

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

DANE COUNTY (PUBLIC HEALTH)

and

DISTRICT 1199W/UNITED PROFESSIONALS FOR
QUALITY HEALTH CARE, AFL-CIO, CLC

Case 148
No. 52978
MA-9182

Appearances:

Mr. Paul Burmeister, Staff Representative, District 1199W/United Professionals for Quality Health Care, AFL-CIO, CLC, on behalf of the Union.

Ms. Molly Plunkett, Assistant Corporation Counsel, Dane County, on behalf of the Employer.

ARBITRATION AWARD

Pursuant to the 1993-1995 collective bargaining agreement between Dane County (hereafter County) and District 1199W/United Professionals for Quality Health Care, AFL-CIO, CLC (hereafter Union) the parties jointly requested that the Wisconsin Employment Relations Commission appoint Sharon A. Gallagher to hear and resolve the dispute between them regarding whether Carole Kretschman was properly denied salary continuation benefits under Article XIV, Section 6 of the labor agreement. A hearing was held on November 13, 1995 at Madison, Wisconsin. A stenographic transcript of the proceedings was made and received by November 30, 1995. The parties agreed upon a briefing schedule and submitted their initial briefs to the undersigned, postmarked by January 23, 1996. The parties reserved the right to file reply briefs herein and they did so by February 12, 1996. The record was thereupon closed.

Issues:

The parties stipulated that the following substantive issue shall be decided in this case:

Did the Employer violate Article XIV, Section 14.06 of the contract?

If so, what is the appropriate remedy?

At the instant hearing, the Employer raised the issue whether the grievance is a proper matter for arbitration, given the language of Article XIV, Section 6 which, in the Employer's view merely provides that the Employer will make a salary continuation insurance plan available to employees but does not require the County to administer the plan. The Union objected to the Employer's raising this issue for the first time at the hearing. The Employer agreed to brief the issue and to allow the undersigned to decide this arbitrability issue along with the stipulated substantive issue in this Award.

Relevant Contract Provision:

ARTICLE XIV - INSURANCE/RETIREMENT

. . .

Section 14.06 Salary Continuation. There shall be available to employees on a share cost basis as determined by the plan, a salary continuation insurance plan which shall be a part hereof by reference. Such plan shall become effective when the required percentage of enrollment of employees has been met. Should such required enrollment fail, the Employer's funds allocated for the purpose of implementing the plan shall be directed to the salary of each employee. This Section shall be subject to renegotiation in the event the Employer shall propose a substitute plan.

. . .

United Wisconsin Group Short Term Disability Plan Excerpts:

. . .

**SCHEDULE OF BENEFITS
SHORT TERM DISABILITY COVERAGE**

Eligible Classes:

All eligible employees.

Service Waiting Period:

1st of the month following 6 months of employment.

Elimination Period

- Illness: 30 working days or 6 weeks.

- Injury: 30 working days or 6 weeks.

Benefit Period:

46 weeks.

Benefit Amount:

65% of weekly Earnings to a maximum of \$1,000.

Benefit Offset From Earnings Received From Rehabilitation:

50%

. . .

SHORT TERM DISABILITY

This booklet summarizes Your Benefits. It is not a policy, but all parts of it depend on the policy. We issued the policy as a contract with the Policyholder. The policy insures You.

DEFINITIONS

ACTIVELY AT WORK or ACTIVE WORK means You must be physically capable of working:

1. for the Group on a regular Full-Time or Part-Time basis and be paid regular earnings; and
2. at least 20 hours per week at either:
 - a. the Group's usual place of business; or
 - b. a location to which the Group's business requires You to travel.

If You meet this criteria, We consider a holiday or a vacation day

on the effective date as a work day.

. . .

DATE OF LOSS means the date You are seen, treated, and certified as Totally Disabled by a Physician. It does not include the last date worked unless:

1. You worked less than 1/2 of Your normal scheduled work hours on that date; and
2. You became Totally Disabled on the same day.

. . .

ELIMINATION PERIOD means a set number of days in a row beginning on the Date Of Loss. The number of days is shown in the schedule. You must be Totally Disabled throughout the Elimination Period. You must be personally seen, treated, and certified as Totally Disabled by a Physician before the Elimination Period begins.

. . .

ILLNESS means any disease, sickness, or pregnancy. The Illness and disability must begin while You are covered under the policy.

