

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
LUXEMBURG-CASCO EDUCATION ASSOCIATION
and
LUXEMBURG-CASCO SCHOOL DISTRICT

Case 13
No. 54946
MA-9837

Appearances:

Mr. Miguel E. Salas, Executive Director, Bayland Education Association, 1136 N. Military Avenue, Green Bay, WI 54303-4414, appearing on behalf of the Association.

Mr. William J. Wolske, Slatky, Wolske & Mehn, Attorneys at Law, 510 Main Street, Kewaunee, WI 54216, appearing on behalf of the District.

ARBITRATION AWARD

The Luxemburg-Casco Education Association and the Luxemburg-Casco School District are parties to a 1995-1997 collective bargaining agreement that provides for binding arbitration of disputes arising under the agreement. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to hear a grievance involving sick leave pay out. The undersigned was appointed and held a hearing in Luxemburg, Wisconsin on June 19, 1997 at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by October 6, 1997.

ISSUE

The Association asks:

Did the Luxemburg-Casco School District violate Article IV, Letter O, of the Master Agreement when it denied the Grievant full pay for unused sick days upon her retirement from the District prior to age 60? If so, what is the appropriate remedy?

The District asks:

Did the employer violate the collective bargaining agreement by denying payment for unused sick days to the employee teacher when the employee terminated employment at age 51?

The Arbitrator frames the issue as this:

Did the District violate the collective bargaining agreement when it denied the Grievant, Barbara Lenz, payment for unused sick leave days? If so, what is the appropriate remedy?

CONTRACT LANGUAGE:

IV. Contracts

. . .
N. The board will pay \$1,000 for one year and up to five years health insurance at the same rate paid to active employees up to age 65 for early retirement. Early retirement may start at age 55 or a mutually agreed upon age.

O. Upon retirement before age 60 a teacher shall receive full pay for unused sick days. This payment shall be made by July 15 of the retirement year.

. . .

BACKGROUND:

The Grievant is Barbara Lenz. She was hired in October of 1977 as a long-term substitute. She became a library aide in 1978, and the middle school librarian in 1984 until August of 1996, when she notified the District that she was going to retire. She was 51 years old at that time. Employees may accumulate up to 10 days of sick leave per year, up to a total accumulation of 100 days. Lenz accumulated 86 days of unused sick leave during her employment with the District. The parties agree that her daily rate of pay at the end of her employment with the District was \$192.51 per day.

Lenz had health problems with asthma and allergies from dust and mold. On August 5, 1996, Lenz sent the District the following letter:

Because of the health considerations described in the attached letter, I am retiring from the position of librarian at Luxemburg-Casco Middle School.

The master agreement indicates that payment is given for unused sick days when one retires prior to age 60. Please let me know at your earliest convenience when I will receive that payment.

The attached letter referred to above was from her physician, and it states:

Barbara Lenz is a 51 year old female librarian who does have a history of asthma and allergic rhinitis. Her symptoms are precipitated by dust, odors, mold, exercise, cats and weather.

An allergy evaluation was done which revealed positive IgE reactivity to dusts, molds and cats.

In view of Barbara's allergies and asthma, precipitators of her symptoms would include old and musty books. In view of her history of asthma and allergies, a change in her employment from her job as librarian should be considered.

I hope that this information is helpful to you. If we can be of any further assistance, please feel free to call or write.

On August 9, 1996, the District Administrator, Ray Thillman, sent Lenz the following letter:

The Luxemburg-Casco Board of Education at a Special Meeting on August 5, 1996, accepted your resignation so that you may retire. The Board of Education would like to thank you for your years of service to the children of this district.

In regards to your request for sick leave payout, this benefit is available for early retirees between the ages of 55 and 59.

Lenz filed a grievance because she sought the sick leave pay out and believed that since she was retired and not going back to work, she was entitled to the pay out under the bargaining agreement. The grievance was denied and the Association pursued the grievance to arbitration.

The language at issue in this dispute first appeared in the 1977-78 labor contract and has not been changed. During negotiations for the 1991-93 labor contract, the District proposed to change the language that states: "Upon retirement before age 60 a teacher shall receive full pay for all unused sick days" to state: "Upon retirement prior to age 55 a teacher shall receive substitute pay for all unused sick leave." The proposal was not agreed to and the language remained unchanged.

Margaret Lychwick has been a member of the Association's negotiation team since 1980 or 1981. She recalled that the District attempted to change the language at issue in 1991. Her understanding of the language was there was always a ceiling of age 60 that one had to retire before in order to collect the sick leave pay out benefit, and that in the District's proposal, it was lowering the ceiling to age 55 but also lowering the payment from the regular rate of pay to the substitute rate of pay. The District did not express its concern about someone retiring before the age of 55 in negotiations.

No one has retired from the District before age 55, although many have left the District or left the profession. Lychwick believes that the term "retirement" only means age 55 if one is asking for the health insurance benefit under the early retirement language, but that "retirement" otherwise has no age limit but means that one has left the profession and is not working elsewhere. Lenz has no intention of working again, and cannot envision the circumstance where she might be employed except for the loss of her husband.

Ray Thillman has been the District Administrator since 1977, and since that time, no one has retired before the age of 55. He does not consider Lenz to be retired. He and the Board

have always considered “retirement” to be at least age 55 or a mutually agreed to age, according to their interpretation of the contract. Age 55 is used because that is an age used to define retirement by the Wisconsin Retirement System.

When the Association asked for a list of all requests for sick leave pay out prior to age 55 and all corresponding responses by the District, the District sent the Association a list of 22 names with their dates of retirement and age when retired. Lenz’s name was listed last, and she was the only one below the age of 55. Thillman did not type this list and does not consider her to be retired just because her name was put on this list.

THE PARTIES’ POSITIONS

The Association

The Association argues that the District violated clear and unambiguous language when it denied the Grievant full pay for unused sick leave upon her retirement. The only requirement under Article IV, Letter O is that a teacher must be less than 60 years old. The Grievant was 51 years old when she retired and therefore meets the requirement of the contract.

The Association notes that the District refers to Article IV, Letter N that allows for benefits to those at age 55 or a mutually agreed upon age, where the District will pay one-thousand dollars and up to five years of paid health insurance after retirement. The Grievant is not asking for any of those benefits under Letter N, just the payment for unused sick leave under Letter O.

Where the language is unambiguous, the arbitrator must enforce its clear meaning, the Association states, even though the results are harsh or contrary to the original expectations of one of the parties. If the Association and the District had intended pay for accumulated sick leave to go to only those retiring after age 55, they would have clearly stated so in the contract, but they did not make that distinction. They chose to separate Letters N and O and create separate requirements. Sections N and O are not under a heading entitled “Early Retirement.”

The Association states that even if the Arbitrator finds the relevant language to be ambiguous, the bargaining history supports the Association’s claim that the Grievant was entitled to pay for unused sick leave at age 51. Currently, a teacher receives full pay for all unused sick leave upon retiring before age 60. During negotiations for a 1991-93 contract, the District proposed to limit this benefit by paying only substitute pay for all unused sick leave after retirement. Additionally, the District proposed to pay for all unused sick leave to only those retiring before age 55. The proposal lowered the amount and the age, and it was rejected. Now the District is trying to circumvent the bargaining process by trying to limit benefits which it was unable to achieve in bargaining. Lychwick testified that the reason the proposal was rejected by the Association was not because the Association denied the right of a retiree to receive pay for all unused sick leave prior to age 55, but because the proposal would have limited those retirees between the ages of 55 and 60 from receiving pay for unused sick leave. The District also proposed to combine N and O into one single clause under a paragraph describing early retirement benefits, but the Association rejected that and N and O have remained separate.

The Association points out that the bargaining agreement contains no language or references to the state statutes regarding teacher retirement or a definition of the normal retirement age in order to receive the benefits of Article IV, Letter O. Letter O only requires a retiree to be less than age 60. If the District did not contemplate employees being eligible for unused sick leave prior to age 55, why did it propose that teachers retiring prior to age 55 should receive the substitute pay for all unused sick leave. The District sought to reduce a benefit in 1991 that it now claims employees never had in the first place. The Association submits that the District contemplated paying employees for unused sick leave prior to age 55, which prompted it to propose the language rejected. Therefore, both parties have recognized that an employee can in fact receive pay for unused sick leave even if she is 51 years old.

The Association requests that the District be directed to pay the Grievant a total of \$16,556.15 for her unused sick leave.

The District

The District argues that the payment for unused sick days is available only to teachers who retire between age 55 and 60. By past practice, no employee has ever retired earlier than age 55 and no payment for unused sick days for a person under age 55 was ever allowed or contemplated by the parties. If payment for unused sick days was allowed for a person who retires earlier than age 55, that would have been so stated in the collective bargaining agreement.

The District asserts that the Employer is entitled to rely on past practice to interpret the language in the agreement. Both the Superintendent and the Union's grievance chairperson testified that in the past, no employee has retired earlier than age 55, and no person under age 55 has ever received payment for any unused sick days. That practice has been consistent over the last 19 years. The contract has been interpreted by the practice of the parties to mean that teachers who retire between age 55 and 60 are entitled to be paid for their unused sick days.

A teacher may qualify for early retirement at age 55 or a mutually agreed upon age, the District states. The normal retirement date to be eligible for retirement benefits from the Wisconsin Retirement System is age 65, but teachers may qualify for early retirement at age 55, according to Secs. 40.02(42), 40.23(1), Wis. Stats. The terms of the bargaining agreement are clear – early retirement is available at age 55, and the only exception is if the Employer agrees to a different age. The age 55 was not simply selected at random, but is consistent with the provisions of the WRS. The Employer's objective of allowing payment of sick days for teachers retiring between the ages of 55 and 60 is to encourage teachers between age 55 and 60 to retire. There is no incentive to the Employer to pay for unused sick days for any teacher under age 55.

The District argues that the employee in this case did not retire. The Employer should be able to rely on the common sense meaning of "retire." Many definitions can be found, but most connote a situation in which an employee has reached a certain age, typically 65, and is then eligible to receive retirement benefits. Age 65 is the age at which a person qualifies for

unreduced Social Security benefits. Some occupations allow for an earlier retirement age, such as after 20 years of active service for military personnel, age 60 for military reservists, age 55 for teachers, and age 50 for protective occupation participants. Those are the ages that a person is immediately eligible to receive retirement benefits. A person that is not entitled to retirement benefits upon termination of employment does not retire – he or she simply quits, no matter what the termination is called.

The Wisconsin Supreme Court held that a 54 year old employee who terminated his employment for health reasons and claimed he retired was not retired. The Court held that the parties intended the word “retirement” to mean voluntary termination of employment at age 65 or at an earlier age upon the consent of the employer. Retirement was held to not include a unilateral, voluntary termination before age 65.

The Union’s position that “retirement” is available at any age is patently unreasonable, the District asserts. Neither the Employer nor the Union ever remotely considered that an employee can retire after any age, such as age 23, and be paid for all unused sick days. The Employer has not abused its discretion or acted arbitrarily in denying payment to the Grievant, and its denial was consistent with its entire past administration of the collective bargaining agreement with respect to all other employees.

Finally, the District submits that the Union should not be allowed to redefine the retirement portion of the collective bargaining agreement by this arbitration proceeding, but only through the bargaining process. The Union wants any teacher to be able to “retire” at any age, whenever that teacher terminates employment and labels it “retirement,” so that he or she can be paid for all unused sick days. Those changes are major, substantive changes that should be brought about as a result of negotiations. The District asks that the grievance be denied and costs be paid by the Union.

