BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
LOCAL 609, AFSCME, AFL-CIO	:	Case 59 No. 48701 MA-7683
and	:	
VILLAGE OF GREENDALE	:	

Appearances:

Ms. Monica Murphy, Podell, Ugent & Cross, S.C., Attorneys at Law, 611 North Broadway, Suite 200, Milwaukee, Wisconsin 53202-5004, appeared on behalf of the Union.

Mr. Roger E. Walsh, Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-3101, appeared on behalf of the Village.

ARBITRATION AWARD

Local 609, AFSCME, AFL-CIO ("the Union") and the Village of Greendale ("the Village") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the Village concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance relating to the long-term disability insurance program. The Commission appointed Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Greendale, Wisconsin on April 20, 1993; it was not stenographically recorded. The parties filed written arguments on June 2, 1993, and waived their right to file reply briefs. On the basis of the record evidence and the arguments of the parties, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

> Did the Village violate the Collective Bargaining Agreement, specifically Article 7, Section 3, when it provided a long term disability insurance program that had a monthly cap of $1,000.00?
>
> If so, what is the remedy?

Further, the Village raised the following additional issue:

Is the grievance timely filed?

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE IV - GRIEVANCE PROCEDURE

Section 1. Step 1. Only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance under the provisions set forth below. If an employee has a grievance, the employee shall first present the grievance orally to his/her immediate supervisor, accompanied by a Union representative, provided the presentation of the oral grievance is made within the time period set for filing the written grievance to the department head in Section 2. Only one subject matter shall be covered in any one grievance, whether oral or in writing.

Section 2. Step 2. If the grievance is not settled at Step 1, the employee and his/her Union representative shall prepare and file a written grievance stating what the grievance is and, to their best ability, cite the specific section or sections of the Agreement alleged to have been violated, to the department head. Any grievance not presented to the department head within twenty-two (22) calendar days of the occurrence of the event causing the grievance shall be considered waived. Within five (5) working days from the date the grievance is filed, the department head shall furnish the employee, the Union Steward, and the District Council 48 Staff Representative with a written answer to the grievance.

Section 3. Step 3. If the grievance is not settled at Step 2, the Union or employee shall have the right to make an appeal in writing within five (5) working days of the date the Step 2 answer is received or the last date due to the Village Manager. The Village Manager may confer with the aggrieved and the Union before making his determination. Such decision shall be reduced to writing and submitted to the aggrieved employee and the Union within five (5) working days from the

Village Manager's receipt of the appeal.

Section 4. Final and Binding Arbitration.

A) If the grievance is not settled at Step 3, the Union shall notify the Village Board in writing within ten (10) working days from the date of the Village Manager's decision or last date due that the matter is to be submitted to arbitration and shall request the Wisconsin Employment Relations Commission to appoint an impartial referee who will arbitrate the grievance under the Wisconsin Employment Relations Commission's arbitration service provided in Section 298.01 of the State Statutes.

. . .

C) Upon completion of this review and hearing, the arbitrator shall render a written decision as soon as possible to both the Village and the Union which shall be final and binding upon the parties. In making his decision, the arbitrator shall neither add to, detract from, nor modify the language of this Agreement.

. . .

Section 5. All grievances not submitted or appealed by the grievant or his representative within the time limits specified herein shall be deemed abandoned grievances and as such, shall be considered as being resolved in favor of the Village. Time limits provided for in this Article may be extended, however, by mutual consent of the parties in writing. The term "working days" shall not include Saturdays, Sundays and holidays.

. . .

ARTICLE VII - SICK LEAVE

Section 1.

A) Each regular full-time employee paid on an annual basis shall earn one (1) day

per month of sick leave to be accumulated for a total not to exceed 150 days. A day of sick leave shall not be earned for any month in which the employee does not receive pay for at least twelve (12) regular workdays.

B) Sick leave is hereby defined to mean the absence from duty of an employee due to illness, injury, quarantine due to contagious disease, or attendance upon a member of his or her immediate family if seriously ill or injured and requiring the care of such employee. Sick leave may also be used for medical or dental appointments, provided, however, that employee shall attempt to schedule such appointments outside of work hours or near the start or end of their shift.

. . .

D) The leave provided for in this section is designed to meet the minimum requirements of Section 103.10 of the Wisconsin Statutes, is intended to run concurrent with, and not in addition to, the leave provided for under Wisconsin law, and is to be considered to be in satisfaction of the obligations under such Wisconsin law.

. . .

Section 3. The Village shall make available a long term disability insurance program for employees which will provide for sixty-five percent (65%) income for non-occupational illness or disability, after a sixty (60) calendar day waiting period, such income to continue until the employee reaches age sixty-five (65) or retires, whichever comes first. Such insurance program is to be coordinated with paid sick leave provided for in this Article so that the employee will not receive more than his regular wages as a result of the combination of paid sick leave and disability insurance. Such insurance payments are also to be offset by any other disability retirement plan provided by any other governmental agency. The Village shall contribute up to one dollar and sixty-six cents ($1.66) per one hundred dollars ($100) of earnings toward the premium for such insurance plus any increase in premium for 1984.

