

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

RACINE PROFESSIONAL EMPLOYEES  
ASSOCIATION

and

CITY OF RACINE

Case 474  
No. 53215  
MA-9274

Appearances:

Hanson, Gasiorkiewicz & Weber, S.C., Attorneys at Law, 514 Wisconsin Avenue, Racine, WI 53403, by Mr. Robert K. Weber, appearing on behalf of the Association.

Mr. Guadalupe G. Villarreal, Assistant City Attorney, 730 Washington Avenue, Racine, WI 53403, appearing on behalf of the City.

ARBITRATION AWARD

Racine Professional Employees Association, hereafter Association, and the City of Racine, hereafter City or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances. The Association, with the concurrence of the City, requested that the Wisconsin Employment Relations Commission appoint a member of its staff as arbitrator to hear and decide the instant grievance. The undersigned was so designated and hearing was held in Racine, Wisconsin, on December 19, 1995. The hearing was transcribed and the record was closed on February 28, 1996, upon receipt of post-hearing briefs.

ISSUE:

The parties stipulated to the following statement of the issue:

Did the Grievant file the application for his flexible account reimbursement in a timely manner?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

**ARTICLE VIII**

**GRIEVANCE PROCEDURE**

A. Definition of a Grievance: Should a difference arise between the City and the Association or an employee concerning the interpretation, application, or compliance with this Agreement, such difference shall be deemed to be a grievance and shall be handled according to the provisions herein set forth.

B. Subject Matter: A written grievance shall contain a clear and concise statement of the grievance and indicate the issue involved, the relief sought, the date the incident or violation took place, and the specific section of the Agreement involved.

. . .

K. Decision of the Arbitrator: The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract area where the alleged breach occurred. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement.

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**ARTICLE XXIII**

**INSURANCES**

A. Medical Coverages: Full-time employees shall be eligible for City paid health insurance following acceptance into the plan by the carrier. . . . The City may from time to time change the insurance carrier and/or self-fund its health care program if it elects to do so, if such change provides equivalent coverage. The revised comprehensive health plan referenced above shall become effective May 1, 1994 for all eligible members of the collective bargaining unit.

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BACKGROUND:

James Singer, hereafter Grievant, is employed by the City of Racine as the Administrative Services Manager at the Police Department. The Grievant has worked for the City for approximately 15 years.

In 1994, the City and the Association negotiated new insurance coverage which included an annual Flexible Spending Account (FSA). The FSA could be used to pay unreimbursed medical expenses incurred during the calendar year. In 1994, the amount available in the account was prorated at \$150 and in 1995, it was the full \$200.

The Grievant submitted two FSA claim forms to Wausau Insurance Company. One claim was for 1994 expenditures and the other was for 1995 expenditures. Both claim forms were dated March 31, 1995. The Grievant's reimbursement forms were date stamped as received by Wausau Insurance on May 4, 1995.

In early May of 1995, Wausau Insurance paid the grievant \$150 for 1994 FSA claims and \$200 for 1995 FSA claims. When Terry Parker, the City's Personnel Labor Relations Officer, realized Wausau Insurance had paid a claim that had been marked as received on May 4, 1995, he told Wausau Insurance that the City and Wausau Insurance had an agreement not to pay claims submitted after April 1. Parker also told Wausau Insurance that, as a result of this agreement, it was not the City's responsibility to pay the \$150 claimed by the Grievant. Parker required Wausau Insurance to repay \$150 to the City. 1/ Parker also told Wausau Insurance that, if Wausau Insurance wanted the \$150 back, then Wausau Insurance should collect from the Grievant.

In late May or early June, the Grievant received a letter from Wausau Insurance stating that the \$150 payment on the Grievant's 1994 FSA claim form had been an error and requesting that the Grievant return the \$150 to Wausau Insurance. The Grievant was also informed that Wausau Insurance would turn the matter over to a collection agency if he did not repay the \$150.

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1/ Under the FSA plan negotiated between the City and the Association, the City pays into a claims account administered by Wausau Insurance. Wausau Insurance processes the claims and pays claims from monies paid into the claims account.

