BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
THE LABOR ASSOCIATION OF WISCONSIN, INC., for and on behalf of JUNEAU COUNTY PROFESSIONAL POLICE ASSOCIATION	Case 99 No. 48894 MA-7754
and	
COUNTY OF JUNEAU, WISCONSIN	

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COUNTY OF JUNEAU, WISCONSIN	

Appearances:

Mr. Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., 2825 North Mayfair Road, Wauwatosa, Wisconsin 53222, appearing on behalf of Labor Association of Wisconsin, Inc., for and on behalf of Juneau County Professional Police Association, referred to below as the Association.

Ms. Angeline D. Miller, Juneau County Corporation Counsel, 220 East LaCrosse Street, Room 16, Mauston, Wisconsin 53948, appearing on behalf of County of Juneau, Wisconsin, referred to below as the County.

ARBITRATION AWARD

The Association and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Association requested, and the County agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in grievances filed on behalf of Steve Coronado and John Weger. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on August 25, 1993, in Mauston, Wisconsin. The hearing was transcribed, and the parties filed briefs by October 18, 1993.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

> Has the County violated the collective bargaining agreement by refusing to pay its portion of the family health insurance premium for Deputies Coronado and Weger for the month of September, 1992?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

> ARTICLE II - ASSOCIATION SECURITY
>
> . . .
>
> Section 2.03 - Employer's Rights: The County possesses the sole right to operate the County and all management rights repose in it, subject to the express terms of this Agreement. Its rights include, but are not limited to the following:
>
> . . .
>
> (b) To establish reasonable work rules . . .
>
> Notwithstanding the above listed employer rights, nothing herein contained shall divest the Association of any of its rights under Wis. Stats. Chapter 111. Furthermore, any and all employer rights shall be exercised consistent with this collective bargaining agreement.
>
> . . .
>
> ARTICLE V - LEAVES
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> . . .
>
> Section 5.03 - Personal Leaves: All full-time employees are eligible for personal leave of absence.
>
> All applications for personal leave of absence shall be presented in writing to the Department Head or designee . . . The granting of such leaves and the length of time for such leave shall be contingent upon the reasons for the request.
>
> The Department Head or designee may grant leave of fourteen (14) calendar days or less without authorization.
>
> Leave of absence of more than fourteen (14) calendar days shall be discussed with the Department Head and he shall present such requests to the Personnel Committee with a recommendation. Personnel

Committee approval must be obtained prior to the taking of the leave of absence.

All leaves of absence shall be without pay . . .

The County's contribution toward the insurance premium shall be paid if the employee works for at least ten (10) working days that month. If the time worked is less than ten (10) working days, the County will not pay any of the premium. An employee may elect to continue with the insurance program if the employee pays the full insurance premium . . .

Leave of absence for a period of not more than one (1) year may be granted due to personal illness, or for disability due to injury off the job, provided a physician's certificate is furnished every ninety (90) days to substantiate the need for continuing leave of absence . . .

ARTICLE XIV - GRIEVANCES

Section 14.01 - Definition: In the event that any difference arises between employer and Association or between employer and any employee concerning interpretation, application or compliance with the provisions of this Agreement, such difference shall be settled only in accordance with a grievance procedure set forth herein . . .

ARTICLE XV - INSURANCE

Section 15.01 - Health Insurance: The County shall make available health insurance that is at least equal to that currently in effect. The County shall pay . . . eighty-one percent (81%) of the family plan premium for said insurance . . .

ARTICLE XVIII - AMENDMENTS AND SAVINGS CLAUSE

Section 18.01 - Amendments: This Agreement may be amended in writing by mutual consent of the parties and in no other way . . .

Section 18.03 - Supersede: The provisions of this Agreement supersede all previous Agreements, Ordinances, Resolutions, etc. that are contrary to or inconsistent with it.

Section 18.04 - Maintenance of Standards: It is agreed that all matters relating to wages, hours or conditions of employment shall be maintained at not less than the highest standards in effect at the time of execution of this Agreement unless otherwise agreed to during the course of negotiations.

