

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 CITY OF MENOMONIE :
 :
 and : Case 59
 : No. 42044
 : MA-5544
 MENOMONIE CITY EMPLOYEES :
 LOCAL 734, AFSCME, AFL-CIO :
 :
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Appearances:

Mr. James Ellingson, District Representative, AFSCME, Council 40,
 appearing on behalf of the Union.
Mr. John K. Higley, City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

The Employer and Union above are parties to a 1988 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the retirement payout grievance of Herb Larson.

The undersigned was appointed and held a hearing on September 21, 1989 in Menomonie, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, neither party filed a brief, and the record was closed on September 21, 1989.

STIPULATED ISSUES

1. Did the City violate the contract when it did not give longevity pay on the termination pay (sick leave and vacation) of the grievant?
2. If so, what remedy is appropriate?

RELEVANT CONTRACTUAL PROVISIONS

. . . .

Section 8.05 Retirement Benefit Employees shall be paid in cash for one-half (1/2) of their unused sick leave on the day of retirement from CITY service.

. . . .

Section 8.07 Termination Benefit Employees shall be paid in cash for twenty-five percent (25%) of their unused sick leave accumulation upon separation or death excluding separation for cause. Upon Social Security approved disability or death the employee or his/her estate shall be entitled to be paid in cash for one-hundred percent (100%) of their unused sick leave accumulation.

. . . .

Section 13.05 Termination Pay Any employee who is entitled to a vacation at the time of terminating his/her service with the CITY shall be paid for his/her vacation at the time of severing employment. If such employee has earned any prorata credit for his/her subsequent vacation, such vacation credit shall be paid in a proportionate ratio.

. . . .

Section 16.03 Longevity Pay Employees shall receive longevity pay as follows:

1. Employees will receive longevity pay of 1.5% of their classified rate of pay after five (5) years of employment with the City.
2. Employees will receive longevity pay of 3.0% of their classified rate of pay after ten (10) years of employment with the City.

(NOTE: The initial payments shall be effective January 1, 1988 for all employees who have completed the indicated number of years of service.)

The salary provided in Appendix A shall be increased by the above percentage effective the calendar month following completion of the indicated years of service with the City. Said amounts shall be based upon base wage only and not affected by overtime, holiday or any other pay feature.

DISCUSSION

In the 1987 round of negotiations the Union and City negotiated for the first time a longevity provision covering all employees in the unit. The language of that agreement remained the same in the succeeding one-year agreement, under which this case arose when the grievant retired from service and was paid the contractually required termination pay consisting of accrued vacation pay plus a percentage of accumulated sick leave. The City calculated the payout at the grievant's regular straight-time rate, but without including the effect of the longevity amounts.

Union President Dick Agnew testified that in proposing the new benefit of longevity pay, the Union was influenced by the existence of such a provision in the then-existing agreement between the City and its firefighters union. Agnew testified that the Union discussed the benefit in those terms internally, and proposed to the City that this be added in the same terms to the Union's contract. The applicable language from the firefighters' collective bargaining agreement reads as follows:

ARTICLE XIV

Section 7. Upon retirement, one-half of the accumulated sick leave shall be paid at the rate in effect at the time of retirement.

. . .

Section 8. Upon termination of employment all accumulated unused vacation shall be paid at the rate in effect at the time of separation.

. . .

APPENDIX A, ARTICLE I

Section 3. Longevity. The salary provided in Section 1 shall be increased by the following percentage effective the calendar month following completion of the indicated years of continuous service in the department.

- 1% after 4 years
- 2% after 6 years
- 3% after 10 years
- 4% after 14 years

Agnew conceded that the language ultimately negotiated did not resemble in its details the firefighters' language, and there is no dispute that neither party discussed at the table the meaning of the differences between the firefighters' language and the formula ultimately agreed on. City Administrator Lowell Prange testified that the City counterproposed the language formula which was ultimately accepted because it had in mind the similar language in the police contract. This language reads as follows:

Section 15.05 - Longevity: Upon completion of the indicated number of years of service, the following additional amounts shall be paid each pay period in recognition of length of service:

- After four (4) years - one (1%) percent
- After seven (7) years - two (2%) percent
- After ten (10) years - three (3%) percent
- After thirteen (13) years - four (4%) percent

Said amounts shall be based upon base wage only and not affected by overtime, holiday or any other pay feature.

Prange testified that under this language employes get longevity pay for regular straight-time work, and receive longevity pay on vacation or sick leave if that is taken in the normal course of events. Prange further testified that two officers in the police department had retired since the contract language there went into effect and neither was paid the termination pay applicable to them such as to include the effect of longevity. Both Prange and Agnew testified that when an employe works overtime the City pays longevity only for the straight-time part of the employe's earnings for those hours, and not on the additional fifty percent. Agnew testified that in addition, when an employe works on a holiday at double-time, he or she gets longevity pay only on the base, straight-time part. If, however, an employe takes the holiday off, the employe does get paid longevity for the holiday, at straight-time. Agnew also testified that no one in the Union discussed with the City the meaning of the term "pay feature" in this context, but that the Union had expected that longevity was like getting a general raise.

The Union argues that the language in Article 16.03 is unique in referring to "any other pay feature" and that the meaning of this is unclear. The Union argues that the intent of Section 16.03 would appear to be to limit longevity to a percentage of wages times 2,080 hours per year, and that Articles 8.05, 8.07 and 13.05 do not explicitly exclude longevity from the calculations involved. The Union contends that the City has the burden to show that the Union was aware of and agreed to its intended exclusions, because the normal expectation would be that longevity would apply to the payout. The Union argues that as no such agreement was reached, the City is liable and the Agreement as a whole should be interpreted as requiring that the City pay longevity on these amounts.

The City contends that while the Union may have wanted the language to be similar to the firefighters' contract, it did not succeed in negotiating that language, while it did succeed in negotiating language similar to the police union's language. The City argues that the history in the police department demonstrates what is and is not paid, and notes that nothing was clearly stated in bargaining here by either side as to what is meant by the language ultimately agreed upon. The City further contends that the last sentence of Article 16.03 favors the City, because it excludes "pay features", a term including retirement and other such benefits. The City notes that employes know they are not paid longevity on holidays-worked or on overtime differentials, and contends that these are "pay features" similar to termination pay, and that the police collective bargaining agreement has been interpreted consistently with that view. Finally, the City contends that not to call these items "pay features" would leave the last few words of Article 16.03 without meaning, because no other contractual items could apply which are not already listed in that Section. The City argues that it does not have the burden of proving this matter, but that the evidence shows that its interpretation is correct in any event.

I find the City's arguments more persuasive here. It is apparent that the Union may have overlooked the significance of the language it agreed to, but that is a common hazard in collective bargaining and there is no evidence that the City deliberately misled the Union. Instead, the Union proposed one formula, but agreed to another based on the City's counterproposal; and the undisputed history of the interpretation of that formula in the police department favors the City's position. I also note that the City's argument has merit that the words "or any other pay feature" would appear to lack any meaning if not interpreted on the City's terms, because the only other pay items excluded from longevity calculations that were named by the Union are overtime and holiday amounts, and these are explicitly named in Article 16.03.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the City did not violate the collective bargaining agreement when it refused to calculate the grievant's termination pay as including the longevity portion applicable to regular straight-time pay.
2. That the grievance is denied.

Dated at Madison, Wisconsin this 16th day of October, 1989.

By _____
Christopher Honeyman, Arbitrator