INJURY means bodily Injury resulting:

1. directly from an accident; and
2. independently of all other causes.

The Injury must occur and Total Disability must begin while You are covered under the policy.

. . .

PHYSICIAN means a person who is:

1. operating within the scope of his license; and either
2. licensed to practice medicine and prescribe and

administer drugs or to perform surgery; or

3. legally qualified as a medical practitioner and legally required to be recognized under the policy.

. . .

TOTAL DISABILITY or TOTALLY DISABLED means Your complete inability, due to Injury and/or Illness, to perform with reasonable continuity any of the material and substantial duties of Your regular occupation. You must be under the Regular Care and Treatment of a Physician. You must provide documentation of this. We may require You to see a Physician of Our choice for an independent medical examination.

. . .

ELIGIBILITY

A. ELIGIBILITY

You become eligible for coverage under the policy when:

1. the Group meets all of Our eligibility requirements for participation; and
2. You are Actively At Work on a regular, Full-Time or Part-Time basis as a member of a class eligible for coverage under the policy; and
3. You complete Your Service Waiting Period.

. . .

CONTINUITY OF COVERAGE

Even if You were not Actively At Work on the policy effective date, We pay benefits to You if You:

1. were covered by the prior carrier at the time of coverage transfer; and

2. were not Actively At Work on a Full-Time basis due to Injury or Illness; and
3. meet the policy's eligibility requirements other than that for Actively At Work.

The Benefit amount We pay under this section is the prior policy's benefit amount, less any benefit paid or payable by the prior carrier.

If You are not Actively At Work, You are not eligible for coverage and the Benefit will not be paid under this policy until after the prior group carrier has paid any extended benefits for which it is liable.

We pay benefits for any Total or Partial Disability resulting from a pre-existing condition if You:

1. were covered by the prior carrier at the time the coverage was transferred; and
2. were Actively At Work on a Full-Time basis on this policy's effective date.

...

TERMINATION OF COVERAGE

Your coverage terminates upon the first to occur of any of the following:

1. the date the policy is cancelled; or
2. the date the policy is modified to exclude coverage for the class to which You belong; or
3. the date You fail to make, when due, any required contribution toward the cost of the coverage; or
4. the time You terminate employment; or
5. the date You are no longer a member of the class of employees eligible for coverage; or
6. the time You are laid off, resign, retire (unless

Totally or Partially Disabled before retirement), or are dismissed from employment; or

7. the day before the date You start a leave of absence, except a disability leave; or
8. the date You are placed on a part-time employment basis; or
9. the date of work stoppage which is the result of a labor dispute; or
10. the date We pay Your maximum Benefit entitlement for a period of Total Disability.

...

GENERAL PROVISIONS

A. LEGAL ACTIONS

You may not bring legal action against Us:

1. before the end of a 60 day period that starts on the date written proof of loss is first required to be provided to Us; or
2. after the end of a 3 year period that starts on the Date Of Loss.

We may decide to mediate or arbitrate a dispute.

B. STATEMENTS BY YOU

We will not use a statement made by You in any legal contest unless We give You, or other party to the contest, a copy of the document that contains the statement.

We deem any statement You make to be a representation, not a warranty. We will not use such a statement to void Your coverage, reduce Your benefits, or defend a claim unless it is in a written application signed by the Group or You. We will give You or Your beneficiary a copy of that

application.

C. TIME LIMIT ON CERTAIN DEFENSES

Except for fraudulent statements, We will not use a statement You made relating to Your coverage to contest Your coverage after Your coverage has been in force for 2 years.

D. NOTICE OF CLAIM

You must give Us written notice of claim within 30 days of the Date Of Loss, or as soon as it is reasonably possible.

When We receive that notice, We will send claim forms to You. If You do not receive the claim forms within 15 days of the notice, You have complied with the requirements of proof of loss when We receive verifiable documentation that establishes:

1. Your eligibility; and
2. the date and cause of Your Total or Partial Disability; and
3. the Physician(s) treating You for that disability.

E. PROOF OF LOSS

1. The proof must provide:
 - a. the Date Of Loss; and
 - b. objective medical evidence. You must cooperate in obtaining the medical information; and
 - c. dates and type of treatment; and
 - d. certification of Total or Partial Disability; and

- e. standard nomenclature diagnosis.
- 2. You must give Us proof of loss no later than 90 days from the Date Of Loss.
- 3. If it is not possible to give Us proof within this time, You may give it as soon as reasonably possible, as long as We are not hurt by the delay. You may not give Us proof of loss later than 15 months after the Date Of Loss.
- 4. You must give Us proof of continued Total or Partial Disability and Regular Care and Treatment of a Physician within 30 days of Our request for the proof.

