BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
MILWAUKEE COUNTY FIRE FIGHTERS' ASSOCIATION	:	Case 305 No. 45693 MA-6706
and	:	
MILWAUKEE COUNTY (FIRE DEPARTMENT)	:	

Appearances:
Mr. Robert Heindl, Representative, Milwaukee County Fire Fighters' Association, appearing on behalf of the Union.
Mr. Timothy Schoewe, Corporation Counsel, Milwaukee County, appearing on behalf of the County.

ARBITRATION AWARD

The Milwaukee County Fire Fighters' Association, herein the Association, requested the Wisconsin Employment Relations Commission to designate a member of its staff as Arbitrator in the captioned matter. The County concurred in the Union's request and a hearing was held on August 1, 1991 before the undersigned. The hearing was not transcribed and post-hearing briefs were filed by September 16, 1991.

ISSUE:

At hearing, the parties were not able to agree upon a statement of the issue to be resolved by the undersigned. Thus, the undersigned states the issue to be:

> Did the County violate Section 2.02 Educational Bonus of the 1990-91 Memorandum of Agreement when it advised the grievant, Benson, he would not be given credit for his County employment from April 27, 1978 until his resignation on September 25, 1980, in determining his eligibility for the Education Bonus? If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE:

PART 2

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2.02 EDUCATIONAL BONUS

(1) The County will make the following annual payments for the completion of course work described in paragraphs (4)(a) and (4)(b) herein for all fire fighters in the bargaining unit:

$125.00 per year for 16 credits

$175.00 per year for 28 credits

$225.00 per year for 40 credits

$275.00 per year for 52 credits

$325.00 per year for 64 credits

$500.00 for associate degree or 75 credits

These payments shall be made on an annual basis as soon as possible after December 31 of the current year. No payments will be made to fire fighters for any year in which they do not remain in the employ of Milwaukee County for the full calendar year.

Fire fighters who attain the required educational credits during the calendar year shall be paid a prorated amount from the first pay period after the educational courses are completed and reported to the County to December 31 of that year.

The above stated salary payments shall be over and above the base salary of the positions eligible for these payments.

(2) No employe will be eligible for these salary payments unless he has a minimum of 5 years' service with Milwaukee County as a fire fighter.

(3) These payments shall not be used in the calculation of overtime premium pay or in the calculation of pension benefits.

(4) Courses approved for which payment will be made under this provision will be as follows:

(a) The course of study leading to an associate degree in Fire Technology/Science at Milwaukee Area Technical College shall be acceptable.

(b) Individual courses taken at other colleges and universities that are acceptable for transfer by the Milwaukee Area Technical College to meet requirements for an associate degree in Fire Technology/Science shall be acceptable.

2.08 VACATION

(1) Employes shall receive annual leave with pay to serve as vacation in accordance with the following schedule based upon years of continuous service, as defined in S.17.17, C.G.O.:

After 1 year - 5 days

After 5 years - 7 days

After 10 years - 10 days

After 20 years - 12 days

For purposes of this section, a vacation day shall mean one 24-hour shift.

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2.12 LONGEVITY

(1) (a) Employes with 6 years of service with Milwaukee County shall receive $150 in the pay period following their anniversary date.

(b) Employes with 10 years of service with Milwaukee County shall receive $245 in the pay period following their anniversary date.

(c) Employes with 15 years of service with Milwaukee County shall receive $305 in the pay period following their anniversary date.

(d) Employes with 20 years of service with Milwaukee County shall receive $365 in the pay period following their anniversary date.

2.15 RETIREMENT BENEFITS

(1) For members whose continuous membership began on or after January 1, 1982, the provisions of Chapter 201.24, C.G.O., Employe Retirement System, shall be modified as follows:

. . .

PART 4

4.01 GRIEVANCE PROCEDURE

(1) APPLICATION: EXCEPTIONS A grievance shall mean any controversy which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or dispute by an employe or group of employes concerning the application of wage schedules or provisions relating to hours of work and working conditions. The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits and position classifications established by ordinances and rules which are matters processed under other existing procedures.

. . .

(8) No grievance shall be initiated after the expiration of 90 calendar days from the date of the grievable event, or the date on which the employe becomes aware, or should have become aware, that a grievable event occurred, whichever is later. This clause shall not limit retroactive payment of economic benefits for which it has been determined the County is liable nor would it prohibit a prospective adjustment of an ongoing situation.

4.02 SELECTION OF ARBITRATOR

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(3) INTERPRETATION OF MEMORANDUM OF AGREEMENT Any disputes arising between the parties out of the interpretation of the provisions of the Memorandum of Agreement shall be discussed by the Association with the Department of Labor Relations. If such dispute cannot be resolved between the parties in this manner, either party shall have the right to refer the dispute to arbitration in the manner prescribed in paragraph (2)(a), except as hereinafter provided. The parties may stipulate to the issues submitted to the Arbitrator and shall present to such Arbitrator, either orally or in writing, their respective positions with respect to the issues in dispute. The Arbitrator shall be limited in his deliberations and decision to the issues so defined. The decision of the Arbitrator shall be filed with the Department of Labor Relations.

(4) ARBITRATOR'S AUTHORITY

(a) The Arbitrator in all proceedings outlined above shall neither add to, detract from nor modify the language of any civil service rule or resolution or ordinance of the Milwaukee County Board of Supervisors, nor revise any language of this Memorandum of Agreement. The Arbitrator shall confine himself to the precise issue submitted.

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DISCUSSION:

The grievant, Benson, was employed by the County on April 27, 1978, as a Firefighter/Equipment Operator. On January 7, 1979, the grievant was promoted to Fireshift Commander and held that position until his resignation effective September 25, 1980. On October 3, 1988, he was rehired by Milwaukee County as a Firefighter/Equipment Operator. Then, on November 25, 1990, he was promoted to the rank of Firefighter and Equipment Operator in charge.

In the fall of 1990, Benson began pursuing with County officials the application process for receiving the educational bonus. At that time, he was directed to the County Human Resources Department and spoke with a Mr. Schmitt. Schmitt advised him that at that time he was not eligible for the bonus. Benson concurred, but said that he wanted to get an early start on the paperwork. Thereafter, Benson completed the paperwork and returned it to Schmitt. In December, Schmitt advised Benson that there was a problem with crediting him for his first period of firefighter service with the County. In February of 1991, Schmitt advised Benson that his application for the Educational Bonus was being denied because the County would not give him credit for his prior employment from 1978 to 1980 when he resigned. On March 8, 1991, Benson filed the instant grievance.

The Union believes that the grievance should be upheld because the contract is clear and explicit and Benson should be treated fairly and equitably. At hearing, the County agreed that Benson met the educational qualifications for receiving the bonus. In looking at the County's service history card, Joint Exhibit #6, it shows that he had been with the Milwaukee County Fire Department for over five years and thus met the service requirement of Article 2.02 of the Memorandum of Agreement. The Union notes, contrary to the County's position, that Article 2.02 does not call for "continuous" years of service, however, there are two articles in the contract, "Vacation", Section 2.08 and "Retirement", Section 2.15, that do call for "continuous" years of service. Because Article 2.12, "Longevity" and Article 2.02, "Educational Bonus" do not use the word "continuous", such a requirement should not be read into the Educational Bonus clause as the County has done.

In response to the County's contention that Benson's prior service as Fireshift Commander should not be applied toward his Educational Bonus eligibility because that position was not included within the bargaining unit, the Union responds that both the Airport Fire Chief and Assistant Airport Fire Chief, who are not unit employes, are eligible for the Educational Bonus. Therefore, it is irrelevant that a portion of Benson's prior service with the County was spent in a nonbargaining unit position and that time should be counted toward his service time for purposes of determining eligibility for the Educational Bonus.

Also, the Union points to an earlier grievance in the Sheriff's Department wherein a dispute arose as to whether previous service was to be counted in calculating the Educational Bonus which is identical to that in the Fire Department. Reider, Vice-President of the Deputy Sheriff's Association, testified that the Deputy Sheriff's Association and the County settled a grievance wherein a deputy was given credit for his first period of service, prior to a break in service, toward his Educational Bonus, as Benson claims he is entitled to receive in this case. The Union also points to the statement of the Deputy Airport Director, Kerr, in his response to Benson's grievance that fire fighters should be treated equally when compared with the Deputy Sheriffs. The Union believes that in comparing these two cases the outcome should be the same, and that Benson should, like the Deputy Sheriff, receive credit for his previous years of service with the County.

The County, on the other hand, believes that for an employe to be eligible for the Educational Bonus the service with the County must be continuous in order to be counted. In this case not only was Benson's service not continuous, but at the time that he filed this grievance he had not achieved the five-year minimum service under any method of calculating prior service. Also the County believes that the time spent by Benson as Fireshift Commander from January 7, 1979 through September 25, 1980, should not be counted as service inasmuch as it was not time spent in the bargaining unit and he was therefore not a firefighter as that term is used in the contract. Thus, the County concluded that the matter was not arbitrable in the first instance since no harm had come to the grievant due to his ineligibility to receive the benefit regardless of how his service was calculated.

Further, the County, in analyzing the grievance settlement agreement with the Deputy Sheriff's Association believes that the pertinent language of the settlement agreement is, "it is my further understanding that the Association agrees that henceforth in order to qualify for the longevity bonus, service as a Deputy Sheriff must be continuous." The County believes that this statement is a clear reflection of the practice now existing between the parties, that despite the presence of the word "continuous" in the language of the Memorandum of Agreement the service requirement contribution is viewed as being continuous. In terms of the settlement agreement itself, which permitted the counting of prior service before a break in determining eligibility for the Deputy Sheriff, that agreement was executed prior to Benson's reemployment by the County and only spoke to the expectation as to how to compute the benefit at that time for that individual, but left future applications to be resolved by the parties.

The County also points to the testimony of Matthew Janes, a County Labor Relations Specialist and previously the Employe Benefits Manager in the Human Resources Department. Mr. Janes testified that since at least 1980 it has been the practice of the County to calculate benefit liability as extending to those persons who had continuous service in the event a service break exceeded 30 days. Benson's service break in this case amounted to eight years. When he was reemployed he started at step one of his pay range and was in all respects treated as a new employe. His previous employment history slate, in terms of benefit accumulation, was wiped clean as a result of his voluntary resignation in 1980. The County concludes that to grant the relief sought by Benson in this case would effectively grant an unbargained-for fringe benefit and would exceed the Arbitrator's authority as set forth in Section 4.02(4) of the parties' Memorandum of Agreement.

Lastly, the County contends that Benson is attempting to count as service with the County, under Section 2.02, time spent outside of the bargaining unit. The County contends that the Union has provided no foundation for the proposition that time spent with the County as a nonbargaining unit employe

should be counted in calculating service to determine eligibility for the Educational Bonus.

After reviewing the instant grievance and Section 4.01(8) of the grievance procedure, the undersigned is satisfied that the grievance is not premature. Section 4.01(8) provides that no grievance shall be initiated after the expiration of 90 days from the date of the "grievable event". In this case, the grievable event occurred in February, 1991, when the grievant was advised by Schmitt that his application for the Educational Bonus was denied and further that he would not in the future receive credit for his county service from April 27, 1978, through September 24, 1980. The County's denial put the grievant on notice that he was being denied a fringe benefit to which he believed he was entitled because of service calculation and the 90-day time limit provided for in the grievance procedure was triggered by that event. To have waited more than 90 days from the date of that occurrence subjected him to a potential argument by the County that he had waived his right to grieve because he had not grieved within 90 days of his knowledge a grievable event occurred. Consequently, the undersigned is persuaded that the instant grievance is arbitrable and I have jurisdiction to resolve this dispute.

One of the Union's principal arguments in this case is that the County in a grievance involving Wayne Smith of the Sheriff's Department, agreed as part of the settlement agreement in that grievance that Deputy Smith would be paid his Educational Bonus under the contract "without regard to the fact that he had a break in service." The testimony surrounding this grievance settlement agreement established that the contractual Educational Bonus language in the Sheriff's Department contract was identical to that in the Fire Fighters contract. The Union concludes from these facts that the grievant, Benson, should be treated as Deputy Sheriff Smith was treated and receive credit for his prior service with the County notwithstanding his eight year break in service. The Union insists that to now treat Benson differently than Deputy Smith would deny the grievant equal treatment.

