BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

STEVENS POINT CITY TRANSIT EMPLOYEES, LOCAL 309, AFSCME, AFL-CIO

and

CITY OF STEVENS POINT

Case 130
No. 62801
MA-12433

(Sandra Plaski Grievance)

Appearances:

Mr. Gerald Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 35, Plover, Wisconsin 54935, on behalf of the Union.

Mr. Louis J. Molepske, City Attorney, 1515 Strongs Avenue, Stevens Point, Wisconsin 54481, on behalf of the City.

ARBITRATION AWARD

At all times pertinent hereto, the Stevens Point City Transit Employees, Local 309, AFSCME, AFL-CIO (herein the Union) and the City of Stevens Point (herein the City) were parties to a collective bargaining agreement covering the period January 1, 2001, to December 31, 2002, and providing for binding arbitration of certain disputes between the parties. On October 8, 2003, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration regarding a deduction from the accrued vacation and sick leave of Sandra Plaski (herein the Grievant) as a result of a denial of a worker's compensation claim by the Grievant. The parties selected the undersigned to arbitrate the issue from a panel of members of the Commission's staff. A hearing was conducted on March 30, 2004. The proceedings were not transcribed. The Union filed its brief on May 3, 2004, and the City filed its rebuttal brief on May 24, 2004. On June 2, 2004, the Union informed the Arbitrator that it would not be filing a reply brief. On November 12, 2004, the parties, at the Arbitrator's request, supplemented the record as to the status of the related worker's compensation proceeding, whereupon the record was closed.

ISSUES

The parties were unable to stipulate to the framing of the issues. The Union would frame the issues as follows:

> Did the City violate the collective bargaining agreement when it deducted sick leave, vacation and floating holiday from Sandra Plaski's accrual for a period of time covered by worker's compensation payments?
>
> If so, what is the appropriate remedy?

The City would frame the issues as follows:

> Did the City of Stevens Point violate the collective bargaining agreement when it determined that the employee was not entitled to worker's compensation benefits and elected to credit sick leave, holiday and vacation time toward the repayment thereof?
>
> If so, what is the appropriate remedy?

The Arbitrator frames the issues as follows:

> Did the City of Stevens Point violate the collective bargaining agreement when it determined that the employee was not entitled to previously awarded worker's compensation benefits and unilaterally deducted previously accrued sick leave, as well as future sick leave, holiday and vacation time toward the repayment thereof?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

Article 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. Those 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;

3. To hire, promote, transfer, schedule and assign employees;

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

5. To layoff employees because of lack of work or any other legitimate reasons;

6. To maintain efficiency of City government operations;

7. To comply with state and federal law;

8. To introduce new or improved methods or facilities;

9. To change existing methods or facilities;

10. To determine the kinds and amounts of services to be performed as pertains to City government operation, and the number and kinds of classifications to perform such services;

11. If the City contemplates subcontracting bargaining unit work, the City shall serve notice to the Union. Should the Union request to bargain, either the decision or the impact of such a decision, the parties will meet to bargain same;

12. To determine the methods and means by which City operations are to be conducted;

13. To take whatever action is necessary to carry out the functions of the City in situations of emergency.

Any unreasonable exercise or application of these management rights by the City shall be appealable by the Union or an employee through the grievance and arbitration procedure.

It is further agreed by the City that the management rights shall not be used for purposes of undermining the Union or discriminating against any of its members, and the Union agrees that this clause shall not be used to harass the City.

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Article 11 – Holidays

A. Holidays: All employees, including probationary employees, shall receive the following holidays with pay:

New Year's Day	Labor Day
Memorial Day	Thanksgiving Day
Fourth of July	Christmas Day

In addition, each employee, except probationary employees, shall be allowed four (4) floating holidays off with pay annually. The date of the floating holiday shall be agreed between the employee and the Transit Manager so as not to disrupt the efficiency of the department. Floating holidays are provided in lieu of these days:

Good Friday	Day Following Thanksgiving
Christmas Eve Day	1 Personal Floater

A probationary employee, who successfully completes his/her probationary period in the calendar year in which he/she was hired, shall be entitled to receive the personal floater and any other floating holidays which may accrue between the end of the probationary period and the end of the calendar year. A probationary employee, who successfully completes his/her probationary period in the calendar year following the year he/she was hired, shall have no personal or floating holidays from the prior calendar year, but shall be entitled to receive the personal floater and any other floating holidays which may accrue between the end of the probationary period and the end of the calendar year.