F. TIMELY PAYMENT OF CLAIMS

We pay claims incurred while the policy is in force when We receive and validate due written proof of loss. We pay Benefits at the end of the month or lesser period for which We are liable. If any Benefit is unpaid when Your Total or Partial Disability ends, We pay that Benefit after We receive proof of that disability.

Background:

Prior to January 1, 1992, the County had a salary continuation insurance plan, also known as short term and long term disability (STD/LTD) insurance policy with Massachusetts Mutual which it made available to employes such as the Grievant, Carole Kretschman. The County arranged to change STD/LTD carriers and it contracted with United Wisconsin Insurance Group (UWG) to provide the same coverage beginning on January 1, 1992. Therefore by memo dated November 26, 1991, the County notified all employes as follows:

. . .

TO: ALL ELIGIBLE DANE COUNTY EMPLOYEES
(AT LEAST 20 HOURS PER WEEK)

RE: SHORT TERM DISABILITY(STD)/LONG TERM
DISABILITY(LTD) INSURANCE (WAGE
CONTINUATION)

Disability can strike at any time, leaving you without sufficient income to "make ends meet." Dane County will continue to offer its employees the option of enrolling in an insurance program that will provide wage continuation during periods of short-term and long-term disability. The disability insurance contract for 1992 was awarded to United Wisconsin Insurance Company (UWIC) also called United Wisconsin Group (UWG). The plan was recommended by the Employee Management Insurance Advisory Committee and approved by action of the Dane County Board of Supervisors on November 21, 1991.

The benefits are basically the same as last year except for caps in maximum benefits. The benefit for short-term disability is 65% of your wages up to a maximum of \$1,000 per week. The benefit for long-term disability is 65% of your wages up to a maximum of \$4,000 per month. Short-term disability benefits are paid for up to a year. If you continue to be disabled after one year, short-term disability benefits discontinue and the long-term disability benefits will begin.

Because the County has a new carrier, ALL eligible employees must complete an application. This is an open enrollment. Your application must be returned to your department's payroll clerk no later than DECEMBER 13, 1991.

. . .

Coverage will be effective January 1, 1992 . . .

Although there was no evidence offered by the County to prove that Kretschman actually received the above-quoted memo, she signed and submitted her application for STD/LTD coverage to UWG on December 11, 1991, just two days before the deadline therefor.

The County sent UWG the names and home addresses of all employees who had timely applied for the UWG STD/LTD benefits. In late June, 1992, UWG sent County employees a booklet describing UWG benefits (relevant portions of which have been quoted above herein). It is clear that although UWG intended to send all County employees who had properly applied for the benefits a copy of the booklet, Kretschman did not receive one until February, 1993. 1/

1/ Union representative Judy Pearson also stated she did not receive a UWG Booklet in the

Kretschman admitted that prior to February, 1993, she never requested a UWG Booklet from BPHCC, County Risk Management or from UWG.

The County offered evidence regarding how the County processes benefit applications. This evidence indicated that,

- 1) Risk Management is the County Department that is responsible for preparing paperwork and sending applications for processing to insurance carriers. Neither Risk Management nor any other County department can approve or deny employee benefit claims -- only the insurance carriers have this authority.
- 2) Risk Management Department employees do not check benefit applications for accuracy before they send the applications with all other necessary documents to insurance carriers.
- 3) Risk Management employee Patty McCarthy regularly answers employee questions regarding benefits and eligibility. If the questions are specific, McCarthy, who receives from 15 to 20 calls per day from employees, sometimes refers to plan description booklets for answers, but often refers employees to the insurance carrier for answers.
- 4) Only after Risk Management receives a request or claim for benefits from a County employee, is a file opened and record kept of telephone contacts.
- 5) The County's Payroll Department is responsible for keeping records of employee applications for benefits, for assisting in the enrollment process, and for making sure various deductions from employees' paychecks are taken correctly, but not for actually handling benefits.
- 6) At BPHCC, payroll office employees, like Janet Latsch, have application forms available for distribution to employees; they

mail in 1992.

assist employes in filling out these forms; keep needed copies thereof for BPHCC; procure the appropriate signatures and send the completed forms to Risk Management.