While the undersigned acknowledges the Union's claim that the contract language in the Deputy Sheriff case is identical to that contained in the instant Memorandum of Agreement, he does not concur in the Union's conclusion that the grievant should therefore be treated identically under the instant Memorandum of Agreement. First, it is generally accepted that identical contract language in different bargaining units with the same employer, or different bargaining units with different employers can have different meaning. This is because the contracts are negotiated separately with different bargaining committees and result from different bargaining history. Thus, even though the language may be identical, the intent of the parties in entering into that language can be different. In this case there was no testimony concerning the bargaining history leading to the inclusion of the Educational Bonus language in either the instant Memorandum of Agreement covering fire fighters or the Deputy Sheriff's contract. Consequently, there is no basis for concluding that the parties to each of these agreements intended the language to be applied identically. Further, the settlement agreement in the Deputy Sheriff's case provides that the deputy was to receive credit irrespective of his break in service, but went on to provide "in regard to the Educational Bonus, both parties have reserved their rights to place that matter on the table and have not agreed to an interpretation at this time." There was no testimony regarding what, if any, discussion took place during negotiations for the subsequent collective bargaining agreement between the County and the Deputy Sheriffs Association regarding the interpretation to be placed upon the language respecting the issue of continuous service. For these reasons, the undersigned does not find the settlement agreement reached between the County

and the Deputy Sheriff's Association as controlling in this case. 1/

Another consideration in resolving this dispute is the Employer's contention, supported by the unrebutted testimony of Schmitt, that since at least 1980 the Employer has treated any break in service exceeding thirty days as a relinquishment of entitlement to all benefits except pension benefits which vested prior to said break in service. Additionally, Schmitt testified that when the grievant was rehired he was treated in all respects as a new employe e.g., he was placed at the first step on the salary schedule. It seems clear, that absent a contractual requirement that "service" in the County employ is to be measured from the earliest date an employe worked for the County, the grievant in this case surrendered his entitlement to the service credit for his first employment stint with the County when he resigned his employment in 1980. The undersigned could find no language in the Memorandum of Agreement which provides as a general proposition that an employe's service is vested and cannot subsequently be lost or surrendered through a discharge or resignation. Obviously, the County, when it reemployed the grievant in 1988, did not believe there was such a requirement or a vested right to prior service inasmuch as the grievant was not given an adjusted service date on his record card nor did the County's initial actions at the time the grievant was rehired reflect it believed he was to be given credit for his earlier service. Also, neither the grievant nor the Union believes now or believed when he was hired that he was

1/ Additionally, there is no evidence of a dispute in the Deputy Sheriff case concerning whether all or a portion of the prior service was in a non-bargaining unit position.

entitled to receive credit for his prior County service for any and all purposes. If either had, a grievance would have been filed over the County's treatment of him when he was rehired. 2/

Consequently, it is necessary to next examine the language of the Memorandum of Agreement to determine if, as urged by the Union, Section 2.02, "Educational Bonus", requires the County to count as County service any or all of the time the grievant worked for the County prior to his resignation in 1980, for the limited purpose of determining his eligibility to resume the Educational Bonus. The Union insists the absence of the word "continuous" in the Educational Bonus, Memorandum of Agreement language is significant, particularly when compared with two other clauses in the same agreement wherein "continuous" is used in reference to service. This contract interpretation construction principle of expressing one thing to the exclusion of another is known as "expressio uno est exclurio alterius." This principle has been commonly used over the years by arbitrators to resolve ambiguities like that present in this case. 3/ In such cases the contract (memorandum of agreement) is presumed to represent the entire agreement of the parties and any eligibility rules are assumed to be complete. Thus, if in one clause the word "continuous county service" appears as a condition to eligibility whereas in another clause only "county service" is used, it is presumed, absent some other explanation, that the absence of the word "continuous" in the second instance was intentional and modifies the previously stated eligibility criterion where the term "continuous" was used.

