

**IN RE ARBITRATION BETWEEN:**

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**AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES,  
AFSCME COUNCIL 5, LOCAL 66**

**and**

**CITY OF DULUTH**

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**DECISION AND AWARD OF ARBITRATOR**

**BMS 13-PA-0417**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**February 4, 2013**

IN RE ARBITRATION BETWEEN:

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AFSCME Council 5, Local 66

and

DECISION AND AWARD OF ARBITRATOR  
BMS 13-PA-0417  
Mark Tucker LTD Grievance

City of Duluth

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**APPEARANCES:**

**FOR THE UNION:**

Diane Firkus, Business Representative  
Robin Davis, Steward  
Mark Tucker, grievant

**FOR THE CITY:**

Steven Hanke, Attorney for the City  
Mike Silvis, HR Generalist  
Kim Hall, former HR Manager

**PRELIMINARY STATEMENT**

The hearing was held January 17, 2013 at the Duluth City Hall. The parties presented oral and documentary evidence at which point the record was closed. The parties waived Post-Hearing Briefs.

**ISSUE PRESENTED**

Did the City violate the CBA when it placed the grievant in long-term disability, LTD, in January 2012? If so, what shall the remedy be?

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement covering the period from August 1, 2006 through July 31, 2011. Article 45 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Bureau of Mediation Services.

**RELEVANT CONTRACTUAL PROVISIONS**

ARTICLE 29.1 – SICK LEAVE

29.1 - Effective the first day of the month following the date of hire, an Employee shall be granted up to 120 working days of sick leave with full pay (paid sick leave) for each illness or injury during a calendar year. ...

29.6 – Temporary disability. Any employee who will be temporarily disabled for a period in excess of ten (10) working days may be offered an Assignment to a Position, which may have tasks or equipment modified to accommodate the Employee's medical restrictions, at such Employee's present rate of pay by the City in his or her present or lower classification, the duties of which the Employee is able to perform. If the City is not able to provide the employee such assignment, the Employee may continue on paid sick leave. If such Assignment is refused by the employee, and justification for the refusal is not provided by the employee's physician paid sick leave will be denied. ...

## ARTICLE 31 – LONG TERM DISABILITY

31.1 – Any employee who has been continuously employed by the City for not less than six (6) months in the classified and/or unclassified service shall be eligible for long-term income protection to age 70 for disability. ...

31.2 – For purposes of this article, disability means that which is caused by illness or injury which occurs during the employee's term of employment and which prevents the Employee from performing the major tasks of the employee's employment.

31.3 – Payment of benefits pursuant to this article to a disabled employee shall commence when the employee exhausts his or her allowance of 120 days of sick leave with full pay provided by Article 29 of this Agreement. The amount of protection shall be 65% of the employee's Basic Hourly Rate as of the time that Employee's sick leave is exhausted or the parties agree to commencement of such payments, but shall not exceed an amount equivalent to a monthly rate of pay of \$3,500; ...

31.4 – payment of benefits due under this article shall be calculated for each regular pay period, and shall be paid of the period at the same time as Employees are then paid pursuant to Article 25 of this Agreement. For any pay period the City may deduct from the payment of benefits any amount which the employee previously received as payment of benefits but to which the Employee was not entitled because of the provisions of this Article.

31.5- Within 24 months from the date of injury or illness causing such disability, if the employee is still receiving benefits pursuant to this Article, the Employee shall:

(a) Return to the Position within the City which the Employee occupied when he or she became disabled; or return to a Position with the City, which may have tasks or equipment modified to accommodate the Employee's medical restrictions, for which the employee is qualified, if such Position is available; but only if the Employee provides written information from a physician chosen and compensated by the City, which indicates that the Employee is then capable of performing the duties of the Position; or,

(b) Request rehabilitation or retraining designed to return the Employee to other work which produces an economic status as close as possible to that enjoyed by the employee before the illness or injury; ...

31.6 – Receipt of long-term disability protection benefits shall cease as at the expiration of 24 months from the date if injury or illness causing such total disability unless the Employee has complied with Section 31.5 of this Article and has been determined to be returned to work, rehabilitated and/or retrained, or eligible for continuing total disability benefits because he or she is disabled as defined in paragraph 31.5. Such determination shall occur upon the occurrence of paragraph 31.7

31.7 – Medical verification by the Employee's treating physician and a physician appointed by the City that the determination is consistent with the Employee's medical condition, in the event of disagreement. A third physician mutually agreed upon by the Employee and the City shall act as arbitrator. The arbitrator's decision as to whether the determination is consistent with the Employee's medical condition shall be binding on both parties.

31.8 – Disagreements under this Article shall be subject to the Grievance procedure.

## ARTICLE 45 – GRIEVANCE PROCEDURE

45.1 – An Employee or group of Employees with a Grievance shall, within twenty one (21) calendar days after the first occurrence of the event giving rise to the grievance, present such Grievance through the Union in writing to the appropriate first line or division manager,

45.2 – Should the manager and the grieving Employee/s be unable to easily resolve the Grievance, the manager and the Union steward will meet and collaboratively prepare a written report of the specific contract language, facts and circumstances pertaining to the Grievance. Such facts and circumstances report shall be prepared within five (5) working days of the initial meeting between the manager and the Employee/s. Both sides shall make a good faith attempt to make the report as complete and accurate as possible. Preparation of the report shall include jointly interviewing all those affected by or with knowledge of the facts and circumstances surrounding the grievance. ...

45.4 – If the Grievance is not settled in accordance with the foregoing procedure, the Union may, within twelve (12) working days after receipt of the reply of the Chief Administrative Officer or designee, submit the Grievance to arbitration. ...

### **UNION'S POSITION**

The Union's position was that the Employer violated the labor agreement by placing the grievant on LTD status in January 2012 without his knowledge or consent and that the grievant was not afforded his rights to be paid for up to 120 days of sick leave as called for under the labor agreement. In support of this position the Union made the following contentions:

1. The Union argued that the terms of Article 29.1 are clear and unambiguous and require that before an employee can even be placed on LTD, the employee is entitled to use up to 120 days of sick leave for each illness or injury. During the time the person is on sick leave they are entitled to full pay and benefits. LTD on the other hand provides only for 65% of the salary and limited benefits.

2. The Union further pointed out that there was no dispute that the grievant suffered from various maladies, including high blood pressure, chest pains and other stress related illnesses due to being subjected to a hostile work environment by his supervisors.

3. The grievant's doctors rendered several medical opinions and work release slips indicating the grievant's condition the need to either be off work entirely or to be placed in a less stressful workplace. See Dr. Nissawandt-Larsen's letters of 1-17-12, 3-13-12 and 12-23-11. His doctor eventually did release the grievant to return to work however by letter dated 10-9-12.

4. The Union asserted that there is no question that the grievant was unable to work due to the hostile work environment created by the City's supervisors. Further, that it was well known that the facility in which the grievant worked was hostile. See Dr. Nissawandt Larsen letter of 12-23-11. The Union further asserted that the grievant received his 120 days of paid sick leave in 2011 and that the condition that he had in 2012 was identical to the one he had in 2011. Thus, he should have been paid his full 120 days paid sick leave.

5. The grievant further never asked for nor made application for a QRC, Qualified Rehabilitation Counselor, nor any of the other benefits provided for under Article 239. He merely made inquiry about a QRC so he knew what his options were but never requested them either formally or informally. See Employer Exhibit 16, and e-mails of 2-1-12, 2-7-12 and 2-15-12.

6. The Union also countered the City's claim that there is a past practice of automatically placing employee's on LTD before their sick leave was exhausted when the disability was open ended. The Union asserted that there is no such practice and that the City's evidence was sorely lacking and did not establish any of the necessary elements of a past practice. Further, the CBA language is clear and requires that the full 120 days of sick leave be exhausted before the employee is placed on LTD.

7. The Union further pointed out that the grievant's doctor took him out of work by letter dated 1-17-12 but indicated that he would soon be seen by an Occupational medicine physician to assess his condition and to possibly provide for a set of restrictions under which the grievant could return to work. Indeed, the grievant held a light duty position for a time in the summer of 2011 but that position expired due to its seasonal nature. Thus there was no "open ended disability" as asserted by the City here.

8. The Union acknowledged that the City has the right to a fitness of duty examination but further asserted that he is now fully capable of returning to his former position and insisted that he should be returned there immediately since his doctors have now cleared him to return. See Dr. Nisswandt-Larsen letter of 10-9-12. He should thus have been returned immediately at that point.