On November 1, 1993 BPHCC issued a memo on the Policies and Procedures regarding employe illness or injury 2/ which read in relevant part as follows:

. . .

D. Medical Leave of Absence

1. Employee will contact immediate supervisor and provide written request for Medical Leave and clearly state reason and anticipated length.
2. Supervisor will either approve or deny request in writing.

2/ The County failed to prove that Kretschman actually received this memo.

A. Request Denied

1. Employee may appeal (sic) this decision by filing a grievance or taking request to the Associate Administrator or Administrator.

B. Request Approved

1. Employee will submit a request in the type of time to used (sic) in accordance with the Sick Leave Policy. The request will indicate the type of time to be used. LOA Request is not necessary unless employee is off the payroll for thirty calendar days or more.
2. Employee will request leave of absence in writing from supervisor two weeks prior to exhausting paid time, and supervisor will assist with processing the forms.
3. During the period the Medical Leave is paid time, payroll information will be provided by the Supervisor to Pay Clerk on Payroll Exception Reports.
4. If the employee requests a medical LOA, he/she will provide a physician's statement to the supervisor supporting the need for that type of leave.
5. Supervisor will place the physician's statement in the BPHCC health file.
6. Two weeks prior to exhausting paid time, the employee must obtain a leave of absence form from their immediate supervisor or payroll

clerk, fill it out in its entirety and return to immediate supervisor.

7. Supervisor will complete their portion of the LOA form and forward to the Payroll Clerk.
8. The Payroll Clerk will have the Administrator sign off LOA request form.
9. The Administrator will forward form to Dane County Employee Relations Office through the Human Services Department along with the original physician's statement.
10. Dane County Employee Relations will approve or deny and return copy of form to immediate supervisor.
11. Supervisor will inform employee if LOA is approved or denied and let them know that they will get copy in mail.
12. Two weeks prior to return to work, employee will notify immediate supervisor of return date.
13. Supervisor will inform Payroll Clerk of return date.
14. Upon completion of all medical LOAs, except routine maternity LOAs, require employee to provide physician's statement clearing him/her to return to work with no restrictions, or identifying any restrictions which need to be accommodated. The physician's statement must be provided to

immediate supervisor before the first day back to work.

15. If the employee has restrictions which need to be accommodated, as stipulated on the physician's statement, the supervisor, administrator, Risk Management, the employee and the physician, as needed, will determine if and how the accommodations will be implemented.

E. Wage Continuation

1. Employee will contact Payroll Clerk to obtain claim form for wage continuation three weeks in advance if employee anticipates being gone thirty working days (6 weeks).
2. Employee will complete Section I of Wage Continuation Form. Have physician fill out Section II and return completed form to Dane County Risk Management Office, Room 425, 210 Martin Luther King Jr., Blvd., Madison, WI 53709.
3. If the employee is on LOA and Wage Continuation, both procedures apply. The LOA and documentation are completed for Employee Relations. The Wage Continuation form and documentation are completed for Risk Management (financial remuneration).

VI. COORDINATION: Risk Management
Employees

Facts:

The Grievant Carol Kretschman had been employed by the Employer for almost 25 years at the time of the instant hearing. Kretschman is a Registered Nurse at Badger Prairie Health Care Center (BPHCC). In approximately 1974, Kretschman's fourth child was born and she took a disability leave of absence for approximately six weeks. From 1974 until 1993, Kretschman had

no occasion to apply for or use the County's salary continuation insurance.

During the Fall of 1993, Kretschman had a lot of personal stress in her life; she began feeling unsafe in her work place and she went to a therapist regarding this problem. Kretschman's therapist was Fred Devett, a Psychotherapist at Counseling and Psychotherapy Associates in Madison, Wisconsin. On November 9, 1993, Devett wrote a letter to Kretschman's employer or supervisor indicating that it was Kretschman's desire to take an extended medical leave from her employment due to stress and stating that Devett concurred fully with Kretschman's decision to take a leave of absence to begin as soon as possible for a period of approximately six months.

