STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ALPHONSE J. KRYMKOWSKI, Complainant, vs. CITY OF SOUTH MILWAUKEE (POLICE DEPARTMENT) Respondent.	:	Case 52 No. 36367 MP-1811 Decision No. 25039-A

Appearances:

Mr. Alphonse J. Krymkowski, 1316 Manitowoc Avenue, South Milwaukee, Wisconsin 53172, appearing pro se.

Mr. Joseph G. Murphy, City Attorney, 1334 Milwaukee Avenue, South Milwaukee, Wisconsin 53172, appearing on behalf of the City of South Milwaukee.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Alphonse J. Krymkowski having, on September 9, 1985, filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of South Milwaukee had committed prohibited practices within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act by failing to provide him certain contractual benefits; and the Complainant having, on September 10, 1985, in writing, advised the Commission that he wish to withdraw said complaint without prejudice; and the Commission having, on October 1, 1985 dismissed said complaint without prejudice; and the Complainant having, on January 16, 1986, resubmitted said complaint; and the Commission having, on December 18, 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 said complaint having been held on February 23, 1988 in South Milwaukee, Wisconsin; and the parties having waived briefs and oral argument in the matter and the transcript in the matter having been received on March 23, 1988; and the Examiner having considered the evidence and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Alphonse J. Krymkowski, hereinafter referred to as the Complainant, is an individual residing at 1316 Manitowoc Avenue, South Milwaukee, Wisconsin 53172.

2. That the City of South Milwaukee, hereinafter referred to as the City, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats. and its offices are located at 2425 15th Avenue, South Milwaukee, Wisconsin 53172.

3. That the Complainant was employed as a police officer by the City beginning on April 22, 1964 until his disability retirement on or about August 1, 1984; that on or about October 28, 1983, the grievant was injured in a fall at home; that the grievant sought medical assistance and was off work on sick leave until December 8, 1983, when his sick leave ran out, at which time he went on an approved leave of absence without pay; that by a letter dated January 17, 1984, the City's Clerk notified Complainant that he had been overpaid by eleven (11) days because another payroll check had been issued to him prior to the Clerk's office being notified that the Complainant's sick leave had been exhausted and that a deduction would be made from his earnings after he returned to work; that the City notified the Complainant by a letter dated March 13, 1984 that he would have to pay the full premium for Health and Dental coverage while on the unpaid

leave of absence or he could not remain in the plan; that the City informed Complainant that it had inadvertently paid the first three months of premiums for 1984 and sought reimbursement for those premium payments; and that Complainant made no premium payments to the City and his insurance ceased on April 30, 1984.

4. That the Complainant received treatment at Trinity Memorial and the Marshfield Clinic and was in the hospital for a period of time during January through April, 1984; that Complainant admitted that he received fair benefit from the insurance payments made by the City; that the Complainant was found to be permanently disabled and retired from the City on Disability Retirement on or about August 1, 1984; that by a letter dated October 30, 1984, the City notified the Complainant that the overpayment of wages and insurance premiums more than offset any vacation pay due Complainant; that in this same letter the Complainant was notified that he was eligible to participate in the City's Health Insurance Program with the City paying 75% of the premiums; that the Complainant was informed that he and the members of his family were required, as a condition of coverage by said insurance, to get a physical at the Milwaukee Industrial Clinic; that Complainant did not take such a physical until May 2, 1986; and that Complainant again became covered by the City's Health Insurance program on June 1, 1986.

5. That on October 30, 1984, the South Milwaukee Professional Policeman's Association/Law Enforcement Employee Relations Division of the Wisconsin Professional Police Association, hereinafter LEER/WPPA, was the exclusive collective bargaining representative for certain of the City's employes in the Police Department including the Complainant; that the City and LEER/WPPA were parties to a collective bargaining agreement which contained the following provisions:

> ARTICLE XI
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> Sick, Injury and Emergency Leave
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> . . .
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> Section 2 - Health Insurance for Disabled Employees
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> If any employee qualifies for a disability pension under the Wisconsin Retirement Fund, the Municiality shall provide such employee with the same health and accident insurance coverage provided regular employees. The Municipality's responsibility shall terminate when the qualification for said disability pension terminates, when such employee qualifies for Medicare or other similar governmental or public program providing health and accident insurance, irrespective if such program does not provide the same degree of coverage as does the Municipality, or when such employee reaches the age of 65 years, whichever event occurs first.
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> . . .
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> Section 5 - Health and Dental Insurance for Employees on approved Leaves of Absences
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> Any employee who is on an approved leave of absence without pay which extends beyond thrity (30) days shall be allowed to remain in the Group Plan for health and dental insurance. However, the full premium for health insurance, surgical care, and dental insurance shall be paid by the same employee to the Municipality during his extended leave of absence.;

and that on May 1, 1985, the Labor Association of Wisconsin, Inc., hereinafter LAW, entered into a contract with the South Milwaukee Professional Police Association to provide labor relations services.