BACKGROUND

The Association filed grievances on behalf of Coronado and Weger dated

October 1, 1992. Each grievance form alleges a County violation of Articles II, XV, XVIII, "(a)nd any other appropriate article". Each grievance form contains a section entitled "FACTS" consisting of four separately numbered paragraphs. The parties stipulated that the first three of those paragraphs could be taken as established fact. Those three paragraphs read thus:

> 1. That on May 15, 1992, the grievant was involved in a work related shooting incident wherein the grievant received a disabilitating wound as a result thereof.
>
> 2. That the Employer continued to pay health insurance premiums pursuant to Article XV of the collective bargaining agreement for the period of May 15, 1992 through August 31, 1992.
>
> 3. That the Employer notified the grievant that the Employer would not pay any part of the insurance premium for September 1992, and that the grievant would be responsible to make payment of $303.75 for the Employer's portion of the health insurance premium, plus the employee's portion, to continue the insurance coverage.

The two grievances were processed through the grievance procedure, and were eventually presented to the County Personnel Committee. That committee denied each grievance in a four page document dated March 1, 1993. That document contains a section headed "FACTS." The parties stipulated that the first paragraph of that section could be treated as established fact. That paragraph reads thus:

> On May 15, 1992, the grievants, Steve Coronado and John Weger, during the course of acting in their official capacity as Juneau County Sheriff's Deputies, were

> involved in an incident wherein both grievants received gunshoot (sic) wounds. Mr. Coronado returned to work as a Juneau County Sheriff's Deputy on October 10, 1992. Mr. Weger returned to work in his capacity as Juneau County Sheriff's Deputy on October 15, 1992. During the course of their absence from work they were both receiving Worker's Compensation benefits for job-related injuries.

The parties exhausted the grievance procedure without resolving the grievances, and have stipulated that each grievance is properly before me.

Barbara Hoile is the County's Insurance Administrator, and has acted in that capacity since 1989. She testified that she processes roughly one hundred Worker's Compensation claims per year. She estimated that roughly five percent of those claims involved employes represented by the Association. She noted that to her knowledge the County has never paid any insurance premium payment for any employe who had been on Worker's Compensation for more than three months. She also noted that, prior to Coronado and Weger, no employe represented by the Association had been on Worker's Compensation for more than three months. She issued the following letter, dated September 21, 1992, to Coronado:

> At the request of the Insurance Committee I am writing to you concerning your health insurance premium now due.
>
> We have been notified by the Personnel Committee, and I am informed that you have too, that the County will not continue to provide their portion of the health insurance premium. Under the Personnel Policy after three months on worker's compensation, all employees must pay the full amount of health insurance premiums to continue to be covered by Juneau County.
>
> Steve, if you still want to be covered under the Juneau County Health Insurance program you will have to pay the County's portion of insurance premium ($303.75), you have already paid your portion ($71.25) by September 25th, or your insurance will be canceled.
>
> . . .

The parties stipulated Hoile sent a similar letter to Weger. Neither letter was provided to the Association. Hoile noted that she has not been notified of any grievances, prior to those at issue here, regarding the County policy regarding insurance premium payment to employes on extended Worker's Compensation.

The Personnel Policy referred to in Hoile's letter was promulgated in 1988. This policy is referred to below as the Policy. The parties stipulated that the County provides copies of the Policy to each new employe, and that the Union played no role in the development of the Policy. The Policy includes the following provisions:

HEALTH INSURANCE

> All permanent full time employees and all permanent part-time employees who work at least 20 hours per week shall be eligible for Health insurance coverage . . . The permanent full-time employee, the County shall pay 100% of the single premium and 80% of the family coverage . . .
>
> WORKER'S COMPENSATION
>
> . . .
>
> The County portion of health insurance premiums shall be continued for a maximum of 3 months for employees eligible for Worker's Compensation due to job-related injury or illness . . .

Further facts will be set forth in the DISCUSSION section below.

THE ASSOCIATION'S POSITION

The Association phrases the issues for decision thus:

> Did the Employer violate the implied and expressed terms of the collective bargaining agreement by refusing to pay the Employer's portion of the health insurance premiums for Deputy Steven Coronado and Deputy John Weger, pursuant to Article XV, for the month of September, 1992?
>
> If so, what is the appropriate remedy?

After a review of the record, the Association contends that the language of Section 15.01 is clear, unambiguous, and requires that the County pay the insurance premium for each Grievant for September of 1992. The language of Section 15.01 is mandatory, according to the Association, and there is no other agreement provision which would require a premium payment by an employe on Worker's Compensation.

