BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION OF THE WISCONSIN PROFESSIONAL POLICE ASSOCIATION

and

VILLAGE OF REDGRANITE

Case 12
No. 58915
MA-11108

Appearances:

Mr. Mark R. Hollinger, Staff Attorney, Wisconsin Professional Police Association, 340 Coyier Lane, Madison, Wisconsin 53713 appearing on behalf of the Law Enforcement Employee Relations Division, Wisconsin Professional Police Association, referred to below as the Association.

Mr. William G. Bracken, Employment Relations Services Coordinator, Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of Village of Redgranite, referred to below as the Village or as the Employer.

ARBITRATION AWARD

The Village and the Association are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in grievance number 00-147, filed on behalf of the entire local. The Commission appointed Richard B. McLaughlin, a member of its staff. The parties submitted written stipulations, including exhibits, to the Commission on September 1, 2000, and requested that the grievance be resolved on the stipulation and their written briefs. The parties submitted briefs, and waived the filing of reply briefs on October 16, 2000. In a letter to the parties dated November 6, 2000, I stated:

> You submitted the above-noted file on a written stipulation, including exhibits and written briefs. I write this letter to ask you two questions to make sure I resolve the matter within the scope of your agreement.

The Association's brief (at 7) states: "The Village chose a plan that required deductions when other retirement plans would have required no such deductions." The Village's brief (at 6) states: "There is no escaping the fact that taxes are inevitable and the Village has no choice but to comply with the tax laws and withhold the appropriate taxes on its $2,000 contribution to an employee's IRA."

Regarding the assertion made by the Association, Item 17 of the Stipulations addresses the parties' consideration "during the negotiations for the 2000-2002 Collective Bargaining Agreement" of "other retirement plans." Can I treat as fact the Association's assertion that retirement plans exist, and are available to the Village, that do not require the payroll deductions at issue here?

My question regarding the Village's assertion requires a bit more background. Item 16 of the Stipulations notes that the "maximum allowable contribution to an Individual IRA is $2,000 per year." The Village adds, at 10 of its brief, that "past practice cannot be used to prevent the Village from complying with state and federal tax law." My question concerns the scope of this argument. It is apparent the Village contends that State and Federal law compel it to deduct payroll taxes on its $2,000 contribution. Beyond this, it is apparent the Village contends that it cannot be compelled, under the contract, to grant an "after tax" benefit of $2,000, since that would require a contribution exceeding $2,000 by "about $153 per person" (Item 9 of the Stipulations) in FICA and Medicare taxes. The contractual component of this argument is apparent, but I am concerned about its potential statutory ramifications. Does the Village contend that the Association's attempt to require a $2,000 "after tax" retirement benefit in itself violates State and Federal law?

In a conference call conducted on November 13, 2000, the parties answered the questions posed by my letter of November 6.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

Did the Village violate Section 13.2 by contributing less than an amount to equal $2,000 yearly, in principal, into a bona fide retirement plan maintained for regular full-time employees?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3.0 MANAGEMENT RIGHTS

3.1 Except as expressly modified by other provisions of the contract, the Village possesses the sole right to operate the Village and all management rights repose in it. These rights include, but are not limited to, the following:

. . .

g. To take whatever action is necessary to comply with State or Federal law;

. . .

p. To determine the financial policies of the Village;

. . .

ARTICLE 13.0 FRINGE BENEFITS

. . .

13.2 Retirement: The Village shall provide retirement benefits to regular full-time employees to equal $2,000 yearly, paid in equal monthly installments, paid into a bona fide retirement plan adopted by the Village. The Village may change the retirement plan to an equivalent plan.

. . .

ARTICLE 16.0 GRIEVANCE PROCEDURE

. . .

16.7 Decision of the Arbitrator: The decision of the Arbitrator shall be in writing to the Employer and the Union. The Arbitrator's decision shall be final and binding upon the parties.

The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract provision allegedly breached. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement.

. . .

ARTICLE 22.0 WAGES

. . .

22.2 The salary schedule shall be:

Jan. 1, 2000	Probation	. . .	Step 3
Utility Operator	9.98		13.48

. . .

BACKGROUND

The parties' written stipulation of fact (Stipulation) reads thus:

The parties hereby stipulate to the accuracy of the following:

1. That Grievance 00-147, Case 12, No. 58915, MA-11108 is arbitrable and timely.

2. That Grievance 00-147 is a matter concerning the interpretation of the 2000-2002 Collective Bargaining Agreement, and thus, a matter properly within the jurisdiction of the Arbitrator.

