

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SOUTH MILWAUKEE CITY EMPLOYEES,
LOCAL NO. 883, AFSCME, AFL-CIO,
MILWAUKEE DISTRICT COUNCIL 48

and

THE CITY OF SOUTH MILWAUKEE

Case 67
No. 44238
MA-6219

Appearances:

Podell, Ugent and Cross, S.C., Attorneys at Law, Suite 200, 611 North Broadway Street, Milwaukee, Wisconsin 53202-5004, by Ms. Monica M. Murphy, appearing on behalf of Local 883, AFSCME, AFL-CIO, District Council 48.

Murphy & Brennan, Attorneys at Law, 1334 Milwaukee Avenue, P.O. Box 308, South Milwaukee, Wisconsin 53712, by Mr. Joseph G. Murphy, City Attorney, appearing on behalf of the City of South Milwaukee.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties for the years 1987 to 1990, South Milwaukee City Employees, Local 883, AFSCME, AFL-CIO, Milwaukee District Council 48 (hereinafter referred to as the Union) and the City of South Milwaukee (hereinafter referred to as the City) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as the arbitrator of a dispute over contributions to the Wisconsin Retirement System for public safety officers and building services helpers in the employ of the City. Daniel Nielsen was so designated. A hearing was held on September 25, 1990 at the City Hall in South Milwaukee at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. The parties submitted post-hearing briefs which were received by the undersigned on October 23, 1990 whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties and the record as a whole the undersigned makes the following award.

ISSUE

The parties stipulated that the following issue was to be determined herein;

Did the City of South Milwaukee violate the collective bargaining agreement, specifically Article XV, when it failed to pay employee contributions for the Wisconsin Retirement System for public safety officers and building service helpers? If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE XV
Pensions

Section 1 - Coverage

Employees shall be covered under the State of Wisconsin Retirement Fund, in accordance with Section 66.90 of the Wisconsin Statutes.

Section 2 - Contributions

The Municipality shall pay the employee's 6% contribution to the fund in addition to its own contribution thereto. Payments made by the Municipality under the provisions of this Section which formerly were employee contributions shall not be considered as the Municipality's contribution subject to the provision set forth in Chapter 40 Wisconsin Statutes.

FACTUAL BACKGROUND

The facts are not in dispute. The City is a municipal corporation providing general governmental services to the citizens of South Milwaukee in Southeastern Wisconsin. The Union is the exclusive bargaining representative for certain of the City's employees, including those in the classification of Public Safety Officer and Building Service Helper. Prior to January 1, 1990 no employee in those two classifications had ever become eligible for benefits under the Wisconsin Retirement System. The law in effect at that time required that employees work at least 600 hours in each of the three consecutive preceding years to qualify for benefits under WRS. The City scheduled its public safety officers and building service helpers in such a fashion as to prevent them from qualifying for WRS benefits. Under the terms of 1989 Wisconsin Act 13, Section 40.22 (2m) (b) was amended to allow for eligibility for all persons who worked at least 600 hours in the preceding 12 month period. The effective date of this change was May 16, 1989. The effect of this was to make the City's Public Safety Officers and Building Service Helpers eligible for WRS coverage.

Article XV of the collective bargaining agreement establishes the right of employees to contributions to the Wisconsin Retirement System (WRS):

ARTICLE XV Pensions

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Article VI Sections 15 and 16 set forth the provisions of the collective bargaining agreement which are not applicable to building service helpers and public safety officers. Article XV is not among the Articles listed as exclusions in Article VI.

Since at least January 1, 1990 the City has paid the Employer's share of contributions for WRS coverage for building service helpers and public safety officers. It has not, however, paid any portion of the employees' contribution, instead deducting this amount from employee's paychecks. The Union filed the instant grievance, contending that the City violated the collective

bargaining agreement by refusing to pay the employees' share of the WRS contribution. The City denied the grievance, contending that the change in the law took place during the term of the collective bargaining agreement and thus any increase in benefits was not the result of voluntary negotiation between the Union and the City. The matter was not resolved in the lower levels of the grievance procedure, and was referred to arbitration.

Additional facts, as necessary, will be set forth below.

THE POSITIONS OF THE PARTIES

The Position of the Union

The Union takes the position that the clear and unambiguous language of the collective bargaining agreement requires the City to pay the 6% employee contribution to the Wisconsin Retirement System. In negotiating the accretion of these employees to the bargaining unit in 1986, the parties agreed that the collective bargaining agreement would be applicable in every respect except as specifically excluded by Article VI. The payment of WRS contributions was not among the benefits denied these employees by the contract. It therefore follows that the parties intended Public Safety Officers and Building Service Helpers to receive WRS contributions, assuming they were otherwise eligible.

While the City contends that it never contemplated the possibility of these employees becoming eligible for WRS contributions, the Union notes that Article VIII, Section 7 provides for a wage-reopener for Public Safety Officers should they be required to work full-time. Full-time work for Public Safety Officers would automatically have entitled them to WRS contributions. Thus, the parties expressly contemplated the possibility of those employees becoming eligible for Wisconsin Retirement System benefits. Furthermore, since the reopener is limited to wages it must have been the intention of the parties to apply the existing pension language to these employees once they became eligible.

The Union argues that numerous provisions of the collective bargaining agreement either exclude or limit benefits for part-time employees, including the maintenance of a separate seniority list, different probationary periods, and different vacation, holiday, health care, and life insurance benefits. Plainly, the City and the Union were capable of drafting specific exclusions and modifications for part-time employees where that was their intent. The fact that no such limitations or exclusions are apparent in the Wisconsin Retirement System benefits is strong evidence that the parties intended these provisions to apply to the Public Safety Officers and Building Service Helpers should they become otherwise qualified.

For all of the foregoing reasons, the Union asks that the grievance be granted and that the Building Service Helpers and Public Safety Officers eligible for WRS coverage have their contributions paid by the Employer and be reimbursed for contributions deducted in the past.

The Position of the City

The City takes the position that Wisconsin Retirement System coverage for Building Service Helpers and Public Safety Officers was never contemplated in the negotiation of the collective bargaining agreement. The contract limits the hours of these employees to a maximum of 11 1/2 per week, or 598 per year. This figure was intended to eliminate the possibility of WRS coverage for these employees. The dramatic change in circumstances occasioned by the amendment of Section 40.22 of the Wisconsin Statutes should not be read as an amendment to the collective bargaining agreement nor allowed to override clear intent of the parties in negotiation that agreement. There is no dispute that, at the time of the negotiation of this agreement, the existing law precluded participation by these employees in WRS. Any change in the City's obligations under the contract should come as the result of negotiation, rather than legislative happenstance.

Inasmuch as the legislative change would produce a result directly contrary to the intent of

the parties in negotiating the contract, the City asks that the grievance be denied.

DISCUSSION

The fundamental duty of the grievance arbitrator is to discern and enforce the intent of the parties to a collective bargaining agreement. The first point of reference in this effort is an examination of the language that the parties themselves have used to express their mutual intent. The familiar rule is that clear language is to be applied, while ambiguous language is to be interpreted.

Article XV, Section 1, defines eligibility for contractual pension benefits by making reference to the Wisconsin Statutes: "Employees shall be covered under the State Retirement Fund, in accordance with Section 66.90 of the Wisconsin Statute." Section 2 of Article XV requires, in pertinent part: "The Municipality shall be pay the employes the 6% contribution to the fund in addition to its own contribution thereto." There is no question but that the employes in issue in this case are covered by the State of Wisconsin Retirement System, thus meeting the requirements of Section 1. Section 2 makes no distinction between full-time and part-time employes with respect to the municipality's obligation to pay the 6% contribution to the fund. This contract language is not capable of sustaining any interpretation which excludes the Public Safety Officers or the Building Service Helpers. Thus, the clear and unambiguous language of the contract requires that the grievance be granted.

Notwithstanding the clear language of Article XV, the City contends that the Retirement Contribution for these employes should not required because the parties had no reason to expect them to qualify for WRS participation during the term of this contract. Granting that the parties did not expressly consider the possibility of a statutory change when they negotiated Article XV, the use of the statutory reference for defining benefit eligibility carries with it the risk of an amendment to the statute, just as referring to "full" payment of insurance coverage incorporates the risk of unknown premium increases, or tying mileage reimbursement to the allowable IRS rate leaves open the possibility of unplanned increases during the agreement. By negotiating a clause which on its face requires a 6% contribution for all eligible employes, and relying on an authority external to the contract to define eligibility, the City and the Union incurred an inherent risk of amendment during the term of the agreement. Had the City wished to exclude these workers from WRS contributions, it could have negotiated language exempting them from Article XV, Section 2's coverage, just as it did with numerous other provisions of the contract.

The clear language of the contract requires the City to pay the employes' contribution, up to 6%, for employes eligible under WRS. The Public Safety Officers and Building Service Helpers are eligible employes under the statute and thus, under the contract. While the change in eligibility criteria was not expressly considered by the negotiators, the possibility of a statutory amendment is always present, and the use of a statutory reference in the contract must be read as accepting this eventuality. In the absence of any clear language excluding these employes from coverage under Article XV, Section 2, the undersigned concludes that the City violated the collective bargaining agreement when it failed and refused to pay the 6% employe contribution to the Wisconsin Retirement System. On the basis of the foregoing, and the record as a whole, the undersigned makes the following:

AWARD

The City of South Milwaukee violated the collective bargaining agreement, specifically Article XV, when it failed to pay the employe's contribution for Wisconsin Retirement System benefits for Public Safety Officers and Building Service Helpers.

The appropriate remedy under the contract is an Order requiring the City to (1) cease and desist from refusing to pay the employe' contribution for Wisconsin Retirement System benefits for public safety officers and building service helpers, and (2) make whole all affected employes by paying to them amounts deducted from their paychecks for the employe' contribution for Wisconsin Retirement System benefits.

The undersigned will retain jurisdiction over the instant grievance for the period of 30 days from the date of this Award solely for the purpose of clarifying the remedy.

Signed and Dated this 7th day of December, 1990 at Madison, Wisconsin.

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator