STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 720, AFSCME, AFL-CIO, Complainant, vs. DANE COUNTY HOUSING AUTHORITY, Respondent.	Case 5 No. 38277 MP-1929 Decision No. 24402-A

Appearances:

Mr. Darold Lowe, Staff Representative, Wisconsin Council 40, 5 Odana Court, Madison, WI 53719, appearing on behalf of the Complainant.
Mr. Robert M. Hesslink, Jr., Attorney at Law, 6200 Gisholt Drive, Madison, WI 53713, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local 720, AFSCME, AFL-CIO having, on February 5, 1987, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Dane County Housing Authority had committed prohibited practices within the meaning of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act, herein MERA; and the Commission having, on April 10, 1987, appointed Lionel L. Crowley, 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 Sec. 111.07(5), Stats.; and hearing on the complaint having been held in Madison, Wisconsin on May 22, 1987; 1/ and the parties having filed briefs in the matter which were exchanged on July 29, 1987; and the Examiner having considered the evidence and the arguments of counsel, and being fully advised in the premisis, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1) That Local 720, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats. and is the certified exclusive bargaining representative for all regular full-time and regular part-time employes of the Dane County Housing Authority excluding all supervisory, managerial, confidential and craft employes; and that its offices are located at 5 Odana Court, Madison, Wisconsin 53719.

2) That Dane County Housing Authority, hereinafter referred to as the Employer, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats. and has its principal offices located at 1228 South Park Street, Madison, Wisconsin 53715.

3) That the Union and the Employer are parties to a collective bargaining agreement effective for the period of January 1, 1986 through December 31, 1987; that said agreement contains a grievance procedure which does not culminate in arbitration for the resolution of disputes arising thereunder or any other means of final and binding resolution of such disputes; and that said agreement provides, in relevant part, as follows:

1/ At the hearing, the Union, with the agreement of the Employer, was permitted to hold in abeyance the allegations set forth in paragraph 4 of the complaint related to compensatory time until further notification by the Union and the only allegations heard at this hearing were on the grievance filed by Barbara Schoenfield.

ARTICLE VII
SENIORITY

7.01 Seniority Accrual. Each employee shall earn, accumulate or lose seniority as follows:

1. While on probation, employees shall not acquire or accumulate seniority. Upon completion of probation, employees shall receive seniority credit retroactive to the date of employment.

2. Employees who work a regular schedule of less than full-time shall earn seniority pro rata related to full-time employment.

3. Employees on military leave shall earn and accumulate seniority in accordance with State and federal statutes.

4. Employees on leave of absence without pay or on lay off shall earn and accumulate seniority up to but not exceeding the first ninety (90) days of such leave or layoff.

. . .

ARTICLE XI
ANNUAL VACATIONS

11.01 Rate of Earning Vacation Credits. All regular full-time employees covered by this Agreement shall earn annual paid vacation credits as per the following:

1. After one (1) year, twelve (12) working days.

2. After five (5) years, fifteen (15) working days.

11.02 Vacation Pay. Each employee shall be compensated while on vacation at the rate of pay in effect for him/her at the time vacation credits are used; regular part-time employees who work eighteen (18) or more hours per week shall earn paid vacation credits on a pro rata basis.

. . .

ARTICLE XII
SICK LEAVE

12.01 Sick Leave With Pay.

1. All regular full-time employees covered by this Agreement shall be granted sick leave with pay at the rate of one (1) day per month. Regular part-time employees who are scheduled to work sixteen (16) or more hours per week shall earn paid sick leave credits on a pro rata basis.

. . .

ARTICLE XIV
LEAVE OF ABSENCE

. . .

14.08 Benefits While on Leave of Absence. Except as provided in this agreement, employees shall not be entitled to fringe benefits while on a leave of absence and shall be required to pay all insurance premiums to the Employer in order to maintain coverage during a leave of absence.

