

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

COUNCIL 48, AFSCME, AFL-CIO, LOCAL 2

and

CITY OF GREENFIELD

Case 133

No. 65744

MA-13310

(Long-Term Disability Grievance)

Appearances:

Attorney Gene A. Holt, Law Offices of Mark A. Sweet, LLC., 705 East Silver Spring Drive, Milwaukee, Wisconsin, 53217, appeared on behalf of Council 48, AFSCME, AFL-CIO, Local 2.

Attorney Nancy L. Pirkey, Davis & Kuelthau, S.C., 111 E. Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, appeared on behalf of City of Greenfield.

ARBITRATION AWARD

The Union 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 Union requested and the City agreed that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance filed on behalf of John Hollman, hereinafter Hollman or Grievant. The Commission appointed Paul Gordon, Commissioner, to serve as the arbitrator. Hearing was held on the matter on May 23, 2006 at Greenfield, Wisconsin. A transcript was prepared and made available to the parties. The parties filed written briefs and reply briefs, and the record was closed on August 7, 2006.

ISSUES

The parties did not stipulate to a statement of the issues. The Union proposed the issues be stated as:

Did the City violate the collective bargaining agreement when it denied the Grievant the accrual of sick, vacation and longevity pay while he was on long-term disability?

If so, what is the appropriate make-whole remedy?

The City proposed the issues be stated as:

Was the grievance filed on a timely basis?

Did the City violate Article 16, Section B when it failed to credit the Grievant with sick leave, vacation and longevity benefits while he was receiving long term disability benefits?

If so, what is the appropriate remedy?

The undersigned finds that the record best supports a statement of the issues as:

Was the grievance filed on a timely basis?

Did the City violate the collective bargaining agreement when it denied the Grievant the accrual of sick, vacation and longevity pay while he was on long-term disability?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 7 – SENIORITY

A. Definitions: Seniority shall be defined as the continuous length of full-time service in the department for which payment has been received by the employee. Seniority shall commence upon the successful completion of the six (6) months probationary period of employment and shall then be retroactive to the original date of hire.

. . .

F. Loss of Seniority: Seniority and the employment relationship shall be broken and terminated if any employee:

1. Quits;
2. Is discharged for just cause;
3. Is absent from work for a minimum of three (3) consecutive working days without notification to and approval by the Employer, unless the employee is unable to notify the employer due to a reasonable excuse;

4. Fails to report within three (3) working days after having been recalled from layoff unless unable to do so because of notice requirement for terminating his employment with an interim employer. In that case, the employee must notify the City within three (3) working days that he will accept the recall and that he will report to work within ten (10) working days after receipt of the recall notice. Recall notices will be sent by registered mail to the last address given by the employee to the City;
5. Accepts other employment without permission while on leave of absence for personal or health reasons;
6. Fails to report for work at the termination of a leave of absence;
7. Retires;
8. Is on layoff status for more than one (1) year.

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ARTICLE 8 – GRIEVANCE PROCEDURE

A. Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of this Agreement.

B. Subject Matter: Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, specific section of the Agreement alleged to have been violated, and the signature of the grievant and the date.

C. Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing.

. . .

F. Steps in Procedure:

Step 1: The employee, alone or with his/her representative, shall orally explain his/her grievance to the Director of Public Works no later than five (5) work days after he/she knew, or should have known the cause of such grievance. In the event of a grievance, the employee shall perform his/her assigned work task and grieve his/her complaint later, unless the task assigned presents a danger to the safety of the employee involved. The Director of Public Works shall, within five (5) working days after the presentation of the grievance, orally inform the employee and the representative, where applicable, of his decision.

ARTICLE 9 – ARBITRATION

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E. Decision of the Arbitrator: The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the Agreement in the area where the alleged breach occurred. The Arbitrator shall not modify, add to, or delete from the express terms of the Agreement.

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ARTICLE 12 – VACATIONS

A. Vacation Allowance: Eligible employees covered under the terms of this Agreement earn vacation benefits as follows:

1. Two (2) weeks vacation after one (1) year of employment
2. Three (3) weeks vacation after seven (7) years of employment
3. Four (4) weeks vacation after fifteen (15) years of employment
4. Five (5) weeks vacation after twenty-two (22) years of employment

A week of vacation is composed of five (5) working days. The accrual for additional weeks of vacation begins in the prior year. For example, the accrual of three weeks vacation for those with 7 years of service begins at the beginning of the sixth year, the accrual for four weeks begins at the beginning of the 14th year, and the accrual for those with 5 weeks begins at the beginning of the 21st year.

