BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**NEW BERLIN PROFESSIONAL POLICE ASSOCIATION, INC.**

and

**CITY OF NEW BERLIN (POLICE DEPARTMENT)**

Case 97
No. 59702
MA-11382

*(Grievance of Christine Chialiva)*

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Appearances:

**Mr. Patrick J. Coraggio** and **Mr. Kevin Naylor,** Labor Consultants, Labor Association of Wisconsin, Inc., 2835 North Mayfair Road, Wauwatosa, Wisconsin 53222, appearing for the Association.

Seneczko Law Offices, S.C., by **Attorney Alan E. Seneczko**, 10701 West National Avenue, Suite 200, Milwaukee, Wisconsin 53227, appearing for the City.

## ARBITRATION AWARD

The Association and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Association requested and the City concurred, that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a dispute as set forth below. The Commission appointed Dennis P. McGilligan, a member of its staff. Hearing on the matter was held on August 28, 2001, in New Berlin, Wisconsin. The hearing was transcribed, and the parties filed briefs and reply briefs by December 26, 2001.

## ISSUES

The parties were not able to stipulate the issues for decision. The Association poses the following issues:

> Did the City of New Berlin violate the collective bargaining agreement between the City and the New Berlin Professional Police Association when they discontinued the contractual prescribed biweekly pay of Christine Chialiva, after October 13, 2000?
>
> If so, what is the appropriate remedy?

The City frames the issues in the following manner:

> Whether the City violated Art. XII of the labor agreement when it denied the grievant's request for salary continuation benefits? If so, what is the appropriate remedy?

Having reviewed the entire record, the Arbitrator frames the issues as follows:

1. Did the City of New Berlin violate Article XII of the collective bargaining agreement when it informed the Grievant, Christine Chialiva, by letter dated October 13, 2000, that it was no longer going to provide her with supplemental pay benefits?

2. If so, what is the appropriate remedy?

## FACTUAL BACKGROUND

### Facts Giving Rise to the Instant Dispute

The parties stipulated to the following facts.

Christine Chialiva was hired as a police officer for the City of New Berlin, herein "City," in January of 1997. She was functioning as a police officer on July 13, 1998.

Officer Chialiva, herein "Grievant," suffered a work related injury on July 13, 1998.

Subsequent to the injury, the Grievant presented notes from various physicians who released her from work or restricted her to part-time work, subject to restrictions. These restrictions, in turn, prevented the Grievant from returning to her regular duties from approximately July 1998 through the present.

On September 4, 1998, and again on January 7, 1999, the City's worker's compensation insurance carrier, Ace Property and Casualty Insurance, sent the Grievant a letter denying her claim for worker's compensation.

On September 30, 1998, the Grievant requested supplemental pay benefits pursuant to Article XII.

On October 2, 1998, the Grievant filed a worker's compensation claim for her work related injury with the Wisconsin Worker's Compensation Division, Department of Workforce Development ("DWD"). On October 19, 1998, DWD provided "Notice" of the Grievant's application for hearing on the claim to the City.

On January 5, 1999, the Grievant requested continuation of her salary "in accordance with the contract, section 12.05 until a decision is rendered by" DWD.

On January 18, 1999, the Grievant signed a promissory note pursuant to Article XII, Section 12.05 of the agreement.

The City and its insurance carrier denied the compensability of the claim and liability for certain temporary disability benefits which resulted in a hearing before Administrative Law Judge James G. Lawrence on July 19, 1999. At the hearing and at all relevant times herein, the Grievant was represented for purposes of her worker's compensation claim by Attorney Michael H. Gillick.

On August 23, 1999, Administrative Law Judge Lawrence issued an Interlocutory Order finding that the Grievant sustained an injury arising out of her employment with the City. A timely petition for review was subsequently filed.

On August 23, 1999, the Grievant filed a claim with the Department of Employee Trust Funds seeking duty disability benefits under Sec. 40.65, Stats.

On March 31, 2000, the Labor and Industry Review Commission affirmed Administrative Law Judge Lawrence's findings and order.

The Grievant has received supplemental pay benefits under Article XII from July 13, 1998 through October 13, 2000. By letter dated October 13, 2000 the City advised her that "we are no longer willing or able to provide you with supplemental pay benefits."

The Grievant received a total of $22,949.24 in supplemental pay benefits for a total of 24 months.

The Grievant's last full paycheck was through October 13, 2000.

The Grievant has been working light duty Monday, Wednesday and Friday from 6:45 a.m. to 10:45 a.m. as a teleserv officer and since September 5, 2000 has been paid for twelve hours a week/24 hours bi-weekly. Her current bi-weekly pay is $597.84.

By letter dated October 16, 2000, the Association sent Ms. Tamara (Tami) Potkay, Director of Human Resources for the City, a letter challenging the termination of the Grievant's supplemental pay benefits. The Association attached a copy of a "Notice of Hearing" scheduled by the DWD. The Notice referenced a hearing date of 9/26/2000. The letter added that the hearing concerned the Grievant's claim of permanent disability (i.e. extent of injury) which was heard by ALJ William Phillips Jr. The letter concluded: To my knowledge no decision has been rendered by the ALJ "and no final resolution has been made in which both parties have exhausted all appeals under the provision of Wisconsin statutes."

The aforesaid attached "Notice of Hearing" stated regarding the issues to be heard: "Duty Disability 40.65."

The City responded to the Association on October 18, 2000 stating in material part:

> This letter is being sent in response to your October 16, 2000 objection and request for clarification concerning the termination of Christine Chialiva's supplemental pay benefits under Article XII of the Labor Agreement.
>
> Reading your letter, it appears that certain basic facts underlying the current situation need to be clarified.
>
> As you know, Section 12.02 provides for up to 12 months of supplemental pay benefits in the event of a difference between an officer's worker's compensation benefits and regular gross pay. Section 12.03 further explains how that benefit is to be administered while the worker's compensation carrier is evaluating the underlying compensability of the claim. Sections 12.04 and 12.05 then address the payment of that benefit in the event the officer appeals the worker's compensation carrier's determination on compensability,

end of healing period, etc. Thus, Article XII clearly relates to claims for worker's compensation benefits under Chapter 102 of the Wisconsin Statutes.