3. That no deduction of payroll taxes (FICA and Medicare) on the retirement plan provided to employees by the Village occurred prior to the completion of the most recent negotiations for the 2000-2002 Collective Bargaining Agreement.

4. That deduction of payroll taxes (FICA and Medicare) on the retirement plan provided to employees by the Village occurred after the completion of the most recent negotiations for the 2000-2002 Collective Bargaining Agreement.

5. That prior to the Wisconsin Professional Police Association (WPPA) first representing the Water Utility and Wastewater Treatment Plant Employees in 1997, the Village of Redgranite unilaterally selected and provided the employees with a Personal Individual Retirement Account (IRA) as the retirement plan adopted by the Village.

6. That the Water Utility and Wastewater Treatment Plant Employees were not represented by any union prior to 1997, nor were they organized into an independent union for purposes of collective bargaining prior to 1997.

7. That the parties did not discuss whether, or not, payroll taxes would be deducted from employees' paychecks for the $2,000 contribution made by the Village into each employee's Personal IRA during the most recent collective bargaining negotiations, nor did the parties discuss this aspect of the employees' retirement plan during the previous negotiations for the 1997-2000 Collective Bargaining Agreement.

8. That the $2,000 contribution made by the Village into the employee' Personal IRA is treated as employee income for tax purposes, and requires that the Village deduct payroll taxes and state and federal income taxes for such a contribution.

9. That payroll taxes (FICA and Medicare) on the Personal IRA retirement plan provided to employees by the Village equals approximately One Hundred Fifty-Three ($153) per year per employee.

10. That should the Arbitrator sustain the grievance, the Arbitrator shall retain jurisdiction over the implementation of the remedy.

11. That the Village's legal counsel advised the Village to withhold appropriate payroll taxes including state and federal income taxes on the Village's IRA contributions made on behalf of employees.

12. That the Village Advised the employees in early 2000 of the option of submitting revised W-4 forms so that employees could adjust their federal income tax withholding to receive a more immediate tax benefit.

13. That employees may be able to deduct the Village's contributions to his/her IRA depending upon his/her federal adjusted gross income, tax filing status and whether or not he/she actively participates in an employer-sponsored retirement plan.

14. That beginning in the year 2000, the Village has made contributions, on a monthly basis, to the employee's IRA account in equal installments that will total $2,000 on an annual basis.

15. That the IRA plan currently in place is a bona fide retirement plan which began in approximately 1985.

16. That during the 2000-2002 Collective Bargaining Agreement negotiations, the Union proposed that the Village adopt the state's WRS Retirement Plan. No agreement was reached. In its place the parties amended the 1997-2000 contract to increase the Village's retirement plan contribution from 4 percent of the employee's annual gross earnings as provided in the 1997-2000 contract to equal $2,000 yearly paid into a bona fide retirement plan adopted by the Village. The maximum allowable contribution to an Individual IRA is $2,000 per year.

17. That the Union requested during the negotiations for the 2000-2002 Collective Bargaining Agreement, and the Village explored, other retirement plans but for various reasons the Village concluded, and the Union eventually agreed, to continue with the same individual IRA plan that had been in existence since approximately 1985.

18. That the Arbitrator shall formulate the issue. The parties suggest the issue is as follows:

A. Association: Did the Village violate Article 13.0 (Fringe Benefits), Section 13.2 (Retirement), of the Collective Bargaining Agreement by failing to provide retirement benefits to regular full-time employees to equal $2,000 yearly? If so, what is the appropriate remedy?

B. Employer: Did the Village violate Article 13.2 (Retirement) by providing retirement benefits to regular full-time employees to equal $2,000 yearly, paid in equal monthly installments, paid into a bona fide retirement plan adopted by the Village? If so, what is the remedy?

The IRA referred to in the parties' stipulation is referred to below as the Plan.

Grievance No. 00-147 was included with the Stipulation. It reads thus:

. . .

BASIS FOR GRIEVANCE: Violation of Article 3.0 - Management Rights, Article 13.0 - Fringe Benefits; Section 13.2 Retirement, Article 22.0 - Wages, and any other relevant Articles and/or Sections of the Agreement.

REMEDY FOR GRIEVANCE: The Employer shall immediately repeal its decision to assess additional FICA and Medicare Tax deductions from the grievant's paycheck for employer contributions toward the grievant's retirement plan. Furthermore, the Employer shall pay back, to the grievant, any relevant FICA and Medicare Tax assessments to date.

. . .

Also included with the exhibits submitted with the Stipulation is the parties' 1997-99 labor agreement. Section 13.2 of that agreement states:

> Retirement: The Village shall provide retirement benefits to regular full-time employees at the rate of four percent (4%) of the employee's annual gross earnings, paid into a bona fide retirement plan adopted by the Village. To be eligible for this benefit, employees must contribute a minimum of twenty dollars ($20) per month into their own retirement account. The Village may change the retirement plan to an equivalent plan.

