BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

EAU CLAIRE CITY EMPLOYEES' LOCAL 284, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

and

CITY OF EAU CLAIRE

Case 269
No. 65588
MA-13259

Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 318 Hampton Court, Altoona, Wisconsin 54720, on behalf of the Union.

Mr. Stephen G. Bohrer, Assistant City Attorney, City of Eau Claire, 203 South Farwell Street, P.O. Box 5148, Eau Claire, Wisconsin 54702-5148, on behalf of the City.

ARBITRATION AWARD

Eau Claire City Employees' Local 284, AFSCME, AFL-CIO (herein the Union) and the City of Eau Claire (herein the City) have been parties to a collective bargaining relationship for many years. At all times pertinent hereto, the Union and the County were parties to a collective bargaining agreement covering the period July 1, 2004 to June 30, 2006, and providing for binding arbitration of certain disputes between the parties. On February 13, 2006, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the method used by the City to calculate an Injury Leave wage supplement provided for under the terms of the contract. The undersigned was appointed to hear the dispute and a hearing was conducted on May 3, 2006. The proceedings were not transcribed. The parties filed briefs by June 19, 2006, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issues. The Union would frame the issues as follows:

1. Did the City violate the contract by its method of implementation of Article 26, Injury Leave on July 1, 2004? If so, what is the appropriate remedy?

2. Did the City violate the contract when it withheld taxes from employees' workers compensation payments? If so, what is the appropriate remedy?

The City would frame the issues as follows:

1. Has the City violated the contract by making adjustments to the supplemental pay for employees on Worker's Compensation? If so, what is the remedy?

2. Has the City violated the contract by decreasing the amount of the supplemental pay from 100% to 87.5%? If so, what is the remedy?

The Arbitrator frames the issues as follows:

1. Did the City violate the contract by withholding federal and state income taxes from employees' workers compensation payments starting in 1983? If so, what is the remedy?

2. Did the City violate Article 26 of the contract by its method of calculation of injury leave payments due to employees on workers compensation? If so, what is the remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 18

Section 6. All employees shall be covered by Worker's Compensation insurance.

ARTICLE 26 – INJURY LEAVE

Section 1. Upon the determination of eligibility, the City shall pay a permanent employee who is injured on the job the difference between 87.5% of their regular salary and their worker's compensation payments, as long as the employee is on injury leave, but not to exceed ninety (90) days for the same injury. Upon the determination of eligibility, the City shall pay a seasonal employee who is injured on the job the difference between 87.5% of their regular salary and their worker's compensation payments, as long as the employee is on injury leave but not to exceed ninety (90) days or until he/she would have been laid off, which ever occurs first.

ARTICLE 29 – GRIEVANCE PROCEDURE

Section 6. The Arbitrator shall have no right to amend, modify, nullify, ignore or add to the provisions of this agreement. The decision of the Arbitrator shall be based solely upon his/her interpretations of the "express language" of the agreement.

BACKGROUND

Article 18, Section 6, of the parties' collective bargaining agreement provides that the City shall provide Worker's Compensation insurance for its employees. At all times pertinent hereto, the City fulfilled this obligation by self-insuring its worker's compensation liabilities. Since at least 1973, the contract provided that injured employees receiving worker's compensation benefits would receive an additional income supplement from the City to make up the difference between their worker's compensation benefits and their regular salary for up to 90 days. In 1983, the City realized that under this system, employees on injury leave were actually making more money than if they were working because only the supplemental portion of their income, approximately one third, was subject to taxation. As a result, in approximately April 1983, the City implemented a new payment system whereby employees receiving injury supplement benefits would only be paid the difference between their worker's compensation benefits and their regular pre-injury net pay. This decision was apparently not shared directly with either the Union or the employees at the time, but occasionally employees would raise questions about it when they received their W-2 forms showing the tax withholding and it would then be explained to them. In any event, the practice went unchallenged until the present grievance.

In 1992, while the parties were bargaining over a successor agreement, the City proposed a change in the language to reduce the injury supplement to the difference between an employee's worker's compensation benefits and 70% of his regular pay. Ultimately, the parties reached a tentative agreement, which reduced the injury supplement to the difference between the worker's compensation benefit and 87.5% of an employee's regular pay and which also redefined the calculation of days of eligibility from calendar days to working days. The tentative agreement was memorialized in a consent award issued by Arbitrator Gil Vernon on March 9, 1993.

