BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between		
LOCAL 1760, AFSCME, AFL-CIO		Case 18 No. 49441 A-5083
and		
SUPERIOR MEMORIAL HOSPITAL		
In the Matter of the Arbitration of a Dispute Between		
LOCAL 1760, AFSCME, AFL-CIO		Case 19 No. 49442 A-5084
and		
SUPERIOR MEMORIAL HOSPITAL		

Appearances:

Mr. James E. Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Ms. Gerry D. Stephens, Human Resources Director, appearing on behalf of the Employer.

ARBITRATION AWARD

The Employer and Union above are parties to a 1991-93 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve the health insurance grievances of Tammy Torgerson and James Graskey.

The undersigned was appointed and held a hearing on December 9, 1993 in Superior, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on February 28, 1994.

ISSUES:

The parties stipulated to the following:

> Did the Employer violate the language of the collective bargaining agreement and past practice by denying to pay the grievants' health insurance premiums while the grievants

were on Workers' Compensation/Industrial leave of absence?

The Employer, as a threshold issue, in addition proposed the following:

Are the grievances timely?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 3 - AGREED RESPONSIBILITIES OF PARTIES

. . .

3.08 Maintenance of Benefits: The Employer will not change any economic benefits enjoyed by members of the bargaining unit during the term of this contract, without meeting with and securing the consent of the Union.

. . .

ARTICLE 7 - LEAVES OF ABSENCE

7.01 Request for LOA: LOA's without pay may be granted for a period not to exceed thirty (30) days. Leaves must be requested in writing, recommended by the department head, and approved by the hospital administration. Leaves may be extended in the same manner not to exceed one (1) year. In the case of leave due to illness or injury only, the request shall be made orally as soon as practical. A copy of the request for leave shall be submitted to the secretary of local 1760 by the employee requesting a leave.

7.02 Non-loss of Accumulated Benefits: Employees on authorized LOA's will not lose seniority rights or any other benefits allowed unless unbroken LOA time, regardless of the number of continuous leaves granted, equals credited seniority at the time of the last day worked or exceeds one year. This provision does not apply to Medical Leaves of Absences, for employees with less than one year of seniority. However, the job provided by shift and/or unit may not be the same when the employee returns. Leave time will not be counted in the accumulation of fringe benefits.

7.03 Reasons for LOA:

E) Industrial LOA: In case of industrial illness or injury, an LOA may be granted when supported by satisfactory medical evidence. Leave will terminate automatically when the employee is placed upon total and permanent disability, or when the employee is capable of returning to work as certified by a physician in charge of the case. The employee must furnish medical verification of the ability to work before being permitted to return.

DISCUSSION:

In separate incidents during April, 1993, Engineer Jim Graskey and Nursing Assistant Tammy Torgerson were injured at work. Graskey was injured on April 2, and applied on April 8 for an Industrial Leave of Absence. This lasted through June 15, at which time he returned to work; on October 17, he re-injured his back, and was once again on Industrial Leave until November 22nd. After that he returned to work part-time. Torgerson was injured on April 13, and was on Workers' Compensation until June 29. After that, she went on light duty for a period of time, later took a medical leave because of pregnancy, and returned to Workers' Compensation on November 25.

On April 20, 1993, the hospital's Payroll Benefit Coordinator, Mary Schnell, told Torgerson that she would have to be responsible for all of her health insurance premium starting in May, gave her a two-page "NOTICE REGARDING THE CONSOLIDATED OMNIBUS RECONCILIATION ACT OF 1986," and had her counter-sign a copy. Schnell had a similar conversation with Graskey on April 22nd. Both grievants admit these conversations, but stated that they did not understand that the contract was being violated by this act at the time. In late May, Graskey had a discussion with another employe, Dick LaJoie, who told him that he had had his own health insurance coverage and payment continued by the hospital while on Workers' Compensation earlier. Graskey also spoke to a local attorney, and from this conversation apparently believed that if the collective bargaining agreement had a "maintenance of benefits" clause, that that clause would cover his health insurance eligibility while on Workers' Compensation. Graskey and Torgerson then filed the grievances which gave rise to this proceeding, on May 27, 1993.