BACKGROUND

The collective bargaining agreements between these parties have provided for a long-term disability (LTD) insurance program since the 1973-1974 agreement. By the text of that current agreement, the Village was to provide a policy which would cover 60% of an employe's income, following a 60-calendar day waiting period, and pay a certain sum towards the premium. By bids publicly issued February 8, 1973, the Village included a additional specification not included in the collective bargaining agreement, namely a $1,000.00 monthly maximum benefit. On February 20, 1973, the Village Board, in open session, voted to accept the bid of Mutual Benefit Life Insurance Company, which bid included that monthly cap. That bid was subsequently withdrawn. The Village then accepted the bid of Health Insurance Corporation,

which also included the monthly cap. The LTD program went into effect on June 1, 1973, at which time the Village provided all covered employes a copy of the initial certificate, which listed the monthly benefit as "60% of salary not to exceed $1,000.00." Neither the Union nor any employe grieved the $1,000.00 monthly cap.

Other than changes in the amount of the Village's contribution for the premium, there were no modifications until 1982. In its initial proposals that year, the Union sought to change the 60% coverage/60-day waiting period to 90% coverage/30-day waiting period. As agreed to by the parties, the only change (other than revision of the premium payment) in the successor program was to increase the percentage covered from 60% to 65%. On September 1, 1982, Village Manager Donald Fieldstad provided to each covered employe a copy of the new certificate, which referenced that the monthly benefit was not to exceed $1,000.00. Inexplicably, the percentage covered was listed as 66 2/3, not the 65 per-cent as provided for the collective bargaining agreement. Neither the Union nor any employe grieved the $1,000.00 monthly cap. At the time of this agreement, there were seven job classifications which had a monthly wage rate greater than $1,538.46, the figure at which 65 per-cent equals $1,000.

The Union again proposed the 90% coverage/30-day waiting period during negotiations for the 1990-1991 collective bargaining agreement, again without success. On May 14, 1990, the Village provided each employe with a copy of the LTD Insurance Certificate, which continued to note the benefit amount of 66 2/3 % of monthly earnings, with a monthly maximum of $1,000. The Union did not grieve.

For the 1992-1993 collective bargaining agreement, the Union did not propose any changes in the LTD program.

The Grievant, James Duclon, is a mechanic in the Village's Department of Public Works. Due to a non-work related injury to his shoulder, he was off work (on sick leave) from August 14, 1992 to November 15, 1992. He then worked three days per week until November 30, 1992, when he returned to work full time.

As noted above, the LTD policy becomes activated after an employe has been off work for 60 consecutive calendar days. In administering the program, the carrier, United Wisconsin Group (UWG) would send the Village the benefit check itself, causing the Village to credit the employe's sick leave account with the hours represented by the amount of the benefits check. The difference between the carrier's payment and full salary would be made up by the use of sick leave, to the extent such sick leave was not exhausted.

By letter dated November 10, which Duclon received on or

about November 11, UWG informed Duclon that he had become eligible for LTD benefits on October 14, and that his benefits for the 17-day period October 14 to October 31 would be $554.10. The letter explained that the LTD benefits were calculated by multiplying monthly salary (in Duclon's case, $2,469.75) times .667%, with a maximum monthly benefit of $1,000, pro-rated for the time in question.

After receiving the November 10 letter, Duclon inquired of UWG as to the reference to the $1,000, whereupon he was informed that it was as provided for in the basic insurance contract.

By certified letter dated December 8, UWG updated Duclon on the status of his claim, noting that Duclon's return to work full-time on November 30 ended the payment of benefits. This correspondence again referenced this $1,000 monthly maximum benefit.

On his paycheck and pay stub of December 18, the Village made deductions from Duclon's sick leave account to account for the difference between the amount covered by the insurance carrier and Duclon's full salary.

On December 23, Duclon raised this matter with Village President Donald Fieldstad, challenging the $1,000 monthly maximum benefit. Duclon filed a written grievance on January 11, 1993. On January 14, 1993, Village Engineer and Public Works Director Nick T. Paulos responded to Duclon's grievance as follows:

> Dear Mr. Duclon:
>
> I am in receipt of your recent grievance form filed with my office regarding the income received during your recent non-occupational illness.
>
> In our review of such occurrence with the Village Clerk's office, it was conclusive that the method and amount applied does conform with the respective article of the present agreement and, therefore, your grievance is hereby denied.
>
> Very truly yours,
>
> Nick T. Paulos /s/
> Nick T. Paulos, P.E.
> Village Engineer and
> Director of Public Works

By written notice dated January 18, 1993, Duclon appealed this denial to Step 3, where it was denied by Fieldstad. By letter dated January 22, Fieldstad wrote:

> Dear Mr. Duclon:
>
> I am in receipt of your Grievance, Step 3, regarding long-term disability insurance benefits per Union contract Article VII, Section 3.
>
> I have reviewed the history of this policy and the contract negotiations with respect to the long-term disability insurance. This insurance goes back to the year 1973 at which time your union and the Village negotiated the contract to have a policy of paying two-thirds of their normal salaries up to $1000 per month maximum. This has remained in full force with changes in premium rates absorbed by the Village of Greendale and adjusted in contracts on a bi-annual basis. If you review your present contract, you will find that the Village is obligated to pay up to $1.66 per $100 of earnings towards the premium and any increase that occurred in 1984. Subsequent contracts have not been adjusted for the premium amount paid by the Village government. There was an increase that was absorbed by the Village in 1991 increasing that premium to $1.74 per $100.
>
> In 1989 during negotiations of a new contract for 1990, your union requested that the provision of long-term disability insurance should be increased to provide for 90% of the income with a 30-day waiting period. At the time, the Village reviewed this policy with your negotiators and it was determined that this type of long-term disability insurance was not available.
>
> Consequently, your negotiators withdrew that request on December 6, 1989 and left the long-term disability coverage with a $1,000 maximum which has been in existence since 1973. Your union was well aware of the $1,000 maximum policy in existence and all that was available in the industry for the Village to obtain.
>
> Based on this review, I feel that your sick

leave was adjusted properly per the agreement and the contract and consequently, I am hereby denying your grievance request.

