BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**TEAMSTERS GENERAL UNION LOCAL 662**

and

**MARSHFIELD ELECTRIC AND WATER DEPARTMENT**

Case 157
No. 63946
MA-12755

(Eiden Grievance)

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**Appearances:**

**Ms. Andrea Hoeschen**, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, appearing on behalf of the Union.

**Mr. Steven Zach**, Boardman Law Firm, appearing on behalf of the Employer.

## ARBITRATION AWARD

The Union and Employer noted above are parties to a 2002-2003 collective bargaining agreement that provides for final and binding arbitration of disputes. The parties jointly asked the Wisconsin Employment Relations Commission to appoint the Undersigned to hear the grievance of Randy Eiden. A hearing was held on November 15, 2004, in Marshfield, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on December 23, 2004.

## ISSUE

The parties ask:

> Did the Utility violate the collective bargaining agreement by denying the Grievant sick leave and vacation accrual while on workers' compensation? If so, what is the appropriate remedy?

## BACKGROUND

The Grievant is Randy Eiden, an employee at the Utility's water department for 18 years. On June 27, 2003, he was hurt at a construction site. He was off work on workers' compensation for four months. He came back to work, had more surgery, then came back full time in the end January of 2004 with no restrictions. At the end of 2003, he was not paid for his sick leave not used for the full year. In 2004, his vacation had been reduced to two weeks – it had been four weeks the previous year.

Eiden got a brochure on workers' compensation and a letter from the Utility explaining his benefits. His understanding was that his sick leave and vacation would continue to accrue. He received a memo dated November 23, 1982 and signed by Utility Manager Robert Pawelski that stated, in part, the following:

> Now I would like to expand on the July 9, 1980 memo with respect to what happens after the 30 working days or 240 working hours period. The contract indicates that after the 30 working day period the employee shall only be compensated by Workmen's Compensation payments and shall not receive other compensation, and shall not be entitled to receive sick leave benefits until such time as his or her Workmen's Compensation benefits have ceased.
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> By law, the Utility must continue to make retirement payments for the employee as long as the employee is on Workmen's Compensation. The amount of the retirement payment is based on normal salary or wages both during the 30-day period and after this period.
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> As stated above after the 30-day period, the employee receives only Workmen's Compensation and no other compensation from the Utility. Hence, the employee would receive no wages, longevity pay, or holiday pay after this 30-day period.
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> Payment for life insurance and health insurance as well as the accrual of vacation, sick leave, and longevity time after the 30-day period may be questionable. For the present, we will continue these benefits after the 30-day period. However, if it appears as though the employee will be on Workmen's Compensation for an extended period of time, further clarification will be needed on the matter.

Another employee, Thomas Rhodes, was out for a total of 10 and ½ months on workers' compensation during 1998 and 1999. He believed he got his total vacation accrual of four or five weeks, but did not accrue sick leave during his time on workers' compensation. James Seefluth, an employee in the craft unit, was on workers' compensation from September 11, 2001, to January of 2002. He accrued his vacation and sick leave during his workers' compensation leave. He returned to work on light duty a couple of times after surgeries.

The Human Resources Coordinator for the Utility is Cathy Lotzer. She calculates vacations based on how earned, and the calendar year for vacation runs May 1st to April 30th. Employees are eligible to use vacation earned from their anniversary date to May 1st and take it between May 1st through April 30th. Sick leave is also accrued on a monthly basis. At the end of 12 calendar months of work, 12 days have been earned. Sick leave and vacation are pro-rated when someone leaves. Lotzer stated that Eiden's vacation and sick leave did not continue to accrue after his first 30 days on workers' compensation. Lotzer noted that Seefluth was out three separate times, and the first time went beyond 30 days. On the other two occasions, Seefluth was not out more than 30 days, so he got his sick leave and vacation then and remained on the payroll. Lotzer and Eiden had a conversation about the 1982 memo, but she had not sent it to him and did not know where he got it.

Lotzer's records of Rhodes' vacation records shows that he got only five days of vacation in 1999 and she believed those were days earned in 1999. In 2000, he received five weeks in 2000 and 2001.

## THE PARTIES' POSITIONS

### The Union

The Union asserts that the clear language of the contract requires the Utility to credit workers' compensation leave when calculating sick leave and vacation accrual. The contract does not require that employees be at work to accrue vacation or sick leave. The contract creates a default rule that employees accrue their seniority-based benefits from years of service, regardless of their actual presence at work, unless a specific provision of the contract provides otherwise. The sick leave and vacation provisions do not provide otherwise. Article 3 defines seniority as the "length of service" with the Utility, and provides that vacations, sick leave, funeral leaves, leaves of absence, disciplinary layoffs, illness and accidents shall not constitute an interruption of employment except where otherwise provided in the contract. Thus, employees on any kind of leave of absence will accrue sick leave and vacation just like any other employee unless based on hours worked rather than years or service or the contract specifically excludes employees on workers' compensation leave.