Thereafter, the Grievant filed a grievance which requested, inter alia, that he not be required to repay the \$150. The grievance was denied at all steps, and, thereafter submitted to arbitration.

## POSITIONS OF THE PARTIES:

### Association

It is undisputed that, if the claim form was mailed on March 31, 1995, it would have been timely filed. The Grievant has offered credible testimony that he mailed the 1994 FSA claim form on March 31, 1995.

The envelope in which the claim form was mailed, which would have been dispositive of the issue on timeliness, was last in the possession of the City's agent, Wausau Insurance. The City has the burden of producing this envelope, or, in the alternative, establishing that the envelope was unavailable for good reason.

The Wisconsin Supreme Court has ruled that the time at which a postcard provided for service was signed and returned has no effect on the date of service (cites omitted). If the date stamp of Wausau Insurance is given any weight, it can be given no more than equal weight to the fact that the application was dated March 31, 1995.

The evidence of the mid-April conversation between Terry Parker and the Grievant does not contain any admission by the Grievant that he had filed a late claim form. Parker's testimony is not inconsistent with the Grievant's explanation that he asked Parker about the deadline because he was concerned that he had not yet received his reimbursement.

Not only is the Grievant's testimony consistent with that of Parker, it must be presumed that the Grievant, the Department Head of the Administrative Services Department for the Racine Police Department, is credible. It is more likely that Wausau Insurance Company and/or the U.S. Postal Department failed to process the claim form in a timely manner than that the Grievant has falsified his application date.

Insurance, including the FSA account, is a benefit due the Grievant under the parties' collective bargaining agreement. The dispute is substantively arbitrable insofar as it concerns the denial and/or recovery of benefits secured by the Association for its members.

Wausau Insurance is the agent of the City who administers the FSA account. If the City and/or its agent, Wausau Insurance, believed that the Grievant's claim form was untimely, the Grievant should not have been paid. The Grievant cashed the check in reliance upon the validity of his claim form. Under the principles of equitable estoppel, the fact that Wausau Insurance, the City's agent, paid the money to Singer, equally estops Wausau Insurance and the City from collection efforts.

The City must be deemed liable for benefits due the Grievant. The City's agent should be estopped from attempting to collect money from the Grievant for his 1994 FSA expenses. The Grievant should be made whole; the City should be ordered to cease and desist from all collection

efforts or ordered to indemnify the Grievant for any collection made by its agent, Wausau Insurance.

### City

The Grievant has the burden of proof to show that he complied with the 1994 FSA filing requirements. While the Grievant alleges that he mailed the applications on March 31, 1995, he does not remember where he mailed them or the time that he mailed them, except that they were mailed after work.

No evidence was presented to show when the mail was picked up or processed by the Post Office. The date received stamp, placed on the application forms by Wausau Insurance personnel on May 4, 1995, is the only concrete evidence on the issue of timeliness produced at the hearing.

Terry Parker testified that, in mid-April of 1995, the Grievant asked what the deadline was for filing for 1994 FSA benefits. When Parker explained to the Grievant that the deadline had passed, the Grievant did not tell Parker that the Grievant had already mailed the applications. Nor did the Grievant make any mention of the fact that he had not yet received his reimbursements.

The Grievant's explanation for asking Parker about the deadline is not plausible. It is plausible, however, for a person who has missed a deadline because he thought the deadline was April 15, the same as the income tax deadline.

Wausau Insurance paid the claim form in error. Wausau Insurance's independent claim against the Grievant is not within the purview of the collective bargaining agreement and cannot be resolved through the grievance process. Under Article VIII, a grievance should involve a violation of a contractual right. Article VIII limits the arbitrator's decision to the interpretation of the contract where the breach occurred.

The Grievant failed to submit his request for reimbursement in a timely manner and the grievance should be denied. In the alternative, the arbitrator should rule that the actions of the insurance carrier, Wausau Insurance, are not within the purview of the arbitrator's jurisdiction and cannot be regulated through the grievance procedure.