Very truly yours,

Donald Fieldstad, Jr. /s/
Donald Fieldstad, Jr.
Village Manager

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union avers and asserts as follows:

> The grievance was timely filed. The collective bargaining agreement gives a grievant twenty-two days to present a grievance to management; Duclon took issue with the deduction from his sick leave account as soon as he became aware of the deductions, and was well within the timeline. Arbitral authority establishes that it is receipt of the paycheck showing a deduction that constitutes the grievable act, not knowledge that a deduction might be made. Further, the continuing reduction in Duclon's sick leave account, reflecting the $1,000 monthly cap, is ongoing. In filing his grievance within five days of receipt of his December 18 paycheck, Duclon complied with all time requirements. Further, the Village offered no objection to the timeliness through any step of the grievance process, and raised the issue for the first time at hearing. The grievance should be addressed on its merits.
>
> As to the merits, the language of the collective bargaining agreement is clear and unambiguous, and requires the Village to make available a long-term disability policy providing for 65% of income after a waiting period. The Village now wants the arbitrator to find a further limitation of $1,000 per month; the arbitrator has no authority to modify the terms of the agreement, and simply cannot add the limitation the Village seeks.
>
> Arbitral authority establishes that it is the language of the collective bargaining

> agreement, not contracts between the employer and third parties, which control. It was the Village's obligation to obtain a policy as called for in the collective bargaining agreement. Differences between the insurance policy and the collective bargaining agreement must be resolved in favor of the agreement. The Village must make up the shortfall caused by its failure to obtain sufficient coverage.
>
> The bargaining history does not support the Village's position. It does not matter that union members may have been aware of the monthly cap; it was the Village's burden, not the employes', to obtain adequate coverage. An employe reading the certificate would reasonably assume the Village had self-insured for the difference between the covered percentage of the monthly cap. Further, the Union proposals in 1981 and 1991 to increase the coverage to 90% would make no sense if the $1,000 cap were understood and accepted by the Union. If the Union had accepted the $1,000 cap, it would be ludicrous for it to propose increasing the coverage in this manner.
>
> Accordingly, the Arbitrator must find that the language of the collective bargaining agreement controls, and order the Village to provide long-term disability insurance that pays 65 per-cent of income.

In support of the position that the grievance should be denied, the Village asserts and avers as follows:

> The grievance should be dismissed because it was not timely filed. Timeliness under this collective bargaining agreement is jurisdictional; since the grievance was not presented within the contractually established, and there was no written extension, the Aribtrator must hold that the grievance was waived, abandoned, and resolved in favor of the Village.
>
> Duclon was aware on November 11, 1992 that there was a $1,000 monthly cap, as noted in correspondence from the LTD carrier. This notification was the "occurrence of the event causing the grievance." The collective bargaining agreement requires written grievances to be filed within 22 days of the

occurrence. The grievance in this matter was not filed until January 11, 1993, 61 days after the occurrence, well beyond the deadline. Accordingly, pursuant to the terms of the collective bargaining agreement, the grievance "shall be considered waived."

The Union may contend the occurrence came on December 18, 1992, when Duclon received his paycheck showing sick leave deductions. Even allowing for this liberal interpretation, the grievance would still be untimely. The written grievance was not filed until January 11, 1993 -- 24 days after the last possible date which could constitute the occurrence, and two days after the last possible deadline.

Further, the collective bargaining agreement requires oral presentation to the immediate supervisor by a grievant accompanied by the union representative; Duclon, unaccompanied, presented his grievance directly to the Village Manager.

This union has been put on notice of the importance of timeliness in pursuing grievances, as noted in Arbitrator Marshall Gratz's Award dismissing a grievance on the grounds of untimeliness.

The language of the collective bargaining agreement is mandatory and jurisdictional. This grievance must be dismissed on the grounds of being untimely.

As to the merits, the language of the collective bargaining agreement was never intended to list all of the provisions applicable to the LTD insurance program. The language in the agreement is merely a summary statement of the program, and omits numerous provisions, such as those relating to benefit offset, total disability benefit periods, specific monthly benefit reduction payments, and so on. There is nothing in the agreement that states there is to be no monthly maximum amount. It is not unusual for insurance benefits not to be completely spelled out in labor agreements. Further, the contractual benefit percentage is erroneous, stating level at 65%, while in fact the level has been 66 2/3% ever since 1982.

The $1,000 monthly cap has been included in the individual insurance certificates since the program's inception in 1973, clearly indicating the parties' intent when they initially agreed to the benefit. The Union and all employes have known about the monthly cap for as long as the program has been in effect. Clearly, it was the insurance contract and the individual Certificates of Insurance which were meant to control the level of benefits for the LTD program. If the Union sought to eliminate or raise the monthly cap, it had ample opportunity to negotiate such changes since 1973.