For unspecified reasons, the changes to Article 26 were not immediately implemented after issuance of the consent award. In 1996, the Union discovered that the practice of calculating days as working days rather than calendar days had not been implemented and brought it to the City's attention. Thereafter, the calculation of days for purposes of injury supplement benefits was based upon working days. In 2004, the City discovered that the change reducing injury benefits to 87.5% of regular wages had also not been implemented. The City notified the Union that it intended to implement the language as of July 1, 2004 and after that date began reducing the supplemental benefit in accordance with its interpretation of the contract. In a nutshell, the City began paying injured employees 87.5% of their regular

wages. This was done by paying injured employees 7 hours of regular pay per day (or 87.5% of a workday) and treating 1 hour per day as leave without pay. The City would then withhold federal, state and FICA taxes from the total, even though worker's compensation benefits are not taxable. Because no withholding was required on the portion attributable to worker's compensation, the City would retain that money rather than remitting it to the government. Then, on a quarterly basis, the actually withholding due would be calculated and the City would reimburse the employees for federal and state taxes withheld on their worker's compensation.

At some point, the Union learned of the City's method of calculating benefits due under Article 26 and objected to it, claiming that the City's method resulted in injured employees receiving less in injury supplement benefits than they were entitled to under the contract. A grievance was filed, which the City denied, and the matter proceeded 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 violated the contract in its implementation of the language of Article 26 on July 1, 2004. Prior to 1992, the City had paid employees on worker's compensation the difference between their worker's compensation benefits and 100% of their regular pay. In 1992 the City informed the Union that the formula needed to be altered because, since worker's compensation benefits weren't taxable, injured employees were actually making more than when they were working. The City sought to adjust the benefit during negotiations over the 1992 contract with the result that the language was amended to provide for a supplemental benefit up to 87.5% of an employee's regular wage. The City, however, did not implement the language change until 2004.

The Union always understood the language of Article 26 to refer to gross salary. This is clear from the fact that in every other reference to salary in the contract, the reference is to gross pay, not net pay and, as noted by the City, the Arbitrator is required to enforce the express language of the contract. The Union's position is confirmed by Union members Horlacher and Clark and Union Representative Day, who participated in the 1992 negotiations and who testified that the discussions were over gross wage reductions.

For whatever reason, the City did not implement the change for 12 years. When it did so, it ignored the language of the contract and paid injured employees only 87.5% of their net pay. This was a unilateral decision of the City and results in the employees receiving a decrease in their net pay while off work. Further, the City's method of implementation, paying for only 7 hours of work per day rather than calculating 87.5%, results in lower WRS pension contributions. The Arbitrator should order the City to cease and desist from this practice and make all affected employees whole.

While investigating the injury leave matter, the Union discovered that for many years the City had also been withholding federal income, state income and FICA taxes from employees' workers' compensation benefits, even though those benefits aren't taxable. Supposedly, taxes withheld from worker's compensation benefits were reimbursed quarterly. City records purport to show this practice existing as far back as 1983, although the Union was never informed of it.

It is academic that worker's compensation benefits are exempt from federal and state income taxes. The contract requires the employer to provide worker's compensation coverage for its employees, so the question of whether the City violated the contract in properly before the Arbitrator. Withholding taxes from worker's compensation benefits is a *per se* violation of the contract. The City claimed that there was no harm since the money was reimbursed, but the fact is the City had use of money belonging to employees for extended periods of time, which it had no right to do. The City should be ordered to cease and desist from the practice and to make all affected employees whole.

The City

The City argues that it did nothing wrong by withholding taxes from employees' benefits. The deduction put the injured workers in the same position as those who were working, so they were not harmed by the change. Further, the City's action was not prohibited by the contract. The City does not concede that its actions violated worker's compensation regulations, but even in that event, such a determination is outside the jurisdiction of the Arbitrator. Past practice also supports the City, in that this policy has been in force since 1983 and the evidence is clear that the Union knew or should have known it. The testimony and records shoe that a significant number of Union members received the benefit over the years and that an average of 1 to 2 per year would question the deductions and receive an explanation. The Union was on notice about the practice, did not object to it and cannot complain about it now. Finally, the fact that the Union, despite its knowledge, never grieved the action, constitutes a waiver and should bar the Union's claim.

The City also did not violate the contract by its method of implementing the 1992 language change. It is generally accepted that language which is clear and unambiguous must be interpreted according to its common meaning regardless how the parties have applied it. Here, the language is clear. An employee on Injury Leave shall be paid the difference between 87.5% of their regular salary and the amount they receive in worker's compensation payments. This language is straightforward and requires no further interpretation.

Should the language be found ambiguous, however, bargaining history supports the City. Everett Foss testified that the reduction was intended to reduce the monetary benefit to give the employees an incentive to return to work. That was why the City initially proposed reducing the benefit to 70%, just above the worker's compensation level of 66%. The City's interpretation is consistent with the Union's response, which was to seek a change in the definition of "days" for purposes of computing the length of the benefit as a quid pro quo. The

Union denied the items were tied, but both Everett Foss and Dale Peters testified to the linkage and their contemporaneous notes support their testimony. The Union witnesses had no notes to support their testimony. Further, contracts were negotiated with other City bargaining units at the same time which also reduced the supplemental benefit, supporting the City's argument. The City cannot account for why the language was not implemented until 2004, but asserts that this delay did not prejudice the Union and should carry no weight in this arbitration.

The Union is right when it asserts that the reduction of the benefit acted as a penalty on bargaining unit members. That was the intent of the City's original proposal to reduce the benefit to 70%, as well as the ultimately agreed provision, which the Union must have known at the time. The language of the contract is clear and the grievance should be denied.

DISCUSSION

Tax Withholding

The first question addresses the City's practice, apparently adopted in 1983, of withholding taxes from employees' worker's compensation benefits. City Exhibit #1, which is a group of memoranda exchanged between management personnel during that period, reveals that the City's intention was to adjust the combination of worker's compensation and injury supplement benefits to correct what the City viewed as a flaw in the system, to wit: because worker's compensation is not taxable, employees receiving worker's comp and the injury supplement were ending up with more net pay than if they were working. The City would then retain the taxes withheld on the worker's compensation portion, since they weren't payable to the government. According to the analysis prepared by City witness Pat Sturz, a certified public accountant, the City's method still resulted in the employees receiving more net pay while injured, because FICA taxes were reimbursed on a quarterly basis, but not as much as if taxes were only withheld on the injury supplement. (City Ex. 5) The City also benefited because monies that otherwise would have gone to the state and federal governments as withholding taxes were retained by the City.

It appears from the testimony that the City may not have directly put the Union on notice of what it was doing. City Exhibit #1 anticipates Union opposition to the plan, but the author of the document, Everett Foss, who was the City Human Resources Director at the time, could not recall if there was direct communication with the Union about the change at the time. Likewise, George Kumpferman, who was the City's Director of Administration, testified that he assumed the Union knew of the change although he did not personally discuss it with Union officials. No grievances were apparently filed, which would tend to suggest either acquiescence or lack of knowledge on the part of the Union. City witnesses Julie Kircher, who works in the Payroll department, and Dale Peters, the current Human Resources Director, testified that there was no attempt to conceal the City's action and that every year there are Union employees receiving injury benefits who ask about the tax withholding and receive an explanation.

It is my sense that this claim is not capable of relief in this forum. Setting aside the fact that this practice has been going on for more than 23 years without complaint, it is a worker's compensation matter, which is a statutory creature subject to administration by the Worker's Compensation Division of the Wisconsin Department of Workforce Development. Article 18, Sec. 6 of the contract states: "All employees shall be covered by Worker's Compensation Insurance." I am further mindful, however, that Article 29, Sec. 6 limits the Arbitrator's authority to go beyond the "express terms" of the contract in rendering his decision There is no claim here that any of the grievants were not covered by Worker's Compensation Insurance and it is my view that an inquiry into the City's practices with regard to how it taxes worker's compensation benefits goes beyond my authority to construe the language in question. Of course, individual employees receiving worker's compensation benefits who have questions about the City's practices may consult with the Worker's Compensation Division or the federal and state taxing authorities, which would all be appropriate forums for such an inquiry.

