

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between  
**THE LABOR ASSOCIATION OF WISCONSIN, INC.,  
WINNEBAGO COUNTY DEPUTIES ASOCIATION, LOCAL 107**

and

**WINNEBAGO COUNTY**

Case 416  
No. 69067  
MA-14464

(Plach Sick Leave Grievance)

---

**Appearances:**

**Mr. Benjamin Barth**, Labor Consultant, Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, Wisconsin, appearing on behalf of Local 107.

**Ms. Anna M. Pepelnjak**, Attorney, Weiss, Berzowski, Brady, LLP, 700 North Water Street, Suite 1400, Milwaukee, Wisconsin, appearing on behalf of Winnebago County.

**ARBITRATION AWARD**

The Labor Association of Wisconsin, Inc., Winnebago County Deputies Association, Local 107, hereinafter "Association," and Winnebago County, hereinafter "County," requested a list of five arbitrators from the Wisconsin Employment Relations Commission from which to select a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was selected to arbitrate the dispute. The hearing was held before the undersigned on October 29, 2009, in Oshkosh, Wisconsin. The hearing was not transcribed. The parties submitted briefs, the last of which was received by January 15, 2010 whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

**ISSUES**

The parties stipulated there were no procedural issues in dispute and framed the substantive issues as:

Did the County violate the terms and conditions of the collective bargaining agreement when it deducted sick leave from Deputy Brian Plach's sick leave account while he was off of work under the County's Long Term Disability Insurance plan? If so, what is the appropriate remedy?

**RELEVANT CONTRACT PROVISIONS**

...

**ARTICLE 1  
RECOGNITION AND UNIT OF REPRESENTATION**

The County hereby recognizes the Association as the sole and exclusive bargaining agent with respect to hours, wages, and other conditions of employment for all regular full-time and regular part-time employees employed by Winnebago County and its Sheriff's Department, including Sergeants, Detectives, Juvenile Officers, Corporals, Police Officers, and Corrections Officers, but excluding from the unit of representation, the Chief Deputy, Assistant Chief Deputy, Captain, Lieutenants, and clerical employees.

This recognition clause shall be construed to apply to employees and not to work. It shall not limit the County's right to contract out work or to transfer work to other employees not included within the aforementioned unit when the nature or amount of work changes, provided however, no bargaining unit employee will be laid off as a result of the County contracting out work or transferring work to other employees.

**ARTICLE 2  
MANAGEMENT RIGHTS**

Except to the extent expressly abridged by a specific provision of this Agreement, the County reserves and retains, solely and exclusively, all of its Common Law, statutory and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Association. Nothing herein contained shall divest the Association from any of its rights under Wisconsin Statutes, Section. 111.70.

...

**ARTICLE 12  
SICK LEAVE WITH PAY**

Employees who elect not to participate in the dental insurance plan shall accrue sick leave with pay benefits at the rate of eight (8) hours for each month of

completed service. Employees who elect to participate in the dental insurance plan shall accrue sick leave with pay benefits on January 1 of each year at the rate of (8) days per year (64 hours). If an employee has been on leave of absence without pay any time during the month-period used to determine sick leave with pay, employee shall not accrue any sick leave with pay for said month. Unused sick leave with pay shall accumulate to a maximum of nine hundred and sixty (960) hours. An employee shall be eligible to use sick leave with pay for a period of absence from employment, which is due to his personal illness, bodily injury, or exposure to contagious disease.

Definition – Sick leave is a form of paid time off which shall be provided to an employee for periods of absences which are necessitated by personal illness or injury of the employee or for medical or dental appointments of the employee which cannot be reasonably scheduled outside of work hours. Sick leave shall be granted to an employee for his exposure to a contagious disease during the contagious period. In addition, sick leave shall be granted for use under the provisions of the State and Federal Family and Medical Leave Laws. Sick leave is not available to employees for any other purpose, unless stated in the applicable union or association contract.

As a condition for sick leave payment, absences to be covered by this provision shall be reported to the Chief Deputy or other designated employee at least one (1) hour prior to the scheduled starting time for work, except in case of emergency. Absences of three successive working days or longer shall require a physician's statement as to the nature of illness or injury and its probable duration.

Employees qualified to receive sick leave with pay shall be compensated for each day of absence at the regular rate said employee was receiving immediately preceding the current sick leave. Sick leave with pay shall not be granted for less than one (1) hour.

