STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Arbitration of a Dispute Between	:	
CITY OF MARSHFIELD	:	Case 82 No. 41984 MA-5519
and	:	
MARSHFIELD CITY EMPLOYEES, LOCAL 929, AFSCME, AFL-CIO	:	

Appearances:
Mr. David White, Staff Representative, AFSCME Council #40, for the Union.
Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Dean R. Dietrich and Mr. Jeffrey T. Jones, for the City.

ARBITRATION AWARD

Marshfield City Employees, Local 929, AFSCME, AFL-CIO, herein the Union, pursuant to the terms of its collective bargaining agreement with the City of Marshfield, herein the City, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an Arbitrator to hear and decide a dispute between the parties. The City concurred with said request and the undersigned was designated as the Arbitrator. Hearing was held in Marshfield, Wisconsin, on June 12, 1989. No transcript of the hearing was taken. The parties completed the filing of post-hearing briefs on July 31, 1989.

ISSUE

The parties agreed that the Arbitrator should frame the issue and proposed the following statements of the issue:

Union

> Did the City violate the collective bargaining agreement when it refused to continue to pay health insurance contributions, longevity and other benefits to an employe on injury leave? If so, what is the appropriate remedy?

City

> Whether the City violated Article 9 and Article 11 of the labor agreement when it required the grievant to pay health insurance contributions and denied accrual of fringe benefits when the grievant was placed on a leave of absence without pay?

The Arbitrator frames the issue as follows:

> Did the City violate the contract either by requiring the grievant to pay health insurance premiums or by denying the grievant longevity pay and the accrual of fringe benefits while the grievant was on a leave of absence? If so, what is the appropriate remedy?

BACKGROUND

The grievant, Alan Esser, has been employed by the City for approximately thirty-five (35) years and currently is classified as a tractor backhoe operator. On October 27, 1988, the grievant suffered a work-related injury and was placed on an injury leave as provided in Article 11. On April 3, 1989, the grievant returned to active pay status through the use of vacation. The grievant returned to work on April 13, 1989.

During the initial forty-five (45) days that the grievant was off work, commencing on or about October 27, 1988, the City paid the grievant for the difference between his regular salary and the Worker's Compensation payments he was receiving, and credited him for the accrual of all fringe benefits.

On January 5, 1989, the City's Comptroller, Michael Brehm, met with the grievant and informed him that on January 6, 1989, the grievant would exhaust the 45 days of supplemental wage payments and that he would be responsible for the payment of his health and life insurance premiums. Brehm also advised the grievant to apply for a leave of absence to avoid losing his seniority. The grievant applied for, and was granted, a leave of absence without pay, during which leave he paid the premiums for his life and health insurance and did not receive any longevity payments or fringe benefit accruals from the City.

The grievant filed the instant grievance on January 18, 1989.

The City has a personnel policy for non-represented employes which provides that: if an employe terminates employment before the 15th day of the month, then the employe does not earn vacation for said month; and, if the employe terminates on or after the 15th day of the month, then the employe does earn vacation for said month. The City relies on the same method for determining when an employe is obligated to pay insurance premiums and accrues fringe benefits during an unpaid leave of absence.

The City presented three prior instances of employes who had work-related injuries. One case in 1985 involved a firefighter, William Schallock, who, after 45 days, had to pay his life and health insurance premiums and received no longevity pay or fringe benefit accruals until his return to work. Said firefighter was covered by a contract between the City and a different union than the Union herein.

Another case in 1986 also involved the grievant herein. In a letter to the grievant, the City advised him that on April 17, 1986, he would exhaust the 45 days of supplemental benefits and would have to begin paying his life and health insurance premiums. However, Esser did not have to pay any insurance premiums because he returned to work on May 12, 1986, which was before the 15th day of the month.

The third case involved an employe who was not in a bargaining unit, Orville Eckes. Eckes did pay his insurance premiums from the time his supplemental payments were exhausted until his return to work.

RELEVANT CONTRACTUAL PROVISION

Article 9 - Leave of Absence

Section 1. Written leave of absence without pay, for periods not in excess of six months in any year, in the discretion of the Employer, may be granted to any full-time employee providing said employee does not accept employment elsewhere. Such leave shall be granted only in cases of sickness and accident. The employee to whom written leave of absence has been granted shall be entitled, at the expiration of the time stated on such leave, to be reinstated to the position in which the employee was employed at the time the leave was granted, at the prevailing rate of pay

without loss of seniority, but all other fringe benefits shall not accrue during the term of the leave. The Union shall be provided with a copy of the written leave, by the Employer, at the time such leave is granted.

. . .

Article 11 - Injury Leave

Section 1. Injury leave may be granted by the Finance, Budget and Personnel Committee for employees who suffer a loss of work because of a job related injury. Employees who are granted injury leave shall receive during such leave, the difference between their regular salary and their Worker's Compensation payments up to a maximum of forty-five (45) days. Only full-time employees shall be eligible for injury leave.

. . .

Article 14 - Grievance Procedure

. . .

Section 5. The arbitrator shall have no authority or power to add to, modify, or delete from the express terms of this agreement.

. . .

POSITION OF THE UNION

Article 11 does not limit an injury leave to 45 days. What is limited to 45 days is the period during which an employe receives supplemental payments from the City. If the parties had intended to also limit the duration of an injury leave, they could have included such a limit just as they did in Section 1 of Article 9 for unpaid leaves of absence. Further, the Arbitrator does not have the power to impose a limit when there is none in the contract.

An injury leave is not the same as a leave of absence. The two leaves are contained in separate articles of the contract. The injury leave language appeared in contracts before the leave of absence language. References to the two leaves in other contractual provisions, e.g., Section 2, Article 16, show the leaves are not considered to be the same thing. Article 9 specifies that leaves of absence are granted only for cases of sickness and accident, whereas Article 11 provides injury leaves for employes who suffer a loss of work because of a job related injury. Thus, Article 11 contains specific language which governs the instant case.

The language of the contract provisions dealing with certain fringe benefits, such as vacations, sick leave, health and life insurance, longevity and holidays demonstrate that employes are entitled to certain benefits. The only exception is when employes are on unpaid leaves of absence. Since the injury leave language does not include such a specific exclusion, then no such exclusion exists.

The other cases cited by the City are not relevant. The language in the firefighter contract is different and does not even discuss leaves. The Union has no role in setting policies for unrepresented City employes. The Union was not aware of the 1986 situation involving the grievant. Further, in that situation, the grievant neither lost any fringe benefits nor had to pay any insurance premiums.

The grievant did not voluntarily apply for a leave of absence, but rather, he did so only to avoid losing his seniority.

POSITION OF THE CITY

The clear and ambiguous language of Article 9 must be given effect. Under said language, the grievant was not entitled to accrual or payment of fringe benefits. The Arbitrator is prohibited from modifying that language. Further, the City has a long-established practice of not permitting an employe to accrue or receive any fringe benefits while on an unpaid leave of absence.

The grievant was not coerced into applying for an unpaid leave of absence. He could have not applied and then grieved any action by the City. There is no evidence that the City has ever placed an employe on injury leave for more than 45 days. In fact, the grievant was placed on an unpaid leave of absence in 1986 following the expiration of a 45 day injury leave.

If the 45 day period in Article 11 applies only to the supplemental payments and not to the length of an injury leave, then the length of the leave clearly is left to the City's discretion.

Article 11 does not grant to an employe on injury leave the contractual right to accrue fringe benefits either during or following the 45 day period. Although the City voluntarily has paid and accrued fringe benefits for employes during an injury leave up to 45 days, it would be inappropriate to extend such a procedure beyond the 45 days.

Arbitrators have long recognized that entitlement to fringe benefits is reserved to working employes. The contract language herein supports such a result.

When the contract is read as a whole, because the language in Article 9 specifically addresses fringe benefits while Article 11 does not, then the specific language governs. It would be inappropriate to require the City to initiate a fringe benefit not expressly provided in the contract.

