STATE OF WISCONSIN
BEFORE THE ARBITRATOR

In the Matter of the

Arbitration of a Dispute Between

LA CROSSE CITY EMPLOYEES UNION, LOCAL 180, SEIU, AFL-CIO, CLC

and

THE CITY OF LA CROSSE

Case 287 No. 54407 MA-9670

(Income Continuation Insurance)

APPEARANCES

Davis, Birnbaum, Marcou, Seymour & Colgan, Attorneys at Law, 300 North Second Street, Suite 300, Post Office Box 1297, La Crosse, WI 54602-1297 by **Mr. James G. Birnbaum**, appearing on behalf of Local 180.

City of La Crosse Personnel Department, City Hall, 400 La Crosse Street, La Crosse WI 54601-3396, by **Mr. James W. Geissner**, Personnel Director, appearing on behalf of the City of La Crosse.

ARBITRATION AWARD

LaCrosse City Employees Union, Local 180, SEIU, AFL-CIO, CLC (hereinafter referred to as the Union) and the City of La Crosse (hereinafter referred to as the Employer or the City) selected Daniel Nielsen, a member of the WERC staff, to act as arbitrator of a dispute over the City's practice of charging sick leave balances for periods of absence also covered by disability insurance. The undersigned was designated. A hearing was held on February 28, 1997 in La Crosse, Wisconsin, at which times the parties were afforded full opportunity to present such testimony, exhibits, stipulations, other evidence and arguments as were relevant to the dispute. No stenographic record was made. The parties submitted post-hearing briefs and reply briefs, which were exchanged through the undersigned. Objections over the contents of the City's reply brief were resolved on May 7, 1997, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

ISSUE

The parties were unable to agree on a framing of the issue and agreed that the arbitrator should frame the issue in his Award. The issue may be fairly stated as follows:

Did the City of La Crosse violate the collective bargaining agreement when it required the grievant to use up all of his paid leave before receiving Income Continuation Insurance benefits? If so, what is the appropriate remedy?

II. RELEVANT CONTRACT LANGUAGE

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ARTICLE 2
GRIEVANCE PROCEDURE

Matters involving the interpretation, application or enforcement of this contract shall constitute a grievance under the provisions set forth below:

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The arbitrator shall not add to, or subtract from the terms of this agreement.

The City and the Union agree that the decision of the arbitrator shall be final and binding on both parties.

The grievance procedure set forth herein shall be the exclusive complaint of any employee as to any matter involving the interpretation or application of this agreement.

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ARTICLE 5
INCOME CONTINUATION INSURANCE

In 1990, the City will provide income continuation insurance. The City's premium contribution shall be limited to the employer's share of the cost as authorized by State Statute Sections 40.61 and 40.62. In the event that the required participation by employees is not reached, this benefit will not be implemented. The City reserves the right to self insure and/or select the carrier for the present level of benefits.

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ARTICLE 7
SICK LEAVE

All employees shall accumulate one (1) day of sick leave which shall be credited to them for each month of employment commencing with the first month of employment. The sick leave credits shall be cumulative to a maximum of 120 days.

The accumulated sick leave may be used for any bonafide illness or injury excepting those compensated for under the Wisconsin Worker's Compensation Act, and except as to

injuries or illnesses incurred by employees engaged in outside employment or business while so engaged in any outside employment or business.

All sicknesses or injuries of over three (3) days duration must be verified by a physician's certificate. This certificate must state the kind or nature of the illness or injury and that the employee has been incapacitated for work for said period of absence. The City reserves the right of reasonable independent medical examination at City's expense. Such medical examination shall be at the request of the Department Head or governing board.

Sick leave shall be based on the rate of pay of employee's regular classification.

Employees may use up to three (3) days accumulated sick leave credits for personal business provided, however, that the employee shall notify his supervisor at least 24 hours prior to the time off requested. Such credits shall be deducted in a like amount from sick leave accumulation. Employees who have not accumulated sick leave shall not be entitled to such time off.

Sick leave shall not be taken less than one-half hour (1/2 hour) at a time, with additional increments not less than one-half hour (1/2 hour).

Personal business shall not be taken less than four (4) hours at a time for forty (40) hours per week employees, and not less than three and one-half (3.5) hours at a time for 37.5 hour per week employees, with additional increments not less than one-half hour (1/2 hour). Shorter minimum periods (less than 4 hours or 3.5 hours respectively, but not less than 1/2 hour) may be approved by the Department's Supervisor if Department operations will not be adversely affected.

At retirement only, the City will make a lump sum payment to the retiring employee, equal to thirty-five (35%) percent of the amount of accrued sick leave at retirement. Such payment shall be according to Wisconsin Statutes Section 40.02 (22) (b) (6) concerning single cash sum payments.

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ARTICLE 19
RESERVATION OF RIGHTS

Except as otherwise specifically provided herein, the management of the City of La Crosse and the direction of the work force, including but not limited to the right to hire, to discipline or discharge for proper cause, to decide initial job qualifications, to lay off for lack of work or funds, or for the reduction in level of services, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine the schedule of work, to subcontract work, together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management.

New rules or changes in rules shall be posted in each department five (5) calendar days prior to their effective date unless an emergency requires a more rapid implementation of

such rules.

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III. BACKGROUND

The facts in this case are largely undisputed. The City provides general municipal services to the citizens of La Crosse in western Wisconsin. The Union is the exclusive bargaining representative for the general City work force, outside of protective services and bus drivers. The grievant, Ron Heller, is employed as an auto mechanic in the municipal service center. He has been with the City since 1979.