Employees with five (5) or more years of seniority who retire upon becoming eligible therefore, or retire thereafter, or who die during the period when they are employed by the County (not upon quit or discharge) shall receive a sick leave termination benefit of sixty-five percent (65%) of their unused sick leave which will be paid to the retiree upon retirement, or at the employee's option, can be converted to paid health insurance.

In the event of the death of an employee, this benefit shall be paid to his designated beneficiary or, if none is designated, to his next of kin.

• • •

## **ARTICLE 15 VACATIONS**

As hereinafter provided, all employees shall be entitled to a vacation and shall earn annual vacations based upon their anniversary date of hire.

Persons hired after January 1, 1982, shall earn vacation as of January 1 of each succeeding year. Vacation earnings shall be prorated for the first partial year of service based upon the number of full months completed.

For purposes of determining future year's vacation eligibility, the first partial year of service shall be treated as a full year, and January 1 of that year shall be used as the anniversary date of the employee for vacation earnings purposes.

Persons hired prior to January 1, 1982, shall have the option of converting their vacation earnings basis to the above calendar year basis.

The vacation schedule shall be as follows:

- Forty-eight (48) hours of time off with pay after one (1) year of continuous service;
- Ninety-six (96) hours of time off with pay after three (3) years of continuous service;
- One hundred forty-four (144) hours of time off with pay after seven (7) years of continuous service;
- One hundred ninety-two (192) hours of time off with pay after twelve (12) years of continuous service;
- Two hundred forty (240) hours of time off with pay after seventeen (17) years of continuous service.

Vacation time may be used in increments of one hour or more in accordance with Department policy.

To determine the total years of continuous service, such service shall be deemed to have commenced as of the last date the employee was hired by the County provided, however, a starting date with the Sheriff's Department in a position covered in this Agreement shall be used to determine the department seniority which shall be the criterion for determining vacation selection by seniority within the bargaining unit regardless of rank.

Such service shall not be considered interrupted while the employee is on military leave, leave of absence without pay, layoff, or while the said employee is receiving weekly, temporary disability benefits pursuant to Workers' Compensation laws of the State of Wisconsin for an injury which occurred while in the employ of Winnebago County.

If an employee has been on military leave, leave of absence without pay, layoff or receiving weekly, temporary disability benefits pursuant to the Workers' Compensation laws of the State of Wisconsin for an injury which occurred while in the employ of Winnebago County, for more than thirty (30) days during the period used to determine his annual earned vacation, he shall receive prorated vacation on the basis of one-twelfth (1/12<sup>th</sup>) of his total allowable annual vacation for each calendar month of completed service during the said annual period.

. . .

## **ARTICLE 26 WORKERS COMPENSATION**

Whenever an employee is injured in the scope of his employment, he shall be entitled to Workers' Compensation and shall turn over the Workers' Compensation check to the Employer and shall receive his regular normal paycheck from the Employer without any loss of sick days. The employee shall receive this compensation for a period not to exceed twenty-five (25) calendar weeks per person per injury. After twenty-five (25) consecutive weeks under the above arrangement, the employee will be allowed to utilize vacation days, holidays, and overtime to supplement his Worker's Compensation benefits and shall designate to the Employer which days he desires to use.

## **ARTICLE 27 MATERNITY LEAVE**

Female employees shall be entitled to such necessary leave prior to and following delivery as is recommended by the employee's physician without loss of seniority; however, it is further agreed that, due to the nature of the work and the possibility of physical injury to the pregnant employee, maternity leave shall commence at the time indicated in writing by a physician. The employee shall submit a physician's statement to the Department of Human Resources at the end of the fifth (5<sup>th</sup>) month of pregnancy and from time to time thereafter at the request of the County. Said statement must include the estimated deliver date and a statement that the employee is able to perform her duties and responsibilities without restrictions. The employee must return to work in the

same classification as soon as she is physically capable of resuming her full duties as determined by her physician.

For maternity leave purposes, an employee may use sick leave and any other available paid time off and a leave of absence without pay. No unpaid leave of absence may be used until all available leave time has been exhausted. An employee may, however, at her option, retain up to six (6) days of vacation upon commencing an unpaid leave of absence.

...

### **ARTICLE 37 LONG TERM DISABILITY/CARE INSURANCE**

The County shall provide long term disability insurance to persons in positions represented by the Association and pay the full premium.

Effective September 1, 2007, the County agrees to make available to employees who retire after August 31, 2007, Long Term Care (LTC) insurance. The retired employee shall pay the full premium cost of the LTC Insurance.

...

