BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

EAU CLAIRE ASSOCIATION OF EDUCATORS

and

EAU CLAIRE AREA SCHOOL DISTRICT

Case 61
No. 60083
MA-11513

(Grievance of June Hootman)

Appearances:

Mr. Stephen Pieroni, Legal Counsel, Wisconsin Education Association Council, on behalf of the Eau Claire Association of Educators.

Weld, Riley, Prenn & Ricci, by **Mr. Stephen L. Weld**, on behalf of the District.

SUPPLEMENTAL ARBITRATION AWARD

I issued a Consent Award in this matter on January 23, 2002, which stated in paragraph 2:

. . .

> 2. Compensation. The Employer shall make the following payments to Employee: $35,000 by March 1, 2002, and $30,000 by January 5, 2003. FICA shall be deducted from the two payments. Any WRS payments (Employer/Employee) will be made by the Employee.

. . .

Pursuant to the agreement of the parties, the Consent Award also stated that I "shall retain jurisdiction over the issue of compliance with paragraphs 2 and 3 above."

Thereafter, a dispute arose over the meaning of paragraph 2 above dealing with "Compensation". The Eau Claire Association of Educators (herein "Association"), contends, and the Eau Claire Area School District (herein "District") denies, that grievant June Hootman does not have to pay all of the FICA contributions called for in paragraph 2 and that she, instead, must only pay one-half of those FICA payments which she already has done, and that the District must pay the other half.

Hearing was conducted on July 10, 2002, in Eau Claire, Wisconsin, and both parties filed briefs that were received by August 7, 2002.

Based upon the entire record and the arguments of the parties, I issue the following Supplemental Arbitration Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

> Is the District required to pay one-half of the FICA contributions under the Consent Arbitration Award and, if so, what is the appropriate remedy?

BACKGROUND

This dispute centers on the negotiations leading up to paragraph 2 of the Consent Arbitration Award.

Grievant Hootman was not physically present in the rooms on January 16 and 17, 2002, (unless otherwise stated, all dates herein refer to 2002), when Association representatives and District representatives met face-to-face in reaching their agreement. Hootman, instead, was located elsewhere in the District's administrative offices. Hootman never orally told anyone that she would agree to pay all of the FICA contributions and District representatives never orally stated that the District would pay any part of the FICA contributions. But for perhaps a January 17 meeting, it is possible that Association representatives never told Hootman orally that she would have to pay all of the FICA contributions.

District representatives did all of the typing relating to the proposals made at that time, with the Association making certain handwritten counterproposals. The District on or about March 8 issued Hootman a check in the amount of $30,025.54 (Joint Exhibit 2). The total amount in dispute here is about $5,000 which covers all of the FICA that must be paid on the $65,000 that the District is required to pay under the terms of the settlement.

The parties at the supplemental hearing presented testimony relating to the various proposals leading up to the finalized paragraph 2 above dealing with "Compensation". Those proposals are set forth chronologically and are as follows:

A. Joint Exhibit 4

> 2. Compensation. Employer shall make a payment of $20,000 to Employee in March 2002. Any unemployment compensation, FICA and WRS payments shall be offset against the $20,000 payment. Employer shall also make a payment of $15,000 to Employee in June 2002.
>
> . . .

All of this typing was crossed out with the notation "See attached". The handwritten attachment to that proposal stated:

> 2. Compensation. Employer shall make the following payments to Employee:
>
> $20,000 by 3/1/02
> $15,000 by 6/10/02
> $30,000 by 1/5/03
>
> FICA + WRS payments shall be included in the payments.
>
> . . .

B. Joint Exhibit 5

> 2. Compensation. Employer shall make a payment of $35,000 to Employee in March 2002. FICA and WRS payments shall be deducted by the District. Employer shall also make a payment of $15,000 to Employee in June, 2002. Employer also agrees to make a payment of $30,000 to Employee in January 2003. FICA and WRS payments shall be included in the $30,000 payments. However, the $15,000 payment will be forfeited if Hootman or Eau Claire Association of Educators officials publicly discuss the terms of the settlement, the merits or demerits of the case, or criticize witnesses for their involvement or input in the case or if Employee enters the grounds of Northwoods School, Boyd School, Sam Davey School or the District's administrative center.