In applying this principle to this case the Union points to two other changes in the Memorandum of Agreement where the word continuous appears. In Section 2.15, "Retirement Benefits" the term "continuous" is used to modify "membership" throughout that section of the Memorandum of Agreement. However, because the term "continuous" modifies "membership" it is distinguishable from the situation presented by the language in the Educational Bonus section wherein "continuous" modifies "service". Reference to "membership" in the Retirement section is a reference to membership in the retirement system as noted in Section 2.15(7) wherein it provides "A member of the retirement system shall be eligible. . ." There was no testimony nor any other documentary evidence to establish that a member of the retirement system is synonymous with County continuous service, and because the term "continuous" is being used to modify two different words it does not automatically follow therefrom, as the Union contends, that when comparing these two Memorandum of Agreement provisions the absence of the use of the word "continuous" in the Educational Bonus provision is significant.

2/ It should also be noted that while the County speaks of the practice of the parties, there was no testimony or documentary evidence adduced of any prior incidents where a firefighter had been denied credit for prior service as was done in this case.

3/ Hoover Universal, Inc., 77 LA 107 (1981).

The same analysis, however, cannot be made with regard to comparing the Educational Bonus language with the vacation language in Section 2.08. In the latter section the term "continuous" is used to modify "service". Clearly, this lends substance to the Union's contention that had the parties intended "continuous service" to be a condition to eligibility under the Educational Bonus clause they could have so stated inasmuch as they saw fit to do for Vacations. However, they did not include the use of the term continuous to modify County service in the language of the Educational Bonus provision. The eligibility requirements for the Educational Bonus entitlement specified in Section 2.02(2) are that the employee have five years of service with the County as a firefighter. The Arbitrator's responsibility in interpreting contract language is to where possible, insure all language has meaning. To disregard the use of the word "continuous" in Section 2.08 would violate this principle. Thus, the absence of the term "continuous" in the Educational Bonus clause must be read as also having some significance and not merely an oversight on the drafter's part. The significance is that an employe, such as the grievant, who has a break in service as a firefighter with the County will not be penalized for that break in service in calculating eligibility for the Educational Bonus. Consequently, the undersigned does believe that the absence of the use of the word continuous in Section 2.02 (2) of the Educational Bonus language requires the County to give the grievant credit for his service as a firefighter in his previous employment with the County in calculating his eligibility for the Bonus.

However, as noted above, one of the eligibility criteria to receiving the Educational Bonus, in addition to length of service, is that said service must have been rendered in the capacity of a firefighter. The County contends that a portion of the grievant's service to the County in his first employment stint was as a Fire Shift Commander, a non-bargaining unit supervisory position. A review of the subject memorandum of agreement reveals that the positions deemed to be in the bargaining unit of firefighters do not include the position of Fire Shift Commander. Further, the testimony at hearing established that the position of Fire Shift Commander that the grievant held from January 7, 1979 until his resignation on September 25, 1980 was not a bargaining unit position at that time. Consequently, the grievant's service during that period cannot be counted towards satisfying the eligibility requirement for the Educational Bonus inasmuch as the Educational Bonus language requires that any service to be counted must be as a bargaining unit firefighter. Because the position of Fire Shift Commander was a non-unit position that period of service cannot be counted. This conclusion is not altered by the fact that the Airport Fire Chief and/or Assistant Airport Fire Chief receive the bonus inasmuch as they are not covered by this Memorandum of Agreement, but rather some other set of rules promulgated by the County.

In conclusion, the County is required to count the grievant's prior service as a firefighter with the County. However, that portion of his service as Fire Shift Commander cannot be counted. Therefore, that service which the County must include in its calculation of County service as a firefighter under Section 2.02(2) of the memorandum of agreement is the period from April 27, 1978, through January 6, 1979.

AWARD

Based upon the foregoing and the record as a whole, the undersigned finds that the County did violate Section 2.02, "Educational Bonus" of the 1990-91 Memorandum of Agreement when it denied the grievant, Benson, credit for that portion of his prior County employment from April 27, 1978 to January 7, 1979, in determining his eligibility for the Educational Bonus. Therefore, the County, in determining the grievant's eligibility for the Educational Bonus must count as County service the period from April 27, 1978 to January 7, 1979.

Dated at Madison, Wisconsin this 2nd day of January, 1992.

By _____
Thomas L. Yaeger, Arbitrator