6. That the Complainant initially filed the instant complaint on September 9, 1985, within 1 year of the City's October 30, 1984 letter indicating the amounts of overpayment and recoupment from accrued vacation pay; that on

September 10, 1985, the Complainant withdrew his complaint without prejudice; that Complainant discussed this matter with LAW who referred him to LEER/WPPA; that LEER/WPPA directed a letter to the City asserting that benefits were withheld from Complainant in violation of the agreement; that the record does not reveal what if any action resulted from LEER/WPPA's efforts; and that the Complainant refiled his complaint on January 16, 1986.

7. That neither the Complainant nor the City submitted the entire collective bargaining agreement into evidence in this matter but only pertinent provisions were submitted and the evidence was limited to the deduction from the Complainant's accrued vacation pay, the amounts which the City had paid on his behalf for wages and for health insurance after 30 days had passed on his approved leave of absence; and that neither party at any time argued that jurisdiction by the Commission was lacking or inappropriate based on timeliness of the complaint or the availability of a grievance and arbitration procedure in the collective bargaining agreement to resolve this dispute.

8. That the City did not violate the agreement by its failure to again cover the Complainant by its Health Insurance Program prior to June 1, 1986; and that the City was entitled to recoup the overpayments for health insurance for the grievant for the months of January, February and March, 1984 in the amount of $905.91; and that the City's deduction of these amounts from the Complainant's accrued vacation payout in October, 1984 did not violate the collective bargaining agreement in effect at that time.

Upon the basis of the above Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. That the complaint filed in the instant matter is timely and in the absence of any evidence of a contractual procedure to finally resolve contractual disputes and because the City failed to raise such a defense, the Examiner will exercise the Commission's jurisdiction over the allegation of a Sec. 111.70(3)(a)5, Stats. violation.

2. That the City of South Milwaukee, by recouping payments for the Complainant's health insurance premiums while he was on an approved leave of absence in January, February and March 1984, did not violate the terms of the collective bargaining agreement, particularly Article XI, Sec. 5, and did not violate the agreement by not granting him coverage under the City's health plan prior to June 1, 1986, and therefore did not commit any prohibited practices in violation of Sec. 111.70(3)(a)5, of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

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

Dated at Madison, Wisconsin this 15th day of April, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

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

(Footnote one continued on page four)

(Footnote one continued from page three)

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 be 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.

CITY OF SOUTH MILWAUKEE
(POLICE DEPARTMENT)

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

BACKGROUND

In his complaint initiating these proceedings, Complainant alleged that the City had committed prohibited practices in violation of Sec. 111.70(3)(a)5, Stats. by the City's violation of the Holiday, Vacation, Health and Dental and Life Insurance provisions of the collective bargaining agreement in effect at the time of his disability retirement. The City answered denying that it had committed any prohibited practices and denied any violation of the holiday and life insurance provisions of the agreement and asserted that the vacation amounts due Complainant were offset by the overpayment of wages and health insurance premiums. At the hearing in this matter, the Complainant agreed to the offset for wages and the issue was narrowed to the offset for health insurance premiums paid by the City in January, February and March, 1984 and the failure of the City to grant health insurance due to his disability retirement prior to June 1, 1986.

JURISDICTION

Although neither party raised any procedural objections to the Commission's jurisdiction in this matter, the Examiner deems it necessary to address the issue prior to any consideration of the merits. Section 111.07(14), Stats. states that "the right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged." The evidence established that the Complainant received an accounting from the City by a letter dated October 30, 1984 of his accrued vacation pay due with the offset for health insurance premiums. 2/ Complainant initially filed his complaint on September 9, 1985 within the one year requirement set forth in the statute. The Complainant then withdrew this complaint without prejudice on September 10, 1985 and apparently relied on LEER/WPPA to resolve it under the contract. 3/ It appears that these efforts proved unsuccessful and the Complainant reinstated his complaint on January 16, 1986. Although this was more that one year from the October 30, 1984 accounting, the Commission has held that a complaint alleging a contractual violation is not barred by Sec. 111.07(14), Stats. until one year after the grievance procedures in a collective bargaining agreement have been exhausted. 4/ Here, the record is not clear as to when the grievance procedure was exhausted but it would appear that a timely complaint would not have been withdrawn and that LEER/WPPA would not have sent a letter unless this activity was part of the exhaustion of the contractual dispute resolution procedures. The City made no objection to jurisdiction on timeliness grounds, so it must be concluded that the complaint was filed within one year of the exhaustion of the grievance procedure and the complaint is timely and within the Commission's jurisdiction.