The problem is that the current situation does not involve a claim for worker's compensation benefits. The current situation, the claim that is currently pending and went to hearing on September 26, 2000, involves a claim for duty disability benefits under Chapter 40. This claim does not involve worker's compensation benefits and our worker's compensation carrier has nothing to do with it. Christine Chialiva's worker's compensation claim ended in March, 2000.

Simply stated, Article XII does not apply to claims for duty disability benefits.

On October 25, 2000 the Association provided the City with a Grievance Worksheet which challenged the City's October 13, 2000 refusal to continue her full salary. The grievance alleged that the aforesaid action violated Article XII, Sections 12.04 and 12.05. The Association subsequently withdrew the Grievance Worksheet on December 1, 2000.

On November 16, 2000, the Grievant advised Human Resources Director Potkay that she was making a claim for functional permanent disability and requested continuance of her salary pending a written decision by the worker's compensation carrier. In support of her claim, she attached a letter from Attorney Gillick to James G. Budish, Attorney for the worker's compensation carrier. In said letter Gillick noted that the Grievant was presently also litigating the issue of Duty Disability.

Grievance Chair Jeff Herro presented a Grievance Worksheet dated December 13, 2000 to Acting Chief of Police, Daniel Noordyk, protesting the City's failure to respond to the Grievant's November 16 request for salary continuation "until a decision of compensability by the WC carrier." The grievance alleged that the City had violated Article XII, Sections 12.03, 12.04 and 12.05 by its failure to respond.

On December 14, 2000, Noordyk responded to the grievance determining that it could not be resolved at that level; identifying that steps two and three of the grievance procedure had been fulfilled; and moving it to step four.

On January 2, 2001, Grievance Chair Herro requested payment for the Grievant to Human Resources Director Potkay. Herro noted: "besides filing for 40.65 disability retirement, Officer Chialiva has also filed for permanent disability under Wisconsin Workers Comp. Laws." Herro asked the City to comply with Article XII of the agreement and continue the Grievant's salary and reimburse her for all lost salary or time as of November 16, 2000.

On January 8, 2001, Human Resources Director Potkay responded to Grievance Chair Herro denying the Chialiva grievance dated December 13, 2000.

On January 10, 2001, Grievance Chair Herro responded to the above letter taking issue with the City's interpretation of Article XII, and asking the City to continue the Grievant's full salary until a final decision on her "outstanding WC Claim for a permanent partial disability."

By letter dated January 19, 2001, Human Resources Director Potkay informed Grievance Chair Herro that "we disagree with your interpretation of the contract for reasons previously stated. This grievance is therefore denied."

On February 7, 2001, a written grievance was signed by Grievance Chair Herro and forwarded to the Chief of Police. The grievance noted that in November, 2000, the City was advised of the Grievant's claim for functional permanent disability and that as of February 5, 2001, the worker's compensation carrier had not made a decision on the Grievant's claim for 4% permanent partial disability. The grievance also noted that Section 12.03 provides that "Pending the written decision of compensability by the WC carrier, the employee shall not suffer any loss in salary." The grievance maintained that the City violated the express and implied terms of the agreement when it failed to pay the Grievant her full salary until a written decision of compensability by the worker's compensation carrier.

Thereafter, the matter proceeded to arbitration.

On July 30, 2001, Administrative Law Judge William Phillips, Jr., determined that the Grievant is entitled to duty disability benefits pursuant to sec. 40.65, Stats., and issued an Order for her to receive benefits from the Department of Trust Funds.

The City has appealed the ruling of Administrative Law Judge William Phillips, Jr.

**Background of the Disputed Contract Language**

The parties stipulated to the basic underlying facts leading up to agreement on the disputed contract provision.

The Association and the City have had a collective bargaining agreement in full force and effect at all times material hereto. This agreement contains a provision relating to "Service Incurred Disability," Article XII.

Gary Blunt was the Chairman of the Association Bargaining Committee during calendar years 1998 and 1999 and negotiated the collective bargaining agreement for calendar years 1999 and 2000.

Human Resources Director Potkay represented the City in those negotiations.

During those negotiations the language in Article XII – Service Incurred Disability was discussed, negotiated and changed.

Gary Blunt testified that the reason for negotiating a change in the language of the aforesaid Article was that officers were not receiving wage benefits while off work due to an injury arising out of their employment when the insurance company denied their claim. Instead, they were forced to use other benefits they received from the City like sick leave or vacation. This was causing morale problems: "the guys thought they were getting screwed over because they're not getting no wages during this time."

Human Resources Director Potkay testified that there had been some claims by officers whose claims were denied; they appealed; and while the determination of compensability was pending employees were given the option of using sick leave or vacation to cover their absences from work or going without pay. In other words, while the dispute over whether this was work-related or not continued they received no wages. They would be given the option of using their other benefits. The Association brought this problem to the attention of the City during negotiations and "we worked through different language scenarios, we met with the mayor, we talked about the concerns, and we agreed on the final language."

During these negotiations, the Association proposed on September 28, 1998, to change Section 12.03 in part as follows:

> If a worker's compensation claim is determined to be non-duty related by the City's WC carrier or if their (sic) is a dispute as to the period of healing, extent of injury, etc. the employee may appeal the decision of the WC carrier.

In her response to the above offer, Human Resources Director Potkay took "extent of injury" out and it was ultimately excluded from the final agreement. She took it out because the phrase "extent of injury" was a separate issue relating to permanent disability. She testified that the extent of the injury "is separate from the period of healing which would be the time missed from work which we would be required to cover the wages" under the contractual language.

