BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 244, AFSCME, AFL-CIO

and

CITY OF SUPERIOR

Case 183
No. 61332
MA-11894

(Seasonal Employee Benefits Grievance)

Appearances:

Mr. James E. Mattson, Staff Representative, 8480 East Bayfield Road, Poplar, Wisconsin, appearing on behalf of Local 244, AFSCME, AFL-CIO.

Ms. Mary Lou Andresen, Human Resources Director, 1407 Hammond Avenue, Superior, Wisconsin, appearing on behalf of the City of Superior.

ARBITRATION AWARD

Local 244, AFSCME, AFL-CIO, hereinafter "Union," requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Superior, hereinafter "City," in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was designated to arbitrate the dispute. The hearing was held before the undersigned on September 18, 2002, in Superior, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs, the last of which was received on November 12, 2002. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The parties agreed that there were not any procedural issues in dispute, but were unable to agree substantively, thus leaving it to the Arbitrator to frame the issue.

The Union proposed the issue as follows:

> Did the Employer violate the terms of the collective bargaining agreement, Appendix C, when it failed to compensate the Grievant for benefits she had earned during the calendar year 2001?

The City proposed the issue as:

> Did the Employer violate the terms of the collective bargaining agreement when it failed to compensate the Grievant for benefits she had earned during the calendar year 2001?

The Arbitrator accepts the City's issue because seasonal employee benefits are referred to within the labor agreement, in addition to Appendix C.

The parties agreed that if the Arbitrator finds a violation, the appropriate remedy is to make the Grievant whole for any loss of benefits she would have earned during calendar year 2001.

RELEVANT CONTRACT LANGUAGE

ARTICLE 5
CLASSIFICATION AND WAGE RATE

. . .

5.03 Regular part-time and full-time employees will be fully classified for the entire year and will not receive less per hour when working in lower classifications. When working in higher classifications than his/her permanent or yearly rate, he/she will receive the pay attached to the higher classification.

Any employee with a classification who is assigned to work within that classification and who exercises his/her seniority to bump to a lower classification, will receive the rate of pay attached to the lower classification for the time he/she worked in the lower classification. The

exception to this would be that if the person assigned to the lower classification has the same rate as the person assigned to the higher classification and both individuals are qualified to perform either task. The most senior employee may exercise his/her right to bump to the lower classification and receive their normal rate of pay. The purpose is to assure that no additional cost is passed on to the City.

5.04 Permanent Rate: For employees hired before July 1, 1986, except for employees working in the Wastewater Treatment Operations Division, the permanent classification is based upon the one in which the employee spent the majority of his/her total hours during the preceding calendar year.

5.05 Yearly Rate: All employees hired after July 1, 1986, and all employees on the seniority roster of the Wastewater Treatment Operations Division, will not be covered by the permanent rate in 5.04. Employees will receive the rate for which they spent the majority of hours in the preceding calendar year whether higher or lower than the rate for the current calendar year.

5.06 Seasonal employees shall be paid pursuant to Appendix C.

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ARTICLE 11
GRIEVANCE PROCEDURE

. . .

11.05 The arbitrator shall hold hearings and take testimony regarding the dispute and shall render his/her decision, which shall be considered final and binding to both parties to this Agreement. The arbitrator, in making his/her decision, shall neither add to, delete from, nor amend any of the existing provisions of this Agreement.

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ARTICLE 14
HOLIDAYS

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14.04 Seasonal employees: See Appendix C

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ARTICLE 15
VACATIONS

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15.08 Seasonal employees are not entitled to any of these vacation benefits, except as provided in Appendix C.

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ARTICLE 16
SICK LEAVE

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16.06 Seasonal employees will be granted sick leave as provided in Appendix C.

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APPENDIX "C"
SEASONAL EMPLOYEES

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Wage Rates: The wage rate for Seasonal Employees shall be as follows:

	1/1/00	3% 1/1/01	3% 1/1/02
1st Season	$5.46	$5.62	$5.79
2nd Season	$5.67	$5.84	$6.02
3rd Season	$6.59	$6.79	$6.99
4th Season	$7.00	$7.21	$7.43
5th Season	$7.78	$8.01	$8.25

. . .

A seasonal employee advances to the next seasonal rate when re-employed a subsequent season as a seasonal employee. See examples below:

Examples:

April 1999	hired as Seasonal 1st year in Parks Division
January 2000	rehired as Seasonal 1st year at Ice Rinks

April 2000	rehired as Seasonal 2nd year in Parks Division
December 2000	rehired as Seasonal 2nd year at Ice Rinks
April 2001	rehired as Seasonal 3rd year at Golf Course

. . .