In negotiations over the 1990 contract, the City offered to add an income continuation insurance (ICI) benefit, and the Union accepted the offer. They added language to the collective bargaining agreement reflecting the new benefit:

> In 1990, the City will provide income continuation insurance. The City's premium contribution shall be limited to the employer's share of the cost as authorized by State Statute Sections 40.61 and 40.62. In the event that the required participation by employees is not reached, this benefit will not be implemented.[1]

The benefit was extended to all City employees, and similar language was included in the contracts covering police officers, fire fighters, and airport police and fire personnel.[2] Income continuation was also made available to unrepresented employees. On July 17, 1989, the Common Council adopted a Resolution authorizing implementation of an ICI plan for City employees:

> Be it resolved by the Common Council of the City of La Crosse that pursuant to the provision of section 40.61 of the Wisconsin Statutes such Common Council hereby determines to offer the Income Continuation Insurance Plan to eligible personnel through the program of the State of Wisconsin Group Insurance Board, and agrees to abide by the terms of the plan as set forth in the contract between the Group Insurance Board and the Administrator.
>
> BE IT FURTHER RESOLVED that the resolution shall be effective on the later of the 1st of the month on or after 90 days following its receipt in the office of the State Department of Employee Trust Funds, or January 1, 1990.
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> BE IT FURTHER RESOLVED that the proper officers are herewith authorized and directed to take all actions and make salary deductions for premiums and submit payments required by the State of Wisconsin Group Insurance Board to provide such Income Insurance Continuation Insurance.

The contract between the City and the Group Insurance Board provides, in part, that ICI benefits are integrated with other income sources, and may be reduced by "Earnings, sick leave, vacation, or other paid time off. The use of such time shall be at the EMPLOYE'S option" (emphasis in the original).

Under the ICI plan, covered employees would receive a benefit of 65% of their normal earnings for period of disability beyond a specified waiting period. Employees had the option of selecting either 30, 60, 90, 120 or 180 day waiting periods. The shorter the waiting period, the higher the cost of the plan. The City agreed to pay the premium for the 180 day option, with employees paying the cost of a shorter waiting period.

The grievant selected the 90 day waiting period, and paid the additional premium cost via payroll deduction. In May of 1996, he injured himself playing softball. He was off work from May 30 through December 10, 1996. At the time of the injury, he had 540 hours of sick leave, 20 hours of compensatory time, and three and a half weeks of vacation. He calculated that he could meet the 90 day waiting period for the ICI benefit by using his accumulated sick leave and two days of vacation, and he advised Personnel Director James Geissner that this was what he planned to do. Geissner informed him that he must exhaust all of his accumulated leave time -- sick leave, vacation and comp time -- before he could use the ICI. He disagreed, and the instant grievance was filed. It was not resolved in the lower steps of the grievance procedure and was referred to arbitration.

At the arbitration hearing, in addition to the facts recited above, the grievant testified that he was a member of the Union's bargaining team when the ICI benefit was added, and that the City never informed anyone across the bargaining table that accumulated leave would have to be exhausted before the benefit could be used. He attended City sponsored informational meetings with a Group Insurance Board (GIB) representative when the ICI plan was first made available. His recollection was that the GIB representative was specifically asked whether employees could use the ICI benefit at the end of the waiting period, even if they still had accumulated leave time, in order to preserve their leave time against a possible recurrence of an illness after return from disability. The GIB

representative said "yes". The grievant also received a copy of the ICI informational pamphlet produced by the Wisconsin Department of Employee Trust Funds. That pamphlet states, under "Benefit Payments" that "Vacation, sick leave, holiday time, and compensatory time are not considered when benefits begin. Subject to personnel policies and rules, you may use such time at your discretion." He did not recall anyone asking questions about this sentence. The grievant also testified that the contract was silent as to the circumstances under which a leave of absence would be granted to employees, and that he had never been shown any personnel policies or rules specifically addressing leaves of absence.

Union President Kenneth Iverson testified that he had never seen any written rule or policy requiring the use of all leave before ICI benefits could be used nor, prior to this case, had he been advised of any such rule or practice. To his knowledge the City did not make any such proposal in bargaining and the Union never agreed to this arrangement.

Pamela Ghouse testified that she has worked for the City since 1991 as a Personnel Specialist. One of her duties is to orient new employees about benefits, and she was told by her predecessor to tell new employees that they had to use their accumulated time before they could draw on the ICI benefit. She is also the contact person for employees who wish to use their ICI benefits. Ghouse testified that she had researched the use of the benefit and found eleven cases, beside the grievant's, where ICI claims were made. Two of the cases arose after the grievant's injury and one was essentially simultaneous. In each case, the employee exhausted his or her leave time before receiving ICI benefits. On examination and cross examination, Ghouse gave the following details of each case:

- A*****n - Not a member of Local 180. This employee was terminally ill and had no reasonable anticipation of ever returning to work. This case arose after the grievant's injury. This employee took a disability retirement;

- D**l - Member of Local 180. The Union was involved in the disposition of this case. This employee was struck by lightning and had very poor prospects of ever returning to work. He did not object to using his leave time before going on ICI and, in fact, his accumulated leave did not cover the entire waiting period;

- D***ke - Not a member of Local 180. This employee took a disability retirement and never returned to work;