In Reply

The Association responds to the District by stating that there is no past practice of denying payment for unused sick days for a person under age 55. Moreover, custom and past practice cannot be used to give meaning to provisions that are clear and unambiguous, as Article IV, Letter O. The Association also disputes the District’s definition of retirement where there are no contractual references or ties to the WRS requirements for early retirement in any section of Article IV. The District’s retirement system is separate from the WRS. There is no definition of a retirement age under Article IV, Letter O, only that a retiree be less than age 60. While the District cites a Wisconsin Supreme Court decision regarding the term “retirement,” the facts in this case are different. However, if the Arbitrator agrees that the word “retirement” is ambiguous, there is extrinsic evidence supporting the Association’s interpretation. Specifically, the District proposed language to limit sick leave payout to those less than 55 years old during the 1991-93 negotiations.

The Association states that Lychwick, a negotiator for the Association, testified that the District was concerned with paying retirees who were less than 55 full pay for all unused sick days, and that it was the understanding of the parties at the time that one could retire prior to age 55 and receive full pay for all unused sick leave. That is why the District proposed paying those retirees prior to age 55 only substitute pay instead of their full rate of pay.

The District replies to the Association by stating that contrary to the allegation made by the Association at the hearing, there was never any understanding or agreement on behalf of the Employer to allow retirement prior to age 55, unless upon mutual agreement with the Board of Education on a case by case basis. Without “retirement” prior to age 55, there would be no retirement benefits prior to age 55. Also contrary to the Association’s argument, any discussion or proposal by the Board to pay substitute pay for unused sick leave to retirees under age 55 and eliminate the full rate of pay for retirees between age 55 and 59 was only to make it easier for the Board to agree to a request from a person requesting early retirement, and not an admission or concession that the Employer would allow a teacher to retire prior to age 55 without the specific permission of the Employer.

DISCUSSION

First, I disagree with Association’s assertion that the only requirement of Article IV, Letter O, is that a teacher must be less than 60 years old. There is another requirement – that the teacher is retired. This is the source of the dispute – what did the parties mean by “upon retirement”?

The word “retirement” is ambiguous to the extent that the parties failed to specify at what age they considered “retirement” to start. However, the Arbitrator must give some effect to the word “retirement” and believe that it had some meaning. To accept the Association’s position in this case would obliterate the word “retirement” and change the clause into a sick leave pay out upon termination. A sick leave pay out upon termination is a major item, and it should be bargained into the contract and not implied through arbitration.

The fact that the Grievant characterizes her termination of employment with the District as a “retirement” is only a unilateral determination. The Association apparently believes that anyone can say at any age that they have retired and collect the sick leave pay out. But if that were so, why didn’t the parties simply agree to a sick leave pay out upon termination? The term “retirement” has to have some meaning, or anyone could collect this benefit at age 25, 35, 45, or 50, simply by telling the District that they were retiring.

The past practice and bargaining history are not particularly helpful in this case. It is unknown how many employees, if any, left the District’s employment before age 55 and asked for a pay out of unused sick leave. There is no record that anyone has been paid for unused sick leave when leaving the District before age 55. The District appears to have consistently interpreted the contract to mean that the unused sick leave pay out is available between age 55 and 60, and not before age 55. This in a reasonable interpretation, especially in conjunction with the language immediately preceding Article IV, Section O. The Association prefers to zero in on

Section O without referring to Section N above it, which defines early retirement. However, it is appropriate to read the contract as a whole in order to interpret it, particularly where the parties failed to state the age of retirement precisely in Section O.

The bargaining history does not support the Association's position, because the District's proposal was a two-pronged approach – to lower the age eligible to receive a sick leave pay out and to lower the payment to the substitute rate of pay rather than the regular rate of pay. Ironically, if the Association had agreed to this proposal in the 1991-93 bargaining talks, it would have gotten part of what it wants in this case, that is, the right to receive a sick leave pay out before age 55, albeit at a reduced rate.

I find the District's interpretation to be more reasonable than the Association's interpretation of the sick leave pay out upon retirement. Article IV, Section N, states that early retirement may start at age 55 or at a mutually agreed upon age. Right after that, the parties state in Section O, "Upon retirement before age 60" Therefore, it is fairly clear that they were talking about early retirement benefits. The Grievant does not satisfy the contractual requirements for retirement, and accordingly, is not entitled to a pay out of unused sick leave under the contract.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin this 11th day of November, 1997.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator