BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

RACINE POLICE ASSOCIATION

and

CITY OF RACINE

Case 604
No. 59735
MA-11390

Appearances:

Mr. Gordon E. McQuillen, Attorney at Law, Cullen Weston Pines & Bach, appearing on behalf of the Association.

Mr. William R. Halsey, Attorney at Law, Long and Halsey Associates, Inc., appearing on behalf of the City.

ARBITRATION AWARD

The Association and the City named above are parties to a collective bargaining agreement which provides for final and binding arbitration of certain disputes, and they jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned as the arbitrator to hear the grievance of David Iverson. The undersigned was appointed and held a hearing on June 1, 2001, in Racine, Wisconsin, at which time the parties were given the opportunity to present their arguments and evidence. The parties completed filing briefs by August 8, 2001.

ISSUE

The parties ask:

> Did the City violate Article XV of the collective bargaining agreement in effect between the City of Racine and the Racine Police Association when it terminated the pay status of Racine Police Officer David A. Iverson? If so, what is the appropriate remedy?

CONTRACT LANGUAGE

ARTICLE XV

Duty Incurred Injury

1. Three (3) Days or Less: If an employee is injured during the course of his/her employment and loses three (3) work days because of such occupational injury or disease, the City will pay the established wages for the time of his/her absence from work.

2. More Than Three (3) Days: If the employee loses more than three (3) days because of occupational injury or disease, the City will continue to pay the employee's full wage for nine calendar months from the date of said injury. Thereafter, the employee will receive Worker's Compensation payment pursuant to a carrier or self-funded program provided by the City. Such Worker's Compensation payments shall continue until the employee qualifies for and receives a disability pension from the Wisconsin Retirement System, or until the employee reaches the point of maximum recovery and is able to return to work.

The City will attempt to obtain full or part time employment of a police nature within the medical limitations of the disabled employee during the period of disability if the employee is unable to return to the position he/she occupied before the disability. The City will guarantee a continuous income equal to the employee's calculated WRF benefit to the employee while his/her disability pension is being considered. The employee will sign a waiver and pay back to the City any monies paid by the City beyond the retroactive starting date of the employee's pension and the Association agrees to assist in such efforts. The employee agrees to pursue a duty-incurred disability pension in a timely fashion.

In order to qualify for the wage continuation plan set forth above, the employee shall endorse the compensation check received by him/her from the insurance carrier and turn the same over to the City.

3. Non-Duty Incurred Injury: If an employee loses more than three (3) days because of injury which is not incurred in the line of duty, positions of a police nature within the capability of the employee may, at the Chief's sole discretion, be made available to the employee in question. Any such assignment, which shall be dependent upon availability of such work in the Department, may be made on any shift within the Department.

BACKGROUND

The basic facts are not in dispute. David Iverson was a police officer with the City. On January 5, 1999, he was working as a security guard/police officer at Gilmore Middle School and was injured in an incident with a student. He filed an injury report with the City and was off work for a couple of weeks. He was given light duty status, and his medical expenses arising from the incident were paid by the City or by insurance. His light duty status was terminated around December 4, 2000, but he was placed on administrative leave with pay until February 16, 2001, when the City notified him that he would be laid off due to his inability to perform the essential functions of his job.

Iverson applied for duty disability under Wis. Stats. Sec. 40.65 on January 14, 2000. The City disputed that the injury was duty incurred. Iverson applied for a hearing, which was still pending at the time of the arbitration hearing. The City stipulated that the injury to Iverson was duty related when Iverson was paid Worker's Compensation benefits. The City later received a medical opinion regarding a pre-existing injury and disputed that the injury or disability was duty incurred.

The language at issue was first negotiated into the labor contract in 1996. James Kozina, recently retired from the City after serving 23 years as Human Resources Manager, was the chief spokesman in all contract negotiations. The Association was concerned that when an officer applied for duty disability, there was a gap between the time he or she was no longer able to work and the time he or she received the disability pension. The parties agreed that the City would provide the equivalent of the Wisconsin Retirement estimated duty disability pension until the pension was approved, retroactive to the time of termination, and then the officer would pay back whatever money the City had paid to them.

The Association brought the issue to the bargaining table. The current representative of the bargaining unit was not involved in those negotiations. The City was the final drafter of the language. Kozina testified that the intention of the language was to cover officers in the interim period between their termination and receipt of their duty disability pension, and it was for duty disability injuries. Duty disability claims arose frequently during Kozina's tenure with the City. The City has the option to certify that the injury is duty incurred or to oppose it. In Iverson's case, the City has opposed the claim that his disability is a result of duty incurred injury.

Kozina testified that the City made payments under Article XV when it had certified that an injured was duty incurred. In one case, the City had difficulty recovering money that had been paid when a person started receiving a duty disability pension. The City has never made payments under Article XV when it has not certified that the injury was duty incurred.

Kozina further testified that it was never the City's intention to cover officers who were injured off duty, and that the Association never asked for that kind of protection.

During the negotiations for the 2000-2001 contract, the City made proposals to change Article XV, which Kozina characterized as housekeeping or clarifications. It was his position that he would never make proposals that would impact a pending dispute, and Iverson's case was in dispute when the proposals were made. The language was not changed in the 2000-2001 contract.

THE PARTIES' POSITIONS

The Association

The Association asserts that the plain meaning of the language in the labor contract supports its position. The 3rd paragraph of Section 2 of Article XV states that the City will guarantee a "continuous income," and the Association assumes that term needs no further clarification. However, the Association asserts that the phrase – "while his/her disability pension is being considered" – cannot mean anything except its plain meaning. To consider something is to think about it carefully and seriously, according to the American Heritage dictionary. The City apparently proposes that "being considered" is a foregone conclusion, that an officer's eligibility for benefits must have been approved before he applied for those benefits.

The Association submits that the language simply does not say that. It also submits that the City's argument is circular reasoning. The City reasons that an officer's injuries must be duty-related in order to qualify for benefits under the Agreement, and since the City does not think that Iverson's injuries are duty-related, he does not qualify for benefits. But the City ignores the language that says he gets benefits while his application for benefits is being considered. Moreover, the City has complete control over the outcome of Iverson's Sec. 40.65 application at this point. Only the City has imposed an impediment to a decision by the Employee Trust Funds awarding Iverson his benefits. If the City changed its mind, the benefits would be granted and the City's concerns would evaporate. The City believes it can impose this impediment in any Sec. 40.65 case and force the applicant into a status of having no income. The plain intent of the language is that the City bears the cost of preserving an employee's income *status quo* during the pendency of an application for duty disability. If the City's interpretation were allowed to stand, it would shift the economic burden flowing from the officer's injuries from the taxpayers as a whole to the disadvantaged individual officer.

The Association further asserts that the language in dispute would be a nullity if the City's argument were to prevail because the City argues that only if Iverson receives benefits is he entitled to compensation from the City. The City is not the party that is to be doing the "considering" of his application for statutory benefits, it is the State of Wisconsin that is "considering" Iverson's application for benefits.

The Association finds that City's concern of economic loss to be without merit. The City worries that an employee has no incentive to apply for Sec. 40.65 benefits if he or she continues to be paid by the City. That is not even relevant, since Iverson applied for benefits.

If another employee does not apply, the City can raise that issue before another Arbitrator. If the employee's application is denied, then the City may have a case for cutting off the flow of the continuous income, but only then. Moreover, if an employee does not apply for Sec. 40.65 benefits, then his or her application for benefits is not being considered, so there can be no claim by that employee for the continuous income from the City under Article XV of the Agreement.

According to the Association, the City's attempt to change the language during recent negotiations undercuts its argument. Just a few weeks before the City placed Iverson on unpaid leave, the City proposed to insert a provision to limit an employee's payments to 85 percent of their regular wages for 3 months. The Association rejected that proposal. Then the City tried to change the language to apply to employees who qualify and receive a duty disability pension. That proposal was made less than a week before placing Iverson on unpaid leave. If the language meant what the City argues it means in this case, there would have been no need for the City to propose modifying it. There is no indication in the proposal that the City was merely trying to clarify an existing practice. Rather, the City was trying to get the Association to agree to its approach in the Iverson case as a valid reading of the contract. When a party attempts but fails to include a specific provision in contract negotiations, arbitrators will hesitate to read that provision into the contract.

The City

The City disputes the Association's contention that because Iverson filed for duty disability, the City must provide the continuous income benefit while his eligibility for the benefit is being litigated. The title of the contract language is "Duty Incurred Injury." Kozina testified that this language was recently added to the labor agreement, in response to the concern raised by the Association that officers who were awaiting certification of their disability claim were exhausting their sick and vacation benefits. Kozina further testified that this arose in the contest of cases where the City was in agreement with the duty disability claim. That is why the continuous income guarantee is included only under the duty incurred injury paragraph. Another section, Article XV(3), deals with non-duty injures, and that is how the City views Iverson's claim.

The City states that in the event Iverson prevails in his duty disability case, he will be made whole under the duty incurred injury language. Under the Association's interpretation of the disputed language, anytime an officer applies for a duty disability pension, the City must make payments under the continuous income guarantee. There is no provision in the labor agreement to require an officer to repay the money if the duty disability application were denied. This would result in the City making payments under the continuous income provision in ridiculous situations. An officer who falls off a ladder at home and suffers a permanent disability would file for duty disability benefits. Although he or she would have no chance of receiving the disability pension, the City would be forced to pay tens of thousands of dollars to

the officer. Duty disability cases can take a great deal of time to resolve. Iverson's claim was dated January 14, 2000, and no hearing was scheduled as of the date of this arbitration hearing.

The City submits that arbitrators have historically rejected contract interpretations that would result in that type of nonsensical result. If one interpretation leads to a harsh or absurd or nonsensical result, and another interpretation leads to a just and reasonable result, the latter interpretation would be used.

Another allegation in the grievance dealt with Iverson's light duty status. He was assigned light duty until December 4, 2000, when Human Resources became aware that Dr. Klein believed he was permanently disabled. That was consistent with the light duty notification that he received in January of 1999. The Department has consistently used light duty assignments only while an officer was recuperating. Once a determination is made that an officer is permanently disabled, the light duty assignment is terminated. Under the non-duty incurred injury provision, light duty assignments are at the Chief's sole discretion. The City acted in good faith in dealing with Iverson. He was allowed to work on a light duty basis for almost two years. The City exercised its right to have Iverson undergo an independent medical examination, which resulted in all doctors agreeing that he is permanently disabled. The City is exercising its right to contest whether the disability is duty-incurred. There is no evidence of bad faith in this matter.

In Reply, the Association

The Association responds by stating that the City predicates its argument almost exclusively on the caption of the disputed contractual provision – "Duty Incurred Injury." The Association asserts that the City's argument must fail because the broad caption "Duty Incurred Injury" also encompasses Section 3 which is captioned "Non-Duty Incurred Injury." The Wisconsin legislature has adopted the standard rule in construing its enactments that the titles to subchapters, sections, subsections, paragraphs and subdivisions of the statutes are not part of the statutes. There is no good reason that an arbitrator should not adopt the same standard when construing a disputed provision in a collective bargaining agreement.

Also, the City concedes that it proposed the language now in dispute, yet it seems to argue that the disputed language is ambiguous. Arbitrators traditionally construe the language against the proponent of the provision. Moreover, the City ignores the fact that it tried to modify the language in recent negotiations to have it reflect the position it now seeks to have prevail in this arbitration. While the City states that Iverson will be made whole if he prevails in his duty disability case, there is no reference or support for that in the bargaining agreement.

In Reply, the City

The City points out that Association did not rebut Kozina's testimony, and his testimony is entitled to great weight. Kozina has over 25 years of experience labor negotiations and testified that the proposed language change was not prompted by this case. There was no dispute with Iverson when Kozina made the proposal, and the grievance was filed after Kozina made the bargaining proposal. The Association has not countered the fact that the language in dispute was intended to control those cases where the City was certifying that the officer was indeed entitled to the duty disability pension. The City would not and did not agree to pay the continuous income to any officer who filed for a duty disability pension for any reason. Such a practice would be abusive and an absurd result.

DISCUSSION

The City's interpretation of the language of Article XV is preferred for several reasons. First and foremost, the contract should be read as a whole. It is unreasonable to just concentrate on the words "being considered" without putting them into context. The full paragraph is important, and it states:

> The City will guarantee a continuous income equal to the employee's calculated WFR benefit to the employee while his/her disability pension is being considered. The employee will sign a waiver and pay back to the City any monies paid by the City beyond the retroactive starting date of the employee's pension and the Association agrees to assist in such efforts. The employee agrees to pursue a duty-incurred disability pension in a timely fashion.

Clearly, the City was agreeing only to provide income for someone who would receive the pension benefit down the road, and the City did not agree to take on any extra financial liability. The Association did not even bargain for such a benefit – it asked to have the City help out while the pension benefit was being considered because of the length of time it took to receive such a benefit.

The fact that the language refers to the "continuous income equal to the employee's calculated WRF benefit" reinforces that interpretation. The language further refers to the employee's pension. The Association now complains that the City's interpretation would mean that it only provides the continuous income when the disability pension is a foregone conclusion. Exactly. That's just what the parties agreed to and nothing more.

I also agree with the City that the language falls under the heading "Duty Incurred Injury" and there is different language for "Non-Duty Incurred Injury," both found under Article XV. The language at issue occurs only in the sections related to duty incurred injuries. The heading is useful in differentiating between the rights and obligations of the parties under different circumstances.

The bargaining history also supports the City. Kozina's unrebutted testimony was that the Association sought this protection, and the City agreed to it. It was the Association that brought the issue to the bargaining table. The City was the final drafter of the language, but it was not the proponent of the proposal – the Association was the proponent of this proposal. The City was not agreeing to take on an additional or an unknown liability, but one which it would recover. The language even demands that the Association assist in recovering money once the pension has kicked in.

Moreover, I credit Kozina's testimony that subsequent bargaining proposals regarding the disputed language were mere housekeeping and not substantive. His testimony was unrebutted. The former Personnel Director is well known to this Arbitrator from many labor relations settings and he is respected by all parties. The dates of the City's proposals are before this grievance was filed, as the City points out.

If the Association wants a broader benefit than the contract allows, it needs to negotiate it into the contract. It wants the continuous income whether or not the disability is duty incurred, and the contract language does not provide for that and the Association cannot gain that through arbitration where it has not negotiated it. The Association did not even ask for such a benefit in negotiations.

For all the reasons above, the grievance is denied.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin this 24th day of October, 2001.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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