. . .

C. Joint Exhibit 6

2. Compensation. Employer shall make a payment of $20,000 to Employee in March 2002. Any unemployment compensation, FICA and WRS payments shall be offset against the $20,000 payment. Employer shall also make a payment of $15,000 to Employee in June 2002.

All of this typing was crossed out with the notation "see attached". The handwritten attachment to that proposal stated:

2. Compensation. Employer shall make the following payments to Employee:

$35,000 by 3/1/02
~~$15,000 by 6/10/02~~
$30,000 by 1/5/03

FICA + State WRS payments shall be deductible from the payments.

. . .

D. Joint Exhibit 7

2. Compensation. Employer shall make the following payments to Employee: $35,000 by March 1, 2002 and $30,000 by January 5, 2003. Any required WRS employer/employee payments will be made by the ee. FICA shall be deducted from the two payments.

. . .

E. Joint Exhibit 8

2. Compensation. Employer shall make the following payments to Employee: $35,000 by March 1, 2002 and $30,000 by January 5, 2003. FICA taxes shall be deducted from the two payments. Any WRS payments will be made by ee. (These last two sentences were handwritten).

Hootman testified that no District representatives ever told her on either January 16 or 17 that she would have to pay all of FICA; that Association representatives never agreed that she would do so; that she in any event never would have agreed to that even if the Association did negotiate over it; and that she understood at that time that she only would have to pay her half of FICA. She also said that the District initially wanted to deduct the $6,000-$7,000 she had received in unemployment compensation benefits; that she replied she would not agree to such a deduction because it was "non-negotiable"; and that the District ultimately dropped that demand.

On cross-examination, she said that we agreed that "my FICA" would be deducted from the $35,000 payment and that she then relied on the absence of any language stating that the "Employer/employee" contribution for FICA would all have to be paid by her.

Michael Burke, the Executive Director for Northwest United Educators, was one of Hootman's representatives when the parties agreed to paragraph 2 above. He testified that he was absent on January 16; that he has never seen a settlement wherein a teacher is required to pay all of FICA; that he was told by District representatives on January 17 that FICA would be applied the same as any other employees; and that District representatives told him earlier that day that the $65,000 total settlement figure must include all of the District's costs.

Personnel Director James Kling was one of the District's negotiators on January 16 and 17. He testified that he never told any Association representatives on January 17 that Hootman would have to pay all of the FICA; that "for the most part" he was not involved in those negotiations; that, "I remember that $65,000 that we were talking about, "no more", and that "everything must be taken out of that sum"; and that "$65,000 was the umbrella."

He also explained why Hootman's March 8 check was delayed; that the $65,000 figure was exclusive of unemployment compensation; and that Superintendent William Klaus told Association representative Burke and Attorney Stephen Pieroni on January 17 that $65,000 was the most that the District would pay. He also said that the District had always paid its half of FICA in prior settlements involving District employees.

Association representative JoAnn Burke testified that FICA was "never brought up" on January 16 when she was present, and that no one told her the District wanted Hootman to pay all of FICA.

Superintendent Klaus testified that the District in negotiations always proposed that Hootman must pay all of FICA; that $65,000 represented the "total amount" that the District would pay in a settlement; and that the two different sentences relating to WRS and FICA were finally agreed upon so that Hootman could decide for herself whether she wanted to make optional WPS payments. He said that he met with Attorney Pieroni and other District

representatives on January 17 in Kling's office; that he then made it "very clear" that $65,000 represented the District's absolute limit; that FICA was then specifically discussed; that he then related that if Hootman did not pay all of the FICA "we're done"; and that Pieroni replied that he did not have Hootman's permission to agree to that. He also said that the representatives met later on in the day; that the Association then agreed to the District's last offer with the understanding that Hootman could speak on the record on January 18; that Burke then asked how much FICA would be; that Kling replied with a number he does not recall; and that Hootman is required to pay all of FICA because $65,000 represented the District's total settlement cost.