- F*******n - Member of Local 180. The Union was involved in the disposition of this case. Ghouse was not sure if the employee asked to use all of her accrued time, but did know she did not object to using her leave time before going on ICI. The employee took a disability retirement and had no expectation of ever returning to work. Her accumulated leave did not cover the entire waiting period;

- G*****r - Member of Local 180 - This employee was terminally ill, took a disability retirement and had no reasonable anticipation of ever returning to work;

- H******n - Not a member of Local 180. This employee's accumulated leave did not cover the entire waiting period. This case arose after the grievant's injury, and this employee applied for a disability retirement;

- H***h - Not a member of Local 180. This employee was terminally ill, took a disability retirement and had no reasonable anticipation of ever returning to work. However, he did return after nearly two years, then went out on disability again;

- P*******z - Not a member of Local 180. This was initially a workers compensation claim, which offsets against ICI benefits. This employee's accumulated leave did not cover the entire waiting period. The employee applied for a disability retirement;

- R**k - Not a member of Local 180. Ghouse did not know the details of his condition, as his case arose in 1990, before she started work with the City's Personnel Department. This employee took a disability retirement;

- R**e - Member of Local 180. Ghouse did not know if Union was involved nor did she know the details of his condition, as this case arose in 1990, before she started work with the City's Personnel Department. This employee's accumulated leave did not cover the entire waiting period;

- S*****t - Not a member of Local 180. The employee was terminally ill and had no reasonable anticipation of returning to work. This case arose two days before the grievant's injury, and the employee applied for a disability retirement.

Ghouse acknowledged that the City had never published, posted or publicized any rule, policy or procedure requiring that employees use all accumulated leave time before claiming ICI benefits. Ghouse also testified that the City had twice attempted in bargaining with the Union to secure a contract provision governing leaves of absence, but was unable to do so. All other City contracts have such provisions.

In rebuttal, Mike LaFleur testified that he started with the City in October of 1990, and had never been told that ICI benefits could not be drawn until leave benefits were exhausted. His orientation on benefit issues consisted of being handed some materials and being told to look them over and contact Personnel if he had any questions. This was during a time when the City was operating with an interim personnel director.

Additional facts, as necessary, will be set forth below.

ARGUMENTS OF THE PARTIES

THE POSITION OF THE UNION

The Union takes the position that the City is ignoring its own resolutions and contracts in attempting to limit the use of ICI benefits. The benefit in the collective bargaining agreement is that which the Common Council established when it adopted the contract negotiated with the Group Insurance Board. That contract provides that the use of accrued leave time after the waiting period is at the employee's option. The City has never changed this policy, has never attempted to negotiate a different policy, and has never given notice of any rule altering this policy. The first time the Union

ever had any notice of the supposed leave of absence policy requiring exhaustion of accrued leave was in July of 1996, when the grievant was told he could not immediately claim ICI benefits after his waiting period ended. The contract is absolutely clear that secret policies cannot be promulgated. Article 19 requires that any new policy or any change in policy must be posted for five days before it becomes effective, and allows the Union to challenge the reasonableness of such rules. As there has never been such posting, the City cannot claim that it has any policy or rule governing leaves of absence.

The City is attempting to deny employees the use of a negotiated benefit. If it purports to have changed the rules for claiming this benefit, it is guilty of a prohibited practice. Income insurance is a benefit, and it is black letter law that the employer may not unilaterally change a negotiated benefit without first bargaining over the change.

The Union points out that the City has allowed its employees to believe that ICI benefits could be claimed at the end of the waiting period, and has thereby induced them to purchase shorter waiting period at their own expense. The grievant testified that this issue was addressed in City sponsored informational meetings, and employees were assured they could claim ICI while still preserving their remaining sick leave and other time. In reliance on this, City

employees annually pay tens of thousands of dollars of their own money to purchase shorter waiting periods. The City collects these payments, and it obviously knows that employees are purchasing these shorter waiting periods. If, as it claims, it also knows that the employees cannot really make use of the shorter waiting periods, it is encouraging employees to waste their money. Given the City's role in prompting employees to purchase shorter waiting periods, it should be estopped from asserting its position.

In addition to having violated the law of arbitration, the law of collective bargaining and the principles of equity, the City seeks to have the arbitrator order and reaffirm an illegal practice, as its interpretation of the ICI benefit violates the Wisconsin Family Medical Leave Act. That statute gives employees the right to time off for debilitating injuries, and to elect to use or not use their paid leave time for those absences. See RICHLAND SCHOOL DISTRICT V. DILHR, 174 WIS.2D 878, 498 N.W.2D 827 (1993) The grievant here was clearly entitled to time off, and the City is plainly violating the FMLA by trying to dictate whether he makes use of his accumulated time to cover the absence. The arbitrator may not enforce this illegal action, and accordingly should grant the grievance.

Finally, the Union rejects any suggestion that there is a past practice supporting the City's position. All other cases cited by the City involved employees who were permanently disabled, and had no reason to try to conserve their accumulated leave time. Thus the fact that these employees agreed to use their sick leave, vacation and comp time before going on ICI benefits does not establish any precedent for this case. Moreover, only five examples were cited which involved Local 180 members. In three cases, the employees' accumulated leave was not sufficient to cover the waiting period, and the fact that they used it all before ICI benefits started means nothing. In two other cases, the employees applied for total disability retirement at the same time they applied for ICI.

Statutes require employees seeking total disability retirement to exhaust their accumulated leave before they can qualify. Again, the fact that the employees used up their accumulated leave says nothing about their contractual rights to claim ICI benefits at the earliest possible date.

In reference to the remaining six cases involving non-Local 180 members, the Union argues that a practice under different bargaining agreements cannot reveal anything about what Local 180 intended when it negotiated Article 5. Two of these employees did not have sufficient accumulated leave to cover the waiting period, and five of the six applied for total disability. All were terminally ill, and had no reason to conserve their leave time.

For all of the foregoing reasons, the Union asks that the grievance be granted and that grievant be credited with all of the leave time he was forced to use after his 90th day of disability.

THE POSITION OF THE CITY

The City takes the position that the grievance is without merit and should be denied. The Union bears the burden of proving a contract violation, yet it has not identified any provision of the contract with which the City has failed to comply. There is nothing in the contract which precludes the City from making rules and regulations governing the use of the ICI benefit, or coordinating those benefits with other benefits granted by the contract. Indeed, the City has reserved its management rights, including the right to make and enforce reasonable rules.

Given the silence of the contract on the question of coordination of benefits, the arbitrator may make reference to past practice to determine what the parties intended on the issue. Past practice strongly supports the City's interpretation. There have been twelve cases of ICI claims over the eight years since the benefit was introduced. In each of these cases, the employee seeking ICI benefits has been required to first exhaust his or her leave time. Thus

the administration of the ICI benefit has been consistent across all bargaining units and the grievant has been treated in exactly the same way as all other employees. If the Union wished to change this interpretation, it was incumbent upon it to raise the question in bargaining and negotiate a different arrangement. Having failed to do so, the Union must be held to have acquiesced in the City's administrative practice.

The arbitrator should disregard the grievant's self-serving testimony that a GIB representative promised employees that they could claim ICI benefits while retaining their accumulated leave. This is unlikely, since GIB rules allow for regulation of this issue through personnel rules and policies, and the Group Insurance Board cannot set those rules for the City of La Crosse. This supposed statement is at odds with the uniform practice of the City since the ICI benefit was introduced. Thus it should be given no weight in this proceeding.

The City points out that even the Union concedes the ICI language was drafted and proposed by the City, and that the Union made no attempt to modify the City's proposal. The City's intent in offering this benefit was to provide a safety net for employees who remained disabled after they had exhausted all other leave. The City did not intend to create an irrational and chaotic system,

whereby employees would jump from benefit to benefit at their option. This intent has since been clearly demonstrated in every case involving ICI benefits. The arbitrator should honor that intent and deny the grievance.

REPLY BRIEFS

The Union dismisses the City's claim that there is no contractual support for its position. The Common Council resolution and contract adopting the ICI program may be read as part of Article 5, and the contract with the State's Group Insurance Board specifies that the use of leave time is optional. Thus the City has violated Article 5. Moreover, the contract provisions defining the accumulation and use of sick leave and vacation both provide that the use of these benefits is discretionary with the employee. The City cannot compel the use of these benefits.

The Union argues that the City's claim that it can regulate the use of ICI benefits by rule or policy ignores both the contract and the principles of labor law. The contract requires the posting of rules and an opportunity for the Union to grieve the reasonableness of the rules. This has not been done. Indeed, it does not appear that there is any actual rule or policy requiring exhaustion of leave time -- this is merely a position the City has taken. In taking that position, the City ignores its obligation to bargain with the Union before changing employee benefits. No such bargaining was ever demanded.

The Union reiterates its argument that there is no relevant past practice of limiting access to ICI benefits. In short, there is no basis in the contract or in past practice, for the City to back away from its promise to provide the ICI benefits that the employees have purchased.

In its reply brief, the City takes issue with the Union's claim that employees were told they could retain accumulated leave while using ICI benefits.[3] The statement, if it was made, was made by a representative of the Group Insurance Board, who does not represent the City. The evidence is clear that new employees are told just the opposite by the City's personnel office and have been ever since the inception of this benefit. The Union also misstates the facts by claiming that the City is inducing employees to purchase shorter waiting periods when they cannot make use of the benefits. On average, City employees do not have enough accumulated leave to cover the standard 180 day waiting period, and purchasing a shorter waiting period is a wise investment. The contract caps sick leave accumulation at 120 days and requires the use of vacation time within the year it was earned. Thus most employees do benefit from buying a waiting period less than 180 days. Moreover, employees must have

proof of insurability if they wish to go to a shorter waiting period after their initial enrollment. Thus even an employee with accumulated leave might wish to maintain a short waiting period as a hedge against repeated disabilities in the future.

The Union's citation of the contract between the City and GIB, the Family Medical Leave Act, and Section 111.70 should all be rejected by the arbitrator. The arbitrator's jurisdiction is limited to the terms of the labor contract, and nothing in the collective bargaining agreement dictates a particular method or means of administering the ICI benefit. Instead, the labor contract reserves to the City all

rights not specifically limited by the express terms of the contract. It is not up to the City to show contractual authority for its actions. It is up to the Union to point out a contract provision that has been violated. There is none. To the contrary, the language of the agreement, read in light of the past practice, disclosed that the City's position is correct. Moreover the Union's citation of the Family Medical Leave Act is inapposite, since the RICHLAND SCHOOL DISTRICT case on which it relies did not involve a request to use contractual benefits. Likewise, the principle that changes in mandatory subjects must be bargained does not apply to this case, since the parties have concluded bargaining on this topic, and plainly left it to the City to regulate ICI usage. The City has done so through its internal policies since the start of the benefit, and thus has made no change.