In the November 13 conference call, the parties agreed that I could treat as fact the Association's assertion that retirement plans exist, and are available to the Village, that do not require the payroll deductions at issue here. The parties also noted their understanding that the Village was not contending that the Association's attempt to require a $2,000 "after tax" retirement benefit in itself violates State and Federal law.

THE PARTIES' POSITIONS

The Association's Brief

After a review of the record, the Association contends that Section 13.2 governs the grievance, and that resolution of the grievance demands that "the arbitrator . . . determine and carry out the mutual intent of the parties." Here, the "language of Section 13.2 is clear and unambiguous," and requires that employees are to receive not less that $2,000 annually toward the Plan.

The Village's Plan "is the same as has been in effect since at least 1985, and . . . requires that payroll taxes be deducted." That the Village never deducted taxes from its contributions to the Plan until after the negotiations for a 2000-2002 labor agreement demonstrates that the parties mutually understood Section 13.2 to set a contribution level not to be reduced by any necessary taxes. Further support for this is demonstrated "by the dictionary definition of the word 'equal'." The Village's deduction for payroll taxes reduces the $2,000 requirement set by Section 13.2 by $153.

The Association contends that the Village's obligation under Section 13.2 cannot persuasively be analogized to "its legal requirement to deduct payroll taxes on employee wages." The "plain language of 13.2 and the record of the last fifteen (15) years" undercuts the analogy. That the Village is not required to adopt a retirement plan requiring payroll deductions underscores this conclusion. The Village's unilateral choice of a plan requiring payroll deductions cannot be held against employees or be used as a basis to reform Section 13.2.

Any possible ambiguity in Section 13.2 can be resolved by demonstrated past practice. The Stipulation establishes that the "Village has never deducted payroll taxes without reimbursement on its retirement plan contributions, nor has it ever raised the specter of such unreimbursed deductions." The Village "cannot reasonably argue that it did not accept its own actions over the many years."

If the Stipulation fails to establish a binding practice, it must be found to establish a Village waiver of "its right to hold employees responsible for the payroll deductions on retirement benefits." Village failure to act prior to the time at issue here constitutes a "waiver . . . by the tacit consent or failure of an employer . . . for an unreasonable length of time, to act upon rights of which it has full knowledge." The Plan was unilaterally adopted by the Village no later than 1985, and "twice agreed to in negotiations." At no time prior to the conclusion of bargaining for the 2000-2002 labor agreement did the Village act to assert the right challenged here. That right must be considered waived.

The Association concludes that the grievance must be sustained, and that "the Arbitrator order the Village to reimburse the costs of all payroll deductions taken from employees on their retirement contributions." The Association further requests "that the Arbitrator either order the Village to reimburse the costs of retirement plan payroll deductions prospectively, or order the Village to adopt a retirement plan that requires no such deductions."

The Village's Brief

The Village contends that Item 14 of the Stipulation establishes that it is providing contributions to the Plan totaling $2,000 annually. This figure "is the maximum allowable contribution the Village can make into an employee's personal IRA account." From this it follows that "the Village has complied with the specific requirements contained in Section 13.2 of the contract." Those requirements must be considered clear and unambiguous, and the grievance must, therefore, be denied.

Section 3.1 provides the Village the authority to determine financial policies and to take any action required by State or Federal law. The Village contends that it erred in not deducting payroll deductions in the past, and acted promptly to correct that error. This action was authorized by Section 3.1.

Nor can past practice evidence be used to reach a contrary result. The Village's legal duties supercede the contractual significance of past practice, and past practice cannot be used to "continue an error once it is discovered by an employer." Because the Village did no more than comply with the law in a fashion not violating the contract, past practice affords no basis to resolve the grievance.

The Village further argues that the Association's contention that Section 13.2 establishes an "after tax" benefit is inconsistently advocated and must be rejected. That the Village afforded employees the opportunity to submit revised W-4 forms "to receive a more immediate tax benefit rather than wait until the employee filed his/her tax return" establishes the Village's good faith in addressing the error. Depending on the individual employee's personal circumstances, "the State and Federal taxes that have been withheld will eventually be recovered by employees, in most cases." More significantly, the Association has failed to submit evidence "that the parties ever bargained an 'after tax' or 'net' benefit arrangement on the Village's retirement contribution." The Association's position is inconsistent with other agreement provisions. Section 22.2 specifies wage rates, but there can be no serious argument that these wage rates are "net" of taxes. Arbitral authority supports this conclusion.