4. That Carolyn LeClair, a housing manager for the Employer, was on a medical leave of absence from January 30, 1985 until April 15, 1985; that during

her absence, the Employer did not credit her with any sick leave or vacation benefits; that on April 25, 1985, LeClair grieved the denial of the accrual of vacation and sick leave credits while on a leave of absence; that the 1985 agreement which was the predecessor to the instant agreement did not contain Sec. 14.08; that the LeClair grievance was processed through Steps two and three of the contractual grievance procedure where the Employer denied the grievance and thereafter no appeal was made and LeClair was not given sick leave or vacation credits for the time she had been on the leave of absence.

5. That in negotiations for the successor agreement to the 1985 agreement, the Employer made the following proposal:

> 14.08 Benefits While on Leave of Absence. Employees shall not be entitled to accumulate fringe benefits while on a leave of absence and shall be required to pay all insurance premiums to the Employer prior to the premium due date in order to maintain coverage during a leave of absence. ;

that the Union proposed that the words, "Except as provided in this agreement," be added to the Employer's proposal as the Union was concerned that the Employer would be taking something away that the Union already had; and that the Employer agreed to this addition and Sec. 14.08 as modified was added to the 1986-87 agreement.

6. That in July 1986, Barbara Schoenfield, a weatherization aid for the Employer, went on a leave of absence which extended from July 7, 1986 to October 1, 1986; that Schoenfield did not accrue vacation or sick leave credits during her leave of absence; and that on October 10, 1986, Schoenfield filed a grievance over the denial of vacation and sick leave credits which was processed through the contractual grievance procedure and denied at all steps by the Employer.

7. That Sec. 14.08 of the parties' collective bargaining agreement precludes the accrual of all fringe benefits while on a leave of absence except those which contain express language providing that they accrue during a leave of absence; that no provision of the parties' agreement specifically provides that employes accrue vacation and sick leave credits while on a leave of absence; and that Schoenfield was not entitled to the accrual of vacation and sick leave credits during her leave of absence pursuant to Sec. 14.08 of the agreement.

Based on the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the Union exhausted the grievance procedure set forth in the parties collective bargaining agreement, and thus, the jurisdiction of the Wisconsin Employment Relations Commission may be invoked to determine the merits of the grievance.

2. That Schoenfield was not entitled to accrue vacation and/or sick leave credits while on her leave of absence pursuant to Sec. 14.08 of the parties' agreement, thus the Employer did not violate the agreement by denying her vacation and sick leave credits for the period she was on a leave of absence, and therefore, did not violate Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 2/

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 22nd day of September, 1987.

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2/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall by based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

DANE COUNTY HOUSING AUTHORITY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In its complaint initiating these proceedings, the Union alleged that the Employer committed prohibited practices by not crediting employes with vacation and sick leave while on a medical leave of absence in violation of the parties' collective bargaining agreement. The Employer denied that it violated the agreement and denied that it committed any prohibited practices.

UNION'S POSITION

The Union contends that Schoenfield was entitled to vacation and sick leave credits while she was on an approved leave of absence. It points out that Section 14.08, which was added to the 1986-87 agreement, contains the provision, "Except as provided in this agreement", which modifies the non-entitlement to fringe benefits while on a leave of absence. It notes that employes would not be entitled to insurance premiums paid by the Employer because of the express language of Sec. 14.08, no holiday pay as Sec. 10.04 requires an employe to work the day before and following the holiday, no jury duty pay because under Sec. 14.05 an employe must be on the payroll, no pay for Death in the Immediate Family under Sec. 14.06 as the Employer is not required to grant pay, no payment to the retirement fund as no eligible pay was received as required under Article XVI and no mileage or parking fees under Secs. 17.01 and 17.02 because no worked was performed in the Employer's business.