The Union's attempts to distinguish the grievant's case from the other eleven ICI cases should be rejected. The City's practice under other labor agreements is relevant, since the language is substantively identical, the City clearly intended to provide a uniform benefit to all employees, and the City has provided uniform benefits.

In the event that the arbitrator reaches the issue of remedy, the arbitrator should reject the Union's request that the grievant be credited the leave time he used after the 90 day waiting period. This would be a windfall, since ICI benefits would only have paid him 65% of his normal wage, while he received 100% of his wages by using his leave time.

DISCUSSION

The role of the arbitrator is to uphold the intent of the parties in applying contract language to any grievance. The steps in determining intent depend upon the specific language at issue. The familiar rule is that clear and unambiguous language is to be applied, since the intent of clear language is obvious, while ambiguous language is to be interpreted first, so as to determine the intent of the parties. Language is clear where it is susceptible to but one interpretation. Language may be said to be ambiguous where reasonable contentions may be made for competing interpretations.

The issue in this case concerns the scope of an employee's right to use the income continuation insurance benefits guaranteed under Article 5. Specifically, the City claims that it has the right to require employees to use all of their accumulated leave time to cover an absence before claiming any income continuation benefits, even though those benefits may be payable before the accumulated leave is exhausted. The Union claims that the employee is entitled to switch to income continuation benefits as soon as the waiting period for those benefits is over. The contract does not specifically address this issue. Article 5 states:

> In 1990, the City will provide income continuation insurance. The City's premium contribution shall be limited to the employer's share of the cost as authorized by State Statute Sections 40.61 and 40.62. In the event that the required participation by employees is not reached, this benefit will not be implemented. The City reserves the right to self insure and/or select the carrier for the present level of benefits.

Neither party's argument is precluded by this language, and the contract must be said to be ambiguous. The principles used for interpreting ambiguous language are well established, and fall

into four general categories:

1. Those which look to the normal usage of language [4];

2. Those which look to the conduct of the parties in negotiating and administering the contract [5];

3. Those which look to the identity of the parties [6];

Those which look to the effect of one permissible interpretation as compared to the effect of another permissible interpretation. [7]

Where they lead to conflicting conclusions, the weight to be accorded any one of these principles depends upon the facts of the case. In this case, however, there is very little conflict between the conclusions that each of these principles yields. As further detailed below, the history of negotiations, reading the contract as a whole, consideration of external law, and interpreting ambiguous language against the author all lead to the conclusion that the City has violated the contract.

NEGOTIATIONS HISTORY

The ICI benefit was negotiated as the result of a City proposal, and the Union accepted the proposal without modification. Five months before this benefit became effective under the contract, the Common Council adopted a resolution establishing the program that was offered to the Union. The resolution defined the new insurance benefit in terms of the contract between the City and the Group Insurance Board:

> Be it resolved by the Common Council of the City of La Crosse that pursuant to the provision of section 40.61 of the Wisconsin Statutes such Common Council hereby determines to offer the Income Continuation Insurance Plan to eligible personnel through the program of the State of Wisconsin Group Insurance Board, and agrees to abide by the terms of the plan as set forth in the contract between the Group Insurance Board and the Administrator.

Thus the plan negotiated between the Union and the City was that which was contracted for with the GIB at the time of the negotiations. That contract is specific as to the use of accumulated leave time in lieu of ICI benefits:

> 5.16 INTEGRATED BENEFITS.
>
> 1. Benefit payments from Income Continuation Insurance shall be reduced by benefits paid or payable from the following sources:
>
> ***
>
> Earnings, sick leave, vacation, or other paid time off. The use of such time shall be at the EMPLOYE'S option.

This language remains unchanged in the current contract between the City and Group

Insurance Board, and is completely at odds with the City's position in this case. While the City argues that the cited language is not part of the labor contract, this argument ignores the realities of collective bargaining. There is specific contract language governing this case, and it is "the City will provide income continuation insurance..." The parties did not negotiate

for something called "income continuation insurance" without regard to the actual benefits employees would receive. Even if the words "income continuation insurance" and the benefits attendant to those words were unilaterally defined by the City at the time the language was first negotiated, they had some meaning at that time, and once Article 5 was added to the labor agreement the basic benefits provided by the plan were also incorporated into the agreement. The City is not free to unilaterally alter those benefits.

READING THE CONTRACT AS A WHOLE

The informational booklets explaining the ICI benefits state that the coordination of paid leave time with ICI is at the employee's discretion "[s]ubject to personnel policies and rules". The City asserts that this case must be considered in the context of the entire contract, points out that it retains the right to make rules under the Management Rights clause, and characterizes its position as merely a rule regulating the use of a benefit, and not a substantive alteration of the benefit.

There are three problems with this argument. The first is that there is no evidence of any rule or policy requiring exhaustion of leave time as a precondition to receiving ICI benefits, merely an unwritten administrative practice. This is significant because, while the contract gives the City the right to make and change rules, the right is not unlimited. The Management Rights clause requires that the rules be reasonable, and it also requires that any new or changed rule be written out and posted for five days in each department before it becomes effective. Thus if the City wanted to make a rule regulating the use of ICI benefits, it would have had to expose it to review by employees and the Union, and face the prospect of a grievance challenging the reasonableness of the rule. It has not posted such a rule in the seven and a half years since the benefit was negotiated, and the fact that no rule was posted draws into question the City's claim that its interpretation is specifically authorized by the Management Rights clause. Assuming it has the right to make a rule regulating the use of this benefit, it has not done so.

