BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 742, DISTRICT COUNCIL 48, AFSCME, AFL-CIO

and

CITY OF CUDAHY

Case 87
No. 55489
MA-10024

Case 88
No. 55490
MA-10025

Appearances:

Podell, Ugent, Haney & Delery, S.C., by **Attorney Robert E. Haney**, appearing on behalf of the Union.

Michael, Best & Friedrich, by **Attorney Robert W. Mulcahy**, appearing on behalf of the City.

ARBITRATION AWARD

Local 742, District Council 48, AFSCME, AFL-CIO, herein the Union, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and to decide a dispute between the parties. The City of Cudahy, herein the City, concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Cudahy, Wisconsin, on February 26, 1998. Post-hearing briefs were exchanged on September 11, 1998.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The City raised the following issues:

Whether the grievance is time barred under Article 10, Grievance Procedure, since the grievant was aware of the underlying allegations which are the subject of the grievance far in excess of the thirty (30) day time limitation? Whether the doctrine of collateral estoppel applies to this case because of a prior settlement agreement between the parties?

In addition, the parties stipulated to the following issues:

Is the City violating Articles 12 and 30 of the contract by denying the grievant five weeks of vacation pay and twenty-five dollars per month longevity pay? If so, what is the remedy?

BACKGROUND

The grievant, Clayton Lynde, began working for the City on June 24, 1968. On October 14, 1996, Lynde voluntarily quit his employment with the City to work as the Athletic Director for the Cudahy School District. At that time he did not ask for a leave of absence and he cashed out all monies and benefits which were owed to him by the City. On November 25, 1996, Lynde met with Frank Miller, the City's Water Utility Superintendent, regarding his possible return to work for the City. On December 13, 1996, Lynde met with Miller and Mike Clark, the City's General Manager of Public Works at the Water Utility, to further discuss his possible return to work for the City. On February 25, 1997, 1/ Lynde returned to work for the City as a new hire. As a new hire Lynde was placed on the first step of the wage schedule for his position and was placed on a six-month probation period. Also on February 25, Lynde sent a letter to the Chair of the City's Personnel Committee requesting a meeting to discuss his rate of pay under Article 11, Section 2 (a) of the contract. The Personnel Committee did meet with Lynde and listened to his request to be moved to the top

step of the wage schedule in the contract. On March 4, the City agreed to place Lynde at the top step of the wage schedule. On March 21, the following settlement agreement was drafted by the City and the Union:

1/ Unless otherwise specified, all other dates herein refer to 1997.

. . .

WHEREAS, Clayton Lynde (hereinafter "Lynde") has been a former employee of the City of Cudahy (hereinafter "City") for 28+ years.

WHEREAS, Lynde left the employment of the City to work for another public sector employer, the School District of Cudahy, for approximately four months; and

WHEREAS, Lynde reapplied and was rehired for his position in the City. There were five candidates who applied. Lynde was the only one to meet specific qualifications. Lynde was interviewed by the Civil Service Commission and hired.

NOW, THEREFORE, BE IT RESOLVED as follows:

1. The City Council agrees that pursuant to Article XI – Rates of Pay, Section 2(a) of the contract, Lynde shall be placed at the top step, Step 5, with regard to wages only under Appendix A.

2. This action shall be done on a non-precedent basis and may not be cited to in any future proceeding. This matter shall be kept confidential to the extent allowed by law.

3. The Union and Lynde agree that they will not file any type of lawsuit, prohibited practice, grievance or complaint regarding this matter.

. . .

Pursuant to the settlement agreement, Lynde was placed at the top wage rate for his job classification. On April 1, Lynde wrote to the City's Personnel Committee and requested a meeting to discuss his employment package. Lynde met with the Personnel Committee and requested that his vacation and longevity benefits be based on his total employment with the City, rather than on his rehire date of February 25. On April 21, the Personnel Committee denied Lynde's request. On April 28, Lynde filed an oral grievance with Miller regarding the City's denial of his request for his vacation and longevity benefits to be based on the total of his years of service with the City. On May 8, Lynde filed a written grievance for the same reason as his oral grievance was filed.