The consistent past practice over the past 20 years of having the $1,000 monthly cap has transformed the practice into a definite contractual provision. Arbitral authority establishes that a consistent course of conduct by the parties may modify the written terms of the labor agreement. Here, the fact that the $1,000 monthly cap was inserted at the inception of the program, and that it was restated without protest in the insurance certificates of 1982 and 1990 point to the obvious conclusion that the cap was and has consistently been considered by all parties to be an agreed-upon provision of the LTD program.

Moreover, the Union is guilty of laches in its tardy attempt to object to the monthly maximum. Union officers have known since 1973 of the monthly cap, but at no time did they raise any objection to its existence. Relying on the Union's manifest acquiescence of the $1,000 cap, the Village never sought its increase or elimination. Had the Union ever given any indication that it was challenging this limit, the Village would have sought to take steps to minimize or eliminate its liability in excess of the $1,000. By acting with unreasonable delay; acting in a manner whereby the Village would have no knowledge of the Union's claim, and acting in a manner whereby the Village would be prejudiced in the event the claim is upheld, the Union has been guilty of laches. Arbitral authority establishes that a party guilty of laches is estopped from claiming the right or remedy at

issue.

Accordingly, because the grievance is untimely and without merit, and because the Union is guilty of laches, the Arbitrator must deny and dismiss the grievance.

DISCUSSION

Timeliness

The Village has made a strong argument that this grievance is untimely. Citing the apparently clear and unambiguous language of the collective bargaining agreement setting forth a seemingly strict time-line for filing a grievance, the Village contends that the Union missed said deadline, and that the Arbitrator thus has no jurisdiction to proceed further. The Union counters that the grievance was timely filed; that the Village waived its right to challenge on the grounds of untimeliness because its challenge itself was untimely.

I must first determine the date "of the occurrence of the event causing the grievance...." The Village asserts that date to be November 11, when Duclon first received notice from UWG that he was subject to the $1,000 monthly maximum. The Union asserts that date to be December 18, when Duclon received a paycheck showing the extent of the deduction from his sick leave bank occasioned by that $1,000 cap.

I conclude the issuance of the paycheck to be the occurrence of the event causing the grievance. It was that paycheck -- or, more precisely, the accompanying statement of balances and deductions -- that informed Duclon with certainty and finality that he was being limited to the $1,000 cap, and that his sick leave bank was being accessed to cover the difference. In Texas Utilities Generating Co., Arbitrator Samuel Nicholas addressed the timeliness of a grievance over sick pay withheld for time spent attending a hearing on an industrial accident. Although the grievant's supervisor told him on the day in question that the time so spent would not be approved for compensation, Arbitrator Nicholas found that is was not this information, but rather the actual paycheck establishing the disallowance, that constituted "the occurrence of the basis of the grievance." As Nicholas explained, "announcements are subject to change and only the action taken on an announcement can prove its truth or falsity," and so "the best and most logical way for determining whether the subject pay would be tendered was an examination of the actual pay check," inasmuch as "said pay check constitutes the best evidence of Management's intention to not pay Grievant as requested." 86 LA 1108, 1111 (1986). I find Arbitrator Nicholas's reasoning convincing.

Further, this collective bargaining agreement provides that

"only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance...." The November 11 and December 9 letters from the UWG disability specialist were communications from a third-party; I do not see how these letters could, by themselves, constitute a grievance under this definition. Accordingly, I find that it was the receipt of the December 18, 1992 pay check that constituted the date of "the occurrence of the event causing the grievance."

Establishing the date of the grievance is really of secondary importance, however; given the January 11, 1993 submission of the written grievance, even a December 18, 1992 date of occurrence is outside the 22-day time limit.

The Union contends that the labor agreement "gives a grievant twenty two days to present a grievance to management," and that, by being "well within that time frame," Duclon "complied with all time requirements." This is a misreading of the labor agreement and a misstatement of the facts.

The labor agreement does not give a grievant 22 days to "present a grievance to management"; it give the grievant 22 days to both present the grievance orally to the immediate supervisor and to file a written grievance (if unsatisfied by the Step 1 response) with the department head. Based on the December 18, 1992 date of occurrence, and the January 11, 1993 written submission, Duclon took 24 days to proceed to Step 2. The labor agreement allows for only 22 days. Duclon was not within the stated time frame, and did not comply with all time requirements.

To reach this conclusion, however, is not to conclude that the grievance is untimely and must be denied. For timeliness is a two-edged sword, and I must address the employer's own untimeliness in raising this objection.

As noted above, the Village gave two written responses to Duclon's grievance, the Paulos letter of January 14 and the Fieldstad letter of January 22, 1993. While the Paulos letter was somewhat conclusory, the Fieldstad letter was a highly detailed analysis of the issue and comprehensive explanation of management's position. Neither communication, however, made any mention of the timeliness of the grievance itself. Indeed, the record does not show the Village ever raising the issue of timeliness until its opening statement at the arbitration hearing itself.