Generally, the Commission will not assert its statutory complaint jurisdiction over a breach of contract claim where there is available a contractual procedure which provides for the final impartial resolution of disputes over contractual compliance. 5/ In the instant case, the parties did not introduce the entire agreement into evidence but only those portions of the contract in dispute. The City never raised any objection to the Commission's jurisdiction on the basis of a failure to exhaust the contractual grievance

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2/ City's answer to the Complaint.

3/ See Letter of John Burpo to Norbert Thine (sic) (Theine) dated December 3, 1985.

4/ Harley-Davidson, Dec. No. 7166 (WERC, 6/65).

5/ Waupun School District, Dec. No. 22409 (WERC, 3/85); Monona Grove School District, Dec. No. 22414 (WERC, 3/85).

procedure, and therefore, the City has waived any objection to the Commission jurisdiction over the Sec. 111.70(3)(a)5 allegation in the complaint. 6/ Therefore, for these reasons, the Commission has jurisdiction of the complaint.

COMPLAINANT'S POSITION

The Complainant contends that he was never informed that he would be obligated to pay the insurance premiums for January through March, 1984, and if he had been, he would have cancelled it and gone to the V.A. Hospital for treatment. The Complainant argued that he was not responsible for the erroneous payment of these premiums and should not be obligated for them and asks that the City pay him the amounts taken from his vacation pay for recoupment of these premiums.

The Complainant insisted that he had taken a physical shortly after the City's October 30, 1984 letter and met the requirement for health insurance which, according to the agreement, would be paid on the basis of 75% by the City and 25% by Complainant. The Complainant asks to be made whole.

CITY'S POSITION

The City contends that the Complainant received an economic benefit from the insurance provided him by the City as the medical bills he incurred in January, February and March, 1984 were all paid by the insurance provided and paid for by the City.

The City submits that the evidence demonstrates that the Complainant never reported for a physical at the Milwaukee Industrial Clinic after October 30, 1984 until May 2, 1986 and he was provided coverage on June 1, 1986. It asks that the complaint be dismissed.

DISCUSSION

A review of the evidence fails to establish that the Complainant submitted to a physical to be covered by the City's health plan after his disability retirement until May 2, 1986. The Complainant thought he had gone for the physical shortly after the October 30, 1984 letter but the Industrial Clinic indicated that he was seen in January, 1984 7/ and not again until May 2, 1986. Inasmuch as the Complainant failed to prove otherwise, it must be concluded that the City did not deny him insurance coverage under the agreement.

With respect to the health insurance premiums for January, February and March, 1984, it is evident that the City paid insurance premiums that it was not required to pay. Article XI, Section 5 of the agreement provides that employes on approved leaves of absence without pay which extend beyond thirty days can remain in the plan but must pay the full premium to the City. Thus, it was the Complainant's responsibility to pay and the City made the payments in error. The City Clerk testified that the payments were due to a clerical error 8/ and the Complainant was promptly notified of the error and asked to reimburse the City. 9/ The Complainant does not deny that the payments were made but asserts that he should have been notified that he was responsible for paying them and if this had occurred, he would have dropped the insurance and gone to the V.A. hospital. As it stands now, he had to pay for insurance he did not want. There are two flaws in the Complainant's argument. The first is that the language of the contract is clear and he is expected to know that after a leave of absence exceeds 30 days, he is required to pay the premium or will be dropped from the plan. He knew his insurance was continuing because he submitted his hospital and medical bills to that insurance. He could have informed the City that he didn't

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6/ Milwaukee County (Sheriff's Department), Dec. No. 24027-A (Schiavoni, 1/87) aff'd Dec. No. 24027-B (WERC, 6/87).

7/ Ex - 5.

8/ TR - 25.

9/ Ex - 2.

want the insurance but rather he took advantage of this benefit even though he knew or should have known the premium was his responsibility. Secondly, the grievant received value and benefit from this insurance premium. Had there been no claims made, the Complainant would have a very strong argument that no recoupment should be made and the City may have been able to recover the excess payments from its insurance carrier. Here, the Complainant, as he admitted, received fair benefit from this insurance. Arbitrators have held that an employer's right to recoupment is coextensive with an employes right to demand agreed upon compensation where he has been inadvertently short changed. As stated in City of Coldwater, Michigan; 10/

> "Where it is found that the employer has underpaid certainly the arbitrator has authority to direct that the employee be made whole. The fact that the employee may have accepted less pay in error for some period of time will not effect his right to have that rectified. This being so, there is good reason why the employer also should have the right, through the arbitration process, to have the salary properly adjusted."

Here, there was no evidence that the City should have discovered the overpayment earlier and prompt notice of such overpayment was given to the Complainant. The Complainant apparently never contested this matter until the recoupment in October, 1984. Under these circumstances, it was appropriate for the City to recoup the overpayments and in doing so it did not violate the terms of the agreement. Therefore, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 15th day of April, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

10/ City of Coldwater, Michigan and Fraternal Order of Police, Star and Shield Lodge 158, 84-2 ARB para 8592 (Daniel, 1984).