BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
TOWN OF VERNON EMPLOYEES UNION, LOCAL 97-U, AFSCME, AFL-CIO	:	
and	:	Case 6
	:	No. 46125
TOWN OF VERNON	:	MA-6880

Appearances:
Mr. Laurence S. Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME
Adelman, Adelman & Murray, S.C., by Mr. Jeffrey S. Hynes, appearing on behalf

ARBITRATION AWARD

The Employer and Union above are parties to a 1988-91 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 a grievance filed by the Union on behalf of all employes, concerning retroactive pension payments.

The undersigned was appointed and held a hearing on January 17, 1992 in Big Bend, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on April 9, 1992.

ISSUES:

The Union proposes the following:

1. Did the Employer violate the contract when it failed to pay 5% of full-time earnings into an individual retirement account retroactive to the effective date of this agreement?

2. If so, what is the appropriate remedy?

The Employer proposes the following:

1. Whether the Union filed a timely grievance in accordance with the contractual grievance procedure.

2. Whether the Union is entitled to a retroactive increase in employes' pension benefits.

RELEVANT CONTRACTUAL PROVISIONS:

Article 7 - Grievance Procedure

7.01 Definition of Grievance: A grievance shall mean a dispute concerning the interpretation or application of this contract.

7.02 Settlement of Grievance: Any grievance shall be considered settled at the completion of any

step in the procedure, if all parties concerned are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next.

7.03 Time Limitation: The failure of either party to file, appeal, or otherwise process a grievance in a manner which is in accordance with the time limits and other requirements set forth in this Article shall be deemed a settlement in favor of the other party. If it is impossible to comply with the time limits specified in the procedure, these limits may be extended by mutual agreement.

7.04 Steps in Procedure:

Step 1: The employee, with one (1) Union representative shall orally contact his or her immediate supervisor within fifteen (15) work days, exclusive of holidays, after he or she knew or should have known, of the cause of such grievance. The employee's immediate supervisor shall, within fifteen (15) working days, orally inform the employee of his or her decision.

Step 2: If the grievance is not settled in the first step, the grievance may be appealed to the Town Board by presenting the appeal in writing to the Chairman of the Town Board within (10) working days after the oral decision of the employee's immediate supervisor. The written grievance will identify the contract provision(s) alleged to have been violated, and will contain a concise factual statement of the incident. The Chairman of the Town Board will place the grievance on the agenda of the next scheduled meeting of the Town Board at which the Union shall have opportunity to explain the grievance. The Town Board will respond in writing within ten (10) working days of that meeting.

Article 8 - Arbitration

8.01 Time Limits: If a satisfactory settlement is not reached in Step 2, the Union must notify the Chairman of the Town Board within thirty (30) working days of the receipt of the Step 2 answer that it intends to process the grievance to arbitration.

8.02 Selection of Arbitrator: Any grievance which cannot be settled through the above procedures may be submitted to an arbitrator, to be selected as follows: If the Board and Union are unable to agree on

an arbitrator within thirty (30) days of the date the Union informs the Town that it intends to process the grievance to arbitration, either party may request the Wisconsin Employment Relations Commission to appoint a member of its staff to act as the impartial arbitrator.

8.03 Arbitration Hearing: The Arbitrator selected or appointed shall meet with the parties at a mutually agreeable date to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing, the Arbitrator shall render a written decision to both the Board and the Union which shall be final and binding upon both parties.

8.04 Costs: Both parties shall share equally the costs and expenses of the arbitration proceedings, including transcript fees, if any. Each party shall bear its own costs for its witnesses and all other out-of-pocket expenses including possible attorney fees. The Town shall allow one (1) town employees, not to exceed eight (8) hours, to participate in an arbitration proceeding without suffering any loss in pay.

8.05 Decision of Arbitrator: The Arbitrator shall not modify, add to or delete from the express terms of the Agreement.

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Article 14 - Wages

14.01 Wage Schedule: A schedule of classifications presently covered by this Agreement shall be contained in Appendix A, which is attached hereto and made a part hereof.

14.02 Pay Period: Employees shall be paid every other Tuesday. If a payday falls on a holiday, employees shall be paid on the day preceding the holiday.

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Article 16 - Wisconsin Retirement System

16.01 As soon as is possible under the rules and regulations of the Wisconsin Retirement System (WRS), the Township shall participate in the Wisconsin Retirement System and shall pay the entire "employee's contribution" to the System's fund, except as may be specifically restricted by State Statutes. This contribution shall be in addition to the Employer's normal "employer's contribution." The Township shall pay for 50% of the prior service credits for all bargaining unit employees employed or laid-off with recall rights on the implementation of this provision.

16.02 Until the Township begins participation in the Wisconsin Retirement System, the Township shall continue to pay an amount equal to five percent (5%) of each regular employee's earnings into an individual retirement account, as it has in the past. These contributions will cease when the Township begins participation in the Wisconsin Retirement System, as set forth in Section 16.01 above.

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LETTER OF AGREEMENT

. . .

The parties agree that with respect to the implementation of the first collective bargaining agreement, only wages shall be retroactive. This Agreement shall not constitute a precedent for any future negotiations between the parties.

. . .

DISCUSSION:

This much is undisputed: After lengthy negotiations, the parties settled their first collective bargaining agreement in December, 1990, to cover a period which by then had largely expired. The Town paid backpay for the wage rates in the agreement shortly before Christmas, 1990, and the days paid were calculated based on time card totals. Sick leave days, vacation and holidays were thus subject to the retroactive pay. The Employer had been paying 5% of wages into each employe's individual retirement account prior to being unionized, and had continued to make such payments quarterly during negotiations. As part of the collective bargaining agreement, the Town agreed to shift employes into the Wisconsin Retirement System, with 50% vesting of prior service. This became effective January 1, 1991, and payments into the IRAs then ceased. A final payment governing the last quarter of 1990, however, was made on or about January 15, 1991.

This triggered the dispute in this case, because the Union, contrary to the Town, contends that that payment should have been made at a rate commensurate with the pay rates resulting from the negotiated increases, and that additional payments should be made for the previously forwarded IRA contributions to bring those up to a level of 5% of the later-negotiated wage rates for the applicable periods.

The parties initially dispute whether each had violated the timeliness provisions of the newly signed collective bargaining agreement. As noted above, Article 7.03 specifies that "the failure of either party to file, appeal, or otherwise process a grievance . . . shall be deemed a settlement in favor of the other party." Each party has its reasons for alleging failure to process or file the grievance timely by the other.

No written grievance was ever filed at Step 1 or 2. Instead, according to two Union witnesses, Steward Tom Cappel approached Director of Public Works LeRoy Titze in the lunchroom on the day Cappel discovered that the pension payment would not be based on retroactive rates. Cappel testified, and employe Bryon Gerick agreed, that this took place in mid-January, within 15 days of discovering that the Town Clerk planned to make such payment. According to Cappel and Gerick, Cappel told Titze the Union had a grievance over this payment, and Titze made no reply. Cappel testified that he waited some days for a response, and received none. He then contacted Union representative David White, who wrote a letter to Town attorney Hynes on February 4 referring to several grievances, among them this one. In that respect, White stated:

> On or about January 10, 1/ 1991, Mr. Cappel presented a third grievance to Mr. Titze. This grievance concerned the fact that the back pay for the employees did not include the 5% pension payment. The reason for my letter to you on these matters is that Mr. Titze was obligated by the Collective Bargaining Agreement in Section 7.04 to "orally inform the employee" of his decision on these grievances within 15 working days of he date Mr. Cappel approached Mr. Titze with them.
>
> **To date, Mr. Titze has not given his decisions on these**

1/ A handwritten notation in this letter (Union Exhibit No. 3) adds "At Lunch Hour." It is not clear from the record whether this was part of the letter as mailed.

matters, and such decisions are now untimely. 2/ Section 7.03 of the Agreement states:

> The failure of either party to file, appeal, or otherwise process a grievance in a manner which is in accordance with the time limits and other requirements set forth in this Article shall be deemed a settlement in favor of the other party. If it is impossible to comply with the time limits specified in the procedure, these limits may be extended by mutual agreement.

(Emphasis added.) 3/

Mr. Titze did not request an extension of his time limit, nor was one granted by the Union.

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On February 12, Hynes replied to White in the following terms:

> With respect to your accusation that Mr. Titze failed to adhere to the grievance procedure, please be advised that the letter I received on February 6, 1991 was the first information that either I or Mr. Titze (or any other manager or supervisor at the Town of Vernon) had received indicating that a grievance had been filed in accordance with Article 7 of the contract.
>
> Mr. Cappel previously alluded to the matters set forth in your letter in early or mid-January. However, he indicated at that time that "the guys" may file some grievances but that he would let Mr. Titze know whether or not they planned to proceed. Neither you, nor Mr. Cappel informed Mr. Titze or I at any time prior to your February 6 letter that they wished to proceed with a grievance. As Mr. Cappel has admittedly been aware of the matters referred to in your letter for over a month, and failed to inform Mr. Titze that he wished to file a grievance concerning such matters, your grievances, (not Mr. Titze's response!) are untimely under Section 7.04 of the Collective Bargaining Agreement, which states that:
>
> > "The employee, with one (1) union representative shall orally contact his or her immediate supervisor within fifteen (15) working days, exclusive of holidays, after he or she knew or should have known, of the cause of such grievance."
>
> Consequently, these grievances must be considered to be resolved in favor of the Town pursuant

2/ Emphasis in original.

3/ Original text.

to Section 7.03 of the Collective Bargaining Agreement.

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Titze testified that he recalled a discussion between himself and Cappel at about the right date, but that all Cappel said was that "the guys may turn in a grievance" on the pension payment. Titze testified that neither at that time nor at any subsequent time did Cappel or any other Union representative formally notify him that there was such a grievance filed. Titze also testified that his practice since the inception of the collective bargaining relationship has been to hold a meeting with the grievant and a witness for the Union, scheduling such meetings during work time. Titze testified that he never regards his lunch time as working hours and that he does not transact business during that time. Cappel, however, testified that Titze routinely gets business calls during lunch time, gets up to handle them, and then returns to his lunch unless he has finished it.

It is clear on the face of the documents entered into evidence that the Union felt no compulsion to pursue other stages of the grievance procedure until it filed for arbitration in this matter. The Town argues that this represents repeated failure to process the grievance timely; the Union contends that it had no need to "process" the grievance further because the Employer had already settled the grievance based on the Union's filing at Step 1 and the Employer's subsequent failure to respond.

In resolving the procedural issue several points must be noted. First, the parties have mutually invited harsh treatment by the language they have used in Section 7.03 of the Agreement. In this instance, each party alleges that the other violated those terms, and each has acted consistently with that allegation since the White/Hynes exchange of letters in February, 1991. The facts, however, suggest the possibility of mutual mistake - or, at least, mutual carelessness - right at the outset. First, there is no basis in the collective bargaining agreement for Titze's expectation that no Union business would be conducted during the lunch hour. This may be an understandable desire on his part, but the uncontradicted evidence that he had conducted other business during lunch hour suggests that the Union should not be expected to read his mind as to whether or not an oral approach during lunch hour would be considered "proper". Second, the ink on the parties' first contract was barely dry when this grievance was filed. Thus no standard approach to handling grievances had yet emerged. And third, the difference between the two Union witnesses' version of what was said in the lunchroom and what Titze recalled revolves only around whether or not the word "may" was used: There is no dispute that some kind of reference to a grievance was made in the lunchroom that day.

But it is apparent that neither party to that discussion bothered to make his intentions or interests plain to the other. When Titze made no response at all (by his own admission) to the news that there (in his words) "may" be a grievance, he failed to engage in the kind of immediate attempt to discuss and try to resolve an issue which is the core and purpose of grievance procedures such as this one. When Cappel failed to follow up his (in his own version) one - sentence pronouncement to make sure he had been understood, he likewise relied on his own view of the letter of the contract's requirement, and ignored its purpose. Whether one party misspoke, the other misheard, or someone is lying thus becomes less significant than the mutual failure to make a good-faith effort. The failure to understand exactly what was being said or intended should therefore be fairly assessed against both. Thus, I conclude that the import of the lunchroom discussion is ambiguous as to whether Titze should have properly understood that a grievance was at that moment being filed or not. In these circumstances, I am particularly mindful of the old arbitral

principle that forfeitures based on procedure should be avoided unless a clear reason exists why either party should be held to have given up its right to have an issue addressed on the merits. I therefore find that the parties' procedural arguments here represent "ships that passed in the night", and conclude that the parties, effectively, mutually waived the timeliness provisions of the Agreement by their conduct.

Turning to the merits, the Union's essential argument is that because pension payments were expressed as a percentage of wages, they constitute wages and should be augmented retroactively by including the negotiated increases. The Union offered testimony by White and Cappel to the effect that no discussion was had in the negotiations to the effect that pensions would be excluded from retroactivity; the Town offered testimony by three board members to the effect that a specific discussion was had on this point. I find that the testimony is irrelevant, however, because the contract language is clear on its face.

The applicable language is contained in the Letter of Agreement attached to the contract. By stating that "only wages" shall be retroactive, the parties clearly intended the narrowest of interpretations of retroactivity. While the Union points to the fact that the old retirement system involved a percentage of wages, the language governing that payment was included in Article 16, titled Wisconsin Retirement System, and not Article 14, entitled Wages. Furthermore, a pension is classically regarded in collective bargaining as a fringe benefit, even though under Wisconsin public sector practice pension fund contributions are customarily expressed as a percentage of wages. There is no support in the collective bargaining agreement for the position the Union takes, i.e. that pensions should be considered wages as opposed to fringe benefits.

The Union points to the fact that the retroactive payments made by the Town prior to Christmas, 1990 did include the effect of the wage increases for days taken as sick leave, vacation, etc. This, however, is not necessarily inconsistent with the Town's interpretation of "wages only". In effect, when an employe takes sick leave or vacation, he or she is being paid regular wages even though he or she is not working. Thus, the pay rate for the day involved is not obviously excluded from a phrase which specifies that "wages only" shall be retroactive. In any event, even if those payments were not consistent with the "wages only" letter, they represented something of a gift horse, and there is no basis in the Agreement or in logic for expanding such an arguable windfall. I conclude that to interpret the Letter of Agreement as the Union urges would require rewriting the language so that it would say something to the effect of "only dollar and percentage amounts shall be retroactive".

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

AWARD

1. That neither party violated the timeliness provisions of the Agreement in its handling of the grievance herein, because they mutually waived those provisions by their conduct.

2. That the Employer did not violate the Agreement by refusing to make retroactive pension payments based on the increased wage rates negotiated as part of the Agreement.

3. That the grievance is denied.

Dated at Madison, Wisconsin this 25th day of June, 1992.

By _____
Christopher Honeyman, Arbitrator