Injury Supplement Reduction

This issue addresses the City's interpretation and implementation of the language in Article 26 regarding calculation of the injury supplement to be paid in addition to worker's compensation benefits. As noted above, prior to 1992 the Article provided for payment of an injury supplement to injured employees receiving worker's compensation representing the difference between their worker's compensation benefits and their regular salary. In 1992, the City bargained for new language in Article 26, Section 1 that reduced the injury supplement to "…the difference between 87.5% of their regular salary and their worker's compensation payments…not to exceed ninety (90) days for the same injury." At the same time, a new Section 6 was added that defined "days" for purposes of calculating benefits as regularly scheduled working days, whereas previously calendar days were used. As also noted, the City did not implement the language until 2004 and, when it did so, interpreted the language to refer to net pay, rather than gross. For the reasons set forth below, I disagree with the City's position.

The City asserts that the language of Article 26, Section 1, is clear on its face. It refers to 87.5% of regular salary and makes no qualifying reference to "gross." In the alternative, the City argues that bargaining history supports its interpretation of the language. I agree with the City's initial premise that the language is clear on its face.

Article 26 ties the injury supplement benefit to the difference between worker's compensation payments and "regular salary." Every other reference to wages in the contract clearly refers to gross pay. There is no dispute that the wage rates set forth in the Pay Plan on pages 31-34 of the contract are in terms of gross wages. Therefore, the percentage wage increases referenced there are percentages of gross, not net, wages, as are the contributions to the Wisconsin Retirement System. Likewise, Article 14 specifies that employees working overtime shall receive one and one-half times their regular rate of pay for all hours worked and two times their regular rate of pay for Sundays and holidays. Here, again, there is no dispute that overtime is computed on the gross wage rate, not the net, with taxes deducted afterward.

There is nothing in Article 26 to lead one to believe that the reference to regular salary there meant anything other than the meaning given to all other references to pay rate in the contract, which is gross wages.

The City tried to create ambiguity by asserting that the bargaining history clearly evinces its intent to reduce the benefit, but that is not inconsistent with my finding. In 1992 the contract called for employees to receive equal to the difference between the worker's compensation benefit and 100% of their gross pay, notwithstanding the City's novel approach to withholding taxes, so any reduction in percentage the City was able to negotiate would reduce the benefit and decrease any incentive employees might have had to not return to work. Had the City achieved its target of 70% of regular salary, the benefit would clearly have been below the regular pay rate, whether computed as gross or net. Nonetheless, agreement was reached at 87.5%, which, even as a percentage of gross wages, clearly reduced the benefit and increased the incentive to return to work.

It is likewise irrelevant whether or not the change in the definition of days in the contract was given as a quid pro quo for the reduction in the percentage. Again, whether the rate was gross or net, the reduction to 87.5% was clearly a concession on the part of the Union and a quid pro quo in return for it would not be unusual. Thus, whether or not the change was a quid pro quo does not bear at all on the question of whether the term "regular salary" was intended to refer to gross or net. In any event, as previously noted, within the four corners of the contract there is no basis for finding that the reference to pay rate in Article 26 was intended to have any other meaning than it has elsewhere in the contract, which is gross wages.

There is also a dispute about the system the City used for computing the injury supplement, as well as the amount. Apparently, for ease of bookkeeping, the City simply records 7 hours worked per day and one hour of leave without pay for employees on injury leave, which is, then, 87.5% paid time. The City is able to do this because it self insures for worker's compensation so all the bookkeeping and disbursements are handled in house. According to the testimony of Union witnesses, however, this method has had an unintended negative affect on WRS contributions and other contractual benefits which are figured as a function of work time. This may have been an oversight occasioned by the City's desire to manage its payroll by the most efficient means. Nevertheless, desire for efficiency cannot be a basis for denying bargaining unit members benefits to which they are contractually entitled.

For the foregoing reasons and based on the record as a whole, I hereby enter the following

AWARD

1. The City did not violate the contract by withholding federal and state income taxes from employees' workers compensation payments starting in 1983.

2. The City did violate Article 26 of the contract by its method of calculation of injury leave payments due to employees on workers compensation. Henceforth, the City shall calculate the injury supplement referenced in Article 26 as the difference between an employee's worker's compensation payments and 87.5% of his or her regular gross salary for an 8 hour work day. Furthermore, as to all bargaining unit members receiving injury supplement benefits between July 1, 2004 and the date of this award, the City shall recalculate their benefits based on gross, rather than net wages, and make them whole for any loss in wages or other benefits.

The Arbitrator will retain jurisdiction over this award for a period of 60 days to resolve any issues arising in the implementation of this award.

Dated at Fond du Lac, Wisconsin, this 20th day of October, 2006.

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

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