Two widely used treatises on arbitration address this issue, both apparently concluding that the prevailing arbitral authority is that the employer must raise the issue of timeliness in a timely manner. Citing over 30 decisions, Elkouri and Elkouri state in How Arbitration Works (BNA, 4th Ed., 1985, pp. 194-195), that "(i)n many cases time limits have been held waived by a party

in recognizing and negotiating a grievance without making clear and timely objection." The authors note that "there are some cases holding to the contrary," citing three decisions. Similarly, Fairweather's Practice and Procedure in Labor Arbitration (BNA, 3rd ed., 1991, p. 87) cites seven cases for the proposition that arbitrators "sometimes hold that an employer which fails to assert a timeliness defense at the preliminary stages of the grievance waives the right to assert the defense at the latter stages," while noting that arbitrators "hold that a discussion of a grievance on its merits at a preliminary state of the grievance procedure will not waive a timeliness objection if the objection is raised by the employer at the first opportunity." Here, however, the employer did not raise its objection at the first opportunity, nor its second opportunity, but not until its last opportunity.

The Village has cited the Gratz Award in City of Greenfield (Case 52, Oct. 18, 1988) as evidence of the importance of timelines in the grievance procedure, and how the Union should have been on notice of their importance. I note, though, a critical distinction in the facts of that case, namely the timely notice which the Village Manager (then, as now, Donald Fieldstad) gave the Union of the employer's belief as to the untimeliness of the grievance. Arbitrator Gratz cites this fact as specific grounds for refuting the Union's argument that the timelines had been waived.

Given the Village's justifiably high regard for Arbitrator Gratz, it is worth noting that he has addressed the issue of an employer's waiver of a timeliness objection in Winnebago County, (Case 184, 8/22/90), and found the prevailing arbitral authority to be that an employer's processing of a grievance at the various pre-arbitral steps without preserving the timeliness defense constitutes a waiver of that defense. Arbitrator Gratz surveyed case law, and related these findings from his research:

> . . .Thus, in Columbian Carbon Co., 47 LA 1120, 1125 (Merrill, 1967), the arbitrator stated,
>
> > There are a number of reasons why the contention of untimeliness seems not well founded. I shall content myself with the reason which would be dispositive even if all the others were not present. This is that the Union has produced an abundance of evidence, both by its own witnesses and through cross-examination of Company witnesses, that at no time during the pre-arbitration handling of the

> grievance by the Company authorities did anyone on behalf of the Company raise the slightest objection to the procedural sufficience of the presentation. Instead, at all levels, the Union's contention was considered and was denied upon the merits. No evidence to the contrary has been presented. By the clearly overwhelming preponderance of arbitral authority, this failure to object to the timeliness of presentation, coupled with disposition of the grievance on the merits, constituted a waiver of the objection of timeliness. [citations omitted]. Accordingly this objection is denied.

Similarly, in Ironrite, Inc., 28 LA 398, 399-400 (Whiting, 1956), the arbitrator stated:

> Article XXIII, Step 1 of the contract provides that "Step One must be taken within five (5) working days after the occurrence complained of". The Company contends that the grievance is thereby barred. It will be noted that no such objection to the grievance was raised in the answer, nor does it appear that such objection was made in the discussion of the grievance prior to the arbitration hearing. The failure to make such objection when the grievance was presented or in prior steps of the grievance procedure must be deemed a waiver of the contractual time limitation. Procedural time limitations serve a useful purpose but may be extended or waived by agreement, and lack of a timely objection is always considered a waiver thereof."

In Denver Post, 41 LA 200, 204 (Gorsuch, 1963), the arbitrator stated,

> It is a well recognized

> principle of the grievance and arbitration process that each step of the grievance procedure is to serve the function of amiably settling disputes, where possible. Arbitration is only to be resorted to when the parties cannot settle the case themselves. . . . Further, it is incumbent upon each party to raise all issues and defenses at each step of the grievance procedure, in order to appraise the other party of all relevant problems. The underlying rationale here is that by laying their cards on the table at each successive step of the grievance procedure, the parties greatly increase their chances for settling the case without resorting to arbitration. . . .For the same reasons, when objections to procedure have been raised during the grievance process, arbitrators will normally refuse to hear them.
>
> The [union] had a right to know of management's intent to strictly adhere to the time limit for grievance initiation at the time it met to decide whether and how to proceed. Without such knowledge, the members could not make an intelligent choice as to whether or not to appeal the foreman's decision. [citations omitted].

In Harbison-Walker Refractories, Inc., 22 LA 775, 778 (Day, 1954), the arbitrator stated,

> The evidence bears out the Company contention [that the grievance was not filed within the agreement time limit]. . . . However the merits of these contentions need not be labored in light of the company's conduct with respect to the grievance. That conduct makes it apparent that both lack of timeliness and the failure to follow the grievance procedure

were waived as possible defenses. For it is absolutely clear that management discussed the grievance at every step after the first. . . . It is also reasonably evident that there was never a clear reservation of the right to assert the procedural defenses while discussing the merits until the appeal to arbitration. By then it was too late. [footnote omitted]. The waiver had already been effected.

To the layman any invocation of a procedural rule to avoid dealing with the substance of an issue is apt to be regarded as a 'technical' and therefore reprehensible avoidance of the merits. The views expressed here should not be interpreted as embracing this conception. The doctrine of waiver is itself technical. And it is important to recognize frankly that there is a legitimate practical purpose to procedural requirements even in labor contract administration where technicalities are generally abhorred. It just happens, on the facts, that in the present instance one "technical rule" is overbalanced by another.