Instead, Human Resources Director Potkay proposed on September 29, 1998 that Section 12.03 read as follows:

> Pending the decision of compensability by the worker's compensation carrier, the employee shall not suffer any loss in salary. If deemed compensable, the city will make the proper adjustments to the employees salary in accordance with section 12.02.

The concept of "pending the decision of compensability by the worker's compensation carrier, the employee shall not suffer any loss in salary" remained in all subsequent drafts of Section 12.03 and ultimately was included in the final agreement.

Human Resources Director Potkay testified that the purpose of Article XII is to protect the employee from wage loss "pending a decision on compensability." Potkay stated that the term "compensability" was specifically used in the contract and means "whether or not a injury is related to the job." Potkay added that the Article XII salary continuation benefit was intended to be provided for twelve months, and that it was not discussed that it would exceed twelve months.

Gary Blunt testified:

> Intent of this language in 12.03 is that pending a written decision from the worker's compensation carrier, the employee would not suffer any loss in salary. If the worker's compensation carrier determined that the claim was a compensable one, then it reverts back to section 12.02 as far as how to pay out that claim.

He added:

> Section 12.04 simply states that if an employee wishes to appeal the worker's compensation carrier's determination on compensability relating to the period of healing, extent of healing, et cetera, which in my mind was any disagreement that they wish to appeal with the worker's compensation carrier, that the employee was entitled to do so under the provisions of the Wisconsin statutes.

Blunt stated that Section 12.04 "would go beyond the appeal of the initial worker's compensation denial" and "would include any litigation relative to an injury on duty" including "a request for a 4065 pension" relating "to a service incurred disability."

Blunt added: "At the time this was drafted, it was my understanding that DWD would be the third-party arbitrator per se to decide the finality of these claims"(relating to injuries sustained while working). Blunt understood: "until the finality of the claim had been decided that the employee after signing a promissory note would continue to get their full pay."

The 1999-2000 collective bargaining agreement was entered into voluntarily between the City and the Association.

## PERTINENT CONTRACTUAL PROVISIONS

### 1996-1998 Collective Bargaining Agreement

### ARTICLE XII – SERVICE INCURRED DISABILITY

**Section 12.01**: Any Officer absent from work because of disability arising in the course of his employment shall receive the difference between his Worker's Compensation benefits and eighty-five percent (85%) of his regular full gross salary for a maximum of twelve (12) months. (If the tax laws are revised so that Worker's Compensation benefits are treated as taxable income, this paragraph will be revised to delete the phrase "eighty-five percent (85%) of".)

The Employer agrees to provide claim forms and assistance in processing a claim pursuant to the current practice now in existence. Employees shall not lose any salary because of filing a claim under this Section. The provisions of Section 40.29, Wis. Stats., shall not be applicable. (Appendix "A")

. . .

### 1999-2000 Collective Bargaining Agreement

### ARTICLE XII – SERVICE INCURRED DISABILITY:

**Section 12.01** The City of New Berlin will provide claim forms (WC-12) and assistance in filing a claim with the city's worker's compensation carrier.

**Section 12.02** Any officer absent from work because of a disability, injury or illness arising in the course of employment shall receive the difference between the WC benefit and eighty-five (85%) of the regular full gross salary for a maximum of twelve (12) months. (If the tax laws are revised so that WC benefits are treated as taxable income, this paragraph will be revised to delete the phrase "eighty-five percent (85%) of")

**Section 12.03** Pending the written decision of compensability by the WC carrier, the employee shall not suffer any loss in salary. If the WC carrier determines that the claim is compensable, the City will make the proper adjustments to the employees salary in accordance with section 12.02. If the WC carrier determines that the claim is non-compensable, the appropriate

adjustment will be made to the employee's pay, or sick leave bank if appropriate, to compensate for all money erroneously paid to the employee in relating to filing a claim under this article.

**Section 12.04** If the employee wishes to appeal the WC carrier's determination on compensability, or on the period of healing, extent of healing, etc., the employee may do so under the provisions of the Wisconsin Statutes. An employee wishing to exercise his/her right to appeal may do so by filing an Application for Hearing with the Department of Workforce Development (DWD).

**Section 12.05** In the event that an employee has filed an appeal to the DWD within thirty (30) days of being notified in writing of the determination of the WC carrier and during that thirty (30) day period an employee submits a written request, which includes a signed promissory note, (Note: The form of the Promissory Note has been initialed by the parties on November 25, 1998) to the Human Resources Department to have the City continue the employee's salary while the appeal is pending, the City shall continue the employee's full salary until the date of the decision of the DWD or the date the employee withdraws his/her request or appeal, if earlier. An employee who withdraws or loses an appeal to DWD is obligated to repay the City for any salary continuation payments that were granted under this Section. The City will make adjustments to the employee's future salary at the rate of reduction not to exceed 25% of the employee's gross salary for all regular pay periods, and 100% of the employee's holiday paycheck, until such debt is repaid. However, if acceptable to the City, the employee may choose to repay the City, in whole or in part, by having the City reduce the appropriate number of days from an employee's sick leave account, vacation account, etc.

If the employee terminates employment with the City without having repaid the full amount of the salary continuation payments the employee was obligated to repay, the City shall be entitled to apply any termination payments owed such employee, including salary, muster, vacations, compensatory time off, holiday pay, etc., toward such repayment. If there still is a balance due, the City shall be entitled to apply any amount owed the employee under Section 6.04 (unused accumulated sick leave) toward such repayment with any balance to be paid by the employee within thirty (30) days of said termination unless the City agrees to some other repayment plan. If an employee fails to repay the City in the agreed upon amount of time, said employee will lose any and all benefits provided for in Sections 5.03, 5.05, 5.07 and 5.08. The Association agrees that in the event the City incurs legal fees in recovering any amount due

under such Promissory Note, the Association will be liable for one-half (1/2) of such attorney fees, up to a maximum of $2,500.00.

