BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MADISON PROFESSIONAL POLICE OFFICERS ASSOCIATION

and

CITY OF MADISON

Case 197
No. 55201
MA-9922

Appearances:

Cullen, Weston, Pines & Bach, by **Mr. Gordon E. McQuillen,** on behalf of the Union.
Mr. Michael G. Dieters, Labor Relations Manager, on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "City," are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Madison, Wisconsin, on September 4, 1997. The hearing was transcribed and the parties thereafter filed briefs that were received by November 5, 1997. Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

> Whether December 18, 1994, or January 1, 1995, is the effective date for the wage increase provided for in the parties' 1994-1995 collective bargaining agreement.

DISCUSSION

The parties in 1994 engaged in collective bargaining negotiations for a successor contract and they in August or September, 1994, reached a tentative agreement which ran from January 1, 1994, to December 31, 1995.

Union President Joe Durkin testified without contradiction that Gary A. Lebowich, the City's then-Labor Relations Manager who no longer is employed by the City, supplied him with a draft contract (Union Exhibit 1), in November, 1994, which stated, *inter alia*:

. . .

"Increase all wages by three percent (3%) effective December 19, 1993; an additional three percent (3%) effective December 18, 1994, and an additional one percent (1%) effective the payroll period including January 1, 1996.

. . .

Durkin said that the Union in negotiations had earlier expressly asked for a December 18, 1994, effective date and that he reviewed said draft and returned it to Lebowich on November 11, 1994, with certain minor changes unrelated to the December 18, 1994, effective date for the three percent wage increase. Durkin also testified that he subsequently met with Lebowich in December, 1994, at which time all such matters were resolved.

Durkin added that when he received his first paycheck on January 5, 1995, he learned that the City made said three percent increase effective January 1, 1995, rather than December 18, 1994, as provided for in Lebowich's own draft; that he then spoke to Lebowich who told him that January 1, 1995, was the correct date and that the Mayor of Madison wanted the January 1, 1995, date; that he, Durkin, then protested that the City's last contract proposal called for a December 18, 1994, effective date; and that he then filed the instant grievance on January 13, 1995, protesting the City's implementation date because, in his words: "I thought they were stiffing us by making a change that they didn't make us aware of."

Durkin added that the Union in March, 1995, subsequently signed the 1994-1995 agreement on the express understanding that this question relating to the effective date of the disputed wage increase remained open and that it would be resolved in arbitration. Lebowich by letter dated March 2, 1995, (Joint Exhibit 14), agreed to this procedure by stating:

> The City acknowledges that the language set forth in Article VIII, Section A, is currently in dispute with regard to the effective date of the 1995 pay increase. In the event that a modification of that provision is required pursuant to an arbitrator's award, a revised copy of Article VIII shall be attached to the agreement. . . .

Durkin added that the Union's membership approved the new contract in September, 1994, and that no City representative up to that point had specifically agreed to the December 18, 1994, effective date now in dispute. Durkin also acknowledged that Lebowich's November, 1994, draft (Union Exhibit 1), marked the first time that the City ever expressly agreed to the December 18, 1994, date.

Gale Dushak on behalf of the City sat in on most of the bargaining sessions leading up to the 1994-1995 contract. He testified that the City in those negotiations "did not agree to any pay period other than the one on January 1" and that he costed out the contract for budget

purposes with a January 1, 1995, pay period because that was the date agreed to by the parties. Asked whether the Union ever specifically said "yes" to a January 1, 1995, effective date, he answered: "I don't think that specifically, no." He also testified that he changed the December 18, 1994, effective date he saw on the City's own contract draft to the Union (Union Exhibit 1), and that all other City contracts had January 1, 1995, as the effective date for 1995 wage increases. On cross-examination, Dushak said that he has never seen the proposed contract with a January 1, 1995, effective date.

Payroll Supervisor Pat Skaleski, an accountant in the City Comptroller's office, testified that beginning of the year raises for City employes always take effect in "the pay period that includes January 1;" that January 1, 1995, marked the beginning of a new pay period; that the prior raise went into effect on December 19, 1993, because that date encompassed the January 1, 1994, pay period; and that the City historically has always made pay increases effective in the January 1 pay period.

Positions of the Parties

The Union asserts that, unlike most other unions who negotiate with the City, it traditionally has negotiated contracts with the City that do not include January 1 as the effective date and that, as a result, the City cannot unilaterally establish January 1, 1995, as the effective date after Lebowich himself had agreed to December 18, 1994. The Union therefore requests that all affected employes be made whole by the approximately $14,000 in dispute.

