

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 CITY OF SOUTH MILWAUKEE :
 (DEPARTMENT OF PUBLIC WORKS) : Case 82
 : No. 50342
 and : MA-8219
 :
 MILWAUKEE DISTRICT COUNCIL 48, :
 AFSCME, AFL-CIO :
 :

Appearances:

Mr. Joseph Murphy, City Attorney, City of South Milwaukee, 2013 14th Podell, Ugent & Cross, by Ms. Monica Murphy and Mr. Al Ugent, (on the

Avenue brief)

ARBITRATION AWARD

According to the terms of the 1990-93 collective bargaining agreement, the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them regarding whether Thomas Nowak should have received 18 weeks of short term disability pay under Article XIV, Sec. 1(f). A hearing was held on March 21, 1994 in South Milwaukee, Wisconsin. No stenographic transcript of the proceedings was taken. The parties submitted initial briefs prior to June 8, 1994. The City then submitted its post-hearing reply brief on June 8, 1994. The Union advised the undersigned on June 10 that it would not file a reply brief and the record was closed.

Issues:

The City submitted two procedural issues to which the Union would not stipulate, as follows:

1. Whether the grievance was timely filed and processed.
2. Whether Thomas Nowak had standing to file the grievance on or about July 13, 1993.

The parties stipulated that in the event the undersigned reaches the substantive issue herein after first dealing with the procedural issues, the undersigned should then determine the following stipulated (substantive) issue:

3. Is Thomas Nowak entitled to 18 weeks of short term disability pay under Article XIV, Sec. 1(f), of the collective bargaining agreement?

Relevant Contract Provisions:

ARTICLE XIV

Section 1 - Life And Long-Term Disability Insurance

The Municipality shall provide Group Life Insurance for State and Local Government Employees administered by the State of Wisconsin Department of Employee Trust Funds which includes the following:

- (a) Basic Coverage in an amount equal to the employee's annual earnings reported to the Wisconsin Retirement System rounded to the next higher thousand. The Municipality shall pay the full premium for basic coverage.

- (b) Optional Supplemental Coverage equal to 100% of employee's basic coverage. The Municipality shall pay 25% and the employee 75% of the premium for supplemental coverage.
- (c) Optional additional coverage equal to 100% of the employee's basic coverage. The employee shall pay 100% of the premium for additional coverage.
- (d) Accidental Death and Dismemberment Coverage is provided for in the Plan under the basic, supplemental and additional coverages.
- (e) Optional employee spouse and dependent coverage. The employee shall pay 100% of the premium for spouse and dependent coverage.
- (f) The Municipality shall provide weekly indemnity of \$120.00 per week for 18 weeks, payable after the employee's sick leave accumulation has been dissipated. The Municipality shall pay 100% of the premium for weekly indemnity. Upon expiration of the weekly indemnity period the City shall provide for group long-term disability insurance which provides 50% of salary for a maximum period of 12 months. The City shall pay 100% of the premium for the initial policy. The employee shall be responsible for payment of premium increases thereafter.

. . .

Stipulated Facts:

1. January 9, 1990 was Thomas Nowak's last day working on the job.
2. Nowak underwent knee surgery for a work-related injury on January 10, 1990.
3. Nowak collected Workers' Compensation benefits until January 29, 1991 and received a permanent partial payout pursuant to the terms of Joint Exhibit 5. Due to the restrictions contained in Joint Exhibit 5, Nowak was unable to perform his job duties as a Waste Water treatment plant operator.
4. On June 3, 1991, Nowak had exhausted all Worker's Compensation, vacation and sick leave benefits and he was so advised pursuant to the terms of Joint 3A.
5. On June 26, 1991, Nowak was sent and received Joint Exhibit 3B.
6. On or about July 12, 1991, Nowak received his final paycheck in the amount of \$6,581.11. That figure was calculated as shown on Joint 3C and was based upon accumulated sick leave and vacation.
7. On March 7, 1991, Nowak applied for Employe Trust Fund Disability pay (Sec. 40.63).
8. Nowak's ETF application was denied on May 9, 1991 (Joint Exhibit 4).