On cross-examination, Klaus testified that Kling was not in the January 17 afternoon meeting; that he, Klaus, at the afternoon meeting said that every deduction, including FICA, had to be taken out of the $65,000 figure; that, "We went through each deduction individually" and that, "All those items were discussed"; and that "For me, it was the total amount of $65,000." He also said that he does not recall discussing FICA on the evening of January 16; that he then "probably" stated that $65,000 was the most that the District would pay in a settlement; that the Association never discussed FICA on January 16; that he told Attorney Pieroni on the afternoon of January 17 that the District would pay $65,000 and "not a penny more."

Deputy Superintendent Greg Butler testified that he was present at the January 17 afternoon meeting when Superintendent Klaus told Attorney Pieroni: "this cannot be a penny over $65,000. Anything over that is a deal breaker." Butler added that they then discussed what was and what was not included in the $65,000, and that there were specific discussions relating to Social Security.

On cross-examination, Butler testified that he does not recall exactly what Attorney Pieroni said at that meeting; that he believes Pieroni asked about the employee and employer's share of Social Security; that Pieroni said this is going to be a "tough sell"; and that the District then made it clear that the "umbrella" settlement could not cost the District more than $65,000.

Executive Director Burke was recalled as a witness and testified that Pieroni never told him the $65,000 included FICA; that he on January 17 believed FICA had to do with the employer/employee's share; that Kling came back with a sheet of paper that had a figure of 7.65 on it; and that no one mentioned $65,000. Burke said that he was not present for the January 16 negotiations; that he nevertheless knew that the District's "bottom line" was $65,000; that "that was the number"; that he did not know whether that figure included FICA; that he assumed Hootman was told about the $65,000 limit; that $65,000 "pretty much" was settled on January 16 and 17; and that, "we tried to get more than that."

Attorney Pieroni testified that Klaus on the evening of January 16 was "very emphatic" that $65,000 was the most that the District would pay in a settlement; that, "It was never made clear" that $65,000 would be offset by the total FICA payment; and that the employer's and employee's FICA contributions were never linked. As for the January 17 negotiations, he said, "I know unequivocally" that there was no linkage of FICA and the $65,000; that, "I knew it was a problem for the grievant"; that he did not then discuss with Hootman; and that "I did not hear that issue conveyed to me." He also said that Burke on January 17 raised the issue of Social Security; that Burke then said, "Well then, you'll treat this as any other deduction"; that the District's representatives did not respond; and that he then never connected the FICA payments to the $65,000.

POSITIONS OF THE PARTIES

The Association asserts that the pay stub issued to Hootman supports its claim that the District must pay one-half of FICA; that the March, 2002 – April, 2002 correspondence between the parties' attorneys establishes that fact; that the "meeting in Mr. Klaus' office. . ." on January 17 clarified that Hootman would only have to pay one-half of FICA; and that bargaining history supports its claim. The Association requests as a remedy that the District be ordered to pay the full employer's share of FICA on the gross $65,000 payable to Hootman under the settlement.

The District maintains that bargaining history establishes that the parties agreed that Hootman would pay all of FICA; that the various written proposals on January 16 and 17 also support its position; and that the March, 2002 – April, 2002 written correspondence and pay stub do not establish otherwise.

DISCUSSION

Before turning to what happened in the key afternoon meeting of January 17 when Superintendent Klaus and Deputy Superintendent Butler met with Attorney Pieroni and Association representative Michael Burke to finalize the settlement, it is first necessary to ascertain the status of negotiations before then.

The record establishes that there was no objective basis for Hootman to believe up to that point that the District would pay one-half of the FICA payments since the District's prior proposals never stated that the District would do so. To the contrary, the District's first proposal (Joint Exhibit 4) stated: "Any unemployment compensation, FICA and WRS payments shall be offset against the $20,000 payment", and that "FICA and WRS payments shall be offset against the $15,000 and $30,000 payments." Hootman under this proposal thus was clearly required to pay all of FICA. Thereafter, Hootman and her representatives never once proposed any written contract language stating that she would only pay one-half of FICA,

and they likewise never once orally told the District's representatives that Hootman wanted the District to pay one-half of FICA. Absent any such written or oral proposal, Hootman either knew, or should have known, going into the January 17 afternoon meeting that the District had never dropped its demand that she pay all of FICA – especially since she never stated that this issue was "non-negotiable", which is the term she used in telling the District that her unemployment compensation benefits could not be deducted from the $65,000.

Hootman also must have known before then that $65,000 was the most that the District would pay since Mike Burke acknowledged that the District's "bottom line" on January 16 was $65,000; that, in his words, $65,000 "pretty much" was settled on January 16 and 17; and that "we tried to get more than that." Hootman thus must have known prior to the January 17 afternoon meeting that she, in fact, had not yet gotten "more than that" other than for the unemployment compensation issue. If she wanted "more than that" by the end of the day, it was incumbent upon her and her representatives to obtain a clear agreement to that effect.

That did not happen. Klaus testified that he made it "very clear" in a meeting with Attorney Pieroni that $65,000 represented the District's absolute financial limit and that if Hootman did not agree to pay all of FICA, "we're done". He also said, "We went through each deduction individually" and that he also told Attorney Pieroni the District would pay $65,000 and "not a penny more." Butler corroborated Klaus' testimony by stating that Klaus said the settlement "cannot be a penny over $65,000" and that the parties then discussed the FICA payments for Social Security.

This testimony was challenged by Mike Burke and Attorney Pieroni. Burke testified that District representatives told them that FICA would be deducted the same way as it had been deducted in prior settlements which Burke assumed would be 50-50, just as it had been in the past. He added that Kling during one of those meetings came back with a piece of paper, since lost, that contained a figure of 7.5, which he assumed represented the District's share of the FICA payment and that the figure of $65,000 was not then discussed. Attorney Pieroni testified "It was never made clear" that $65,000 would be offset by all of the required FICA contributions and that the employee and employer's FICA contributions were never linked to the $65,000.

Trying to reconcile this conflicting testimony is simply impossible at this time, given the credible manner in which all of these witnesses testified and the absence of any clear and convincing objective evidence as to what then transpired. Hence, no ultimate findings can be made as to exactly who said what to whom on January 17.

Nevertheless, Hootman at the end of that day – just like the beginning of that day – had no reasonable basis for believing that the District had dropped its prior demand that $65,000 represented the absolute limit the District would pay except for her unemployment benefits.

As a result, she either knew, or should have known, that she had failed to get, in Mike Burke's words, "more than that." Hence, she is bound to that understanding and she cannot now receive $65,000 plus, i.e. the $65,000 and the additional $5,000 she wants the District to pay for FICA contributions.

The Association argues otherwise by stating that the District drew up the language of the Settlement Agreement and that any ambiguity thus must be "construed against the proponent." While it certainly is true that the District typed the bulk of the proposals, it also is true that the Association itself also made handwritten counterproposals, thereby establishing that it, too, was partly responsible for the drafting that took place here. In addition, the Association's claim presupposes that Hootman had a reasonable basis for believing at the end of January 17 that the District would pay half of the FICA. For the reasons just stated above, however, Hootman either knew, or should have known, that the District had never agreed to that. Hence, her knowledge controls, especially when it is remembered that Hootman and her representatives never once proposed, either orally or in writing, that the FICA payments must be split between the District and Hootman.

The Association also claims that its interpretation of the Settlement Agreement should be adopted because the District's subsequent actions in paying Hootman the first installment reveal that it did not really believe that Hootman had to pay all of FICA. The District's actions and letters and Hootman's pay stub certainly are not a model of clarity. However, they do reveal that the District at that time never agreed to pay half of FICA. In addition, its actions in any event cannot obscure the one fundamental fact that is dispositive of this matter. Hootman either knew, or should have known, at the end of January 17 that the District had never agreed to pay any FICA.

Having failed to obtain "more than that" at that time, it is my

SUPPLEMENTAL AWARD

That the District is not required to pay one-half of the FICA contributions under the Consent Arbitration Award.

Dated at Madison, Wisconsin, this 20th day of August, 2002.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

AAG/gjc
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