## POSITIONS OF THE PARTIES

### Association's Position

The Association makes the following principal arguments.

The Arbitrator is being asked to **interpret and apply** the language found in the agreement. In doing so, he may not exceed his authority. He may not ignore clear language and rewrite the parties' contract.

It was necessary to change Article XII so that employees who suffer on-the-job injuries would not suffer financial hardship, or loss of benefits while an appeal was pending, due to the insurance company's willful denial of legitimate worker's compensation claims.

Lieutenant Blunt's testimony clearly demonstrates that the Association negotiated the changes in Article XII to protect an officer's wages while any appeal was pending. The aforesaid contract language "may be some what ambiguous in part, but the intent of the language is crystal clear as set forth in the testimony of Lt. Gary Blunt."

If the contract language is clear and unambiguous the Arbitrator need look no further in order to ascertain the intent of the parties. However, the Arbitrator may look to other sources to determine the parties' intent including, but not limited to, pre-contract negotiations, bargaining history and past practice. All of these criteria support the Association's position.

The Association points out that it agreed to safeguards for the City in Article XII. In return, the Association argues the City agreed contractually to provide wages and benefits to the employee during any appeal process related to an injury sustained in the line of duty.

The City's argument regarding a maximum supplemental payment to worker's compensation of twelve months lacks merit because it relies on a single sentence in Section 12.02 which states under the circumstances described therein an officer will receive salary continuation benefits "for a maximum of twelve (12) months." This ignores the newly negotiated language currently found in Section 12.03 which provides: "**Pending the written decision of compensability by the WC carrier, the employee shall not suffer any loss in salary**." It also ignores the reasons for changing the language in Article XII in the first place. The Association concludes that any interpretation other than Section 12.03 was meant to provide officers with **full salary benefits** while a claim is pending fails the test of reasonableness.

The Association's interpretation of Article XII makes sense and is not absurd. In contrast, the City's argument that the Association's interpretation of the disputed contract language "may favor officers with minor injuries that are disputed more than officers who suffer more serious undisputed injuries" makes no sense because it is the insurance carrier who is responsible for this absurdity. The insurance carrier bears sole responsibility for the duration of time it takes to resolve claims because of their propensity to deny legitimate claims.

The Grievant's litigation under Sec. 40.65 Stats., stems from her work related injury on July 13, 1998. While the disputed contract language does not specifically cover any appeal made by the employer, its intent is clear – to cover the employee and provide benefits while any appeal related to an on-the-job injury is pending.

If the Arbitrator applies the plain meaning of the word "maximum" to the facts of the case, the Association believes the Grievant is entitled to Service Incurred Disability pay "beginning with the **final determination** of compensability of a specific WC claim."

The City's interpretation of Sections 12.03, 12.04 and 12.05 ignores bargaining history. It is also nonsensical when one considers the fact that the twelve-month benefit was already part of Article XII prior to the creation of the aforesaid Sections. Consequently, there was no need for the Association to make the concessions that it did unless it was for the purpose of obtaining some income protection for officers who find themselves in disputed worker's compensation claims exceeding twelve (12) months.

The City describes Article XII as "an **elaborate mechanism** to address the injured officer's wage loss in the event of a disputed claim." The Association agrees with this definition. Therefore, the Association finds it hard to believe that the City truly believes that an elaborate mechanism such as Article XII, could possibly be administered in a "one size fits all" fashion as is possible for other benefits like vacation time. This is particularly true due to the uncertainty created by continuous denials of legitimate claims.

Sections 12.03, 12.04 and 12.05 must be read to supplement and add to the twelve-month limit set forth in the Agreement.

Based on the record and the foregoing, the Association respectfully requests that the Arbitrator sustain the grievance and award the appropriate remedy.

**City's Position**

The City summarizes its position as follows.

The provisions and intent of Article XII are both clear and unambiguous.

Under the 1996-98 version of Section 12.01, officers injured at work were entitled to 12 months of service incurred disability pay, but not if the worker's compensation insurance carrier challenged the compensability of their underlying injury. The parties therefore created an elaborate mechanism (Article XII) to address an injured officer's wage loss in the event of a disputed claim.

This mechanism compensates officers recovering from work-related injuries for any wage loss they may suffer due to the difference between their worker's compensation benefit, if any, and regular pay. The benefit is payable for a "maximum of 12 months" and is available even if the officer's worker's compensation claim is denied by the City's worker's compensation insurance carrier. Section 12.02 creates the benefit; Section 12.03 explains how it relates to the insurance carrier's decision; Section 12.04 sets forth an employee's appeal rights; and, Section 12.05 explains how the benefit is payable and/or recoverable in the event of an appeal. Simply stated, the aforesaid Sections establish how the benefit provided by Section 12.02 is to be administered when the underlying cause of an officer's injury or the duration of her recovery are disputed by the insurance carrier.

These provisions all work together and must therefore be interpreted accordingly, i.e. in a manner that reflects and supports the purpose and intent of the entire Article, and not just one isolated Section.

The "maximum" benefit available under Article XII is 12 months of service incurred disability pay. This is what the contract expressly provides and this is the only interpretation that is consistent with the plain meaning of the word "maximum." Moreover, a contrary interpretation would lead to unreasonable and absurd results, since it would place officers with conceded claims in a less favorable position than officers with disputed claims.

The Grievant has already received 24 months of service disability benefits under Article XII. This is 12 more months that she is entitled to under the contract. She has exhausted all of the benefits available to her under the Article and she is not entitled to more.

The subject matter of the present grievance i.e. the Grievant's claim for permanent disability benefits, is beyond the scope of Article XII for a number of reasons.

First, contrary to the Association's assertion, Article XII does not apply to appeals of claims for duty disability benefits under Section 40.65 Stats. The Association's own actions in withdrawing a claim for duty disability benefits under Section 40.65 Stats., belie its contention.