9. Nowak appealed this denial and the appeal was denied on May 7, 1993 (Joint Exhibit 4A).
10. Nowak applied for short term disability pay on May 11, 1993 (Nowak had requested and received the application form on April 30, 1993). (Joint Exhibit 6).
11. The City did not respond to Nowak's May 11, 1993 short-term disability application prior to his filing the instant grievance.

Background:

On April 16, 1987, Thomas Nowak was injured at work. Nowak made a Workers' Compensation (WC) claim which was processed and on February 26, 1991 the WC insurance carrier issued a letter which stated inter alia, that a permanent partial payout would be made to him and that he was considered permanently partially disabled:

. . .

Based on Dr. Robbin's final medical report of January 29, 1991, you have sustained 20 percent permanent disability to your right knee as a result of your work-related injury on April 16, 1987. This entitles you to 85 weeks of permanent partial disability at the rate of \$117.00 per week, or \$9,945.00.

As a result of your injury, you lost 75 weeks from work for which \$23,968.68 was due. The total due on this claim is \$33,913.68 of which \$24,680.63 was previously paid. Our check for the balance of \$9,233.05 is attached. Also attached is form WC-13.

. . .

On June 3, 1991 Nowak had exhausted all WC benefits and the City sent Nowak the following letter which read in relevant part as follows:

. . .

The clerk's office has informed the Wages, Salaries and Welfare Committee of the Common Council that your worker's compensation, vacation and sick leave have all been fully used. You are therefore currently on an unapproved leave of absence.

Correspondence from your doctor has stated that you can no longer do your duties in the Waste Water Department. If your doctor has changed his opinion and now believes you can return to work without restriction, please present yourself with that statement and an Authorization for Release of your Medical Records at the office of the City Administrator and he will immediately schedule a medical examination for you.

The medical authorization must allow the doctors, to whom the City refers you for evaluation, access to your complete medical records. You must return to work within five (5) days or your employment will, regretfully, be terminated.

. . .

On June 26, 1991, the City sent Nowak the following letter offering him a PSO opening (enclosing the job description therefor) which Nowak refused:

. . .

At the direction of the Wages, Salaries, and Welfare Committee, the Clerk's office has held up your final payment check, which constitutes the completion of your termination, pending your response to this letter.

There is currently an opening for a Public Safety Officer in the Police Department. This is a part-time position and has very limited benefits, as you know. The job description for the position is enclosed. If you are interested in accepting this position, we would offer you an opportunity to transfer to, qualify for and fill the position.

Public Safety Officer's do not have full paid health insurance. You will have to pay your own health insurance on or before July 1, 1991 to continue it or in response to the Clerk's letter which I believe is being forwarded to you regarding your conversion rights.

In the event that you are interested in accepting this position as Public Safety Officer, please present yourself along with a letter from your doctor fully describing any and all restrictions you have at the City Administrator's office on or before July 8, 1991. In addition to indicating your interest in accepting the job and providing proof from your doctor that your (sic) are capable of doing the work, you will have to demonstrate to the Police Department staff that you are qualified for the work.

In the event that you do not respond to the City Administrator by July 8, 1991, we will assume that you have no interest in this position and will proceed to process your termination.

. . .

On July 12, 1991, having heard nothing from Nowak, the City terminated him and sent Nowak a final payout of his accumulated sick leave and vacation in the amount of \$6,581.11. Nowak then applied for an Employee Trust Fund (ETF) disability. ETF then processed that case under its procedures. At some point, probably before Nowak filed for ETF disability (in early March, 1991) he spoke to representatives of the City regarding his options.

