BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OSHKOSH PROFESSIONAL POLICE OFFICERS ASSOCIATION

and

CITY OF OSHKOSH

Case 338
No. 62106
MA-12160

Appearances:

Frederick J. Mohr, S.C., Attorney at Law, 414 East Walnut Street, Suite 101, P.O. Box 1015, Green Bay, Wisconsin 54305-1015, by **Mr. Frederick J. Mohr,** appearing on behalf of the Union.

Davis and Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, by **Mr. William G. Bracken,** appearing on behalf of the City.

ARBITRATION AWARD

The City of Oshkosh, hereafter City or Employer, and Oshkosh Professional Police Officers Association, hereafter Union or Association, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide the instant grievance. Coleen A. Burns was so designated on March 5, 2003. A hearing was held in Oshkosh, Wisconsin on April 14, 2003. The hearing was transcribed and the record was closed on June 10, 2003, upon receipt of post-hearing written arguments.

ISSUE

The parties were unable to stipulate to a statement of the issues.

The Union frames the issues as follows:

Is the Grievant entitled to contribute an additional thirteen and one-half (13.5) days of accumulated sick leave to his Section 457 plan?

The City frames the issues as follows:

Did the City violate Article VI(A) of the 2001-2003 contract when it deposited the Grievant's sick leave payout into his 457 account based on fifty percent (50%) of the Grievant's wage rate in effect when his deposit was made in 1998, 2000 and 2001?

If so, what is the appropriate remedy?

The undersigned adopts the Union's statement of the issue.

RELEVANT CONTRACT LANGUAGE

ARTICLE VI

AUTHORIZED ABSENCE

A. Sick Leave

. . .

In addition to the employees' right to accumulate sick leave without limitation, unused accumulated sick leave up to 150 days shall be paid at one-half of the employees' rate in effect at the time of said separation for those employees who retire at age 50 or older or for those employees who separate because of disability. Pursuant to ss.66.191. As another option, an employee, who has accumulated 150 sick days and is at least 50 years old, may choose to contribute one-third of his/her total accumulated sick leave payout amount placed in a 457 (currently R.C.) account for each of the next three years. In such case, the employee shall receive one-third of his/her total accumulated sick leave paid at one-half of the employee's rate in effect when the deposit is made. This option shall only be available to those employees who meet all rules, regulations and requirements of the 457 plan administrators. Effective 11/4/02, payment for unused accumulated sick leave shall be increased from "one-half of the employee's rate in effect" to "59 percent of the employee's rate in effect" in this paragraph under both options.

. . .

ARTICLE XI

WAIVER OF RIGHTS

Neither party to this agreement by such act at the time hereof or subsequent hereto agrees to and does waive any rights possessed by it or them under state and federal laws, regulations or statutes. In the event any clause or portion of this agreement is in conflict with statutes of the State of Wisconsin governing municipalities or other statutes such clause or portion of the agreement shall be declared invalid and negotiations shall be instituted to adjust the invalidated clause or portion thereof.

. . .

ARTICLE XIII

RULES & EVALUATION REPORTS

The Association recognizes that the employer may adopt and publish rules from time to time, however, the employer shall submit such rules to the Association for its information prior to the effective date.

For this purpose, rules shall be defined as any rules, regulations, policies, directives, and postings published by the Department or the city affecting the department. Such rules shall be submitted to the Wage Board Chairman and the Association President and shall also be posted for knowledge and record. All such rules shall bear the signature of the Chief of Police or his designee. In the event of a dispute to such rules, the Association shall have fifteen (15) days after inception to dispute such rules through the grievance procedure.

. . .

ARTICLE XVI

GRIEVANCE PROCEDURE

. . . A grievance is defined as any dispute or misunderstanding relating to employment between the City and the Association.

> For the purpose of the final step of the grievance procedure, a grievance will be limited to the interpretation of application of the terms and conditions of this agreement, including past practices and policies incorporated in this agreement by its terms . . .

ARTICLE XX

RECOGNITION & UNIT OF REPRESENTATION

. . .

> THIS AGREEMENT shall become effective as of the 1st pay period of 2001, and will remain in full force and effect to and including the 31st day of December, 2003.

RELEVANT BACKGROUND

Michael Novotny, hereafter the Grievant, is a Detective in the City's Police Department. At the time of the arbitration hearing, the Grievant was fifty-seven years old and had served as a police officer for the City for thirty-three years.

