BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between WAUSAU CITY DEPARTMENT OF PUBLIC WORKS EMPLOYEES LOCAL 1287, AFSCME, AFL-CIO and CITY OF WAUSAU	Case 54 No. 41264 MA-5345

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, N-419 Birch Lane, Hatley, Wisconsin 54440, appearing on behalf of the Union.

Mr. Dean R. Dietrich, Mulcahy & Wherry, S.C., Attorneys at Law, P.O. Box 1004, Wausau, Wisconsin 54401, appearing on behalf of the City.

ARBITRATION AWARD

Wausau City Department of Public Works Employees Local 1287, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Wausau, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned was appointed to arbitrate the dispute. A hearing was held before the undersigned on May 15, 1989 in Wausau, Wisconsin. There was no stenographic transcript made of the hearing. The parties exchanged briefs, the last of which was received on June 20, 1989.

ISSUES

At hearing, the Union raised the issue of whether the City violated the collective bargaining agreement by not paying the grievant's health insurance premiums for the same period for which it sought credit for holidays and vacation benefits in the original grievance. The City countered that the health insurance issue was not timely raised, and moved to strike that portion of the grievance. The parties agreed to brief the health insurance issue.

Based upon the statements of the issue in the parties' briefs, the undersigned would frame the issue as follows:

Whether the City violated the collective bargaining agreement when it failed to credit grievant Randy Sawyer with holiday and vacation benefits, and pay grievant's health insurance premiums, while he was on Worker's Compensation "direct"?

If so, what is the appropriate remedy?

The Union further raises the following issue:

Did the City policy of denying vacation, holiday, and other benefits to employes off work more than 50% of any 30-day period violate the collective bargaining agreement?

PERTINENT CONTRACT PROVISIONS

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ARTICLE 18 - VACATION

A. Vacation Schedule: Each employee shall receive:

1. One (1) week of vacation with pay after one (1) year of employment.

2. Two (2) weeks of vacation with pay after two (2) years of employment.

3. Three (3) weeks of vacation with pay after eight (8) years of employment.

4. Four (4) weeks of vacation with pay after fourteen (14) years of employment.

5. Five (5) weeks of vacation with pay after nineteen (19) years of employment.

6. Exception: An employee completing his 2nd, 8th, 14th and 19th year of service may use the additional vacation benefit provided above after the employee's anniversary date during the calendar year in which the anniversary occurs.

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ARTICLE 19 - HOLIDAYS

A. Holiday Schedule: All regular full-time employees shall be granted the following holidays off with pay:

New Year's Day	Labor Day
Good Friday	Thanksgiving Day
Memorial Day	December 24th
Independence Day	Christmas Day

Upon successful completion of the probationary period, employees shall be allowed one (1) floating holiday to be scheduled by mutual agreement.

Effective January 1, 1988, each full-time employee shall receive two (2) personal holidays per calendar year.

If a holiday falls on a Sunday the following Monday shall be declared the holiday and if the holiday falls on a Saturday the preceding Friday shall be declared the holiday. If December 24th falls on a Saturday or Sunday , the last preceding work day prior to the Christmas holiday shall be granted as a holiday for all employees. The employee must work the day before and the day after each holiday to be eligible for holiday pay with the exception of normal days off or excused absences.

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ARTICLE 20 - SICK LEAVE

A. Benefit and Accumulation: Employees shall receive 3.6923 hours of sick leave for each biweekly pay period of employment during the first sixty (60) months of employment and 5.5385 hours for each biweekly pay period thereafter to a maximum of 840 hours. Accrual for all other employees shall remain at 5.5385 hours per

pay period. (3.6923 hours biweekly = 8 hours per month; 5.5385 hours biweekly = 12 hours per month). All employees shall be allowed to accumulate a maximum of eight hundred and forty (840) hours.