Benefits:
Seasonal employees of the City who work 1,400 hours or more in any calendar year shall be granted, for use in the following calendar year if employed, vacation pay, sick leave, and holiday pay in proportion to the number of hours worked. Employees who have earned sick leave pay may request to carry over up to 30 hours sick leave to be used in the following calendar year if employed. If the employee does not request to carry over the sick leave hours prior to the end of the calendar year, the hours will be lost. All vacation hours remaining at the end of the summer season will be cashed out. Vacation, sick leave and holiday pay in this category shall not be accumulative from year to year except as described above for sick leave, and must be used during the calendar year. Example: An employee who worked 1,560 hours in a calendar year would receive 6 hours pay for a holiday, if in paid status on the day before and day after the holiday.

Seasonal employees, once they have qualified for holiday pay as described above, shall receive only those holidays where they are in paid status the work day before and the work day after the holiday.

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FACTS AND BACKGROUND

During January, 2001, the Association filed two grievances on behalf of seasonal employee, Jason Valentine alleging that Valentine had been denied Appendix C benefits and was wrongly terminated. The City's response, dated February 6, 2001, denied an unlawful termination and explained that calendar year hours are the hours that an employee is "paid for "in" the year 2000," that this is an established past practice for 10 years and that these are the same hours used to calculate an employee's base rate per Article 5.05. Following grievance meetings at steps one and two of the grievance procedure, the City proposed the following Side Letter Agreement to settle the Valentine grievances:

> Local #244 AFSCME, AFL-CIO and the City of Superior, enter into this agreement that, for purposes of interpreting hours worked in calendar year referenced in Articles 5.04, 5.05, 7.04(B), and Appendix C - Benefits, the hours reported to the Wisconsin Retirement System which are the hours paid in

the calendar year, will be used as the basis for hours worked. It is agreed that this language will be incorporated into the AFSCME Local #244 Working Agreement upon renewal of the Working Agreement.

Further, the following non-precedent setting settlement is agreed to by the parties to resolve two grievances filed on behalf of Jason Valentine, dated 1/30/01 and 2/6/01:

1. Jason Valentine will receive prorated benefits, based on 1,430.25 hours worked in 2000, for use in 2001; and
2. Jason Valentine will be allowed to be hired for seasonal employment, excluding seasonal work at the skating shelter as a rink attendant.

. . .

Chuck Miller, Local 244 President presented the Side Letter Agreement to his membership which was voted down by the membership. Lacking an agreement, the City went ahead and rehired Valentine with prorated benefits. The Valentine grievance is the progenitor to the pending grievance.

The City utilizes a bi-weekly payroll system with 26 14-day pay periods. This system was implemented by the City in 1978, although the software and software provider has changed over that time period. The system calculates annual earnings based on the 26 pay days and these earnings are reported to the Wisconsin Retirement System (WRS) and Internal Revenue Service (IRS).

The Grievant, Kathleen Otto, is a seasonal employee hired for summer employment. The Grievant has worked for the City for five summer seasons and is currently paid at the hourly rate of $9.17. From January 1, 2002, through the last full pay period in 2002 that ended on December 14, 2002, the Grievant had worked 1342 hours. The Grievant worked an additional 63 hours between December 15, 2002, and December 31, 2002. The City determined that the Grievant worked 1342 hours for 2001 and therefore denied her Appendix C prorated benefits for 2002 on the basis that she had not worked 1400 hours. The Grievant filed the pending grievance on January 23, 2002.

POSITIONS OF THE PARTIES

The Union

The Union argues that the language of the parties' labor agreement clearly states that "calendar year" is the measure to be applied when determining whether a seasonal employee is entitled to Appendix "C" benefits. It relies on the view of Elkouri and Elkouri that "clear and

unequivocal language cannot be vitiated by a past practice unless the parties have reached a mutual accord to do so." (Union brief p. 6) The Union denies that an accord exists in the case and further that the language of the agreement is clear; a calendar year runs from January 1 through December 31 and any attempt by the City to define it otherwise is incorrect. Had the parties desired to define a year in the method the City asserts, then they would have done so in the agreement and since the language does not state "payroll year as reported to the Wisconsin Retirement Fund" nor does it state "payroll year as reported to the Internal Revenue Service" then the commonly accepted January 1 through December 31 definition applies.

The Union challenges the City's claimed past practice. It argues that the Union had no knowledge of the City's Data Processing department internal procedure and calculation of the Wisconsin Retirement Fund and Internal Revenue Service reporting years. Given that there was not a mutual understanding and knowledge between the parties over the period and calculation of the "bookkeeping year," a past practice does not exist.