The parties' collective bargaining agreement that was in effect from 1998 through 2000, contains the following language:

> In addition to the employees' right to accumulate sick leave without limitation, unused accumulated sick leave up to 150 days shall be paid at one-half of the employees' rate in effect at the time of said separation for those employees who retire at age 50 or older or for those employees who separate because of disability. Pursuant to ss.66.191. As another option, an employee, who has accumulated 150 sick days and is at least 50 years old, may choose to contribute one-third of his/her total accumulated sick leave payout amount placed in a 457 (currently R.C.) account for each of the next three years. In such case, the employee shall receive one-third of his/her total accumulated sick leave paid at one-half of the employee's rate in effect when the deposit is made. This option shall only be available to those employees who meet all rules, regulations and requirements of the 457 plan administrators.

In an "Employee Change Form" dated July 15, 1998, the Grievant requested to contribute one-third of his accumulated sick leave payout amount into his 457 account. The amount that was paid into his account, $4582.28, includes an additional $100 contribution that was made by the Grievant. In an "Employee Change Form" dated August 9, 2000, the

Grievant requested to contribute one-third of his accumulated sick leave payout amount into his 457 account. The amount that was paid into this account was $4408.97. In an "Employee Change Form" dated April 23, 2001, the Grievant requested to contribute one-third of his accumulated sick leave payout amount into his 457 account. The amount that was paid into this account was $4408.97. Each of the above contributions includes a payment for one-third of one hundred and fifty accumulated sick leave days, *i.e.*, fifty days, or four hundred hours.

The parties' 2001-2003 collective bargaining agreement was established through the interest arbitration Award of Raymond E. McAlpin. CITY OF OSHKOSH, DEC. NO. 30312-A (11/4/02). In that Award, McAlpin selected the City's final offer, which included the following:

> 8. Schedule A - Wages - Increase all wage rates by 3.0% effective the first pay period in 2001 and 3.0% effective the first pay period in 2002. Effective upon ratification or upon implementation of the City's PPO plan as described above, add to the wage rates currently in effect, an additional 0.75% of the 2001 wage rates. Increase all 2002 wage rates 4% effective the first pay period of 2003.
>
> . . .
>
> 12. Article VI, A. Sick Leave - Add as a new sentence in the last paragraph:
>
> "Effective upon ratification or an arbitrator's award, payment for unused accumulated sick leave shall be increased from "one-half of the employee's rate in effect" to "59 percent of the employee's rate in effect" in this paragraph under both options."

The Grievant filed a written grievance in mid-January of 2003 that alleged "I was denied 13.5 days sick leave payout which I intended be put in my 457b acct." The grievance "Remedy Sought" is as follows:

> 9% of all sick leave paid into my 457b account. This includes all sick leave on the books after 11-4-02 and any accumulated thereafter until this option can be exercised.

Attached to this grievance was the following statement from the Grievant:

Grievance OPPA #03-02

In December 2002 I requested 13.5 days of sick leave be placed in my 457b retirement account, held by the ICMA Corporation.

This request was per our 2001, 2002, 2003 Labor Contract with the City of Oshkosh. The above contract was awarded through an arbitrator's decision in November of 2002.

On 1/13/2003 at 10:45 a.m. I was informed by Ms. Linda Bochinski, (payroll clerk for the City of Oshkosh) that she didn't feel I was entitled to anymore sick leave payout. According to her this was because the new percentage (59% of 150 days versus 50% of 150 days became effective on 11/04/2002.

I contacted Mr. John Fitzpatrick (Human Resource Director for The City of Oshkosh) and reiterated my request for 13.5 days of sick leave payout be put into my 457b retirement plan. This was at approximately 11 a.m. On 1/13/2003. Mr. Fitzpatrick stated he would get back to me.

At approximately 11:40 a.m. Mr. Fitzpatrick called me at home and stated I was not entitled to 59% of 150 days for the following reasons:

1: The 2001, 2002, 2003 Labor contract between the City of Oshkosh and the Oshkosh Professional Police Association clearly stated that the 59% of 150 sick days payout is effective on 11/04/2002.

2: That the grievant had exercised my option of 50% of 150 days previous to the effective date of 11/04/2003.

3: I could not retroactively ask for 59% of 150 days in payout.

It is the Grievant's position that the refusal to allow the grievant to partake of the sick leave payout effective 11/04/02 is age discrimination and exclusionary to the grievant and as such is in violation of Wisconsin State Statutes and the "spirit of the labor contract". Further, the Grievant's contention is that 9% of all sick time in the Grievant's sick leave account, as well as sick leave earned after 11/04/2003 should be paid into the Grievant's 457b account managed by the ICMA Retirement Corporation.

The grievance was denied and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Union

The grievance presents "a question of contract interpretation." The changes to Article VI "must be construed to allow (the Grievant) to convert an additional thirteen and one-half (13.5) days toward his 457 plan." Any other conclusion "would result in age discrimination and invalidate the contract provision under state and federal law."

The revised language of Article VI, which provides the 59 percent benefit level, is made available for "each of the next three years." This reference is unclear regarding when the three year period commences, and thus on whether it permits "a maximum three (3) year window" or "more than a three (3) year window." Since the underlying language "can be reasonably . . . susceptible to more than one construction" it follows that "an ambiguity exists." Since the language is traceable to an arbitration decision in favor of the City and since the City proposed the language, it follows that the ambiguity should be construed against it.

Beyond this, the City's view is "inherently discriminatory" against the Grievant due to his age. The Grievant is the sole employee who is denied the increased benefit, and he is over fifty years old. Since the benefit is generally available to employees under the age of fifty, it follows that the benefit is granted based on age. This violates state law, federal law and the departmental policy and procedure manual.

The contract, particularly in light of the definition of a grievance under Article XVI, should be construed "to be legal and enforceable." Any other result would render the change to Article VI unenforceable. Under Article XI, the parties "would then be required . . . to immediately commence negotiations to adjust the sick leave language to comply with age discrimination laws." The grievance must be sustained.

City

The change to a 59% contribution level became effective on November 4, 2002. There is no evidence for the Union's attempt to make this benefit retroactive.

The City contributed to the Grievant's 457 plan in 1998, 2000 and 2001. The City's contributions for the Grievant were completely made "prior to the effective date of the increase in benefits" and, thus, the Grievant "already received all that he is entitled to." If the change had been a decrease "would the Grievant be expected to return a portion of the contribution made by the City on his behalf?"

Beyond this, the governing language clearly demands that the contribution shall be made at "one-half of the employee's rate in effect when the (contribution) is made." The evidence shows that the City paid the contribution at "his pay rate then in effect." To require any further contribution affords the Grievant a "windfall" and "a benefit the parties did not intend." It would also expose the City to claims from any employee who ever received the sick leave payout benefit.

The Grievant has failed to demonstrate that he was treated differently than others who are similarly situated. That the Grievant did not receive the 59% contribution is traceable to nothing other than his choice to take the benefit when he did. There is no discrimination against the Grievant. The grievance is without merit and, therefore, must be denied.

Union Reply

The City's brief "emphasizes only a portion of the relevant contract language" and obscures the ambiguity of the contract. The City's attempt to assert that a reduction in the benefit plays a role in the interpretation of the ambiguity attempts to mask that any increase or decrease in a benefit must be bargained, and the City "did not bargain in an exclusion" of the Grievant to the fifty-nine percent contribution.

That the City completed its contributions to the Grievant is true, but it is no less true that the parties bargained an enhancement of the benefit, which obligated the City to a greater contribution. Nor is there any evidence to indicate the parties intended anything other than a unit-wide affect for the fifty-nine percent contribution level. The assertion that this "would open the door for retirees to come back and make claim borders on the ridiculous." The enhancement "clearly applies to employees on the payroll on November 4, 2002." The Grievant is the sole employee on the payroll "who had exercised the full option under the 457 plan" and no one who retired before that time could timely file a grievance.

The City's actions are "blatantly discriminatory" and treat the Grievant "differently, because of his age." On this basis alone the City's view must be rejected.

City Reply

The Union's reading of the formula improperly applies the fifty-nine percent payout rate to the number of accumulated sick days rather than to the employee's wage rate in effect at the time the deposit is made. This does not yield a different result than the Union seeks, but cannot explain "the appropriate wage rate" to be applied to the 13.5 days that the Union seeks. Moreover, the Union's view strains the language of the grievance procedure and Article XI.

The changes to Article VI are clear and unambiguous. The only change in the language was the increase in the payout rate from fifty to fifty-nine percent. The establishment of a cutoff date cannot be considered unclear. Contrary to the Union's view, there is only "one possible conclusion" regarding the three year period: "An employee has three years from the date that he . . . first deposits one-third of his sick leave into his 457 account to complete the transaction." That Bochinski permitted the Grievant to contribute "to his 457 account in three of four years" was no more than an accommodation for the Grievant. It would be improper to penalize the City for this single variance.