Floating holidays must be taken in a full shift.

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Article 12 – Sick Leave and Injury Allowance

A. Sick Leave: Any employees prevented from working because of disabling sickness or disability due to injury not covered by standard Worker's Compensation insurance, shall receive sick leave 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 certificate from a physician, nurse practitioner, chiropractor, or other health care professional.

B. Time Allowed: The sickness or injury allowance time shall be determined as follows:

1. Monthly Accrual: One (1) day allowance for disabling sickness during each calendar month of employment. However, no employees shall be able to draw accumulated sick leave benefits until he/she has completed six (6) months of service.

2. Accumulation: Any employee, during absence from work because of such disabling sickness or injury, shall be entitled to the pay as provided in this section to the extent of his/her accumulated allowance and thereafter such an allowance shall again accumulate on the same basis.

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Article 13 – Vacations

A. Annual: Employees shall receive vacation with pay based on their length of service in accordance with the following schedule:

After twelve (12) months	-one (1) week (40 hours)
After two (2) years	-two (2) weeks (80 hours)
After seven (7) years	-three (3) weeks (120 hours)
After thirteen (13) years	-four (4) weeks (160 hours)
After twenty (20) years	-five (5) weeks (200 hours)
After twenty-five (25) years	-five (5) weeks and one (1) day (208 hours)*
After twenty-six (26) years	-five (5) weeks and two (2) days (216 hours)*
After thirty (30) years	-six (6) weeks (240 hours)

*These changes are effective on the employee's anniversary date in 2002.

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C. Employees on Sick Leave: Any employee carried on the payroll while ill or disabled shall be entitled to the same vacation with pay to which he/she would have been entitled if not disabled or ill.

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Article 25- Entire Memorandum of Agreement

A. This agreement constitutes the entire Agreement between the Employer and the Union. Amendments or addendums to this agreement shall not be binding unless such changes are in writing, executed by the Employer and the Union, and attached to this agreement as a permanent part of it.

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

OTHER RELEVANT LANGUAGE

CITY OF STEVENS POINT
ADMINISTRATIVE POLICY

Policy Title:	Standard Benefits	
Date of Issuance:	December 18, 1989	Policy No. 3.01
Revision date:	2-90, 5-90, 10-93	Page 1 of 4

Description: This policy covers all benefits in which employees are eligible to participate. Benefits include State Retirement, Federal Social Security, Health Insurance, Life Insurance, Worker's Compensation and Deferred Compensation. Benefits are administered by the City Personnel Office.

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6. Worker's Compensation

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C. All Worker's Compensation payments should be sent in care of the Personnel Office so the Accounting/Data Processing Manager can be informed of the amount of the payment. The employee will then be issued a City check of the difference between his/her normal gross wage and the Worker's Compensation payment.

BACKGROUND

The Grievant, Sandra Plaski, has been a transit employee for the City of Stevens Point since 1996. On December 28, 2001, she injured her right foot and subsequently filed an injury report with her supervisor, Susan Lemke. Several months later, the injury had not resolved itself and she sought medical attention, at which time the City filed an injury report with the Department of Workforce Development, Worker's Compensation Division. In April, 2002,

she received a diagnosis of a fractured toe. Conservative treatment of the injury was unsuccessful and in June, 2002, she underwent surgery to repair the fracture, resulting in an extended period off work while she recovered. While she was off work she received workers' compensation benefits from Sentry Insurance, the City's worker's compensation insurance carrier. She also received a supplemental benefit from the City, pursuant to City administrative policy, to cover the difference between the Workers' compensation payments and her regular wage. She returned to work with restrictions on September 16, 2002, and returned full-time without restrictions on October 9, 2002.

On September 12, 2002, the Grievant had an independent medical exam at Sentry's request. The examiner concluded that the Grievant's injury was not work related. As a result, on September 30, 2002, Sentry notified the Grievant that it was denying her worker's compensation claim and that it would be seeking reimbursement for all sums paid on her behalf. On October 8, 2002, the City notified the Grievant that it had reimbursed Sentry for sums paid to her and on her behalf, and that she was required to reimburse the City for this amount, as well as the supplemental benefits it had paid her, in a total amount of $9,371.54. To that end, the City converted the Grievant's existing accrued sick leave and vacation benefits, as well as an outstanding paycheck, and advised her that it would continue to withhold benefits until the balance due was paid. As of the time of the arbitration hearing, the Department of Workforce Development had not made a determination on the Grievant's worker's compensation claim.