B. Accumulations: Vacation allowance shall be accumulated on a monthly basis at 1/12th the annual rate, prorated according to the years of service.

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ARTICLE 13 – SICK LEAVE

A. Allowance: Each regular full-time employee who has completed his/her probationary period of employment shall receive one (1) day of sick leave each month of employment, and such leave shall be accumulated to a maximum of one hundred fifty (150) days. Employees shall not earn sick leave while on a leave of absence after the employee's accumulated sick leave had been used up.

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ARTICLE 16 – HEALTH INSURANCE

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B. Long-Term Disability The City will provide a long-term disability insurance plan at 66 & 2/3% of covered salary, with a 60 consecutive calendar day elimination period.

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ARTICLE 18 – LONGEVITY

Each eligible employee shall receive pay in addition to his regular salary commencing with the regular pay period following the time at which he becomes eligible for such pay. Longevity pay shall be based upon the following schedule:

<u>Years Completion of Continuous Employment</u>	<u>Additional Total Pay Per Month</u>
5	\$ 6.00
10	\$12.00
15	\$15.00
20	\$18.00
25	\$21.00

BACKGROUND AND FACTS

The case concerns the accrual of vacation, sick time and longevity pay benefits for Grievant, John Hollman, during time he was on long-term disability pursuant to Article 16 Section B of the collective bargaining agreement. The parties agree that the benefits in dispute are 33.3 hours of vacation, 16 hours of sick time and \$21.00 longevity pay for one month if the grievance is sustained.

In the 2002-2003 labor agreement the parties agreed to add a long term disability benefit in exchange for eliminating a short-term disability benefit that had existed since at least 1982. This benefit is for non work-related matters. Work-related matters are covered under the City's workers compensation benefit. During negotiations over this change in benefits the subject of accrual of other benefits while on long term disability was not specifically discussed. There was limited discussion about employees being treated the same as with the prior short term disability benefit. In the negotiations for the 2006-2008 agreement the subject of benefit accrual during long term disability came up, but was not discussed further because that issue was part of a pending grievance filed by bargaining unit member Dan Ewert. Neither party made any proposals on the matter, and other subject matter was discussed.

During the term of prior agreements at least one other bargaining unit member, Terry Bartz, had his vacation and sick leave days accrue while on short-term disability in 1982. At the time of the 2006-2008 contract negotiations the Ewert grievance contained an issue about accrual of vacation, sick leave and longevity pay benefits while on long-term disability, along with a timeliness issue. That grievance was settled on a non-precedent setting basis.¹ Since at least 1994 the City has not accrued vacation, sick leave and longevity pay for bargaining unit members on short or long term disability, although it appears that Bartz, Ewert² and Hollman are the only members of the bargaining unit who have been on short or long-term disability. None of them filled out leave of absence paperwork with the City.

Grievant has been a City employee since January 3, 1979, and went on long-term disability for a non-work related medical matter on September 21, 2005. He returned to work on November 7, 2005. While on long-term disability he received disability checks from the City's long-term disability insurer, but not a payroll check. Also, while on long-term disability the City continued to credit his seniority and continued his health insurance benefits. The City did not credit or accrue his vacation or sick leave benefits. He was paid one month's worth of longevity pay for September because, based on his anniversary date being the 3rd of the month, he was working or on the payroll on September 3rd. The City also paid him another month's worth of longevity pay which the City feels it was incorrect in doing because the person responsible for payroll forgot to stop that benefit for one of the months at issue. After Grievant returned to work he received regular payroll checks on November 17, December 1, December 15 and December 29, 2005. He received payroll checks on January 12 and January 26, 2006. He submitted the instant grievance on January 31, 2006.