At or about this time, Kretschman spoke to an employee in the payroll department at BPHCC, Janet Latsch. Kretschman asked Latsch what the procedure was for filing to receive benefits during an LOA. Latsch suggested that Kretschman fill out a short-term disability claim form and hand it in around Christmas, 1993. 3/ At this time, Latsch also indicated she did not believe there would be a problem with the fact that Kretschman had been seeing a psychotherapist rather than a physician, although Kretschman recalled that Latsch stated that the County might make Kretschman see a psychiatrist at some point. Latsch also told Kretschman that she had sent applications through before with the signature of only a therapist on them. Latsch indicated that they (BPHCC) would simply try to process her claim with the therapist's authority only. During their meeting, Latsch indicated that there was a six week "elimination period" and that Kretschman would have to use her accrued time off to satisfy this elimination period before receiving salary continuation benefits. Latsch gave Kretschman a short-term disability claim form, "Attending Physician's Statement", which Kretschman took to her therapist at the end of December, 1993. Therapist Devett completed this form and dated it January 18, 1994. Risk Management Assistant Patty McCarthy sent this form to UWG on January 21, 1994. At this time, McCarthy stated she did not notice that Kretschman's forms indicated that her illness was work-related. UWG received Devett's statement on January 24, 1994.

On February 10, 1994, McCarthy received Kretschman's application back from UWG indicating that Worker's Compensation had become an issue. On February 11, 1994, Kretschman received a call from Peggy Jorgenson, a representative of UWG. Jorgenson indicated that Kretschman should have seen a physician from the first day of the elimination period, that UWG would not accept her application for benefits signed by a psychotherapist and that UWG strongly

3/ Kretschman admitted that at the time she spoke to Latsch, she was uncertain when she wanted her leave of absence to begin -- November 15, 1993 or December 1, 1993, and that she may have told Latsch the wrong date for the start of her leave (December 1st rather than November 15th). Kretschman stated that she later decided to move up the starting date of her leave of absence to November 15, 1993. Kretschman did not state that she told Latsch of her decision to change the starting date of her LOA. Kretschman also admitted that Latsch never told her not to file her paperwork early.

recommended that short-term disability applications should be sent immediately when the employee begins their leave of absence. Kretschman stated that all of this information conflicted with information she had been given previously by Janet Latsch. 4/

4/ On cross examination, Kretschman stated that Latsch told her that she could delay filing her short term disability application until toward the end of the six week elimination period and that she could delay seeing a physician if she chose. It should be noted, that Latsch has retired from her position at BPHCC, that she has been ill, and that she was not called as a witness herein.

After receiving this information from Jorgenson, Kretschman admitted that she delayed trying to get a doctor to sign a physician's statement for her. Kretschman stated that at this point, it was three months after the start of her leave of absence and that she did not know how she would gain a psychiatrist's signature when she had not seen one previously. On approximately February 14th, Kretschman also spoke to Patty McCarthy, Risk Management employe, who told Kretschman she must have a physician/psychiatrist sign her physician's statement and send it in immediately. 5/ On February 19, 1994, Kretschman wrote a letter to UWG's Peggy Jorgenson which read in relevant part as follows:

Enclosed is my application for short term disability which is signed by the psychiatrist supervising my treatment.

. . .

Last November when I first started my leave of absence, I was told that I didn't need to apply for short term disability until January, when I had satisfied the elimination period. Since I was using some holiday and vacation time, I sent the application in January. My therapist, Fred Devett, mentioned at one point that sometimes clients must be seen by the supervising Psychiatrist but the contact person in payroll said it was unnecessary at this time.

. . .

I would have most assuredly complied with the guidelines in the handbook -- however, the first time I had seen or heard of those guidelines was Friday, February 11th (approximately three months after my leave of absence began). . . .

In addition, on February 10, 1994, Jorgenson called Patty McCarthy and indicated that Kretschman had to file Workers' Compensation papers, because her therapist had stated her disability was work-related. At this time, Patty McCarthy told Jorgenson that the United Wisconsin Group should begin payments to Kretschman starting February 6, 1994, as soon as the Workers' Compensation issue was cleared up.

5/ McCarthy stated that she did not recall speaking to Latsch about Kretschman's application until sometime after January 18, 1994. McCarthy also stated that she did not recall speaking to Kretschman about her benefits being paid retroactively to December 27, 1993 and McCarthy denied she would have told Kretschman this, as Kretschman was on the payroll at that time and therefore could not have received the benefits.