It submits that two fringe benefits are left; vacation and sick leave. It cites Sec. 11.01 which provides that all regular full-time employes earn annual vacation credits. It claims that this provision does not require the employe to work to earn the vacation as all that is required is the employe be a regular full-time employe covered by the agreement which requirement was satisfied by Schoenfield while on a leave of absence. Also Sec. 12.01 provides that all regular full-time employes are granted sick leave at the rate of 1 day per month. It reiterates its agrument that the employe does not have to work to earn the sick leave. It submits that Schoenfield satisfied this contractual requirement while on the leave of absence. It argues that Sec. 14.08 limits fringe benefits except as provided in the agreement and Sec. 11.01 and Sec. 12.01 provide fringe benefits which are exceptions to Sec. 14.08. It insists that the Employer is attempting to get what it fail to get in negotiations. It requests that the grievance be sustained and that Schoenfield be granted vacation and sick leave credits for the time she was on the approved leave of absence.

EMPLOYER'S POSITION

The Employer contends that under the parties' agreement, an employe is not entitled to the accrual of paid sick leave and vacation credits while on an unpaid leave of absence. It gives three reasons for this contention.

The first is that the plain language of the agreement in Sec. 14.08 states that employes are not entitled to fringe benefits while on a leave of absence. It points out that Secs. 11.01 and 12.01 provide that full-time employes earn vacation and sick leave and employes who work 18 or more hours get pro rata vacation and 16 or more hours get pro rata sick leave. It asserts that an employe on a leave of absence is not in active employment and is not entitled to benefits. It argues that the plain meaning of "fringe benefits" encompasses vacation and sick leave accruals and these are suspended during a leave of absence unless the agreement provides otherwise. It claims that no provision provides an exception to the general suspension rule set forth in Sec. 14.08 and thus vacation and sick leave do not accrue during a leave of absence.

Secondly, it alleges that the bargain history and past practice support this interpretation. It points out that the language of Sec. 14.08 was negotiated into the most recent agreement and the exception was added so employes would not lose

anything they already had. It notes that no employe had ever been given vacation or sick leave credits while on an unpaid leave and the LeClair grievance, which is identical to the present grievance, was resolved adversely to the Union. It maintains that where a party is aware of an existing practice and makes no proposal to change it, the presumption is that the parties intended the practice to continue as before. It takes the position that the LeClair grievance result was accepted by the Union and no change was proposed or made and Sec. 14.08 is consistent with the bargaining history and past practice.

Thirdly, the Employer argues that the rules of contract construction support its interpretation. It contends that the Union drafted the exception language in Sec. 14.08 and if there is any ambiguity in this agreement, it must be construed against the drafter, the Union. It maintains that it accepted this language based on the Union's assertion that it was offered so employes would not lose what they already had and there was no indication that this language created a new benefit. According to the Employer, the interpretation argued by the Union was not the result of a meeting of the minds and that interpretation should be rejected. It insists that acceptance of the Union's interpretation would render the no fringe benefits language of Sec. 14.08 a nullity because only those fringe benefits which are excluded by other contractual language would be suspended and all others would accrue. It insists that an interpretation which renders language a nullity must be rejected. Finally, it submits that the Union's interpretation would lead to absurd results because it would provide benefits where none had previously existed and were not advocated in negotiation. The Employer posits that the language of Sec. 14.08 was to clarify the existing practice concerning fringe benefits while on a leave of absence by express contract language and the Union's interpretation is the antithesis of the parties' intent.

For the above reasons, the Employer asks that the complaint be dismissed.

DISCUSSION

The issue presented in this case is what fringe benefits accrue to an employe under the terms of the parties' collective bargaining agreement while the employe is on an approved unpaid leave of absence. The general rule is that fringe benefits do not accrue to an employe where the employe does not work unless the contract contains a specific provision providing otherwise. For example, vacation rights are a form of additional compensation and are thought of as accruing or vesting as employes perform services. 3/ This general rule was succinctly stated by Arbitrator Seidman in Truck Transport, Inc.: 4/

> "In general fringe benefits, including hospitalization insurance, are a part of the employees total compensation for performing services for his employer and are paid out of the profit derived by the employer from such services. Where no services are performed the employer has no profit to derive out of which he may provide the benefit due his employee. If the employee does not work it follows that the employer is not obligated to pay his fringe benefits unless the employer specifically contracts to do so. That this is so is evidenced by the many contracts which contain specific provisions for the payment of certain fringe benefits even under circumstances where the employee is not fully and regularly employed. The fact that such provisions exists (sic) indicates that in their absence there would be no such obligation."