City employees receive a regular payroll check every two weeks. The checks contain a stub which reflects their balances of vacation, sick leave, longevity pay and other information. The various benefits accrue at various times of the month, but are not updated on the paycheck stubs until the first check in the month following accrual. Grievant's paycheck stub for November 17, 2006 as well as each one for each pay period for the rest of year reflect that the City was not accruing vacation or sick time for the time he was on long-term disability, and there was a month of longevity pay which was not added to his paycheck. Although his vacation and sick time balances showed an increase before going on long-term disability, the balances remained the same on each stub after his return to work – vacation at 89.93 hours and sick time at 14 hours. Grievant did not notice these accrual balances on his paycheck stubs as he received them. He thought he was accruing benefits for the time on long-term disability.

¹ Both parties have tried to argue that the Ewert grievance and its settlement have some value as precedent in this case. However, there were other issues pending between the City and the Union at the time of the settlement, one known as scrap-gate. Because the Ewert settlement was on a non-precedent setting basis, and also because the settlement of any grievance might also involve numerous matters not of record or relevant to any other grievance, this Award does not put any precedent value of the Ewert grievance and settlement.

² See footnote 1, above.

He had not been told by the City that it was his responsibility to check the paycheck stub for accrued balances. He did not inquire of the City as to accruals before going on long-term disability. Sometimes City employees do inquire of payroll as to the accrued balances of their benefits.

On January 26, 2006, after receiving his check stub, he happened to speak with Ewert, the Union President who had a grievance pending at that time concerning accruals while on long-term disability. They discussed whether Grievant's benefits were accruing. On January 27, 2006 Grievant called Kim Kurz in the City payroll department to inquire as to accruals. Kurz was not able to answer the question then without looking into the matter. Because Grievant was leaving on vacation, by prearrangement she called Union steward John Laskoski on January 31, 2006 informing him that Grievant has not accrued benefits. Also by prearrangement, Laskoski signed and submitted the instant grievance on January 31, 2006 after learning from Kurz that Grievant's vacation, sick time and longevity benefits had not been accrued by the City for the time Grievant was on long-term disability.

The City denied the grievance on the basis that it was untimely, that the agreement does not provide for such accruals, and that the past practice of the City was to not accrue those benefits. This arbitration followed.

Other matters appear as are in the discussion.

POSITIONS OF THE PARTIES

The Union

In summary, the Union argues that the grievance is timely because the cause of the grievance was not known and should not have been known until Kurz informed them there was no accrual being made. Grievant did not know the cause as to why his paycheck did not show the proper accrual of vacation, sick leave or longevity pay until after he made a call to Kurz. The grievance was submitted within five (5) working days of that and is timely. A procedural default is neither appropriate nor fair in this case. General case law supports the notion of avoiding forfeitures. The procedural defense must be viewed in light of the Ewert grievance where the City's behavior suggests an obvious laxness to enforcement of time requirements for filing a virtually identical grievance. Bargaining unit members do not routinely use pay stubs to verify accrual of benefits, and people call payroll all the time to verify accrual amounts. Stubs do not show how many hours accrue, only that balances go up. A narrow, strict interpretation of the grievance process would be detrimental to this and future grievances. The matter will undoubtedly arise again if the arbitrator rules for the City on the issue of timeliness.

The Union also argues that the City's decision to deny Grievant accrual of vacation, sick leave and longevity pay violated the plain terms of the collective bargaining agreement. The contract provides for accrual and accumulation of vacation based on length of employment and no other factors. The accrual of vacation occurs in the prior year and is based on years of employment. The contract provides accrual is based on years of service and nothing in the contract forfeits that while on short or long-term disability. Vacation accrues monthly. And, there is no contract language for vacation as in sick leave, which describes a situation where accrual does not occur. Given the absence of such language for vacations, it is fair to assume the parties did not intend to exclude accrual of vacation during leaves of absences and for all other absences as well. As to Grievant's sick leave, the plain language of the contract requires accrual. Article 13 – Sick Leave requires accrual. The language uses the word employment, which is not restricted to work time, paid time or other limitation. The contract discusses the employment relationship in Article 7, Section F, and as long as an employee is employed he would receive a sick day per month. No excluding conditions apply to Grievant's case. Similarly, Grievant was entitled to longevity pay under the contract. Article 18 is plain and unambiguous. Article 7 defined seniority. Grievant received payment throughout his employment either through accrued benefits or in the form of a negotiated benefit, long-term disability. He continued to accrue seniority and health insurance. By any definition Grievant had not lost his seniority or severed the employment relationship. Fairness requires that Grievant receive his accrual of benefits. It would be unfair to resolve Grievant's case in any manner different than Ewert's non precedent-settling basis.