The record provides no reason to conclude that the parties intended to alter existing practices by changing Article VI. The November 4, 2002 date is a cutoff date to distinguish who receives a fifty percent payout rate and who receives a fifty-nine percent rate. The Grievant's election to act when the payout rate was fifty percent was his choice. The cutoff date is clear and unambiguous and thus need not be construed, or construed against its drafter. The date "was merely the implementation date for the 59 percent payout improvement that the parties had negotiated."

The burden of proving age discrimination is the Union's. The assertion that employees under the age of fifty may receive the benefits does not show discrimination, but highlights that the Grievant "has already availed himself of the benefits under the sick leave payout formula." That he is not entitled to more says no more than that the benefit enhancement is prospective rather than retroactive. It may be that certain employees must be paid under each payout rate, depending on when they claim the benefit. That the City gave the Grievant the benefit of a retroactive pay increase in 2001 further underscores the City's "extremely good faith in applying the terms of the Contract."

DISCUSSION

The City's statement of the issues presents a potential issue with respect to the City's conduct in supplementing the deposit that was made on April 26, 2001 to reflect the 3% wage increase that, under Arbitrator McAlpin's Award, was retroactive to the first pay period in 2001. The City's conduct in making this supplemental deposit is not at issue in the grievance that was filed in this matter. The Union's statement of the issue accurately reflects the issue presented in this grievance. Accordingly, the Union's statement of the issue has been adopted by the undersigned.

The collective bargaining agreement language that was in effect from 1998 through 2000 provided the Grievant with a right to use accumulated sick leave to make contributions into a Sec. 457 plan. The relevant language in Article VI(A) is as follows:

> In addition to the employees' right to accumulate sick leave without limitation, unused accumulated sick leave up to 150 days shall be paid at one-half of the employees' rate in effect at the time of said separation for those employees who retire at age 50 or older or for those employees who separate because of disability. Pursuant to ss.66.191. As another option, an employee, who has accumulated 150 sick days and is at least 50 years old, may choose to contribute one-third of his/her total accumulated sick leave payout amount placed in a 457 (currently R.C.) account for each of the next three years. In such case, the employee shall receive one-third of his/her total accumulated sick leave paid at one-half of the employee's rate in effect when the deposit is made. This option shall only be available to those employees who meet all rules, regulations and requirements of the 457 plan administrators.

The parties are in agreement that, through the Sec. 457 contributions made in 1998, 2000, and 2001, the Grievant contributed the maximum accumulated sick leave payout amount allowed under the language that existed under the 1998-2000 collective bargaining agreement. The Union, contrary to the County, argues that the Grievant is entitled to contribute an additional thirteen and one-half days to his Sec. 457 plan by virtue of "new language" that was added to Article VI(A) of the 2001-2003 collective bargaining agreement. This "new language", which was added to the last sentence of Article VI(A), states as follows:

> Effective 11/4/02, payment for unused accumulated sick leave shall be increased from "one-half of the employee's rate in effect" to "59 percent of the employee's rate in effect" in this paragraph under both options.

The Union asserts that the addition of this new language created an ambiguity with respect to whether the Sec. 457 contribution provided for in Article VI(A) is for a maximum of three years, or is for more than three years. The Union argues that this ambiguity must be construed against the City's position, i.e., that the Sec. 457 position is for a maximum of three years, and in favor of the Union position, i.e., that this contribution is for more than three years, because (1) the City proposed the language and, under the rules of contract construction, ambiguous language should be construed against the drafter and (2) the City's interpretation results in a contract construction that discriminates against the Grievant on the basis of age, in violation of federal and state law and County policy.

In the Arbitrator's view, the issue of whether or not the Grievant has a right to make a contribution in more than three contribution years is resolved by the following language: "As another option, an employee, who has accumulated 150 sick days and is at least 50 years old, may choose to contribute one-third of his/her total accumulated sick leave payout amount placed in a 457 (currently R.C.) account for each of the next three years." Given the fact that each contribution is required to be "one-third of his/her total accumulated sick leave payout

amount" and this "one-third of his/her total accumulated sick leave payout amount" is to be placed in the Sec. 457 account in "each of the next three years," the only reasonable conclusion to be drawn from this language is that Article VI(A) provides the Grievant with the right to make one contribution per year for three years.