In Philips Industries, Inc, 63-3 ARB Par. 8358 (Stouffer, 1963 at 4179), the arbitrator stated,

[The company may not raise the question of timeliness of filing of the grievance in these arbitration proceedings]. The reasons therefor seem obvious. If [the arbitrator] were to find in favor of the Company on this issue, it could silently sit by and cause the Union to make unnecessary expenditures in preparation for arbitration. This would be unfair and inequitable. If the Company intends to press objections as to the arbitrability

> of issues, it should acquaint the Union with such objections in steps of the grievance procedure preliminary to arbitration. The question presented here is not a new or novel one. There is a division of opinion between Arbitrators thereon. However, in this Arbitrator's opinion, the better reasoned decisions hold that where, as here, there is an absence of contractual provisions on the subject, procedural objections are waived unless raised prior to arbitration. [citations omitted]
>
> Discussion of the merits of grievances in steps of the grievance procedure does not bar the raising of procedural objections at the arbitration level so long as such objections are voiced in proceedings prior thereto. Full discussion of all aspects of grievances are conducive to settlement thereof, and the parties have, in effect agreed by the terms of Section 8 [Grievance Procedure] of the Agreement, to do so.
>
> In view of the foregoing, it is the finding of this Arbitrator that the Company may not for the first time raise the question of timeliness of filing of the grievance in these arbitration proceedings.". . .

I concur that these excerpts reflect the prevailing view of arbitral authority. As succinctly stated in Unit Parts, 86 LA 1241, 1243 (White, 1986), "by proceeding to process the grievance on through the arbitration hearing without asserting timeliness as a defense, the employer waived the time limit objection." For, as explained in Food Employers Council, 87 LA 514, 516 (Kaufman, 1986), "(i)t is not too much to expect that an objection based on untimeliness will itself be timely, lest a party prepare for and incur the expense of arbitration in anticipation that a dispute will be determined on the merits; and so the failure to raise the question of procedural arbitrability before the arbitration hearing is often considered reason enough to dispose of the question."

In a way, the employer is procedurally guilty of the same offense it raises against the Union on the merits, namely laches. The Village Manager's comprehensive rejection came on January 22, 1993; yet it was not until hearing on April 20, 1993 that the Village raised the issue of timeliness. This four-month period represents one-third of the time remaining in the labor agreement in force at the time the dispute arose. There was no reason for the Village to wait that long to raise this matter. Thus, the delay was unreasonable. Further, it is self-evident the Union had no knowledge the Village would be making this argument. Finally, by incurring the expense of preparation for hearing, and having no opportunity to investigate for evidence to rebut the claim of untimeliness, the Union would clearly be prejudiced in the event the Village's argument of untimeliness is upheld.

The employer contends that the issue is jurisdictional, implying that its objection to the untimely filing can neither be waived nor lost. Yet the Village cites no language in the labor agreement, and I cannot find any, that denies the arbitrator jurisdiction on the basis of a late filing or tardy processing of a grievance. Fairweather's describes untimeliness in filing a grievance as a "procedural defect." (supra, at p. 83; emphasis added). Indeed, even the Gratz Award of 1988, upon which the Village relies in large measure, refers explicitly to procedural arbitrability, and never even raises the matter of jurisdiction. Procedural arbitrability is a matter for the arbitrator to determine. International Union, United Auto., Aerospace and Agr. Implement Workers of America v. Allis-Chalmers Corp., 447 F. Supp. 773, 774 (E.D. Wis., 1978), citing John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964)

Accordingly, I find that the Village, by failing to raise the issue of timeliness in a timely manner, has waived its right to challenge arbitrability on this ground.

I further find Duclon's December 23, 1992 oral presentation to the Village Manager, rather than to his immediate supervisor, to be a less-than-fatal flaw. The Village has not offered clear and convincing evidence that this provision has been strictly enforced in the past. Nor has the Village shown a timely protest to this aspect of Duclon's proceeding. In the absence of such evidence, and consistent with the prevailing arbitral precedents, I cannot deny and dismiss this grievance solely on the grounds that Duclon made his timely oral presentation to the Village Manager rather than to his immediate supervisor.

Accordingly, I shall now consider this grievance on its merits.

Merits

The issue here is clear. For over 20 years, the Village has provided a long term disability insurance policy which is not in keeping with the explicit terms of the collective bargaining agreement. During that same time period, the Union -- aware of the discrepancy -- never raised a challenge. Whose rights are now paramount?

The Village argues that the labor agreement is merely "a summary statement" of the program, and that it was the insurance contract and the accompanying Certificates of Insurance, and not the labor agreement itself, "which were meant to control the level of benefits" in the LTD program.

Independent arbitrators appear generally to hold to the contrary, resolving discrepancies between the collective bargaining agreement and a separate insurance contract executed under the auspices of that agreement in favor of the agreement. As stated by the Elkouri's, arbitrators confronted by this type of situation "frequently have concluded that the insurance contract did not constitute a part of the collective agreement, and they have held that the collective agreement must control over the insurance contract (thus, the scope of the employer's obligation to the employees has been determined by the collective agreement.)" How Arbitration Works, (BNA, 4th ed., 1985, p. 363.)

Thus, in Morton Norwich Products, Inc., 75 LA 603, 607 (Wolff, 1980), the arbitrator stated:

> It was the obligation of the employer to obtain an insurance contract which would provide coverage and benefits which were agreed upon and provided for in the Agreement of the parties. If the insurance contract does not measure up to those benefits, the Company is required to make the grievant whole for the benefits contracted for by the Company and the Union ....

Arbitrator John Sembower seemed to be stating a well-settled principle when he held, in Georgia-Pacific Corporation, 66 LA 352,353-354 (1976) that there have been "innumerable arbitration and court decisions" that have held

> that the union-company contract always controls in these instances, and that the Company is acting as an agent of the parties to secure insurance coverage consistent with the terms of the Agreement so that the Agreement always controls and if the insurance policy is inconsistent therewith, it is subordinate. The unfortunate and regrettable result of this is that often the Company, in

> innocently trying to carry out its obligation is stuck with liability because the insurance carrier has inserted into its policy terms which are inconsistent with the labor-management agreement which is the entire basis for the obtaining of the policy in the first place.

Here, of course, it was not a matter of the insurance company inserting added provisions into its contract with the Village; rather, the Village explicitly made the $1,000 monthly maximum a specific part of the specifications from its first request for bids on February 8, 1973. The Village also informed the employes, including those employes who were agents and officers of the union, of that limitation by June 1, 1973.

The Village makes two related, but distinct arguments from the fact of the Union's long-standing awareness of the $1,000 cap. First, it contends that the cap has blossomed into a past practice modifying the express terms of the labor agreement. In the alternative, it argues that, by sitting on its rights, the Union is blocked by the concept of laches from pursuing those rights at this time.

Past practice is certainly a well-established concept in contract interpretation, and its precepts are generally understood as expressed by Arbitrator Jules Justin: "In the absence of a written agreement, 'past practice,' to be binding on both Parties, must by (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties." Celanese Corporation of America, 24 LA 168, 172 (1954).

I cannot find, however, that the facts of this case meet this definition. First, of course, there is a written agreement which explicitly provides for coverage in the amount of 65 percent of salary. The Village argues that, in the absence of a provision forbidding a monthly cap, such a cap is merely supplemental to, and not in violation of, the agreement. As discussed above, I side with the prevailing arbitral authority that holds a conflict between the labor agreement and a third-party insurance contract must be resolved in favor of the labor agreement. Further, I reject the Village's argument that the cap was supplemental to, and not in violation of, the labor agreement. Under the Village's logic, the actual insurance policy could have had a monthly cap of $500, $250, or even $1.00, and still not violate the terms of the labor agreement.

In considering further the past practice argument, I also must confront the question of whether the cap was indeed mutually understood and accepted. Here, I find the parties actions in regard to the 1990-1991 agreement to be highly illuminating.

During those negotiations in late 1989, the Union proposed amending the coverage from 65 percent after 60 days to 90 percent after a 30 day waiting period. The Village did not agree to either of these changes. I find the actions of both parties -- the Union in making the proposal, the Village in rejecting it -- to have profound implications for the notion that the $1,000 cap was mutually understood and accepted.

As the Village has noted, by 1982 (the year the coverage was changed from 60% to 65%), several job classifications were paid rates that would have left the incumbents affected by a $1,000 cap. As the Union has noted, there were even more such classifications by 1989. I take arbitral notice of the fact that collective bargaining involves give-and-take, as labor and management both seek to balance their needs with those of the other party. I take further notice that it is contrary to a party's interests to offer a proposal which is, by its terms meaningless, and that it may also be contrary to a party's interests to object to such a meaningless proposal made by the other party.

If the Village is correct about the $1,000 cap, the Union's proposal to raise the coverage to 90% was meaningless, inasmuch as no employes could benefit. The lowest hourly wage rate under the 1990 agreement was $8.16, or $1414.13 per month; 90 % of that sum is $1272.72, a figure that exceeds the $1,000 level. Thus, every employe would have been capped at the $1,000, and no employe could have benefited from the 90% coverage. That makes the Union's proposal meaningless.

Making a meaningless proposal in bargaining takes a party's time and energy, weighs down its overall offer, and detracts from the quality of its collective bargaining. Thus, I can find no explanation of why, if the Union understood and accepted the $1,000 monthly cap, it would seek to raise the coverage to 90%.

Likewise, I am puzzled by what the Village did -- and did not do -- in response to the Union proposal. As the Village itself notes, as of January 1, 1991, the starting rates for all public works and utilities positions, and the top rates for all clerical positions, all exceeded the point at which 65% of the monthly wage exceeds $1,000. The purported $1,000 cap would have prevented any employe from benefitting from the increase to 90% coverage. If the Village truly believed this cap was mutually understood and accepted, it must have wondered why the Union was making this meaningless proposal. Moreover, and more importantly, if it truly thought the cap was in place, the Village should have made that point known to the Union once the Union made this proposal which was inconsistent with acceptance of the cap. Yet the record is devoid of any such evidence indicating the Village did so. Sitting silent in the face of a Union proposal which shows either

ignorance or unacceptance of the $1,000 monthly cap, the Village cannot now claim that the cap was mutually understood and accepted.

I can only conclude, from their actions, that the parties did not mutually understand and agree on the validity of the $1,000 monthly maximum. Accordingly, I cannot find an established past practice.

I turn now to the Village's final argument, laches, and the cases the Village cites in support thereof. In Cross v. Soderbeck, 94 Wis. 2d 331, (1980), the Supreme Court agreed that laches prevented a Sheriff from challenging a deputy's civil service status "based on a long past violation of an ordinance that has since been repealed." id., at 347. While the statement of the law of laches may be useful, the unusual facts of that case make it less than convincingly persuasive.