The Union contends the City's defense on the substantive issue lacks merit. The contract is not silent on the question of accrual. If there is ambiguity it should be decided in favor of the Grievant to avoid a harsh, absurd or nonsensical result. The law abhors a forfeiture. The City was not able to establish a past practice. Some of the employees referred to by the City were not in this bargaining unit. Bartz, a member of the bargaining unit, received accruals while on short-term disability. When Long-term disability was negotiated the City and Union talked about the employee being treated the same. There is no evidence of a past practice within Local 2 as suggested by the City.

The City

In summary, the City argues that the grievance is not arbitrable because it was not timely filed in accordance with the collective bargaining agreement. According to Article 8, Section F, a grievance must be presented within five (5) work days after he/she knew or should have known the cause of such grievance. Grievant should have known of the facts giving rise to his grievance on November 17, 2005, when he received his first paycheck from the City after returning from a medical leave of absence. Each paycheck contains information on the total sick leave and vacation accumulated to that point, and identifies whether a longevity payment is included in that paycheck. His November 17th paycheck reflected he had not accrued any sick

or vacation days for the month of October, with the sick and vacation leave not increasing from the last time he was paid by the City. Grievant received four paychecks in 2005 after returning to work wherein his sick leave and vacation totals did not increase, demonstrating he did not accrue additional time during October and November. The December paycheck reflects no longevity payment for November. The Grievance was presented January 31, 2006, forty-six (46) workdays after the November 17th paycheck indicating he had not accrued benefits for October. This is well beyond the five-day limit in the grievance procedure. The November accruals are untimely as well. Arbitral precedent supports looking to the paycheck as the occurrence giving rise to the grievance. The date of the paychecks was the date he knew or should have known the cause of such grievance, and the City raised the issue at each step of the grievance procedure.

The City also argues that the City's past practice is that employees receiving long-term disability insurance benefits do not accrue sick leave, vacation or longevity. Article 16, Section B of the agreement provides for long-term disability insurance but does not state that employees continue to accrue sick leave, vacation or longevity benefits. The provisions regarding sick leave, vacation and longevity do not state employees receiving long-term disability insurance will continue to accrue these benefits. At best the contract is ambiguous. Articles 12, 13, and 18 indicate employees receive benefits based on months or years of employment, but employment is not defined. Arbitral history means employed has to be actively working. Past practice is also relevant, and supports the City's position. There is a binding past practice which is to withhold accrual of such benefits to employees paid disability insurance benefits. The practice is unequivocal, clearly enunciated and acted upon. Since at least 1994 the City has unequivocally followed a practice of not paying benefits to employees who are receiving either short-term or long-term disability insurance payments if not working on their anniversary date and not receiving a paycheck from the City. Ewert and Grievant are the only DPW employees to use the long-term disability insurance plan benefits and both forfeited accruals. Ewert was the Union president and received a letter with the City position during his similar grievance. At least three other people have forfeited sick leave and vacation benefits when they were on short term disability. It is readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. The Union acquiesced after Ewert filed his grievance, the issue wasn't raised in bargaining the 2006-2008 agreement, and no past practice was terminated. The City was acting in accordance with past practice in not accruing Grievant's benefits.

Union Reply

In summary, the Union replies that the grievance should be held to be timely. The present case is distinguishable from the cases cited by the City. The language in the relevant clauses is different than the language here. Knowing the cause of a grievance is substantially different than knowing the occurrence of the event giving rise to the grievance. The plain meaning of the contract language must be applied. Grievant did not learn the cause of the

grievance until after he called Kurz, who was not immediately able to tell him the cause either. The Union contends that given the City's handling of the Ewert grievance, timeliness should not be an issue. If one assumes the City's argument that Ewert's situation was common knowledge, then so was his lengthy delay in filing a grievance. A reasonable employee would have no reason to believe that a grievance over the denial of accrued benefits would be challenged based on timeliness.