To be sure, the most reasonable construction of the phrase "next three years" is that the three contribution years will be consecutive and such a construction is inconsistent with the parties' conduct in permitting the Grievant to make his contributions in 1998, 2000 and 2001. The County now argues that the County made a mistake when it permitted the Grievant to contribute to his Sec. 457 account in 2001 because, under the plain language of the 1998-2000 collective bargaining agreement, the Grievant's contributions should have been made in 1998, 1999, and 2000. Mistake or not, the 2001 contribution only raises an issue as to which three years may be contribution years. It does not provide any reasonable basis to conclude that the Grievant is entitled to make a Sec. 457 contribution in more than three years. Thus, for the purpose of resolving this grievance, the undersigned need not, and does not, make any determination as to whether or not the County made a mistake in allowing the Grievant to contribute in 2001.

The undersigned turns to the "new language" that was added to the 2001-2003 contract. The reference "Effective 11/4/02" points strongly to the prospective application of the final sentence of Article VI(A). To the extent doubt exists on this point, the continuing presence of the "one-half of the employee's rate in effect when the deposit is made" resolves it. If the final sentence were to have retroactive effect, this reference should have been eliminated from the contract. It was not, and an arbitrator must give effect to all of the terms of an agreement. The City's view does so.

The Union seeks to avoid this result by focusing on the total number of days that can be included under the revised fifty-nine percent payout. This view has, however, little support in the language of Article VI(A). The formula of Article VI(A) does not focus a contribution on accumulated days, but rather, on a "payout amount." This "payout amount" is a sum of money keyed to "the employee's rate in effect when the deposit is made." By its terms, the formula is to yield dollars not days. Thus, the Union's view, unlike the City's view, strains the existing language.

As with the evidence of past practice, evidence of bargaining history is limited. The revision of Article VI(A) is traceable to the City's final offer, which was awarded through interest arbitration. It does not, however, follow from this that any ambiguity in the provision must be construed against the City. The City's offer did no more than enhance the payout contribution formula from fifty to fifty-nine percent. Whatever ambiguity exists in the questioned language, *i.e.*, the meaning of "each of the next three years," preceded the revision and this undercuts the force of the Union's argument.

The Union argues that the interpretation of Article VI(A) should be guided by external law and departmental policy incorporating it that precludes age-based discrimination. Neither the agreement nor the evidence supports an arbitrator's attempt to interpret external law. The final sentence of the first paragraph of Article XVI broadly defines a grievance, but the following sentence restricts an arbitrator to "the interpretation of application of the terms and conditions of this agreement." The provisions of Article XI do not undercut this conclusion. The first sentence states that neither party waives its statutory rights. This does not mean they have agreed to arbitral enforcement of them. The next sentence states a "savings clause" that falls short of stating that an arbitrator's decision can declare a contractual provision "invalid."

Moreover, the asserted conflict with external law is less than apparent. The Grievant contends that, for the reason of age, a younger employee may be able to claim a benefit he cannot. This ignores that the same employees, for the reason of age, did not qualify for the benefit he chose to receive in 1998, 1999 and 2001. It also ignores that the Grievant's failure to qualify for the Sec. 457 benefit that he now claims is not due to his age, but rather, is due to the fact that he claimed the full Sec. 457 benefit under the contract provisions then governing it.

In summary, the most reasonable construction of Article VI(A) is that it provides for only three contribution years. The "new language," relied upon by the Union, establishes a formula for calculating the monetary value of Sec. 457 contributions made on, or after, November 4, 2002, but does not modify, in any way, the contract language that provides for only three contribution years.

The Grievant elected his three contribution years when he made his contributions in 1998, 2000 and 2001. Inasmuch as these contributions were made prior to November 4, 2002, the Grievant is entitled to have the monetary value of these contributions calculated under the formula that existed prior to November 4, 2002. The County calculated the monetary value of these contributions under the formula that existed prior to November 4, 2002. Accordingly, the Grievant has received the Sec. 457 benefit that was negotiated by the parties.

Contrary to the argument of the Union, the Grievant is not entitled to contribute an additional thirteen and one-half (13.5) days of accumulated sick leave to his Sec. 457 plan. Accordingly, the grievance has been denied and dismissed.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Grievant is not entitled to contribute an additional thirteen and one-half (13.5) days of accumulated sick leave to his Section 457 plan.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 6th day of November, 2003.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

CAB/gjc
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