Facts:

Grievant Nowak stated that he believed that he had to wait until the State of Wisconsin ruled on his application for disability payments from the Department of Employee Trust Funds before he could apply for Article XIV short-term disability payments from the City. Nowak stated that he concluded the above after having had conversations with City Administrator Norbert Theine and City employe Jackie Johnson. The first conversation was with Johnson alone, perhaps sometime in early April, 1991. Nowak stated he spoke to Johnson at sometime prior to April 10, 1991 about the benefit options Nowak would have following his 1987 accident at work. Nowak stated that he asked Johnson about his eligibility for short-term disability; that Johnson stated she was unsure regarding this because this had never happened before. Jackson stated that she would have to go over it with then-City Administrator Theine before she could respond.

Sometime after this conversation but before April 10, 1991, Nowak met with Johnson and Theine. Theine and Nowak's versions of this conversation are

in conflict. Under direct questioning, Nowak stated that during this conversation, Thiene went over Nowak's options -- Social Security Disability and Wisconsin Retirement Fund Disability. Nowak stated that Thiene told him to apply for SSI disability; that Thiene also requested that Nowak send a letter from his doctor stating whether Nowak could return to work at the Waste Water plant; that Thiene also told Nowak to apply for ETF disability retirement. Nowak stated that he did not apply for Article XIV(1)(f) short-term disability pay because he thought the ETF decision would go back to the date of its filing and he believed that he could not get both short-term disability and ETF disability payments.

Under cross-examination, Nowak admitted that he never checked the language of Sec. 40.63, Stats. regarding ETF disability prerequisites. Nowak stated that he never spoke to Thiene or consulted with the Union about his ETF appeal or whether he should appeal the initial denial of disability by ETF. Nowak also stated that he never asked the Union about his eligibility for short-term disability pay prior to April 30, 1993. Nowak also admitted that no one actually told him that he could not receive both ETF disability and short-term disability. Nowak stated that he assumed that if he were denied ETF he would be paid short-term disability and that he could not apply for the latter benefit until he was finally denied the former benefit. Nowak admitted that there was nothing in the labor agreement to support his assumptions, and that he never appealed the last written denial of ETF benefits. Nowak also admitted on cross-examination that he was actually unsure whether or not he had even talked to Thiene about short-term disability.

Former City Administrator Norbert Thiene testified that he never advised Nowak what he should or should not do regarding Nowak's application for benefits. Thiene stated that he did go over Nowak's options with him regarding Social Security disability and ETF disability. Thiene stated he did not recall discussing short-term disability with Nowak at this time. Thiene stated he asked about Nowak's ability to return to work at his old job. Thiene recalled that at the time of their discussion, there was then no word from Nowak's doctor whether Nowak would be able to return to work and Thiene asked Nowak for a letter from his doctor on this issue. Thiene was unsure whether Worker's Compensation had by then decided that Nowak was 20% permanently disabled. Thiene stated that in his view, Nowak was not entitled to STD benefits because he had received WC benefits. Thiene stated that Worker's Compensation benefits, triggered by an injury on the job, were different from the contractual short-term disability benefits which were triggered by exhaustion of accumulated sick leave and vacation.

ETF, having denied Nowak's claim initially, issued the following written decision on Nowak's appeal, dated April 29, 1993:

. . .

Hearing was held in Madison, Wisconsin April 16, 1993.
Appearances: Applicant in person. Department of
Employee Trust Funds by Gauche Eisenbrandt, Attorney.

On March 7, 1991 the Department of Employee Trust Funds received a Disability Estimate/Application form from the appellant requesting benefits under Section 40.63, Stats. On May 8, 1991, the Department of Employee Trust Funds notified the appellant that his application for benefits under Section 40.63 has been denied and gave as the reason for such denial: "The medical evidence submitted did not establish that you are disabled within the meaning of the law."

It is from this determination that the appellant has

made timely appeal.

In issue: Whether the appellant is entitled to benefits under Section 40.63. On this issue, the hearing examiner makes the following:

PROPOSED FINDINGS OF FACT

The injury on which the appellant predicates his request for benefits under Section 40.63 occurred on April 16, 1987. On that date, during the course of his employment by the South Milwaukee, he tripped over an electrical conduit and fell on to his right knee. He was initially treated for an injury to that knee by Dr. Charles Theisen, his family physician, who referred him to Dr. James Guhl, an orthopedic specialist. He subsequently had two surgeries performed to his right knee by Dr. Guhl and by Dr. Stone. Following the surgeries he did return to work for the City of South Milwaukee. However because he did have physical restrictions imposed upon him by his treating orthopedic physicians, such as lifting limited to 20 pounds and no climbing of ladders, the City of South Milwaukee terminated his employment. The appellant's last day of work for the City of South Milwaukee was January 9, 1990.