9. The Union asserted strenuously that there was no “agreement” between Ms. Davis, the steward, and Mr. Silvis, that the decision to place the grievant on LTD was appropriate. See City Exhibit 3. They both signed that document but Ms. Davis did so only to acknowledge that the meeting required by Article 45 was held. It was not an agreement to anything. The Union pointed out that the matter was pursued through the grievance procedure after that meeting and it should have been obvious that the Union had not agreed to anything as the result of the meeting between Ms. Davis and Mr. Silvis.

10. The Union asserted that it provided the medical documentation allowing the grievant to return to work and acknowledged that the City has the right to conduct a fitness of duty evaluation pursuant to article 31.7 of the CBA but insists that the grievant either be returned to work immediately or that the City perform the fitness exam so the grievant can be returned to duty without further delay.

11. The Union argued that the decision to place the grievant in LTD was in retaliation for his complaints regarding the creation of a hostile work environment. The Union argued that the CBA is clear and that he should have been placed on sick leave for the mandated 120 days. The fact that he was not under these circumstances shows the City’s bad faith in placing him on LTD even though it was clear that he was improving and that he would be updating the City as to his condition in a reasonable period of time.

The Union seeks an award of the arbitrator sustaining the grievance and making the grievant whole for all lost wages and contractual benefits due to the City’s actions here.

**CITY’S POSITION:**

The City’s position was that there was no contract violation in the matter. In support of this position the Employer made the following contentions:

1. The City outlined the LTD program within the City of Duluth and noted that it provides payment of 65% of the employee’s salary at the time of the disability as well as payment of many valuable benefits pursuant to the CBA, including health insurance and life insurance.

2. The City further argued though that the employee must update the City as to their status and when or if they will be able to return to work. The grievant did not do that in this instance and the City asserted that it had only the information that the grievant was unable to perform his regular duties without any firm indication as to when he might be able to return to full duty. See section 31.5(a), wherein the employee is obligated to provide written information from a qualified physician.

3. The City asserted that under these circumstances it was appropriate to place the grievant in LTD rather than to allow him to exhaust sick leave. The grievant's medical condition was the same in 2011 as it was in 2012 and to allow him to use sick leave again was inappropriate under the CBA.

4. The City asserted that the grievant's doctor made it clear that the grievant was not coming back to work at any time certain. Further, the grievant had the same medical diagnosis and condition in 2012 that he had in 2011, and which was the basis for his being taken out of work at that time. The City had no way to know when or if the grievant would return to work as of January 2012.

5. Further, the City asserted that the doctor's notes are confusing and inconsistent at best. First Dr. Nisswandt-Larsen indicated that the grievant was unable to perform his regular duties. See City exhibit 19 and medical reports contained therein. Later however the doctor indicated that he would be able to return to his old job but that if he encountered work related stress he "may need to go into a different position." See Dr. Nisswandt-Larsen letter of October 23, 2011. This letter was not clarified or explained until her letter of 1-7-12.

6. Further, the City noted that it never received the letters of January 17, 2012, March 13, 2012 or October 9, 2012 from the doctor until shortly before the hearing in this matter. The City submitted numerous affidavits from City employees working in the HR department claiming that they never saw these letters and that they were never delivered to the City during calendar year 2012. Thus it was impossible to know when or if the grievant was able to return to work or whether he was medically clear to do so.

7. The City further asserted that the parties held the required grievance meeting pursuant to section 45.2 of the grievance procedure and that certain agreements were reached in that meeting. Notably, there was an agreement that the “statement contained in the official grievance form stating that LTD placement is retaliatory is not an accurate representation...” Moreover that the grievant was “actively pursuing benefits under LTD. Specifically he has requested benefits under Section 31.5(b).”

8. The City asserted that it felt that the parties had come to a resolution of the grievance at that time and that the matter had been effectively settled with the Union agreeing that the LTD place was appropriate for the grievant.