On February 22, 1994, Dr. Stanley Miezio signed a new short term disability claim form - attending physician's statement on behalf of Kretschman. On February 28, 1994, UWG received that physician's statement. On March 9, 1994, Kretschman received a letter stating that UWG had asked her psychiatrist for more information. On or about March 28, 1994, Kretschman's psychiatrist submitted that information. On April 4, 1994, Kretschman began receiving salary continuation benefits from the UWG.

On June 8, 1994, the Union filed the instant grievance on behalf of Kretschman. The grievance states in relevant part that

. . .

Because of misinformation given employee by payroll, employee was unable to satisfy the qualifications for salary continuation in a timely manner. As a result, a considerable amount of sick time was used unnecessarily.

The grievance sought that "the employee be made whole in every way including compensation for sick time that was unnecessarily used".

The County submitted evidence to show that it could not pay Kretschman's salary continuation benefits retroactively unless she returned to the County all compensation she received from the County prior to the approval and receipt of salary continuation benefits (approximately \$10,000). The County asserted that only after the return of all compensation, could the County submit amended IRS, State Tax and, WRS forms and restore Kretschman's leave banks. Kretschman indicated that she did not have \$10,000 to give to the County if she were ordered to do so.

Positions of the Parties:

Union:

The Union argued that due to misinformation given to Kretschman by agents of the Employer, the Employer failed to meet its responsibilities to properly administer the contract benefits and to advise employees correctly regarding how to apply and use contract benefits. This, the Union asserted constituted a violation of Article XIV, Section 14.06. The Union noted that where, as here, the employee has paid for a benefit that was part of a quid pro quo in bargaining, but which the employee could not use due to the County's negligence, a full remedy should be granted.

The Union observed that Kretschman went on an approved six month leave of absence on November 15, 1993; that she applied for salary continuation benefits thereafter; and that

Kretschman was told by McCarthy that she could receive salary continuation benefits as of December 27, 1993. If the County had given Kretschman proper information, the Union urged, Kretschman would have received salary continuation benefits effective December 27, 1993. In addition, the Union noted that the Employer failed to take any corrective action to assure that Kretschman had properly filled out her application forms the first time. Because Kretschman did not receive salary continuation benefits until April 3, 1994, she used 305 hours of accrued leave.

The Union pointed out that Kretschman's testimony herein stood unrefuted, and that general information about how claims are processed cannot refute the Grievant's affirmative statements herein. The Union further noted that neither employee who testified (the Grievant and Union representative Pearson) received the UWG insurance booklet. Because the Grievant relied to her detriment on the County's false statements regarding her eligibility for and the effective date of salary continuation benefits, the Union sought an Award making Kretschman whole by paying her \$6,500 or crediting her leave balances with the amount of leave she took during the period December 27, 1993 through April 2, 1994.

County:

The County urged that it is required by Article 14.06 merely to make a salary continuation benefit available on terms determined by the plan. Because such a plan was available to Kretschman, the County asserted that no contract violation was committed in this case. The County noted that the proper administration and accessibility of salary continuation benefits are questions for the insurance carrier who is responsible for these matters. The County argued that it does not have a responsibility to instruct employees regarding benefits under Article 14.06, or any other article of the collective bargaining agreement.

The County urged that delays in processing Kretschman's claim did not violate the contract. The County observed that Kretschman talked only to Ms. Latsch regarding salary continuation benefits and did not attempt to contact anyone in Risk Management or at the insurance carrier; that Latsch stated to Kretschman that she should get her application and paperwork in by Christmas, 1993. However, the County noted that Kretschman waited four more weeks beyond Christmas, 1993 before she made her formal application.

The County argued that after Christmas, 1993, none of the delays in getting coverage that Kretschman experienced were directly or completely attributable to the County. In this regard, the delay in the effective date of benefits was in large part due to the slow response of Kretschman's therapist and due to the fact that both Kretschman and her therapist had initially indicated that Kretschman's disability was job-related, causing confusion regarding whether this was a Worker's Compensation claim or not. The County further contended that Kretschman did not actually qualify for disability benefits until March 28, 1994, when all of the correct information required by UWG had been received by it. Thus, the County argued that it could not predict either the time it would take to process Kretschman's claim or the outcome, as the County has no control

over either of these matters. Therefore, the County urged that the grievance must be denied and dismissed in its entirety.

