

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 INTERNATIONAL ASSOCIATION OF :
 FIREFIGHTERS, LOCAL 875 :
 :
 and : Case 53
 : No. 42668
 : MA-5769
 CITY OF ASHLAND :
 (FIRE DEPARTMENT) :
 :

Appearances:

Lawton & Cates, S.C., by Mr. Richard V. Graylow, 214 West Mifflin Street,
 Madison, Wisconsin 53703-2594, appearing on behalf of the Union.
Mr. Scott W. Clark, City Attorney, City of Ashland, 214 Second Street
 West,
 Ashland, Wisconsin 54806, appearing on behalf of the City.

ARBITRATION AWARD

International Association of Firefighters, Local 875, hereinafter referred to as the Union, and the City of Ashland are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances over any difference of opinion, misunderstanding, complaint or grievance which may arise between the parties. Pursuant to a request for arbitration the undersigned was assigned to arbitrate a dispute over the separation benefits of an employee. Hearing on the matter was held in Ashland, Wisconsin on October 17, 1990. Post-hearing arguments and reply briefs were received by the undersigned by December 14, 1991. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties agreed upon the following issue:

Did the City violate Section 13.07 or 18.02(A) of the collective bargaining agreement and if so what remedy, if any, is appropriate.

PERTINENT CONTRACTUAL PROVISIONS

. . .

ARTICLE XIII - SICK LEAVE

. . .

13.07 Terminal leave pay shall be paid upon retirement or forced retirement due to disability to the employee or his estate at the rate of one-half (1/2) of his accumulated sick leave but not to exceed thirty-seven and one-half (37 1/2) days at the employee's present rate of pay.

. . .

ARTICLE XVIII - BENEFITS

18.01 Health Insurance: The employer shall pay 90% of the family and single HMP and Dental Insurance Plan.

18.02(A) For employees hired prior to January 1, 1986:
 Upon retirement or forced retirement to the employee, the employer shall pay the full cost for the employee's individual health insurance policy until covered by Medicare.

18.02(B) For employees hired on or after January 1, 1986: Only upon forced retirement due to disability to the employee, the employer shall pay the full cost for the employee's individual health insurance policy until covered by Medicare.

An employee retiring for reasons other than disability may continue to carry group health insurance coverage after retirement at the employee's own expense and subject to the approval of the City's group health insurer.

18.02(C) Neither 18.02(A) nor 18.02(B) shall be subject to negotiations unless both parties agree in writing to permit such negotiations.

18.03 Pension Fund Contribution: The employer shall pay 8% of the employee's Wisconsin Retirement Fund Contribution beginning January 1, 1983.

. . .

BACKGROUND

Amongst its various governmental functions the City operates a Fire Department. The City has employed James Thompson, hereinafter referred to as the grievant, as a firefighter since May 23, 1967. During June, 1989, the grievant submitted the following letter to the City's Fire Chief, Gerald Giese.

Chief Gerald Giese
Ashland Fire Department
300 Stuntz Avenue
Ashland, WI

Dear Jerry,

This letter is to inform you that I will be retiring from the Ashland Fire Department effective Wednesday, June 14, 1989. I regret the short notice on my retirement but conditions did not allow an earlier notification.

I have enjoyed my 22 years on the department, however, things change and now with new opportunities it is time move on.

We can work out the amounts due me on unused sick leave, vacation, clothing allowance, and holiday pay as well as details on my health insurance this week. If you have any questions regarding these items please feel free to contact myself or the Union President.

Once again it has been a pleasure working with, and for you, as well as the City of Ashland for these past 22 years. It has been all good times but it has been a time I will always remember.

Sincerely,

James R. Thompson /s/
Ashland Fire Dept. (Ret.)

On June 16, 1989, the grievant received the following letter from City Clerk, Jane S. Smith.

Mr. Jim Thompson
c/o M/V Corinthian
P.O. Box 790
Veldez, AK 99686

Dear Jim:

Enclosed you will find your regular bi-weekly payroll check. Please be advised that your accrued vacation, for vacation earned in both 1988 and 1989, will carry you through a full bi-weekly payroll check on July 14, 1989, at which time all vacation will be exhausted. Consequently, your health and dental insurance coverage paid by the city will continue through August 31, 1989.

Also enclosed is a check for 4 days holiday pay (4 days x 12 hours x \$10.29 (time and one half rate) = \$493.92) and longevity pay (7 months @ \$68.51 = \$479.57) for a total of \$973.49. Your prorated uniform allowance is \$150.00 for which a separate check is also enclosed.

As we discussed, you do not meet eligibility requirements, as established by the State of Wisconsin, to "retire" and we must treat your departure as any other resignation. Therefore, you are not entitled to any sick leave payout and are not entitled to continued paid health insurance premiums as provided in your Union Contract.

The monthly premium for family HMP coverage is \$254.71

and the premium for family dental coverage is \$27.93. If you wish to continue coverage through the city's group for either of these policies, you must send a check (made payable to WPS) to the City Treasurer's Office no later than the 10th of each month for the following month's coverage. For example, you must send a check by August 10, 1989 to have insurance coverage for September. You may choose to have either health insurance or dental insurance or both.

You may wish to contact Carol Staples, WPS representative, at (715) 845-8231 regarding other options for health/dental insurance coverage.

Sincerely,

Jane S. Smith
City Clerk/Personnel Director

On June 23, 1989, Union President Richard Williams sent the following letter to Chief Giese:

TO: Chief Gerald Giese
FROM: Richard Williams
SUBJECT: Thompson Grievance

On 12 June, 1989 Mr. Jim Thompson presented to you a letter stating that as of 14 June, 1989 he would be retiring from the Ashland Fire Department following 22 years of service. On 16 June 1989 Mr. Thompson received a letter from the City Clerk stating that in the Cities (sic) opinion he was not entitled to his retirement benefits. The oral grievance was filed on 20 June, 1989, and denied that day.

According to Article XIII subsection .07, Mr. Thompson at the time of his retirement is entitled to one-half (1/2) of his accumulated sick leave paid out at his current rate of pay and by Article XVIII subsection .02(a) Mr. Thompson is entitled to the individual health insurance policy until covered by medicare.

We find the Cities (sic) "eligibility requirements" questionable at best and are therefore compelled to use the dictionary definition of retirement. "A withdrawal from active engagement in one's occupation or profession". We also find the Cities (sic) treatment of a veteran firefighter saddening following 22 years of dedicated service.

We are therefore filing this written grievance to claim the aforementioned benefits for Mr. Thompson.

Respectfully,

Richard F. Williams
President, IAFF Local

875

On June 27, 1989, Chief Giese sent the following letter to Union President Williams:

TO: Richard Williams, President, IAFF Local
875
FROM: Gerald Giese, Fire Chief, Ashland Fire
Department
DATE: June 27, 1989
SUBJECT: Thompson Grievance

This letter is in response to your letter of June 23, 1989, filing a written grievance claiming retirement benefits for James Thompson, who has resigned from the Ashland Fire Department to take another job. Mr. Thompson does not meet the eligibility requirements, as established by the State of Wisconsin, to "retire" either by age alone or by a combination of age and years of service added together to reach the required total of 78.

Article 13.07 of the 1988-89 IAFF Local 875 contract stipulates:

"13.07 Termination leave pay shall be paid upon

retirement or forced retirement due to disability"

Article 18.02 (A) states:

"18.02 (A) For employees hired prior to January 1, 1986: upon retirement or forced retirement to the employee, the employer shall pay the full cost for the employee's individual health insurance policy until covered by medicare."

Mr. Thompson did not "retire" because he did not meet eligibility requirements to retire nor was he forced to retire because of a disability. He merely quit to take another job. Therefore, it is my decision that he is not eligible to receive the sick leave payout as prescribed by Article 13.07 nor the health insurance premium payment as required by Article 18.02 (A).

The intent of the contract language, past practice, and common sense are all contrary to your position. The grievance is denied.

On July 3, 1989 Williams sent the following letter to the City's Labor and Personnel Committee:

TO: Labor & Personnel Committee
FROM: Richard F. Williams, President, IAFF Local 875
DATE: July 3, 1989
SUBJECT: Thompson Grievance

On Tuesday, June 12, 1989 Mr. James Thompson tendered a letter to Chief Gerald Giese stating that he was retiring effective June 14, 1989 and that he would assist in calculating the benefits due him under the contract specifically in question the benefits due under articles 13.07 and 18.02.

On June 16, 1989 City Clerk Jane Smith sent a letter to Mr. Thompson stating that he did not meet the states (sic) requirements to draw a pension and was therefore not entitled the aforementioned benefits.

On Tuesday, June 20, 1989 an oral grievance was presented to Chief Giese and denied on the ground of the City Clerks (sic) letter.

On Friday, June 23, 1989 a written grievance was filed with Chief Giese, this to was denied by letter dated June 27, 1989.

This letter is to inform you that were (sic) are proceeding to the 3rd step in our grievance procedure and are requesting an informal hearing with your committee as specified in the working agreement between the City of Ashland and Firefighters Local 875 Article 11.03, Step 3:.

The Articles we feel have been violated are as follows:

Article 3 Subsection .01
Article 13 Subsection .07
Article 18 Subsection .02(a)

The City Clerk and Fire Chief's position is this matter appears to be that Mr. Thompson did not retire because he is not eligible to draw his pension. We disagree and say there is a difference between drawing a pension and Retiring. And we further contend that a Firefighter with over 22 years of service to this City should not have do battle with the City to receive benefits due by the Contract when he wishes to Retire from the most dangerous occupation in the Country.

If any member of the committee has any questions on the grievance and wishes to discuss it with me please feel free to contact me at any time. I can be reached at 682-9673.

Enclosed you will find copies of all correspondence to this date.

Thank you,

Richard F. Williams
President, IAFF Local 875

Thereafter the Union processed the matter to arbitration.

At the time the grievant separated from his service with the City's Fire Department he was not eligible for benefits under the Wisconsin Retirement System. Upon leaving the Fire Department he commenced employment with the Exxon Corporation as a head chief on a marine vessel anchored in Prince William Sound, Alaska. Sometime thereafter the grievant returned to Ashland, unemployed. The grievant sought, and received, unemployment compensation for which the City paid from October 1989 through March 1990.

The instant matter is the first time a long term employes has left the City's service and claimed retirement status without being eligible for a Wisconsin Retirement Fund pension.

UNION'S POSITION

The Union contends the grievant retired from his position with the City and that the City's failure to provide the grievant with his retirement benefits violates the parties' agreement. The Union argues the agreement should not be construed narrowly or technically. Further, that the intent of the parties should be construed from the agreement itself and forfeitures such as retirement or insurance benefits should be avoided if by reasonable interpretation it can be avoided. In support of its position the Union points to the following:

To withdraw from active service as an officer of the army or navy; to separate, withdraw, or remove. State v. Love, 95 Neb. 573, 145 N.W. 1010, 1013, Ann.Cas. 1915D, 1078. (Black's Law Dictionary 1479 (4th ed. 1957)).

1. to withdraw, or go away or apart, to a place of abode, shelter, or seclusion. 2. to go to bed. 3. to withdraw from office, business, or active life: to retire at the age of sixty. 4. to fall back or retreat, as from battle or danger. 5. to withdraw, go away, or remove oneself. (American College Dictionary 1036 (4th ed. 1961)).

The Union concludes the City has taken the position that a firefighter, in order to "retire", must have a minimum number of years of service, must have attained a certain age, and must be receiving benefits from the Wisconsin Retirement Fund. The Union argues the plain language of the agreement dispels such a contention. The Union points out the City, in 1980, sought to condition payment of benefits by proposing language to limit insurance coverage to only employes between the ages of 55 and 62 years. The Union asserts the City's attempt was rejected and the language has remained unchanged. The Union argues Chief Giese's testimony demonstrated there are no specific age restrictions contained in the agreement, there are no references to Wisconsin Retirement Fund eligibility in the agreement, and that the instant matter is one of first impression. The Union would have the undersigned sustain the grievance and direct appropriate remedial orders.

CITY'S POSITION

The City contends the grievant did not qualify for retirement sick leave payout and insurance benefits when he quit on June 14, 1989. The City points out that there has never been any employe who terminated service prior to age 55, except disability retirees, who have received these benefits. Further, that four (4) other employes have terminated service with the City to accept employment elsewhere and none of these employes were entitled to receive benefits under Articles 13.07 or 18.02A. The City asserts in the last thirteen (13) years regular retirees included three (3) employes who voluntarily terminated their employment and each immediately qualified for retirement benefits from the Wisconsin Retirement Fund. The City also points to Chief Giese's testimony that there is no policy of retirement after twenty (20) years of service with the City.

The City does acknowledge that the collective bargaining agreement is silent on the definition of the term "retirement". However, the City argues the parties' past practice precludes the grievant's claim. The City, in support of its position, also points to the following definition:

retirement a voluntary or forced severance of employment because of age, disability, or illness. Generally the individual withdraws permanently from gainful work and lives on a retirement allowance or a pension.

Robert's Dictionary of Industrial Relations, Third

The City also argues the grievant's retirement claim is further rebutted by his collecting unemployment compensation on the City's account for six (6) months. The City contends the grievant cannot claim he "retired" while at the same time he collected unemployment compensation.

The City also asserts the Union's position would result in an absurd result. The City points out that the retirement benefits outlined in Articles 13.07 and 18.02A are very expensive. To allow anyone to establish their entitlement to the retirement benefits by calling their quitting to take another job a "retirement" would result in expanding the City's liabilities far beyond that contemplated by the parties. The City concludes that adoption of the Union's position would allow a firefighter who completed his six (6) month probationary period to quit, claim it was a retirement, and thus obligate the City to pay health insurance premiums for thirty (30) years or more. Such a result, the City claims, would be ludicrous.

The City would have the grievance denied.

UNION'S REPLY BRIEF

The Union claims the City's contention that the City's position is supported by past practice is not dispositive. The Union argues that for a practice to be effective it must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time. The Union points out Chief Giese acknowledged in his testimony the instant matter was one of first impression and only one retirement has taken place since the language was agreed to by the parties. The Union asserts one instance does not a practice make.

The Union also reasserts the City is attempting to gain in arbitration what it was unable to gain at the bargaining table, restrictions and conditions for payment of benefits. The Union concludes the language is clear and unambiguous. Retire means retire. Such a construction is well supported by the parties' bargaining history.

CITY'S REPLY BRIEF

The City contends the Union takes the unrealistic position the agreement should be construed without considering the past practice of the parties. The City asserts a firefighter in order "to retire" must have a minimum number of years on the force, must have obtained a certain age, and must be receiving benefits from the Wisconsin Retirement Fund. The City argues these elements are part of the established past practice in the Fire Department.

The City also argues the Union's dictionary definition of "retire" would allow a firefighter to argue he "retired" any time he would "go to bed". The City also points the American College Dictionary cited by the Union also defines retire as . . . "to withdraw from office, business or active life: to retire at age of 60". The City concludes the grievant at age 50 quit his employment. He did not withdraw from business or active life when he quit but merely changed the pursuit in his business or active life to something other than firefighting.

DISCUSSION

The facts herein are not in dispute. The grievant submitted a letter to the City in June, 1989 claiming he was retiring effective June 14, 1989. Thereafter the City denied the grievant retirement benefits identified in Articles 13.07 and 18.02(A). The Grievant did take employment elsewhere. Thereafter, the grievant also filed for and received unemployment compensation benefits.

The record demonstrates that the instant matter is the first time an employe has severed the employer-employe relationship, claimed he has retired, and has not applied for benefits from the Wisconsin Retirement Fund. Both parties have supplied the undersigned with dictionary definitions of the term "retirement" and argued the definitions support their position. Both parties have argued that absurd results occur if the opposing party's position is adopted by the undersigned. The undersigned does note however that the burden herein is on the Union. While the grievant did withdraw from active service with the City, he thereafter provided active service to another employer. While the grievant did separate from the City his separation is not different from the other employes who separated employment to work elsewhere and did not claim retirement benefits other than the grievant had been employed by the City for a longer period of time. The undersigned can only conclude that the grievant did not retire as contemplated by the parties when they agreed to Articles 13.07 and 18.02(A) because the grievant separated to take employment elsewhere.

The undersigned has reached this conclusion because Articles 13.07 and 18.02(A) cannot be construed without consideration of Article 18.03. All three provisions identify "retirement" benefits. Article 18.03 specifically mandates

the City to pay funds on behalf of an employe for an employe's pension into the Wisconsin Retirement Fund. The undersigned finds it inconsistent to conclude that an employe's separation of employment can be called a retirement unless the employe is eligible to receive all three "retirement" benefits. Both parties are aware that an employe must meet specific requirements in order to be eligible to receive their pension. While the parties have not placed the specific requirements into the agreement, the requirements still must be met in order for the employe to receive the "retirement" pension. The undersigned concludes that the parties, by identification in Article 18.03 of the Wisconsin Retirement Fund, have therefore determined the distinctions between a separation to take employment elsewhere and a retirement. Therefore, as the grievant was not eligible to receive a pension from the Wisconsin Retirement Fund the undersigned concludes the grievant was not eligible for the "retirement" benefits of Articles 13.07 and 18.03(A).

Based upon the above and foregoing and arguments, evidence and testimony presented by the parties, the undersigned concludes the City did not violate Articles 13.07 or 18.03(A) when it failed to provide the grievant with retirement benefits. The grievance is therefore denied.

AWARD

The City did not violate Section 13.07 or 18.02(A).

Dated at Madison, Wisconsin this 8th day of April, 1991.

By _____
Edmond J. Bielarczyk, Jr., Arbitrator