Section 14.08 of the parties' agreement provides as follows:

> "Except as provided in this agreement, employees shall not be entitled to fringe benefits while on a leave of absence and shall be required to pay all insurance premiums to the Employer in order to maintain coverage during a leave of absence."

3/ Briggs v. Electric Auto-Lite Co., 37 Wis. 2d 275, 155 N.W. 2d 32 (1967).

4/ 66 LA 60 (1976).

This language appears to be compatible with and expresses the general rule set out above. The Union has reviewed the fringe benefits language of various provisions and concluded they were not applicable because of the language of the particular provision and not because of Section 14.08. The Union asserts that vacation and sick leave accrue because the language of Secs. 11.01 and 12.01 contain no language limiting such benefits during a leave of absence. This interpretation ignores Section 14.08 as well as the general rule set out above. Section 14.08 states that employes are not entitled to fringe benefits except as provided in the agreement. This does not mean that employes are entitled to all benefits in the agreement except those that are self limiting. There would be no reason to include Sec. 14.08. Rather Sec. 14.08 must be interpreted as embodying the general rule that there is no accrual of benefits during a leave of absence unless there is an affirmative expression in the fringe benefit that there is an accrual during the leave of absence. Neither Sec. 11.01 nor Sec. 12.01 contains such an affirmative statement. An example of such an affirmative statement is set forth in Article VII, Sec. 7.01 4., which states as follows:

> "Employees on leave of absence without pay or on lay off shall earn and accumlate seniority up to but not exceeding the first ninety (90) days of such leave or layoff."

This language provides a clear exception to the no fringe benefits exclusion of Sec. 14.08. The vacation and sick leave provisions of Secs. 11.01 and 12.01 do not. Thus, it must be concluded that Sec. 14.08 precludes the accrual of sick leave and vacation credits during an unpaid leave of absence.

This conclusion is supported by the parties bargaining history and past practice. The evidence failed to establish that employes on unpaid leaves of absence accrued vacation and sick leave credits in the past. In 1985, LeClair was not granted vacation and sick leave accrual during her leave of absence. She grieved the denial but the Employer's denial of her grievance was not appealed. This scenario establishes that the Employer followed the general rule with respect to fringe benefits during an unpaid leave of absence and the Union apparently acquiesced in this position. In negotiations for the 1986-87 agreement, the Employer sought to include express language adopting the general rule in the contract. The Union sought an exception to the general rule where the contract expressly provided otherwise so as not to lose any present benefit. Inasmuch as no one was accruing vacation or sick leave benefits during an unpaid leave of absence, this provision did not take away any right under the parties' agreement. Without this language, a conflict on accrual of seniority during such a leave may have arisen because of the express language that seniority was earned during the first ninety days of a leave of absence. The addition of the exception did not continue all fringe benefits presently in the agreement, otherwise Sec. 14.08 would not be needed and wouldn't make sense. The exception to Sec. 14.08 applies only to those fringe benefits that state in express terms that they accrue during an unpaid leave of absence. That is what the parties negotiated. If they had intended to accrue vacation and sick leave during a leave of absence, given the language of Sec. 14.08, it would be necessary to indicate in Secs. 11.01 and 12.01 that benefits accrued during a leave of absence in order to come within the exception to Sec. 14.08's prohibition on fringe benefits. No such proposals were made and it is concluded that the parties intended that these would fall under the general prohibition of such fringes under Sec. 14.08.

The language of Sec. 14.08 in light of the past practice and the bargaining history excludes the accrual of vacation and sick leave credits during an unpaid leave of absence. The Employer's denial of Schoenfield's accrual of sick leave and vacation during her leave of absence did not violate the agreement, and therefore, the Employer did not violate Sec. 111.70(3)(a)5, Stats. Consequently, for the reasons set out above, the complaint has been dismissed.

Dated at Madison, Wisconsin, this 22nd day of September, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner