BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MILWAUKEE METROPOLITAN SEWERAGE DISTRICT	Case 258
and	No. 46960
LOCAL 366, AFSCME, AFL-CIO, DISTRICT COUNCIL 48	MA-7115

Appearances:

Mr. Donald L. Schriefer, Senior Staff Attorney, Milwaukee Metropolitan Sewera

Mr. Alvin R. Ugent, Podell, Ugent & Cross, S.C., 611 N. Broadway, Suite 200, Mi

ARBITRATION AWARD

According to the terms of the 1989-1992 collective bargaining agreement between Milwaukee Metropolitan Sewerage District (hereafter District) and Local 366, AFSCME, AFL-CIO, District Council 48 (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them relating to whether the District can require bargaining unit members to exhaust accrued sick leave and vacation after duty incurred disability pay benefits are exhausted. The undersigned was designated arbitrator. Hearing was held at Milwaukee, Wisconsin on June 24, 1992. A stenographic transcript was made and received by July 15, 1992. The parties filed their initial briefs by August 31, 1992 which were thereafter exchanged by the undersigned. The District filed its reply brief by September 14, 1992. The Union chose not to file a reply brief.

ISSUES:

The parties were unable to stipulate to the issue(s) to be determined herein, but, they agreed to allow the undersigned to frame the issues. The Union suggested the following issues statement:

1) Does the contract permit the District to require Local 366 members to exhaust accrued sick leave and vacation days after duty incurred disability pay benefits under the contract are exhausted.

2) If so, what is the appropriate remedy?

The District suggested the following statement of the issues:

3) Do the contract and the District's September 19, 1983 policy regarding "Unpaid Leave of Absence" permit the District to require Local 366 members to exhaust accrued sick leave and vacation days after "duty-incurred disability pay" benefits under the contract are exhausted?

4) If not, what is the remedy?

Based upon the relevant evidence and argument and in light of the clear evidence of the District's long-standing practice and policy regarding unpaid leaves of absence (as discussed infra), I conclude that the District's statement of the issues is fair and appropriate and, therefore, issues 3) and 4) will be determined in this case.

RELEVANT CONTRACT PROVISIONS:

SCHEDULE A

. . .

B. VACATIONS

. . .

3. Administration of the vacation plan will be in accordance with the following regulations:

a. Each employee must select his/her vacation periods by May 1st of the current year or he/she will be assigned a vacation period not already selected by other employees. If vacations are not taken before April 1st of the following year, the unused vacation will be lost.

. . .

D. DUTY-INCURRED DISABILITY PAY.

1. A regular full-time employee who sustains an injury while performing within the scope of his/her employment, as provided by Chapter 102 of the Wisconsin Statutes (Worker's Compensation Act) shall continue to receive normal straight time take-home pay including shift premium pay normally received, described herein as "injury pay," in lieu of worker's compensation for the period of time he/she may be temporarily totally or temporarily partially disabled because of said injury.

2. However, in no case shall an employee receive "injury pay" for more than 210 working days for each compensable injury, provided they are used within twelve (12) months from the date of the injury, excluding time worked in a light-duty capacity.

. . .

F. INSURANCE

1. HEALTH AND DENTAL INSURANCE

. . .

> i. After an employee has exhausted his/her sick leave due to medical reasons, the District shall continue the employee's health insurance coverage in subparagraph a. above for a period not to exceed six (6) months from the first of the month in which sick leave is exhausted.

. . .

STIPULATIONS OF THE PARTIES:

1. The parties agreed that the Award in the instant case shall be applied to a similarly situated employe, Daniel Kutnyak.

2. The parties agreed that the undersigned should retain jurisdiction for a period of 90 days following a ruling in favor of the Union (should that occur) to allow the parties to work out a voluntary agreement concerning the remedy before the undersigned would consider additional evidence/arguments and impose a remedy.