### **BACKGROUND AND FACTS**

The County provides employees of the County Sheriff's Department with a Long Term Disability (hereinafter, "LTD") plan administered by National Insurance Company. The County pays the employee premium for the plan. When a new employee is hired, they are provided a copy of the LTD plan booklet, although they are not eligible for coverage until the first of the month following six complete months of employment. When the employee reaches their six month anniversary, the County Human Resources Department automatically enrolls the employee in the LTD plan. The National Insurance Company plan affords an employee who suffers an eligible illness or injury with 66 2/3 % of their base income up to a maximum of \$45,000. The plan requires that the employee complete a 90 day elimination period before he/she may begin collecting benefits.

The Grievant, Brian Plach, is 23 year veteran of the County Sheriff's Department. The Grievant suffered an off-the-job injury to his leg on October 18, 2008. The Grievant's injury prohibited him from returning to work and as a result, his wife contacted the County to file an application for benefits pursuant to the LTD policy he held with the County. As a result of the Grievant's wife's telephone call, the County filed a claim for LTD benefits on the Grievant's behalf.

On October 20, 2008, Polishinski directed the following letter to the Grievant:

Dear Mr. Plach,

As part of the policy for Long Term Disability, it is the responsibility of Winnebago County to inform and file a statement with National Insurance Company as to the illness or injury when an employee is on an extended medical leave. Please find enclosed forms that you and your physician will need to complete and return to National Insurance Company. The return address is at the top of the forms.

There is a ninety-day elimination period with this policy. No benefits can be paid until the elimination period has been met. In addition to the elimination period, if you have a sick leave balance, benefits will not be paid until your sick leave is exhausted. If your claim is approved, the benefit payable by National Insurance is normally two-thirds of your salary in effect at the time of the illness or injury.

If you have any further questions or concerns, please contact me at (920) XXX-XXXX.

Sincerely,

/s/  
Mary Polishinski  
Payroll & Benefits Manager

The Grievant completed and submitted the necessary paperwork to initiate the filing of an LTD claim. The County reported to National Insurance Company the Grievant's available leave balances.

On November 6, 2008, National Insurance Company directed the following letter to the Grievant:

Dear Mr. Plach:

We are writing to you concerning your claim for Long-Term Disability benefits.

Your Long-Term Disability coverage provides benefits after you have been "totally disabled" for a period exceeding 90 consecutive calendar days. Based on the information that we have received from you, from your employer, and from Dr. Hash, we determined that you will first become entitled to Long-Term Disability benefits starting on January 16, 2009, assuming that you remain totally and continuously disabled through that date.

Long-Term Disability benefits are calculated and paid on a twelve-month per calendar year basis. Your Long-Term Disability benefits are calculated in conjunction with other benefits and income to which you are entitled so that the combined amount of your Long-Term Disability benefit and your Other Specified Income do not exceed 66 2/3% of your pre-disability insured earnings, subject to a maximum annual covered salary of \$45,000.00. The Long-Term Disability coverage also provides that, after you have satisfied the elimination period for your disability claim, that you may receive either Long-Term Disability benefits from this plan or sick leave benefits from your employer, but not both for the same period of time. The Long-Term Disability coverage provides that if you utilize remaining sick leave benefits after you have satisfied the elimination period for your disability claim, then no Long-Term Disability benefits are payable to you for the period for which sick leave benefits are paid to you by your employer. After sick leave benefits end or are exhausted, Long-Term Disability benefits will become payable to you.

The Long-Term Disability coverage requires that you apply for, and coordinates with Social Security disability benefits and Wisconsin Retirement System disability benefits. However, we will waive this requirement for you at this time, pending our additional investigation as to the expected duration of your disability. If, in the future it becomes necessary for you to apply for Social Security Disability benefits and apply for Wisconsin Retirement System disability benefits, we will write to you and advise you to do so.

Your Long-Term Disability coverage requires “total disability” as a condition for benefits. This means that a covered injury or a covered illness must prevent you from performing the substantial and material duties of your usual occupation as a Patrol Officer for the Winnebago County Sheriff’s Department. If your disability were to continue for a period that exceeds the first 24 months of the benefit period for your claim, the meaning of “total disability” would change. At that time, the Long-Term Disability plan would require that you be both, totally disabled from performing your usual occupation also that you be totally disabled from performing any other work for which you are qualified, in order to continue receiving benefits from this plan. Both definitions of “total disability” require that you remain under regular medical care in order for the company to consider a period of total disability for your claim. If the latter definition of total disability is met, maximum benefits are payable for a period of five years.

