BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**ROLLING HILLS EMPLOYEES LOCAL 1947,
AFSCME, AFL-CIO**

and

MONROE COUNTY

Case 145
No. 58529
MA-10978

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, AFSCME, AFL-CIO, Wisconsin Council 40, appearing of behalf of the Union.

Mr. Kenneth Kittleson, Director, Monroe County Personnel Department, appearing on behalf of the Employer.

ARBITRATION AWARD

Rolling Hills Employees Local 1947, AFSCME, AFL-CIO (herein the Union), and Monroe County (herein the County or the Employer), were parties to a collective bargaining agreement, covering the period from January 1, 1997, through December 31, 1998, and providing for binding arbitration of certain disputes between the parties. On February 9, 2000, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over health insurance coverage allegedly due to Tammy Schober (herein the Grievant), and requested the appointment of a member of the WERC staff to arbitrate the issue. At the time the grievance arose, the parties were in a hiatus period between contracts, however, the parties agree that the matter is arbitrable under the applicable contract language. The dispute was submitted on a stipulation of facts and no hearing was conducted. The parties filed briefs by April 25, 2000.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The parties stipulated to the issue, as follows:

Did the County violate the collective bargaining agreement, and specifically Article 22, Section 15, by starting the Grievant's one (1) year health insurance continuation for a work-related, in-service accident on March 29, 1999, rather than September 10, 1999?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 3 – MANAGEMENT RIGHTS

The County possesses the sole right to operate county government and all management rights repose in it, subject only to the provisions of this Agreement and applicable law. These rights include, but are not limited to, the following:

A. To direct all operations of the County;
B. To establish reasonable work rules and schedules of work;
C. To hire, train, promote, transfer, schedule and assign employees to positions within the County;
D. To suspend, discharge and take other disciplinary action against employees for just cause;
E. To relieve employees from their duties because of lack of work or any other legitimate reason;
F. To maintain efficiency of county government operations;
G. To take whatever action is necessary to comply with state or federal law;
H. To introduce new or improved methods or facilities;
I. To change existing methods or facilities;
J. To determine the kind and amount of service to be performed as pertains to county government operations; and the number and kinds of classifications to perform such services. In case of the creation of a new position or classification, or a change in the content of an existing position or classification, the parties shall negotiate wages for the position or classification.
K. To contract out for goods and services, provided that such contracting out for goods and services shall not result in layoffs of present employees.
L. To determine the methods, means and personnel by which county operations are to be conducted.

The County's exercise of the foregoing functions shall be limited only by the express provisions of this Agreement. If the County exceeds this limitation, the matter shall be processed under the grievance procedure.

ARTICLE 15 – INSURANCE

Section 1.

. . .

B. Modified Duty Classification – Temporary
Employees covered by this Agreement who sustain a disabling work-related injury covered by the Worker's Compensation Law or other personal injuries that may affect the performance of their job duties may be eligible for Modified Duty Classification. A disabling injury shall be defined as "an injury, certified by a physician, to necessitate an absence from work and resulting in either total or partial temporary disability." Upon a physician's certification that the employee may return to work with specific limitations limiting regular job performance, the employee may be assigned to a Modified Duty Classification provided such modified duty employment is available and feasible. The County's rights set forth in ARTICLE 3 – MANAGEMENT RIGHTS shall not be deemed modified by this Section.

An employee assigned to a Modified Duty Classification shall receive payment of sixty-six and two-thirds percent (66 2/3%) of that employee's regular hourly rate of pay. In addition, that employee may receive an additional Worker's Compensation payment as determined by the Worker's Compensation Carrier. The total payment shall be less than on hundred percent (100%) of regular pay. Participating employees are not medically able to fulfill all of the requirements of their position. Employees who are able to fulfill all of their position's requirements, but not full shifts or their regularly scheduled hours of work will be paid one hundred percent (100%) of their regular hourly rate.

The Modified Duty Classification shall, in most cases, be limited to no more than ninety (90) calendar days, however, the County reserves the right to extend the classification based on medical evaluations and needs of the Institution. In no event, shall the classification become permanent. Participating employees may be required to undergo periodic evaluations by a physician during the classification period. Upon expiration of the period, employees must obtain a medical release before returning to their regular classification and pay.

Section 2.