The Union also argues the contract language provides for accrual of benefits. The contract states in relevant part that eligible employees covered under the terms of this Agreement earn vacation benefits as follows: . . . five (5) weeks vacation after twenty-two years of employment. Grievant's anniversary date was not altered. The plain language of the contract defines how benefits are accrued and does not create any exceptions for periods of time on disability absence. Also, employees receiving workers compensation benefits continue to accrue benefits despite the fact they are not actively working.

The Union contends the City's argument on past practice is not supported by the facts. The City has not established the element that a practice was unequivocal. Only three employees in this bargaining unit received disability benefits. One received accrued benefits during disability absence. One situation was resolved through the grievance procedure. One is the subject of this action. The City cannot claim that the practice was clearly enunciated and acted upon. The City does not claim to have communicated it to the Union until the Ewert grievance in 2005, and the Union never agreed to that practice. The City is unable to point to a single situation where it denied an employee the accrual of benefits while they were on disability absence. There is no past practice to rely on. And, the City has not established mutuality. In both instances where the issues arose the Union has challenged the practice asserted by the City, demonstrating the City cannot establish mutuality of the practice.

City Reply

In summary, the City replies that the grievance procedure contains clear and unambiguous timelines and cannot be construed to excuse the Grievant's failure to file a timely grievance. The Union's cited cases actually support the City, or are otherwise distinguishable. The term employment used in the vacation, sick leave, and longevity provisions is ambiguous and distinguishable from the health insurance and seniority provisions. Accrual is based on months of employment. The interpretation of employment is the real issue. Because that word is ambiguous the arbitrator must look to past practice to determine the intent of the parties. The language does not say that there is or is not accrual. Longevity payments are based on years of completion of continuous employment. Nothing in the contract indicates the seniority section should be read in conjunction with longevity. The language in the health insurance and seniority provisions is clearly distinguishable from the other contract provisions. Grievant was still an employee of the City and received health insurance benefits because they are not conditioned on months of employment. Seniority is similar. And, fairness cannot depend on

the Ewert case because that was settled on a non-precedent setting basis. The contract is silent on the issue of whether employees receiving long-term disability insurance accrue benefits and any ambiguity should be resolved by past practice rather than construing the language in favor of the Union. Past practice is more likely to evidence the parties' intent. The single Bartz incident 24 years ago does not create a binding past practice. The City's practice has been to deny accrual to employees on disability leave. The Union did not provide notice to terminate a practice and negotiate contract language, acquiescing to the City practice. The denial of benefits to Grievant was consistent with the City's established past practice.

DISCUSSION

Grievant contends that the clear language of the collective bargaining agreement supports his claim that sick leave, vacation and longevity payments should have accrued for him while he was on long-term disability from September 21, 2005 to November 6, 2005 for a non-work related medical matter. He further argues that the City has not established any past practice to rely upon to deny his grievance. The City has raised a threshold issue of arbitrability, contending the grievance was not presented timely under the terms of the contract. The City also argues the plain language of the contract as well as past practice supports the non-accrual of the benefits. The timeliness issue must first be considered.

The agreement contains a grievance procedure that includes a definition of a grievance and sets the time limits of the various steps in the grievance process.

ARTICLE 8 – GRIEVANCE PROCEDURE

A. Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of this Agreement.

B. Subject Matter: Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, specific section of the Agreement alleged to have been violated, and the signature of the grievant and the date.

C. Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing.

. . .

F. Steps in Procedure:

Step 1: The employee, alone or with his/her representative, shall orally explain his/her grievance to the Director of Public Works no later than five (5) work days after he/she knew, or should have known the cause of such grievance. In the event of a grievance, the employee shall perform his/her assigned work task and grieve his/her complaint later, unless the task assigned presents a danger to the safety of the employee involved. The Director of Public Works shall, within five (5) working days after the presentation of the grievance, orally inform the employee and the representative, where applicable, of his decision.

This case does present a dispute concerning the interpretation or application of the agreement. It concerns how the City has applied the accrual of benefits under the agreement and how the two parties interpret the agreement. This is not a case about a scrivener's error, mathematical mistake, or mistake of fact.³ The issue of accruals as a grievance is controlled by the grievance procedure.

The time limit at issue is at Article 8, Section F. Step 1, which requires a grievance to be initiated no later than five (5) work days after he/she knew, or should have known the cause of such grievance. The grievance here was initiated in writing and was presented to the City on January 31, 2006. Neither party has commented on initiating or presentment of the grievance orally to the director of Public Works as Step 1 states, and the filing of the written grievance on the grievance initiation form is deemed to have met that part of Step 1. The issue turns on whether Grievant either knew or should have known the cause of his grievance more than five (5) working days before the presentment on January 31, 2006.

The cause of the grievance was the way the City was accruing, or not, the sick leave, vacation and longevity benefits while on long-term disability. Grievant did not pay attention to the totals on his pay stubs as he received them. Grievant first asked the City about accruals on January 27, 2006 and the City answered the question, from its perspective, on January 31, 2006 that his benefits were not accrued by the City for that time. This is when he knew that the City had actually not accrued the benefits, and the initiation is within five working days. However, the issue is whether Grievant should have known the cause of his grievance before that.

Sick leave, vacation and longevity pay totals are all set out on the pay stubs with each paycheck. Some of the information, such as vacation, is not updated until the end of the month. That information is then presented on the pay stub with the first paycheck of the

³ The record is clear that from the City's perspective there was a mistake made in payroll processing which paid Grievant one month's worth of longevity payments that the City believes he should not have received. The Union believes that payment and other longevity payments should have been made. However, the parties have stipulated that one month's worth of longevity payments are at issue and no contention has been raised that Grievant should repay the City in the event his grievance is not sustained. Thus, for purposes of this Award, it is the accrual of longevity benefits and not the dollar amount of any benefits that may be due which is at issue.

following month as a balance. Even though the number of hours or days earned is not reflected, the balance is. It is possible to see the change in any balance by comparing a previous month's pay stub with that of a following month. In this case the balances of Grievant's sick leave and vacation on all November and December pay stubs showed a balance of 14 hours and 89.93 hours, respectively. These are the same balances as shown on the October 6th pay stub, which had increased over the September 22nd pay stub. The payment of one month's longevity pay for September and October was shown, but nothing for November. It is clear from the pay stubs that the balances for sick leave and vacation were not being increased, and longevity pay was not paid for each month.

Because of the lag time between when a benefit actually would accrue, usually dependent on anniversary date, and the end of the month, some of the information on the pay stubs is not current. However, the information is current for the first pay stub of each month. Thus, the accruals for September or October would not be recorded on a pay stub until the first paycheck in November. The accruals for the month of November would not be reflected until the first paycheck in December, in this case, December 1st. Given Grievant's static balances of sick leave and vacation, by December 1st the information on Grievant's pay stubs shows he was not accruing those benefits for the time he was on long-term disability. Even considering the accrual of benefits while on long-term disability as one single issue, rather than a separate issue for each month or fractional month of sick leave, vacation or longevity pay, December 1, 2005 is the date that Grievant should have known the City had not accrued his benefits. That is the day he should have known the cause of filing a grievance – the non accrual of benefits.

Grievant should have known this by December 1, 2005 because that is the mechanism that the City regularly reports this information to the individual employees. Employees may call or contact the City, through the payroll department, anytime to get current balances and ask questions. Some do this. There is nothing else in the record which shows how employees verify specific balances or what is happening with their benefits accruals. Even though Grievant did not pay attention to the balances on his pay stubs, he could have seen the balances not increasing at least by December 1st and contacted payroll by then to verify what the pay stub indicated. He did not do this until January 27, 2006, which is well beyond the five (5) working days that he should have known the cause for the grievance he presented.

Grievant points out that the Ewert grievance would have been filed beyond the five (5) working day limit and that is a reason to relax the time requirement. However, the parties settled that matter on a non-precedent setting basis and that is just what that is. Moreover, the record shows that there was a different issue also between the Union and the City at that time concerning the salvaging of City materials. That may or may not have affected the settlement of the Ewert matter and is another reason why no weight should be put on a settled case that the parties agreed is non-precedent. The Ewert case is not a basis to relax the time limits agreed to in the contract. Thus, the Union reference to a past practice of lax enforcement, citing CABBELL UNION HIGH SCHOOL DISTRICT, 118 LA 561 (BAGUE, 2003), is not relevant.