The Union denies the City assertion's that upholding the grievance will be detrimental to other seasonal employees. It points out that enforcement of the clear language of the labor agreement is for the benefit of all employees and this over-rides any possible negative effect to a few employees. Further, it is not the role of the City to determine what is best for the union represented employees.

In its reply-brief, the Union first challenges the City's calculation that the Grievant's work hours for 2001 would be 1350 when an eight hour day is added to the Grievant's January through December WRS calendar year. It reminds the Arbitrator that the Grievant testified at hearing that had her hours been calculated on a January 1 through December 31 calendar year, then she worked 1405 hours.

With regard to the City's allegation of a past practice, the Union denies that it accepted the City's method of calculation. It asserts that the Valentine grievance on the important issue of discipline was settled, thus negating a reason to pursue the calculation issue to arbitration and the Tutor grievance was withdrawn by Mr. Tutor (a permanent employee) after he learned that he had miscalculated. It further notes that Mr. Dowell, City Data Processing Manager, has no involvement in collective bargaining and thus had no knowledge of what the parties' mutually practiced.

For all of the above reasons, the Union requests that the grievance be upheld.

The City

The City asserts that a long-standing practice exists to calculate calendar year totals based on the WRS and IRS reporting years. The Data Processing Manager testified that the City has been using the Wisconsin Retirement System (WRS) and Internal Revenue Service

(IRS) calendar year for calculations related to hours of work since 1978. This calculation method has been used for greater than 20 years constituting a long-standing practice which was affirmed in 1986 by the Union when the parties bargained into the labor agreement Section 5.04, Permanent Rate and 5.05, Yearly Rate in 1986 which reference "calendar year" and in 2001 upon the filing of the Jason Valentine grievance.

The Union was fully aware of the City's use of the WRS calendar year for calculation which is evidenced by a grievance filed on January 30, 2001. During settlement discussions for that grievance, the City's method of calculation was discussed. On April 2, 2001, the City and Union met and reached a "gentlemen's agreement" to implement the terms of a side agreement which would return Valentine to work and incorporate into the labor agreement the City's method of calculation using the WRS calendar year. Ultimately, the Union did not ratify the side agreement. It also did not pursue the grievance to arbitration. Since the Union was on notice that the City utilized the WRS calendar year for calculating rates and determining benefits and it did not pursue arbitration of the matter, the City asserts the Union accepted the practice.

A second related grievance, filed by Gerald Tutor, challenged his permanent rate based on the number of hours worked during the calendar year. (See section 5.04) Again, the City concluded that the Union had accepted the City calculation practice. Had the Union believed that the City's practice was inconsistent with the labor agreement, the grievances should have been processed to arbitration to settle the issue.

The City next argues that the Grievant has not worked 1400 hours in the calendar year and thus, is not entitled to Appendix C benefits. There were 26 14-day pay periods beginning on December 18, 2000, and ending on December 14, 2001, totaling 364 days. Although this is one day short of a January through December calendar year, even if one eight-hour work day was added to the Grievant's total hours, it would still be less than the requisite 1400 hours for Appendix C benefits.

The City points out that the impact of changing the method of calculating benefits will result in the withdrawal of benefits from some Union members. This change will entirely eliminate current benefits provided to Steven Law and will reduce the benefits of two other employees. 1/

1/ A change in the interpretation will also result in an increase in the prorated benefit levels for three employees.

The City notes that the parties are currently negotiating the successor labor agreement and the City has presented a proposal to specifically state the calendar year as the WRS

calendar year which evidences the City's desire to meet, confer and negotiate a change in the long standing practice. It asserts that making a "change through the grievance procedure is not the appropriate method of negotiating the change."

Finally, with regard to the remedy, the City concludes that should the Arbitrator find for the Union, it is impossible to make the Grievant whole by changing the calculation method. Sick leave and vacation balances can be credited to the Grievant, but retrospective prorated health insurance benefits for the year 2002 cannot be granted. Additionally, if the Grievant does not work the requisite hours during 2002, she will not be entitled to benefits for 2003.

The City declined to file a reply-brief.

For all of the above reasons, the City asserts the grievance should be denied.

DISCUSSION

The crux of this dispute is what the parties intended when they used the term "calendar year" in their labor agreement. The Union contends that the calendar year begins with January 1 and ends with December 31, whereas the City asserts that calendar year, for purposes of the collective bargaining agreement with the Union, is the Wisconsin Retirement System and Internal Revenue Service reporting years which begin with the first day following the last complete pay period of December of the prior year and ends with the last day of the last complete pay period of December in the current year.

