

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL NO. 316 I.A.F.F.

and

CITY OF OSHKOSH

Case 285
No. 56051
MA-10153

Appearances

Mr. John B. Kiel, Attorney at Law, Schneidman, Myers, Dowling, Blumenfeld, Ehlke, Hawks & Domer appearing on behalf of the Union.

Mr. Warren P. Kraft, City Attorney, City of Oshkosh, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the Employer named above are parties to a 1997-1999 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to hear and decide a grievance involving the number of pay periods in a year. The undersigned was appointed and held a hearing on April 30, 1998, in Oshkosh, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by September 24, 1998.

ISSUE

The issue to be decided is:

Did the City violate the collective bargaining agreement when it declared a 27th pay period for the calendar year of 1997, thereby delaying the wage increase for 1998 until January 3, 1998? If so, what is the appropriate remedy?

BACKGROUND

The Union and the City have been parties to many collective bargaining agreements. They have not bargained specifically for the date of pay increases to start but have generally agreed that the effective date of pay increase for a new calendar year does not start on January 1 of that year, but starts with the first pay period, which often starts in December of the preceding year.

This grievance arose because the first pay period in 1998 started on January 3rd due to the fact that the City declared a 27th pay period in the calendar year of 1997. Normally, there are 26 pay periods because employees are paid on a bi-weekly basis. However, every 10 or 11 years, there is a 27th pay period.

The City declared the pay period between December 20, 1997, and January 3, 1998, to be the 27th pay period for 1997. The Union believes that this pay period should have been the first one for 1998, and that the City should not have a 27th pay period until the year 2000.

In the early part of the 1970's, the parties agreed to convert the bi-monthly pay periods to bi-weekly pay periods. Everyone was aware that this conversion required a 27th pay period in approximately every 11 years. Employees never have less than 26 pay periods in a year, and will have 27 pay periods every 10 or 11 years.

The dates in the labor contracts calling for wages effective January 1st or for the first pay period have not been dates that were negotiated. The Director of Administrative Services, Norbert Svatos, has supplied the dates when they were known or he has put in the pay period. The City has been responsible for putting the contract in its final form, and Svatos testified that he simply supplied the dates when they were known.

The 1972 labor contract had bi-weekly rates, with a wage schedule for January 1, 1972, to December 31, 1972. The last day of the year, December 31, 1972, would have been the first day of the first pay period for 1973.

The 1973 labor contract also referred to the wage schedule for January 1, 1973, to December 31, 1973. However, the wage increase started on pay period #1 on December 31, 1972, and ended with pay period #26 on December 29, 1972.

The 1974 contract was similar, in that it called for a wage schedule on January 1, 1974, to December 31, 1974. But the wage increase for 1974 would have started on December 30, 1973, with pay period #1, and ended with pay period #26 on December 28, 1974.

1975 – same thing happened. The contract says January 1, 1975 to December 31, 1975. The wage increase started December 29, 1974, and ended on pay period #26 on December 27, 1975.

1976 – the contract contained split wage increases, the first increase to be from January 1, 1976 to June 26, 1976. The increase actually started on December 28 with pay period #1. June 26 of 1976 appears in the middle of the 14th pay period. The second part of the year's increase was from June 27, 1975 to December 31, 1976. The record does not show whether the increase actually took place on June 27th. And in 1976, the first 27th pay period shows up, starting on December 19th and running through January 1 of 1977.

1977 & 1978 – the contract stated the correct date of pay period #1, January 2, 1977. It also showed that the wage schedule ran through December 31, 1977, which was the date that pay period #26 ended that year. The contract contained a wage reopener for 1978, and when the parties reached an agreement on the reopener, the wage schedule was for increases for January 1, 1978, to December 31, 1978. The January 1st date worked as pay period #1 started then, but the 26th pay period ended on December 30, 1978, not the 31st.

1979 & 1980 – the contract called for the wage schedule effective pay period #1, 1979. However, the pay period started on December 31, 1978, and ended on December 29, 1979. The contract for 1980 again referred to the pay period #1, 1980, which started on December 30, 1979, and ended on December 27, 1980.

1981 & 1982 – there were split increases in both years of this contract. Both wage schedules referred to the wage schedule effective pay period #1 and #14. The first pay period started on December 28, 1980, the 14th pay period start on July 5, 1981, and the 26th pay period ended on December 26, 1981. Accordingly, the first pay period of 1982 started on December 27, 1981, and the last pay period of the year ended on December 25, 1982.