Second, her request for permanent disability benefits does not relate to any wage loss, and does not involve a dispute concerning the "compensability" of her claim or her "period of healing or extent of healing," prerequisites for benefits under Sections 12.03 and 12.04.

The purpose of new Sections noted above was to put officers with disputed claims on the same footing as officers whose claims were not – meaning that they too would be entitled to "a maximum of 12 months" of service incurred disability benefits while their claims were being litigated.

Nothing offered by the Association about the history and original intent of the new Sections rebuts this basic premise.

Nor is the Association's argument that Blunt "intended" Article XII to provide for unlimited benefits supported by any evidence in the record or elsewhere.

The Association's argument that because the contract contains a provision for recovering benefits paid to officers whose claims are ultimately found to be not work-related (Section 12.05), there is no 12-month cap on the benefit is flawed. The right of recovery contained in the aforesaid Section provides that the parties "intended" that an officer who received 12 months of benefits he was not entitled to has to pay them back, not that the benefits he received during litigation is unlimited.

The City asserts that the purpose of Section 12.03 is simple: an officer is entitled to receive 12 months of benefits while his claim is pending, the same as if his claim was never denied in the first place. The City adds that the reason for a Promissory Note protecting the City while an appeal is pending is also simple: an officer whose injury is found not to be work-related will have received 12 months of benefits that he was not entitled to.

The Association's position that officers with conceded injuries are limited to just 12 months of benefits, even if it takes longer to recover, while officers with disputed injuries receive unlimited benefits, cannot be succeed by blaming the insurance company and its "propensity to deny legitimate claims."

The City requests that the grievance be denied.

## DISCUSSION

At issue is whether the City violated Article XII of the collective bargaining agreement when it informed the Grievant by letter dated October 13, 2000, that it was no longer going to provide her with supplemental pay benefits.

The Association argues for such a violation, while the City takes the opposite position.

As stated in BARRON AREA SCHOOL DISTRICT, Case 44, No. 59352, MA-11262, pp. 8-9 (McGilligan, 9/01), and MANITOWOC COUNTY (SHERIFF DEPARTMENT), Case 68, No. 59857, MA-11431, p. 14 (McGilligan, 1/02), contract interpretation involves giving meaning to the words and conduct used by the parties in their collective bargaining agreement. *Labor and Employment Arbitration*, Volume 1, Tim Bornstein, Ann Gosline and Marc Greenbaum General Editors, Chapter 9, Contract Interpretation and Respect for Prior Proceedings by Jay E. Grenig, s. 9.01[1], 9-3 (1998). Ideally, contract interpretation results in a determination of exactly what both parties in fact had in mind or intended. This ideal is seldom attainable:

> In the first place, it is impossible to know exactly what the parties did have in mind. Moreover, even if this could be determined, it may be doubted whether very many cases would be found in which both parties did have exactly the same things in mind. The best we can do is to approximate that ideal by adopting as a goal something that is more nearly possible of attainment. That goal, must, however, be fair to both parties to the contract. 2/ *Labor and Employment Arbitration*, Id., and the cases cited therein. (Footnote omitted).

Over the years, arbitrators have looked to the principles of contract interpretation for guidance in interpreting collective bargaining agreements. In the instant case, both parties cite various standards of contract interpretation to support their position. However, the principles of contract interpretation serve only as guides and should not be used as rigid or undeviating rules to be followed as methodically as though labor relations were an exact science. *Labor and Employment Arbitration*, supra, 9-3 and 9-4.

Many arbitration awards interpreting contracts focus on the intent of the parties. *Labor and Employment Arbitration*, supra, s. 9.01[2], 9-4. Here, both parties rely on the parties' intent when they negotiated the disputed contract language in support of their respective positions. However, they differ strongly as to what was intended when the parties agreed to the disputed contract language. Consequently, the Arbitrator will consider the purpose of the disputed contractual provision as a basis for its interpretation. The purpose may be ascertained from the language of the contract as well as evidence of bargaining history and the parties' administration of the contract. *Labor and Employment Arbitration*, supra, 9-5. The Arbitrator will also consider the arbitration awards cited by the parties in support of their position as well as other arbitral precedent.

The Association argues that the clear meaning of Article XII, Sections 12.03, 12.04 and 12.05 is that the City cannot discontinue an employee's salary continuation while any worker's compensation appeal is pending with DWD. The Association maintains that the City violated this clear contractual mandate when it unilaterally discontinued the Grievant's supplemental pay benefits on October 13, 2000.

Sections 12.02, 12.03, 12.04 and 12.05 of Article XII pose the interpretative issues, and cannot be considered clear and unambiguous since both parties have made plausible, but conflicting, arguments regarding their interpretation. An ambiguity occurs when one asks whether the twelve (12) month "maximum" salary continuation benefit found in Section 12.02 applies to instances where an employee has filed an appeal of the worker's compensation carrier's determination to the DWD. There is also an ambiguity as to what kinds of claims are covered by the aforesaid contractual provisions. The Association believes that the twelve (12) month "maximum" contained in Section 12.02 does not apply when an officer files an appeal of the carrier's determination pursuant to Sections 12.04 and 12.05. The Association also believes that any appeal resulting from an officer's injury entitles an officer to benefits under Article XII. The City takes the opposite position. The parties' arguments demonstrate that the disputed contractual provisions, however, do not clearly and unambiguously provide answers to the questions posed above. The Arbitrator, therefore, turns his attention to the other criteria set forth above.

The Association initially argues that pre-contract negotiations and bargaining history support its position that Article XII protects an officer's wages while any appeals are pending with Worker's Compensation. The record, however, does not support such a finding.

Lieutenant Gary Blunt was one of the authors of the language now found in Article XII – Service Incurred Disability of the 1999-2000 collective bargaining agreement.