Section 40.63 requires that in order to qualify for benefits under this section, the appellant must have a statement from at least two licensed and practicing physicians approved by or appointed by the department to the effect that he is disabled to the extent that he is unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued or indefinite duration. (Section 40.63 (b) and Section 40.63 (d)).

The appellant has been unable to furnish such certification from two physicians approved by the department. Dr. Stone in his medical report dated February 26, 1991 states that it is his opinion that the appellant is totally and likely to be permanently disabled for the performance of any of the duties of any position involving substantial gainful activity. This doctor's diagnosis of the applicant's condition is a right knee patella femoral arthritis. Dr. James Wood in his report dated April 18, 1991 states that the appellant is and is not (sic) totally and likely to be permanently disabled. He refers to his narrative report as an explanation of his opinion. Dr. Wood states in his report "With regards to this patient's present employer and employment, with the City of South Milwaukee, Water Treatment Plant: I do not feel that he can go back to work unless he is doing desk type of work only. This is permanent in nature." Dr. Paul Sienkiewicz was the third doctor to render an opinion in this case. He stated that the applicant was not totally and likely to be permanently disabled for the performance of the duties of any position involving substantial gainful activity.

Further, the facts of the appellant's activities since his termination by the City of South Milwaukee demonstrate that he would be able to perform some type of job not involving heavy physical activity or even light physical activity. He is presently a student at the Milwaukee Area Technical College carrying 12 credits. He has a satisfactory grade point average. He states he is able to attend school 12 hours per week and do approximately 24 hours of homework. This demonstrates that he does have the mental capacity to perform work not requiring physical activity. He also received 26 weeks of Unemployment Compensation benefits. In order to receive such benefits, he must certify that he is able to perform in the labor market.

Although the appellant is not able to perform his former duties for the City of Milwaukee, the injury which he sustained does not preclude his performance in other sections of the labor market. The medical reports and the facts of the appellant's activities following the injury, clearly demonstrate that the appellant is not totally and likely to be permanently disabled for the performance of the duties in any position involving substantial gainful activity.

PROPOSED ORDER

The determination of the Department of Employee Trust Funds to the effect that the appellant is not eligible for benefits under Section 40.63 herein be and same hereby is affirmed.

Nowak appealed the above-quoted ETF decision and that appeal was denied on May 9, 1993. On April 30, 1993, Nowak received an application form from the City for short-term disability benefits which he completed and delivered to the

City on May 11, 1993. The City did not respond to Nowak's application. Nowak filed the instant grievance seeking short-term disability pay. In response to the grievance, City Administrator John Syndergaard wrote Nowak a letter dated November 11, 1993 which read in relevant part as follows:

. . .

After significant consideration, we have determined you are not eligible for short-term disability benefits at this time. Since you received worker's compensation, additional benefits under short-term disability claims are disallowed. The intent of providing disability benefits is to offer assistance as an alternative to worker's compensation but not in duplication of each other. In incidents where worker's compensation applies, short-term disability benefits will not.

. . .

At no time during the processing of the grievance did the City question, in writing, Nowak's standing to file a grievance or the timeliness of the grievance.

Positions of the Parties:

Union:

The Union urged that the City's timeliness and standing arguments must be rejected because they were raised for the first time at the instant hearing, after the City had repeatedly discussed the merits of this case with the Grievant and his Union representatives. In any event, the Union argued, the Grievant, as a former employe of the City has standing to pursue a grievance which arose out of that employment. By itself failing to timely raise these defenses, the City has prejudiced the Union and the Arbitrator should rule that the City thereby waived its right to raise these defenses.