Graskey testified that to his understanding two other employes, LaJoie and Dennis Gunderson, had had their health insurance paid by the Employer while on Industrial Injury Leave. Torgerson did not testify concerning any other employes' experience; the Union introduced a written statement from LaJoie to the effect that his insurance had been paid by the hospital under these circumstances (LaJoie was ill and unavailable to testify), and the parties stipulated that this would have been his testimony had he been able to appear. But Schnell testified that LaJoie had received paid health insurance during his Industrial Injury Leave only because of a special arrangement by which

because of financial hardship he was allowed to "buy" his vacation time, by converting that time to cash for use in paying the premiums. Schnell testified that she knew this because in 1985, she got a note from the hospital Controller approving this arrangement. Schnell further testified that Gunderson was a member of the management, and that at the time he received payment for health insurance premiums while on Industrial Injury Leave the hospital policy was to exempt management personnel from such payments being made personally for up to six months. Schnell testified that there was a standing hospital policy for unpaid leaves, to the effect that if an employe was to be out for more than 15 days, the employe has to pay the full premium. Schnell added that since the COBRA law employes have been specifically notified about the right to continue such coverage at the employe's own expense. The hospital's Risk Manager, Lois Boone, testified that she has never heard of any employe being paid health insurance premiums while out on Workers' Compensation, except for managers. She testified further that in most years there are two to three Workers' Compensation cases that involve lost time, but did not testify as to whether there were previous cases in which the lost time had been over 15 days.

Schnell introduced two exhibits, the relevant pages from the hospital's 1985 and current handbooks of personnel policy, and testified that the policies enacted by the hospital were consistent with the handbook's language. Graskey, recalled to testify, testified that although he was President of the Union for 15 years, he had never seen either handbook. Torgerson, in recalled testimony, also denied ever having seen either handbook before.

The Union contends with respect to timeliness that the fact that the Employer notified the employes of their COBRA rights did not inform them that they had contractual rights or that they were foreshortening those contractual rights by not claiming them promptly. The Union points to testimony from both grievants that they never understood from the COBRA document that they were surrendering any economic benefits by not acting immediately. The Union contends that the language of the contract in both Articles 7.02 and 3.08 clearly favors continuation of employer payment for both grievants. The Union argues that Article 7.02 specifies that employes on an authorized Industrial Leave of Absence shall not suffer any loss of benefits, and contends that the grievants both fit within the Article 7.03(E) specification of an Industrial Leave, and do not fit the exception in 7.02 for new employes on a Medical Leave of Absence who have less than one year of seniority. The Union further contends that the Employer's co-payment toward health insurance premiums is a basic economic benefit which was then denied to the grievants. In addition, the Union contends that Article 3.08 independently justifies these grievances, because it guarantees the status quo of keeping the current level of benefits. The Union requests that the Arbitrator award in favor of the grievants and make them whole by requiring the Employer to pay for the lost health insurance co-payments for the period of time the grievants were on their respective

Industrial Leaves of Absence.

The Employer contends with respect to timeliness that both grievances were filed long after the ten calendar days specified in Article 15, and that both employes clearly knew they were being required to pay their own health insurance premiums as of April 20 and 22 respectively. With respect to Article 3.08, the Employer contends that there is no specific contract language defining what maintenance of benefits or loss of benefits means, and that there was no change in economic benefits for either grievant. The Employer further contends that the requirement that these employes pay their own premiums while on Industrial Leave was consistent with the Employer's past practice. The Employer makes the same contention with respect to Article 7.02 as 7.03. The Employer also contends that the Union's evidence that LaJoie had received similar payment was refuted, and notes that four employes referred to in the grievances as being available as witnesses who had allegedly received such payments in the past failed to appear at the hearing. The Employer requests that both grievances be denied.

With respect to timeliness, I find that both grievants were properly on notice as to the Employer's intentions as of the date they were required to sign a copy of the COBRA form, but that both grievances fall within a widely recognized class of exceptions to a rigid interpretation of timeliness requirements, known as "continuing" violations or alleged violations. First, it is apparent that both employes were properly notified by the Employer in advance of their being required to pay the full premiums. There is no reason to believe that the contractual terms were unavailable to grievant Torgerson, let alone grievant and former Union President Graskey, and therefore the grievants both must be held out of time as to the original claim when they filed their grievances on May 27. At the same time, it is widely recognized in arbitration and labor relations generally that even the strictest of grievance time limits must allow for the possibility of certain types of events being of a recurring nature. The classic example is a wrongly calculated pay rate, paid bi-weekly, which an employe may not discover until sometime after beginning to receive that rate. Many arbitrators have found that with respect to this type of issue a fresh grievance arises with each fresh miscalculated payment. I find that the recurrent nature of the requirement to pay the monthly health insurance premium entirely by the employe is similar in nature, and therefore establishes a fresh grievance as of each new monthly required payment. Thus both grievances are untimely as to their original date or the first month's payment, but are timely as to any subsequent payments.

I do not find that the Maintenance of Benefits clause, Article 3.08, has any bearing on this case. Clauses of this type are routinely used to cover benefits not otherwise mentioned in

the collective bargaining agreement, and where unions have been able to negotiate such clauses, the clause serves to protect a range of benefits which may have existed as a result of custom and past practice, but which are not reflected in the collective bargaining agreement itself. In this case, the right to an employer payment toward health insurance is clearly reflected in the collective bargaining agreement itself. Consequently, Article 3.08 is inapplicable.

A confusing situation emerges with respect to Article 7.02, however. On its face, the phrase "employes on authorized LOA's will not lose seniority rights or any other benefits allowed . . ." is broad language, which brings within its sweep everything that is customarily regarded as a "benefit." Contrary to the Employer's assertion, there is no reason in this record or labor relations practice generally to regard health insurance payments by the Employer as something other than a "benefit." Thus on its face Article 7.02 appears to require the continuation of such payments for employes on authorized leaves of absence, up to the limits specified in that clause. There is no dispute that both grievants were on an authorized leave of absence during the applicable period. Therefore, on the face of the language, they were entitled to such payment.

I am, I must admit, somewhat troubled by the evidence of past practice. In particular, Schnell's testimony was a cohesive explanation that one employe, Richard LaJoie, who thought he had received such payment, had in fact made up for it himself by cashing in vacation payments. Similarly, management employes are frequently treated differently than bargaining unit employes, and the fact that one receives a certain benefit is of little weight in interpreting whether a collective bargaining agreement means or does not mean that the other is entitled to such a benefit. Yet none of the witnesses appeared very clear as to whether there had been, up to the Torgerson and Graskey instances, any prior instances of Workers' Compensation other than LaJoie's and Gunderson's which had gone over the 15 days which the Employer was covering as a matter of policy. And while two management witnesses referred to the management's personnel handbook, neither sought to rebut the two grievants' testimony that they had never seen such a handbook. Finally, neither party offered any evidence as to the bargaining history of the critical sentence in Article 7.02. I conclude that on balance, there is insufficient evidence here to justify departing from the facial interpretation of Article 7.02, and that in accordance with general arbitral practice, I should therefore read that language the way it appears to be intended on its face. Accordingly, both grievants are entitled to health insurance contributions retroactively (the remedy requested by the Union) but limited in time from the date of the grievances forward.

For the foregoing reasons, and based on the record as a

whole, it is my decision and

AWARD

1. That the grievances are timely only as to continuing violation of the collective bargaining agreement, and untimely as to retroactivity.

2. That the Employer violated the collective bargaining agreement by refusing to pay for health insurance contributions for both grievants for each month after May 27, 1993 when each was respectively still on an Industrial Leave of Absence.

3. That as remedy, the Employer shall, forthwith upon receipt of a copy of this Award, repay to each grievant a sum of money equal to the Employer's share of the health insurance premium for each month that said grievant continued to be on Industrial Leave of Absence after May 27, 1993.

Dated at Madison, Wisconsin this 2nd day of June, 1994.

By Christopher Honeyman /s/

Christopher Honeyman, Arbitrator