DISCUSSION

When an injury leave is granted by the City, then the language mandates that the employe receive a supplemental payment equal to the difference between the employe's regular salary and the Worker's Compensation payments received by the employe during the injury leave. The supplemental payment clearly is limited to a maximum of 45 days, which fact the parties do not dispute. However, the Union, contrary to the City, asserts that the 45 day maximum applies only to the duration of the supplemental payments and not to the duration of the injury leave. The use of such phrases as "Injury leave may be granted" and "Employees who are granted injury leave" in Article 11, Section 1, clearly provides the City with the discretion to decide whether or not to grant an injury leave. Inherent in that contractually provided discretion is the ability to determine the length of the injury leave when such a leave is approved. While the City apparently has the discretion to grant an injury leave with a duration in excess of 45 days, it chose not to do so in this case. Rather, the City approved an injury leave of 45 days for the grievant, which is the maximum period during which the City is obligated by the contract to make supplemental payments to an employe. Although Article 11, Section 1, does not appear to place a limit of 45 days on an injury leave, the language of said provision grants the City the ability to limit the length of such a leave to 45 days, or less, if it so chooses.

There was no evidence presented to show that the City has ever granted an injury leave in excess of 45 days to an employe who was unable to work because of a job related injury, even if the period of disability exceeded 45 days. Thus, the City cannot be said to have treated the instant matter differently than it has treated previous cases.

The grievant did apply for a leave of absence to commence upon the expiration of his 45 day injury leave. There is no doubt that the grievant did so in order to protect his seniority rights with the City, rather than

simply because he agreed with the City's position that his injury leave would cease after 45 days. Whether or not the grievant's request for a leave of absence was voluntary is not the issue. The issue is whether the City had to continue the grievant's fringe benefits after 45 days.

Upon the expiration of the 45 days of supplemental payments, the grievant was no longer being paid by the City for lost wages. Therefore, the grievant was in an unpaid status and on a leave of absence. Accordingly, it was reasonable for the City to advise the grievant to request a leave of absence under Article 9, Section 1. The City's actions of requiring the grievant, during that leave of absence, to pay his health and life insurance premiums and of not accruing fringe benefits for the grievant conformed to the language of Article 9, Section 1.

As noted by the Union, injury leaves under Article 11 and leaves of absence without pay under Article 9 are two separate types of leave. However, as discussed above, the City has the discretion both to grant or deny an injury leave and to set the length of an injury leave. If, as occurred in this case, the City decides that the injury leave expires when an employe exhausts the 45 days of supplemental payments, then the employe must go on an unpaid leave of absence to protect his seniority. Article 16, Section 2, refers to both non-paid leaves and time off due to injury incurred on the job. That language does not require the City to treat all time off due to an injury on the job as injury leave. Rather, said language requires the City to include all time off due to an injury on the job as part of an employe's service when longevity payments are calculated, without regard to the type of leave the employe was on during the absence. Since employes can take non-paid leaves for other reasons beside injuries on the job when the supplemental payments expire, the inclusion of both types of absence in Article 16, Section 2, is not a contradictory result.

There was no evidence presented which would show that in this case the City treated the grievant differently than it has treated other employes in similar past situations. In fact, the only similar situation, arising in the bargaining unit in which the grievant works, was in 1986 and also involved the grievant. In April 1986, while the grievant was off work due to a job-related injury, he was informed that, when his 45 days of supplemental payments expired, he would have to pay his insurance premiums. The grievant did not actually pay any insurance premiums in 1986 because he returned to work before the 15th day of May. Thus, while the Union may not have been aware of the City's practice of requiring employes to pay insurance premiums when the supplemental payments expired, the grievant certainly was aware of that practice. Although one such incident may not be sufficient to establish a binding practice, said incident certainly supports the City's position concerning its interpretation and administration of the disputed provisions.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the City did not violate the contract either by requiring the grievant to pay health insurance premiums or by denying the grievant longevity pay and the accrual of fringe benefits while the grievant was on a leave of absence following the expiration of his supplemental payments to Worker's Compensation; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 10th day of October, 1989.

By /s/ Douglas V. Knudson
Douglas V. Knudson, Arbitrator