BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO
and its affiliate LOCAL NO. 883, AFSCME, AFL-CIO

and

CITY OF SOUTH MILWAUKEE

Case 98
No. 58361
MA-10925

Appearances:

Podell, Ugent, Haney & Miszewski, S.C., Attorneys at Law, by **Mr. Matthew J. Miszewski**, on behalf of Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliate Local 883, AFSCME, AFL-CIO.

Mr. Joseph G. Murphy, City Attorney, on behalf of the City of South Milwaukee.

ARBITRATION AWARD

Milwaukee District Council 48, AFSCME, AFL-CIO, and its affiliate, Local No. 883, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of South Milwaukee, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on March 22, 2000, in South Milwaukee, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by April 11, 2000. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there are no procedural issues and to the following statement of the substantive issue:

> Did the Employer violate the Collective Bargaining Agreement when it failed to allow the Grievant to accumulate sick days for the months of February, March and April while he was out on Worker's Compensation?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited:

ARTICLE VIII

SECTION 1 – REGULAR RATES OF PAY

The parties agree that the rates to be paid to the employees covered by this Agreement shall be as set forth in Appendix A.

. . .

ARTICLE X

. . .

SECTION 2 – AMOUNT OF SICK LEAVE

Each employee shall earn one (1) working day of sick leave with pay during each month of service in which the employee receives wage compensation for at least three-quarters (3/4) of the scheduled work days, including holidays, accumulative in the sick leave account. Allowable accumulation in the sick leave account shall be unlimited, and part-time employees shall receive sick leave in accordance with the provisions of this Article on a pro-rated basis.

. . .

ARTICLE XI

SECTION 1 – DUTY-INCURRED DISABILITY PAY

Any employee who sustains an injury while performing within the scope of his/her employment, as provided by Chapter 102 of the Wisconsin Statutes (Worker's Compensation Act) shall receive eighty (80) percent of salary in lieu of Worker's Compensation for the period of time he/she may be temporarily totally or temporarily partially disabled because of said injury, not to exceed one (1) year from the date of injury.

BACKGROUND

The Grievant, Bruce Cota, is employed in the City's Streets Department. The Grievant experienced a work-related injury in 1999 and was off work the months of February, March and April of 1999. During those three months the Grievant received payments pursuant to Article XI, Section 1 of the parties' Agreement; however, the City did not consider the Grievant to be accumulating sick leave during those months and did not credit his sick leave account with three sick leave days in that regard.

The City's refusal to credit the Grievant's sick leave account one day for each of the three months was grieved. The parties were unable to resolve the dispute and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union asserts that the language of Article X, Section 2, the only provision cited and relied upon by the Union in the grievance, is clear and unambiguous. The rule followed by arbitrators is that when a contract's terms are clear and unambiguous, they are to be given their ordinary meaning and past practice cannot be used to alter the contract. Here, the parties used the term "wage compensation" in Article X, Sec. 2 to trigger the accrual of sick leave days. If the parties had intended to exclude Worker's Compensation payment, they could easily have expressed such, but did not. Further, had the parties used only the term "wages", it might have been unclear what they intended to cover. By using the term "wage compensation" the parties made clear they intended to include more than just wages paid in exchange for work. It was the Union's intent by using the word "compensation" to include such situations as occurred in this case, i.e., where an employe received compensation as a result of being employed and not just pay in exchange for work. Given the clear and unambiguous nature of the wording, evidence as to past practice is irrelevant.

Even if the language of Article X, Sec. 2 is found to be ambiguous, the alleged practice by the City cannot be relied upon, since the City unilaterally altered the prior practice of allowing accrual in this situation and failed to notify the Union of the change. To properly terminate a past practice, a clear intent to do so must be communicated to the other party. By the City's witnesses' own testimony, this never occurred. Further, to effectively change a practice that gives meaning to ambiguous language, it is not sufficient to merely repudiate the practice; rather, the ambiguous language must be rewritten. This was not done and there is no evidence adduced of any mutual agreement to the City's interpretation. Last, given the short tenure of the City's practice and the likelihood that it would not be apparent to employes, little, if any weight, should be given to such a practice.

Last, the Union asserts that since neither the grievance, nor the City's response, raised the issue of past practice, and the issue submitted to the Arbitrator does not reference past practice, it is beyond the scope of the Arbitrator's authority to consider that argument.

The Union requests that the grievance be sustained and the Grievant be made whole.

