BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MENASHA FIRE FIGHTERS, LOCAL 695, I.A.F.F., AFL-CIO

and

CITY OF MENASHA

Case 93
No. 55395
MA-10004

Appearances:

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, Attorneys at Law, by **Mr. Timothy E. Hawks**, appearing on behalf of the Union.

Godfrey & Kahn, S.C., Attorneys at Law, by **Mr. James R. Macy**, appearing on behalf of the City.

ARBITRATION AWARD

Menasha Fire Fighters, Local 695, I.A.F.F., AFL-CIO, hereinafter referred to as the Union, and the City of Menasha, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as the sole Arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held on December 10, 1997, in Menasha, Wisconsin. The hearing was transcribed and the parties filed post-hearing briefs and reply briefs, the last of which were received on February 13, 1998.

BACKGROUND

The basic facts underlying the grievance are not in dispute. Pay day for fire fighters is every other Thursday. On February 13, 1997, the City's Attorney/Personnel Director by letter informed the Union's President that employes would not receive a pay check on December 31, 1997, as that would represent the 27th pay period for 1997 and by that date employes would have been paid their full annual salary. The Union filed a grievance which was appealed to the instant arbitration.

ISSUE

The parties were unable to agree to a statement of the issue. The Union framed the issue as follows:

> Did the City of Menasha violate its collective bargaining agreement with Local 695, International Association of Fire Fighters, when it announced its intent not to issue a pay check on December 31, 1997, and if so, what is the appropriate remedy?

The City stated the issue as follows:

> Did the City violate Article IX of the collective bargaining agreement when it paid unit members an annual salary for 1997 divided into 26 pay periods?

The undersigned adopts the issue as stated by the Union.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE IX - RATE OF PAY

A. Compensation Schedule:

The monthly pay rates prescribed herein are based on full time employment at normal working hours.

. . .

	EFFECTIVE 1/1/97	7/1/97
FIRE FIGHTER		
Hire	$2699	$2726
After 6 months	$2762	$2790
After 1st year	$2976	$3006
After 2nd year	$3068	$3099
After 3rd year	$3127	$3158
After 4th year	$3219	$3251

AERIAL DRIVER	$3273	$3306

MOTOR PUMP OPERATOR

Substitution Rate	$3297	$3330
Regular Rate	$3328	$3361

LIEUTENANT

Substitution Rate	$3348	$3381
Regular Rate	$3443	$3477

CAPTAIN

Substitution Rate	$3519	$3554
Regular Rate	$3581	$3617

. . .

D. Pay day shall be every other Thursday. The Bi-weekly base pay rate shall be the annual base pay rate divided by 26. The annual base pay rate shall be calculated by multiplying the monthly base pay rate plus school credits (as set forth in Article XVIII herein) times 12 plus annual longevity pay (as set forth in Article IX.B. herein). The hourly base pay rate shall be the annual base pay rate divided by 2912 hours.

ADDITIONAL FACTS

This is not the first time the parties have gone to arbitration over the issue of a 27th pay period. When pay day is on every other Thursday, generally there are 26 pay periods in a year; however, every 10 years or so there are 27 pay periods. This is so because there are 365 days in a year (366 in a leap year) and 26 x 14 days equals 364 days, so there are one or two additional days each year beyond the 26 pay periods which after a number of years results in a 27th pay period. In 1986, there were 27 pay periods and the City divided the annual pay by 27 and paid that amount to employes each pay day. The Union grieved this diminution in bi-weekly pay and the grievance proceeded to arbitration. In the 1985-86 agreement, the rates of pay were specified as monthly and Section D merely stated that pay day shall be every other Thursday. The arbitrator denied the grievance noting that the agreement did not provide how bi-weekly pay was to be calculated and concluded that the City's method of calculating bi-weekly pay did not violate the contract. In the next round of negotiations, the Union made the following proposal:

ARTICLE IX - RATE OF PAY

. . .

Change monthly pay amounts to bi-weekly pay amounts.

The parties kept the monthly rates but added the present language to paragraph D of Article IX.

UNION'S POSITION

The Union contends that Article IX, Section D is clear and unambiguous and states that "Pay day shall be every other Thursday." It submits the City did not regard December 31, 1997, as a "pay day." The Union argues that the contract specifies the formula to be paid every other Thursday and that is the annual base pay divided by 26 and any other calculation would require rewriting the contract. The Union notes that there is an ambiguity in the contractual reference to monthly rates and this conflicts with the requirement to pay "every other Thursday." The City pays bi-weekly despite the fact that it exceeds the monthly rate and according to the Union the more specific formula controls, that is, the every other Thursday pay day trumps the notion of a monthly salary. It observes that in no month is an employe ever paid the monthly salary. It insists that the above scenario occurs because the second sentence of Section D controls. It submits that the heart of the bargain is the first two sentences of Section D despite the more general reference to the monthly rate.

