BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE LABOR ASSOCIATION OF WISCONSIN, INC.
and THE MEQUON EMPLOYEES ASSOCIATION, LOCAL 811

and

THE CITY OF MEQUON

Case 32
No. 61183
MA-11837

(Grievance of Donna Perry)

Appearances:

Mr. Patrick J. Coraggio, Labor Consultant, Labor Association of Wisconsin, Inc., on behalf of the Association.

Davis & Kuelthau, S.C., Attorneys at Law, by **Ms. Mary L. Hubacher**, on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "City", are parties to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, I heard this matter on July 17, 2002, in Mequon, Wisconsin. The hearing was transcribed and the parties there agreed that I would retain jurisdiction if the grievance is upheld. The parties subsequently filed briefs that were received by August 22, 2002.

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

ISSUE

Since the parties did not jointly agree on the issue, I have framed it as follows:

Did the City violate Section 14.01 of the contract when it refused to pay a retirement benefit to grievant Donna Perry and, if so, what is the appropriate remedy?

BACKGROUND

Grievant Perry, who worked for the City for 14 years and 10 months, is 53 years of age. On February 12, 2002 (unless otherwise stated, all dates herein refer to 2002), she informed Fire Chief Cutis Witzlib by memo (Exhibit B): "Effective February 15, 2002, I am retiring from my position at the Fire Department. I expect to receive all the benefits offered me under the current labor contract. . ." Witzlib accepted and signed her memo on that day and Perry, who was classified as an Administrative Secretary, severed her employment.

By letter dated March 14, Labor Consultant Patrick J. Coraggio asked Human Resource Manager Claudetta Wright to pay Perry the retirement benefit provided for in Section 14.01 of the contract. Wright by letter dated March 27 (Exhibit D) informed Coraggio:

. . .

> This is in response to your letter of March 14, 2002 regarding the final payment to Donna Perry who resigned from her position with the Fire Department effective February 28, 2002. Based on the information available, Ms. Perry has been paid any and all monies owed her under the MEA collective bargaining agreement.
>
> A review of our records shows:
>
> - Ms. Perry worked 1045 hours in 2001 (.502 full time equivalent) and is therefore entitled to just over one-half of the vacation and floating holiday hours provided for under the MEA contract.
> - Based on her start date of April 6, 1987, as of the date of her resignation, Ms. Perry had been employed by the City for 14 years, 10.3 months and eligible for prorated vacation (.502 x 20 days or 80.32 hours) for her current service year.

Calculation of Final Payment

Annual Vacation Allocation	80.320
Vacation Prorated (.86 of service year)	69.075
Vacation Used as of Resignation	85.000
Vacation Balance	-15.925
Floating Holidays (1.75)	14.056
Hours to be Paid Out	**- 1.869**

The leave accounting records used to determine Ms. Perry's payout were obtained from Payroll and have been reviewed for accuracy and a Personnel Clearance Form detailing all payout calculations will be forwarded to Ms. Perry. Finally, I have confirmed with Finance Director Douglas Bates that the City will not require Ms. Perry to refund the $27.62 overpayment.

. . .

Labor Consultant Benjamin Barth by letter dated April 2 (Exhibit E) informed Wright:

. . .

In the last round of negotiations, the parties reached a tentative agreement in Section 14.01, deleting the requirement for an employee to retire under the terms and condition of the Wisconsin Retirement System or have a combined age and years of service with the city of 75 years. It was the intent of the Association to include any employee who "retires" from the City to be eligible for two (2) full working days of pay for each year of service.

It is the Association's position that since Donna Perry retired from City employment effective February 28, 2002, she is entitled to the benefit in Section 14.01, in addition to the Calculation of Final Payment, that you stated in your March 27, 2002 letter.

. . .

The City refused to pay Perry the payment provided for in Section 14.01 on the ground that she was not eligible to retire under the Wisconsin Retirement System ("WRS"), hence leading to the instant grievance (Exhibit F) and arbitration.

Perry, who worked about 20 hours a week as a part-time employee, has not worked since leaving City employment and she is not looking for work. She said that Human Resource Manager Wright had previously told her that she was not entitled to the Section 14.01 retirement benefit because she was under 55 years of age and because she was ineligible to receive any WRS benefits.