During his many years as a union official, Lieutenant Blunt became keenly aware of problems concerning disputes over worker's compensation claims filed by Officers Steve Schulte, Kim Friese and Duane Schlottke.

Lieutenant Blunt testified that Officer Schulte was injured twice during the course of his employment and that on both occasions he filed worker's compensation claims. (Tr. p. 14). On the most recent occasion, Officer Schulte suffered an injury to his lower abdomen while booking a suspect. (Tr. pp. 14-15). Officer Schulte's subsequent worker's compensation claim was initially denied by the insurance carrier. (Tr. p. 15). He filed an appeal and was eventually successful in obtaining payment from the worker's compensation provider. Id.

Officer Schulte was also involved in an on-duty squad car accident which resulted in an injury to his lower back. Id. He filed a worker's compensation claim which was also initially denied by the insurance carrier. Id. Officer Schulte filed an appeal and was eventually paid worker's compensation for the back injuries he sustained in the squad car accident. (Tr. p. 16).

Likewise, Officer Kim Friese "was at the scene of the accident and twisted her knee which subsequently resulted in surgery." (Tr. p. 18). The insurance company denied her worker's compensation claim. Id. Officer Friese prevailed in her appeal, and she was eventually compensated for her on-the-job injury. Id.

Finally, Lieutenant Blunt testified that within the last four to five years Officer Duane Schlottke filed a worker's compensation claim for an on-duty injury that was initially denied by the insurance company only to be upheld on appeal. (Tr. pp. 20-21).

In at least two of the above cases, although appeals were successful, the officers involved found it necessary to supplement their incomes with other forms of paid time such as sick leave while the claims were being appealed. (Tr. pp. 16-19).

Lieutenant Blunt testified the membership was frustrated with the insurance company's denials of worker's compensation claims, and these denials had a corresponding negative effect on morale. (Tr. pp. 21-22). He added that officers were "frustrated to the point where they were and did discuss changing the contract language." (Tr. p. 23).

Article XII of the 1996-1998 collective bargaining agreement was the language that was in effect at the time, and "the language that the Association felt was problematic." (Tr. p. 27). Under Article XII, officers who were absent from work because of disability arising in the course of their employment received a salary continuation benefit for a maximum of twelve (12) months if their claim was approved by the worker's compensation carrier. However, officers whose worker's compensation claim was denied did not receive salary continuation. Instead, they "were given the option of using sick leave to cover their absences from work or using vacation or going without pay." (Tr. p. 142). The Association wanted to address this problem: "there would be a dispute over whether this was work-related or not and they would receive no wages while that dispute was ongoing." Id.

Lieutenant Blunt communicated the above concerns and frustrations of the Association's membership to both Human Resources Director Potkay, who represented the City in negotiations with the Association, and Mayor Gatzke. (Tr. p. 25). The Association set out to amend Article XII so that employees who suffered "on-the-job injuries would not be made to suffer financial hardship, or loss of benefits while an appeal was pending, due to the insurance company's willful denials of legitimate worker's compensation claims."

However, contrary to the Association's assertion, this "pre-construction evidence of the intent of the parties" does not support the Association's contention that any appeal to Worker's Compensation will trigger the income continuation benefit found in Article XII. The record indicates that Officers Schulte, Friese and Schlottke filed worker's compensation claims under Chapter 102 in order to be compensated on a temporary basis while they recovered from

injuries received during the course of their employment. (Tr. pp. 14-21, 154-155). There is no persuasive evidence in the record that they filed permanent disability claims under Chapter 102 or Section 40.65 duty disability claims like the Grievant herein. Therefore, this evidence does not support the Association's claim that the Grievant should receive salary protection while she pursues those kinds of claims.

Likewise, bargaining history does not support the Association's position.

Lieutenant Blunt testified that there was a morale problem because officers weren't getting worker's compensation benefits because their claim had been denied, and "they were forced to use their other benefits." (Tr. p. 57). Blunt stated: "this was what was causing the morale problems, the guys thought they were getting screwed over because they're getting no wages during this time." Id. Blunt explained that the intent of Article XII is to protect an officer from a wage loss "while they're getting screwed around by an insurance company." (Tr. pp. 57-58). Blunt added that the purpose of the amendments to Article XII "is to protect an officer's wages in the event he suffers a work-related injury that causes him to be absent from work" and "during any appeal process." (Tr. p. 58).

As a result, the service incurred-disability benefit provided in Article XII is expressly connected to the difference between an officer's worker's compensation benefit and regular full salary (Section 12.02), or salary loss in connection with disputes over compensability (Section 12.03).

The words used in Article XII are critical. Liuetenant Blunt acknowledged that the Wisconsin Worker's Compensation Act incorporated various "terms of art" unique to that law, and that he was familiar with those terms. (Tr. p. 51). These "terms of art" include "compensable" and "compensability," which are used in connection with issues concerning the cause of injury and the question of whether it is "work-related." (Tr. p. 52). Blunt also acknowledged that the salary continuation benefit provided in Article XII is triggered by disputes over the "compensability" of a claim, and that this same reasoning applies to "appeals" under Section 12.04. (Tr. pp. 59, 70).

In addition, Lieutenant Blunt acknowledged that eligibility for temporary disability benefits under the Worker's Compensation Act depends upon the healing process; more specifically, the question of whether an individual has reached an "end of healing" – words that are also found in Section 12.04. (Tr. pp. 53-54). The temporary disability benefit is the wage indemnification that an officer would receive under the worker's compensation law while recovering from that injury. (Tr. p. 53). The wage benefit is two-thirds of the officer's average weekly wage but it's not taxed. Id. If the insurance carrier determines that an officer has reached an "end of healing," the officer is not entitled to any further wage indemnity benefits (temporary benefits). (Joint Exhibit Nos. B1, B2, Tr. p. 54).