The Union points out that Article 9 is clear that employees earn vacation based on their years of service, and it states that time spent and leaves of absence and layoff will have no bearing on their vacation accrual. Article 12 is similarly clear, and provides that sick leave will be accrued based on years of service, and there is no requirement that the employee work a threshold number of hours. Article 12 says that the Utility will not pay any other compensation, including sick leave benefits, i.e. sick leave payments. The provision does not say that employees will not accrue sick leave. It does nothing to contradict the clear language of the seniority provision.

Moreover, the Union submits that the past practice supports its claim even though the contract language is unambiguous. Seefluth had his full sick leave and full vacation accrual for his years of service. While the Utility tried to distinguish his situation by saying it treated his

leave as multiple periods, it failed to explain why one employee would be treated as having multiple leaves while another would be treated as having only one leave. The Utility also failed to explain why Seefluth got his full vacation accrual but Eiden did not. The clearest evidence of a past practice was the 1982 memo providing that for the time being, the Utility would allow the accrual of vacation, sick leave, and longevity after an employee had been on workers' compensation for 30 days. The Utility never changed its policy in writing and offered no evidence that it had changed the policy in practice.

**The Employer**

The Employer argues that the labor agreement precludes accrual of sick leave and vacation time after 30 days of a workers' compensation leave. Article 12, Section 3, addresses the issue and says that the employee shall not receive other compensation and shall not be entitled to receive sick leave benefits. To accrue sick leave, an employee must earn it by continuous work for the Utility. Vacation time also must be earned before an employee is entitled to use or accumulate it. The term "years of service" means actual time worked as outlined in Article 9, Section 4, which states "time spent by employees on leaves of absence and layoff shall not be considered in determining the time required to qualify for vacation." Section 2 also uses the phrase "vacation shall be earned" which means that the employee has worked in the prior fiscal year. Section 6 supports that interpretation by referring to benefits acquired and vacation pay earned on a pro rata basis. Similarly, Section 3 refers to a pro rata share of vacation which has been earned. The notion of earning vacation means that one has actually worked and earned it. Vacation does not accrue merely because one is employed by the Utility and does not automatically accrue upon the beginning of a new anniversary year of employment.

The Employer further contends that the maintenance of standards clause does not apply, because there is an exception to its coverage, namely, the phrase "except as otherwise regulated." The sections of the contract preclude the application of the maintenance of standards clause. Moreover, the Utility has not deviated from any established past practice. Rhodes testified that he did not receive sick leave accrual but got five weeks of vacation. However, that testimony was rebutted and he did not accrue vacation from May, 1998, through May, 1999. Seefluth testified that he was off work on three occasions and got sick leave and vacation benefits during those times. However, the Utility treated each of those three leaves as separate incidents, and he was never on workers' compensation for over 30 days. The 1982 memo says the question of accrual of sick leave and vacation are questionable and it does not establish a practice. Current management did not know about the memo and was not using it. It was not followed in the Rhodes and Seefluth situations. It does not contradict the Utility's interpretation of the contract, that accrual of sick leave and vacation pay benefits after 30 days was not required by contract. The seniority provisions do not apply to this grievance where other terms prevail. Seniority is defined as an employee's length of uninterrupted employment, and a leave is not an interruption of employment for purposes of determining an employee's seniority. Thus, when Rhodes returned from his workers' compensation leave, he still retained five weeks of vacation dictated by his seniority. The seniority provisions, however, do not dictate whether benefits accrue or are earned during the period of leave.

## DISCUSSION

The collective bargaining agreement for the non-craft unit states in part in Article 9, Vacation:

> Section 1
> Vacations are to be based on the fiscal year. . . . Fiscal year for vacation is May 1 to April 30.
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> Section 2
> In order to reconcile an employee's employment date with the fiscal year for vacation purposes only, all employees' vacation shall be pro-rated to the next succeeding May 1 following the employment date. Said pro-ration shall be paid at the end of his first full year of continuous service with the utility. Said pro-rated vacation shall be earned at the rate of 1/12 of forty (40) hours for each month of service between the employee's employment date and the next succeeding May 1.
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> . . .
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> Section 4
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> . . .
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> Time spent by the employees on leaves of absence and lay-off shall not be considered in determining the time required to qualify for vacation.
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> . . .
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> Section 6
> Any employee who quits without giving two (2) weeks notice shall forfeit one (1) week of accumulated vacation benefits acquired during the year of quitting, unless otherwise mutually agreed upon by the union and employer. Any employee who has died, retired or has been totally disabled shall be entitled to vacation pay earned on a pro-rate basis to be determined as of the date of his discharge, death, retirement or disability.