It bears repeating that even a posted rule is subject to challenge for reasonableness. Other than simply asserting that it has the right to regulate the use of ICI benefits and that it wishes to have a uniform administration of those benefits, the City has not articulated any reason for its policy. It characterizes the ICI benefit as having been intended purely as a "safety net", but given the nature of the benefit it is not susceptible to abuse, nor is there a cost impact to the City if an employee draws ICI benefits while retaining accumulated leave. Thus the second problem with the City's argument is that, on the state of the record before the arbitrator, it is not possible to say that this is a reasonable rule.

The third problem with the City's position that this is merely a rule or policy regulating the use of ICI benefits is that this is a fairly extravagant interpretation of what constitutes "mere" rules or

policies. The distinction between a change in a work rule, which the contract will allow, and change in a condition of employment requiring mutual agreement is not easy to define. It is fact driven and turns on the impact of the change on the bargaining unit and the degree to which the change limits employee rights under the negotiated agreement.[8] Certainly the City has the right to adopt administrative practices allowing it to efficiently administer benefit programs and police them against abuse. For example, an employee may be required to fill out the necessary forms as a condition to receiving insurance coverage, even though he or she is absolutely entitled to the benefit under the contract. Likewise an employe may be required to submit forms before receiving pay for sick leave or vacation. The fact that the practices might inconvenience an employee or even somewhat delay receipt of a benefit does not make them a denial of the employe's rights under the contract. The practice in this case goes well beyond merely inconveniencing employees in the name of administrative necessity. The grievant had a clear right under the insurance policy to receive payments from the carrier after 90 calendar days had elapsed from the date of his disability. He secured that

right by paying premiums. The City's rule prevented him from receiving the benefits he paid for and, as discussed above, did so for no apparent reason.

CONSIDERATION OF EXTERNAL LAW

The Union contends that accepting the City's interpretation requires the arbitrator to ratify an act which violates the Family Medical Leave Act, citing RICHLAND SCHOOL DISTRICT V. DILHR. The Union's reasoning is that under RICHLAND, the FMLA permits employees to choose whether they use their contractual benefits during a period of leave covered by the FMLA, and the City's policy effectively strips employees of this right. The City distinguishes RICHLAND on the grounds that this case presents an attempt to use contractual benefits, rather than simply a request for a medical leave.[9]

It is not entirely clear to the undersigned why the City believes this point sets the instant case apart from RICHLAND, as that decision directly addresses the relationship between contractual benefits and medical leave. The entire dispute in RICHLAND was over whether an employe could substitute paid contractual benefits for unpaid leave under the FMLA.The Supreme Court determined that employees did have that option:

Under Section 103.10 (5)(b), "[a]n employe may substitute . . . paid or unpaid leave of any other type provided by the employer" for the statutory leave provided by FMLA. The only statutory requirement for substitution is that there must be some type of "leave . . . provided by the employer." When the employer provides leave, the statute does not restrict or limit the employe's power of substitution; the decision to substitute is left up to the employe's discretion. Nor does the statute state that the employe's right to substitute is limited by the terms of a collective bargaining agreement. RICHLAND, at 896.

This case presents the other side of the coin -- whether employes may be compelled to use their paid leave during an absence covered by the FMLA. The cited language strongly indicates that they may not be compelled to do so, since the discretion to use paid time necessarily suggests the discretion not to use paid time.

The arbitrator is not a judge of general jurisdiction, and cannot rely on external law as the substantive basis of rights underlying an Award. The question is what the parties meant by their contract, not what the legislature meant by its statute. If the parties clearly contract for illegal results, the arbitrator is not free to amend or supplant the contract through the use of external law. In such a case an arbitrator will instead take account of the illegality in the process of crafting a remedy, usually by declining to order or enforce any illegal acts, and will leave it to the parties to cure the defect in their contract through negotiations. However, if the contract is ambiguous, the parties may be presumed to have intended that their contract be legal and enforceable. Where the arbitrator has a choice between two possible interpretations of the ambiguous language, one of which is consistent with external law and the other of which requires or sanctions an illegal act, the former interpretation will be favored. Here the ambiguous language is "the City will provide income continuation insurance" and the presumption must be that in contracting for this benefit, the parties meant to have it made available in a manner consistent with the law, including the FMLA.

The medical leave provided under the FMLA is two calendar weeks per year (10 work days for the grievant). The grievant's absence after the 90 day waiting period and before the exhaustion of his paid leave time was 14 work days.[10] Thus the majority of the time at issue would have been covered by the FMLA, and during that time the City's requirement that he involuntarily use paid leave was contrary to the statute. The City's policy does not recognize any distinction between time which is covered by the FMLA and the time beyond FMLA coverage. To the extent that the policy is intended to be uniform across the entire period of absence, the Union's interpretation is more plausible as it does not violate external law.[11]

INTERPRETATION AGAINST THE DRAFTER

The City was the drafter of the Income Continuation Insurance language in Article 5, and for that reason the Union asks that the ambiguity in the language be construed against the City. While it is true that this is an accepted principle of interpretation, it is also a principle of last resort. It assesses fault to the drafter because that is the party that could have avoided the ambiguity, not because the identity of the drafter somehow reveals the true intent of the language. This principle cuts in the Union's favor, but I have not assigned it any substantial weight in this proceeding.