Nor is the other case the Village cites dispositive. In City of Great Falls, 88 LA 396 (McCurdy, 1986), the 1981 (and successor) labor agreements called for the two parties to appoint a Craft Council Safety Committee, responsible for developing a Safety Procedures Manual; an Accident Review Committee, a subcommittee of the Safety Committee, was charged with reviewing accidents and imposing discipline based on the Manual's point system. At no time following ratification did the Union seek to exercise its contractual right and responsibility to make its appointments to the Safety Committee. While there was no definitive evidence that the Manual was ever formally adopted by the Safety Committee, the Manual was printed and distributed in late 1982 and implemented effective in February, 1983. In July, 1985, an employe was disciplined by the Accident Review Committee.

The arbitrator rejected the Union's challenge to the validity of the Safety Procedures Manual, finding that questioning the validity of the manual "and the safety program it embodies, more than three years after the manual was first put into effect" would prejudice the employer. The arbitrator stated that the Union "had a clear duty to know the manual existed because if it had pursued its right of appointment to the committee, it would have gained such knowledge either directly or indirectly from its own appointees." id., at 399. (emphasis added)

I believe this is a critical distinction which separates these two cases. In Great Falls, the Union had an affirmative responsibility, explicitly stated in the labor agreement, to appoint members to the Safety Committee; by negligently failing to meet this duty, the Union lost its ability to challenge the product of that Committee in the manner it sought. In the instant case, however, there was no such affirmative responsibility assigned to the Union; rather, the sole burden -- that of making available an LTD program featuring certain terms -- was assigned

to the Village.

The Cross cases sets forth three elements of laches. Here, there may well have been a lack of knowledge on the part of the Village that the Union would be making this claim. Too, the Village may well have been prejudiced, by relying on what it purports to believe was Union acquiescence with the monthly cap. But what has been the unreasonable delay?

The Village asserts that the 20-year period between the Union's constructive first knowledge of the monthly cap and the filing of this grievance constitutes an unreasonable delay. Indeed, were I to find a lapse of 20 years between knowledge and action, I would hold that to be an unreasonable delay.

But exactly what is it that the Union has known for two decades? Two things: one, that the labor agreement establishes an explicit level of coverage (originally 60%, now 65%) for non-occupational illness or injury resulting in long-term disability; two, that the employer has purchased an insurance policy from an outside carrier which reflects that coverage, but with a monthly maximum. From these two facts, the Union could draw one of two conclusions: first, that the explicit terms of the labor agreement were prevailing, and that the employer would self-insure for the difference between the monthly cap and the covered percent; or, that the employer had disregarded the terms of the labor agreement, and was limiting its coverage to a lesser level.

To find unreasonable delay, I would have to conclude that the Union believed that the Village had provided substandard coverage, and that the Union failed to raise this matter over a period of two decades. The evidence does not support such a conclusion.

This is the first time since the program's inception that the monthly cap has become a factor. While there here is nothing in the record to indicate that the Union has ever directly told the Village it did not accept or endorse the monthly cap, there is likewise nothing in the record to show the Village ever directly told the Union of its reliance on the cap.

Given the explicit and unambiguous language of the labor agreement, I believe the burden of communication in this regard fell on the Village -- especially if it is going to accuse the Union of "unreasonable delay." In failing to meet this burden, and relying on the Union's "manifest acquiescence," the Village falls short of establishing the kind of unreasonable delay needed to assert successfully the defense of laches.

Having reviewed the Village's arguments, I consider now the Union's. Its position is relatively basic: that the labor agreement is clear and unambiguous, and prevails over the insurance contract. I agree. The text is direct and mandatory:

the Village "shall make available a long term disability insurance program for employees which will provide for sixty-five percent (65%) of income for non-occupational illness or income ...." That is the agreement the parties have made, and that is the agreement I must enforce. The fact that the Village has chosen to obtain outside insurance to cover part, but not all, of its burden is a business decision the Village has made; but that unilateral business decision cannot do harm to the labor agreement itself.

As noted above, the labor agreement states explicitly that I shall "neither add to, detract from, nor modify" the language of the agreement. Yet, in a way, the Village is asking me to do just that. The explicit text of Article VII, Section 3 provides for coverage amounting to 65 percent of income. The Village seeks an Award which will modify these express terms by adding a provision (the $1,000 cap) which subtracts from the level of benefit. The labor agreement does not allow me to do so.

As to the remedy, there is one further complication. As noted, the labor agreement calls for 65 percent coverage. Yet, inexplicably, the insurance contract the Village has obtained provides for 66 2/3 percent coverage (with, of course, the invalid cap). Just as the Village could not rely on the outside contract in derogation of the labor agreement's clear terms, so too the Union cannot rely on the outside contract to enhance the labor agreement. The parties have agreed that the employer will provide coverage for 65 percent of income -- the employer cannot provide less, and the Union cannot claim more.

Accordingly, on the basis of the record evidence and the arguments of the parties, it is my

AWARD

1. That the grievance is properly before me to consider on its merits.

2. That the grievance is sustained.

3. That the Village is directed to restore to James Duclon sufficient sick leave to make up the difference between a monthly maximum of $1,000.00 and 65 percent of his income for the period he was eligible for the Long Term Disability Program.

Dated at Madison, Wisconsin this 30th day of August, 1993.

By Stuart Levitan /s/
Stuart Levitan, Arbitrator