The above sections show that the parties considered which circumstances would lead to loss of vacation time or pro-ration of vacation time. In Section 4, the parties determined that leaves of absence and lay-off would not count as time for qualifying for vacation. They did not include workers' compensation to be leaves of absence, and they could have clearly said so. Moreover, they considered the possibility of disability and dealt with it in Section 6, noting that total disability would entitle one to vacation on a pro-rated basis. Clearly, the parties left out a partial disability that would leave someone unable to work for months or be on workers'

compensation. To list some things but to exclude others shows the intent of the parties. The parties considered incapacity to work and dealt with it in terms of vacation accrual. Consequently, vacation should continue to accrue during a workers' compensation leave because it was not included in either Section 4 or 6 of Article 9 of the labor contract.

The contract also states in Article 3, Seniority, that: "Vacations, sick leave, funeral leaves, leaves of absence, disciplinary layoffs, illness and accidents shall not constitute an interruption of employment except where otherwise specifically provided for in the Agreement." This reinforces the concept that Eiden's employment was not interrupted in terms of vacation accrual unless it was specifically provided for in the contract, and it was not.

However, Article 12, Sick Leave, specifically dealt with sick leave benefits and workers' compensation as follows:

> Section 3
> Any employee who is absent by reason of illness, sickness or injury which is being compensated by Worker's Compensation payment shall be paid the difference between their regular salary and their Worker's Compensation payments up to a maximum of thirty (30) working days. After that time the employee shall only be compensated by the Worker's Compensation payments and ***shall not receive other compensation and shall not be entitled to receive sick leave benefits under the provisions of this article until such time as his Worker's Compensation benefits have ceased.*** (Emphasis added.)

This section would seem rather clear on its face, that Eiden would not continue to accrue sick leave while on workers' compensation because the language says one shall not be entitled to receive sick leave benefits. The accrual of sick leave is a sick leave benefit, to be used at a later time. The Union attempts to make a distinction between the accrual and the pay out as the benefit referred to in the contract, but there would be no pay out without the accrual. Thus, the accrual and the pay out are the sick leave benefits in Section 3 above.

While the 1982 memo presents an interesting wrinkle, it does not establish a past practice, and the parties' conduct does not meet the criteria for any recognizable past practice. A binding past practice is unequivocal, clearly enunciated and acted upon and readily ascertainable over a reasonable period of time as a fixed and established practice by both parties. None of those elements is present here. The 1982 memo shows that the Utility was wavering on the issue, and it called the accrual of vacation and sick leave questionable and that further clarification would be needed if an employee was on workers' compensation for an extended period of time. Hardly the unequivocal and readily ascertainable past practice arbitrators look for. The examples of Rhodes and Seefluth do not establish any past practice either. The record is mixed on what they actually got, why they got it, how long they were out, etc.

In the case of sick leave, the contract specifically provides for what happens when one is on workers' compensation. It says one does not get sick leave benefits until the workers' compensation benefits have ceased. However, the vacation section, Article 9, has no such language regarding vacation accrual during workers' compensation leaves. The Utility recognizes that an employee's length of service continues to accrue time with the Utility as the leave occurs and rewards the employee with the full vacation when the employee returns to active duty. However, nothing in the contract can be read to deny the employee's accrual of vacation time while on workers' compensation. If the parties had meant to do so, they clearly would have done so in one of these sections of the contract.

Accordingly, I find that the Utility violated the contract by denying the Grievant vacation accrual while he was on workers' compensation leave, but it did not violate the contract by denying the Grievant sick leave accrual while on workers' compensation.

## AWARD

The grievance is sustained in part and denied in part.

> The Utility did not violate the collective bargaining agreement by denying the Grievant sick leave accrual while on workers' compensation but it did violate the bargaining agreement by denying him vacation accrual while on workers' compensation. The Utility is ordered to make the Grievant whole for the denial of the vacation accrual by granting to him the vacation amount denied, either in time off or in an equivalent sum of money, to be mutually agreed upon by the parties. In the event that the parties cannot agree on whether the vacation time or the money is to be granted, the Utility is then ordered to give the Grievant the vacation time off which was previously withheld.

Dated at Elkhorn, Wisconsin this 15th day of March, 2005.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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