As pointed out by the City, the above words are critical for two reasons. First, they all appear in and relate directly to Article XII. They are also consistent with the underlying purpose of Article XII: to protect officers from any wage loss they may suffer in the event of disputes about the underlying cause of their injury or how long it is taking them to recover. (Emphasis in the original). Second, they exemplify why the Grievant's present claim has nothing to do with Article XII.

In this regard, the Arbitrator points out that when the Grievant filed her first claim for service disability benefits in September 1998 and January 1999, the compensability of her claim was in dispute, as well as the extent of her healing. (Joint Exhibit Nos. B1, B2, B3 and C). She was therefore eligible for, and granted, service disability benefits under Article XII while her appeal was pending. However, these issues were resolved by ALJ Lawrence on August 23, 1999 and by the Labor and Industry Review Commission on March 31, 2000, when the Grievant's injury was found to be compensable and she was awarded temporary disability benefits for her wage loss. (Joint Exhibit Nos. E and F). All of these issues and disputes are consistent with the intent and purpose of Article XII based on bargaining history.

The facts underlying the Grievant's first claim under Article XII must be contrasted with those underlying her present claim. On November 16, 2000, the Grievant presented her current request for service incurred disability benefits on the ground that she was "making a claim for functional permanent disability." (Emphasis in the original). (Joint Exhibit No. H). Attached to her request was a letter from her attorney, who specifically noted that the Grievant had "successfully established her case as work related." Id. Hence, at the time she requested additional benefits under Section 12.03, no dispute existed concerning the "compensability" of her claim for temporary disability benefits which is received "while the officer's healing." (Tr. p. 54).

Claims for "functional permanent disability" under the Worker's Compensation Act have no direct relation to an individual's wage or wage loss – a fact recognized by the Union. (Tr. pp. 54-55). They compensate an employee for permanent damage to some part of the body. In the aforesaid November 16th letter, the Grievant was making a claim for a "4% permanent partial disability." (Joint Exhibit No. H). Permanent partial disability benefits ("PPD") are payable regardless of whether an employee is working. (Tr. p. 74). Applied to the Grievant, a claim for 4% functional PPD entitles the Grievant to $179/week for 40 weeks, and she would receive the amount whether she was working full time or not at all. (Tr. pp. 54-55, 108).

Section 102.44 and 102.52 Stats., make it clear that permanent disability benefits compensate an employee for permanent damage to some part of the body. As discussed below, by deleting any reference to "extent of injury" from the final language of Article XII, the parties expressly limited said contract provision to situations involving temporary disability.

The above facts clearly distinguish the Grievant's PPD claim from her prior claim and the essence of Article XII. Article XII is intended to protect an officer from potential wage loss while the compensability of the officer's temporary disability claim and/or period of healing is being disputed. Yet, the PPD the Grievant has requested has nothing to do with her current work schedule or restricted duty. (Tr. p. 74). In other words, the benefit she is now seeking has no relation to, and will not compensate her for, any wage loss she may have suffered or may now be suffering. (Tr. pp. 74, 79).

In addition, while Article XII references "worker's compensation carrier," "compensability," and "period of healing, extent of healing," there is no reference to duty disability, Section 40.65, Stats., or the Department of Employee Trust Funds. Article XII also fails to reference "permanent functional disability." There is no persuasive evidence that the parties agreed to include these subjects in Article XII during bargaining. Bargaining history does not support a finding that said Article applies to any situation other than worker's compensation claims for temporary disability.

Finally, the Arbitrator notes that Lieutenant Blunt testified that the issue of "permanent disability" relates to the "extent of injury," another worker's compensation term of art. (Tr. pp. 71-72). In fact, he used those exact words in one of his proposals to the City for the disputed contract, (Joint Exhibit No. A1, 9/28/98), but they never made it into the final draft of Article XII. (Tr. pp. 72-73). In other words, the Association unsuccessfully sought to have Article XII include permanent disability claims. Arbitrators are reluctant to read a provision into a contract where a party has attempted but failed to include it. Elkouri and Elkouri, *How Arbitration Works*, (BNA, 5th Ed., 1997), p. 502.

Lieutenant Blunt, who at one point testified about the importance of precision when negotiating contract language, (Tr. p. 49), later stated that such "terms of art" should be inferred into the agreement from his use of "etc." (Emphasis in the original). (Tr. p. 71). The Association similarly argues that "great weight" must be given Blunt's testimony that he intended that the new contract language protect officers against financial hardship or loss of benefits while any appeal by an officer related to an injury suffered during the course of employment was pending. However, it is a well recognized arbitral principle that it is the manifested intent of the parties during negotiations that is to be considered by the arbitrator and not the undisclosed intent. Elkouri and Elkouri, Id.

Lieutenant Blunt's use of the word "etc." is also inconsistent with the dictionary definition of the word. "Et cetera" is defined as "other unspecified things of the same class: and so forth." (Emphasis added). *Webster's II, New College Dictionary*, (Houghton Mifflin Company, 1999), p. 385. Section 12.04 states that if an "employee wishes to appeal the WC carrier's determination on compensability, or on the period of healing, extent of healing, etc., the employee may do so under the provisions of the Wisconsin Statutes." In this sentence

"etc." follows the terms "period of healing" and "extent of healing." As noted above, both terms relate to the availability of benefits for temporary disability. Applying the dictionary definition of the term "etc.", any other terms included by the use of "etc." would also have to relate to temporary disability benefits. There is no proof in the record that duty disability claims or permanent disability claims would fall into this category.

The above application of "etc." is much closer to the City's understanding of the use of "etc." in Section 12.04 as meaning "along the same lines" and pertaining to the time it takes an employee to recover and be able to return to work. (Tr. pp. 149, 168-169). While issues related to "permanent disability" and "duty disability" may arise under the Worker's Compensation law, there is no persuasive evidence in the record that they are included in Article XII by the parties' use of "etc." in Section 12.04.