B. Advance Notice to City: Sick leave benefits shall begin on the first day of absence and continue until the employee returns to work or has used all his accumulated sick leave. Employees who are sick and unable to report to work shall notify or cause the employee in charge, where reasonable, to be notified at least twenty (20) minutes before the start of the regular shift or assignment or earlier. The City agrees to designate employees that will be available to receive such notification before each work shift.

One-half (1/2) day sick leave shall be granted in any case; however employees may return to work after less than one-half (1/2) day and sick leave in that event shall be computed on 1/2 hour increments for the time away from the job. Use of sick leave for doctor or dental appointments within Marathon County shall be limited to one-half (1/2) day increments or less unless additional time is documented by a physician.

C. Disciplinary Action: The City may require a doctor's statement or other evidence or proof of illness, including a sick leave explanation form. (Employees who abuse sick leave benefits shall earn no sick leave for the six (6) months succeeding the date of last proven violation. Additional abuses of sick leave may subject an employee to dismissal. No less than one-half (1/2) hour sick leave shall be granted to any case.)

D. Continued Accumulation: Any employee who is off work because of illness, vacation or is receiving worker's compensation shall be considered to be maintaining employment status with the City and shall be credited with his allotted sick leave accrual. However, an employee who has used all accumulated sick leave shall no longer receive the monthly sick leave accrual unless and until the employee returns to work.

E. Family Illness: Employees will be allowed to use sick leave in case of emergency injury or illness in the immediate family where the immediate family member requires the constant attention of the

employee (i.e. child breaks arm on playground). The department head may require that the employee make other arrangements for the ill family member within five (5) working days. Immediate family is defined as the employee's spouse, children, parents, or member of the employee's household.

This provision shall not apply to employees accompanying family members to any routine or scheduled medical or dental appointments. This provision shall apply to all other requests for sick leave including requests relative to surgery.

F. Worker's Compensation: Employees eligible for Worker's Compensation benefits shall be allowed to exercise one of the following options:

1. Receive the Worker's Compensation benefit with no deduction from accumulated sick leave;

2. Receive the Worker's Compensation benefit and be paid the difference between their regular pay based upon a normal work week and the Worker's Compensation benefit with the City charging the employee's sick leave account with the number of hours that equal the cash differential between the Worker's Compensation and regular pay.

G. Sickness During Vacation: Off days, vacations, leave of absence and holidays shall not be included in the computation of sick leave. Employees on those days may not claim additional compensation and deduction of such days from their sick leave accumulation.

H. Sick Leave Conversion to Medical/Hospital Costs: When an employee retires with at least 80 credits arrived at by adding the employee's age to the employee's length of full-time continuous employment with the City of Wausau, or is forced to retire due to medical disability, a maximum of fifty percent (50%) of the sick leave remaining in the employee's accumulated sick leave account may be converted to its monetary value (employee's hourly rate, exclusive of longevity and shift differential) and used to pay costs towards the hospital and surgical insurance plan then in effect for the employee, until such time as one of the following occurs:

1. The fund is depleted;

2. The employee dies; or

3. The employee becomes employed and/or eligible for other comparable hospital and surgical insurance from another source.

In order to be eligible for the above-described benefit the employee must meet all of the following conditions:

a. Apply for Wisconsin Retirement Fund benefits within thirty (30) days of the last day of work; and

b. Whenever possible, in cases of voluntary retirement, give the Employer notice of retirement and intent to utilize the above-described benefits by December 1 preceding the date of retirement.

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ARTICLE 23 - LEAVE OF ABSENCE

A. Normal Reason for Leave: Written leave of absence, without pay, for periods not in excess of six (6) months in any year may be granted in the discretion of the City to any full-time employee to further his education, for a long continuous illness or accident or where sick leave is exhausted or where the City will directly benefit from the leave, providing said employee does not accept employment elsewhere or become self-employed. The City at the end of any six (6) month period shall review any leave to determine whether an additional six (6) month period will be granted. The employee, to whom written leave of absence has been granted, shall be entitled, at the expiration of the time stated in such leave, to be reinstated to the position in which he was employed at the time the leave was granted. During the period of leave of absence no vacation, sick leave or other benefits (other than seniority) shall accrue to the employee. The City shall allow any employee on a leave of absence to continue the employee's medical benefits and dental and life insurance coverages, however, the employee shall pay the entire cost for such coverages.

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BACKGROUND

The grievant, Randy Sawyer, is an Operator I with the City of Wausau Department of Public Works. In the spring of 1987, Sawyer was injured on the job and began receiving Worker's Compensation benefits under Article 20 - Sick Leave, Subsection F., which states as follows:

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F. Worker's Compensation: Employees eligible for Worker's Compensation benefits shall be allowed to exercise one of the following options:

1. Receive the Worker's Compensation benefit with no deduction from accumulated sick leave;

2. Receive the Worker's Compensation benefit and be paid the difference between their regular pay based upon a normal work week and the Worker's Compensation benefit with the City charging the employee's sick leave account with the number of hours that equal the cash differential between the Worker's Compensation and regular pay.

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Pursuant to Article 20 (F), Sawyer chose Option 2. The parties stipulated at hearing that under Option 2, an employe continues to receive full fringe benefits. Around October 7, 1987, Sawyer switched to Option 1, referred to as Worker's Compensation "direct", under Article 20 (F). At that time, he was advised by the City that he would have to pay his own health insurance premiums, and he complied. Upon his return to work in 1988, Sawyer inquired of Ila Koss, City Payroll Assistant Specialist, as to the amount of vacation he was entitled to for 1988. On August 1, 1988, Koss sent the following to Sawyer:

August 1, 1988

TO: Randy Sawyer

FROM: Ila Koss

RE: Vacation 1988

Your vacation usage for the year beginning 1-1-88 was calculated to be;

80 hours carried over from 1987 because of non-usage
-64 hours earned in 1987
144 hours to be used in 1988

Your earned vacation in 1987 was calculated as follows;

10 days per year of service/1987
divided by 12 months = .83 days per month of service/1987
.83 x 9 months (service Jan/Sept '87) = 7.47/8 days earned

8 days x 8 hours = 64 hours vacation earned.

The reason you did not receive vacation credits for the months of October thru December 1987 was because you chose to be off the payroll as an inactive employee during that period. Employees off work for more than 50% of any 30 day period receive no benefits except for the accumulation of sick leave as stated in your contract; Art. 20 (D).

In addition to not receiving vacation credits for the months of October through December, 1987, Sawyer did not receive holiday pay for Thanksgiving, Christmas Eve, Christmas, and New Year's Day. On August 4, 1988, Sawyer filed the instant grievance seeking holiday pay, vacation accrual, and other benefits denied him for the period he was under Option 1. The grievance was denied by the City on October 13, 1988.

POSITIONS OF THE PARTIES

Union

In response to the City's assertion that the health insurance issue was not timely raised, the Union argues that the grievant was not aware of the possible contract violation until he returned to work and spoke with the union steward. The Union asserts that the grievance was timely filed no later than 15 work days from the date the grievant discovered the possible violation, pursuant to Article 14 (F) of the bargaining agreement. The Union argues that the timeliness of the filing of the grievance is further supported by the lack of any challenges to the processing of the grievance on the part of the City.

Regarding the merits, the Union contends that the contract language of Article 20 requires that Worker's Compensation be treated as a form of sick leave. Article 20 (D) specifically states that an employe receiving Worker's Compensation maintains employment status with the City. Further, the Union points out that nowhere are there any exclusions of benefits for such employes, nor is there any reference to or definition of "active" versus "inactive" employe status as the City attempts to establish by its 50% policy rule. Also, the Union argues that Article 23, "Leave of Absence", does not apply in this case, since a written leave was neither requested nor granted as required by Article 23. The Union further contends that the Union's interpretation of Article 20 is supported by the County's interpretation of nearly identical language in the County Parks Department agreement. The Union points to the historically close bargaining relationship of the

County Parks Department and the City DPW unit, and the fact that both contracts were bargained for and administered jointly by the same parties until 1985, as support for its assertion that the County's interpretation of its sick leave language should be relevant in interpreting the City agreement.

City

Contrary to the claims of the Union, the City argues that the grievant's claim for recovery of health insurance contributions is untimely. The City points to the fact that the City discontinued the payments in October, 1987, and a grievance was not filed until August 4, 1988, well beyond the 15-day time limit provided in Article 14. Further, the City contends that the reason it did not challenge the arbitrability of the health insurance issue earl
ier in the grievance process was because the issue was not raised by the grievant or the Union until the arbitration hearing. The City contends that the issue of arbitrability can be raised at any stage of the grievance procedure given its primary relevance to the jurisdiction of the arbitrator to hear a particular grievance.

On the merits, the City argues that, taken as a whole, the labor agreement does not entitle the grievant to the accrual and payment of holiday and vacation benefits, as well as health insurance premiums, while on unpaid leave. Citing several cases, the City contends that the doctrine of "expressio unius est exclusio alterius" applies, and that arbitrators have recognized that it is improper for an employer to initiate a fringe benefit not expressly provided for by the parties in the agreement. The City argues that the language of Article 20 (D) is clear and unambiguous in that it provides that an employe on Worker's Compensation is only entitled to sick leave accrual. Further, the City points out that the parties expressly agreed, in Article 23, that an employe on unpaid leave would not be entitled to the accrual or payment of any fringe benefits, except in the case of sick leave accrual if a sick bank existed. Also, the City points out that arbitrators have recognized that entitlement to fringe benefits belongs to working employes versus employes on unpaid leave. Because the grievant was not working for the City, i.e., on active status, while on Worker's Compensation "direct", he is not entitled to the benefits sought. Further, the City contends that it has a long-established past practice of not allowing the accrual or payment of fringe benefits to employes on unpaid leave, except sick leave under certain circumstances. There was no evidence that the Union ever challenged the 50% rule, and the Union has, therefore, acquiesced to the practice. Finally, the City argues that it has no connections to Marathon County and any comparison to the County and its interpretation of its sick leave provision is irrelevant.

DISCUSSION

The issue to be decided in this matter is whether the City violated the collective bargaining agreement by failing to credit the grievant with holiday and vacation benefits, and by failing to continue to pay the grievant's health insurance, while the grievant was on Worker's

Compensation "direct", i.e., Option I of Article 20 (F). Further, the City challenges the arbitrability of the health insurance issue on the basis that it was untimely. Finally, the Union, in its brief, raises the issue of whether the City's 50% rule violates the collective bargaining agreement.

Procedural arbitrability is a threshold issue, and must be addressed prior to a consideration of the merits of the grievance. The City argues that the health insurance issue is untimely and should be dismissed based upon the following: (1) the City discontinued the payment of the grievant's health insurance on October 7, 1987; (2) the grievant did not file a grievance until August 4, 1988; (3) the grievant did not raise the issue of nonpayment in the initial grievance, and in fact the issue was not raised until the arbitration hearing; and (4) even if the issue had been raised in the grievance, the 15-day time limit for the filing of a grievance specified in Article 14 had long expired. The Union, on the other hand, argues: (1) the grievant was not aware of a potential contract violation until he returned to work; (2) the grievance was filed within the 15-day period after the grievant returned to work and discussed the matter with a union steward; (3) the grievant's injury kept him away from the work site; and (4) the circumstances of an employe going on Worker's Compensation "direct" rarely occurred.

The parties have recognized the importance of promptness in the filing and processing of grievances. Article 14 (F), Step 1, of the collective bargaining agreement states as follows:

> All grievances must be presented promptly and no later than fifteen (15) work days from the date the employee knew or should have been aware of the cause of such grievance.

Further, Article 14 (D) states the following:

> Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent. Time limits shall be exclusive of Saturdays, Sundays and Holidays.

The language of Article 14 (F) and (D) makes it clear that the parties intended that grievances be timely filed, and that any deviation from the time limits set forth in the agreement be by mutual consent. It follows that any grievance which is untimely filed, without an extension by mutual consent, must be dismissed.

The evidence presented does not support the Union's contention that the health insurance issue was timely raised. The grievant testified that when he chose to go on Worker's Compensation "direct" in October, 1987, he was told by the City that he would have to pay his own health insurance, and that he did so. Further, Ila Koss, City Payroll Assistance Specialist,

testified that she sends employes going on Worker's Compensation "direct" a letter spelling out their responsibility to pay for their health insurance. Therefore, it is clear that the grievant (1) was given notice of the City's position regarding the payment of the health insurance, (2) paid the health insurance premiums, and (3) did not challenge the City's action, or even discuss the matter with his Union representative until he returned to work in 1988. Pursuant to Article 14 (F), it is clear that the grievant "knew or should have been aware of the cause of such grievance" in October, 1987. The fact that the grievant did not discuss the possibility that the City's action might have been a violation of the agreement until he returned to work does not negate the fact that he was aware of the "cause" of the grievance and did not challenge it within the prescribed time limits. Also, there is no evidence that the parties mutually agreed to an extension of the time limits pursuant to Article 14 (D). The fact that the grievant was away from the work site due to his injury, or the fact that there have not been many employes on Worker's Compensation "direct", does not persuade the undersigned that there were extenuating circumstances for the delay in filing. Nor does the language of Article 14 indicate that the parties intended anything other than the precipitating event to trigger the running of the 15-day time limit. In this case, the precipitating event was, at the very latest, the first health insurance premium payment paid by the grievant to the City, not when the grievant decided to discuss the matter with the union steward. To follow the Union's logic would mean that the filing of any grievance could be delayed indefinitely, and this certainly was not the parties' intent. Further, the fact that the City did not challenge the timeliness of the health insurance issue prior to hearing is explained by the fact that the grievance did not mention health insurance payments nor was the issue of health insurance raised during the grievance process, according to unrefuted City witness testimony. Therefore, the lack of a challenge to the issue of health insurance was the result of the City being unaware that the nonpayment of health insurance premiums was being grieved, rather than a sign of acquiescence by the City to its timeliness as the Union contends. Based upon the above, the undersigned concludes that the issue of health insurance was not timely raised, and is not arbitrable in this grievance.

Having found that the issue of health insurance was not timely raised, the remaining issue to be decided on the merits is whether the City violated the collective bargaining agreement by not crediting the grievant with vacation and holiday benefits while the grievant was receiving Worker's Compensation "direct". The City is correct in its assertion that the contract must be construed as a whole, and given a reasonable interpretation in light of its various provisions. The concept of "expressio unius est exclusio alterius" is interpreted to mean that the express mention of one thing implies the exclusion of others. In other words, the written contract is presumed to include the entire agreement of the parties, and any terms, rights, or obligations not expressly provided for in the contract should be deemed deliberately excluded, unless there is clear evidence that a past practice or oral agreement between the parties has created a contractual obligation not found in the contract itself. 1/

Applying the concept of "expressio unius est exclusio alterius" to the collective bargaining agreement between the Union and the City, it is the opinion of the undersigned that the City did violate the agreement in denying the accrual of vacation and holiday benefits to the grievant. Although the parties agree that the grievant was not on a leave of absence as provided in Article 23, the language of Article 23 is instructive in that it specifically provides that an individual on such a leave of absence without pay shall not accrue any benefits other than seniority. The relevant portion of Article 23 states as follows:

> During the period of leave of absence no vacation, sick leave or other benefits (other than seniority) shall accrue to the employee. The City shall allow any employee on a leave of absence to continue the employee's medical benefits and dental and life insurance coverages, however, the employee shall pay the entire cost for such coverages.

The absence of comparable language anywhere in the agreement as it might affect an individual on Worker's Compensation is notable. Further, the only provision in the agreement which addresses the matter of an employe on Worker's Compensation is Article 20, which states, in part, as follows:

> D. Continued Accumulation: Any employee who is off work because of illness, vacation or is receiving worker's compensation shall be considered to be maintaining employment status with the City and shall be credited with his allotted sick leave accrual. However, an employee who has used all accumulated sick leave shall no longer receive the monthly sick leave accrual unless and until the employee returns to work.

The language of Articles 20 and 23, when read as a whole, indicates the apparent intention of the parties to specifically deny most benefits to employes on leaves of absence, while recognizing the employment status of employes on Worker's Compensation, as well as those off work because of illness or vacation.

The City attempts to explain the reference to employes on Worker's Compensation "maintaining employment status" by making a distinction between employes on "active" or pay status, and employes on "inactive" or nonpay status with the City. However, the agreement makes no such distinction. It is the opinion of the undersigned that the reference to sick leave accrual in Article 20 (D) is intended to explain to employes who are ill, on vacation, or receiving Worker's Compensation that sick leave shall continue to accrue unless and until all accumulated sick leave is used up, rather than to restrict other benefits available to employes on Worker's Compensation. There is nothing in 20(D) which differentiates between employes who are ill or on vacation, and

those on Worker's Compensation. Certainly employes who are ill or on vacation do not lose other benefits, unless they formally apply for an unpaid leave of absence under Article 23. There is nothing in Article 20 (D) which says that for the purpose of Article 20 (F) 1., "maintaining employment status" means receiving no benefits other than possible sick leave accrual, whereas if an employe chooses (F) 2., the employe will retain all benefits. Further, the only reference to Worker's Compensation in the agreement is under the sick leave provision, which indicates that the reference is intended to show the impact of receiving Worker's Compensation for purposes of sick leave only. The rest of the agreement is silent regarding the impact of Worker's Compensation on any other benefit.

The City points to its 50% rule as evidence of its established practice to deny benefits to any employe who is off work for more than 50% of any 30-day period. However, there was unrefuted evidence at hearing that the Union had no previous knowledge of this practice, and, therefore, it cannot be said that the parties had an established past practice upon which the City could rely. Further, testimony of Ila Koss, the City's Payroll Assistant Specialist, established that it is only in the last year that employes have been on Worker's Compensation "direct", and, therefore, it cannot be said that there was an established City practice regarding benefits for these employes, even if the practice has been applied to other employes in the past.

It is interesting to note that both parties cite the Walworth County decision to support their respective positions in this matter. 2/ The Union cites Walworth because the arbitrator held that, under the language of the agreement between the parties, an employe on Worker's Compensation was entitled to holiday pay. The City cites the case for the proposition that entitlement to fringe benefits is restricted to working employes, and that the arbitrator rightly denied sick leave and vacation benefits to these employes. It is clear from a reading of Walworth that the arbitrator based his award on the language, or absence thereof, in the agreement between the parties, as well as the County's Worker's Compensation policy. In the case at hand, there is insufficient evidence to establish a City policy which defines the rights of employes on Worker's Compensation beyond the express language of Article 20. In addition, there is no evidence that the agreement referred to in Walworth contained language similar to the "maintaining employment status" language found in Article 20 as compared to the exclusionary language regarding benefits denied to employes on leaves of absence. Therefore, Walworth is not particularly relevant for our purposes.

Having found that the City violated the agreement based upon an interpretation of the contractual language, it is not necessary to address the Union's secondary issue regarding the status of the City's 50% rule except to say that such a rule should be the result of the bargaining process between the parties. Further, given these findings, it is not necessary to address the past bargaining relationship of the City and the County as it might affect the outcome of this matter.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The grievance is sustained in part and denied in part. The part of the grievance regarding the payment of health insurance premiums is untimely and shall be dismissed. The City shall credit the grievant with holiday and vacation benefits for the period he was on Worker's Compensation "direct".

Dated at Madison, Wisconsin this 18th day of August, 1989.

By _____
Beverly M. Massing, Arbitrator

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