Michele Corrao, employed since 1994 as a part-time employee, took over Perry's job as an Administrative Secretary I when Perry left. Corrao testified that the Association in the last round of contract negotiations insisted on having part-time employees receive pro-rated benefits and that the Association in negotiations succeeded in making wholesale changes to the language previously contained in Section 14.01 which earlier stated that in order to receive the benefit, employees had to be eligible for retirement under WRS, or have a combined age and years of service with the City for 75 years, or suffer death or a serious injury. She also said that the City in negotiations never said that employees either had to be 55 years of age to receive the retirement benefit provided for in Section 14.01 or that they must be eligible to retire under WRS.

On cross-examination, Corrao testified that the Association in negotiations may have offered to drop its retirement proposal in favor of its severance proposal; that the Association eventually dropped its severance proposal; that the City finally agreed to the same retirement language contained in the City's contract with the DPW employees who also are represented by the Association; and that the language in Section 14.01 is "an honor system. If you say you are retiring, you are retiring."

Association President Dennis Hoffman testified that the Association in negotiations tried to get pro-rata benefits for part-time employees; that the parties in negotiations never agreed to any age restriction or WRS eligibility in order to receive the benefit spelled out in Section 14.01; and that the Association wanted this benefit whenever anyone retires.

On cross-examination, he testified that the City in negotiations flatly rejected the Association's severance pay proposal; that the Association in negotiations "implied" that employees could retire at any age; and that employees are entitled to the Section 14.01 payment only if they in fact retire. He added you have to "go on the integrity of the person"; that employees should not receive that payment if they do not retire; that, "The intent was to retire at any age"; and that he did not know that the City's DPW employees need to meet the WRS criteria for retirement before they can receive the retirement provided for in their

contract with the City.

Human Resource Manager Wright testified that resignations are treated differently than retirements under the contract; that the City does not pay the Section 14.01 benefit if a general employee is under 55 years of age and is ineligible for WRS benefits; that she does not look at what employees do after they retire at age 55; and that, "I use the WRS specific guidelines." She also said that the Association in negotiations never stated that employees can receive the Section 14.01 benefit if they are under 58 years of age; that the word "retirement" is not defined in the contract; that she told Perry she was not entitled to the Section 14.01 payment; and that Fire Chief Witzlib does not have the authority to determine whether someone qualifies for retirement. She also said that the Association in negotiations twice presented a severance proposal which the City rejected; that the Association there asked for the same language contained in the City's DPW contract; that City DPW employees get this benefit only if they are over 55 years of age; and that the word "retirement" was never defined in negotiations because it was "superfluous".

She further stated that the longevity and sick leave conversion benefits provided for in the contract always have been pegged to a 55 age requirement; that the Association in negotiations never stated that the Section 14.01 benefit would be paid to employees who retire before they are 55; and that under the Association's claim, the Section 14.01 benefit would be treated differently than the other retirement benefits provided for in the contract.

On cross-examination, Wright testified that no DPW employees have retired before 55; that she cannot recall ever telling DPW employees they must be 55 to retire; that before Perry's situation, she never told the Association that the term "retirement" as used in the contract is tied to being 55 years of age; and that, "I never had an inquiry addressing that issue." She also said that during negotiations, there was an "interest" on the Association's part in making "benefits" more available to part-time employees.

POSITIONS OF THE PARTIES

The Association asserts that by not paying grievant Perry the retirement benefit requested, the City has violated Section 14.01 of the contract because, in the Association's words, it states in "clear and unambiguous" language that retirement pay must be paid to all employees who retire, without qualification; because the plain meaning of the word "retirement" supports its interpretation; because the "qualifiers" surrounding retirement found in the prior contract "have been removed" from the current agreement; because the City does not apply the WRS requirements to longevity payments paid to retirees; and because "the benefits of Section 14.01 are not WRS provision benefits." The Association further claims that bargaining history supports its position because the City has not successfully rebutted the testimony of its witnesses who testified about bargaining history and that, furthermore: "The intent of the parties in changing the language of Section 14.01 must be given great weight by

the Arbitrator."

The City contends that the Association is "attempting to use the grievance process to receive the severance payment. . ." it failed to get in negotiations; that the Association's interpretation of 'retire' is not reasonable; and that past practice surrounding the WRS payments supports its position. It also maintains that the "Association's interpretation is contrary to contract interpretation because it results in internal inconsistencies. . ." within the contract and because the Association's position, if adopted, would put the City in an impossible position because eligibility would have to be determined "on the sole basis that the employee says he or she is retiring. . ."

