

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SHEBOYGAN CITY EMPLOYEES LOCAL 1750A,
AFSCME, AFL-CIO,

Complainant,

vs.

CITY OF SHEBOYGAN,

Respondent.

Case XVII
No. 17051 MP-269
Decision No. 12079-A

Appearances:

Mr. Michael J. Wilson, District Representative, WCCME, AFSCME,
AFL-CIO, appearing on behalf of Complainant.

Mr. Clarence Mertz, City Attorney, City of Sheboygan, appearing
on behalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Sheboygan City Employees Local 1750A, AFSCME, AFL-CIO, having, on July 31 and October 1, 1973, filed a complaint and amended complaint wherein it alleged that the City of Sheboygan has committed prohibited practices within the meaning of the Wisconsin Municipal Employment Relations Act; and the Commission having appointed Herman Torosian, a member of its staff, to act as Examiner, and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and pursuant to notice a hearing having been held in the matter at Sheboygan, Wisconsin, on October 1, 1973, before the Examiner; and the Examiner having considered the evidence and arguments, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Sheboygan City Employees Local 1750A, AFSCME, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization; and that Michael J. Wilson, is the District Representative of the Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO assigned to the Complainant.

2. That the City of Sheboygan, hereinafter referred to as the Respondent, is a Municipal Employer having its principal offices at the City Hall, Sheboygan, Wisconsin, and that Clarence Mertz is the City Attorney of the Respondent.

3. That for a number of years, Respondent has recognized Complainant as the collective bargaining representative for certain of its employees; that the parties entered into a collective bargaining agreement for 1971; that a grievance was filed in 1971 which alleged that Respondent was in violation of that agreement by excluding a certain employee, Ralph Beniger, from its coverage; and that following unsuccessful attempts at resolving that issue, and pursuant to the agreement, the parties submitted the question to arbitrator Robert M. McCormick.

4. That after holding a hearing on the matter, Arbitrator McCormick issued his Arbitration Award on July 10, 1972, wherein he found Beniger was, in fact, covered under the collective bargaining

agreement, and that, therefore, Respondent had breached the agreement by excluding him from the contract's coverage.

5. That Arbitrator McCormick's Award, in material part, is as follows:

"AWARD

That Ralph Beniger is not a temporary employee within the meaning of the agreement, that Beniger is a regular part time employee entitled to seniority credit back to date of hire, January 5, 1971, and entitled to reinstatement from lay off status, if he has since been separated from the active payroll, provided a less senior employee had been retained; that the City be directed to pay Beniger for all wages and overtime premium lost since November 30, 1971, according to the applicable provisions of the agreement; that Beniger be made whole with respect to any paid holiday benefits he otherwise would have enjoyed had he been classified regular, from November 30, 1971 to the date of the award; that the City pay Beniger for any actual expenses incurred by Beniger after November 30, 1971, which he experienced because of illness or injury according to the coverage of the Insurance Plan of the agreement upon Beniger's proffer of evidence of such covered expenditures; grant to Grievant length-of-service credits from January 5, 1971 for purposes of future vacation entitlement and pay to Grievant a vested vacation benefit for a vacation in calendar year 1972, based upon said length of service, but not to include any vacation entitlement as earned vacation for 1971.

The Arbitrator reserves jurisdiction of the matter for sixty (60) days, for purposes of assisting the parties only as to fashioning a make whole remedy, in the event the parties are unable to reach an agreement upon implementing the remedy directed.

Dated at Madison, Wisconsin this 10th day of July, 1972."

6. That following the issuance of the aforementioned Award, Arbitrator McCormick received a telegram dated September 7, 1972 from the Union on behalf of grievant Beniger, which requested that the Arbitrator retain his jurisdiction over the case so as to resolve any problems arising from the remedy; and that Arbitrator McCormick, by letter dated September 8, 1972 advised the parties that he would extend the time for retention of his jurisdiction to October 30, 1972.

7. That sometime after receipt of Arbitrator McCormick's Award, but prior to September 20, 1972, Respondent sent Complainant a work sheet with calculations indicating what the Respondent considered due and owing to Beniger as ordered by Arbitrator McCormick.

8. That on September 20, 1972, the Union Representative, Wilson, sent the following letter to Respondent's City Attorney Mertz:

"The following are the corrections the Union feels should be made in the City of Sheboygan's computations of the above Arbitration Award:

1. The City had computed Beniger's wages at pay grade 6 that of a Laborer I, but has not provided extra compensation for the time worked in pay grades 7, 8, or 9.
2. Ralph Beniger's seniority dates from January 5, 1971, and therefor his wage increments would advance accordingly. The City has correctly begun the computation at November 30, 1971, but not at the appropriate step of the salary schedule. By November 30, 1971, Beniger would be at step #2 and not

the beginning rate of his classification and on January 5, 1972 he should be at maximum.

- a) November 30, 1971 - \$2.93 per hour (1971 Salary Schedule)
- b) January 5, 1972 - \$3.23 per hour (1972 Salary Schedule)

- 3. The Union also assumes since there was no break in his employment with the City, Beniger would be entitled to 7.5% longevity on those rates during the year.
- 4. At those times that Beniger was laid off (Example, over the 4th of July) and less senior employees were maintained he should be compensated for his lost time.
- 5. The City should pay the retirement benefit on the compensation awarded Beniger. It is assumed the City has made the retirement contribution on what wages were originally paid Ralph Beniger.

Should you desire a meeting, September 25, 27, 28, 29, or October 2, 3, 4, 5 and 6 are available.

I am forwarding a copy of this letter to Robert M. McCormick, Arbitrator, so that he may know what specific problem exist [sic] with respect to the City's proffered remedy."

9. That thereafter, on October 6, 1972, Michael Wilson, David Rabinovitz, Beniger's attorney, Thomas Zengler, Director of Personnel and Clarence Mertz, met and settled the Beniger grievance by signing the following settlement agreement:

"Ralph Beniger Arbitration Award

- 1) Time cards show higher classification rate will be paid the higher rate (all such days)
- 2) As set forth in 9/20/72 letter to City
- 3) Withdrawn
- 4)* As set forth in 9/20/72 letter to City
- 5) As set forth in 9/20/72 letter to City

*At those times Beniger was laid off subsequent to Nov. 30 1971 . . . (as written in letter)"

10. That following the execution of said settlement agreement, Arbitrator McCormick took no further action in the matter.

11. That pursuant to said agreement, Beniger received a check dated December 15, 1972, in the amount of \$1,393.63 and was credited with eight (8) hours' accumulated sick leave. 1/

12. That grievant Beniger filed another grievance on April 17, 1973, wherein he alleged in substance that Respondent refused to comply

1/ by the terms of the parties' 1971 and 1972-1973 collective bargaining agreement, employees were entitled to eight hours of sick leave for each completed month of service.

with Arbitrator McCormick's Award by failing to credit him with sick leave retroactive to January 5, 1971; that the parties were subsequently unable to resolve said grievance; and that Complainant filed the instant amended complaint wherein it alleged that Respondent's refusal to grant sick leave credit violated the terms of the aforementioned Arbitrator's Award.

13. That Respondent has, in fact, refused, to credit Beniger with sick leave for the period prior to Arbitrator McCormick's Award.

14. That neither Arbitrator McCormick's July 10, 1972 Award nor the parties' October 6, 1972 settlement Award require Respondent to grant Beniger any retroactive sick leave credit.

Upon the basis of the above and foregoing Findings of Fact, the Examiner notes the following

CONCLUSION OF LAW

That Respondent's refusal to grant sick leave credit to employe Beniger retroactive to January 5, 1971 was not violative of Arbitrator McCormick's July 10, 1972 Award and that, therefore, Respondent's refusal to do so did not constitute a prohibited practice within the meaning of Section 111.70 (5)(3) of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and files the following

ORDER

IT IS ORDERED that the complaint and amended complaint filed in the instant matter be, and the same hereby are, dismissed in their entirety.

Dated at Madison, Wisconsin this 22nd day of October, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Complainant, by its complaint filed with the Commission on August 1, 1973, alleges that the Respondent, City of Sheboygan, refused to proceed to arbitration over the April 17, 1973 grievance of Ralph Beniger concerning his accumulated sick leave. During the course of the hearing held on said matter on October 1, 1973, Complainant amended its complaint to allege, instead, that the Respondent, by its refusal to comply with the terms of the arbitration award issued by Arbitrator Robert McCormick on July 10, 1972, violated Section 111.70(5)(3). The grievant in said arbitration was Ralph Beniger.

The primary issue herein is whether the Respondent's admitted refusal to grant Beniger sick leave credit, retroactive to January 5, 1971, violated the terms of Arbitrator McCormick's July 10, 1972 Award.

In analyzing the terms of that Award, it is clear that the Arbitrator considered in very precise detail the specific remedy to which Beniger was entitled as a result of the Employer's failure to consider him in the bargaining unit. As a result, the Arbitrator held Beniger was to be accorded seniority credit, back to the date of hire, reinstatement if separated from employment, back wages, overtime premium, holiday benefits, vacation and vacation benefits. Completely absent, however, in the Arbitrator's extensive discussion of this remedy was any mention whatsoever of the sick leave credits now in issue.

It is also clear from the record that the parties' October 6, 1972 settlement of said award did not provide for such sick leave credit. While the Union argues that said settlement agreement only covered monetary items and not language items such as sick leave, the uncontroverted fact remains the parties did not agree to provide retroactive accumulation of sick leave.

Because there is no language in the Award which can reasonably be construed as providing for retroactive sick leave accumulation, the undersigned concludes there is no merit in Complainant's assertion that Respondent's failure to grant sick leave credit to Beniger violated the Arbitrator's Award.

Based on the above, the undersigned finds the complaint and the amended complaint should be dismissed in their entirety.

Dated at Madison, Wisconsin this 22nd day of October, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BY 

Herman Torosian, Examiner