On December 5, 2002, the Grievant filed a grievance against the City for the withholding of her sick leave and vacation benefits. The City denied the grievance and the matter proceeded through the contractual grievance procedure to arbitration. Additional facts will be referenced, as necessary, in the discussion section of the award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that the City's actions are based on an erroneous claim of past practice, because Article 25, Section C of the contract disavows any practices or side letters pre-existing the contract, unless codified. Any reimbursement cases previous to the contract are, therefore, irrelevant. Furthermore, as to any cases occurring during the relevant time period, the City presented no evidence indicating whether those reimbursements were voluntary or involuntary. Thus, there is no support in practice for the City's assertion that it has the unilateral right to deduct sick leave and vacation benefits from an employee's account for reimbursement without the employee's or Union's consent.

There has been no adjudication by the Department of Workforce Development of the validity of the Grievant's claims. Sentry concluded on its own that the Grievant's claim had no merit and the City accepted Sentry's position without question. Under Chapter 102,

Wis. Stats., DWD has exclusive jurisdiction to determine whether there has been an overpayment of worker's compensation benefits. Further, Chapter 102 precludes an employer from recovering money from an employee to discharge a liability under the Chapter.

The City's wage supplement policy exists separately from the contract and is intended to fill the gap between worker's compensation benefits and the employee's regular wage. There is no written policy permitting recoupment, no applicable contract language, nor is there any evidence of a binding practice that would justify the City's action. Evidence of practices with non-represented employees or those in other bargaining units is not relevant here.

Sentry's and the City's proper avenue of recourse was to appeal through the worker's compensation law for a determination from DWD as to the validity of the Grievant's claim. They did not do this and instead wrongfully confiscated the Grievant's benefits. They have thus been unjustly enriched and the grievance should be sustained.

The City

The City asserts that benefits were paid to the Grievant under a mistake of fact, that being that she had an injury compensible under worker's compensation. Once the error was discovered, the City sought reimbursement from the Grievant's employee benefits, which were inadequate, so the City continued to withhold benefits into the future to make up the shortfall. Nothing in Chapter 102 precludes the City from doing this.

The supplemental wage benefit is not required by statute, nor is it referenced in the labor contract. It is a creation of City administrative policy, which covers all employees, union and non-union alike. As such, the contract has no applicability in determining the City's right in administering the policy. City Personnel Director Lisa Jakusz established that there is a long standing practice of the City recouping such benefits when paid erroneously. The Union assumes that all previous cases of repayment were voluntary, but offers no evidence to establish the fact.

Article 12(A) of the contract establishes that sick pay is provided in all cases of sickness or injury not covered by worker's compensation. Thus, where there is no worker's compensation coverage the City is required to cover employee absences by deducting from the employee's sick leave account. That is what the City did. The City is entitled to make the initial determination of worker's compensation coverage and it is the employee's right to appeal to DWD if the claim is denied. The Grievant has not done this. In any case, even were benefits paid by the insurance carrier not recoverable, this would have no effect on the recoupment of the supplemental benefit, which exists separately from the worker's compensation law. The grievance should be dismissed.

DISCUSSION

This case arose initially as a worker's compensation claim involving a request by the Grievant for benefits subsequent to an allegedly work related injury to her foot. It comes before me as a labor contract grievance because the worker's compensation carrier subsequently denied her claim and on that basis the City unilaterally withheld the Grievant's existing and future sick leave, vacation and holiday benefits to cover the reimbursement of the worker's compensation benefits and supplemental benefits that had already been paid to the Grievant or the medical care providers on her behalf. 1/ Worker's compensation is regulated by the Department of Workforce Development pursuant to Chapter 102, Wis. Stats., and is not subject to the jurisdiction of the Arbitrator. Thus, the issue before me is not whether the Grievant was or was not entitled to worker's compensation benefits, but rather whether the City, after the denial of her claim, violated the contract by converting her existing and future benefits to recoup the loss.

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1. Arguably, in the absence of the worker's compensation claim, the Grievant's medical bills, or a portion of them, would have been covered under the health insurance plan provided by the City. Presumably, however, no claim was made due to the worker's compensation proceeding. The record does not indicate to what extent the amounts paid by the worker's compensation carrier would be recoverable through the health insurance plan or whether any effort was made to mitigate the cost in this way. The issue of where responsibility for such an inquiry lies, or whether should be any commensurate offset against the reimbursement, was not raised before the Arbitrator and is not part of the award.