A. Health Insurance

The County shall during the calendar years 1997 and 1998 contribute such amount toward the family and single plan premiums of a dual-choice Health Maintenance Organization (HMO) and a Preferred Provider Organization (PPO) offering each covered employee the choice between the plans on an annual basis. The County shall also offer single and family dental insurance to all employees who work at least 20 hours per week. The employer and employee shall contribute toward such premiums based on percentages, with the employer paying eighty-seven percent (87%) of the monthly premium and the employee paying thirteen percent (13%) of the monthly premium. Premiums for part-time employees are prorated in accordance with Article 21 of the collective bargaining agreement. The County may, during the term of this agreement, commence a self-funded insurance program or seek bids for different carriers provided that any insurance program shall provide benefits, specifically including deductible amounts and choice physicians, substantially equal to those benefits provided in the insurance plans during the 1997 calendar year.

. . .

ARTICLE 22 – GENERAL PROVISIONS

. . .

Section 15. All time lost due to in-service accident, sick leave, funeral leave, holidays, and leaves of absence of fourteen (14) calendar days or less shall be determined as time rendered in-service. Vacation time shall accrue for up to two (2) years from the onset of a work related, in-service accident, but shall cease after a two (2) year period. The employer's portion of health insurance will be continued for up to one (1) year for a work related, in-service accident.

. . .

BACKGROUND

The parties stipulated to the following facts upon which the case is submitted:

1) Grievant Tammy Schober was hired by Rolling Hills Rehabilitation Center as a Certified Nursing Assistant on June 13, 1990.

2) Grievant was no longer able to work as a Certified Nursing Assistant effective March 29, 1999, due to her latex allergy as ordered by her physician.

3) Effective April 4, 1999, the Grievant began performing temporary clerical duties in the Medical Records section of Rolling Hills under the modified duty clause of the collective bargaining agreement.

4) Effective September 10, 1999, the Grievant's temporary modified duty assignment in Medical Records was terminated and the Grievant was placed on medical leave of absence.

5) The attached language of Article 22, Section 15, of the collective bargaining agreement governs benefits while on leave for work-related illness or injury and is the pertinent section for this grievance. The Employer's Workers Compensation carrier has taken the position that the Grievant's latex allergy is a work-related illness.

6) The only issue in dispute in this grievance is when the one year of health insurance begins. The Employer contends that the year begins on March 29, 1999, when the Grievant was unable to work her assigned position. The Union contends that the year begins on September 10, 1999, when the employe completed her temporary assignment in Medical Records.

7) Both parties agree to waive formal hearing and present arguments to the assigned arbitrator through briefs according to the Arbitrator's schedule.

POSITIONS OF THE PARTIES

The Union

This case centers on the correct interpretation of Article 22, Section 15, of the collective bargaining agreement. As there is no relevant past practice relating to the issue, the case is strictly a matter of contract interpretation and application of the contract to the stipulated facts.

The Grievant, Tammy Schober, developed a latex allergy, which the County's Workers Compensation carrier determined to be work-related. This condition forced her to cease working as a Nurse Assistant as of March 29, 1999. On April 4, she was assigned temporary clerical duties under the Modified Duty Classification clause of the contract. This position ended on September 10, 1999, and the Grievant has not worked for Rolling Hills since.

It is undisputed that the Grievant's condition constitutes a work-related, in-service accident under the contract. The question is, at what point does her one year of health insurance continuation commence? The County argues that, under Article 22, Section 15, the continuation is triggered by the onset of her condition, which would be March 29, 1999. The sentence relied upon by the County, however, relates to accrual of vacation time and the sentence covering health insurance continuation says nothing about the onset of the condition.

The Union argues that health insurance continuation commences at the point at which the employee is absent from work. The Grievant worked from March 29 until September 10, and was eligible for health insurance coverage throughout that time under Article 15, Section 2, governing health insurance for employes, quite apart from her rights to continuation

benefits under Article 22. Under the County's theory, had the Grievant's temporary assignment lasted from March 29, 1999, until March 29, 2000, she would not be entitled to any continuation benefits at all, which would render the last sentence of Article 22, Section 15 meaningless. The Union cites LA CROSSE COUNTY, MA-10532 (KNUDSON, 1999) for the principle that the triggering event is not the injury itself, but the time at which the employe is first absent from work. In this case, that date is September 10, 1999, and the Grievant's continuation benefits should have commenced as of that date.

The County

The Grievant was hired as a Dietary Assistant at Rolling Hills on June 13, 1990, and became a Nursing Assistant on August 15, 1991. She had an average employment history, with the exception of having been disciplined at various times over the years for unauthorized use of the telephone, threatening a nurse and a physical altercation with a co-worker. The Grievant acquired a latex allergy and stopped working as a Nursing Assistant on March 29, 1999, on her physician's orders. The Workers Compensation carrier initially determined the allergy to be a work-related illness, but later denied coverage and a workers compensation hearing is pending.

The Employer attempted to find the Grievant another position in the dietary, housekeeping or activities departments, but these were all precluded by the work restrictions imposed by her physician. The physician did clear her for clerical duties; therefore, she was assigned temporary clerical duties in the Medical Records office as of April 4, 1999. The Grievant also attended school part-time under a Department of Vocational Rehabilitation retraining grant and the Employer accommodated her by allowing her to flex her hours around her school schedule. Her temporary position was also extended an additional three months to September 10, 1999, to coincide with her beginning school full-time under the DVR grant. She was told at that time that her continuation benefits would extend through March 31, 2000, pursuant to the language of the contract.

There is no precedent for this situation, thus, the Employer relied on a strict interpretation of Article 22, Section 15. This section clearly ties the commencement of the benefit to the date of onset of the Grievant's condition. The first sentence of the section makes the date of onset the determinative date for accrual of vacation benefits. Logically, that date also applies to health insurance continuation benefits referenced in the second sentence. It is unlikely the drafters of the language intended that vacation and health insurance continuation would have different starting times. Rather, they both start at onset and the Grievant is merely attempting to pull out clauses out of context in order to secure an unintended benefit.

An award in favor of the Grievant will have serious consequences, for it will force the Employer to evaluate the additional cost whenever it considers extending modified duty to an injured employe who cannot do their regular job. This could result in the Employer having to restrict or eliminate the modified duty program in the future, to the detriment of deserving employes. The grievance should, therefore, be denied.

DISCUSSION

In this case, the Arbitrator is asked to construe the language of Article 22, Section 15, of the collective bargaining agreement, which, among other things, purports to establish time periods for the continuation of certain benefits after an employe suffers a debilitating work-related injury. In performing this task, bargaining history and past practice will be of no avail, as the parties indicate they have not discussed the provision in bargaining and have no previous experience in applying the provision to similar facts.

The Grievant was a Nursing Assistant at Rolling Hills until March 29, 1999. At that time, due to an allergic condition, she had to leave her duties. Under Article 15, Section 1.B. of the contract, she was temporarily assigned to a modified duty classification and continued to work at the nursing home as a clerical assistant in the Medical Records department. According to this provision, temporary positions typically last no more than 90 days, but can be extended at the discretion of the Employer. The Grievant received an extension of her temporary position in July, 1999, and continued in the position until September 10, when she returned to school full-time. At that time, the Employer informed her that she would receive health insurance continuation benefits through March 2000, pursuant to Article 22, Section 15. 1/ There lies the rub. The Employer believes that the under the language of that provision the one-year clock on the Grievant's health insurance continuation benefit began to run on March 29, 1999, which it deems to be the onset of her injury. The Union, however, contends that the continuation benefits did not start running until September 10, the date she was no longer working.

1/ Under Article 15, Section 2.A., the County pays 87% of the monthly health insurance premium for full-time employes. The County's contribution toward the premiums of part-time employes is prorated according to a formula, based on hours worked per week, set out in Article 21, Section 3.C.

At the outset, I note that the overriding theme of Article 22, Section 15, is the effect of time lost from work due to a variety of causes. Thus, the first sentence of the provision lists a number of types of absences – in-service accident, sick leave, funeral leave, holidays and leaves of absence of up to 14 days – and specifies that time lost for those reasons will be considered "in-service" time, presumably for the computing of overtime, seniority and so forth. The underlying assumption is that the employe is not working, for he or she is being given credit for time worked, even though absent.

The second sentence deals with accrual of vacation after onset of an in-service accident and sets a limit of two-years on the benefit. It is the use of the word "onset" in this sentence upon which we must focus attention. Does "onset" mean the same as the date of injury, or does it mean something else? The provision is ambiguous in this regard and, therefore, requires interpretation. The County argues that the term is synonymous with date of injury, but I am not persuaded that this is so. Put another way, I view the date of injury, as applied here, as being the first date of time lost at work, rather than the date of the precipitating event.