Reply Briefs:

Union:

The Union contended, contrary to the County, that making salary continuation benefits merely available for employees is insufficient to meet the County's contract obligations. Thus, the Union argued, a separate legal action against the insurance carrier would not lie to gain a proper recovery for Kretschman because the harm Kretschman suffered was attributable to the County's negligence.

The Union discounted the County's argument that as a Registered Nurse Kretschman should have known a physician's statement was required for approval of her salary continuation benefits. The Union asserted that had UWG received a correct application from Kretschman in December, 1993, Kretschman would have timely received benefits. The Union asserted that Kretschman spoke to Latsch, the on-site Employer representative, knowledgeable on the subject of salary continuation benefits, and reasonably relied on Latsch's advice. Thus, in the Union's view, Kretschman's reliance upon Latsch's information to her detriment requires a make-whole remedy for Kretschman in this case.

County:

The County noted that the contract does not specify that it has the duty to inform employees of benefits. Nor does the contract state that the County is responsible for giving accurate employee benefits information. The County argued that Kretschman was not misinformed by any of the County's agents. Rather, the County asserted, Kretschman was negligent in pursuing her benefits.

The County pointed out that in January, 1994, McCarthy actually corrected Kretschman's application regarding the Workers' Compensation issue. The County noted that even if Kretschman had been eligible for salary continuation benefits as of December 27, 1993, she did not submit her application for another month. As Kretschman was not approved by the insurance company as totally disabled until March 28, 1994, she could not have received salary continuation benefits prior to this time. Finally, the County urged that no one in the County's hierarchy had actually assured Kretschman, either during or after her leave, that salary continuation benefits could be made retroactive for a period of time when she was still on the County's payroll (November 15, 1993 to April 3, 1994). In all of the circumstances, the County urged that the grievance must be denied and dismissed in its entirety.

DISCUSSION:

I note that Section 14.06 states that ". . . there shall be available to employees . . . a salary continuation insurance plan. . . ." Section 14.06 also states the circumstances under which such a plan will become and remain effective, what will occur should the conditions precedent for the maintenance of the plan fail, and when Section 14.06 shall be subject to renegotiation. Article XIV, Section 14.06, does not expressly require the County to administer the salary continuation benefit plan. Section 14.06 contains no assurance or guarantee that the County will properly instruct employees regarding their benefits, that the County will be responsible for any errors it makes in such instruction, or that the County will be responsible for failing to check employee applications for errors prior to forwarding them to the insurance carrier for approval or denial. Thus, there is no express contractual reference to any County obligation or responsibility to give employees information regarding salary continuation insurance benefit or to administer this benefit.

The question then arises whether such duty or responsibility should be implied under the terms of the effective labor agreement. On this point, the record failed to show any portion of the agreement which could support such an implied obligation. Furthermore, the Union offered no evidence to show that the County had ever voluntarily shouldered these responsibilities: The Union offered no proof of past practice or bargaining history to show that the parties had ever agreed that the County should be responsible for correctly informing employees of their benefits and properly administering contract benefits. Thus, there is no intrinsic or extrinsic evidence on this record to support a conclusion that the County breached an implied duty to Kretschman.

The Union argued that because Kretschman relied to her detriment upon incorrect information given to her by a County agent, the County should therefore make Kretschman whole.

In this case, the contract does not support the Union's equitable arguments. The facts in this case show that Kretschman made errors and delayed in submitting the required paperwork. In this regard, I note that Ms. Kretschman admitted that she may have told Janet Latsch the wrong date for the commencement of her leave of absence. Based upon this, Latsch may have therefore given Kretschman an incorrect date for submitting her application for salary continuation (STD) benefits to Badger Prairie Health Care Center. It is also significant that Latsch told Kretschman that her therapist's signature might be insufficient and that a doctor's signature might be required by the insurance carrier. Kretschman also admitted that thereafter, she did not submit her application for STD to her therapist until the end of December, 1993, despite the fact that Ms. Latsch had advised Kretschman to get her paperwork "in" by Christmas, 1993.

