BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LUXEMBURG-CASCO EDUCATION ASSOCIATION

and

LUXEMBURG-CASCO SCHOOL DISTRICT

Case 16
No. 62111
MA-12162

(Survivors' Benefits Grievance)

Appearances:

Mr. David Brooks Kundin, Executive Director, Bayland UniServ, 1136 North Military Avenue, Green Bay, Wisconsin 54303 on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney Robert W. Burns**, 200 South Washington Street, Green Bay, Wisconsin 54301, on behalf of the District.

ARBITRATION AWARD

At all times pertinent hereto, the Luxemburg-Casco Education Association (herein the Union) and the Luxemburg-Casco School District (herein the District) were parties to a collective bargaining agreement, which covered the period July 1, 2001, to June 30, 2003, and provided for binding arbitration of certain disputes between the parties. On February 13, 2003, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration on behalf of certain bargaining unit members who were contemplating early retirement (herein the Grievants) concerning the rights of survivors of retirees to health insurance benefits under the voluntary early retirement provision of the collective bargaining agreement. The Union requested the submission of a panel of WERC staff from which to select to arbitrate the issue. The parties subsequently designated the undersigned to hear the dispute and a hearing was conducted on July 1, 2003. The proceedings were transcribed and the transcript was filed on July 21, 2003. The parties filed briefs on August 25, 2003, and reply briefs on September 15, 2003, whereupon the record was closed.

ISSUES

The parties stipulated to the issues to be determined, as follows:

Whether the District has misinterpreted or inequitably applied the language of the Collective Bargaining Agreement by asserting that Article IV, Paragraph N, does not provide health insurance benefits for dependents or surviving spouses of retirees who die prior to receiving the full benefit to which they would have been entitled?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

IV. CONTRACTS

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N. The Board will pay $1,000.00 for one year and up to five years health insurance at the same rate paid to active employees up to age 65 for early retirement. Early retirement may start at age 55 or a mutually agreed upon age. Upon retirement before age 60 a teacher shall receive full pay for unused sick days. This payment shall be made by July 15 of the retirement year.

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IX. INSURANCE

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B. The Board shall provide health and dental insurance at a dollar amount equal to 90% of premium at the September anniversary date of the policy for single or family plan for all full-time teachers. The Board shall pay 50% of the above agreed schedule for half-time teachers. The family plan is available to any male or female teacher who qualifies. The Union shall negotiate the carrier with the Board.

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BACKGROUND

Since at least 1993, the Collective Bargaining Agreement between the parties has contained voluntary early retirement language essentially identical in all material respects to that contained in Article IV, Paragraph N, above. During the 2002-2003 school year, several teachers who were approaching the age of eligibility for early retirement began planning for their retirement. These included the Grievants herein, Margaret Lychwick, Sheila Postel, Jill Dopke, Paul Steffeck, Ed Langin and Lee Schmilling. During this time, a question arose among the Grievants as to whether the contractual early retirement benefits, essentially health insurance premium contributions for up to five years, extended to surviving spouses and dependent children in the event the retiree deceased prior to expiration of the benefit. The question was posed to the District administration which took the position that there are no survivors' benefits under the voluntary early retirement provision. Upon receiving the District's response, the instant grievance was filed. The matter proceeded through the contractual grievance process and the grievance was denied at each step, resulting in the present arbitration.

POSITIONS OF THE PARTIES

The Union

In order to effectuate the purpose of the earned early retirement benefit, it must be available to surviving spouses and dependents. Benefits, such as health and dental insurance, which are received purely by virtue of the existence of an employment relationship should, by rights, expire upon the termination of the employment relationship. This reality is what gives rise to the need for an early retirement benefit. Early retirement benefits do not exist simply by virtue of employment; they must be qualified for. To qualify, a District employee must retire between the ages of 55 and 60, whereupon they become eligible for a $1,000.00 cash payment and up to five years of health insurance premium contributions at the rate applicable at the time of retirement. Thus, early retirement benefits are earned.

The District Administrator stated that the early retirement benefit does not extend to surviving spouses or dependent children of deceased retirees. It is the District's position that benefits exist to the extent that they are expressly defined and do not exist by implication. This is inconsistent with long-established practices within the District. Examples include payment of premiums for retirees at the family-plan level if they were taking the family plan at retirement, paying 100% of the premium instead of 90% when both spouses are employed by the District and continuing to pay premiums for employees after they have exhausted their sick leave, but prior to their becoming eligible for long-term disability benefits. None of these benefits are specifically stated in the contract, but have been developed and maintained by consistent practice.

