BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

STEVENS POINT CITY EMPLOYEES (DPW), LOCAL 309, AFSCME, AFL-CIO

and

CITY OF STEVENS POINT

Case 129
No. 62800
MA-12432

(Plaski Sick Leave/Worker's Compensation Grievance)

Appearances:

Gerald Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 35, Plover, Wisconsin 54467-0035, appearing for the labor organization.

Louis Molepske, City Attorney, City of Stevens Point, 1525 Church Street, Stevens Point, Wisconsin 54481, appearing for the municipal employer.

ARBITRATION AWARD

Stevens Point City Employees Local 309, AFSCME, AFL-CIO and the City of Stevens Point are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to sick leave and worker's compensation. The Commission appointed Stuart D. Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Stevens Point, Wisconsin, on February 19, 2004; it was not transcribed. Pursuant to the stipulated briefing schedule, the Union filed written argument on March 22; the employer filed written argument on April 9, and the Union filed a reply brief on April 23. In late May, City

Attorney Molepske telephoned the undersigned to report that the parties had settled the dispute, which assertion Union Staff Representative Ugland denied by correspondence dated May 27 and June 9. In response to the arbitrator's request, the parties supplemented the record on October 14 and 15, 2004, with information about relevant and related proceedings before the Wisconsin Department of Workforce Development.

ISSUE

The parties stipulated to the following issue:

"Did the City violate the collective bargaining agreement when it deducted sick leave from Steve Plaski's accrual during the period of 7/11/02 to 8/28/02? If so, what is the appropriate remedy?"

On further consideration, I restate the issue as follows:

"Did the City violate the collective bargaining agreement when it deducted 280 hours of sick leave from Steve Plaski's accrual to cover the period July 11 to August 28, 2002? If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL LANGUAGE

SECTION 2 – MANAGEMENT RIGHTS

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

1. To direct all operations of the City;

2. To establish reasonable work rules and schedules of work;

. . .

4. To suspend, demote, discharge and take other disciplinary action against employees for just cause;

. . .

6. To maintain efficiency of City government operations;

7. To comply with State and Federal law;

. . .

SECTION 14 – SICK LEAVE AND INJURY ALLOWANCE

A. Sick Pay. An employee prevented from working because of disabling sickness or disability due to injury not covered by standard Worker's Compensation insurance shall receive sickness or disability-due-to-injury allowance with pay. The employee shall receive one hundred percent (100%) of his/her normal hourly rate for each hour of time lost. If an employee is off more than three (3) consecutive days, he/she shall provide the Employer with a doctor's certificate.

. . .

SECTION 26 – ENTIRE MEMORANDUM OF AGREEMENT

A. This Agreement constitutes the entire Agreement between the parties and no verbal statement shall supersede any of its provisions. Any amendment of Agreement supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto. The City recognizes the right of the Union to discuss and/or negotiate changes in working conditions affecting the bargaining unit.

B. Rights claimed in this Agreement shall be consistent with those rights and responsibilities conferred upon the Employer and/or the Union by applicable state and federal statutes. Nothing contained in this Agreement shall be interpreted as granting to either the Employer or the Union authority to unilaterally establish any matter which is a mandatory subject to collective bargaining pursuant to Wisconsin Statutes.

C. All side letters and practices predating this agreement shall be considered terminated unless codified pursuant to (A) above.

(Id, p 20-21)

BACKGROUND

The grievant, Steven Plaski, has worked for the City of Stevens Point Streets Department since July, 1988; since about 1997, he has been classified as a mechanic, a position with the collective bargaining unit represented by Local 309. This grievance concerns the relationship between the statutory Worker's Compensation system and the sick leave benefits provided under the applicable collective bargaining agreement.

On May 31, 2002, Plaski purportedly suffered an injury at work, hyper-extending his elbow from swinging a hammer and missing his intended target. On June 19, Plaski's supervisor completed an Accident Investigation report. Shortly thereafter, in response to a June 21 request from Sentry Insurance, the City's insurance carrier, Plaski submitted an Employee's Report of Claim. Plaski thereupon missed work from July 11 to August 28, during which time he was paid his statutory Worker's Compensation benefit plus supplemental under City administrative policy which makes employees whole for the difference between their wages and the worker's compensation benefit.

On September 12, Dr. David M. Goodman, the insurance company's certified independent medical examiner, examined Plaski. He determined that Plaski did not suffer from a work-related accident or injury, but rather was either malingering or suffering from lateral epicondylitis, a condition sometimes called "tennis elbow." Dr. Goodman determined that "malingering is also strongly suggested by the lack of a clean, coherent and medically consistent reported history," as well as the "significant secondary gain consideration of avoiding work during the same time period that his wife is also off of work on worker's compensation."

On September 30, Sentry Claims Representative Mary Beth Slezak wrote Plaski, in part, as follows:

> As a result of this opinion we will be following up with the medical providers we have currently paid for your medical treatment. We will seek reimbursement starting with your first day of treatment. We will inform them that these payments were under mistaken (sic) of fact. We also have the right to seek reimbursement as well regarding your disability benefits that we paid you out of good faith. We have spoken with your employer and due to their direct payment system they will utilize all sick an(sic) vacation benefits that you currently have and if need be future benefits of sick and vacation time. Your total weeks of benefits paid were 7 weeks for a total of $3,671.40.
>
> . . .

> If you do not agree with this conclusion, you may submit the matter to the Department of Workforce Development for a hearing and impartial decision.
>
> On October 10, the City's Personnel Specialist, Lisa Jakusz, wrote to Plaski as follows:
>
> Dear Steve:
>
> We have received notification from Sentry Insurance that your Workers Compensation claim has been denied.
>
> As a result, your time away from work will be deducted from your sick leave balance, and if necessary, your vacation balance.

The City thereafter deducted 280 hours from Plaski's sick leave account, the number of hours at his hourly wage ($17.12) needed to recoup the $3,671.40 in statutory benefits plus the $1,122.20 in the city's internal supplemental benefits.

On November 15, Plaski grieved, seeking the return of the 280 hours in sick leave. On March 10, 2003, the City's Personnel Committee rejected the grievance, a decision affirmed by the Common Council the following week.

As of the date of this award, Plaski's claim for worker's compensation remained in dispute before the Department of Workforce Development, with a hearing yet to be scheduled.

Further facts will be as stated below.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers that the City unduly enriched itself by unilaterally taking sick leave from the grievant without offering him the opportunity for a voluntary arrangement, and without even having an adjudication by the agency with expertise and experience resolving disputes over worker's compensation, namely the Department of Workforce Development. The Union further asserts that the city's claim of past practice is unsupported by the evidence, that its reimbursement to Sentry Insurance was gratuitous, and that it had the means to challenge the alleged overpayment through an appeal to DWD. Accordingly, the Union states, the grievance should be sustained, and the grievant should have his confiscated sick leave reinstated and otherwise be made whole.

In rebuttal, the City claims that the worker's compensation statute does not prevent an employer from recouping benefits paid erroneously, and that it has been the city's long-standing practice to recover such erroneous payouts. The City further asserts that the Union has improperly sought to bundle the issue in a manner contrary to the law and facts, in that the supplemental payment is neither by statute or union contract, but rather City-wide administrative policy. Moreover, the City states, the language of the collective bargaining agreement clearly indicates that the city is required to deduct sick leave for a non-worker's compensation injury; it is undisputed that the independent medical exam discovered that the alleged injury was not worker's compensation-related. According to the City, the Union position would prohibit the City from recouping erroneous payments and would be tantamount to prohibiting the City from initially determining whether or not there was a worker's compensation injury. Surely, the City asserts, it is not believed appropriate that an employee can be away from work for seven weeks without accounting for the time in some manner; to suggest that the City wait 12 years before recouping payments made in error is ridiculous.

In reply, the Union reiterates that the City has improperly assumed jurisdiction which rightly belongs to DWD to adjudicate the alleged overpayment, that the City failed to avail itself of the proper procedure for challenging the payments, and that the City was unable to substantiate a practice of recoupment which would be irrelevant anyway under the terms of the collective bargaining agreement. Moreover, the Union asserts that the City has acted illegally and contrary to sec. 102.16(3), Wis. Stats., by its confiscation of the grievant's sick leave benefits. The Union further states that only after DWD makes a determination about the underlying payment of the worker's compensation benefit will the parties know whether the city's supplemental payment should be recouped under policy and an admitted practice.