City

The City concurs that this dispute concerns the application of the wording "receives wage compensation" in Article X, Sec. 2, of the Agreement. The City asserts that the phrase does not include payments made as insurance indemnity for an employe injured under circumstances covered by Ch. 102, Stats., Wisconsin's Worker's Compensation laws. Ch. 102 requires and provides for payments to employes for injuries suffered in the course of employment without regard to fault. The injured employe is compensated pursuant to a schedule of benefits based upon the permanency and extent of the injury. The employer is required to pay for the employe's medical expenses and to pay an indemnity for the "weekly wage loss" attributable to the employe's wage loss during his convalescence. Thus, the payment to the injured employe during his convalescence under Ch. 102 is an "indemnity".

While under both Article XI, Sec. 1, of the Agreement and Ch. 102, the indemnity benefit is described as a percentage of the employe's usual wage, this does not convert the payment for wage loss into "wage compensation". The payment the Grievant received in the three months in issue were made "in lieu of the Worker's Compensation" benefit for weekly wage loss pursuant to Article XI. That provision states specifically that the payments are made in lieu of the otherwise applicable Worker's Compensation payments.

Worker's Compensation is a mandatory insurance program and payments made for injury-related losses under that program are insurance benefit payments, not wage compensation. Wages to be paid pursuant to the parties' Agreement are defined in

Appendix A, Base Salary and Wage Rates, For Probationary and Regular Employees. The indemnity paid under Article XI does not appear in Appendix A.

The City concludes that it has correctly applied Article X, Sec. 2 in not crediting the Grievant accumulated sick days for February, March and April.

DISCUSSION

The Arbitrator does not find the wording of Article X, Sec. 2 to be clear and unambiguous. It is instead necessary to look to the wording of the two provisions (Article X, Sec. 2 and Article XI, Sec. 1) cited by the parties to determine their interplay.

It is an accepted principle of contract interpretation that words will be given their ordinary and popularly-accepted meaning in the absence of evidence to indicate they were used in a different sense. Elkouri and Elkouri, *How Arbitration Works*, (3rd Edition), p. 305. Article X, Sec. 2 of the Agreement states that employes will earn one day of sick leave during each month of service in which the employe "receives wage compensation for at least ¾ of the scheduled work days. . ." The City would distinguish payments received under Article XI, Sec. 1, because such payment, "eighty (80) percent of salary", is "in lieu of Worker's Compensation". However, "in lieu of" is defined as "instead of" or "in place of." *Webster's New World Dictionary* (2nd College Edition) p. 816. Thus, it may be reasoned that instead of receiving the insurance benefits under Worker's Compensation, the employe receives "eighty (80) percent of salary", i.e., eighty percent of the employe's wages, under Article XI. This seemingly would qualify the employe to accumulate paid sick leave as far as "receiving wage compensation."

Further, while "wages" may be taken to mean pay for work performed, it does not appear that such paid time off as vacation, paid sick leave or holidays are excluded under Article X, Sec. 2. Also, the term "compensation" can be defined as either "anything. . .given to make amends for a loss" or "payment for services." *Webster's New World Dictionary* (2nd College Edition) p. 289. Thus, the term "wage compensation" is far too susceptible of different meanings within the context of this dispute to give it the narrow definition for which the City argues.

It is also an accepted principle of contract interpretation that if an agreement is susceptible of two constructions, one of which works a forfeiture and one of which would not, the latter is preferred in the absence of strong evidence that the parties intended a forfeiture. Elkouri and Elkouri, *How Arbitration Works*, (3rd Edition), p. 312. For that reason, the Union's interpretation is preferable to the City's.

Last, while the City arrived at its interpretation in 1994, it does not appear that the City ever communicated that interpretation to the Union.

For the foregoing reasons, it is concluded that the payments the Grievant received under Article XI, Sec. 1, of the Agreement for the months of February, March and April of 1999, qualified him to accumulate one paid sick leave day for each of those months under Article X, Sec. 2, of the Agreement. Thus, it is concluded that the City violated Article X, Sec. 2, of the Agreement when it refused to credit the Grievant with an accumulated paid sick leave day per month for February, March and April of 1999.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is sustained. The City is directed to immediately make the Grievant whole by crediting his sick leave account with three (3) sick leave days with pay.

Dated at Madison, Wisconsin this 6th day of July, 2000.

David E. Shaw /s/
David E. Shaw, Arbitrator

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