Beyond this, the Association argues that other agreement provisions specifically preclude the unilateral action taken by the County. More specifically, the Association cites Section 2.03, which requires any exercise of the County's management rights to be consistent with the labor agreement. The County's unilateral promulgation of a Personnel Policy cannot, the Association asserts, be considered to be action consistent with the labor agreement. That the Policy was not bargained violates, the Association contends, Sections 18.01, 18.03 and 18.04.

The Association challenges the County's contention that a past practice can support its action. Initially, the Association notes that arbitral precedent requires that "the clear and unambiguous language of the contract must overrule any real, or perceived, past practice." Since Section 15.01 requires an employe payment of 19% of the family premium, without creating any exception for employes on Worker's Compensation, the Association concludes that the language of Section 15.01 must be applied as it was clearly and unambiguously written.

The Association asks, as the remedy appropriate to the County's

violation, that the County be found to have violated Section 15.01; that each Grievant receive $303.75 for their payment of the County's portion of the September, 1992, family insurance premium; that the County pay interest to each Grievant; and that the County be ordered "to cease and desist any further violations of this nature."

THE COUNTY'S POSITION

After a review of the record, the County, in its brief, phrases the issues for decision thus:

> Did the County violate the terms and conditions of the Collective Bargaining Agreement when it paid the County's portion of the insurance premium for three months while the grievant employees were on leave and receiving Worker's Compensation Benefits?
>
> Did (the Association's) failure to object to the County's 1988 Personnel Policy practice of limiting payment of its portion of health insurance premiums to three months while employees were on Worker's Compensation leave serve to establish tacit agreement when (Association) members were fully advised of the policy and did not bring the issue to the bargaining table or grieve application and implementation of the 1988 policy until 1992?

Regarding the first issue, the County argues initially that Section 5.03 limits County insurance contributions to those months in which an employe works at least 10 days. Asserting that it "is clear that the grievant employees were on leave from their employment for medical reasons due to injuries received on the job," the County asserts that its Policy has expanded the insurance contribution the labor agreement would otherwise require for employes on Worker's Compensation. To apply the agreement strictly would, the County argues, require the Grievants to reimburse the County for its payment of their insurance premiums for June, July and August of 1992.

Turning to the second issue, the County asserts that it "was not obligated to bargain the health insurance premium limitations for two reasons." The first is that Section 5.03 governs the provision of health insurance premium payments. The second is that the Policy's liberalization of the rule of Section 5.03 did not impact wages or terms and conditions of employment in a fashion requiring bargaining.

Beyond this, the County contends that its distribution of the Policy to each employe effectively formed the basis of a binding past practice. The Policy is clear on its face, according to the County, and has been clearly and unequivocally acted upon by the County since its promulgation. Against this background, the County concludes the Policy states what has become a binding past practice. That no Association member prior to the Grievants in this case have complained of the policy underscores this conclusion, according to the County.

The County concludes that Section 5.03 governs the grievances, and would require further premium contributions from the Grievants. Noting that its Policy and the practice it created have liberalized the insurance premium payment benefit, the County notes that it "does not expect or want reimbursement of premiums paid on behalf of the grievants." The County concludes, however, that its reasonable treatment of the Grievants should not

be held against it. Concluding that the limitations imposed on the payment of the Grievants' premium payments are reasonable, the County notes that any change in its policy should be won, if at all, by the Association in bargaining and not through arbitration.

DISCUSSION

The issue phrased above refers to an agreement violation generally, to reflect the number of agreement provisions in dispute. Resolution of the issue does, however, focus narrowly on the facts posed by the two grievances.

The grievances pose a difficult interpretive issue because the parties generally agree the contract covers the dispute, but do not agree on which parts of it specifically apply. The parties cite Articles II, V, XV and XVIII, but dispute how those provisions are to be made applicable to the leaves at issue. The provisions cited do cover the points raised by the parties well enough to support the County's assertion that this is not a case in which further bargaining is appropriate.

Application of the agreement focuses on Section 15.01, which generally obligates the County to "pay . . . (81%) of the family plan premium." The Association persuasively argues that this provision is broad and mandatory. This establishes a general entitlement to a County premium contribution. The Association's contention that this entitlement is clearly and unambiguously unlimited in scope is not, however, persuasive. Under the Association's view, the County's obligation to pay the insurance premium would survive a layoff. The layoff provision is not at issue here, and the parties can contract for such a result, but it is not a persuasive reading of Section 15.01 to contend it creates an unlimited entitlement. The Association appears to seek a broader entitlement than it bargained.

The County's view of the limits of Section 15.01 are, however, no less sweeping than the Association's view of its scope. The County bases its view of the limitations on Section 15.01 on Article V, and on past practice as created by its promulgation of the Policy.

The County's contention that Section 5.03 is applicable is unpersuasive. That section governs personal leave, and is not applicable by its terms to a Worker's Compensation leave. Section 5.03 makes the granting of a personal leave discretionary with a "Department Head or designee," or the Personnel Committee. Granting leave for a Worker's Compensation injury is not, however, within the discretion of County department heads or Board members. This point is recognized in Section 5.03 which does not refer to leave for Worker's Compensation. Rather, the section refers to "disability due to injury off the job." The limitation contained in Section 5.03 regarding "(t)he County's contribution toward the insurance premium" is, then, not applicable to the leaves posed here. In fact, the County's specific limitation, in Section 5.03, of the general entitlement to premium payment stated in Section 15.01 makes it difficult to accept the County's contention that silence in the contract denies the applicability of Section 15.01. If this was the case, there would be no need to specifically note the limitation on the County premium contribution stated in Section 5.03.

The more forcefully argued position of the County concerns the application of the Policy. The County contends that the Policy has become, since its promulgation in 1988, an established past practice. Crucial to any finding of a past practice is the existence of mutual understanding. The County acknowledges this point, but contends that "mutual acceptance may be tacit - an implied mutual agreement - arising by inference from the circumstances."

Contrary to the County's assertion, the circumstances posed here will not support the finding of any mutual understanding. The County promulgated the Policy without Association involvement. It distributes the Policy to newly hired employes, but practice, like a collective bargaining agreement, is reached between the parties to the agreement not the individuals who are governed by the agreement. In this case, there is no persuasive evidence the Association was aware of, or agreed to, the Policy's three month limitation on County liability for insurance premium payments to employes on Worker's Compensation. No employe represented by the Association has, prior to the Grievants, made a claim for such premium payments. Hoile's letter to the Grievants advising them of the cessation of County insurance payments was not copied to the Association, and she has never issued a letter of this type to any other Association represented employes. Against this background, it is impossible to imply the mutual understanding essential to a binding past practice.

The Association's contention that Sections 18.01 and 18.03 render the Policy inapplicable is persuasive on these facts. Section 18.03 is the most directly applicable and states the labor agreement supersedes the Policy, as a Board Ordinance or Resolution, if the Policy is "contrary to or inconsistent with it." The inconsistency in this case is not, however, as the Association asserts. The Association contends that Section 15.01 is clearly and unambiguously unlimited, thus any limitation is inconsistent with it. As noted above, Section 15.01 cannot be persuasively read as an unlimited entitlement. The County's contention that past practice can limit the entitlement was unpersuasive not because practice cannot limit the scope of Section 15.01, but because no binding past practice has been proven. The inconsistency of the Policy with the agreement is the broad scope the County asserts for the Policy. Under the County's view, the Policy, by its terms, applies as written without any negotiation or further review.

Reading the Policy as expansively as the County asserts would, however, conflict with existing agreement provisions. Section 2.03(b) permits the County to "establish reasonable work rules." Such rules must, under the terms of the final paragraph to Section 2.03, be consistent with agreement provisions, and are grievable under Section 14.01 of the parties' agreement. The County contends, in essence, that its promulgation of the Policy sidestepped both provisions.

In sum, the Association urges a view of the general entitlement of Section 15.01 which is unlimited. The County urges a view of the Policy, as incorporated into the agreement as a past practice, which is also unlimited. Both seek, through arbitration, a result not secured in bargaining.

Because the County has, in effect, sought to impose the limitations of the Policy on County payment of insurance premiums during extended Worker's Compensation leaves as a work rule, the reasonableness standard bargained by the parties to cover work rules must be applied in this case.

The Policy seeks, as a rule good for every case, to deny County premium payments beyond the third month of a Worker's Compensation leave. As the County points out, this rule seeks to induce employes to return to work as soon as possible, and to deter malingerers. Even granting the validity of this purpose does not, however, explain why it is reasonable to grant premium payments for three months and deny them past that point. Such a view apparently accepts the possibility of malingering so long as it does not exceed three months. The difficulty of establishing an appropriate time limit must be acknowledged. The essential problem with the Policy is, however, that it seeks to operate without any regard to the underlying condition of the employe.

Nothing in the Policy requires the County to assess the condition of the employe claiming the premium payment, and the County did not undertake such an assessment with regard to Coronado or Weger. As a result, there is no basis to ground the denial of a premium payment to the Grievants except for the provisions of the Policy itself. The Policy is, however, inapplicable through the operation of Section 18.03.

That parties can voluntarily agree to limit insurance premiums as the Policy does can be granted. That such a time limit is not inherently unreasonable can also be granted. Such a rule has not, however, been bargained in this case. Such bargaining is important to the reasonableness analysis, since the presence of agreement presumes the bargaining parties have themselves agreed to the reasonableness of the rule. In the absence of such agreement, I am unwilling to conclude that the Policy's limitation of County insurance premium contributions can reasonably be applied without some assessment of the condition of the individual employe affected by the rule. Since no such assessment was made in these cases, there is no established basis for the denial

of the September premium payment. It is, then, impossible to find the County reasonably denied the Grievants an insurance premium payment for the month of September, 1992.

It is necessary, given the parties' broad arguments, to summarize the conclusions reached above. Section 15.01 generally mandates a County contribution toward employe health insurance premiums. The limits of this mandate are not clear in the agreement, and the section does not expressly address what impact Worker's Compensation leave has on County premium contributions. That Section 15.01 is broad enough to mandate some County payment of insurance premium during Worker's Compensation leaves is apparent in the parties' conduct. The dispute posed here is how the premium contribution can be terminated. Contrary to the County's position, Section 5.03 does not apply. Nor can a binding past practice be found based on the Policy. There is no evidence of mutual understanding, express or implied, between the parties on this point. The Policy cannot be applied as a work rule without applying the reasonableness test stated at Section 2.03(b). To apply the Policy by its terms without the reasonableness test is inconsistent with Section 2.03(b), and thus would violate Section 18.03. In the absence of collective bargaining, the County's three month limitation cannot be reasonably applied to the facts posed here. There is no evidence that either Grievant was physically capable of returning to work in September, 1992. In the absence of an assessment of their condition, it is impossible to conclude the County's denial of an insurance premium payment for that month was reasonable.

It must be stressed that these conclusions are limited to the facts of these cases. Section 15.01 can be limited by contract language or practice. In this case, regarding the law enforcement unit, no such practice has been proven. The parties may elect to limit the provision of premium payments to employes as the Policy does. Doing so, however, must be done at the bargaining table, and not through grievance arbitration.

The Award entered below does not require extensive discussion. The parties have not disputed that the focus of the remedy is the provision of the September, 1992, County premium payment for each Grievant. The Association also seeks a cease and desist order. The Award does not include such an order to clarify that the conclusions stated above are limited to the facts posed here. The entitlement the Association seeks is unlimited, but the precise limits of Section 15.01 are neither clear nor unambiguous, and I am unwilling to speculate on its specific application to future cases. The Association has also sought interest on the make-whole award. The parties' agreement does not address this point, and there is no evidence that such awards have become part of the parties' bargaining relationship. Broadly speaking, awards of interest are atypical in grievance arbitration. 1/ Presumably, the Association seeks this result based on its assertion that the application of Section 15.01 to these facts is clear and unambiguous. The application of the section to the facts has, however, been difficult, and I am not convinced an award of interest would be appropriate in these cases.

AWARD

The County has violated the collective bargaining agreement by refusing to pay its portion of the family health insurance premiums for Deputies Coronado and Weger for the month of September, 1992.

1/ See, generally, How Arbitration Works, Elkouri & Elkouri (Fourth Edition, BNA, 1985 and 1989 Supplement), at Chapter 10.

As the remedy appropriate to its violation of the collective bargaining agreement, the County shall pay its portion of the family health insurance premium for Deputies Coronado and Weger for the month of September, 1992.

Dated at Madison, Wisconsin, this 22nd day of December, 1993.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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