1983's labor contract called for a wage increase effective pay period #1, which started on December 26, 1982.

1984 – the labor contract called for a wage increase effective January 1, 1984. That was not followed – the first pay period started December 25, 1983.

1985 – 1986 – 1987 – a three year contract started with the wage increase effective January 1, 1985, which was actually paid on the first pay period starting on December 23, 1984. The contract also called for the wage increase for 1986 to be effective on January 1, 1986, but it was actually effective December 22, 1985. Then at the end of 1986 – a 27th pay period shows up again, running from December 21, 1986, to January 3, 1987. The third year of that three year contract called for a wage increase effective pay period #1, 1987, which started on January 4, 1987. No grievance was filed.

1988 – 1989 – 1990 – shows split increases in each of three years, with the wage schedules to be effective on the first and fourteenth pay periods. The first pay period for the year 1988 started on January 3, 1988. The first pay period for the year 1989 started on January 1, 1989. The first pay period for the year 1990 started on December 31, 1989.

1991 - 1992 - the contract shows a wage increase effective pay period #1, which would have started on December 30, 1990. There were further schedule increases for pay period #14 and #21, with a salary reopener for 1992. The 1992 agreement calls for a wage increase effective pay period #1, which started on December 29, 1991.

1993 - 1994 - the 1993 wage increase was to be effective pay period #1, which started on December 27, 1992. The 1994 increase was effective pay period #1, which started on December 26, 1993.

1995 - 1996 - the 1995 wage increase was to be effective pay period #1, which started on December 25, 1994. The 1996 wage increase used the same procedure, with the effective pay period #1 actually starting on December 24, 1995.

The current contract for 1997, 1998 and 1999 starts with a wage increase effective pay period #1, 1997. Pay period #1 for 1997 started in 1996 on December 22 and ran through January 4, 1998. Then the City created a 27th pay period in 1997, which ran from December 21, 1997, through January 3, 1998. This is the event that triggered the grievance.

The labor contract provides for a wage increase effective pay period #1, 1998, which started on January 4, 1998. The contract also provides for a wage increase effective pay period #1, 1999, which will start on January 3, 1999.

Union President John Gee has been on the bargaining committee since 1988. The Union's expectation is that wage increases are to occur on the first pay period, which typically comes after pay period #26. Gee expected the pay raise for 1998 to begin after the end of pay period #26. He believed that pay period #1 should start on December 21 of 1997 and run through January 3 of 1998. Gee calculated that he lost \$43 in wages because of the delayed pay period in 1998. The impact continues into 1999.

The Union believes that the 27th pay period would naturally occur in the year 2000 where the 27th pay period would end on December 30, 2000. Then December 31, 2000 would start pay period #1 for the year 2001. The next time a 27th pay period would naturally occur, under the Union's analysis, would be 2011, when it would end on December 31, 2011.

Svatos is responsible for personnel, labor relations, purchasing, and payroll, among other things. He has been on the bargaining team since 1970 and recalled the move from a bi-monthly payroll to a bi-weekly payroll in 1973. Svatos testified that no matter what the labor contract said, the pay raise date always started with pay period #1. From the City's standpoint, it was a matter of paying 650 employees their increases at the same time for payroll purposes, rather than breaking down the bargaining unit which has about 87 employees in it. The documents for the labor contracts were generated by Svatos' office, and he supplied the dates for increases when known in advance.

All of the eight bargaining units in the City knew that there would be an additional pay period every 10 or 11 years, and the City always worked it out so that the dates of increases favored employees. The raises occurred more often in December than in January. During the year 1977, when the pay increases started on January 2, 1977, none of the bargaining units in the City objected to the date of the pay raise. Also, none of the units objected when a 27th pay period occurred in 1986.

The parties never negotiated over a 27th pay period or the specific date of an increase for the start of a calendar year. The Union was probably not aware of the possibility of a 27th pay period when negotiating for the current contract.

THE PARTIES' POSITIONS

The Union

The Union argues that this is not a case about management rights but a case about money and the effective date of the 1998 wage increase. The City's action has taken a unilateral wage concession from its fire fighters, as much as \$46.25 on the top step. The Union asks that the City be ordered to make its fire fighters whole.