On January 21, 1994, Risk Management Assistant Patty McCarthy sent Kretschman's disability claim form to UWG. 6/ Because Kretschman and her therapist had filled out the forms incorrectly, UWG questioned whether Kretschman should have applied for Worker's Compensation, rather than short term disability. On February 11, 1994, UWG agent Jorgenson called Kretschman and told her that she should have seen a physician rather than a therapist and

6/ I note that at no time did McCarthy have authority to make any assurances regarding the effective date of salary continuation benefits to Kretschman because McCarthy is not an employee or agent of UWG.

that Kretschman should have sent in her disability application form immediately upon commencing her leave of absence. Kretschman admitted that she delayed trying to get a physician to sign the forms for her after having been advised of this problem by Jorgenson on February 11th. It was not until February 22, 1994 that Kretschman's attending physician, Dr. Miezio, signed and submitted the required "attending physician's statement" for Kretschman. UWG received that form on February 28, 1994. UWG thereafter requested more information from Dr. Miezio on March 9, 1994 which Dr. Miezio did not submit until March 28, 1994. On the next pay day, April 4, 1994, Kretschman began receiving salary continuation benefits from UWG.

The summary of the facts stated here, clearly demonstrates that Kretschman delayed and made errors in submitting and processing her claim for salary continuation benefits. The delays and errors committed from November, 1993 to February 28, 1994 are substantially attributable to Kretschman, not to the County. These facts also tend to undermine the Union's argument that Kretschman reasonably relied on County actions and statements and that Kretschman's actions and reactions thereto were reasonable. By the clear terms of the plan, Kretschman could not receive salary continuation benefits until after UWG had approved her application. Approval or denial of benefits was the exclusive province of UWG. The County did not have ultimate control over this process. 7/ The fact that the County also made errors in processing Kretschman's claim does not require a conclusion that the County must restore Kretschman's leave banks for leave she used and was paid for in 1993-94. All employees, including Kretschman, have a duty to pursue their benefits vigorously and to get as much information as possible in order to assure they receive benefits if they are entitled to them under the terms of the benefit plans.

There is no reason to disbelieve Kretschman and Pearson's statements at the instant hearing that they did not receive salary continuation insurance booklets from UWG. In addition, I credit Kretschman that she did not receive the November 1, 1993 memo regarding policies and procedures for leaves of absence from BPHCC. It is also possible, but far less likely, that Kretschman failed to receive the November 26, 1991 memo from the County regarding the necessity for BPHCC employees to re-apply for short term and long term disability insurance with UWG. 8/

7/ I am troubled by UWG's delay in approving salary continuation benefits for Kretschman from February 28, 1994 through March 28, 1994. This one-month delay was not Kretschman's fault. Although I have no jurisdiction over UWG, it is my opinion that UWG should have granted Kretschman salary continuation benefits retroactively, beginning February 28, 1994. It seems to me insurance companies have a financial incentive to delay approval of employee benefits on technical grounds so as to avoid their responsibility to timely pay claims that should otherwise be covered. In such cases, the employer is the only party that has sufficient leverage with the insurance carrier to insist upon the timely and fair processing of employee claims. I note that the record failed to show that the County made any efforts on Kretschman's behalf in this area.

8/ It is significant that Kretschman applied for short term and long term disability coverage

This evidence, however, is insufficient to require a ruling in favor of the Union, especially in light of Kretschman's admission that she never attempted to call UWG or to contact anyone in the Risk Management Department regarding what she should do in order to timely receive salary continuation benefits. Even assuming a reliance theory is applicable here, in the circumstances of this case, it was not reasonable for Kretschman to rely upon Latch's statements or McCarthy's statement when other better sources of information were available to Kretschman.

The disturbing factual situation of this case demonstrates that there are some injuries that cannot be reasonably foreseen. In addition, this case also proves true the principle that most collective bargaining agreements do not address and provide a remedy for every industrial wrong. Thus, both employers and unions have an obligation to assist employees in understanding and using all of their benefits. Employees also have a responsibility to make sure they are fully aware of their rights and obligations regarding their benefits and that they timely apply for the benefits they wish to receive.

with UWG by properly submitting a timely application on December 11, 1991. It is likely, therefore, that Kretschman received some form of communication regarding the necessity to re-apply for such benefits with the new carrier, UWG, before she submitted her application to UWG, two days before the deadline for submission..

Therefore, based upon the relevant evidence and arguments in this case as well as the specific facts and circumstances proven herein, 9/ I issue the following

AWARD

The Employer did not violate Article XIV, Section 14.06 of the contract. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 6th day of May, 1996.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

9/ I disagree with the County that because Kretschman was a Registered Nurse she should have somehow had greater knowledge regarding salary continuation benefits. This argument is simply illogical and not based upon any fact of record.