### DISCUSSION:

At hearing, Parker acknowledged that, if the Grievant had mailed his 1994 FSA claim form on March 31, 1995, as claimed by the Grievant, then the Grievant would have filed his 1994 FSA claim in a timely manner. The City, however, disputes the Association's assertion that the Grievant mailed his 1994 FSA claim form on March 31, 1995.

The Grievant recalls that he mailed both claim forms on March 31, 1995, at the West

Racine Post Office on his way home from work. The fact that the Grievant does not recall the

exact time that he left work on March 31, 1995, does not, as the City argues, provide a reasonable basis to discredit the Grievant's testimony that he mailed the claim forms on March 31, 1995.

Given the testimony presented herein, it is the act of mailing, and not the postmark, which is dispositive of the issue of timeliness. Thus, the City's argument that no evidence was presented to show when the mail was picked up or processed by the Post Office is not compelling.

The Association and the City have stipulated to the fact that Wausau Insurance stamped the Grievant's 1994 FSA claim form as having been received on May 4, 1995. The parties have further stipulated that Wausau Insurance did not save the envelope used to mail the Grievant's 1994 FSA claim form.

Normally, it does not take more than a month to deliver mail between Racine and Wausau, Wisconsin. However, it is not inconceivable that mail could be mislaid or misrouted by the postal service, or, indeed, by Wausau Insurance.

The date stamp of Wausau Insurance does not establish the date on which the document was mailed. 2/ Thus, while the date stamp is not inconsistent with the City's theory that the Grievant's claim forms were mailed after March 31, 1995, it does not prove this theory.

At hearing, Parker stated that, in mid-April of 1995, he had a conversation with the Grievant. According to Parker, the Grievant was in the Personnel Department to either pick up or drop off material for the Police Department. As Parker recalls the conversation, the Grievant asked Parker "What's the deadline date for filing for 1994?" and Parker responded "Well, it's April 1. If you haven't filed your claim by now, it's too late. If you want, you could probably submit a claim now, but I'm sure they won't pay it." Parker, who could not recall that the Grievant made any other statement, stated that the conversation lasted one or two minutes.

The Grievant agrees that he had a conversation with Parker in mid-April, 1995. The Grievant recalls that he asked Parker what the deadline was for filing FSA claims and Parker responded by saying April 1. The Grievant further recalls saying something about the filing deadline being tax related and that he thought the deadline was April 15, 1995.

While Parker and the Grievant do not have identical recollections of the conversation in

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2/ As the Association argues, the best evidence of the mailing date is the envelope which contained the claim form. Wausau Insurance, the City's agent in this matter, did not save this evidence.



mid-April, 1995, the two recollections are not inconsistent. Each recalls that the Grievant requested and received information on the filing deadline. Neither Parker, nor the Grievant, recalls that the Grievant made any admission that he had not yet filed his 1994 FSA claim form.

At hearing, the Grievant offered the following explanation for his conversation with Parker: following conversations with other employes, the Grievant understood that FSA reimbursements had been made within a week after a claim was submitted; it had been over two weeks since he had submitted his claim form and he was concerned that he had not yet received his reimbursement; he was unable to locate the sheet which contained the instructions for filing a claim; he wondered whether he had made the deadline and if he had time to resubmit the claim form; and he initiated the conversation with Parker because "Terry would know" the deadline date 3/.

Given the Grievant's claim that he had misplaced the instruction form for filing FSA claims, and the fact that the form does contain a reference to income tax returns, it is plausible that the Grievant was confused as to whether the filing deadline for FSA claims was April 1 or April 15 and sought clarification of the filing date from Parker. The Grievant's comments regarding the tax deadline do not, as the City argues, lead to the conclusion that the Grievant had not yet filed his 1994 FSA claim form.

The City considers it suspicious that, in mid-April, the Grievant would be considering resubmitting a claim form which allegedly had been mailed on March 31, 1995. It is plausible, however, that an employe who believed that he had not received FSA reimbursement within the normal reimbursement period would seek "insurance" by resubmitting the claim, if he could do so in a timely manner. 4/

The City considers it suspicious that the Grievant did not respond to Parker's comments by explaining that he had filed his 1994 claims in a timely manner. Parker's comments "If you haven't filed your claim by now, it's too late. If you want, you could probably submit a claim now, but I'm sure they won't pay it." are gratuitous comments because the record demonstrates that the Grievant sought information on only one point, i.e., the filing deadline. Gratuitous comments often fail to elicit a response.

The City considers it suspicious that the Grievant did not tell Parker of the Grievant's

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3/ T. at 21

4/ At hearing, the Grievant acknowledged that he did not resubmit the claim form. According to the Grievant, when Parker confirmed that the deadline was April 1, the Grievant understood that it was too late to resubmit his claim.

concern that he had not received his reimbursement in a timely manner. According to the Grievant, he decided to wait a while before checking into the status of his claim because he thought it likely that processing was tied-up with end of the year claims. Given the Grievant's testimony that he believed the normal processing time to be one week; his claim that it had been approximately two weeks since he mailed his claim; and the fact that April 1 was the filing deadline, it is plausible that the Grievant would have considered it premature to voice a concern about the delay in reimbursement.

Parker testified that the Grievant was in the Personnel Department on City business and "just happened" to go into Parker's office. This testimony indicates that the Grievant's inquiry was off-the-cuff. The off-the-cuff nature of the inquiry is consistent with the overall tenure of the Grievant's testimony, *i.e.*, while the Grievant was concerned about the delay in reimbursement at the time of his conversation with Parker, the concern was not of sufficient magnitude to compel further action upon the part of the Grievant. Contrary to the argument of the City, neither the timing of the Grievant's conversation with Parker, nor the content of the Grievant's conversation with Parker, provides a reasonable basis for discrediting the Grievant's claim that he mailed his 1994 FSA claim form on March 31, 1995.

### Summary

The Grievant has testified that he mailed his 1994 FSA claim form on March 31, 1995. The record does not demonstrate otherwise. The undersigned is satisfied that the Grievant filed the application for his flexible account reimbursement in a timely manner.

Parker's testimony demonstrates that FSA was part of the employe health insurance plan which was negotiated into the 1994-95 collective bargaining. 5/ The employe health insurance plan is provided to employes by Article XXIII, Section A.

Under the provisions of Article VIII, a difference concerning "compliance" with the collective bargaining agreement is a grievance. By asking that the City honor the Grievant's 1994 FSA reimbursement request, the Grievant is seeking the City's compliance with the collective bargaining agreement. 6/ Contrary to the argument of the City, this dispute does involve a grievance within the meaning of the parties' collective bargaining agreement.

In order for the City to be in compliance with Article XXIII, Section A, the City must provide Wausau Insurance with sufficient monies to pay legitimate claims. By requiring Wausau Insurance to repay the City the \$150 that Wausau Insurance paid to the Grievant on his 1994 FSA

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5/ T. at 29.

6/ See Joint Exhibit #2.

claim, the City violated its contractual obligation to provide sufficient monies to pay legitimate FSA claims.

Based upon the above, and the record as a whole, the undersigned issues the following

AWARD

1. The Grievant filed the application for his flexible account reimbursement in a timely manner.
2. The Grievant is contractually entitled to be reimbursed \$150 for 1994 FSA expenses. 7/
3. The City is to immediately direct its agent, Wausau Insurance, to cease and desist from taking any action against the Grievant to collect the \$150 which has been paid by Wausau Insurance in reimbursement of the Grievant's 1994 FSA claim. In the event that Wausau Insurance collects the \$150 from the Grievant, the City is to immediately make the Grievant whole for any loss suffered as a result of this collection.

Dated at Madison, Wisconsin, this 31st day of July, 1996.

By Coleen A. Burns /s/  
Coleen A. Burns, Arbitrator

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7/ Although the Grievant claimed a \$200 reimbursement from the 1994 FSA, the parties agree that, due to pro-ration, the Grievant was entitled to \$150.