9. Further, the City noted that the grievant actively sought benefits that are only available under the LTD program, namely the assistance of a QRC to aid in placement in an appropriate position within the City. This benefit is not available to someone on sick leave but is for someone on LTD. See City exhibit 19, 2-15-2012 e-mail from Mr. Silvis to the grievant. The City further noted that these steps were taken after the grievance was filed and argued that the grievant’s position in seeking a QRC at the same time his grievance was pending was curious at best and wholly inconsistent at worst. The City questioned how the grievant would be seeking such benefits yet claiming that he should not have been placed on LTD.

10. The City asserted that it would have been inappropriate to return the grievant to his regular position without adequate medical support for that in January 2012. At that point all the City had was the letter from the grievant’s doctor indicating that he was unable to return as of January 2, 2012 and that he would be seen by an Occupational Medicine physician and “that return to work will be clarified at that time.” See letter of 1-2-12. There was no follow up with that and the City was never apprised as to the grievant’s status after that. Accordingly the City felt it had no choice but to place the grievant on LTD.

11. The City further asserted that there is a past practice of placing employees on LTD in circumstances like this, i.e. where the employee's medical condition is longstanding and where there is no clear end date for the disability. Here this is exactly the case. The City had no clear indication of when the grievant could return and so consistent with its practice, placed him on LTD and immediately began paying him those benefits.

12. Even if the grievant had been on sick leave for the first 120 days of 2012, there was no information that as of the 121<sup>st</sup> day he would or could have returned to full duty. At that point he would certainly have been on LTD. Without any medical verification of fitness, the grievant would clearly have been on LTD at that point. Here though the City acted consistently with its practice to place him on LTD in January.

13. Finally, while there were rumors that the grievant had been released to return to work there was no definitive statement to that effect given to the City until just shortly before the hearing. The City could not act on mere rumor or innuendo however and needed a clear written release.

Accordingly the Employer seeks an award of the arbitrator denying the grievance in its entirety.

### **DISCUSSION**

The facts of this matter were generally straightforward and for the most part undisputed. The grievant has worked for the City of Duluth for some 9 ½ years as a Water Quality Specialist in the Public Works Department. The evidence showed that he was subjected to a hostile work environment based on the actions of his supervisors and that has caused medical problems in the form of high blood pressure and chest pains.<sup>1</sup>

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<sup>1</sup> These allegations were not deeply explored at the hearing and there was little evidence of exactly how this occurred. It was clear however that there was a hostile work environment and that this led directly to the grievant's medical conditions as outlined by his physician.

The evidence showed that the grievant was taken out of work by his physicians in 2011 due to these health related concerns. It was also clear that he was granted 120 days of sick leave in 2011 due to these same concerns. He worked for a short time in a light duty capacity but that was a temporary position and was again out of work as of the beginning of 2012.

The City requested an update of his health status by letter dated 12-27-11. In that letter the City alleged that the grievant's use of sick leave appeared to be "unjustified" and requested that he provide a physician's notice. In apparent response to this, the grievant provided a letter from his physician dated 1-2-12 which indicated that the grievance was "unable to work at this time" but that the grievant "will be having more evaluation by occupational medicine and return to work date will be clarified at that time." The evidence showed that the City did receive this letter.

The City then placed the grievant on LTD by letter dated January 10, 2012. That letter simply stated that "the City has determined that you [the grievant] qualify for Long-Term Disability (LTD) benefits. Reports from your physician continue to support the need for absences and work restrictions in your position as Water Quality Specialist."<sup>2</sup> The evidence showed too that the grievant did not formally apply for this and that the City determined that he would be placed in LTD without consulting him or the Union prior to sending the January 10, 2012 letter.

The grievant's doctor wrote another letter on 3-13-12 which provided as follows: I had referred him to occupational medicine in January to look at stress in his job and work toward solving the situation and possibly get approval to work out of remote location." The evidence showed that the City did not, for whatever reason; receive this letter until well after it was written, perhaps not even until just prior to the hearing of this matter.

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<sup>2</sup> See also, letter of October 11, 2011 in which the City acknowledged that the grievant was out of work due to the medical conditions occasioned by the hostile work environment. It was in apparent response to this letter that the grievant provided the doctor's note date October 13, 2011 in which Dr. Nisswandt-Larsen indicated that the grievant was medically stable to return to his old position but that if again encountered work stress from a hostile environment, he may need to go into a different position." It was never clear why the grievant was not returned to his old position at that time since the evidence also showed that at some point in 2011 the supervisor who was the cause of the bulk of the stress had left the facility.