DISCUSSION

This case mainly turns on the application of Section 14.01 of the contract which states:

> **Section 14.01** Upon retirement, each regular permanent employee shall receive two (2) full working days of pay for each year of continuous full-time service in a position with the City. The rate of pay is to be determined by the employee's current hourly base rate, or the highest hourly base rate during the preceding three (3) years preceding the date of retirement, whichever is greater. The determination of a full working day for regular permanent part-time employees shall be based upon the average number of hours worked per day during the previous year. (Emphasis added).

The key phrase here is "Upon retirement". Does it refer to *any* retirement as contended by the Association, or instead, does it refer only to those retirements under the WRS which generally does not grant retirement benefits to general employees unless they have reached 55 years of age, as contended by the City. Section 14.01 does not state at what age this retirement benefit kicks in.

Article XV, entitled "Wisconsin Retirement System" states:

> **Section 15.01 – Wisconsin Retirement System**: In addition to the payment of the Employer's required contribution to the Wisconsin Retirement System, the Employer shall pay up to seven percent (7%) of the employee's earnings as defined in the Statutes toward an employee's contribution to the Wisconsin Retirement System. Eligibility requirements and pension benefits shall be as provided by Statutes and the rules and regulations of the Wisconsin Retirement System.

If we assume, as does the City, that the retirement provided under this language is the same retirement referenced in Section 14.01, then no retirement benefits need be paid out under Section 14.01 unless all of the eligibility requirements of Article XV have been met, including the one requiring general employees to be 55 years of age or older. Ordinarily, this would be a reasonable construction of the contract because it is generally assumed that the same words – here the term "retirement" – have the same meaning throughout a contract.

But here, the parties bargained over Article XIV of the former contract which stated:

ARTICLE XIV – RETIREMENT CONTRIBUTION

> **Section 14.01**: Employees shall be eligible for this benefit if they are eligible for retirement under the Wisconsin Retirement System at the time they retire or have a combined age and years of service with the city of seventy-five (75) years, upon an employee's death or if an employee retires due to injuries or illness which prevents the employee from physically or mentally performing his/her duties. A regular full-time employee shall receive two (2) full working day's pay for each year of continuous service with the City. The rate of pay shall be determined by the employee's regular straight-time rate in existence at the time of retirement or death, or highest regular straight-time hourly rate during the preceding three (3) years preceding the date of separation, whichever is greater. Regular part-time employees shall receive two (2) full working days pay for each year of continuous service. In the event that the part-time employee becomes a full-time employee, the determination of the part-time benefit (hours per day) will be calculated at that time. The determination of a full working day of pay shall be based upon the average number of hours worked per day during the previous year. The rate of pay for part-time employees shall be determined in the same manner as for full-time employees. No additional days shall be accumulated after the employee reaches sixty-five (65) years of age. Continuous service shall not accrue during any period of layoff or unpaid leave of absence which exceeds thirty (30) continuous calendar days. (Emphasis added).

Newly-revised Section 14.01 thus drops the requirements in the prior contract that employees are to receive this benefit only if "they are eligible for retirement under the Wisconsin Retirement System. . .or have a combined age and years of service with the City of seventy-five (75) years. . ."

If the City wanted to limit the Section 14.01 retirement benefit to those employees "who are eligible for retirement under the Wisconsin Retirement System. . ." - which is the

construction it advances here - it therefore should have insisted in negotiations that

Section 14.01 now contain words to the effect: "Eligibility requirements and pension benefits shall be as provided by Statutes and Rules and Regulations of the Wisconsin Retirement System." The City, though, failed to even propose such language.

It is true, as the City points out, that no Association representative ever expressly told the City in negotiations that the definition of retirement under Section 14.01 would be different from the one used in Article XV which pegs retirement to the WRS' 55-year age requirement. It also may be true, as contended by the City, that it "had no knowledge that the Association would interpret Section 14.01 as providing retirement benefits to any employee, regardless of age, who states that she or he is retiring."

On the other hand, Carrao and Association President Hoffman's testified that the City in negotiations never once suggested that the Section 14.01 retirement benefit was in any way related to either the WRS benefit provided for in Article XV or to any of the eligibility requirements needed to qualify for WRS pension benefits. The City in negotiations also never told the Association that the City has a policy of not paying out the Section 14.01 retirement benefit to the City's DPW employees unless they are 55 or older. Having failed to give such notice then, it is too late now to claim that the Association somehow or another either knew, or should have known, of that practice.