In many respects, this case is remarkably similar to CITY OF STEVENS POINT, CASE 129, NO. 62800, MA-12432 (LEVITAN, 10/18/04), which, coincidentally, involved a worker's compensation claim by the husband of the Grievant here, also an employee of the City of Stevens Point. In that case, the Grievant had made a worker's compensation claim for an ostensibly work-related arm injury. After an independent medical exam, but prior to an adjudication by DWD, the worker's compensation insurance carrier denied the claim. Thereafter, the City deducted a number of hours from the Grievant's sick leave account sufficient to cover reimbursement of the lost wages and medical benefits paid to the Grievant while he was off work. As here, the Grievant grieved the City's unilateral deduction from his sick leave account prior to the matter being decided by DWD.

Arbitrator Levitan concluded that under the language of the contract governing sick leave, which is identical to Section 12A of the contract here, the City was required to apply sick leave in cases of absence due to an injury not covered by worker's compensation. Since the Grievant had been in fact absent from work, therefore, and had been paid, if worker's compensation did not apply his compensation must be deducted from his sick leave. The question of whether there had been a violation of the contract, therefore, would depend on the

ultimate determination by DWD as to whether the injury was covered by worker's compensation. As to the case before me, I am persuaded that Arbitrator Levitan's analysis is correct as to the confiscation and application of the Grievant's accrued sick leave to the sums paid to her or on her behalf. Accordingly, I enter a provisional award as to those sums and hold that if DWD ultimately sustains her worker's compensation claim, then the City violated the contract by applying her accrued sick leave. If, however, DWD rejects her claim, then there has been no violation of the contract by the City in unilaterally charging off her accrued sick leave.

There remains, however, an additional issue that did not come up before Arbitrator Levitan, which is the City's prospective seizure of the Grievant's future paid sick leave, vacation and holidays to make up the difference not covered by her accrued sick leave. The City, in its brief, appears to assume that if application of the Grievant's accrued sick leave was permissible under the contract, then its prospective action was, as well, but this is not necessarily the case.

For the City to confiscate a contractually guaranteed employment benefit there must be some basis for it either in the contract itself or in the accepted practices existing between the City and the Union. As previously stated, the City's right to apply accrued sick leave to the Grievant's time off is set forth in Section 12A. According to the testimony of Personnel Specialist Lisa Jakusz, there is also a practice of recovering such payments from employees through the application of sick leave. There is, however, nothing in the contract which expressly or impliedly gives the City the right to withhold future benefits to amortize an existing liability. Nor is there anything in the record which indicates the existence of any such recognized practice between the parties. Further, the language of Article 25 of the contract expressly states that no such practice or agreement may have force unless codified according to the procedure outlined therein.

After applying the Grievant's accrued sick leave to her liability the City had, in effect, a legal claim against her for the balance owed. Were the Grievant not an employee, the City would have had to either negotiate a repayment plan with her or pursue legal remedies through the courts. Only by virtue of the existing employment relationship was it in the position to employ the "self-help" remedy of withholding employment benefits to make up the deficiency. As stated, however, in a collective bargaining relationship, such a remedy requires a basis in contract or practice, which I do not find here. Thus, notwithstanding the validity of the Grievant's worker's compensation claim, I find that the City's withholding of her future employment leave benefits to recoup the previous payments by the City and the worker's compensation carrier on her claim was a violation of the contract.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

Whether the City of Stevens Point violated the collective bargaining agreement when it unilaterally deducted previously accrued sick leave from the Grievant's account is contingent upon the outcome of the Grievant's worker's compensation claim. If she prevails, then the deduction was a violation of the contract and the sick leave benefits must be restored. If she does not prevail, then the City did not violate the contract and no restoration of the benefit is due.

The City did violate the contract by withholding future sick leave, holiday and vacation benefits which had not accrued at the time the Grievant returned to work and is ordered to make the Grievant whole by restoring those benefits that would have otherwise accrued after her return to work.

The Arbitrator will retain jurisdiction of this award for a period of thirty (30) days to resolve any issues arising in the implementation of the award.

Dated at Fond du Lac, Wisconsin this 10th day of February, 2005.

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

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