STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

EAU CLAIRE CITY EMPLOYEES, LOCAL 284, AFSCME, AFL-CIO, Complainant,

vs.

CITY OF EAU CLAIRE, Respondent.

Case 281
No. 68375
MP-4460

Decision No. 32730-E

Appearances:

Stephen Bohrer, Assistant City Attorney, City of Eau Claire, 203 S. Farwell Street, P.O. Box 5148, Eau Claire, Wisconsin, 54702, appearing on behalf of the City of Eau Claire.

Mark DeLorme, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 701 North 8th Street, Manitowoc, Wisconsin, 54220, appearing on behalf of Eau Claire City Employees, Local 284, AFSCME, AFL-CIO.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On November 4, 2008, Local 284 filed a complaint alleging that the City of Eau Claire violated Sec. 111.70(3)(a)5, Stats. by failing to comply with an arbitration award issued by John Emery. Emery's original ruling was issued on October 20, 2006. He retained jurisdiction and was asked to supplement his award by the Union. He issued a verbal modification on January 31, 2007 and reduced that decision to writing on May 20, 2008. His Supplementary Award of May 20, 2008 included a revised order directing that:

> The City's obligation under Article 26, Section 1 is to pay a qualifying employee an injury supplement representing the difference between his or her workers' compensation benefits and 87.5% of his or her gross regular wages.

Arbitrator Emery further concluded that the benefits were to be recalculated going back to 2004.

The Union filed its Sec. 111.70(3)(a)5 complaint within one year of the issuance of the written Supplementary Award, alleging generally that the City had failed to comply with the Emery Order.

The complaint was assigned to Daniel Nielsen, who ultimately dismissed it based upon his belief that the dispute had settled. The Union disagreed and appealed the matter to the Commission which reversed the dismissal by order dated November 17, 2010. The matter was assigned to the undersigned based upon a delegation of final authority to issue a Commission decision pursuant to Secs. 111.07(5) and 227.46(3)(a), Stats.

A supplemental hearing was conducted on July 18, 2012 and the parties submitted written argument following the hearing. On August 28, 2012, I issued an Order denying the City's Motion to Dismiss.

The matter is now ripe for final resolution. Having reviewed the record and being fully advised in the premises, the Commission issues the following

FINDINGS OF FACT

1. Complainant, Eau Claire City Employees Local 284, AFSCME, AFL-CIO is a labor organization representing employees employed in the Streets, Sewer and Water Utilities, Engineering, Parks Recreation and various other smaller departments of the Respondent City of Eau Claire.

2. At all times material Local 284 (hereinafter Union) and the City of Eau Claire (hereinafter "City") were parties to collective bargaining agreements.

3. The various collective bargaining agreements entered into between the parties covering the time period from 2004 through 2011 provided that employees injured on the job and who were eligible for workers' compensation benefits for temporary total disability were to receive "the difference between 87.5% of their regular salary and their workers' compensation payments" for no more than 90 days. The provision in question was denominated as Article 26.

4. In February of 2006 the Union filed a request to arbitrate a grievance raising issues regarding the manner in which the City was applying the provisions of Article 26 of the collective bargaining agreement.

5. On October 20, 2006 the arbitrator, John Emery, concluded that the City violated the contract "by its method of calculation of injury leave payments due to employees on workers' compensation leave."

6. The parties disagreed on how to implement the award and at the request of the parties Arbitrator Emery issued a "Supplementary Bench Award" following a hearing. On May 20, 2008 he reduced the award to writing.

7. The City made no changes in the manner in which it calculated the Article 26 supplement following the Emery Supplementary Award.

8. One year after the issuance of the Emery Supplementary Award the Union filed a prohibited practice complaint alleging that the City had violated Sec. 111.70(3)(a)5, Stats. by failing to comply with the arbitration award issued by Arbitrator Emery.

9. Employees who were eligible for the injury supplement provided for in Article 26 of the 2004-2006 collective bargaining agreement and those eligible under successor agreements containing the identical language did not receive the benefits to which they were entitled under the contract as interpreted by Arbitrator Emery.

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

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the prohibited practice complaint filed in this matter.

2. The City of Eau Claire has failed to comply with the Emery Arbitration Award(s) in that they are reducing the supplemental benefit payments otherwise due employees by reducing the non-taxable portion of the benefit payable to employees by misrepresenting that portion of the benefit as taxable income.

3. The City's failure to comply with Arbitrator Emery's award is a violation of Sec. 111.70(3)(a)5, Stats.

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

ORDER

1. City of Eau Claire will cease and desist from failing to comply with Emery's Award.

2. For every employee who, from May 20, 2008 to date received an Article 26 benefit, the City will recalculate the benefit due under the Emery Award and pay to each employee the difference between the recalculated amount and the amount previously paid with interest.[1]

3. The City will provide the Union with a detailed report of each re-calculation and the amount due and owing.

Given under our hands and seal at the City of Madison, Wisconsin, this 19th day of June, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

[1] The initial award in this matter lacked clarity but any doubts as to the validity of the City's practice were finally resolved following the issuance of the supplemental award. Accordingly the backpay order runs from that date. The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. The instant complaint was filed on November 4, 2008, when the Sec. 814.04(4) rate was "12 percent per year." Section 814.04(4), Wis. Stats. Ann. (1986). See generally Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83) citing Anderson v. LIRC, 111 Wis.2d 245, 258-9 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.2d 623 (Ct.App., 1983).

City of Eau Claire

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The City of Eau Claire and the Union agreed the City would provide additional compensation for employees out of work as a result of a work-related injury. Historically the practice (not unusual among municipal employers and their unions) was designed to make up some or all of the difference between the workers' compensation temporary total disability benefits and the employee's normal weekly pay. The position of the unions was that employees injured on the job should not suffer because the workers' compensation benefit was often significantly less than what the employee normally earned. As the caps on temporary total disability payments increased over the years the need for such language became less of an issue but as occurred here, the language remained in successive labor agreements.

The City of Eau Claire and the Union originally had contract language that provided that the City would make up 100% of the difference between the employee's regular rate of pay and the amount of workers' compensation benefits for a ninety-day period. In 1994 they negotiated a change in the amount of the supplement from 100% to 87.5% but they did not implement the change until 2004. The contract language, which gave rise to the original grievance provided as follows:

ARTICLE 26 – INJURY LEAVE

> Section 1. Upon the determination of eligibility, the City shall pay a permanent employee who is injured on the job the difference between 87.5% of their regular salary and their worker's compensation payments, as long as the employee is on injury leave, but not to exceed ninety (90) days for the same injury. Upon the determination of eligibility, the City shall pay a seasonal employee who is injured on the job the difference between 87.5% of their regular salary and their worker's compensation payments, as long as the employee is on injury leave but not to exceed ninety (90) days or until he/she would have been laid off, which ever occurs first.

The original grievance which was arbitrated in 2006 resulted in an award by Arbitrator John Emery issued in October of 2006 and supplemented by an award issued in May 2008. Emery concluded that the City had violated the terms of the contract and directed that:

> The City's obligation under Article 26, Section 1, is to pay a qualifying employee an injury supplement representing the difference between his or her worker's compensation benefits and 87.5% of his or her gross regular wages.

It is undisputed that the City made no changes in the way it calculated the workers' compensation supplement following the Emery Award.

The clearest way to understanding what occurred is to use an example to illustrate. For this purpose we will assume an employee with a regular weekly gross pay of $1000 and a combined federal and state tax rate of 26.77%. Also important to the calculation is the fact that at all times temporary total disability (TTD) benefits under workers' compensation were not subject to state or federal income taxation. Our hypothetical worker receiving a gross wage of $1000 per week would receive a net pay check of $723.30, calculated as follows:

	$1000.00	(regular gross wage)
-	$ 267.70	(26.77% tax rate)
	$ 723.30	net pay

That same hypothetical employee on TTD using the City's interpretation of Article 26 would receive a benefit calculated as follows:

	$875.00	(87.5% of gross pay)
-	$234.23	(26.77% tax rate)
	$640.77	net pay

This information would be reported on the employee's weekly pay stub. However in fact the City was not paying $234.23 to the IRS and Wisconsin Department of Revenue because $666 of the 87.5% was not taxable income. The City was paying $55.95 to the taxing authorities and simply keeping the difference. The correct calculation for the employees under Article 26 as interpreted by Arbitrator Emery should have been:

	$666.00	workers' compensation benefit
+	$209.00	(difference between 87.5% of gross salary and workers' comp.)
	$875.00	(gross salary and workers comp.)
-	$ 55.95	(tax on $209 at 26.77%)
	$819.05	net wage

In the end the City was withholding $234.23 of which $55.95 was paid to the taxing authorities and $178.28 was kept by the City. The employees did not pay more in taxes because the workers' compensation benefit of $666 was not reported as income. While the employee's pay stub would include the inaccurate information, the W-2 year-end report would accurately reflect the correct amount withheld. The City did not violate any tax regulations nor did they violate the workers' compensation act. What they did do however was violate the Emery decision and order.

Emery directed that the City pay the employees the difference between the workers' compensation benefits and 87.5% of the regular gross wage. The City ignored the order and continued its practice of reducing the entire payment as though it were taxable income and in effect eliminated all or most of the supplement.

The City argues that the Emery award (and by implication contract language) creates an incentive for employees to stay on workers' compensation because they will receive more than if they were working. The City is correct in that respect. To use our hypothetical employee he would receive $819.05 in net wages while on TTD and $732.23 while working. The solution however would have been to negotiate new language not to simply continue to violate the contract.

Where the City ran astray was to misinterpret some of the language in the Emery award. The Union understood what the City was doing and made the appropriate arguments. Arbitrator Emery apparently did not understand what the City was doing. He reasoned that "if the City is incorrectly withholding taxes from the employees' benefits those questions are appropriately referred to the state and federal taxing authorities." (Emery award p. 7) He further noted that the City's duty to withhold taxes and the computation were controlled by state and federal law. *Id.* That analysis however misled the City into believing that it could continue its practice of reducing pay by characterizing the reduction as the withholding of taxes.

This is not however a tax issue. Had the City taken the money and paid it to the taxing authorities it would not have violated the contract. The employees would have received the over withholding back in the form of a tax refund. The City did not miscalculate what it owed taxing agencies. It did not "incorrectly withhold taxes from employee benefits." It simply reduced the amount of money it owed employees under the contract under the guise that it was paying tax withholding. That action violated the clarified Emery award. This is not a workers' compensation issue either. While the workers' compensation benefit was in effect reduced as a result of the "withholding" the portion of the supplement that was paid along with the workers' compensation benefit exceeded the TTD benefits otherwise due.

This is not to suggest that the City engaged in fraud or misrepresentation. The Union became aware of the practice and filed the original grievance. The City maintains that the practice was ongoing from at least the 1980's. On rare occasions when individual employees questioned the "practice" the City explained what it was doing. On the other hand it is relatively clear that an employer may not misrepresent the reasons funds are being withheld from a paycheck. Wis. Stat. Sec. 103.457. Wis. Adm. Code Sec. DWD 272.10, 272.11(1)(h).

The City argues that Arbitrator Emery was only concerned with the issue of whether the 87.5% rate was based on gross versus net pay rates. To the contrary, the supplemental award makes it clear that the arbitrator understood the issue:

> So, for example, an employee who receives a gross salary of $1,000.00 would receive worker's compensation benefits of $666.67, which under federal law, is not taxable. The injury supplement would make up the difference between the worker's compensation payment and $875.00, or $208.33, which would be taxable. Under the contract language, therefore, the employee's net pay would, in my view, be the equivalent of the workers' compensation payment plus the supplement, after withholding of the appropriate taxes.

Emery's supplemental award set forth at p. 7 City of Eau Claire, Dec. No. 32730-B (WERC 2010).

The City ignored the directive of Arbitrator Emery and failed to implement the Award. Accordingly the City committed a prohibited practice in violation of Sec. 111.70(3)(a)5, Stats.

Dated at Madison, Wisconsin this 19th day of June, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

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