DISCUSSION

In analyzing this grievance, it is important to keep in mind what is, and what is not, at issue. What is at issue is whether the City violated the collective bargaining agreement when it unilaterally deducted 280 hours of sick leave from Steve Plaski's accrual to cover his absence from work during the period July 11 – August 28, 2002. What is not at issue is the determination of whether Plaski was or was not entitled to worker's compensation payments during that period, which will be addressed through a separate, as yet unscheduled proceeding before the Department of Workforce Development.

That determination does, however, materially affect the issue before me.

Sometime between the September 12, 2002 examination of Plaski by the independent medical examiner, Dr. David Goodman, and the September 30, 2002 letter from Sentry Insurance claims representative MaryBeth Slezak, a determination was made that Plaski's

absence from work was not covered by worker's compensation. Again, whether or not that determination was proper is not what is before me; whether or not the City's response was proper is.

As of September 30, 2002, Plaski had a seven-week hole in his employment record. Due to his claimed injury, he was not at work; nor, however, was he on approved worker's compensation. He had, however, been paid his full salary for the period in question $4,760 (through worker's compensation plus the supplemental under city policy). Obviously, some adjustment is required.

The crux of the Union's complaint seems to be that the City did not offer Plaski the option of returning the payments he had already received prior to unilaterally deducting the necessary hours from his sick leave bank to make it whole.

It is natural and reasonable for Plaski to want to retain as much sick leave accrual as he can. The accrued Sick Leave Credit, section 14C, allows sick leave hours which are unused at retirement to be used for full health and surgical insurance premiums. This is a very significant benefit, and one which most employees would seek to protect and grow. Moreover, like all banked leaves, sick leaves grows in monetary value the longer it remains unused.

The Union implicitly argues that Plaski should have been allowed to return his payments, effectively turning the seven weeks into an unpaid leave of absence. While that would have been a nice option for the employer to offer, the Union has not cited any provision in the collective bargaining agreement which authorizes such leave.

The City has offered evidence of several other instances in which it unilaterally deducted sick leave after a retroactive denial of benefits, in sufficient number to validate the City's belief that deducting sick leave for denied benefits was the general practice. However, as the Union notes, none of those instances applied to employees covered by the same collective bargaining agreement as Plaski. Thus, while this evidence shows that the City was acting consistent with its own understanding and practice, it is not evidence that such action was consistent with the collective bargaining agreement before me.

As noted above, Section 14A provides that an employee "prevented from working because of disabling sickness or disability due to injury not covered by standard Worker's Compensation insurance shall receive sickness or disability-due-to-injury allowance with pay." The agreement also provides that the affected employee "shall receive one hundred percent (100%) of his/her normal hourly rate for each hour of time lost," and that employees off more than three (3) consecutive days, must provide the City with a doctor's certificate.

Thus, Plaski must either have been on worker's compensation leave, or on sick leave; there appear to be no other options under the collective bargaining agreement.

Plaski was prevented from working, he said, due to an injury which the independent medical examiner, and thereafter Sentry Insurance, determined was not covered by standard worker's compensation insurance. If that determination was correct, then the provisions of Section 14A automatically apply, and the City was within its contractual rights to place Plaski on sick leave and retroactively deduct the 280 hours necessary to cover the payments he had already received. The Union's argument that Plaski couldn't be put on sick leave because he didn't submit the requisite request to be placed on sick leave is not persuasive.

Conversely, if the physician and insurance company were wrong in determining that Plaski was not entitled to worker's compensation, then Section 14A is not applicable, and the city's actions were in violation of the collective bargaining agreement.

As of this date, more than two years since the City notified Plaski it was deducting from his sick leave balance to recover the payments already made, and a year after Plaski appealed the denial, the worker's compensation division of the Department of Workforce Development is yet to schedule a hearing to determine whether Plaski was or was not entitled to worker's compensation. Unfortunately, until Plaski's appeal is adjudicated, the question of whether the City violated the collective bargaining agreement can be answered only conditionally.

Therefore, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is conditionally granted and conditionally denied. I shall retain jurisdiction for the purposes of issuing a final award upon receipt of a copy of the final determination of whether the grievant was entitled to Worker's Compensation for the period July 11 – August 28, 2002.

Dated at Madison, Wisconsin, this 18th day of October, 2004.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator

SDL/gjc
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