The City, in turn, contends that the signed contract here provides for the January 1, 1995, effective date and that the Union should not have signed it if it wanted to litigate this issue. The City also states "no one on behalf of the City up to [the date of the Union's ratification] had specifically agreed to the December 18, 1994, effective date;" that the City never agreed to that date across the bargaining table; and that the City traditionally has negotiated contracts with its other unions which have provided for a January 1 effective date. The City also argues that the signed contract represents the entire agreement between the parties under Article 1, Section E, and that Article 6, Section D, prohibits an arbitrator from amending, modifying, subtracting, adding or ignoring the contract, which it claims is what the Union really wants done here.

DISCUSSION

This case essentially boils down to which party is to bear the price for the foul up which has arisen between the parties over whether January 1, 1995, or December 18, 1994, is the correct date for the implementation of the wage increase provided for in the parties' 1994-1995 contract.

There are several reasons why the City should bear this price, the main one being that the City's own last draft contract proposal to the Union (Union Exhibit 1), expressly provided for the December 18, 1994, date. Since Durkin subsequently returned that draft to the City with other minor changes unrelated to the December 18, 1994, date, and since Lebowich did not try to correct that date when he subsequently met with Durkin in December, 1994, the parties at that point had a binding agreement over this and all other issues. That being so, the City was <u>not</u> entitled to subsequently change the effective date from December 18, 1994, to

January 1, 1995, without further negotiations. Instead, if it believed that the December 18 1994, date referenced in the draft contract was incorrect, it was obligated under the doctrine of good faith to first bring that matter to the Union's attention before unilaterally implementing the January 1, 1995, effective date. The need to do that was all the more glaring since Dushak admitted that the Union in contract negotiations had never specifically agreed to the January 1, 1995, date. That being so, how could the City legitimately believe that it was proper to unilaterally change the contract in this way? The City offers no plausible explanation to this critical question.

However, there is one major fact cutting the other way, i.e., Durkin's admission that the City's November, 1994, draft (Union Exhibit 1), marked the first time that the City had ever expressly agreed to the December 18, 1994, date. Moreover, since Durkin, in early 1995 knew about the City's change of position before he executed the 1994-1995 contract, the Union was free to disregard that tentative contract and to proceed to interest-arbitration over this narrow issue if it so desired.

Weighing these relative factors is difficult because there are equities in support of both parties. On balance, though, they favor the Union because Union negotiators upon reading the City's own draft contract reasonably assumed that the City had agreed to the December 18, 1994, date and because the City was not entitled to unilaterally establish January 1, 1995, as the effective date after its own chief negotiator had earlier agreed to December 18, 1994. I therefore sustain the grievance.

In doing so, I find without merit the City's claim that the grievance cannot be sustained because that entails modifying the contract, which is something that Article VI, Section E, of the contract expressly prohibits. For here, I am not adding or in any other way altering what the parties initially agreed to since the City's own draft to the Union contained December 18, 1994, as the effective date for the wage increase in dispute and since Lebowich never disputed that date when he met with Durkin in December, 1994. That is why it is really the City which is attempting to change the agreed upon contract by deleting December 18, 1994 and by substituting January 1, 1995, as the effective date. That, it cannot do.

I also find without merit the City's claim that it should not be held to the December 18, 1994, effective date because it has negotiated other effective dates with other unions. What the City has done with other unions is a separate question of whether the City here agreed to the December 18, 1994, effective date and, if so, whether it should be held to that date.

Moreover, there is no merit to the City's additional claim that the Union should be held to the January 1, 1995, effective date because that is the date referenced in the signed contract. The record, in fact, shows that the Union signed that contract only after Lebowich by letter dated March 21, 1995, (Joint Exhibit 14), agreed that any such signing would not constitute a waiver of the Union's claim. That is why Lebowich's own letter to Durkin stated: "In the event that a modification of that provision [relating to the effective date] is required pursuant to an arbitrator's award, a revised copy of Article VIII shall be attached to the agreement. . . ."

As a remedy, the City will pay to all affected police officers the additional wage increase they should have received effective with the December 18, 1994, payroll period. In

order to resolve any questions that may arise over application of this Award, I shall retain my jurisdiction indefinitely. The parties therefore are directed to let me know within thirty (30) days of today whether any such questions have arisen.

In light of the above, it is my

AWARD

1.That December 18, 1994, was the effective date for the wage increase provided for in the parties' 1994-1995 collective bargaining agreement.

2.That the City shall make all affected police officers whole in the manner described above.

3.That I shall retain my jurisdiction indefinitely to resolve any questions that may arise over application of this Award.

Dated at Madison, Wisconsin this 13th day of January, 1998.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

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