This interpretation is compelled by both logic and equity. As noted before, the language of the section in its entirety assumes an employe is not at work. If an employe is at work, his or her vacation benefits accrue as a matter of course and no special provision is needed to secure them. It is for the employe who is unable to work due to an in-service accident that this provision is intended. Therefore, the onset referred to in the provision must equate with absence from work.

Let us use for an example two employes who are required to cease work on the same day due to work-related injuries. The first employe suffers from carpal tunnel syndrome, which has been gradually worsening for six months and which has not responded to medical treatment. Accommodations at work have also been unsuccessful and the Employer has no other work available that the employe can do. The second employe suffers a traumatic injury and cannot work thereafter. Under the County's line of reasoning, the first employe would receive the vacation accrual benefit for only 18 months, whereas the second employe would receive it for the full two years, because, although they ceased working on the same day, the onset of injury for the first employe occurred earlier. Such an outcome would be irrational. Reading this sentence in the context of the total paragraph, therefore, I conclude that the onset of a work related in-service accident is the date on which the employe first loses time from work as a result of the accident.

Applying this interpretation to the next sentence, dealing with health insurance continuation benefits, leads to the same conclusion. The triggering event is the date time is first lost from work, not the date the work-related in-service accident occurred. In this regard, I agree with the Union's observation that an employe who is working needs no continuation benefits, because the Employer's contribution to health insurance benefits is a condition of employment under the contract. The continuation benefit exists for the person who is unable to work and, therefore, would not be entitled to any employer contribution, but for this provision. Thus, to activate the continuation rights of an employe who is working would be both redundant and unfair.

An additional consideration in this case, however, is what, if any, significance to attribute to the fact that the Grievant was reassigned under the Modified Duty provision. The County's position is that the character of the Grievant's employment changed at that time in such a way that her continuation benefits should be deemed to have begun running even though she was still technically working for the County. I am not persuaded that this is the case. In the first place, the Grievant apparently worked for the County continuously until September 10, 1999. The record does not reflect that she was given a "make-work" job, but that she performed necessary duties in Medical Records and, in fact, one of the conditions for receiving a modified duty assignment under Article 15, Section 1.B. is that " . . . such modified duty employment is available and feasible." There is no evidence that her modified duty assignment disqualified her from health insurance benefits, therefore, it is assumed that she was entitled to, and received, the same health insurance contribution as any other employe until September 10. As noted above, if she was entitled to health insurance benefits as an employe between March 29 and September 10, she did not need the continuation benefit during that period and to reduce her eligibility by a corresponding amount of time would be unreasonable.

I also note that, while the standard period of time for a modified duty assignment is 90 days, under Article 15, Section 1.B., such an assignment could last for an indefinite period and, in fact, the Grievant's assignment lasted for five and one-half months. Theoretically, therefore, the Employer could extend such an assignment for a year or more. Under the County's interpretation of the contract, an employe in such a case could lose his or her continuation rights altogether, which would negate the language of Article 22, Section 15. Arbitrator's will typically avoid an interpretation of a contract that would render a particular provision void, and while the County is receiving an employe's services, and absent clear language to the contrary, there is no justification for such an interpretation or result.

Finally, the County argues that upholding the grievance will have a deleterious effect in the larger context, because the additional financial burden of extended continuation benefits may require elimination of the modified duty program. That may be, although the lack of past practice in this area leads me to believe this is not an issue that arises with great frequency and, therefore, the financial impact is not likely to be great. Further, the Arbitrator's function is to construe the contract language and apply it to the record, not to engage in speculation as to the impact of an award on County policy, or to adapt his interpretation of the contract to achieve a desired result, however laudable.

Based upon the foregoing and the record as a whole, the undersigned enters the following:

AWARD

The County violated Article 22, Section 15, of the collective bargaining agreement when it commenced the running of the Grievant's health insurance continuation benefits on March 29, 1999. Therefore, the County shall continue it's contribution toward the Grievant's health insurance premiums, at the same level in effect on September 10, 1999, until September 10, 2000, and shall reimburse the Grievant in the same amount for any contribution not made between March 31, 2000, and the date of this award.

The Arbitrator will retain jurisdiction over this matter for a period of 30 days for the sole purpose of resolving any issues surrounding the implementation of the remedy ordered herein.

Dated at Eau Claire, Wisconsin this 24th day of July, 2000.

John R. Emery /s/
John R. Emery, Arbitrator

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