

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
LOCAL 1288, AFSCME, AFL-CIO : Case 227
and : No. 43592
MANITOWOC COUNTY : MA-6010
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Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54221-0370, appeared on behalf of the Union.
Mr. Mark Hazelbaker, Attorney at Law, Manitowoc County Corporation Counsel, 1010 S. 8th Street, Manitowoc, Wisconsin 54220, appeared on behalf of the County.

ARBITRATION AWARD

On February 5, 1990, Local 1288, AFSCME, AFL-CIO and Manitowoc County jointly requested the Wisconsin Employment Relations Commission to provide an arbitrator to hear and issue a final and binding award on a pending grievance.

On March 12, 1990, the Commission appointed William C. Houlihan, a member of its staff, to hear and decide the matter. A hearing was conducted on May 22, 1990, in Manitowoc, Wisconsin. Briefs were submitted and exchanged by August 6, 1990.

This case addresses whether or not Ms. Elda Fisher, a nursing assistant, is exempt from certain wage concessions negotiated by the parties.

BACKGROUND AND FACTS

The County and Union have been signatories to a series of collective bargaining agreements over a period of years. Relevant provisions of the current agreement are set forth below. In June, 1988, under conditions of financial distress for the Health Care Center, the parties met and agreed to modifications of the 1988 collective bargaining agreement. In essence, those modifications, whose relevant provisions are set forth below, called for certain concessions in wages, hours and working conditions and accompanied a commitment not to sell the Health Care Center

One aspect of this modified agreement was to exempt certain employes from the reductions otherwise implemented.

Negotiations leading to this agreement were quite visible, with resolution subject to mutual ratification. The local newspaper carried a front page story in its June 16, 1988 edition which contained the following passages:

MANITOWOC -- Members of Local 1288 have overwhelmingly ratified an 18-month job-security pact which includes pay cuts, a wage freeze and other concessions designed to save the financially-troubled Manitowoc Health Care Center.

. . . .

The Union voted 103-30 Wednesday night to ratify the agreement, which was hammered out in almost six hours of negotiations and fine tuning earlier that day and signed by union and county officials this morning at the Health Care Center. The personnel committee unanimously approved the agreement Wednesday, which the county board will vote on Tuesday.

. . . .

"A handful of employees" or about five persons -
- those eligible for retirement on or before Jan. 1,
1992 - will not be affected by the pay cuts, Hazelbaker
said. They were exempted because they would otherwise
have reduced pensions because "your retirement is
calculated on the past three years of your earnings.

"They're spared a penalty on their retirement
that would stick with them for the rest of their lives.
It tells them that we want to reward them for their
service to the county."

. . .

The terms of the modified agreement were implemented shortly thereafter.

Elda Fisher, the grievant, has been a nursing assistant with the County for 15 years. She was aware of the concession bargain, read the newspaper article cited above, and had her wages, benefits and hours adjusted in the summer of 1988. She was aware of the fact that she was subjected to the concessions at the time of their application.

At some point in time, Ms. Fisher determined that she would retire "early", 1/ i.e. at an eligible age but with reduced pension. Ms. Fisher, who is approximately 64 is eligible to retire under the Wisconsin Retirement System with a reduced benefit. The benefit reduction is caused by the fact that Ms. Fisher lacks 30 years creditable service.

Ms. Fisher, through her Union, filed a grievance on November 7, 1989 citing the violation of several provisions of the labor agreement and seeking "all concessions back in full pay."

ISSUE

The parties stipulated to the following:

- 1) Is the grievance timely?
- 2) Has the Employer violated Article VII, Paragraph 10 of Joint Exhibit #2.
- 3) If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

The parties 1988 collective bargaining agreement contained numerous substantive provisions. Only the relevant portion of the grievance procedure is set out:

ARTICLE 7 - GRIEVANCE PROCEDURE

A. Definition of a Grievance: Should any differences arise between the Employer and the Union as to the meaning and application of this Agreement, or as to any question relating to wages, hours, and working conditions, they shall be settled under the provisions of this Article.

B. Time Limitations: The failure of a party to appeal a grievance in a timely fashion will be treated as a settlement to that particular grievance, without prejudice. However, if it is not possible to comply with the time limitation specified in the grievance procedure because of work schedules, illness, vacations, holidays, any approved leave or time off, these time limitations may be extended by mutual agreement.

The party who fails to receive a reply in a timely fashion shall have the right to automatically proceed to the next step of the grievance procedure.

C. Steps in Procedure:

Step 1: The employee and one (1) Union steward who represents the employee in that area of work shall orally

1/ The reference to retire early is taken from the grievance (Jt. Exhibit #4).

state grievances to the immediate supervisor within a reasonable period of time but in no event later than thirty (30) working days after the Union knew or should have known of the occurrence of such grievance.

In the event of a grievance, the employee shall perform his or her immediate assigned work task, if any, and grieve the dispute later, unless his/her health or safety is endangered. The immediate supervisor shall within five (5) working days, orally inform the employee and the Union of his/her decision.

Step 2: If the grievance is not settled in Step 1, the Union shall reduce the grievance to writing and present it to the Administrator within ten (10) working days of communication of the immediate supervisor's oral response. The Administrator shall offer to discuss the grievance with the employee and one (1) Union Steward, and following such meeting, if any, shall respond in writing within ten (10) working days of receipt of the grievance.

RELEVANT PROVISIONS OF THE AMENDED AGREEMENT

The Amended Agreement (term 6/16/88 - 12/31/89) contains a number of modifications of the 1988 agreement. Those substantive modifications are found in paragraph 4. Certain employees are potentially exempt from the modifications, as set forth in paragraph 10:

. . .

10. Any direct care employee eligible for retirement on or before January 1, 1992 shall not be required to accept the reductions in employee benefits and conditions of employment prescribed by paragraph 4 of this agreement.

. . .

POSITIONS OF THE PARTIES

It is the view of the Union that the County bears the burden of demonstrating that the grievance is not timely. In its view, the grievance was filed within 30 days of when the Union became aware of the occurrence giving rise to the grievance. The newspaper clipping is a hearsay document which can hardly be viewed as formal notification to the Union that the County would breach its contract obligations. The Union should not be obligated to keep track of each individual bargaining unit member. The Union does not monitor or audit the payroll. The Union cites authority for the proposition that the timeliness trigger is what the Union, and not the individual knew.

On the merits, the Union contends that direct care employees eligible for retirement did not have to accept the concessions. Ms. Fisher is eligible for retirement prior to January 1, 1992. The language of the agreement does not limit application to an unreduced pension retirement. The labor agreement, in a variety of places, contemplates retirements which involve either full or reduced pension benefits.

In the view of the County, this is a textbook example of an untimely grievance. The grievant had 30 working days to file a grievance. She waited 16 months and six days after the concession agreement took effect to file. She waited until fifteen months after she first received a reduced paycheck as a result of the concession agreement, and ten months after she received her W-2 form showing reduced wages. The County seeks finality, and complains of stale evidence, lost opportunity to mitigate and similar concerns. The County claims it has lost the opportunity to recoup a part of the claimed backpay since the medicaid reimbursement filing period has expired.

On the merits, the County alleges that the agreement, which was publicized, was that people eligible to retire with full benefits would be exempt from concessions. This was done to insulate pensions from a lowered level of earnings during the last three years of employment. This grievant seeks access to extra earnings in order to take a reduced pension.

DISCUSSION:

I regard the timeliness issue as analytically complicated. Ms. Fisher waited a long time to file her grievance and make her claim. The County has a bona fide complaint, aggravated by the inability to seek medicaid reimbursement. This grievance raises a very fundamental question about who is intended to be covered by paragraph 10. The parties have very significant differences with respect to the scope of paragraph 10 and who is exempt from the wage/benefit concessions. These questions were first raised as the amended agreement was set to expire.

The Union has drawn a distinction between the knowledge of the individual and the knowledge of the Union. I agree that a distinction exists and I further agree that the Union is not obligated to monitor the payroll to police compliance with the contractual wage/benefit provisions. Nothing in the record suggests that the Union knew what Ms. Fisher's status was. The contractual standard is what "the Union knew or should have known." I am not sure what the Union should have known. This was a concession agreement with a relatively narrow exception set forth in paragraph 10. When the wage/benefit cuts were applied it seems reasonable to assume that individual employes were put on painfully obvious notice that they were subject to or exempt from the adjustments. However, to impute that knowledge to the Union without some indication of actual communication would read something into the agreement.

The Union calls for a very literal reading of the contract, which draws a technical distinction between the Union and the individual. The Union insists that information open and obviously available to the individual never be imputed to the Union. Assuming, for purposes of this award, that very technical construction is to be applied, the timeliness issue is still not resolved.

Paragraph 10 is written in a somewhat unusual fashion. It provides a potential, but not blanket, exemption from the wage concessions. Certain employes "are not required to accept the reductions . . ." This paragraph, on its face, appears to permit individual distinctions. Certain individuals are potentially exempt from the fate of the balance of the group. The paragraph is written in the singular: "any direct care employee." Read literally, the paragraph provides certain direct care employes with the ability not to accept the reductions. By implication, even those employes covered by paragraph 10 would be free to accept the reductions.

Construed in this fashion the question is raised; Did the grievant timely raise her claimed individual right under Paragraph 10, not to accept the reductions. Whether the contractual 30 working days standard or a rule of reason is used, I believe the answer is no. Whatever her rights, Ms. Fisher sat on them far too long. The County has been adversely impacted. She asks a fundamental question about the amended agreement. If that question was to be asked it should have been asked at the time the agreement was executed.

AWARD

The grievance is denied as untimely.

Dated at Madison, Wisconsin this 7th day of November, 1990.

By _____
William C. Houlihan, Arbitrator