On August 27, Miller sent a letter to Lynde advising him that he had satisfactorily completed his six-month probation period.

POSITION OF THE UNION

The grievance was filed on a timely basis. A grievance would have been premature if filed before the City actually denied the vacation and longevity pay request. Said denial occurred on April 22 and the grievance was filed on April 28.

The contract defines seniority as an employe's length of continuous service and references seniority in various portions of the contract. With regard to the accumulation of vacation time, the contract refers to years of service, not seniority or years of continuous service. With regard to the determination of longevity pay, the contract says only that it is to be paid after a certain number of years, but does not say years of continuous service. The City has previously recognized that vacation accrues on the basis of total years of service as opposed to years of continuous service. Such an interpretation was provided by a former City Attorney. If the City argues that the terms "years of service" and "years of continuous service" have different meanings based on whether or not the employe is covered by the contract, then the City violates Article 1, Section 3 of the contract.

In rehiring Lynde, there was no intention by the City to deny him any benefits due under the terms of the contract. The side letter agreement between the parties did not address the issues of vacation and longevity pay, but rather, it only addressed the issue of pay. The City is violating the contract by denying five weeks of vacation and twenty-five dollars per month to Lynde.

POSITION OF THE CITY

The grievance is untimely. The date causing the grievance is arguably the date of Lynde's employment, February 25, but it definitely is no later than March 20, when the settlement agreement was signed. Using either date, Lynde failed to meet the thirty-day time limit contained in the contract.

The doctrine of collateral estoppel prohibits Lynde from grieving the City's decision and the settlement agreement, which memorialized his wages and benefits as a new employe under the contract. There is no evidence that Lynde was unaware of his longevity and vacation entitlements either at the time he applied for reemployment or at the time he made his request to the City for a higher wage. Lynde admitted waiting to make the second request for benefits until after the agreement on his wage increase was finalized.

The City had no contractual obligation to treat Lynde any different than other new hires are treated. Lynde was informed prior to his rehire that he would be starting as a new hire and that a higher wage rate and additional benefits could only be requested through the Personnel Committee.

Article VII defines seniority as an employe's length of continuous service. The arbitrator must find that Lynde's entitlement to benefits is based on continuous service in order to find compatibility between Article VII and Articles XII and XXX. Although the contract gives the Personnel Committee the authority to increase Lynde's wages, there is no language giving it the authority to increase vacation and longevity benefits.

The Union failed to establish the existence of a binding past practice. It claimed that two employes who left their employment with the City and subsequently returned were granted additional benefits. One of those employes was Greg Loferski who held a bargaining unit position when he left the City's employ and who returned to a non-bargaining unit position. Thus, the terms and conditions of his reemployment were governed by an ordinance, rather than a contract with the Union. The other employe, John Tomczak, was rehired in a different bargaining unit and under a different contract than applies to Lynde. The circumstances involving each of these employes are different and cannot be construed as a past practice which controls this grievance.

The grievance should be denied.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE I – RECOGNITION

. . .

3. No Discrimination: The City agrees that it will not discriminate in hiring of employees or during their tenure of employment because of . . . Union activity. . . .

. . .

ARTICLE VII – SENIORITY

1. Definition: Seniority means an employee's length of continuous service with employer since his date of hire. . . .

. . .

ARTICLE X – GRIEVANCE PROCEDURE

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5. Steps in Procedure:

Step 1: The employee, alone, or with his Union representative, shall orally explain his grievance to his immediate supervisor no later than thirty (30) days from date of the cause of such grievance. After the oral grievance has been presented, the employee shall continue to perform his then assigned work task. The employee's immediate supervisor shall, within five (5) working days, orally inform the employee of his decision on the grievance presented to him.