Since you will not begin to accrue Long-Term Disability benefits for some time, we will contact you at a later date to solicit an update from you and from your physician, as to your disability status. In the interim, should your condition change or should you become approved for any Other Specified Income benefits that have not been reported to us, please contact us immediately.



If you have any questions about your Long-Term Disability claim, please contact me.

Sincerely,

/s/

Dennis M. Boyle  
Claims Manager

National Insurance Company directed a second letter to the Grievant dated January 8, 2009 confirming that he was approved for LTD benefits effective January 16, but that since he was receiving sick leave benefits from his employer and would do so through May 19, 2009, no LTD benefits would be paid to him until his sick leave payments ended.

The Grievant used 87 sick leave days and three vacations days after he had fulfilled the elimination period and before he collected any LTD benefits. The Grievant continued to earn vacation leave, sick leave and retirement benefits during the time period that he was exhausting his sick leave and vacation days, but stopped earning those benefits once he began receiving LTD payments.

Between January 16 and May 19, National Insurance Company paid benefits pursuant to the Grievant's LTD insurance policy to the County in the amount of 66 2/3% of the Grievant's salary.

The Association filed a grievance on April 10, 2009 asserting that the County was violating Articles 2, 37 and any other applicable article or section by continuing to deduct sick leave from the Grievant's sick leave account while he was off of work under the County's LTD Insurance plan. The Association characterized the County's actions as an unreasonable exercise of management rights. The County denied the grievance at all steps.

### **ARGUMENTS OF THE PARTIES**

#### **Association**

The Association maintains that the County violated the labor agreement when it unilaterally decided to deduct sick leave and vacation leave from the Grievant's accounts at the same time that it was collecting the Grievant's LTD benefits from the LTD insurance provider.

The County unilaterally implemented a change affecting a mandatory subject of bargaining. Citing SEWAGE COMMISSION OF THE CITY OF MILWAUKEE, DEC. NO. 17302 (WERC, 9/79) the Association points out that not only are LTD benefits a mandatory subject of bargaining, but that the parties' bargained the creation of the benefit. The County's unilateral decision to require substitution of leave time was a per se refusal to bargain. The

County never attempted to bargain with the Association even though it was obligated to bargain any change or modification to Article 37.

The parties' past practice supports the Association, not the County. The County argued throughout the hearing that since 1975 it has docked employees' accrued time before allowing them to collect LTD payments, but the evidence does not support this assertion. The County called one witness, Mary Polishinski, to defend its claim of "past practice". Polishinski testified that the County had a policy of reducing employees' sick leave, prior to paying LTD benefits, and did so consistently for 35 years. The Association expected the County to then parade witnesses before the Arbitrator testifying to the County's position, but not one witness was called nor any documents submitted in support of the asserted practice. In contrast, the Association called Deputy Roger Peters who testified he did not believe employees were expected to exhaust accrued time balances before collecting LTD insurance. He testified based on his position as president of the Association and personal knowledge after he filed a LTD claim in 2005.

The County claims that the language of Article 37 is clear, but then relies on past practice to support its actions. The County maintains that Article 37 requires only that the County pay the premium and provide the benefit. The County's belief is flawed. Nowhere in the language of Article 37 does it say that the County may receive the employee's LTD benefit nor does it say that the employee must exhaust his/her leave balance. Instead, the County refers the arbitrator to the County handbook, chapters relating to unpaid leaves and fringe benefits. Under Chapter 18, the County claims that the Grievant is out on unpaid leave. It then relies on Chapter 21 and the offset provision of the LTD policy concluding that the chapter allowed it to completely drain the Grievant's sick leave bank. Not a single provision of the handbook was bargained with the Association.

The County also attempts to "cherry pick" sections from the LTD policy to justify its position. The insurance document states that employees have the choice to use sick leave or collect LTD payments, yet Polishinski testified that the County does not believe it is bound by the policies of the LTD insurer. The Association points to a decision issued by Arbitrator McLaughlin's wherein he found that the County's attempt to rely on the content of an insurance plan booklet that imposed a 30 day waiting period which was not bargained and therefore was not a part of the collective bargaining agreement was a violation of the labor agreement and state statutes. WAUPACA COUNTY, DEC. NO. 24764-A, (McLaughlin, 7/88).

The collective bargaining agreement makes no reference to sick leave, vacation time or any accrued time being forfeited prior to an employee receiving the benefit of Article 37, Long Term Disability Insurance. Without explicit language stating a restriction, the forfeiture of accrued benefits should not be construed.

The Association maintains that the County violated the collective bargaining agreement and asks the Arbitrator to order the County to compensate the Grievant for 87 sick days and

three vacation days which were deducted from his leave balance. The Association further seeks a cease and desist order directing the County to stop violating the parties' agreement.

