BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

FEDERATION OF NURSES AND HEALTH PROFESSIONALS, LOCAL 5001, AFT, AFL-CIO

and

MILWAUKEE COUNTY

Case 481
No. 57902
MA-10772

Appearances:

Ms. Carol Beckerleg, Field Representative, Federation of Nurses and Health Professionals, Local 5001, AFT, AFL-CIO, 9620 West Greenfield Avenue, West Allis, Wisconsin 53214, appearing on behalf of the Union.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of the County.

ARBITRATION AWARD

Federation of Nurses and Health Professionals, Local 5001, AFT, AFL-CIO, hereinafter Union, and County of Milwaukee, hereinafter County, are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union, by request to initiate grievance arbitration received by the Commission on August 13, 1999, requested that the Commission appoint either a staff member or a Commissioner to serve as Arbitrator. The Commission appointed Paul A. Hahn as Arbitrator on August 19, 1999. The hearing was scheduled for December 9, 1999 in room 203-P of the Milwaukee County Courthouse, Milwaukee, Wisconsin. The hearing was not transcribed. The parties filed post-hearing briefs which were received by the Arbitrator on January 18, 2000 (Union) and January 27, 2000 (County). The parties were given the opportunity and declined to file reply briefs. The record was closed on January 27, 2000.

ISSUE

The parties stipulated to the following issue:

Did the County violate Sections 2.11 and 2.12 of the Memorandum of Agreement in its calculation of earned retirement leave for the Grievants? If so, what shall the remedy be? (Note that the labor agreement is referred to as a Memorandum of Agreement).

RELEVANT CONTRACT PROVISIONS

1.01 RECOGNITION

The County of Milwaukee agrees to recognize and herewith does recognize the Federation of Nurses and Health Professionals, Local 5001, AFT, AFL-CIO, as the exclusive collective bargaining agent on behalf of bargaining unit classifications, in accordance with the certification of the Wisconsin Employment Relations Commission as amended, made pursuant to Subchapter IV, Chapter 111.70, Wisconsin Statutes.

. . .

1.02 BARGAINING UNIT DEFINED

(1) Whenever the term "nurse" is used in this Agreement, it shall mean and include bargaining unit nurses of Milwaukee County in the following classifications: Registered Nurse I, Registered Nurse I (Mental Health), Registered Nurse II, Registered Nurse II (Sheriff's Department), Registered Nurse II (Mental Health), Nurse Practitioner, Clinical Nurse Specialist (Mental Health) and Clinical Nurse Specialist, Mental Health Emergency Service Clinician RN, Community Service Nurse, RNII-AODA, Staff Development Coordinator, EMS Instructor, RNII Adult Services Division, RNII Department on Aging, Infection Control Practitioner, Regular Pool Nurse (Corrections), RNI (Pool), and RNI-Mental Health (Pool). Whenever the term "employe" is used it shall mean in addition to those set forth above, the following bargaining unit classifications: Forensic Chemist.

. . .

2.11 RETIREMENT SYSTEM

(4) Upon retirement, employes shall have the following options:

(a) A retirement leave may be taken, the duration of which shall not exceed 40 days of accumulated sick leave plus 16 hours for each 100 hours or fraction thereof of accumulated sick leave in excess of 320 hours.

. . .

2.12 SICK LEAVE

(1) Employes may be given leave of absence with pay for illness or disability of 3.7 hours for each pay period, or a proportionate credit for employes who regularly work less than 40 hours per week; provided, however, that such credit shall be canceled for each pay period in which the employe is absent without pay for more than 3/8 of the required hours except absences due to disability in line of duty or leave for military service; and further provided that:

. . .

4.02 GRIEVANCE PROCEDURE

The County recognizes the right of an employe to file a grievance and will not discriminate against any employe for having exercised her rights under this Section.

. . .

4.03 SELECTION OF ARBITRATOR

. . .