The Union asserts that at the time the parties executed the 1997-99 collective bargaining agreement, they intended the wage increase to become effective on December 21, 1997. The City should not be allowed to use arbitration to rewrite the bargain. The express language of the contract, the negotiations, the bargaining history and past practice all support the Union's claim that the parties intended to make the 1998 wage increase operative December 21, 1997, when they agreed to an increase "Effective Pay Period 1, 1998." The language states that paydays will be bi-weekly with a one-week hold back. If allowed to proceed uninterrupted, the bi-weekly pay period system naturally produces a 27th pay period every 12 years. The parties knew that when they negotiated the 1997-99 contract.

The Union states that prior to 1998, the parties negotiated a series of agreements that had wage increases taking effect before January 1st, and negotiated wages that took effect on or before January 1st in 22 of the 25 years preceding their 1997 negotiations. As they negotiated the current contract, they not only knew of the existing practice but also agreed on the pay periods then in effect. There was no dispute that the last pay period of 1996 ended on December 21, 1996, or that the first pay period of 1997 began on December 22, 1996. With that knowledge, the City agreed to wages effective on pay period #1 and it negotiated the effective date of wage increases without notifying the Union that it wanted to alter the past practice or the natural progression of the bi-weekly pay system. Therefore, the Union asserts, the City acquiesced to the status quo requiring wage increases taking effect before January 1st into the current contract.

The Union argues that the City's silence at the bargaining table and the past practice of implementing wage increases on the first day of the pay period each December supports the grievance. The City should be estopped from declaring the 27th pay period in 1997 because of its silence in bargaining while it was aware that wage increases regularly became effective in December. The City made no proposal to make the wage increase effective January 4, 1998 nor did it propose a reopener to deal with the effective date of the wage increase. Allowing the City to change the effective date of the wage increase after the contract is settled has a destabilizing effect on the Union's confidence in its contract and undermines the relationship between the parties. Issues such as this should not be resolved through unilateral action or the grievance process.

The Union states that Article XV incorporates past practice into the contract, and past practices involving monetary subjects of bargaining are solidly binding on an employer. The practice of wage increases taking effect on or before January 1st of any given year went unabated for 25 years, with only two instances of deviation which were mutually agreed upon in 1977 and in 1987. Those isolated instances do not support the City's unilateral action. A past practice need not be absolutely uniform, but be the predominate pattern of practice.

The Union further argues that an award to the City would produce an unreasonable result, because the City asks the Arbitrator to declare that it has the right to create a 27th pay period in 1997 that is removed from the process of collective bargaining. If the City prevails, it could perpetually delay the effective date of the wage increases by perpetually declaring a 27th pay period, which is illogical and should be rejected. The City has a duty to bargain with the Union over matters primarily related to wages, hours and conditions of employment. The date of a wage increase is a mandatory subject of bargaining.

The City could, the Union believes, unilaterally secure an automatic concession by simply delaying the effective date of a wage increase through the declaration of a 27th pay period. An award to the Union, on the other hand, is reasonable because the employer has to deal with the effective date of a particular wage increase at the bargaining table.

The City

The City asserts that the first source of information to resolve this grievance is the contract. That document indicates that pay period #1 is the effective date of pay increases, but there is no language, express or implied, as to when pay period #1 would begin. The contract does not show that the parties have a meeting of the minds as to when the first pay period begins. The Employer has rights not otherwise altered by the contract. Therefore, the Arbitrator must resort to other evidence, which showed two uncontroverted points – 1, that the Union never expressed any expectations as to when pay period #1 was to begin, and 2, past practice indicates that the City unilaterally established dates when pay period #1 and pay period #14 started when increases were split during a given year.

The City points out that the Union maintained silence in bargaining over the effective date of the wage increase. While the Local President Gee testified as to his expectation of the effective date of the wage increase, he did not share that expectation or understanding at the bargaining table. Gee testified that there was no discussion at the bargaining table about the effective date for pay period #1 for 1998, despite the Union's argument that the parties were aware of when a 27th pay period would naturally occur. Gee agreed that the City started pay period #1 on January 4, 1987, and there were no objections from any of the bargaining units about the declaration of the 27th pay period in that year.

The City believes that the past practice supports its position. Svatos' bargaining history extends at least 15 years beyond Gee's tenure on the Union negotiating team. Svatos testified that when the City bargained for the bi-weekly pay cycle, all the bargaining units understood that periodic adjustments would be necessary to keep the bi-weekly cycle in sync with the calendar years. The changeover from a bi-monthly system was made in 1973, and all the units were made aware that a 27th pay period would be necessary every 10-11 years. In most years, pay period #1 began as early as 10 days before January 1st.

Despite language which established a specific pay increase date, the City always followed a pay period #1 date regardless of where the date fell on the calendar. For example, the 1973 contract calls for a pay increase to be effective on January 1, but Svatos testified that it actually took place one day earlier. In succeeding years, the City began the pay increase on December 30, 1973, for the 1974 increase, on December 29, 1974 for the 1975 increase, and on December 28, 1975, for the 1976 increase. The City also instituted the June 27, 1976, split increase on June 20, 1976. The City ignored the contractual start dates because of the easier administration with over 650 employees.

While the Union argues that the 1977 pay increase is clearly stated in the contract as January 2, 1977, Svatos testified that he was the one who inserted those dates into the contract, and the subject was not discussed by the parties. Svatos testified that if the Employer unreasonably exercises one of its management rights, the Employer loses that right. He suggested that declaring only 25 pay periods in a contract year was irresponsible, as would be starting pay period #1 as early as December 2nd. The issue of how many pay periods in a contract year has never been negotiated. The record shows that in more contract years than not, the employees benefited from the City's declaration of the start date of pay period #1.

The Union acquiesced to the City's establishment of the effective dates of pay increases. Gee was familiar with payroll procedures, and even the 1986 practice occurred on his watch. The City asserts that the Union's theory about a naturally occurring 27th pay period in 1999 and 2011 is correct only because the City declared 27 pay periods in the past.

The City also notes that this grievance potentially affects several hundred other employees in other bargaining units. If the Union's position were upheld, an absurd result would be created whereby one union got its 1998 pay increase two weeks earlier than all other employees because it sought through the grievance procedure what it admittedly failed to negotiate at the bargaining table.

The Union's Reply

The Union responds to the City's arguments by stating that the City is asking the Arbitrator to give the management rights clause an unduly expansive reading. The clause does not give the City the right to make unilateral determinations about the effective date of wage increases. That is the purpose of Article V, Pay Police, and the appendix regarding wages and fringe benefits. Allowing the City to periodically delay wage increases beyond the beginning of a calendar year allows it to evade Article V and the appendix.

Moreover, the Union argues, the past practice does not support the City. The City argued that all of its bargaining units agreed that a 27th pay period was necessary to keep the bi-weekly pay cycle in sync with the calendar year. But that is not so, because a 27th pay period naturally occurs within a calendar year and the delay of the pay increase was not necessary to the operation of the bi-weekly pay structure. There is no evidence to show that other bargaining units agreed to a unilateral addition of a 27th pay period whenever the City deems it appropriate. It is unreasonable to rely on Svatos' recollection of bargaining agreements reached two and one-half decades ago, where the documents themselves are available. The Union further states that if the City reached an understanding with the fire fighters' Union to allow it to periodically declare a 27th pay period, it should have reduced that agreement to writing.

The Union argues that the fact that the City implemented wage increases at the start of pay period #1 rather than the contractual date of January 1st does not allow the City to unilaterally declare a 27th pay period. The decision to start wage increases earlier than called for by contract was made unilaterally and done for ease of administration with all employees. Therefore, it was a benefit to the City. The Union did not object because its members got their wage increases earlier than expected. However, adding the 27th pay period does not make the pay system easier to administer and it saves the City money at the expense of its employees. If the City believes that the practice should swing both ways, it should seek an explicit agreement at the bargaining table.

DISCUSSION

The Union cites Article XV, Present Benefits, as a source of a potential contract violation. That Article states:

The parties agree to maintain the present level of benefits and policies that primarily relate to mandatory subjects of bargaining, not specifically referred to in this agreement. This provision is expressly limited to mandatory subjects of

The City cites Article II, Management Rights, as a source of potential justification for its action. That Article states:

The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this agreement.

The powers, rights and/or authority herein claimed by the City are not to be exercised in a manner that will undermine the union or as an attempt to evade the provisions of this agreement or to violate the spirit, intent or purposes of this agreement.

Article V as cited by the Union only states that pay days will be bi-weekly with a one-week hold back. The appendix states that wage increases are effective pay period #1. Nothing in the contract specifically supports the Union's position that the pay increase should take place in the later part of December rather than the early part of January.

It is necessary to resort to past practice to resolve this dispute because the contract does not say when pay period #1 takes effect, and the past practice shows how the pay periods have been implemented for many years – over 25 years without a grievance. A past practice must be unequivocal, clearly enunciated and acted upon, readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. The practice here has met the criteria sufficiently to be a binding past practice.

It has been unequivocal in that the wage increase has always started on pay period #1, since the early 1970's. It has been clearly enunciated, acted upon and readily ascertainable over time. Both parties have agreed to wage increases effective upon the date of pay period #1, even where the labor contracts provided for different dates. For example, the 1972, 1973, 1974, 1975, 1976, 1984, 1985, and 1986, contracts all called for wage increases on January 1st, but pay increases never took place on January 1st of any of those years. When the correct date of the wage increase was put in the contract, it was only there because Svatos knew the exact date of pay period #1 when he or the personnel office prepared the final draft of the labor contract, as happened in 1977. In the rest of the contracts, the wage increase was to be effective on pay period #1.

Both parties have acquiesced in the practice of pay periods starting both before and after January 1st. Wage increases started before January 1st in 1973, 1974, 1975, 1976, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1990, 1991, 1992, 1993, 1994, 1995, 1996, and 1997. Wage increases started after January 1st in 1977, 1987, and 1988. Wage increases started on January 1st in 1978 and 1989. In 1976, 1986 and 1997 – there was a 27th pay period. Both parties acquiesced the early wage increases, despite contract language to the contrary, and both acquiesced in late wage increases as well as those that came on January 1st. Both parties acquiesced in the 27th pay period on two prior occasions at ten-year intervals. It is only the last

one that is being grieved now.

The City always established the dates of the pay periods. Most of the time, the pay periods have to be in 26 periods, but they have to be adjusted for a 27th pay period every decade or so. The Union acquiesced in the City's establishment of the dates of the pay periods, even during the years that the City's determination of a 27th pay period resulted in the wage increases becoming effective after the first of the year. The City has not used the declaration of a 27th pay period to save money. In fact, it has given pay raises early most of the time.

There is no evidence that the parties ever negotiated the dates of increases, particularly the starting date of the first increase of a new year, although they may have given more thought to the date of a split increase. To the contrary, the dates were put in by the City personnel office. The parties could have negotiated that the pay raises were to start on January 1 – or any other date – of any given year, but they did not do so. Moreover, the Union is not arguing that the pay raise should start on January 1 – it wants it to start on December 21, 1997 – 11 days prior to the start of the new year.

The Union overreaches a little here – it wants the benefit of having its pay raises 11 days early for 1998 and 15 days early by the year 2000. It discounts all the early pay raises it has enjoyed in the past, where the numbering of the pay periods has worked to the advantage of employees more often than not. It has not negotiated for pay raises to start in the prior year but has taken the benefit of pay period #1 reaching back into those years. The few instances in this contract that pay period starts in early January is not a violation of the contract, where the Union has not negotiated for a specific date of the wage increase.

Both parties accuse each other of being silent at the bargaining table on this issue. They are both correct – neither party appeared to raise the issue during bargaining. The parties could have, of course, agreed that wage increases were to take effect on January 1st or any other date of any given year. They have instead agreed that wage increases take effect in the first pay period or what is called pay period #1. They never negotiated when pay period #1 was to start – the City has always supplied that date.

The Union never grieved when the contracts called for the increases to start on January 1st and the City started those increases in December of the previous years. This happened on several occasions without any protest, as noted previously. The Union never grieved when the City declared a 27th pay period on two prior occasions. It never grieved when pay raises started after January 1st until the current contract.

If the Union wants to get rid of this practice, it should do so at the bargaining table and not through arbitration. Bargaining for the effective date of a wage increase is one of the most common practices occurring in negotiations. If the Union wants to change the practice of a wage increase effective as of pay period #1, it can do so in the future in contract talks.

AWARD

The grievance is denied and dismissed.

Dated at Elkhorn, Wisconsin this 9th day of October, 1998.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator

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