PAST PRACTICE

The City's case rests primarily on past practice. Where contract language is ambiguous, one of the most reliable indicators of intent is how it has been administered over a period of time. Even where the contract is completely silent as to the existence of a right or a benefit, a clear past practice may rise to the level of a binding commitment by both sides. This is because the actions of the parties over time generally reflect their true intentions. The general rule is that the parties may be bound where the practice is clear and unequivocal, established over a reasonable period of time, and shows evidence of being a mutually accepted working condition. The degree of certainty needed before an arbitrator will bind the parties to a practice depends in part on the purpose for which it is cited. If the practice is being cited to establish a right or benefit not addressed anywhere in the contract, it will require a much stronger quantum of proof than one which is used as an aid to interpreting express but vague contract language. The practice in this case is offered to give meaning to the

ambiguous language of Article 5.

There have been twelve ICI claims by City workers over seven years. In every case, the workers exhausted their paid leave before drawing their ICI benefits. On the face of it, this provides strong support for the City's position. On closer examination, however, the evidence of past practice is not nearly so compelling. One of the cases is the grievant's, and three others arose at the same time or shortly after he made his claim for benefits and filed his grievance. Those four cases do little to demonstrate any settled, mutual understanding of how the ICI benefit is to be administered. In one of those cases and in three other cases, the employee did not have enough accumulated leave to cover the ICI waiting period, and retention of leave after ICI benefits began was not an issue. In every case except the grievant's and two others, the employee claiming the ICI benefit was also claiming disability retirement.[12] As a condition of disability retirement, employees must exhaust their leave balances, inasmuch as they cannot receive a disability retirement if they are owed any wages by the employer.[13] In the two cases where the employee did not claim a disability retirement, the employees' accumulated leave was not sufficient to cover the waiting period. None of the other persons who used ICI benefits had any expectation of returning to work, and thus had no reason to preserve any paid leave balances. Given that the ICI benefit is 65% of salary, these employees had a strong incentive to use all of their paid leave before accepting ICI payments, no matter what the City's policy was.

The significance of all of this is that, while the practice was uniform, it does not necessarily show a mutual intent that all employees, no matter what their circumstances, would be required to exhaust their leave balances before taking ICI benefits. The question when examining a past practice is not just what was done, but why it was done. Aside from the grievant, every ICI claimant over the history of this benefit would have been required to exhaust his or her accumulated leave, without regard to any City policy, either because the leave ran out before the end of the waiting period or because they had to zero out their leave balances in order to claim a disability retirement. For these reasons, even though the City's approach has been uniform, I cannot conclude that the handling of past ICI cases shows any

mutual acceptance of the City's administrative practice of requiring leave exhaustion before collecting ICI benefits. The issue has never been squarely presented before, as the grievant's is the first case where an employee would have been able to maintain a leave balance if he was allowed to use his ICI benefits immediately after the waiting period.

CONCLUSION ON THE MERITS

The contract promises that the City will provide income continuation insurance to employees, but does not specifically define the benefits attendant to that insurance. Those benefits were detailed in the contract between the City and the Group Insurance Board executed several months before the benefit was added to the collective bargaining agreement. That contract specified that the use of paid leave time as a substitute for ICI benefits would be at the employee's discretion. Thus at the time Article 5 was added to the collective bargaining agreement, the employee and not the City was entitled to control the use of paid leave when payments were available under income continuation. While the general rules of the GIB allow employers to regulate how ICI benefits are coordinated

with other paid leave, the City's claim that it has issued rules regulating the relationship between paid leave and ICI benefits is not borne out by the evidence. There is no written rule or policy, and the Management Rights clause is specific in requiring that new or changed rules must be in writing, and be posted for five days prior to implementation. That clause also limits the employer to issuing reasonable rules, and on the state of this record, the purported rule is not reasonable. Moreover, the City's policy goes beyond the normal bounds of a rule or administrative practice, since it prevents the use of a benefit that is both promised by the contract and paid for by the individual employee.

The City's interpretation of the ICI language is contrary to the state statutes governing Family Medical Leave, as the Supreme Court has determined that the use of paid time off benefits during a medical leave is within the discretion of the employee. Even though the City has proved that its administration of the benefit has been consistent across time in all bargaining units, that uniformity of administration does not establish a mutual intent by the parties to require that employees exhaust their paid leave before receiving income continuation insurance payments. In every prior case, the employee was required to exhaust paid leave either because they did not have enough to bridge the period between leaving work and the end of their ICI waiting period, or because they were seeking disability retirement and could not receive it if they had any right to claim wages from the employer.

On the basis of the foregoing, and the record as a whole, the arbitrator has concluded that the City violated the collective bargaining agreement by requiring the grievant to use all of his accumulated sick leave, vacation and comp time as a pre-condition to letting him draw income continuation insurance benefits.

APPROPRIATE REMEDY

The grievant was required to use his accumulated leave rather than drawing ICI benefits. The Union seeks restoration of the leave time he used, while the City believes that this over compensates him, since he would only have gotten 65% of his pay under the ICI benefits. Under the peculiar circumstances of this case, the arbitrator concludes that restoration of the leave time is the remedy that best restores the parties to the positions they would have occupied had the contract not been violated. Granting that this leaves the grievant slightly better off than he would have been if he had received the 65% ICI benefit, the violation here is the forced use of leave time. If the arbitrator reduces the leave time credited to the grievant to approximate the income he would have received under ICI, he is still being compelled to draw down his accumulated leave against his wishes. Thus the City's proposed remedy continues the violation, albeit at a reduced level.

The City is free to seek reimbursement, if possible, from the Group Insurance Board for the period of time that the grievant would have received insurance benefits had he not been required to use his leave time, and may require the grievant to cooperate in this effort.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The City of La Crosse violated the collective bargaining agreement when it required the grievant to use up all of his paid leave before receiving Income Continuation Insurance benefits. The appropriate remedy is to immediately credit his leave accounts for the paid leave he used between the end of his waiting period and the exhaustion of his paid leave. The City is free to seek reimbursement, if possible, from the Group Insurance Board for the period of time that the grievant would have received insurance benefits had he not been required to use his leave time, and may require the grievant to cooperate in this effort.

Dated at Racine, Wisconsin this 15th day of August, 1997.

Daniel J. Nielsen /s/_____
Daniel J. Nielsen, Arbitrator

ENDNOTES

1/ The only change in this language since it was first negotiated was subsequent to the addition of a sentence allowing the City to self-insure these benefits and/or change carriers. ". . . The City reserves the right to self-insure and/or select the carrier for the present level of benefits."

2/ The benefit was added to the contract between the City and the bus drivers represented by the Amalgamated Transit Union effective January 1, 1992. All other City employees received the benefit as of January 1, 1990.

3/ Certain portions of the City's reply brief cited facts outside of the record, principally the outcomes of prior litigation between these parties. Those portions are not summarized here, and those arguments have not been considered.

4/ See headings entitled "Normal and Technical Usage", "Agreement to be Construed As A Whole", "To Express One Thing Is To Exclude Another", "Doctrine of Ejusdem Generis", "Specific Versus General Language" and "Construction In Light Of Context" in Chapter Nine of Elkouri and Elkouri HOW ARBITRATION WORKS, 4th Ed. (BNA, 1985), (hereinafter cited as "Elkouri" at pps. 342-365.

5/ See headings entitled "Precontract Negotiations", "Custom and Past Practice of the Parties", "Prior Settlements as Aid to Interpretation", and "Interpretation Against Party Selecting the Language" in Chapter Nine of Elkouri. See also Chapter Twelve of Elkouri "Custom and Past Practice" at pps. 437-456.

6/ See headings entitled "Experience and Training of Negotiators" and "Industry Practice" in Chapter Nine of Elkouri.

7/ See headings entitled "Construction in Light of Law", "Avoidance of Harsh, Absurd, or Nonsensical Results", "Avoidance of a Forfeiture" and "Reason and Equity" in Chapter Nine of Elkouri.

8/ As Arbitrator Yarowsky stated in a case dealing with the specific subject of smoking restrictions, "The difference lies in the impact of the unilateral action upon unit employees ... thus setting a bottom line on employer unilateral action..." SHERWOOD MEDICAL INDUSTRIES, 72 LA 258 (1979) at page 260. In the context of the duty to bargain, the NLRB has recognized that some unilateral changes may not rise to the level of a statutory violation, depending upon the degree of change involved. An employer is not obligated to bargain over restrictions which do not have significant, substantial and material impacts on terms and conditions of employment. RUST CRAFT BROADCASTING, 225 NLRB 327 (1976); ST. JOHN'S HOSPITAL, 281 NLRB 1163 (1986).

9/ The City's argument in this regard appears to contain a typographical error: "In this argument, the Union alleges that the City has violated Wisconsin's Family Medical Leave Act. ... The City has reviewed the Richland School District v. Dilhr case and believes that it does apply to the facts in this case. The grievant in this case did not merely request an unpaid leave of absence for a serious medical condition. His request goes beyond a regular unpaid leave of absence. He seeks to use a bargained for benefit during his unpaid medical leave of absence. This fact alone distinguishes this

case from Richland School District." The arbitrator assumes that the City meant to say that the RICHLAND case "does not apply to the facts in this case."

10/ I have excluded the Labor Day holiday from this calculation, as it is not a work day for the grievant's department.

11/ The Union also argues that the City's policy violates the duty to bargain under Section 111.70, the Municipal Employment Relations Act. I have found that the contract addresses the issue of leave usage in conjunction with ICI benefits. There is no duty to bargain during the contract term over matters already addressed in the contract, and accordingly I have not discussed this aspect of the Union's argument.

12/ There was one case in 1990 where it was not clear what the employee's condition was or what eventually became of him. That case involved an employee from a different bargaining unit. It arose before Ghouse came to work for the City and she could not provide any details about it. However, that was a case where the employee did not have enough accumulated leave to see him through the waiting period. The other case in which disability was not claimed was an employee who was struck by lightning and had no reasonable prospect of returning to work. That employee also lacked sufficient accumulated leave to cover the waiting period.

13/ See, for example, the instructions to employers on the Employer Disability Certification form in City Exhibit #11:

> The employe named above is applying for a disability benefit. Please provide the employe's last day worked and last day for which paid (tentative) in the spaces below. For WRS disability purpose only, the last day for which earnings (including vacation pay, holiday pay, sick leave or compensatory time) have been or will be paid is deemed to be the termination date. This date establishes the earliest annuity.

See also Sec. 40.63(1)(c), Stats.

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