### County

The County was well within its rights when it denied the Grievant LTD benefits until after he exhausted his sick leave balance. The management rights clause is broadly worded and provides the County the right to control its own affairs. The Association may only make a claim if the County has violated an express provision of the agreement. If there is no express language, then the County has not ceded away or agreed to share any rights with the Association.

LTD is a non-mandated benefit. There is no statute, ordinance, rule of law that requires employers to furnish this type of insurance coverage. The County is at liberty to attach whatever conditions it wishes, so long as the employment benefit is provided without discrimination to all eligible employees. Once coverage is provided, its terms, conditions, limitations and exclusions are entirely up to the County and the carrier.

There is nothing in the labor agreement that addresses sick leave exhaustion in non-work-related injury situations. Since the contract is silent, past practice is binding. Past practice has been established and was enforced upon the Grievant. Polishinski testified that the County has required employees for 35 years to exhaust their sick leave before collecting LTD benefits for non-work-related injury claims.

Association witness Peters' testimony is irrelevant. Because Peters' claim began as a worker's compensation injury, he was not required to exhaust his sick leave. Peters personal situation is irrelevant and he testified that he knew of no other union member who had not been required to exhaust sick leave before receiving LTD benefits. The County maintains that the overwhelming evidence establishes that a past practice exists.

As to the Association's argument that the County was required to provide employees with the choice between using sick leave or collecting LTD insurance, there are three defects. First, the insurance policy contradicts the County's unpaid leave policy where it states that exhaustion of sick pay is required. Although the Grievant did not specifically request unpaid leave, he was not at work and he was not terminated, thus he had to be on some form of leave. The fact that he did not complete a form requesting unpaid leave is immaterial because no form exists.

Second, if the County allowed employees to choose between LTD benefits and sick leave, it would violate the LTD policy. The "Monthly Benefit Provision Direct Offset" provides that "Other Specified Income" offsets the monthly benefit on a dollar-for-dollar basis. Sick leave is an "Other Specified Income." Dennis Boyle, National Insurance Service representative, explained that whether or not sick leave is received, the provision is included

in the policy in order to avoid a “moral hazard;” a situation in which the receipt of benefits establishes a financial disincentive to return to work.

The third defect is the County does not believe the Grievant wants the remedy to which he seeks. If the Arbitrator returns to the Grievant his sick leave, then he will be required to repay 33 1/3% of his income along with all accrued paid time off and retirement contributions. That is the make whole remedy.

As to the Grievant’s LTD benefits being paid to the County, that is simply how the payments work under the plan. This procedure allows the County to realize a return on premiums by recovering payments that would otherwise be payable to the covered employee. This is what permits the County to provide this non-mandated benefit. This is the same practice that the parties use for worker’s compensation benefits.

The County requests that the grievance be denied.

### DISCUSSION

The issue in this case is whether the County can require employees to exhaust accumulated leave balances before collecting under their LTD insurance policy. Central to addressing the issue is the inter-relationship among and between the collective bargaining agreement, the LTD insurance policy, and the County Handbook for Represented Employees.

The Association and County negotiated the creation of a Long Term Disability/Care Insurance benefit greater than 35 years ago. The language of Article 37, Long Term Disability/Care Insurance reads:

The County shall provide long term disability insurance to persons in positions represented by the Association and pay the full premium.

Effective September 1, 2007, the County agrees to make available to employees who retire after August 31, 2007, Long Term Care (LTC) insurance. The retired employee shall pay the full premium cost of the LTC Insurance.

This is a “contribution-defined” plan. Contribution-defined plans are those in which the employer agrees to provide or pay for some type of protection or loss. Bornstein, Gosline, Greenbaum, *Labor and Employment Arbitration*, 2<sup>nd</sup> Ed., p. 35-41 (2005). In contrast, “benefit-defined” plans are those in which the parties negotiate specific benefits. *Id.* It is generally accepted that if the parties negotiate a contribution-defined policy, then the “details, eligibility requirements, restrictions and exclusions may be unilaterally determined by the outside carrier”. *Id.* at 35-43.

The County points out that the language of Article 37 only requires that it provide a plan and pay the premium. This is a true, but the County conditioned the Grievant’s claim for

LTD benefits on the exhaustion of his sick leave balance. No such obligation is contained in Article 37 nor was this condition precedent to collecting LTD insurance benefit bargained with the Association and therefore, the question becomes whether the County was within its rights to impose such an obligation.

The Grievant maintains that the terms of the LTD policy provided him the right to choose between using his sick leave or collecting LTD benefits. The specific provision he relies on is entitled, "Coordination With Employer Provided Sick Leave Benefits" which states:

After the elimination period has been satisfied, the claimant may either bank any available sick leave and accept insured benefits, or may continue to exhaust remaining sick leave accumulations. If the claimant chooses to utilize remaining sick leave at a rate of one full day of sick leave per working day of disability, the applicable benefit will be paid to the Employer. When sick leave benefits are exhausted, all applicable benefits will revert to the claimant.

The Coordination clause provides this option to the Grievant. When the Grievant informed the County he wanted to accept the LTD insurance benefits and retain his sick leave balance, the County denied his request.

The County argues that the Coordination clause of the LTD policy is inapplicable because another provision of the policy, the Benefit Offset clause, required that the Grievant use his sick leave. Additionally, a binding past practice exists wherein administration of the LTD plan is consistent with County policy that requires represented employees on an unpaid leave to use their leave balances before receiving LTD benefits.

The Direct Offset provision of the LTD policy provides in relevant part:

**MONTHLY BENEFIT PROVISION**  
**DIRECT OFFSET**

Ease Insured Employee's Monthly Benefit equals his or her Plan Monthly Benefit minus Other Specified Income, if any, Sources of Other Specified Income are as follows:

...

- i. Any sick pay or any other salary continuation paid or payable to Insured Employee's because of his or her disability by his or her Employer, but not vacation pay;

...

The County's National Insurance Service Claim Manager, Dennis Boyle, testified at hearing. Boyle was asked multiple times, by both the Association and the County, whether the LTD policy required the exhaustion of sick leave prior to collecting LTD benefits. Boyle unequivocally responded that the Direct Benefit Offset provision, specifically sub-section i, did not require that an employee exhaust all accumulated sick leave before collecting from the LTD plan. Boyle also acknowledged his company pays LTD benefits, as of the date a claimant becomes eligible, regardless of whether the monies are paid to the County or a claimant.

Boyle's testimony is supported by memoranda exchanged between Boyle, his colleague, Sherry Powell, and Boyle's supervisor, Scott Briscoe. In an email dated October 1, 2009, Powell informed Boyle and Briscoe that she would be attending a meeting concerning the Grievant and his request for reimbursement of sick leave starting with the day he became LTD eligible. Powell concludes her email explaining that the, "County stipulates that the employee must exhaust sick leave before collecting LTD. This is not in our plan with them – but, according to the county, it is in their contract or under "best practices"." Jt. Ex. 6

The County's reliance on the Offset provisions of the LTD policy is misplaced. The County's action in forcing employees to use accumulated sick leave triggered the application of the Offset provision. Once the County required the Grievant to use his sick leave, then the monies were paid, sub-section i applicable and the Grievant's LTD benefits were paid to the County while he depleted his sick leave bank. If the County had not required the Grievant to use his accumulated sick leave, then the Offset provision would not have applied. If the Offset provision had not applied, then the County would not have been paid the LTD monies due per the Grievant's LTD policy. The Offset provision created an inducement for the County to require employees to use up their leave balances.

The County maintains that a binding past practice exists whereby the terms of Section 18 of the County Handbook have been incorporated by practice into the parties' collective bargaining agreement. The principles of a past practice, to be binding on the parties in the absence of a written agreement, are generally understood to be, "to (1) unequivocal; (2) clearly enunciated and acted upon; [and] (3) readily ascertainable over a reasonable period of time as a fixed," *CELANESE CORPORATION OF AMERICA*, 24 LA 168, 172 (Justin, 1954).

County Handbook of Employment Policies Covering Represented Employees of Winnebago County, Section 18 which reads as follows:

#### Section A

GENERAL PROVISIONS. Unpaid leaves of absence for personal, medical, maternity or military reasons are available under the terms of the respective union or association contracts. As a general rule, all paid leave such as vacation, sick leave, floating holiday and compensatory time must be used before an unpaid leave can be granted. Any leave requested under the

Wisconsin Family Leave Act may have different requirements. All requests for any type of leave must be presented in writing as far in advance as possible.

Section B

BENEFIT CONTINUANCE. During the first thirty days of an unpaid absence, all County paid benefits will continue in full force and effect with the exception of paid time off benefits which cease to accrue during this period. Health and other insurance coverage may be continued and be paid, unpaid or waived depending on the insurance and the provisions of the applicable union or association contract.

...