On the merits of the case, the Union asserted that the labor agreement does not preclude payment of short-term disability (STD) benefits to employes who have exhausted their WC benefits. The Union noted that in Article XIV, Section 1, the City did not use limiting language such as that found in Article XI, which states that Duty Incurred Disability Pay is available in lieu of WC benefits for up to one year. Absent specific language in Article XIV making STD benefits unavailable to those who have received and exhausted their WC benefits, such a forfeiture should not be implied, the Union argued. Rather, because Article XIV only requires that sick leave to be dissipated before STD benefits may begin, Nowak was clearly entitled to those benefits as of June, 1991.

The Union observed that Nowak would not have received duplicate benefits because by the time he had exhausted his sick leave he was no longer receiving WC benefits. Thus, Nowak's case was one where STD benefits were appropriate.

City:

The City argued that Article VII, Section 2 of the labor agreement allows employes to file grievances "within 20 days after the event giving rise to the complaint." The City observed also that Article XIV gives "employes" the right to request and receive short-term disability (STD) pay. The City noted that Nowak was not an employe when he filed the instant grievance and that to be timely, he should have requested STD pay in June or July of 1991, when he knew he had exhausted WC and his vacation and sick leave had run out.

The City contended that Nowak's argument that he relied on advice from City officials to his detriment in the instant case is without merit. The City pointed out in this regard that Nowak admitted he never spoke to City officials about whether he should appeal ETF's initial rulings; that Norbert Thieme (then City Administrator) specifically denied Nowak's claims that Thieme had advised Nowak to seek an ETF disability; and that Nowak's ETF appeal was initially denied on May 9, 1991. The City urged that the Union failed to prove that the City had done anything to delay Nowak's application for STD benefits which Nowak was only arguably entitled to in June of 1991. Therefore, the City asserted, the grievance must be found untimely and dismissed on that basis. In addition, the City contended, because Nowak has not been an employe of the City since July, 1991, he lacked standing to bring the instant grievance and on this separate ground, the grievance should be dismissed.

Regarding the merits of the case, the City argued that, by its express terms, Article XIV benefits are available only to "employes." In addition Article XIV benefits are designed to assist employes who are not entitled to receive WC benefits. The City observed that Article XI covers employes who are eligible for WC benefits and that when these contract provisions are read in the context of Sec. 102.03(2), Stats., the STD and WC benefits become mutually exclusive. The City quoted from the Statutes as follows:

. . . Where such conditions exist, the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer, any other employee of the same employer and the worker's compensation carrier. . . .

The City argued that even if Nowak had properly applied for and received STD benefits, his WC benefits would have been decreased by the amount of STD benefits received. The City asserted that Nowak was 709 days late (July 12, 1991 plus 20 days in August 1, 1991) in filing the grievance and that when he filed the grievance Nowak had not been an "employee" eligible for STD benefits for two years. The City urged denial and dismissal of the grievance in its entirety.

City's Reply:

The City urged that because the Union failed to raise any objection at the instant hearing to the City's timeliness defense, the City did not offer evidence which would have showed that it raised the timeliness issue prior to hearing. The City further asserted that the legal concepts of estoppel and waiver do not apply where, as here, the labor agreement at Article VII, Section 1, requires all time extensions and waivers of timeliness to be in writing. Hence, the City never voluntarily and intentionally relinquished its right to raise timeliness as a defense and the Grievant never reasonably relied to his detriment on the City's alleged failure to previously raise timeliness as a defense. For these reasons and those stated in its initial brief, the City sought an Award denying and dismissing the grievance.

Discussion:

The initial questions for determination in this case are whether Nowak had standing, as a terminated employe of the City, to file and pursue this grievance and whether the grievance was timely filed by Nowak. On the latter point, I note that there is strong arbitral precedent to show that timeliness may be raised at any time during the pendency of the grievance. In addition, I note that the City's actions in refusing to process and respond to Nowak's STD application, support a conclusion that the City took the position early on that it had no obligation to process Nowak's STD claim. Finally, there was no showing that pursuant to Article VII, the City had expressly waived its right to raise a timeliness defense or that it had ever mutually agreed, in writing,

to extend Nowak's time for filing a grievance thereon.