(3) INTERPRETATION OF AGREEMENT

Any dispute arising between the parties out of the interpretation of the provisions of the Agreement shall be discussed by the Federation with the Department of Labor Relations. If such dispute cannot be resolved between the parties in this manner, either party shall have the right to refer the dispute to arbitration in the manner prescribed in par. (1), except as hereafter provided.

The parties may stipulate to the issues submitted to the arbitrator and shall present to such arbitrator either orally or in writing, their respective positions with regard to the issues in dispute. The arbitrator shall be limited in arbitrator's deliberations and decision to the issues so defined. The decision of the arbitrator shall be filed with the Department of Labor Relations.

(4) ARBITRATOR'S AUTHORITY

The arbitrator in all proceedings outlined above shall neither add to, detract from nor modify the language of any civil service rule or resolution or ordinance of the Milwaukee County Board of Supervisors, nor revise any language of this Agreement. The arbitrator shall confine himself/herself to the precise issue submitted.

(5) FINAL AND BINDING

The decision of the arbitrator when filed with the parties shall be binding on both parties.

STATEMENT OF THE CASE

This grievance involves Federation of Nurses and Health Professionals, Local 5001, AFT, AFL-CIO representing the employes set forth in Article 1.01, Recognition. (Jt. 1) The Union alleges that the County violated Sections 2.11 and 2.12 of the Memorandum of Agreement in its calculation of earned retirement leave for two Nurse Grievants who retired from County employment by not giving them full credit for sick leave earned under Section 2.12 of the Agreement. (Jt. 2)

The Grievants were both part-time employes at the time the Grievants applied for and received retirement leave. Both Grievants had worked full-time at various points in their employment as Registered Nurses with the County. Section 2.11(4)(a) of the Agreement provides for retirement leave, which consists of the employes' accumulated sick leave. Employes may receive a maximum of forty (40) days of accumulated sick leave. In addition, employes with more than three hundred twenty (320) hours of accumulated sick leave receive an additional sixteen (16) hours of leave per each one hundred (100) hours or fraction thereof above the base of three hundred twenty (320) hours. Due to their status as part-time employes at the time of their retirement, the County computed the Grievants' retirement leave benefits differently than if they had been full-time. The County computed their 40 days of accumulated sick leave at half-time or four hours or 160 hours rather than 40 eight-hour days or 320 hours. According to testimony by the County, this method of computing part-time employes' sick leave had been in effect since 1983. This methodology resulted in the County interpreting the forty days as applying to full-time employes only; part-time employes were given a proportionate credit the equivalent of half-time or four hours per day. Section 2.12 of the parties' agreement describes the manner in which employes earn sick leave benefits. Full-time employes earn 3.7 hours of sick leave per pay period. Part-time employes who regularly work less than 40 hours per week earn a proportionate credit. (Jt. 1)

The retirement leave computations by the County for the Grievants provided for 160 hours for 40 days of accumulated sick leave rather than 320 hours. (Jt. 3 and 4) These computations resulted in the grievances being filed. (Jt. 2) Further facts as alleged by the parties will be discussed through the statement of the parties' positions and the Discussion section of this Award.

The parties processed the grievance through the contractual grievance procedure and were unable to settle the grievance; the grievance was appealed to arbitration. No issue was raised as to the arbitrability of the grievance through the arbitration hearing. The hearing in

this matter was held by the Arbitrator on December 9, 1999 in the City of Milwaukee, Wisconsin in the offices of the Milwaukee County Courthouse. The hearing concluded at 12:03 p.m.

POSITION OF THE PARTIES

Union Position

The Union argues that Section 2.11(4) is clear and unambiguous on its face. The Union argues that forty days means forty days and that the only hours given to define a workday in the collective bargaining agreement are either eight, ten or twelve hours. (See Section 2.26 of Jt. 1) There is nothing in Section 2.11 or the entire labor agreement to suggest that part-time employes receive pro rata retirement leave benefits or four hours times forty days rather than eight hours times forty days. The Union points out that other sections of the labor agreement concerning sick leave, holidays and vacation provide for pro rated benefits for part-time employes, but that such pro ration was not carried forward into Section 2.11 covering retirement benefits. The Union notes that by having their sick leave benefits pro rated under Section 2.12, the Grievants in this case, as part-time employes when they retired, already have had taken into account their working less than full-time in the computation of their sick leave benefits and that it would be egregiously unfair for that to occur again in computation of their retirement leave benefits under Section 2.11. The Union points out again that nowhere in the collective bargaining agreement is half time described as a four hour day. The only time periods given to a "day" are either eight, ten or twelve hours a day and that Grievants, when they did work half time, always worked an eight-hour day.