Step 2: If the grievance is not settled at the first step, the employee and/or his representative will write up the grievance initiation form and present it to the department head within fifteen (15) days. the (sic) department head will further investigate the grievance and submit his decision to the employee and his representative in this step in writing on the grievance disposition form within ten (10) working days after receiving written notification of the grievance.

. . .

ARTICLE XI – RATES OF PAY

. . .

Section 2 – Movement in Step:

(a) Unless otherwise authorized by the Common Council of the City, an employee shall be hired at the first step of the pay scale for such employee's classification. The employee shall be advanced to Step 2 after six months and shall advance one step every twelve (12) months thereafter until the employee reaches the maximum pay rate.

. . .

ARTICLE XII – VACATION

1. Schedule: The vacation plan shall allow employees:

A. Two (2) weeks vacation after one (1) year of service.
B. Three (3) weeks vacation after seven (7) years of service.
C. Four (4) weeks vacation after fifteen (15) years of service.
D. Five (5) weeks vacation after twenty-three (23) years of service.

. . .

3. Seniority: Choice of vacation weeks shall be made on the basis of bargaining unit seniority. However, in the Water Utility the use of seniority shall be limited to selection of employee's first two weeks vacation only, with a seniority rotation on the remaining time.

. . .

ARTICLE XXX – LONGEVITY

The City agrees to pay longevity pay to employees as follows:

A. After five (5) years - $5.00 per month longevity pay.
B. After ten (10) years - $10.00 per month longevity pay.
C. After fifteen (15) years - $15.00 per month longevity pay.

D. After twenty (20) years - $20.00 per month longevity pay.
E. After twenty-five (25) years - $25.00 per month longevity pay.

Longevity payments shall commence at the end of the closest payroll period ending after the anniversary date of hire.

. . .

DISCUSSION

The undersigned concludes that the grievance was timely filed. Although Lynde had been told that he would be returning to work at the wage rate for a new hire, he knew that the contract allowed an employe to request being placed at a wage rate above the first step of the pay scale for the employe's classification. Lynde was also told by Clark and Miller that his fringe benefits would be the same as those received by any new hire and that any improvements in benefits would have to be granted by the Personnel Committee, which they did not believe would be likely to occur. Such a statement left open the possibility of improved benefits. Thus, it was reasonable for Lynde to wait to file a grievance over the improved benefits until his request for such had been denied by the Personnel Committee. He did file his grievance within 30 days following the denial.

The undersigned now examines the City's contention that the doctrine of collateral estoppel prohibits Lynde from grieving the decision of the Personnel Committee and the subsequent settlement agreement. It is true that the City had no obligation to rehire Lynde. Further, the parties did enter into an agreement, whereby Lynde was placed at the top wage rate for his job classification, rather than the entry level wage rate. But the subjects of fringe benefits, longevity pay and earned vacation time are not mentioned in said agreement. Neither is there any evidence to show that improved benefits for Lynde were discussed while his request for a higher wage rate was being considered. Apparently, the City's position rests on the last sentence of the settlement agreement, which uses the term "this matter." However, the evidence fails to support such an interpretation. Lynde's letter, dated February 25, to the Personnel Committee requested that the Committee discuss his rate of pay under Article XI, Section 2(a) of the contract. Said provision authorizes the City Council to move an employe to a higher step of the pay scale for such employe's classification. The minutes of the Personnel Committee meeting of March 4, state that the Committee voted to raise Lynde to the top level as a Serviceman 2 and that the rate should go into effect if the labor negotiator found no problem with the action of the Council. The settlement agreement was then drafted. It was not until after the settlement agreement was executed that Lynde filed his request, dated April 1, for the Personnel Committee to consider granting him the same longevity and vacation

benefit levels as he had been receiving at the time he left the City's employ in October of 1996. According to the minutes of the Personnel Committee meeting on April 21, the Committee voted to deny Lynde's request for restoration of his vacation and longevity benefits. It is concluded that the settlement agreement dealing with Lynde's wage rate did not address Lynde's request for restoration of his vacation and longevity benefits, nor was it the intent of the parties to do so. Rather, the settlement agreement dealt solely with Lynde's request to be placed at a higher wage rate than the rate for new employes. Since the instant grievances raise different issues than were covered by the settlement agreement, the doctrine of collateral estoppel is not applicable to these grievances.

The City's interpretation of Article XII appears to be more logical than the Union's interpretation. However, the Union asserts that the City has altered the meaning of the disputed language through its practice of administering said language. The Union presented two prior cases in support of its position that the language in Article XII should be interpreted to mean total employment with the City in those situations where an employe was employed by the City, then left the City's employ and later returned to work for the City. Both of those cases occurred in November of 1993. The first case involved an individual named Greg Loferski, who worked for the City from May 21, 1984 to October 22, 1987, in a position in the same bargaining unit as Lynde's position is located. On January 16, 1990, Loferski was rehired into a non-represented position with the City. In 1993, Loferski talked to the City Attorney about the calculation of his vacation time. The City Attorney concluded that the City's Ordinance fixing the salaries and fringe benefits for unrepresented employes in 1993 allowed three weeks of vacation after seven years of service and did not state that the years of service must be continuous. The City Attorney concluded therefore that Loferski was entitled to use his prior employment with the City in calculating his vacation eligibility, which information was conveyed to the City's Payroll Department in a memo from the City Clerk on November 12, 1993.

The second case involved an individual named John Tomczak who worked for the City from October 7, 1969 to September 15, 1978, in a position in a bargaining unit also represented by the Union, but covered by a different contract than the contract covering Lynde's position. Tomczak returned to work for the City on May 5, 1981, in the same bargaining unit as when he previously worked for the City. Loferski told Tomczak that he had received credit for his prior employment in calculating his vacation benefits. On November 17, 1993, the Payroll Department was informed by a memo from the City Clerk that, based on the City Attorney's prior conclusion concerning Loferski, Tomczak's vacation eligibility should be calculated in the same manner as Loferski's vacation had been calculated.

The undersigned is not persuaded that the Union has established the existence of a past practice which should control the instant dispute. The two examples occurred approximately five years ago and within the space of a few days. Neither of the examples involved the

interpretation of the contract covering the bargaining unit in which Lynde's position is located. Although the language of the ordinance covering non-represented employes is virtually identical to the language of the contract relevant herein, one isolated example is insufficient to show there is a consistent past practice. The language in the contract covering Tomczak in 1993 was different, since it provided that the date of hire shall be the vacation anniversary date for all employes. There is no evidence to show that the City Attorney evaluated the language of the contract covering Tomczak, which language is even less susceptible to an interpretation similar to the one in the Loferski case. Thus, the Tomczak example should not have been found to be the same as the Loferski situation and is not helpful in the instant matter. Further, in reviewing the contract provision concerning longevity pay, it is noted that the longevity payments are to commence at the end of the closest payroll period ending after the anniversary date of hire. In Lynde's case, his date of hire is February 25, 1997. There is no support in that language for the Union's interpretation that Lynde should get credit for a prior period of employment with the City. The undersigned is not convinced that the parties intended vacation eligibility to be computed in a different manner than longevity is computed, i.e., that an employe who is rehired should be given credit for prior periods of employment for computing vacation benefits.

The undersigned does not agree with the Union's assertion that the City is discriminating against employes on the basis of their Union activity if it applies the relevant contract language and such application results in a different level of benefit for an employe represented by the Union than is received by an unrepresented employe.

Based on the foregoing, the undersigned enters the following

AWARD

That the grievances filed by Clayton Lynde were filed in a timely manner; that the doctrine of collateral estoppel did not bar the grievances; that the City did not violate Articles XII and XXX of the contract by denying Lynde five weeks of vacation pay and twenty-five dollars per month longevity pay; and, that the grievances are denied and dismissed.

Dated at Madison, Wisconsin, this 4th day of December, 1998.

Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator

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