Mary Polishinski, County Payroll and Benefits Manager, testified that during her entire 35 year tenure working with County payroll and benefits, the County has required employees to exhaust their sick leave balance before collecting under the LTD policy. Polishinski testified that the County imposed the terms and conditions of Section 18 addressing unpaid leaves. Polishinski's testimony, while credible, was the only evidence offered by the County to support its assertion that a past practice of existed.

The County offered a summary document prepared by the LTD carrier which was intended to represent a history of its expectation that employees exhaust their sick leave balance before collecting under the LTD policy. That exhibit identified the number of claims made and the number of claims where the County received payment for calendar years 2005, 2006, 2007, 2008 and 2009 to date. The data contained in the exhibit was as follows:

Calendar Year	Number of Claims made	Number of Claims where County received a payment
2005	47	9
2006	21	5
2007	31	1
2008	28	7
2009 to date	23	3

The problem with this exhibit is that even if it is a summary document of all LTD claims filed in the County, it does not identify who filed the claims, i.e. Association members, other bargaining unit members, elected officials or unrepresented employees and therefore, it is possible and highly probably that the processing and eligibility requirements of multiple labor agreements and/or County policies were implicated. The exhibit is nothing more than a recitation of claims. <sup>1</sup> It fails to identify if the claims were approved, if the claimant served the

---

<sup>1</sup> The Article 27 - Maternity Leave provision of the labor agreement contains the following, "an employee may use sick leave and any other available paid time off and a leave of absence without pay. No unpaid leave of absence may be used until all available leave time has been exhausted." This specific language authorizes the

90 day elimination period and if the employee had any accumulated leave time. Lacking this and other foundational aspects, the exhibit serves no evidentiary purpose.

Union President Roger Peters testified that he collected LTD benefits in 2005 and was not required to use all of his sick leave and that was unaware that the County was requiring employees use their sick leave before receiving LTD benefits. While it is true that Peters' claim arose first from a workers' compensation claim, that does not diminish the fact that the County did not go back and require him to use his sick leave before collecting the LTD benefits. At the very least, it serves as an example of an inconsistency with the County's asserted past practice of requiring leave exhaustion before collecting benefits.<sup>2</sup>

The County offered one witness who testified that the County has always required employees to exhaust their sick leave before collecting LDT benefits. The Union offered one witness who disputed the County's contention that a past practice existed and testified to his own personal situation wherein he was not required to run down his leave balances before collecting LTD benefits. The County did not offer any LTD claim data, correspondence, or other credible evidence to support its contention that the County has required leave exhaustion prior to an employee collecting pursuant to the LTD policy. There is insufficient evidence to establish that a binding past practice exists to either require the exhaustion of accumulated leave benefits and/or impose Section 18 conditions on the Association membership, especially since the terms of Section 18 are inconsistent with specific terms of the parties' negotiated labor agreement.

Article 12, Sick Leave of the collective bargaining agreement provides in part, "[i]f an employee has been on leave of absence without pay any time during the month-period used to determine sick leave with pay, employee shall not accrue any sick leave with pay for said month." Article 15, Vacation provides that:

...

If an employee has been on military leave, leave of absence without pay, layoff or receiving weekly, temporary disability benefits pursuant to the Workers'

---

County to require the exhaustion of leave balances. The County's claim that it has the inherent right to take the Grievant's leave balances is inconsistent with the negotiated specific language of Article 27. Not only does this specific language establish that the parties knew how to draft language addressing the specific issue in this case, but it also contradicts the County's position that the right to take employee leave time is contained in the language of Article 37.

<sup>2</sup> Peters' situation further challenges the value of the County's claim history document in that Peters' claim would/should have been included in the total for 2005 claims. It is unclear from the document whether Peters' claim is recorded as a claim from which the County would have received a payment and further, if it is recorded in that manner, whether the payments to the County were pursuant to the workers compensation provisions of the labor agreement or the County's LTD procedures.



Compensation laws of the State of Wisconsin for an injury which occurred while in the employee of Winnebago County, for more than thirty (30) days during the period used to determine his annual earned vacation, he shall receive prorated vacation on the basis of one-twelfth (1/12<sup>th</sup>) of his total allowable annual vacation for each calendar month of completed service during the said annual period.

...

