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, WI 53202, appeared on behalf of City of Greenfield.

SUPPLEMENTAL 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.

One of the issues raised by the City concerned the timeliness of the grievance. On November 29, 2006 the undersigned issued an Arbitration Award in this case which denied the grievance as untimely, and, thusly, did not reach or determine the merits of the grievance.

By letter of February 2, 2007, and as discussed in a conference telephone call between the undersigned and the Attorneys for the Parties, the Parties requested a decision on the merits, as set out in the February 2nd letter:

> Given that the matter is capable of replication and in fact has again arisen, the parties ultimately need a decision with regard to the merits of the case. In the

interests of judicial economy, the parties have agreed that a new hearing is not necessary. The parties hereby jointly request that you re-examine the record as presented to you on May 23, 2006, give due consideration to the post-arbitration briefs submitted by each party, and render a decision on the substantive matters.

In the above referenced conference call, the Parties agreed that the undersigned issue an expedited, shorter formed award to address the substantive merits. Accordingly, this Supplemental Arbitration Award is made.

ISSUES

As indicated in the original Award, the substantive issues are:

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.

. . .

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.

. . .

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.

. . .

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.

ARTICLE 16 – HEALTH INSURANCE

. . .

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.

. . .

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:

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

Other contract provisions are set forth as in the discussion.

BACKGROUND AND FACTS

The background and facts are those set out in the original Award, which are hereby incorporated by reference as if fully set forth herein.

POSITIONS OF THE PARTIES

The positions of the Parties are those set out in the original Award, which are hereby incorporated by reference as if fully set forth herein.

DISCUSSION

The case concerns the accrual of vacation time, 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. 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. As to the merits, the City argues the plain language of the contract as well as past practice supports the non-accrual of the benefits.

The collective bargaining agreement provides for various benefits to employees in the bargaining unit. In this case, some of those benefits were provided to Grievant while on long-term disability, and some were not. His health insurance premiums and coverage was maintained by the City and his seniority dates and status was maintained on City records to include the time on long-term disability. The benefits at issue were not accrued by the City. There is no appreciable difference in the qualifying language for each of the various benefits under the collective bargaining agreement. It is a compelling argument that if Grievant was and is to be considered an employee for some benefits, he would then be considered an employee for all benefits (assuming provisions for such things as mandatory co-pays of insurance premiums and other elective matters).

There is one particular provision in the agreement which addresses and makes reference to the phrase "employment relationship", and that is in Article 7-SENIORITY. This is a provision which was accrued by the City while Grievant was on long-term disability. That provision provides in part:

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

and then lists eight (8) different circumstances which would break or terminate such employment relationship. None of those eight (8) circumstances applies here. This is a strong indication that the employment relationship was maintained while Grievant was on long-term disability. This also shows that the City considered Grievant to be an employee while on long-term disability.

Similarly, the health insurance benefits under article 16 states in pertinent part:

> A. Health insurance coverage shall be provided by the City, and the City shall pay the full premiums minus employee contributions.

There is no further definition or qualification of "employee" other than that to initially receive the benefit. Health insurance was maintained by the City for Grievant while he was on long-term disability. This shows that the City considered Grievant to be an employee while on long-term disability.

Despite differences in how an employee is defined or referred to in the above benefits sections, they are still considered employees. For the benefits at issue, the various clauses also use different language when referring to the employee. They speak in terms of "eligible employee(s)" for Vacations and Longevity, and in terms of "regular full-time employee" for Sick Leave. Formulas for the respective benefits follow each qualifier. There are no further definitions as to who is an employee. The City argues that there is nothing in the three benefit clauses at issue which says that those benefits will accrue during long-term disability. However, there is nothing in the seniority or health insurance benefits clauses which says they will accrue while on long-term disability. Grievant had those benefits accrued. Thus, the absence of such language in the three benefits clauses at issue is not dispositive. Such absence does not exclude accrual. Importantly, there is no language which excludes an employee on long-term disability from having any of these benefits accrue. Conversely, there is no language in the health insurance or seniority provisions which says they do apply to those on long-term disability. Employees, however referred to in the various benefit clauses, are entitled to the respective benefit. Grievant remained at all times an employee.

The Parties did negotiate into the collective bargaining agreement a sick leave provision which does limit accrual of that benefit in some circumstances not applicable to this case. (Employees shall not earn sick leave while on a leave of absence after the employee's accumulated sick leave has been used up. (Article 12, Sec. A). Grievant was not on a leave of absence, and had not filled out any required leave of absence forms. What that shows is that the parties do know how to put non-accrual language into the agreement. The Union correctly argues that the absence of such provisions in the clauses here indicates that accrual is to occur.