The language of the labor agreement is, in any event, clear and unambiguous and arbitral perception of the "equities" of the grievance affords no basis to overturn that language. Section 16.7 specifically restricts an arbitrator to the language of the agreement, and the Association's attempt to pull arbitral review beyond it must be rejected.

A review of the record substantiates the contractual strength of the Village's action and the contractual weakness of the Association's position. The Village concludes by requesting "that the Arbitrator dismiss the grievance."

DISCUSSION

The issue for decision does not adopt either statement proposed by the parties. Those statements presume the violation or compliance put at issue here. The issue stated above highlights the parties' agreement that Section 13.2 governs the dispute, and notes that Village compliance or non-compliance with the section cannot be presumed.

As preface to addressing the issue, it is useful to stress what is not in dispute. The application of state and federal law is only peripherally posed here. The grievance can be read to seek to have the Village decline to pay the disputed tax. As the Village accurately points out, Subsections g and p of Section 3.1 preclude this. The taxes must be, and have been, paid. Thus, the remaining dispute is contractual, not statutory. The issue is whether the $2,000 payment required by Section 13.2 is a gross or an after-tax benefit to the employees.

The Management Rights specified in Article 3 do not govern this issue directly, since by the terms of Section 3.1, they apply "(e)xcept as expressly modified by other provisions of the contract." Subsections g and p of Section 3.1 thus govern the grievance only to the extent Section 13.2 does not. While the parties differ on their views of Section 13.2, it is evident that

the section directly governs the grievance. Contrary to the parties' arguments, the language of Section 13.2 cannot be said to unambiguously dictate adoption of either party's view. The arguments advanced by each party are forceful and plausible interpretations of the section.

The language of that provision, and what can be said of relevant interpretive guides, favors the Association's view. Section 13.2 obligates the Village to "provide retirement benefits . . . to equal $2,000 yearly". Significantly, the mandate focuses generally on "retirement benefits . . . to equal" rather than stating no more than the specific dollar amount. As an interpretive matter, all the terms of Section 13.2 must be granted meaning. The Village's view, however, renders meaningless the reference "retirement benefits . . . to equal". Under the Village's view, the first sentence reads: "The Village shall provide to regular full-time employees $2,000 yearly, paid in equal monthly installments . . ."

Viewed more specifically, the reference preceding the "$2,000 yearly" payment mandated by Section 13.2 favors the Association's view. The Village forcefully points out that the reference can be read as no more than a preface to the required contribution. However, the language employed by Section 13.2 must be contrasted to other references preceding contractual payments. For example, Section 22.2 states that "(t)he salary schedule shall be", then specifies the dollar amounts. There would appear to be no latitude in the prefatory statement, and the Village properly notes the wage payments are a gross benefit. The prefatory statements in the contract provision governing the IN RE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION (OCSEA) AND PUBLIC EMPLOYEES REPRESENTATIVES UNION (PERU), 97 LA 942 (BRUNNER, 1991) case cited by the Village are similarly specific. That language provides that "(a)ll employees . . . shall receive a monthly car allowance of $350.00" and that "each staff representative shall receive a monthly per diem allowance of $185.00". Neither prefatory reference permits latitude for interpretation. The arbitrator found each to preface a gross contribution.

Here, however, the reference preceding the "$2,000 yearly" payment is "retirement benefits . . . to equal". Each part of this reference introduces fluidity into the mandated payment. The mandate is thus focused initially on "retirement benefits" and then on a stated dollar amount. The initial focus on retirement benefits must be noted. The reference "to equal", when combined with this focus cannot be lightly brushed aside. On a grammatical level, the Association's view introduces some flexibility into the "$2,000 yearly" payment, since a net benefit of $2,000 will require a larger than $2,000 gross contribution. This fluidity has some support in the language of Section 13.2

More significantly, Section 13.2 deals with a retirement plan, and this lends further significance to the reference to "retirement benefits . . . to equal 2,000 yearly". As Paragraphs 15 and 16 of the Stipulation make clear, the retirement plan governed by Section 13.2 is an IRA subject to a maximum annual contribution of $2,000. Paragraphs 8

and 12 of the Stipulation further clarify that the contribution is taxable income to the individual employee. Paragraph 13 makes apparent that, subject to an individual employee's personal circumstances, the employee may be able to deduct the Village's contribution to the IRA. This general background sketches out, in my view, that the "$2,000 yearly" reference is akin to the use of a generally understood term of art. Contributions to a traditional IRA may or may not be deductible, but are capped in any event at $2,000 yearly. The same cap governs the ROTH IRA, which must be funded with after-tax dollars. Thus, the amount of after tax dollars necessary to reach the $2,000 cap on IRA contributions may vary, but the $2,000 cap is constant and is thus a reference to a principal contribution to the retirement account. Put another way, an individual who can deduct an IRA contribution will suffer less out of pocket expense to reach the maximum contribution than will an individual who cannot. In either event, however, the principal amount contributed to form the IRA retirement benefit would be $2,000. The use of individual IRA plans is fairly widespread and with it, in my view, the common understanding that in the retirement area it may take more or less than $2,000 to contribute the maximum amount of principal annually to an IRA. The contribution maximum is constant, the individual costs to reach it are not.