Thus, in my view the City's timeliness and standing issues are properly before the Arbitrator and they must be determined. Based upon Nowak's admissions under oath in this case and other testamentary and documentary evidence, I find that Nowak did not timely pursue STD pay until long after his termination and that Nowak's grievance must be dismissed.

Under Article VII, Section 1, a grievance is defined as "only matters involving interpretation, application or enforcement of the terms" of the labor agreement. Section 2 also states that the employe must initiate his/her grievance:

. . . within twenty (20) calendar days after the event giving rise to the complaint occurred, or the employe could reasonably have been expected to have knowledge of it.

In addition, Section 1 of Article VII states:

All time requirements set forth in this Article may be waived or extended upon mutual written agreement of the parties.

The facts of this case show that Nowak was injured on the job in 1987. Thereafter, he received WC benefits. On March 7, 1991, Nowak applied for ETF disability pay. Nowak was then receiving WC benefits and he continued to receive these benefits until June 3, 1991, approximately one month after his appeal of the initial denial of ETF benefits had been denied.

Nowak stated herein that sometime prior to April 10, 1991, City officials advised him to wait until he had heard whether he would receive ETF benefits before applying for STD pay under Article XIV. The record does not support Nowak's claim. I note in this regard that neither former City Administrator Thiene nor Ms. Jackson so advised Nowak on or before April 10, 1991, according to Nowak's testimony. Nowak admitted that no one actually told him that he could not receive ETF disability and STD pay. Nowak admitted that there was no support for his belief in the language of the labor agreement. Nowak also admitted that he was unsure whether he ever talked to former City Administrator Thiene about STD pay/benefits. Furthermore, Nowak admitted that he never spoke to his Union representative regarding his eligibility for STD pay or about his ETF benefits appeal. Nowak also admitted that he never spoke to Thiene about his ETF benefits appeal. Finally, Nowak admitted that he never consulted the Wisconsin Statutes to check out the legal prerequisites for receiving ETF benefits.

In addition, former City Administrator Thiene stated herein that he never advised Nowak what to do regarding his application for benefits; and that he did not recall talking to Nowak about STD benefits. It is significant that the City clearly notified Nowak, by its June 3 and June 26, 1991 letters, that Nowak had exhausted his sick leave (as well as his other accumulated benefits).

Article XIV, Section 1(f) when read along with Article VII shows that Nowak then had an obligation, at the time that his sick leave accumulation had "dissipated," to file a claim for STD pay. Nowak did not do this and the City then terminated Nowak's employment on July 12, 1991 without his objection. The City sent Nowak the final payout of all of his accumulated sick leave and other benefits at this time. At the very most, Nowak should have filed his request for STD benefits within a reasonable time of his receipt of his final payout. Yet, Nowak waited approximately one year and nine months before filing for STD benefits.

One year and nine months is an unreasonably long period of time to wait before filing for such a benefit which is expressly available only to "employees." Had he read Article XIV of the labor agreement, Nowak should have reasonably concluded that a claim for STD benefits should be made upon dissipation of accumulated sick leave. Yet, according to his testimony, Nowak chose to go a different route -- to seek ETF benefits -- based solely upon his own thoughts and beliefs. In all of the circumstances of this case, I find that Nowak failed to pursue an STD claim within a reasonable time of his dissipation of his accumulated sick leave and that Nowak waited to file his STD claim until long after he was no longer a City employe. Therefore, Nowak's grievance was not timely filed and he lacked the necessary employe standing to pursue the grievance, the City having reasonably concluded long before that Nowak had waived his right to pursue such a claim.

I therefore issue the following

AWARD 1/

1/ Having dismissed this grievance on procedural grounds, I have not reached the merits of this case.

The grievance was not timely filed and processed. Thomas Nowak lacked standing to file the grievance on or about July 13, 1993.

The grievance is therefore denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 18th day of August, 1994.

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