The City argues that Grievant was not on the payroll, but was being paid via insurance benefits and that is a reason why the benefits do not accrue. However, there is nothing in the agreement which states this or which makes being on the payroll - as opposed to receiving insurance benefits in place of the payroll – as a qualification for the benefit. And, the Article 14 Duty Incurred Disability provisions provide certain benefits for those who may eventually receive worker's compensation benefits. Under that Article, an incapacitated employee is still referred to as being an employee regardless of whether a Chapter 102 determination has been made and, if the employee has no accrued sick leave, he/she shall not be paid. The Article, for at least certain circumstances, considers them an employee even if not being paid by the City.

The conclusion drawn from this is that Grievant need not be receiving pay via the payroll in order to be considered an employee for benefits purposes. He is still an employee who happens to be on long-term disability.[1]

The City cites DENMARK SCHOOL DISTRICT, CASE NO. 62909 (GALLAGHER, MAY, 2004) for the proposition that to be "employed" means the person has to be actively working. In DENMARK SCHOOL DISTRICT the School District denied sick leave and personal leave for the period an employee had not worked while she was receiving workers compensation and long-term disability benefits. The contract there contained a provision that employees who work less than 540 hours per year shall not be eligible for fringe benefits unless specifically provided for in the agreement. The grievant there had not worked the requisite 540 hours during the time period at issue. In applying the language at issue there, Arbitrator Gallagher found that the particular language required both the status of being an employee and the action of performing work, at least as to some of the claimed benefits. No such requirement exists in the agreement here. It is status only. Moreover, in DENMARK SCHOOL DISTRICT, Arbitrator Gallagher made the following observation:

> The Association has argued that because the District consistently treated Piontek as an employee and because she was never separated from her employment as a 12-month District employee during her extended absence, she must be considered "employed" during her absence pursuant to Section 24.01 and therefore entitled to sick leave. If Section 18.06 were not included in this labor agreement, this argument would likely have been persuasive on this point. However, Section 18.06 provides that unless there is specific contractual language to the contrary, "any employee" who "works less than 540 hours per year" shall not be eligible for " fringe benefits."
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> Id. p. 15.

Here, there is no language similar to the 540 hour limitation. Thus, DENMARK SCHOOL DISTRICT does not require a finding that Grievant here is not entitled to accrual under this agreement. If anything, DENMARK SCHOOL DISTRICT would be more supportive of the Union's position in that Grievant did not break or terminate the employment relationship and, accordingly, is entitled to the benefit accruals under the agreement.

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[1] It is not clear from the record what limitations or qualifying conditions exist in any insurance policy provisions available under the long-term disability benefit. The possibility exists that a long-term disability condition may result in the City having to accrue benefits for a significant period of time and at some expense. It is not known if there is an ending date or condition to that plan at which time an employee either can or cannot return to work, with attendant implications for further benefits. However, that issue is not presented in this case in that Grievant returned to work within months.

The City argues that there is a past practice of not accruing these benefits. However, the only three incidents of bargaining unit employees being at issue concern the Bartz and Ewert cases, and the current case. Those are the only cases that arguably might support a past practice in interpreting the collective bargaining agreement between the City and the members of the bargaining unit. There is no practice as to non-bargaining unit members that applies to this case. As to the bargaining unit members, obviously the current case is at issue. The Ewert case was settled on a non-precedent basis. As stated in the original Award, no value is put on that case as precedent, and no value will be put on that case as past practice either for or against accrual. That leaves the single Bartz matter. It is difficult to establish by a single incident the mutuality, recognition, long standing authority and readily ascertainable scope normally needed to attain the status of a binding past practice. The undersigned is not persuaded that, as argued by the Union, there is a past practice of accrual. Thus, no past practice, for or against accrual, is established on the basis of this record to aide in a determination.

Grievant remained in the employment status under the collective bargaining agreement so as to be eligible for the benefits claimed. The City violated the agreement when it denied him the accrual of vacation time, sick time and longevity pay while he was on long-term disability.

Accordingly, based upon the evidence and arguments in the case, I issue the following

SUPPLEMENTAL AWARD

The grievance is sustained as to the merits. As a remedy, the City will provide and accrue to Grievant 33.3 hours of vacation time, 16 hours of sick time and $21.00 longevity pay.

Dated at Madison, Wisconsin, this 19th day of February, 2007.

Paul Gordon /s/
Paul Gordon, Commissioner

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