It was also shown that the City never received the report from the occupational medicine doctor to whom the grievant was referred in January 2012. The grievant claimed that it had been sent to the City but provided no other evidence of that.

The Union filed a grievance over the placement of the grievant on LTD on January 30, 2012. This grievance sought a number of remedies and cited a number of provisions of the CBA that were allegedly violated. The evidence further showed that Mr. Silvis and Ms. Davis met pursuant to section 45.2 of the grievance procedure to prepare a written report of the contract language, facts and circumstances pertaining to the grievance. See Employer exhibit 3. That report was dated 4-26-12 and provided in relevant part as follows:

“The City and AFSCME representation of mark tucker agree that the following represents factual findings related to the grievance fled on 1-31-12. Article 31 of the 2011 Basic Unit contract is the actual article that the Union contends was violated. All other referenced articles on the official grievance form are either not applicable or are directly tied to the status of Mr. Tucker under Article 31 regarding long-term disability. ... The statement contained in the official grievance form stating that LTD placement is retaliatory is not an accurate representation as there is sufficient medical and other supporting documentation since 4/11/2011 to support the leave of absences that he was provided as well as the temporary assignment that he worked and that LTD was an appropriate action to take. ... Mr. Tucker contends that his placement on LTD was not an appropriate action to take. ... Should verification, according to Article 31.5(a), be provided to the City indicating that Mr. Tucker is capable of performing the duties he will be returned to City employment.”

The Union asserted that despite the language above this was merely an acknowledgement of the grievance and not an agreement as to any particular set of facts or of a result. Indeed, the Union continued to pursue the grievance after this report was written.

The question initially is whether the Union is somehow bound by the statements contained in this report. This was frankly a far more troubling question than anything else in this case. The language uses the word “agree” and sets forth “factual findings.” The document is signed by both the HR representative and the Union steward.

A careful comparison of the agreements in this document to the evidence adduced at trial though shows that indeed there was no evidence of retaliation for filing the charge of a hostile work environment. Further, the grievant's claim appears also to be covered by the clear terms of Article 31, discussed more below. Moreover, while there was a statement that placement on LTD was "appropriate" there was no agreement as to when such placement was appropriate. Also, there is the statement that the grievant continued to contend that his placement on LTD was inappropriate.

Finally, there was no apparent agreement either on this record or in this report of April 26, 2012 that the grievance was resolved or dropped. This significant fact coupled with the clear evidence that the Union continued to pursue this grievance up to and including arbitration undercuts the theory that there was a settlement of this grievance.

Based on these statements, this document does not govern the result here in the fashion asserted by the City. The case thus proceeded on an analysis of the facts brought forth at the hearing and on the CBA language at issue here.

As noted above, it was clear that the grievant continue to suffer from the same medical condition in 2012 as he had in 2011. It was also clear that it was not completely clear as of January 2012 when he would be able to return to his duties with the City. There was a statement that he would be seen by an occupational medicine physician but there was no set time frame for that and no evidence that this report was ever transmitted to the City.

Finally, in late 2012, the evidence demonstrated that the Union gave the City documentation that the grievant was able to return to work. The evidence further showed quite clearly that the City had always agreed that if such documentation were to be provided the grievant would be returned to duty. See report of 4/26/2011 cited above. See also, City exhibit 18 and the November 21, 2012 and December 6, 2012 minutes of the grievance meetings between Union and management representatives. Those minutes make it clear that the parties agreed that if a release to return to work is provided to the City the grievant "can return immediately."

Dr. Nisswandt-Larsen's letter of October 9, 2012 definitively states that the grievant was able to return to work.<sup>3</sup> It was only at that point that there was a clear, unmistakable release to return to work. The evidence showed however that this letter was not presented to the City until only very shortly before the hearing of this case. It is against that factual backdrop that the question of a CBA violation proceeds.

Article 31.3 is clear and unambiguous. It provides that "payment of benefits pursuant to this article to a disabled employee shall commence when the employee exhausts his or her allowance of 120 days of sick leave with full pay provided by Article 29 of this Agreement." Article 29 is equally clear and provides that "effective the first day of the month following the date of hire, an Employee shall be granted up to 120 working days of sick leave with full pay (paid sick leave) for each illness or injury during a calendar year."