Assuming *arguendo* that the Grievant was on an Unpaid Leave of Absence, the manner in which the County administered the Grievant's benefits were neither consistent with Section 18 of the County Handbook nor consistent with the collective bargaining agreement. Section 18 provides that an employee on unpaid leave is not entitled to accrue sick leave and vacation leave as if he was fully employed. The Grievant's collective bargaining agreement provides that the Grievant's leave is pro-rated. Yet, during the 90 paid leave days between January 16 and May 19, the Grievant earned vacation leave, sick leave and Wisconsin Retirement System benefits as if he was fully employed. The Grievant was not treated as if he was on Unpaid Leave.

In summary, the parties negotiated Article 37 and created the Long Term Disability benefit. The parties did not negotiate the terms of the LTD plan, therefore it was reasonable for the Grievant to rely on the terms and conditions as contained in the policy prepared by the insurance carrier. No binding past practice existed wherein the terms of Section 18 and specifically, the requirement that leave time be used before an unpaid leave would be granted, applied to the processing and administration of LTD claims. The question therefore becomes whether the County had the management right to require the Grievant to use up his sick leave and vacation leave before collecting LTD benefits.

It is well accepted that "management has the fundamental right to issue, communicate, and enforce work rules that: 1) are reasonably related to the safe, orderly and efficient operation of a company's business; and 2) do not conflict with any provision of the parties' Agreement or of law." ALLEN DAIRY PRODUCTS, 97 LA 988, 990 (Hoh, 7/91). The County has not identified an operational business reason for requiring employees to exhaust their sick leave before collecting LTD benefits. Instead, the County articulated a desire to deter employees from extending leaves of absence by creating a "moral hazard" and a desire to recoup from the payment of LTD insurance premiums. These are not reasons related to business operations.

Article 12 - Sick Leave With Pay provides, "An employee shall be eligible to use sick leave with pay for a period of absence from employment, which is due to his personal illness, bodily injury, or exposure to contagious disease." Similarly, in Article 15 - Vacations, "[v]acation time may be used in increments of one hour or more in accordance with Department policy." These provisions provide that once the employee is approved for leave, the employee has the right to choose what type paid leave time to use. This is a benefit.

Moreover, it is a benefit to choose to retain paid leave time. As Arbitrator Gerald B. Chattman eloquently stated in UNION HOSPITAL, 108 LA 966, 973 (Chattman, 7/97),

By unilaterally implementing a policy whereby the UH requires its employees to substitute accrued paid time during an FMLA leave period, the Employer has violated the collective bargaining agreement and infringed on the due process rights of all affected individuals. Since the CBA expressly entitles bargaining unit members to elect to receive paid time and does not contain language preserving the employer's right to force the use of paid time, any policy unilaterally implemented by the Employer must be found void and in violation of the CBA. UH cannot alter the rights set forth in the CBA without appropriate bargaining.

Neither Article 27 - Long Term Disability, Article 12 - Sick Leave With Pay, Article 15 - Vacation or any other article of the collective bargaining agreement granted the County the authority to force the Grievant to use his accumulated paid leave time. The County violated the terms of the collective bargaining agreement.

The County has not provided the Grievant the benefit to which it was required to provide pursuant to Article 37. The County was obligated to offer the Grievant a LTD insurance benefit. The County failed to do so. The Grievant had his 87 sick days available for use when he filed his LTD claim. He used those days. He did not need the LTD provision of the labor agreement in order to use the 87 days. He did desire to utilize the LTD insurance plan for those days, but was not allowed to do so. Instead, the County took the Grievant's LTD benefits. The County's claim that it complied with Article 37 is erroneous.

As to the remedy, the Grievant became eligible for LTD benefits effective January 16, 2009. After he had completed the elimination period, he used an additional 87 sick days and three vacation days before he started collecting LTD benefits.<sup>3</sup> The Grievant is entitled to recovery in a manner that does not cause him harm.

### AWARD

1. Yes, the County violated the terms and conditions of the collective bargaining agreement when it deducted sick leave from Deputy Brian Plach's sick leave account while he was off of work under the County's Long Term Disability Insurance plan.

---

<sup>3</sup> The Association argued at hearing and in its briefs that the County violated the labor agreement when it required the Grievant to use three vacation days before he was entitled to receive LTD benefits. The evidence supports this conclusion. Moreover, the specific language of the Direct Offset provision specifically excludes vacation leave. My authority is limited to the issue presented and in this case, the parties stipulated that I was only to address whether the County violated the terms and conditions of the collective bargaining agreement when it deducted sick leave. As such, I have not addressed the taking of three vacation days.

2. The appropriate remedy is to reinstate 58 days to the Grievant's sick leave balance.

Dated at Rhinelander, Wisconsin, this 19th day of April, 2010.

Lauri A. Millot /s/

---

Lauri A. Millot, Arbitrator