Against this background, the reference to "retirement benefits . . . to equal $2,000 yearly" in regard to an IRA plan connotes the maximum annual principal contribution more than the out of pocket expense necessary to reach that contribution. This favors the Association's view of Section 13.2 over the Village's.

The Village's contention that dollar amounts specified in the agreement are typically gross, not net, amounts is persuasive. As touched upon above, however, the language of Section 13.2 is unique. The prefatory reference "retirement benefits . . . to equal" does not mirror the preface to the Wage schedule of Article 22. Beyond this, the "$2,000 yearly" reference connotes, in my view, a different meaning when applied to an IRA than when applied to a salary. Few would anticipate receiving a net benefit from a contract providing "$2,000 yearly" to salary, but that changes when the "2,000 yearly" is applied to an IRA. This view is supported by the focus of Section 13.2 on "retirement benefits" and on the more fluid reference "to equal $2,000 yearly".

What evidence there is of guides to interpreting contractual ambiguity slightly favors the Association's view. The most persuasive of these guides are past practice and bargaining history since they focus on the conduct of the parties whose intent is the source and the goal of contract interpretation. As the Village properly points out, the strength of these guides must not be overestimated. Past practice cannot exempt the Village or the Association from state and federal tax requirements. Section 3.1 g, precludes this. Thus, the prior non-deduction of taxes, even if characterized a past practice, cannot serve as a tax exemption. As an interpretive matter, however, the error has no impact on the labor agreement. More to the

point, the evidence shows at a minimum that the parties have not expressly addressed the impact of FICA and Medicare taxes on the contribution mandated by Section 13.2. This increases the likelihood that when the parties agreed to set a "$2,000 yearly" contribution level, they mutually understood that $2,000 in principal would be contributed to the IRA.

What evidence there is of bargaining history favors, if slightly, the Association's view. Section 13.2 of the 1997-99 labor agreement set the mandated contribution at "the rate of four percent (4%) of the employee's annual gross earnings". Here, the reference to "gross earnings" affords some basis to believe that if the parties saw the "$2,000 yearly" contribution as a gross amount, they would have expressly stated this. At a minimum, the evidence of practice and bargaining history makes it unpersuasive to conclude that the bargaining parties envisioned something other than a "$2,000 yearly" principal contribution to an IRA.

The final consideration worthy of some note is that the Village unilaterally adopted the Plan governed by Section 13.2. The final sentence of the section reserves to the Village the discretion to change the Plan "to an equivalent plan." The Association has noted that the Village chose a plan that required the taxes at issue here. That other options not requiring these deductions are available to the Village makes it difficult to hold the unanticipated tax deductions of the current Plan against the employees.

In sum, the language of Section 13.2 cannot be considered clear and unambiguous. However, the common meaning of its terms favors the Association's view over the Village's. What evidence there is of interpretive guides does not undercut, and slightly supports that view. Thus, the obligation of Section 13.2 must be read to impose on the Village a "$2,000 yearly" principal payment to the Plan.

The parties stipulated that I should retain jurisdiction in the event I determined the Village violated the labor agreement. The Award stated below notes that retention of jurisdiction, and states a flexible period of time to permit the parties to address the issue with or without my involvement prior to my acting to relinquish jurisdiction. In light of the retention of jurisdiction, and in the presence of the unique language of Section 13.2, further comment on the remedy at this point is ill advised. The parties should be permitted to address the point mutually prior to any remedial action on my part.

AWARD

The Village violated Section 13.2 by contributing less than an amount to equal $2,000 yearly, in principal, into a bona fide retirement plan maintained for regular full-time employees.

As the remedy appropriate to this violation, the Village shall take appropriate action to make affected employees whole for its violation of Section 13.2. As requested by the parties, I will retain jurisdiction over the grievance to determine the specific remedy. I will retain jurisdiction for not less than forty-five days from the date of this Award.

Dated at Madison, Wisconsin, this 27th day of November, 2000.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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