the leadership of the District changed and the new District Administrator refused to talk to her. Baker admitted at the hearing that he was the person to give Wagner the answers she sought.

The Association notes that the District made much of the fact that Wagner did not provide a date certain for her return to work. Providing an approximate return date is a contractual requirement at the beginning of one's leave; it is an option, at the District's request, later on. Predicting a return date was difficult, given the nature of Wagner's illness. Dr. Dougherty made the same point and his letter was available to the District. The District also knew that Dr. Prince had shifted his estimated date of Wagner's return at least once before the fall of 2004. He stated in October of 2003 that he was unable to estimate a date for Wagner's return. The District failed to notify Wagner in a meaningful way that a return date was the crux of the information it sought and it did not obtain that information through an IME. The District should be estopped now basing its termination of Wagner on the fact that she did not or could not provide a date of return before August 4, 2005.

The Association takes issue with the District's claim that Wagner knew that her ability to work at Michael's conflicted with her claims of physical limitations to the District. Wagner expressed her belief that while she was physically able to work at Michael's, she was not yet physically able to work at the District due to the differences in hours, working conditions, and possible accommodations.

DISCUSSION

Everything in this case flows to the question of whether Wagner was physically able to resume her teaching job in April of 2005. If she was physically able to return to teaching and did not, she will be deemed to have resigned, in accordance with the collective bargaining

agreement's language of Article VI, Section D(5), which states:

> In the event that a teacher fails to return to work as soon as he/she is physically able to perform his/her duties or as per Paragraph F, he/she shall be deemed to have resigned his/her teaching position with the District and waived any and all rights to further employment by the District.

If she was not physically able to return to work, the District's refusal to allow her to return in effect terminated her employment and is in effect a discharge.

This case is an example of why a fair investigation is important. If the employer fails to carry out a fair and thorough investigation, it runs the risk of not having the correct facts in hand to prove its case. And in this case, the District cannot prove that the Grievant was physically able to return to work. The District cannot prove it at any time – in April when Baker saw her tending bar or at any other point in time. The District's case rests on Baker's visit to Michael's House of Prime on two occasions. Baker had no other knowledge of how many hours the Grievant worked in a night or in a week, whether she could take breaks and rest, whether she was capable of working a regular teaching schedule, or any information on which to determine that the Grievant was capable of returning to work. All Baker really knew is that the Grievant was tending bar on two occasions – once when he was there for about 50 minutes and another time when he was there for about 35 minutes.

On the other hand, Wagner's testimony was credible as she explained how she was able to work part time at Michael's in a low stress situation while still being unable to work at the District. She described Michael's as a small supper club with an older clientele and about 19 or 20 bar stools where people waited to be seated at tables in the dining room. This matches Baker's observations as he testified that the bar area cleared out as patrons were called to their tables and others completed eating and were leaving. As the bar area cleared, Wagner was not as busy as when he first entered the establishment. He noticed that there was some time where she was not waiting on people. This is not a very high pressured bartending job. (The Arbitrator has the advantage of having tended bar in various places.) Many bartending jobs are physically demanding and stressful. But that's why the facts are important, because this bartending job is not the same as many others. In fact, when Baker visited the second time at the end of April, again on a Friday night, he saw only about 10 – 13 patrons in the bar during the prime hours of a Friday night, and there were two bartenders on duty. In his notes, Baker described the environment as "relatively fast-paced," but two bartenders waiting on 10-13 patrons cannot be considered fast-paced work. Baker saw that Wagner even had time to stand around, move to the music, smoke a cigarette, and stock coolers, which would indicate a rather low stress level of a job and not very past-paced. Wagner's description of the job is more accurate – you greet someone, get their drink order, make the drink and serve it.

More importantly, the District did not know that Wagner was able to lie down at Michael's whenever she needed to do so. It did not know that she did not work on consecutive

days or not more than two days in a row. It did not know how many hours a day she worked,

how often she rested, or what kind of pain she was in while she was working. While the District suggests that Wagner could have asked the District for necessary accommodations, it's a given that teachers don't rest and lie down during their classes. The District points out that Wagner worked 27.5 hours in her first two weeks back at Michael's, but that is less than 14 hours a week, not even half-time work. Her hours were quite low after the holiday season, sometimes down to 13 or even as low as 7 hours in a two week period. Nothing in her job at Michael's compares to what would be expected of her as a teacher.

The District objects to Wagner's testimony that her work at Michael's was part of a rehabilitation plan, and it objects that there is no documentation about this plan. The District has no evidence to the contrary. It has no proof, no evidence, nothing at all except Baker's observations on two occasions, once on April 1, 2005 and once on April 30, 2005. Baker was never at Michael's for even an hour at a time. His evidence is not enough to contradict Wagner's credible testimony, for the reasons mentioned above. The District attacks Wagner's credibility because she told the Board at the Step 3 grievance meeting that she started working at Michael's in April of 2005, when in reality she started back there in December of 2004. However, the Arbitrator rejects this as it was well after the time when the District refused to allow her to return to work. It is the kind of evidence that is of questionable admissibility, in that it happened after the fact, after the time of the District's determinations that Wagner was no longer an employee and no longer entitled to return to work. The District complains now that it did not know until the hearing that Wagner was able to lie down and rest while working at Michael's and other conditions that she testified to at the hearing in this matter. That's another reason for an investigation – to talk to the employee involved and get the facts before making assumptions that may be proven wrong later. Baker's consistent refusal to talk to Wagner at any time in this case has worked to the District's detriment, in that it never had the facts at hand that it needed to determine Wagner's status.

While the District has argued that Wagner was physically able to do the things she had told the District she couldn't do, the District has stretched the letter of September 27, 2004 from Physical Therapist Schaefer beyond its meaning. Schaefer wrote that:

> Diane has muscle spasms and neck pain which limit her ability to turn her head either direction. She is also unable to hold her head upright for long periods forcing her to lay down often. Her headaches are constant and can be very debilitating causing, at the very least, an inability to concentrate or keep her eyes open. Due to these symptoms and limitations, Diane spends much of her time laying down and would be unable to work as a teacher or even as a tutor.

Baker stated that while at Michael's, he saw Wagner turn her head in either direction. But he did not know to what extent she was limited in turning her head. He said she could hold her head upright. But he did not know for how long. He said she could keep her eyes open. Again, he did not know for how long. He had no idea about whether she suffered from headaches, muscle spasms, neck pain, or the inability to concentrate. Baker decided, without

any proof whatsoever, that Wagner was physically able to return to her teaching job.

This point cannot be made strongly enough – the District has no proof that the Grievant was physically able to perform her duties as a teacher.

The District could have easily sought such proof if it wanted to. It could have exercised its right under Article VI, Section D(4) to have Wagner examined by a doctor of its choosing or have Wagner's doctors sign a statement indicating she was physically able to perform her regular duties. While the District was not required to do any of this, it needed some proof that Wagner was able to work as a teacher before cutting off her rights to her job. Baker was wrong in his assumptions about Wagner's physical abilities, and a search for some proof would have turned up the fact that Wagner was still having many physical problems. She was scheduled to go to the Mayo Clinic in May of 2005 to see a neurologist about spinal fluid leaking outside of her spinal column, a rare side effect of meningitis. In fact, her doctor never cleared her to return to work until August 4, 2005.

Baker considered her no longer an employee after his first visit to Michael's on April 1, 2005. He testified that he considered her to have abandoned her job, that she had resigned. Yet he knew within a few days that Wagner was trying to return to her teaching position on a part-time basis. On April 5, 2005, Wagner wrote Baker that she wanted to return to teach half days in the afternoons as soon as possible, and she asked what documentation she needed to do this. Baker never responded. In fact, when Wagner called about her contract for the 2005-2006 school year, Baker told her he was not offering her one and he was not obligated to explain anything to her. So knowing that she had not resigned or abandoned her job, he still refused to tell her anything. Baker could not logically assume that Wagner was resigning, given her April 5th letter and her telephone request for a contract for the upcoming year. It was completely incumbent upon him to tell her either that he considered her to have resigned or that she was being terminated. Baker even went back to Michael's on April 29, 2005, but he still never said anything to Wagner or even to the Board. There is no evidence that Wagner knew who Baker was when he visited Michael's. They had never met as she was already on medical leave when he started with the District.

Baker never told Wagner that he considered her to have resigned, he never told Froiland or the Association, and he never told the School Board. Wagner's intent to return to teach was clear – she expressed it in many ways. Baker had to realize that there was a problem here that he should have addressed in some manner rather than his silence until August of 2005. Wagner had been a teacher in good standing for a significant period of time – she had worked at the District for 12 years. She developed its Spanish program. She had a very serious illness that forced her out on medical leave for three years. She had been an active person who did not want to be sick and lying around her house. There is no evidence that she was malingering. There is evidence to the contrary, that she was attempting to work again, to get stronger, to be able to get back to teaching.

There is no evidence that Wagner was physically able to return to work when the District decided she had resigned. She clearly had not resigned. If the District believed it did

not need proof of Wagner's physical ability, it should have realized that it might have to

defend its position. It was cutting off her right to return to work – cutting off all employment rights – just as Wagner requested to return to work on April 5, 2005, right after Baker decided she had resigned. The District's refusal to allow her to return to work may properly be characterized as a constructive discharge. Arbitrators often scrutinize an employer's action in not allowing an employee back to work following a medical leave, because an employer's indefinite layoff for medical reasons could amount to a suspension or discharge and circumvent he just cause provisions of a labor contract.

The District did not have just cause to discharge Wagner. It never believed it needed to non-renew her or terminate her, because it always believed that she was remiss in not returning when physically able, despite the lack of evidence of such and the availability of evidence to the contrary. These findings, of course, also determine that the Grievant had standing to bring a grievance. As an employee who had either been constructively discharged or had been refused employment following a medical leave, she had the right to challenge the employer's decision. The Association correctly notes that the logical result of the District's position would be nonsensical in that all grievances challenging employee terminations would be non arbitral.

The Arbitrator also agrees with the Association's interpretation of the bargaining agreement regarding the need for medical documentation and return to work dates. The District makes way too much of the fact that Wagner did not provide the District with her expected date of return. The District was well aware from her doctors that a return date was very speculative, and every time the doctors made an estimate, they were wrong. The only troubling aspect of this case is that on October 18, 2004, Dr. Prince estimated that Wagner could return to work part time during the second semester in January of 2005. And nothing happened between October and January 17, 2005, when Baker wrote to her. Wagner did not return to work in January of 2005, and the District did nothing to prepare for her return. On January 28, 2005, Dr. Prince stated that Wagner was still unable to return to work. Both parties seem to be remiss here. Wagner could have and should have told the District well before the second semester that she was unable to work. The District – if it really expected her back – should have been sending her a schedule of hours or classes so that she could prepare for her classes. This is not an assembly line – people don't just show up for work one day and someone finds a spot for them. There is much more planning that goes into teaching schedules. There is no evidence that the District gave the replacement teacher a notice of partial layoff so that Wagner could return. So even when the District had an expected date of return, it did not act as if it made any difference. Since both parties seemed to have missed the boat here, the Arbitrator discounts this incident as being of any significance to the ultimate outcome in this award. Perhaps both parties were quite used to missing these expected dates, since that had happened for years.

Article VI, Section D(3) called for the teacher to provide statements "upon commencing his/her leave of absence," and says nothing about providing regular updates. The contract says nothing about providing updates for every change in condition. The District may require

updates at reasonable intervals, under the language of the contract. The District did this but

also continued to tell Wagner she was in violation of the contract by not providing updates, although she did every time she was asked for them. Wagner fulfilled her obligations and was ready to give the District any information it sought. If the District thought that Wagner did not provide enough information or the correct information, it could have and should have informed her of that. However, the District was satisfied with the information she provided in response to its requests. It cannot complain now.

Based on the record as a whole and for all of the reasons stated above, the grievance is sustained.

The Remedy

Diane Wagner is entitled to be made whole, with a reinstatement order and back pay. The Arbitrator is aware that there may be some difficulties in determining what constitutes an appropriate make whole remedy in this case. Accordingly, the Arbitrator will hold jurisdiction until March 31, 2007. If the parties have not agreed to a complete remedy by that time, a hearing on the remedy may be held.

AWARD

The grievance is sustained.

The Arbitrator will hold jurisdiction until March 31, 2007 in accordance with the "Remedy" section of this Award.

Dated at Elkhorn, Wisconsin this 19th day of December, 2006.

Karen J. Mawhinney, Arbitrator

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