The Union argues that the County cannot rely on a past practice argument because a past practice cannot "vitiate" clear and unambiguous language of the collective bargaining agreement. The Union strongly argues that it could not have acquiesced in the County's practice of computing retirement benefits for part-time employes under Section 2.11 as it never had any knowledge of this practice and, therefore, the Union has never agreed and acquiesced in this "past practice" of the County. Further, the Union submits that there is no evidence that the County ever informed the Union that it was following this methodology, and no complaint has ever been filed with the Union by any Union member. The Union avers that the testimony of the County's own witness proves there have been few part-time employes applying for retirement benefits. Therefore, it would not be unusual for the Union not to have been aware of the practice because of the lack of complaints from its members.

The Union concludes by asking the Arbitrator to rule in favor of the Grievants and award them the same calculation of sick leave retirement benefits as a full-time employe would receive.

County Position

The County argues that Section 2.11(4) is unambiguous and points out that the sick leave benefit accumulation in 2.11(4) is stated in days not hours and in calculating work days the County appropriately interpreted Section 2.11 taking into consideration the full-time and part-time status of the retiree at the time of the retirement. The County strongly argues that this method of calculating accumulated sick leave benefits has been the County's practice, as substantiated by the testimony of its witness and Joint Exhibit 5, since 1983. The County submits that the Union has acquiesced in this practice of the County. The County points out that in the negotiation history that the Union introduced, the Union never attempted to amend Section 2.11 or to specify the Union's point of view on this issue. The County argues that all part-time employes have been treated the same as the Grievants and that part-time Union members who were retired from County employment at the time of the Doyne Hospital closing were treated the same as the Grievants in this particular matter.

The County also submits, in its post-hearing brief, that the Grievants are no longer County employes and are not covered by the terms of the labor agreement and are not entitled to the Agreement's benefits, i.e., the grievance process with final and binding arbitration.

The County concludes its argument by stating that the County's administration of the retirement leave provision (2.11) is both consistent and of longstanding and that the practice has given life to the words of the contract since at least 1983, which would override the Union's interpretation of Section 2.11 should the Arbitrator agree that the Union's interpretation is correct. The County takes the position the Union is merely trying to amend the contract by arbitration not through collective bargaining. The County requests that the Arbitrator reject the effort of the Union and deny the grievance.

DISCUSSION

This is a contract language arbitration. The Union has alleged that the County violated Sections 2.11 and 2.12 of the Agreement when it did not give the two Grievants full credit for their accumulated sick leave at the time of their retirement. Section 2.12 of the Agreement covers the procedure for employes to accumulate sick leave:

> 2.12 SICK LEAVE
>
> (1) Employes may be given leave of absence with pay for illness or disability of 3.7 hours for each pay period, or a proportionate credit for employes who regularly work less than 40 hours per week; provided, however, that such credit shall be canceled for each pay period in which the employe is absent without pay for more than 3/8 of the required hours except absences due to disability in line of duty or leave for military service; and further provided that: . . . (Jt. 1)

There is no dispute that less than full time employes accumulate sick leave credit at a rate commensurate with the hours they work and at a rate less than full time employes. And there is no dispute over the computation of the Grievants' sick leave. The dispute arose when the Grievants went to the County just prior to their planned retirement to have their retirement benefits calculated. Section 2.11(4) of the retirement provision provides:

> 2.11 RETIREMENT SYSTEM
>
> (4) Upon retirement, employes shall have the following options:
>
> (a) A retirement leave may be taken, the duration of which shall not exceed 40 days of accumulated sick leave plus 16 hours for each 100 hours or fraction thereof of accumulated sick leave in excess of 320 hours. (Jt. 1)

The Grievants met with County Human Resources Department employe, Gloria Fritz, who informed Grievants that since they were not full time employes they would only receive credit for one-half of their first 320 hours of accumulated sick leave or 160 hours. (Jt. 3 and 4) Grievants were told that since 1983 that is how the County had computed sick leave credits for employes working less than full time. (Jt. 5) Grievances were then filed leading to this arbitration.