BACKGROUND:

The contract language quoted above relating to vacations and the contract language promising to pay employe health insurance premiums for six months following the exhaustion of sick leave for "medical reasons" were the same in the parties' 1981-83 labor agreement. The Duty Incurred Disability Pay provision was different in the 1981-83 agreement and it read as follows:

D. Duty-Incurred Disability Pay

> 1. A regular full-time employee who sustains an injury while performing within the scope of his/her employment, as provided by Chapter 102 of the Wisconsin Statutes (Workers Compensation Act) shall receive full salary, described herein as "injury pay," in lieu of workers' compensation for the period of time he/she may be temporarily totally or temporarily partially disabled because of said injury.
>
> 2. In no case shall an employee receive "injury pay" for more than one year (250 working days) for each compensable injury.

The 1981-83 contract, as well as the current labor agreement, are silent regarding what if any, leaves without pay may be available to employes.

On June 20, 1983, then-District Labor Relations Manager, William K. Strycker, wrote to the Local 366 representative at District Council 48, Nick Ballas. In his letter, Strycker indicated:

> Recently the District has received numerous requests for unpaid leaves of absence. These requests have been for varying reasons and for various periods of time. Because of the need to be consistent, a procedure was developed which formalizes our practices in this area. We have forwarded copies of this procedure to our

> supervisors so that employees may be informed about the implications of their unpaid leave of absence requests. If you would like to discuss this procedure or have any clarifying questions, please contact me.

Strycker enclosed a sample request form for unpaid leave which listed as possible leaves to be taken -- "Medical, Annual Military Training, Military Funeral Leave, Child Rearing, Family Illness and Other." On the form there were areas for the employe to fill in the beginning date, ending date and reason for Leave. Also on the form was a space for a physician's certification as to when the employe would be able to return to work as well as spaces for various supervisory and managerial approval of the requested leave. Strycker also included a flow chart showing how and to whom an employe could apply for leave and how the employe could appeal a denial of a request for leave, as well as how the form is processed to a conclusion. Finally, Strycker enclosed a two page analysis of Unpaid Leave Operating Procedures showing the various leaves available under the policy and what affect taking such leave would have on accrued benefits: health, dental and life insurance, and seniority accrual. Regarding unpaid medical leaves, this analysis stated in relevant part as follows:

> Paste chart here

On September 19, 1983, having heard nothing from the Union, the District issued its policy in final form, a document entitled "Administrative Procedure," on the subject of Unpaid Leaves of Absence. Attached to this Procedure were all of the documents which Strycker had previously enclosed in his June 20th letter to Ballas. Strycker sent Ballas a copy of this "Procedure" and attachments, according to the undisputed evidence. The "Administrative Procedure" read as follows:

> The Milwaukee Metropolitan Sewerage District, in order to permit the retention of qualified staff, recognizes that some exceptional circumstances may necessitate employee absences independent of those absences involving accrued sick leave or vacation benefits. The District will permit such absence without prejudice to the employee if the reason for the absence is legitimate and necessary. Certain leaves will be granted providing all conditions of applicable laws and contracts are met.
>
> Dependent on the type and extent of leave requested, it will be necessary to first exhaust all applicable accrued benefits, according to operating procedures. Such operating procedures further designate those unpaid leaves under which an employee shall not accrue sick leave or vacation benefits.
>
> Individual arrangements must be made with the Compensation Department of the Human Resources Division for the continuation of certain insurance coverages in those cases where employer paid health, life and/or vision coverages cease for the period of leave. Dates of employee seniority will be adjusted to account for periods of absence during unpaid leaves in which the procedure identifies there is no seniority accrual. Employees on unpaid leave will be considered for promotional opportunities occurring during their absence only if they are available to start work the date the successful candidate is determined.
>
> Certain leaves such as jury duty are mandated by law. Leaves that are not mandated by law will be granted at the discretion of management. Needs of the department may necessitate the denial or leaves not mandated by law. Management reserves the right to fill vacated positions on a permanent basis if necessary. Employees on leaves of absence whose positions are filled may be recalled when and if the position again becomes available. The District is under no obligation to rehire individuals on leaves not mandated by law that extend beyond 30 days. All absences not covered under the provision of sick leave, vacation, holiday, or a similar explicit benefit program must be requested by submitting a leave of absence request form to the immediate Supervisor as soon as the need is known but in no case less than one week prior to the leave. The authorizing authorities shall be the immediate Supervisor, the Cost Center Manager (or Division Director), and the Manager of Human Resources unless otherwise stated in the operating procedures.

> An employee who wishes to appeal a denial of unpaid leave by the Supervisor and/or Cost Center Manager, must submit a written appeal and a copy of the original request to the Division Director and the Manager of Human Resources for review and disposition.

Neither Ballas nor the Union ever objected to any part of this Procedure/Policy nor did they seek to bargain regarding the matter.

The District submitted evidence regarding a grievance it believed similar to the instant one, filed by employe Rick McCarthy in December, 1987 in which McCarthy and the Union alleged that McCarthy had been "coerced into utilizing my sick allowance and other benefits while on Industrial Injury" and sought a make-whole remedy. On April 7, 1988, in a Fourth Step Grievance Answer, Strycker denied the grievance stating the reasons for his denial of the grievance, as follows:

> Mr. McCarthy exhausted his injury pay rights under the contract. In order to qualify for an unpaid medical leave of absence, employees must exhaust all sick leave, vacation, and other accrued time. In Mr. McCarthy's situation, his accrued time was being used to supplement worker's compensation payments up to his normal take home pay amount. This supplemental procedure has been District policy for many years and the leave of absence procedure has been known to the union for over 4 years. By supplementing the statutory worker's compensation payments, Mr. McCarthy remains on the payroll and is eligible to continue to accrue benefits and receive paid insurance coverage in accordance with the contract (Schedule A, F. Insurance, 1, h.). Since the contract was not violated, the grievance is denied.

Neither McCarthy nor the Union appealed Strycker's denial of this grievance. Furthermore, the District's main witness, Compensation and Benefits Manager, Ms. Sherry Krahn, stated without contradiction that the District's Procedure/Policy on Unpaid Leaves has been applied to approximately 40 employes over the years since its establishment without complaint and that the only prior grievance on point here is the McCarthy grievance.

During negotiations for the 1987-89 contract, the parties agreed to change the language of Section D, Duty-Incurred Disability Pay from that quoted above (1981-83 contract) to read as it does today. During negotiations for the 1991-93 contract the District submitted the following proposal to the Union:

Schedule A, Section D, 5 (p. 17) Duty-Incurred Disability Pay	Add for clarification: After an employee exhausts his/her 'injury pay' but is still receiving temporary total disability (ttd) payments, an employee will be required to utilize any and all accrued time benefits to supplement the ttd payment up to their gross pay."

The District ultimately dropped this proposal and it never became a part of the 1991-93 agreement.

As a practical matter, the duty-incurred disability clause and unpaid medical leave policy work together to provide a scheme whereby an employe who is going to be off work for any medical reason (on and off-duty injuries included) for more than 30 days, is required to exhaust his/her accrued time benefits -- sick leave, other accrued time and vacation. If the leave is for less than 30 days, the employe is not required to exhaust their accrued time benefits. The employe must fill out an unpaid leave request form if they are going to need unpaid leave. This is usually done in the case of a duty-incurred disability, after the contractual 210 working days have elapsed since the employe's on-the-job injury or if the employe is going to require medical leave time after one year from the date of the injury. An employe may exhaust his/her accrued vacation time prior to requesting an unpaid medical leave, but after an unpaid leave commences, the District requires the employe to exhaust all accrued time benefits.

The Procedure/Policy operates as follows vis a vis the disabled employe's pay. The temporary total disability pay (or TTD) is in fact 66 2/3 percent of the injured employe's gross pay. The District then docks the employe's accrued sick leave at a rate 33 1/3 percent (2.6 hours per day) so that the employe receives his normal gross pay while he is disabled. During his/her disability, the employe is considered an active employe, continues to accrue sick leave and vacation and he/she receives fully paid health insurance. When 210 working days after a compensable injury has expired or one year after the date of the injury, the employe is no longer eligible for TTD and if the employe is not medically able to return to work on light duty and has no more accrued benefits, the employe is then in unpaid status. 1/ The employe could then apply for a medical disability pension from the City of Milwaukee and although this pension would be less than the employe's gross pay, if accepted, the employe could retain the right to be covered by contract benefits such as insurance. Under the labor agreement, if the employe was refused a medical disability pension and the employe was in unpaid status, the employe could self-pay his/her health, dental and life insurance for one year. 2/ Thereafter, the employe would have Federal COBRA rights to self-pay his/her insurance.

FACTS:

The grievant, Matthew Pachi, has worked for the District for more than thirty-one years. Some time in late July or August, 1989, on a Wednesday, Pachi injured his back at work when he fell into an effluent discharge hole. The District called an ambulance and Pachi was removed from the hole and taken to Trinity Hospital's Emergency room. Pachi was told by the Emergency room Doctor that he should not return to work until the next Monday. The emergency room Doctor also referred Pachi to an orthopedic surgeon, Dr. Diulio, for further treatment. Pachi returned to work on the Monday following his injury. The Employer offered Pachi light duty work within his Doctor's restrictions and Pachi worked on light duty during the greater part of the 12 month period following his injury. Pachi regularly saw Dr. Diulio until in December, 1989, when Diulio referred Pachi to a neurosurgeon, Dr. Tsuchiya. Pachi made an appointment with Dr. Tsuchiya but could not get in to see him until March of 1990. During this period of time, Pachi did miss several months of work due to

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1/ The undisputed evidence showed that the District has been successful in accommodating employes with light duty work who return from disability with medical restrictions.

2/ Section F Insurance p. 25 (i). This provision has existed in its form in all labor agreements since 1981.

his injury but he received full pay under the Duty Incurred Disability provision of the contract. Pachi also used his sick leave for doctor's appointments during this period of time.

After seeing Dr. Tsuchiya, the Doctor took Pachi off work immediately. Dr. Tsuchiya treated Pachi, with various treatments including physical therapy and steroid injections. Tsuchiya ultimately performed a laminectomy on Pachi's spine, removing a disc and a portion of a vertebrae.

Although the record facts are somewhat sketchy, it is clear that for the greater part of the one year period following Pachi's 1989 accident, he worked on light duty full-time but Pachi was also off work for several months on Duty Incurred Disability. Pachi had used approximately 456 hours of vacation time (and an unknown amount of sick leave) as of the date of hearing herein, to supplement the 6300 to 6400 hours of duty incurred disability pay he has received. During the time since Pachi's 1989 injury, he has been treated as an active employe and he has continued to accrue vacation and sick leave and to have his pension and health, dental and life insurance, paid by the District, while in disability pay status. At his request, Pachi was also allowed to exhaust his accrued vacation time before the District (apparently) began docking his sick leave at the 33 1/3 percent rate (2.6 hours per day). 3/

On August 12, 1991, Pachi had a conversation with District counsel Crawford regarding his accrued benefits status. Mr. Crawford confirmed their discussion in his letter dated September 9, 1991 which read as follows:

> In our conversation on August 12, you raised the question about whether you were required to use sick leave benefits to supplement temporary total disability (TTD) worker's compensation benefits while recovering from your doctor's recommended treatment for your back. You raised the question as to whether you could decline to use sick leave to supplement TTD while recovering (sic) the back surgery? The answer is no.
>
> You are in the category of employees who have exhausted eligibility for duty disability benefits under your collective bargaining agreement and who will likely require additional time off work to recover from medical treatment. When an employee has exhausted his contractual "injury pay" benefits and it is still medically necessary to recuperate away from work, payment of the TTD rate as set forth in Chapter 102 and the DILHR Administrative Regulations is required. The TTD rate in effect at the time of your injury, July 31, 1989 remains $334.98 weekly.
>
> The District's long standing policy is that an employee is required to utilize accrued time benefits to supplement the TTD benefits up to the normal bi-weekly wage.
>
> Your normal bi-weekly wage rate is $1,117.40 or an hourly rate of $13.97. You would be paid, bi-

3/ Because the parties stipulated to my retention of jurisdiction should I rule in favor of the Union, they did not specify the details of Mr. Pachi's proposed remedy beyond what is noted herein.

> weekly, $669.96 for temporary total disability benefits. The remainder, $447.50 bi-weekly would be deducted from accrued time benefits (sick leave and vacation time) at a rate of $447.50 bi-weekly. At your current rate of pay, you will be required to utilize approximately 32.03 hours of sick leave (or vacation time) on a bi-weekly basis. The accrued time benefits must be utilized to supplement TTD payments until these contractual benefits are exhausted.
>
> At such time, you could expect to be paid only the TTD amount.
>
> This has been a long standing District policy and practice. The practice is recognized in paragraph 10 of the Limited Compromise Agreement you signed in the matter of the Worker's Compensation Claim No. 89045948 regarding the injury sustained at work on July 31, 1989.
>
> It is inappropriate for the District to engage in collective bargaining with any individual represented by Local 366. Should you have further objection to the District's policy, please refer your concerns to your collective bargaining representative.

Pachi filed the instant grievance on September 19, 1991 because he objected to the District's insistence that he exhaust his accrued sick leave while on unpaid leave. Rather, Pachi wished to receive just 66 2/3 percent of his pay and not have his accrued sick leave docked to supplement his duty incurred disability pay. Pachi did not experience any re-injury or new injury to his back after his 1989 accident. Pachi has received his full annual pay since his 1989 injury.

On Cross-examination by the Union, Compensation and Benefits Manager Sherry Krahn stated that the District has always required exhaustion of accrued sick leave in cases like the instant one; that under the District's policy and the labor agreement, the injured employe on temporary total disability (TTD) does not receive worker's compensation but the pay is treated the same as worker's compensation benefits are for tax purposes. Therefore, the District withholds taxes from and pays Social Security on only the 33 1/3 percent of the employe's gross pay (which comes from the use of accrued benefits). In regard to the District's 1991-93 bargaining proposal to add language to Section F, Para. 1. (i), Krahn (who was present at the bargaining table) stated that the District made it clear that the proposal was being made only for "clarification"; that at bargaining, the District explained that the proposal merely reflected the District's long-standing practice and policies; and that it was being made to clarify the labor agreement and codify the District's practices and policies on the point.

<u>POSITIONS OF THE PARTIES</u>:

<u>Union</u>:

The Union asserted that it was only with the consent of the affected employes that the Employer has used employe accrued paid days after the employe has exhausted disability benefits under the labor agreement. The Union observed that this assertion is supported by the fact that no other employes have complained (other than Grievants Pachi and Kutnyak) to arbitration

regarding this requirement.

The Union further contended that the Employer is attempting in this case to gain an advantage it was unable to negotiate at the bargaining table. The Union observed that the District's proposal to change Section F Para. (i) constituted new language by which the Employer would be specifically allowed to do what it did in this case. Such Employer actions had never before been expressly provided for or allowed in the labor agreement.

The Union contended in addition, that nothing in Section F. para. (i) requires that employes to exhaust their vacation and comp time. For the Employer to require employes to spend their vacation time recuperating from duty
incurred illness nullifies the express language of Section B, Para. 3 (a) and takes vacation selection and usage out of the hands of disabled employes.

Contrary to the Employer, the Union contends there is no past practice applicable to this case because previously employes agreed to use up their sick leave and vacation upon exhaustion of their contractual disability benefits. The Union noted that in Pachi's case, he has actually used very little of the 210 days of duty incurred disability leave, yet the Employer seeks to limit its obligation to continue Pachi on full paid health insurance by requiring Pachi to use up his accrued paid time so that he is no longer eligible for Employer paid health benefits. The Union noted that where as here, an employe has worked for the Employer for 31 years and he was injured on the job, causing him to go on duty incurred disability leave, his health benefits should not be jeopardized by the Employer's unfair and short-sighted wish to limit its health benefit liability.

The Union therefore sought to have Pachi's sick leave and other accrued paid leaves restored and that an award issue prohibiting the Employer from requiring that employes injured on the job exhaust their sick leave, vacation and any other accrued paid leave after exhausting their duty incurred disability benefits.

<u>Employer</u>:

The Employer argued that it has proven that it established a clear, uncontested and long-standing past practice of requiring employes like Mr. Pachi who are on unpaid leaves of absence to exhaust all accrued paid time after they have used up their contractual duty-incurred disability benefits. This policy, the Employer urged, has therefore become past practice, a part of the contractual relationship of the parties.

The Employer observed that the evidence was undisputed that in June of 1983 Labor Relations Manager Strycker sent its then-suggested Unpaid Leave of Absence Policy to the Union, with documents fully explaining the Policy's function and usage, and asked whether the Union had any questions or comments and offered to discuss the policy with the Union if it wished. The Union did not respond or seek negotiations regarding the policy. Three months thereafter, the Employer implemented the policy (as previously described to the Union) and over the next approximately nine years the policy was applied to approximately 40 members of the Union without significant objection. These facts, the Employer contended, showed that the Union knowingly acquiesced in the policy and procedure and that the Union therefore has waived any right it may have had to contest this policy.

The Employer argued that the Unpaid Leave of Absence Policy is otherwise reasonable and consistent with the labor agreement. The Employer noted that its Policy is consistent with Section F, <u>Insurance</u> Para. (i) (which has

remained unchanged since at least 1981). Indeed, the Employer observed, were employes allowed to avoid using accrued paid time after starting an unpaid medical leave, the final provision of para. (i) (indicating that Employer paid health insurance continues for only six months after sick leave is exhausted) would be rendered meaningless. This six month limitation was also fully described in the Policy's "Operating Procedures" charts issued in 1983, and, the Employer urged, it was and is a reasonable limitation on the Employer's paid health benefits to its employes.

The Employer contended, contrary to the Union, that its Policy on Unpaid Leaves is also consistent with the Section B Vacation Para. 3 (a) provisions of the labor agreement relating to employe selection of vacation. In this regard, the Employer asserted that the purpose of the Vacation provisions of the agreement were to facilitate orderly and fair vacation selections by active employes in a way that does not unduly disrupt Employer operations. The Employer's Unpaid Leave Policy does not conflict with this purpose. Rather, it gives full effect to Section F, Para. (i). Furthermore, the Employer observed, the Union proffered no evidence to show that Pachi had in fact attempted to select vacation prior to May 1 of any year and that such selection had been denied due to the Employer's Unpaid Leave of Absence policy. For these reasons, the Employer urged that the provisions of Section B. Para. 3 are not relevant and that the Employer's Unpaid Leave of Absence Policy is nonetheless consistent with the labor agreement.

Finally, the Employer asserted, its recent bargaining proposal to add clarifying language to Section F. Para. (i) does not necessitate that the grievance be sustained. Rather, the Employer noted, the proposal was specifically made in December, 1991, to add language to the labor agreement which would codify the Employer's long-established, consistent past practice on unpaid leaves. In addition, the proposal was made while the instant grievance was pending and it constituted neither an admission nor a concession on the issues in the instant case. Based upon the evidence and argument herein, the Employer sought an award denying and dismissing the grievance in its entirety.

REPLY BRIEFS:

The Employer wished to reserve the right to file a reply brief in this case and the Union objected to this reservation. The undersigned believes that reply briefs should be accepted and therefore overruled the Union's objection thereto. Proper reply briefs which are limited to rebuttal areas or areas of asserted factual misrepresentation regarding arguments made or facts contained in the opposing party's initial brief are, in my view, appropriate in all contested cases especially where, as here, the decision is final and binding.

The Employer asserted that the Union's claim in its initial brief that the instant case is different from the approximately 40 cases to which the Employer has applied its Unpaid Leave Policy in the past is incorrect. The Employer pointed to the evidence of the Rick McCarthy grievance on the identical issue which the Union filed in 1987 and dropped short of arbitration. The Employer argued that the McCarthy case provides a precedent clearly demonstrating a Union waiver on the issues at hand.

In contrast to the Union, the Employer urged that it is the Union, not the Employer, that is attempting to gain advantages through arbitration without bargaining on the matter, by seeking to have the undersigned guarantee employes the option to refuse to exhaust their sick leave upon commencing an unpaid leave. The Employer urged that it has proven its past practice argument and that neither the contract nor the practice support the Union's claims.

The Employer also noted that a ruling in favor of the Union would allow employes on unpaid leaves to receive Employer-paid health insurance potentially

for many years, as long as the leave of absence lasted. This result, in the Employer's view, would be contrary to both the contract and to valid past practice since at least 1983 as codified (without Union objection) in the Employer's Unpaid Leave Policy. This result would also render Section F. Para. (i) superfluous.

Finally, the Employer contended that the Union's reliance upon Section B, Para. 3 (a) merely emphasizes the lack of strong arguments on the Union side in this case. In sum, the Employer urged denial and dismissal of the grievance.

DISCUSSION:

This case involves the question whether the Employer may require employes to exhaust accrued sick leave and vacation after the employes have exhausted duty incurred disability benefits. Section D, Paras. 1 and 2 clearly state the conditions and terms upon which duty incurred disability pay known as temporary total disability (TTD) pay, will be received. Paragraph 2 clearly limits the receipt of such pay to no more than 210 working days per injury so long as those days are used within 12 months from the date of the injury, excluding time worked in light-duty. However, the labor agreement is silent on the specific question of whether the employe must exhaust all accrued benefits following the employe's exhaustion of TTD benefits. Therefore, under general arbitral principles, where the labor agreement is silent, parol evidence regarding bargaining history and past practice is relevant to fill in the gaps.

The Employer presented such extrinsic evidence regarding its Unpaid Leave Policy. I note that this evidence stood generally uncontradicted, that this Policy was fully explained to the Union in 1983, that the Employer offered to discuss the Policy with the Union and after no request to bargain was made, the Policy was then implemented without Union objection. It is also clear that in 1983, Section F, Para. 1. read as it does in the effective labor agreement so that the Policy's impact on the continuation of Employer paid health insurance upon the employe's exhaustion of TTD benefits should have been contemplated by the parties. In addition, the Employer's use and dissemination (first to the Union and then to employes) of the Benefit flow chart regarding Unpaid Leave Operating Procedures demonstrated the affect of Unpaid leaves on accrued benefits:

> that where an unpaid medical leave was to continue beyond 30 days, the employe "must exhaust all other accrued time."

Similarly, although Section D, Duty Incurred Disability Pay of the 1981-83 labor agreement contained different language than that currently contained in that section, the provision was not substantively different from the extant Section D. In other words, the concepts were the same but the number of possible days of TTD pay was then set at a different level - not more than "one year (250 working days) for each compensable injury." 4/ Thus, the evidence regarding the creation and implementation of the Unpaid Leave Policy tends to support the Employer's contention that it has the right to require the exhaustion of both accrued vacation and sick leave upon an employe's exhaustion of his/her TTD pay benefits.