The Union points out that a harsh result should be avoided by a procedural issue. However, it would also be unreasonable to have potential grievances lingering for perhaps several years if an employee were not on notice by receipt of a pay stub as to the status of their benefits. Both of these concerns are met by the parties having negotiated time limits for filing a grievance after the employee knew, or should have known the cause of such grievance. That is the language of the agreement. It is not ambiguous. The agreement, Article 9, Section E., does not allow an arbitrator to modify, add to, or delete from the express terms of the agreement.

The City correctly points out that arbitrators consistently hold that when an employee grieves his or her pay or accrued benefit amounts it is the receipt of their paychecks which is the occurrence giving rise to the grievance. Here, it is the act of accruing or not accruing benefits which is the cause of the grievance. Those actions took place at least by the end of each month and were communicated to the Grievant with the first pay stub of the following month. This is the first opportunity he has to notice his benefits were not being accrued. This is similar to ST. MARY'S/DULUTH CLINIC HEALTH SYSTEM, CASE 5, NO. 58085, A-5805 (BOHRER, 7/2000), where the contract had grievance time limits from when the employee "knew or could have reasonably known of the events(s) giving rise to the grievance". The arbitrator found that the pay stub information accompanying paychecks was the employees' first opportunity to notice that their vacation balances had not accrued after their anniversary dates, and receipt of the pay stub information was the event giving rise to the grievances therein. VILLAGE OF GREENDALE, CASE 59, NO. 48701, MA-7683 (LEVITAN, 8/1993), is similar. There, the operative language was: Any grievance not presented to the department head within twenty-two (22) calendar days of the occurrence of the event causing the grievance shall be considered waived. There the arbitrator concluded that the issuance of a paycheck to the employee was occurrence of the event giving rise to the grievance. He reasoned that the paycheck's accompanying statement of balances and deductions of sick leave informed the employee of how his leave was being accessed, citing arbitral precedent. The Union argues that the ST. MARY'S/DULUTH CLINIC HEALTH SYSTEM language and CITY OF GREENDALE language is different than here, and that knowing the cause of a grievance is substantially different than knowing the occurrence of the event giving rise to the grievance. This argument is not persuasive. The issue is when should Grievant have known the cause of his grievance. Knowing the event giving rise to a grievance is essentially the same as knowing the cause of a grievance. The cause of the grievance is the non-accrual of benefits, which grievant had notice of by at least December 1st. The call to Kurz and her response was made after Grievant, following discussions with other employees, noticed the pay stub balances in January. Grievant could have called payroll as soon as his check stubs indicated there was no accrual. Kurz merely confirmed what the pay stubs had indicated for two months or longer. The same point is made in SHEYBOYGAN COUNTY SUPPORTIVE SERVICES, CASE 163, NO. 47903, MA-7427 (GRATZ, 4/1993), where the language at issues was: filed more than thirty (30) days after the union knew, or should have known of the existence of grounds for such complaint. There, the Arbitrator found it appropriate and necessary under Article 25 (the grievance procedure) to allow the Grievants to wait until they were paid to know for sure how their overtime hours were going to be compensated. Accordingly, because the grievance was filed within 30 days

after the Grievants received the relevant paycheck, it was filed within the applicable Article 25 time limit and hence procedurally arbitrable. These cases and the others cited by the City, along with the language in Article 8, Section F, all provide convincing reasoning that it is the receipt of benefit information accompanying a paycheck which is when Grievant should have known the cause of his grievance. It is not a strict and narrow interpretation of a guideline, as the Union suggests in re LICKING COUNTY, OHIO SHERIFF'S OFFICE, 105 LA 824, (PAOLUCCI, 1995) cautions against. Rather, receipt of paycheck information is a widely accepted and commonly understood event giving employees notice of how the employer is applying their contractually negotiated benefits.

Grievant should have known the cause of his grievance by December 1, 2005 and the grievance was not filed until January 31, 2006. The grievance was filed more than five (5) work days after Grievant should have known the cause of such grievance, making it untimely under the terms of the collective bargaining agreement. There is no relevant past practice or other consideration present here to relieve the Union and Grievant of the requirement of timely presentment of the grievance. Accordingly, based upon the evidence and arguments in this case, I issue the following

AWARD

The grievance is denied as untimely. The merits are not reached and no remedy is made.

Dated at Madison, Wisconsin, this 29th day of November, 2006.

Paul Gordon /s/

Paul Gordon, Arbitrator