The County raised for the first time in their post hearing brief that Grievants, since they are now retired, no longer had a right to the arbitration provisions of the parties' labor agreement. I accept that the County is raising an arbitrability issue, though it did not argue it with much vigor. Where an employer has raised an arbitrability issue for the first time in its post hearing brief, I have held, as I do now, that it is too late. By raising the issue at this time, the County denies the Union any reasonable opportunity to respond. To consider such an argument at this time denies the Union fundamental due process. Therefore, I reject the County's arbitrability argument and proceed to consider this matter on the record before me. 1/

1/ MARATHON COUNTY, WERC CASE 263, NO. 57509, MA-10657 (HAHN, 1999); JOY MFG. CO., 44 LA 304, 306 (SEMBOWER, 1965); WINNEBAGO COUNTY, WERC CASE 184, NO. 43883, MA-6098 (GRATZ, 1990).

Both parties argue in their briefs that the language of Section 2.11(4), the only real area of dispute, is unambiguous and supports their respective positions. The language cannot be supportive of both positions; it would, therefore, be tempting to find the language is ambiguous. However, I am not obligated to agree with either party. I am obligated to consider Section 2.11(4) as it reads and as it fits with the language of the rest of the Agreement and the probable intent of the parties. I also am to read the language to avoid a harsh result. 2/

I find that the language of Section 2.11(4) is unambiguous and requires the County to give the

Grievants full credit up to 320 hours for their accumulated sick leave. Nowhere in 2.11(4) is there any differentiation between part time or full time employes. Nowhere in 2.11(4) is "days" defined. Section 2.26 of the Agreement defines the "workday" in terms of eight, ten or twelve hours. Nowhere in the Agreement is a day or half day defined in terms of four hours or half of eight, ten or twelve hours.

2/ See generally: Common Law of the Workplace, Chapter 2, Contract Interpretation, by National Academy of Arbitrators, Theodore J. St. Antoine, editor, Bureau of National Affairs, Inc. (1998) and Elkouri & Elkouri, How Arbitration Works, Chapter 9, Standards for Interpreting Contract Language, 5th Edition, Voltz & Goggin, co-editors (1997).

Reviewing other sections of the Agreement it is clear that the parties have provided for the accumulation of benefits on the basis of hours actually worked. 3/ And yet, in Section 2.11(4) no such pro ration of benefits is stated based on an employe's status. To receive the retirement benefit a person only has to be an "employee" with accumulated sick leave. (Jt. 1) I agree with the Union argument that the Grievants have already had their less than full time employment accounted for in the method that employes accumulate sick leave under Section 2.12. I can find nothing in the language of Section 2.11 that allows or obligates the County to reduce a less than full time employe's accumulated sick leave at the time of retirement.

3/ Jt. 1, Sections 2.02 (Overtime), 2.12 (Sick Leave), 2.21 (Vacation), 2.22 (Personal Hours), 2.23 (Holidays). Other provisions offer no differentiation between full time and part time employes, 2.27 (Certification Fees), 2.28 (Duty Incurred Injury), 2.34 (Seniority), 2.38 (Jury Duty).

Because I find the language to be unambiguous, I need not and do not resort to evidence of bargaining history.

Because I find the language unambiguous, evidence of past practice is not relevant as an aid to resolving contractual ambiguity. However, the County has also argued, in the alternative, that the practice is strong enough to amend the contract language. I turn to a consideration of this argument. While there are many definitions of a past practice there is not any real dispute that a past practice includes: clarity and consistency of the pattern of conduct; longevity and repetition of the activity; acceptability of the pattern of conduct and mutual

acknowledgment on the pattern of conduct by the parties. 4/ Arbitration case law precedent

requires that for practice to modify unambiguous language, there must be sufficient evidence of a mutual accord between the parties to modify the contract language. 5/

4/ See generally: Common Law of the Workplace, Chapter 2, Contract Interpretations, by National Academy of Arbitrators, Theodore J. St. Antoine, editor, Bureau of National Affairs, Inc. (1998).

5/ Elkouri & Elkouri, How Arbitration Works, Chapter 12, Custom and Practice.

There is little question that the record proves the practice has been clear and consistent and has been repetitive over the past seventeen years. (Jt. 5) County witness, Fritz, testified creditably that she first started calculating the part time employe retiree benefit, as it relates to accumulated sick leave, in 1983. The interpretation of 2.11(4) and how it was to be applied to part time employes was made by her supervisor. Fritz memorialized this interpretation and procedure in a memorandum. (Jt. 5) Fritz testified that she has followed this practice consistently with part time employes from the bargaining unit representing the Grievants and with part time employes in other County bargaining units. I accept that Fritz has treated the Grievants no differently than other employes. But it is clear from her testimony that she offered no reason for this interpretation, which was not hers, other than this was how she was told to do it by her supervisor in 1983, Robert Kazanova; his reasoning never became part of this record. Further there is no explanation of why an employe who works more than twenty hours but less than forty hours would only receive accumulated sick leave credit at the rate of four hours times forty days in Section 2.11(4). It is with the acceptability and mutual acknowledgement of the practice that I find the County's argument in this case problematic.

For the County's past practice argument to succeed, I must determine whether there was a mutual acceptance by the parties of this practice/interpretation in administering Section 2.11 or whether there is evidence that the Union had knowledge and acquiesced in the practice. The Union claims that it did not have any knowledge of the practice and was never informed of it by the County. Union staff person Kelsey testified that no member of their bargaining unit ever complained of or raised the computation as an issue before the Grievants did. There is no evidence in the record that the parties ever agreed to the County's interpretation. Did, however, the Union acquiesce in the practice? To find that the Union acquiesced, the practice would have to be so widely well known as to leave little or no doubt that the Union must have known but did nothing about the practice either in a grievance or at the bargaining table. 6/

6/ Id. @ pgs. 632-633.

The parties did not introduce any evidence as to the size of this bargaining unit and how many of its members worked less than full time. Nor was any evidence introduced as to the number of locations the members worked. The County offered sparse evidence as to the number of part time members of this unit who had retired and accepted without complaint the methodology used by the County in crediting accumulated sick leave for part time employes. Fritz testified that other part time members of this bargaining unit have retired and mentioned the names of two nurses who recently retired. But naming two employes since 1983 who have retired and not giving the specifics of even their retirement does not strike me as significant evidence of a well known practice about which the Union should have known and therefore, as the County argues, acquiesced. I find this particularly so because in this case the County's method of calculation under Section 2.11 is reducing a monetary benefit to the Grievants. While I might credit knowledge to a union for such a practice in a small localized bargaining unit, I cannot do it here based on my general knowledge of the probable size of this bargaining unit and the numerous locations in the County where they work.

I therefore cannot and do not find that this past practice of the County modifies or supplants the language of Section 2.11(4) which I have found requires that all retiring employes receive their accumulated sick leave credit the same as the County has and is doing for full time employes.

Based on the foregoing and the record as a whole, I enter the following

AWARD

The County violated Sections 2.11 and 2.12 of the Memorandum of Agreement in its calculation of earned retirement leave for the Grievants.

REMEDY

The County will calculate earned retirement leave benefits for Grievants under Section 2.11 of the Memorandum of Agreement the same as for full time employes.

Dated at Madison, Wisconsin this 23rd day of February, 2000.

Paul A. Hahn /s/
Paul A. Hahn, Arbitrator

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