4/ The language did not take into account for or deduct from the total work days on TTD any light duty work done by disabled employes, as the current Section D does. This would likely make the number of actual days on TTD greater under the current language than under the 1981-83 language.

Notably, the Employer also submitted evidence to show that for several years following 1983, the Union failed to complain about the operation of Sections D and F. Some four years later the Union filed the McCarthy grievance, then dropped the grievance (which is on all fours with the instant case) short of arbitration. It is significant that the Union submitted no evidence to show what its intention was in dropping McCarthy's grievance. Such silence on the part of the Union tends to support a conclusion that the Union acquiesced in Will Strycker's rationale for denying the grievance -- that McCarthy was required by the Unpaid Leave Policy to exhaust "all sick leave, vacation and other accrued time" in order to qualify for unpaid medical leave and that the contract was therefore not violated.

The contract language relevant to this case was the same on all relevant points as that in the agreement when McCarthy's grievance was denied and dropped. Also, Ms. Krahn testified without contradiction that approximately 40 claims for unpaid leaves have been processed by the Employer since the 1983 implementation of the Unpaid Leave Policy, with only the McCarthy grievance and the Pachi/Kutnyak grievances having been filed. The Union asserted that the only conclusion to be drawn from these historical facts is that no other employes were upset by the application of the Policy to them during the period from 1983 to the present. I disagree. Rather, the passage of time when considered in conjunction with the Employer's offer to discuss the Policy prior to its implementation and the filing and decision to drop the McCarthy grievance, tend to show that the Union knew of the Employer's construction of the Policy and the labor agreement and that the Union acquiesced in this.

The Union urged that the Employer's attempt and failure to place language in the 1991-93 agreement to require that employes exhaust any and all accrued leave to supplement TTD pay, demonstrates that the contract and past practice must be contrary to that asserted by the Employer. Again, I disagree. In the circumstances here, failure to obtain agreement to its clarifying language does not require a conclusion that the practice has been extinguished. I note that in this case, the asserted Policy had been in place for several years, that the Union had objected to it but had then dropped its grievance thereon without any explanation or resultant change in the relevant contract language. The Employer's bargaining proposal (made during the pendency of the instant grievance) had been specifically made "for clarification" only and with the stated assertion that it was intended merely to codify the long-standing past practice. Despite its failure to gain the Union's agreement to place the clarifying language in the 1991-1993 agreement, the Employer nonetheless continued to apply the Unpaid Leave Policy as it had done prior to 1991-1993 contract negotiations. In these circumstances, the Unpaid Leave Policy and the past practices surrounding it were not extinguished and one could reasonably conclude that they remained a part of the bargain between the parties.

Contrary to the Union's assertions, I find nothing inherently unreasonable or inherently arbitrary, capricious or discriminatory in the fact that the parties have chosen to limit the Employer's responsibility for fully paid health insurance benefits under Section F, given the extensive added benefit represented by TTD pay. In addition, I can find no relevant substantive conflict between Section F and Section B. Vacations in this case, which would require a different conclusion than is reached here. I note that there is no record evidence to show that Pachi attempted to select vacation since his injury and that he was denied his selection.

In all of the relevant circumstances and based upon the relevant evidence and argument, 5/ I issue the following

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5/ Were the grievant and others allowed to keep sick leave and/or vacation

AWARD

The contract and the District's September 19, 1983 "Unpaid Leave of Absence" policy permit the District to require Local 366 members to exhaust accrued sick leave and vacation days after "duty-incurred disability pay" benefits under the contract are exhausted.

The grievance is therefore denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 20th day of November, 1992.

By ________________________________
Sharon A. Gallagher, Arbitrator

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time in reserve, this could arguably render meaningless the language of Section D. which cuts off duty incurred disability leave at 210 working days (not including light duty work time) and it might defeat or hinder the clear intent of Section F. which is to limit Employer liability for paid health insurance benefits.

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