There thus was a lack of clarity in negotiations over this issue, which is why this case turns on which party had the burden in negotiations to clear up this issue. The subjective views held by Wright, Carrao and Hoffman cannot be given much weight because all of them had a good faith, reasonable basis for believing that the ultimate language reached in Section 14.01 supported their respective positions. This case thus must turn on objective criteria since that is the best way for determining what transpired in contract negotiations.

As to that, it is undisputed that the City in negotiations never told the Association that the City has a policy of not paying this benefit to anyone under 55 years of age and that the City therefore wanted that policy reflected in Section 14.01. The City had the burden of communicating that key fact to the Association if it wanted Section 14.01 to have the qualifying language it argues here. By failing to meet that burden, Section 14.01 must be applied according to its clear and unambiguous terms which means that employees who legitimately retire are entitled to this benefit even if they are not 55 years of age since Section 14.01 on its face has no such age restriction.

The City also asserts that that past practice should control over how Section 14.01 is now applied. If there were proof that this practice were ever communicated to the Association at any time, this would be a valid point. But, Human Resource Manager Wright acknowledged that she never relayed this fact to Association representatives. Hence, there is no basis for

finding that any Association representatives were ever made aware of this practice, which is

why it does not constitute a binding past practice since a past practice by definition: "must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties." Elkouri and Elkouri, *How Arbitration Works*, (BNA, 5th Ed., 1997), p. 632. Here, since the practice was never communicated to the Association, it was not "accepted by both parties." That is why this case differs from the various cases cited by the City in support of its contrary claim. See CITY OF TULSA, 90 LA 1076 (Baroni, 1988); SCHOOL DISTRICT OF BELOIT, 73 LA 1146 (Greco, 1979); WEBSTER TOBACCO CO., 5 LA 164 (Brandschein, 1946).

It is true that the Association in negotiations failed to obtain severance payments for employees who leave City employment. Given that failure, it is understandable why the City does not want to make any severance payments through any back door device that requires the City to grant severance pay under the guise of calling it "retirement" pay.

While the City's concern is certainly understandable, this benefit is available only to those employees nearing retirement age and who say that they, in fact, will retire. Here, since Perry is 53 years of age, she is near the WRS's normal 55 age requirement. She therefore can legitimately claim that she wishes to retire, as opposed to merely severing her employment.

The City asserts that granting this benefit to someone who is not yet 55 years of age will present administrative problems in determining whether such employees, in fact, will retire from the workforce and that, "Under the Association's definition, a thirty-five (35) year-old employee can receive a retirement benefit because he/she says he/she is retiring."

I disagree. A thirty-five (35) or even a forty-five (45) year-old employee cannot receive this benefit, as he/she does not even come close to the normal retirement age. Hence, this benefit need be paid only if the employee is near the 55 retirement age, which is the situation here since Perry is 53 years old.

In this connection, Carrao acknowledged this is "an honor system. If you say you are retiring, you are retiring." Association President Hoffman similarly stated you have to "go on the integrity of the person" and that employees should not receive that payment if they do not retire. Their testimony is important because it shows that the Association does not want employees to rip off the City by falsely claiming they are retiring, when in fact they are not. Hence, if the parties want to avoid future disputes over this issue, they may want to agree on a minimum age that is needed to qualify for this benefit even though the current contract does not provide for that.

It is true, as contended by the City, that sustaining the grievance will result in having different retirement ages for receiving the retirement benefit in Section 14.01 and the WRS

retirement benefit provided for in Article XV. That difference, however, is not logically inconsistent since the one-time retirement benefit paid by the City under Section 14.01 is different from the WRS pension benefit provided for under Article XV and which is payable over a retiree's lifetime. Different benefits therefore can kick in at different times, depending on what the parties negotiate. Moreover, total consistency is not achieved even under the City's view of the case since the City paid Perry a longevity payment under Section 13.04 of the contract which states that such payments are to be based "up to the date of retirement."

In light of the above, it is my

AWARD

1. That the City violated Section 14.01 of the contract when it refused to pay retirement benefits to grievant Donna Perry.

2. That to rectify that contract violation, the City shall immediately pay grievant Donna Perry the retirement benefit provided for in Section 14.01.

3. That to resolve any remedial questions that may arise over application of this Award, I shall retain my jurisdiction for at least sixty (60) days, and I shall extend it if necessary.

Dated at Madison, Wisconsin, this 3rd day of September, 2002.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

AAG/gjc
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