The Union contends that the arbitrator in the 1986 case prescribed the means adopted by the parties to resolve the conflict and that is the provision as to how bi-weekly pay is to be calculated. It claims the City added an annualized pay figure and an hourly rate but left intact the requirement that pay day be every other Thursday and it was up to the City to change the consequences of its proposal. The Union requests that the grievance be upheld and the City be found to have violated the agreement when it failed to pay employes 1/26 of their annual salary on December 31, 1997.

CITY'S POSITION

The City contends that the same issue presented by this grievance was previously arbitrated and the Union lost and that decision is binding precedent in the instant matter. The City claims that in the 1989-90 negotiations, the parties agreed to a pay formula limiting the number of pay days to 26. It points out that the agreement provides that the annual pay is divided by 26, yet the Union wants a windfall pay check. It submits that the February 13, 1997 letter to the Union reiterated the contract language as well as the 1987 arbitration award. The City asserts that the prior award should be given considerable deference because it involves the same issue and the same parties and the grievance should be denied.

The City claims that the Union's prior grievance also was an attempt to receive a windfall pay day. It points out that there was no change in Article IX, the Rate of Pay section, and the hours of work remained the same and after receiving the 26th pay check in 1997, all members had received their full annual salary. It insists that the Union knew what changes were required to negotiate a change in the contract to obtain what it desired, yet it failed and the language agreed to

merely provides for annual pay over 26 pay periods. The City argues that nothing in

the agreement shows that the City agreed to a provision that would be impractical, unrealistic and a $40,000 windfall. It observes that the terms of a collective bargaining agreement are to be applied in a logical manner consistent with the language, intent of the parties and with the entire agreement. It opines that the Union's interpretation would result in an illogical outcome.

The City notes that there has been no change in hours since the last arbitration and the Union is attempting to alter the negotiated salary structure. The City insists that it agreed to limit the number of pay days to 26. It states that the contract has been interpreted that the City agreed to an amount for the annual salary whether it was divided by 26 or 27 and the City agreed to 26 to avoid diminution of the pay by dividing by 27 as opposed to 26. It submits that there was no intent to give the employes an extra pay check especially in a year where they had received a 6 percent wage lift.

The City maintains that the Union has not met its burden of proof in this case. It insists that other than one witness who suggests that it was his intent to gain a windfall, no language in the contract exists to support this position. The City takes the position that it simply agreed to limit the number of pay days to 26 because the Union came to the table requesting there not be 27 pay days to get the same amount of money and the City agreed to this simple change and only this change. The City notes that it received no quid pro quo for the estimated $40,000 windfall sought by the Union. It observes that nothing in the negotiating history even mentions any quid pro quo for an additional 112 hours of pay. The City asks that the grievance be denied.

UNION'S REPLY

The Union contends that the City's characterization of the remedy sought as a "windfall" is nothing but an editorial tactic. It submits that the issue is whether the parties agreed to a bi-weekly salary rather than a monthly or annual salary, and if they did, the City's failure to pay it is a windfall for the City. The Union insists that the City's argument that the prior arbitration award is preclusive must fail because the language is different and it begs the issue. The Union insists that the present bargain is that employes are to be paid a salary every other week without exception and the Union seeks payment of the bi-weekly salary due to them. It notes that the prior arbitration indicated there was no method for calculating bi-weekly amounts and the Union proposed and won a change in the manner of computation of the bi-weekly rate and never agreed that the City could avoid its obligation to pay every two weeks. The Union terms the City's windfall an exaggeration because a 27th pay period occurs every 11 years or 573 pay periods which amounts to 17/100 percent of each pay period which is neither a deal maker or breaker. Contrary to the City's assertion, the Union insists that it never proposed nor does the agreement provide for only 26 pay periods. It asserts that the City did not fully appreciate the relationship of the Union's proposal and the City's formulation of the bi-weekly pay language. It states that if the City wants to only pay 26 times a year it had the obligation to change the phrase "every other Thursday," but did not. It insists the City must pay employes "every other Thursday" as required by the contract.

CITY'S REPLY

The City contends that the Union has the burden of proof and not the City as the Union suggests. It notes that the Union now claims its intent was to gain a windfall but it failed to propose language, make clear its intent and draft language to satisfy that intent as recognized by both parties. The City views the prior grievance as a problem of having 27 pay days in one year and it was agreed to pay the existing monthly rates in 26 pay periods and never again having 27 pay periods with less in each check. The City submits that the evidence fails to establish that the Union secured the windfall it now seeks. It submits that the Union could have changed the monthly amounts set forth in the contract for the actual pay for each pay period but it did not and the change was merely that there would never be 27 pay periods in any year. The City argues that the Union is attempting to over apply what was bargained into a change in the method and amount of pay provided by the contract; however, this was not what the parties agreed to and the Union failed to prove that it gained a significant windfall.

The City observes that the Union fails to recognize that the contract provides negotiated monthly pay figures. It notes that the Union relies on the phrase, "Pay day shall be every other Thursday," and ignores the actual negotiated express and specific dollar amounts historically bargained. The City argues that the Union had to change these to obtain the result it seeks and it did not. It observes that the Union's position is that Article IX, Section D controls how much an employe makes but Section D does no more than state how many pay days there may be in a year and employes received their full annual salary based on the negotiated monthly amounts every other Thursday which is 26 pay periods and not 27. It further asserts that a strict reading of the first sentence of Article IX, Section D ignores the rest of Section D as well as Section A. It insists that the Union's tortured and convoluted application of the provisions of the contract are interesting and novel but simply do not establish the intent of the parties to be as the Union purports. It concludes that the grievance is without merit and should be denied.

DISCUSSION

The Union has relied on the first two sentences of Article IX, Section D. The first sentence states that "Pay day shall be every other Thursday." This language is clear and unambiguous and sets the day when employes are paid. However, it does provide what if anything employes will be paid on a pay day. If an employe breaks a leg skiing and cannot work and goes on a leave without pay, he would not be paid on a pay day where he had not earned any wages. This language sets the pay day but it does not establish that an employe will receive a pay check that day. The Union relies on the second sentence of Section D to establish how much must be paid every pay day. The second sentence reads: "The Bi-weekly base pay rate shall be the annual base pay rate divided by 26." The Union claims this language establishes the amount to be paid every pay day including those years when there are 27 pay days. This argument is not persuasive when the contract is read as a whole.

Article IX, Section A expresses rates of pay in monthly amounts. Some months have 30

days, others 31 and February has 28 or 29, yet the monthly pay is the same whether there are 28, 29, 30 or 31 days in that month. Thus, the 365th and 366th days each year are included in

the monthly and annual pay. Had the parties intended bi-weekly rates they could have expressed these rates as bi-weekly by multiplying these monthly base pay rates by roughly 46 percent and expressed these in dollar amounts. The third sentence of Article IX, Section D spells out how the annual base pay rate is calculated which is to multiply the monthly base pay rate in Section A plus the school credits in Article XVIII by 12 and the annual longevity pay set forth in Article IX, Section B is then added to this sum. The school credits are expressed in a monthly amount, just like the monthly pay rate and longevity is expressed as an annual amount. It simply does not make sense that the annual longevity, clearly expressed as such, would effectively be increased by 1/26th one year every 10 or 11 years. Similarly, the school credits expressed as a monthly rate would not be increased by 1/26th one year every 10 or 11 years. The Union's argument would carry more weight if these two items were paid separately. The pay rates are monthly, the school credits are monthly and the longevity is annually, and these compose the annual base pay rate. When the annual base pay rate is divided by 26, it simply establishes that each year after 26 pay days the monthly rate for the year is paid in full, the monthly school credits is paid in full and the longevity is paid in full. After these payments the employe is entitled to nothing more under these provisions should there be a 27th pay day as in 1997. Given the language of all these provisions, the undersigned is unconvinced that the parties agreed to a bi-weekly pay rate that would be an entitlement that the City was obligated to pay in an extra 27th pay day. All that was agreed was that the City would pay the monthly base pay rates, the monthly school credits and the annual longevity. These amounts were paid in 1997. The employes got what they bargained for. Inasmuch as they had no additional amounts coming from these three items, they were not entitled to any pay on December 31, 1997, the 27th pay day, as they had been paid in full under the contract and were entitled to nothing else. Inasmuch as the contract language when read as a whole is clear, there is no need to review the prior arbitration award and bargaining history.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The City did not violate the agreement when it announced its intent not to issue a pay check on December 31, 1997, and therefore, the grievance is denied in all respects.

Dated at Madison, Wisconsin, this 17th day of March, 1998.

Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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