There was no question that the grievant received his sick leave in 2011 and there was no persuasive reason put forth by the City as to why he was not entitled to this same benefit in 2012. The language says "calendar year" and it of course means that the 120 days entitlement commences on January 1<sup>st</sup> of each year. Further, while the City's letter of December 27, 2011 raises the specter of unjustified sick leave there was no evidence that the grievant's use of sick leave was inappropriate or fraudulent. Indeed, the only medical evidence on this record was from the grievant's doctor. Even though there were some inconsistencies noted in it, as discussed above, it was clear that as of January 2012, the grievant was unable to perform the regular duties of his position and was thus entitled to sick leave.

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<sup>3</sup> It should be noted that the doctor's letters here are hardly a model of clarity and contain several inconstant statements over time. Her letter of January 2, 2012 clearly says the grievant is not able to return to work; just as her prior letters had indicated. Later though she attempted to "clarify" her October 2011 letter with a letter dated January 17, 2012. As discussed below, while the City should have placed the grievant on sick leave pursuant to Article 31, the City's confusion about the grievant's work release status was understandable. This was of course exacerbated by the apparent miscommunication and failure to make sure some of the physician's letters were in fact in City hands in a reasonable time after they were written.

This record was somewhat convoluted to be sure but on the whole the evidence showed that the decision to place the grievant on LTD as of January 2012 was contrary to the clear provisions of Section 31.3 cited above. Further, the evidence showed too that the grievant was unable to perform the duties of his job for at least 120 days commencing January 2, 2012, the date of Dr. Nisswandt-Larsen's 1/2/12 letter. This determination is based on the medical evidence in the file and what was known at the time these determinations were made.<sup>4</sup>

Further, while the grievant inquired as to his rights under section 31.5 and specifically a QRC the evidence showed that this was an inquiry only and was done after the decision had been already made to place him on LTD. At that point it was quite reasonable for the grievant to try to engage a QRC as well as to pursue this grievance in order to preserve his options. The fact that he made inquiry into the possibility of a QRC did not somehow prevent him from pursuing the grievance nor did it constitute an acknowledgment that the City's decision to place him on LTD was appropriate. Neither was it a waiver of any kind – it was merely an inquiry.

The City's point though with respect to what happens on the 121<sup>st</sup> day of this type of disability was well taken. Thus, even though on this record the grievant should have been placed on sick leave for 120 days following the January 2, 2012 letter, once that time period expired the grievant was appropriately placed on LTD and was entitled to remain there until cleared to return to work by his doctor.

On this record it was clear that the grievant's doctor has now cleared him to return to work. It was also clear, and acknowledged by the Union at the hearing, that the City would have the right to a fitness of duty examination by one of its own doctors if it chooses to do so.

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<sup>4</sup> At one point Dr. Nisswandt-Larsen indicated in her 10-9-12 letter that she never felt the grievant needed to be on LTD and that he did not have to be off work since the winter of 2012. While that may be true, there was no evidence that the grievant ever showed this or gave it to anyone at the City until well after it was written.

Accordingly, the remedy ordered is as follows: The grievance is thus sustained on the following basis. The grievant is entitled to 120 days of paid sick leave plus any accrued contractual benefits from January 2, 2012 until the 120 working days called for by the clear terms of Article 29 expired.. This amount is to be mitigated by any LTD/contractual benefits received during that same period to avoid a double recovery of wages or contractual benefits. The grievant was appropriately placed on LTD upon the expiration of the 120-day period referenced immediately above. Since the grievant has now been cleared to return to work by is doctor, he is to be reinstated to his former position within 5 business days of this Award. If the City chooses to seek the examination provided for in Section 31.7 it shall immediately notify the Union of this and the examination shall be conducted as soon as practical. The grievant shall remain on LTD, unless returned to duty, during the interim period of any such examination conducted pursuant to Section 31 hereunder. The arbitrator shall retain jurisdiction in the event of a dispute regarding the remedy awarded hereunder.

**AWARD**

The grievance is SUSTAINED as set forth above.

Dated: February 4, 2013

AFSCME #5 and City of Duluth.doc

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Jeffrey W. Jacobs, arbitrator