Based on all of the above, the Arbitrator rejects the Association's position that bargaining history demonstrates that all claims pursued by an officer are covered by the income continuation benefit. It is well settled that a party may not obtain through grievance arbitration what it could not through negotiations. Elkouri and Elkouri, Id.

A question remains as to whether there is a maximum supplemental payment to worker's compensation of twelve months.

The Association first argues that only under the circumstances described in Section 12.02 does an officer receive salary continuation benefits "for a maximum of twelve (12) months." Section 12.02 states: "any officer absent from work because of" an injury "arising in the course of employment shall receive the difference between the WC benefit and eighty-five (85%) of the regular full gross salary for a maximum of twelve (12) months." However, it provides no other limitations as to when the maximum should apply. It does not state, for example, that the aforesaid benefit applies only when the worker's compensation carrier determines that a claim is compensable.

The Association also argues that the City's position that a maximum supplemental payment of twelve (12) months applies while claims are being disputed ignores the newly negotiated language currently found in Article XII. That language in Section 12.03 states: "**Pending the written decision of compensability by the WC carrier, the employee shall not suffer any loss in salary**." (Emphasis in the original). The Association states the "fact is that Section 12.03 was meant to provide officers with **full salary benefits** while a claim is pending." (Emphasis in the original).

Section 12.03 doesn't say that. It simply provides that pending a written decision of compensability by the WC carrier, the employee shall not suffer any loss in salary. (Tr. p. 28). (Emphasis added). It doesn't address the issue of an officer appealing the WC carrier's determination. That is done in Sections 12.04 and 12.05.

Section 12.04 recognizes the right of an employee to appeal the worker's compensation carrier's determination on issues relating to temporary disability pursuant to Wisconsin Statutes. There is no persuasive evidence in the record that it includes "any litigation relative to an injury on duty" or "a request for a 40.65 pension." (Tr. p. 30). Nor does it say anything about the amount of time the salary continuation benefit is in effect while an appeal is pending.

Section 12.05 basically states that within thirty (30) days after an employee receives a written determination from the worker's compensation carrier, the employee can file a written request to the City which would include a signed promissory note to have their full salary continued during the appeal process. Section 12.05 also provides that "the City shall continue the employee's full salary until the date of the decision of the DWD or the date the employee withdraws his/her request or appeal, if earlier." This appears to conflict with the mandate found in Section 12.02 limiting the salary continuation benefit to a "maximum of twelve (12) months." A way to harmonize these two provisions, however, is to conclude that the "maximum" benefit available under Article XII is twelve (12) months, regardless of whether a claim is conceded or disputed. This approach harmonizes the two Sections in a manner that allows all of its parts to work together.

Such an approach avoids the "absurd and unreasonable results" pointed out by the City. In this regard, the Arbitrator points out that the City demonstrated at hearing that the Association's proposed interpretation of Article XII provides officers whose claims are disputed with greater benefits than officers whose claims are conceded. (Emphasis in the original). (Tr. pp. 60-63). In other words, officers would actually be better off if the insurance carrier denied their claim. (Tr. pp. 64-65).

The Association responds to the City's "seemingly valid" argument that the interpretation it is advancing would lead to absurd result by blaming it on the insurance company and its "propensity to deny legitimate claims." Assuming *arguendo* that the Association is correct in its attack on the practices of the insurance company, its reasoning still does not follow.

As pointed out by the City, why "would the parties create a mechanism that limited officers with conceded injuries to just 12 months of benefits, even if it took them 24 months or longer to recover, while providing officers with disputed injuries unlimited benefits?"

The Association explains this absurdity by suggesting that the purpose of Section 12.03 is to "punish" the insurance carrier for making unfounded denials of worker's compensation claims and to encourage it to concede claims, but offered no persuasive evidence in support of this proposition.

In addition, Sec. 102.18(1)(bp) Stats., provides that DWD may "include a penalty in an award to an employee if it determines that the employer's or insurance carrier's suspension of, termination of or failure to make payments or failure to report an injury resulted from malice or bad faith." Sec. 102.22 Stats., provides penalties for delayed payments due an injured employee. Because the Statutes provide for penalties to the WC carrier for bad faith handling of claims, there would be no need to include such penalties in the collective bargaining agreement. There is no persuasive evidence of bargaining history that supports a finding that the parties intended this to be the purpose of Article XII.

Finally, the Association asks: "What purpose would be served by Section 12.03 if the twelve (12) month maximum was meant to be enforced while a claim was pending?" As pointed out by the City the answer is simple: "*That officer would be entitled to receive 12 months of benefits while his claim was pending, the same as if his claim was never denied in the first place*." (Emphasis in the original). The next question: "Why would the Association have agreed to sign a Promissory Note protecting the City while an appeal was pending?" Again the answer is simple: "*Because the officer whose injury is found not to be work-related will have received 12 months of benefits that he was not entitled to*." (Emphasis in the original). This is exactly what happened in the instant case.

Based on the foregoing, it is clear that there is a maximum supplemental payment to worker's compensation of twelve months which applies whether the worker's compensation carrier approves a claim or there is an appeal of the carrier's determination.

In view of all of the above, the Arbitrator finds that Article XII provides a salary continuation benefit in cases of worker's compensation claims involving temporary disability only and this benefit is paid for a "maximum of twelve (12) months." There is no dispute that the Grievant received such a payment.

Therefore, the Arbitrator finds that the City of New Berlin did not violate Article XII of the collective bargaining agreement when it informed the Grievant, Christine Chialiva, by letter dated October 13, 2000, that it was not longer going to provide her with supplemental pay benefits.

In reaching the above conclusion, the Arbitrator has addressed the major arguments of the parties. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator's decision.

Based on all of the above, and the record as a whole, it is my

**AWARD**

The grievance filed in the instant matter is hereby denied, and this matter is dismissed.

Dated at Madison, Wisconsin, this 11th day of March, 2002.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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