In a contract interpretation grievance, it is the arbitrator's role to attempt to ascertain the intended meaning of a word or phrase that the parties' included in their labor agreement. When the general and ordinary meaning of contract language is ascertainable, it is determinative lacking strong evidence that the parties' mutually intended otherwise. The phrase in question is "calendar year." Webster's dictionary defines calendar year as "a period of a year beginning and ending with the dates that are conventionally accepted as marking the beginning and end of a numbered year (as January 1 and December 31 in the Gregorian calendar)." Webster's New Collegiate Dictionary, G & C Merriam Co. (1981). The parties' labor agreement does not define calendar year although it references it in Section 5.04, 5.05 and Appendix C. 2/ I do not find there to be any ambiguity in the definition of the term "calendar year"; it begins with January 1, the first day of the first month of the calendar, and ends with December 31, the last day of the last month of the calendar. Further, I accept the argument of the Union that had the parties intended for the WRS year to be the measure of calculation then "WRS year" rather than "calendar year" would have been included in the parties agreement. Given that the contract language is clear and following that "evidence of a past practice is wholly inadmissible when the contract language is plain and unambiguous,"

Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 652 (1997) analysis as to the existence of a practice would be inappropriate but for the City's assertion that the parties reached an accord.

2/ The City refers the Arbitrator to Section 5.04 and 5.05 for guidance in defining "calendar year" and in support of its method of calculation. These sections are not instructive. First, they relate to permanent employees. Second, although the term "calendar year" is in both of these sections, Exhibit 13 indicates that the City does not utilize the same method of calculation for both sections.

The City contends that the parties have an established practice of using the WRS and IRS reporting year as the calendar year and further, that this practice modifies the language of the labor agreement. In order for a contract to be modified, there must be mutual agreement to amend the existing agreement. The Union did not become aware of the City's use of the WRS/IRS method to determine calendar year benefits until January of 2001. Regardless of whether the City has used this method since 1978, lacking the Union's knowledge and assent, it is not an accord. Further, the Union's lack of knowledge prior to 2001 dispels any assertion that a binding past practice exists since knowledge is an essential element to establish a binding past practice. 3/ Given that there is no evidence to support either a valid accord of the labor agreement or a binding past practice as the City asserts, I do not find that the City's position is supported by the facts.

3/ In order for a practice to binding on the parties, it must be "1) unequivocal, 2) clearly enunciated and acted upon, and 3) readily ascertainable over a reasonable period time as a fixed, and established practice accepted by both Parties." Elkouri and Elkouri, How Arbitration Works, 5th Edition. p. 632 (1997).

Alternately, the City argues that 365 days constitutes a year and since the time period between December 14, 2000 and December 18, 2001, totaled 364 days, then even if an eight-hour day is added to the Grievant's total work hours, she would not have crossed the 1400 hour threshold to earn benefits. Although I agree with the City that 365 days constitutes a year 4/, this argument fails to recognize that the word calendar modifies the word year in the term "calendar year." The calendar begins with January 1 and ends with December 31. This is the commonly understood meaning of "calendar" and for that matter, is consistent with the commonly understood meaning of "calendar year." I, therefore, do not find the City's argument persuasive.

4/ My agreement with the City's conclusion that there are 365 days in a year is taking notice of "Leap Year."

The City next argues that the Union waived its right to arbitrate the pending issue by not pursuing the prior grievances of Valentine and Tutor. The record evidence establishes that the Valentine grievance was not pursued due to the City's offer to re-hire Valentine with pro-rated benefits and Tutor's decision to withdraw his grievance after learning that he had made a mathematical error. The parties did not reach a settlement in either grievance addressing the definition of calendar year. A decision by the Union and grievant to not pursue a grievance to arbitration does not, in and of itself, negate the right of the Union and a future grievant to challenge the same issue, especially, as here, where there is no evidence to indicate that the Union acquiesced to the City's definition.

Finally, the City argues the theory that a party should not be allowed to gain in arbitration what it could not at the bargaining table. I agree. The Union and City are currently bargaining a successor agreement. If the City desires to change the current contract language from "calendar year" to "WRS year" or "IRS year" then the change should be gained at the table.

AWARD

1. Yes, the Employer violated the terms of the collective bargaining agreement when it failed to compensate the Grievant for benefits she earned during the calendar year 2001.

2. As the parties stipulated, the appropriate remedy for the violation found in item one above is: The City shall make the Grievant whole, without interest, for all benefits customarily made available to seasonal employees in the bargaining unit.

3. I shall retain my jurisdiction for at least sixty (60) days to resolve any questions involving application of this Award.

Dated in Wausau, Wisconsin, this 14th day of January, 2003.

Lauri A. Millot /s/
Lauri A. Millot, Arbitrator

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