Custom and practice may be introduced to provide the basis for ruled governing matters not included in the written contract, or to indicate proper interpretation of ambiguous contract language, or to support allegations that the clear language of a written agreement has been amended by mutual action or agreement, as reflected by the past practice. Elkouri and Elkouri, How Arbitration Works, 5th Edition, p.630 (1997). In this case, the contract language itself does not indicate whether the benefit passes to survivors upon the death of an eligible retiree. Custom and practice, however, have been to provide benefits where the language is ambiguous or less than clear, as shown above. Further, the District's practice has been to collect the retirees' portion of the insurance premiums a year in advance, reflecting the District's perception that its commitment is for the entire benefit, not just on a month-by-month basis. The only reason it is only done yearly instead of all at once is because premium rates change annually. This existence of standing practice supports the Union's position in this case.

Public policy also supports the Union's position. It can be assumed that retirees expect their early retirement benefits to carry over to their survivors in the event of their deaths. Retirement contemplates planning for contingencies, therefore, it is logical to assume that retirees expect their benefits to carry over to their survivors in the event of their deaths and to interpret the early retirement provision accordingly. At the time the benefit was included, premiums were lower and it may assumed that the District and employees intended it as an incentive for teachers to retire sooner rather than later and, to that end, to provide protections for the retirees' dependents as part of the incentive.

This is a different circumstance than a teacher dying while employed, because the insurance contribution is an earned benefit in consideration for retirement, not a benefit based on employment status. As an earned benefit, their retirees are entitled to the full value of the benefit. This would have been the case when the benefit was added and it should not be changed merely because the cost of providing the benefit has risen.

The District

Arbitral authorities agree that contract language should be interpreted to give effect to all words and provisions. Any modification of the meaning of the contract must be based upon clear and unequivocal conduct of the parties. (Citations omitted.) In this case, the language of Article IV, Paragraph N, is clear. Teachers retiring early are entitled to a $1,000.00 lump sum payment, up to 5 years' health insurance premium contributions to age 65 and a cash payment for unused sick days if retiring before age 60. There is no reference to any survivor benefit. Given the rules of contract construction, it must be concluded that the District has, therefore, interpreted and applied the contract appropriately.

The Union has never bargained this benefit, nor raised it during negotiations. At the time the issue was raised, the Administrator conducted an investigation into the history of the matter. He discovered that the issue was not addressed in the contract, had never previously

been raised between the parties and that no such benefit had ever been extended to deceased retirees' survivors in the past. Further, other conference schools that had the benefit had specifically bargained it into the contract. On this basis, it cannot be said there is any practice or policy supporting such a benefit. Even the principal Grievant, Margaret Lychwick, testified that the existence of the benefit was an assumption made by bargaining unit members, rather than a result of any discussion or negotiation between the parties. The fact is, the grievance appears to have been triggered by the coincidence of the Grievants' prospective retirements and their probable concern over the cost and value of their benefits due to recent premium rate increases.

The Union presents the survivor component of the early retirement provision as an "earned and assumed" benefit. There is no evidence that this issue was ever even considered before Ms. Lychwick retired. It was only when she requested clarification on the matter from the administration and was informed that there was no survivor benefit that a grievance was filed. As held in MUSKEGO-NORWAY SCHOOL DISTRICT, WERC CASE 57, NO. 54393, MA-9665 (GRATZ, 4/2/98), such benefits cannot be inferred, but must be found in the language of the contract, which is not the case. Assumptions are suppositions or things taken for granted without proof. That is the case here. The Grievants took for granted something that was without basis in fact when contract benefits must be based upon specific agreements, not assumptions.

The Union also erroneously interprets past actions of the District in administering benefits as supporting its position. In a case where a teacher received insurance benefits subsequent to using his sick leave, but prior to receiving long-term disability, the benefits were required under the Family Medical Leave Act. The exemption of employees from premium contributions where both spouses were District employees was a mutually agreed benefit. The provision of insurance contributions for retirees at the level that they retired is a natural extension of the contract's insurance provision. None of these instances supports the Union's contention that survivor benefits are warranted here.

The Union plays the sympathy card by arguing that retirees' dependents would be left bereft if the retiree dies prior to five years from retirement. The fact is, there are many options available to retirees under the Wisconsin Retirement System or privately to ameliorate loss to their survivors. Some of these are certainly more expensive than a benefit provided at 90% cost to the District, but should the District, for that reason, be burdened with the cost of supporting not only the retirees, but their survivors? This is a benefit not even available to District employees and it makes no sense to assume the District would agree to provide a benefit to person who no longer provide services that it does not provide to its employees. The grievance is based on assumptions, not contract language, past practice or logic, and should be denied.

The Union in Reply

The District's brief inaccurately sets forth the facts and, thus, mischaracterizes the Union's case. It misstates the number of grievants and suggests that Margaret Lychwick is the sole grievant. It also claims not to have known prior to hearing that benefits for dependents other than spouses were in issue when that question was previously raised before the School Board. This and other misrepresentations appear to be an attempt to attack Ms. Lychwick's credibility.

Ms. Lychwick never contended that the issue of survivors' benefits was ever discussed in bargaining. The issue first arose when Ed Langin was preparing to retire and raised the issue of survivor coverage for his wife with Ms. Lychwick. The grievance arose when the coverage was denied.

The Union agrees that the Arbitrator is bound to apply clear and unambiguous language according to its terms. Thus, a provision that said either that there was or was not survivor coverage would control. There is no such provision and, therefore, the Arbitrator must construe the language of Article IV, Paragraph N, to determine if such a benefit is included. The District characterizes the Union's position as a mistaken assumption concerning the extent of the insurance benefit. Whether it is mistaken is for the arbitrator to decide. The Union views the early retirement benefit as a *quid pro quo* for retiring early and, because it is thus earned at retirement, it should pass to survivors in the event of the retiree's early demise. The District incorrectly cites MUSKEGO-NORWAY SCHOOL DISTRICT, WERC CASE 57, NO. 54393, MA-9665 (GRATZ, 4/2/98) in support of its position. A reading of that decision clearly shows that the arbitrator based his decision on bargaining history and the Union's attempt to obtain a benefit in arbitration that it could not get at the bargaining table. That is not what happened here because the issue has never been raised in bargaining.

The District also argues mistakenly that retirees should not get benefits unavailable to employees. In fact, retirees receive many things not available to District employees, such as pension benefits, paid health insurance although no longer working, a $1,000 lump sum payment and possible payout of accrued sick days. These are inducements given to encourage employees to leave teaching. In the case of insurance benefits, if the benefit does not extend to survivors, then the retiree is not getting the full benefit of the bargain. Retirees are fully vested with five years of insurance benefits at retirement, which should not be curtailed simply because insurance costs are increasing.

The District in Reply

The Union draws a distinction between benefits that are a condition of employment and those that are earned via early retirement. Regardless of how a benefit is acquired, the question to be answered is "what does it consist of?" The District maintains that benefits only exist to the extent they are set forth in the contract, are part of a recognized past practice, or are otherwise agreed to between the parties. None of those conditions exist here.

In PESHTIGO SCHOOL DISTRICT, WERC CASE 29, NO. 55409, MA-10007 (BIELARCZYK, 10/6/98), the arbitrator held that the District did not violate the contract by not paying insurance premiums during the summer months for laid off employees. The Union argues that the summer insurance premiums were an earned benefit based on service the previous school year, but this was not set forth in the contract's layoff language. The arbitrator held that the benefit did not exist because it was not specifically stated in the contract. A similar result was achieved in SCHOOL DISTRICT OF SEVASTOPOL, WERC CASE 10, NO. 49615, MA-8007 (GRECO, 9/27/94). These cases show that benefits not stated in the contract may not be assumed to exist.

The Union argues that certain benefits currently existing under past practice support the existence of this one as well. As the District has shown in each case, however, these benefits were a matter of discussion and agreement between the parties. In this case, the administration searched the contract for applicable language, reviewed past practice, polled District and Union personnel, examined past contracts, inquired of other Districts about retirement benefits and questioned School Board members. The result was that no support was found for the Union's position.

Finally, if the Union prevails, the question arises of where the District's responsibility to provide benefits ends. If unstated survivor benefits are presumed to exist, then why does the Union's representatives bargain such a benefit in other Districts? Is the District to be expected to provide other unspecified and unbargained for benefits in the future? There is no question that a survivor benefit for early retirees is of value to the Grievants, but the fact remains that it was never bargained for or even discussed in negotiations. This is a benefit that should be bargained for, not sought in arbitration.

DISCUSSION

The Union contends that the early retirement provision contained in Article IV, Paragraph N, is an "earned" benefit because it is a *quid pro quo* for the early retirement of the employee. In contract parlance, by retiring early the employee has given consideration to the District, in return for which the District provides the benefits listed in Paragraph N. Further, the employee has completely performed his or her part of the bargain and, therefore, in the Union's view is entitled to complete performance from the District. In this case, that performance is claimed to include up to five years of health insurance premium contributions, which pass to the retiree's dependent survivors in the event of his or her untimely death. For the reasons set forth below, I disagree.

Article IV, Paragraph N, specifies the benefits extended to early retirees. These include a one-time lump sum payment of $1,000.00 and health insurance premium contributions for up to five years at the rate applicable for active teachers up to age 65. In addition, teachers retiring prior to age 60 are entitled to receive a payout of their unused sick

days at full value. As all parties concede, the provision makes no specific reference to any interest of surviving spouses or dependent children upon the early death of the retiree. That being the case, it is not possible to determine the existence of such a benefit from the face of the contract itself. Thus, it becomes necessary to look at collateral evidence to determine whether such a benefit may be inferred.

A review of the bargaining history between the parties is not instructive. In fact, if anything, it undercuts the Union's case. This is because both parties agree that the issue of survivors' benefits has never been discussed in bargaining. Thus, there is no bargaining history, per se, on this question. The Union asserts that this is because the members always assumed that survivor benefits were included and that there was no need to bring it up. The underlying presumption is that the survivor benefit was such an obvious part of the package that it needed no discussion or explication. Unfortunately, without any discussion having occurred it is difficult to discern any meeting of the minds between the parties on this point. The District denies any such understanding and the record is barren of any contradictory evidence. Thus, it is not possible based upon bargaining history to find the existence of any understanding regarding such a benefit.

Another primary method of determining the existence of an agreement outside of the contract language is past practice between the parties. In this case, the Union points to three instances where it contends contractual benefits have been extended beyond their written parameters, although none dealing with the question raised here. Specifically, the instances are 1) husband/wife faculty members receiving 100% health insurance premium contribution, 2) a disabled faculty member receiving health insurance benefits after exhausting his sick days, but prior to qualifying for disability insurance and 3) providing health insurance premiums for early retirees at the family plan level rather than the single plan level although not specified in the contract language. On this basis, the Union contends that a past practice exists of interpreting contractual benefits broadly to cover any gaps not addressed in the contract language, which should also control here. I disagree.

The doctrine of relying on past practice to clarify the meaning of ambiguous language is limited in scope to the specific language at issue and the specific interpretation of that language that the practice is alleged to support. To infer a controlling practice from actions agreed to between the parties in isolated circumstances dealing with different issues would, to me, be a dangerous precedent. That is because the alleged practice is used to indicate an understanding or meeting of the minds between the parties. I am not persuaded on this record that the District ever understood isolated agreements regarding insurance premiums for married or disabled employees to be an acknowledgement of survivors' benefits for early retirees. I am likewise reluctant to find an established past practice as to a concept as amorphous as the "gap-filling" policy proposed by the Union. Such a policy would have far-reaching and unforeseen, not to say costly, consequences for the District extending in many directions. Without more definitive evidence as to such a broad understanding, therefore, I am unwilling to reach so far.

Finally, on two grounds, the Union maintains that public policy dictates that survivors' benefits attach to the early retirement provision. First, the Union asserts that the insurance benefit is earned and completely vested upon retirement and thus the District is bound to extend the full benefit to either the retiree or his or her heirs. I agree that the benefit is vested to the extent that once an employee has retired, he or she has done all things necessary to qualify for the benefit and the District is required to honor it to the extent provided by contract. That does not mean, however, that the benefit automatically extends beyond the retiree. Not all personal property interests, tangible or intangible, automatically pass to one's heirs upon death, which is a primary reason for estate plans, where intended rights, interests and transfers are carefully spelled out. Likewise, if the Union intends retirement benefits to have such scope it needs to have them clearly defined.

Secondly, the Union asserts what may be termed an "expectation interest" on the part of its members to a survivorship component to the early retirement benefit, and that it would be inequitable to deny the existence of a benefit that the Union's members have assumed existed and relied upon for years. Thus, it is at least suggested that when the Union agreed to the early retirement provision, it was at least in part in reliance upon insurance also being extended to survivors. While there is testimony that individual members, and certainly the Grievants, assumed such a benefit existed, however, the record does not support a finding that such an assumption was universal or even made by a majority of members. Single employees certainly were unlikely to be overly concerned about survivors' benefits and had there been a groundswell of interest about such an important benefit among the members with families one would have expected the question to have been raised in bargaining or some other forum before this. As it is, while the record does contain references to assumptions made by Union members about the scope of the benefit, it does not show that the District was ever made aware of this interpretation, nor that it was a significant factor in the Union's willingness to agree to the provision.

For the reasons set forth above and based upon the record as a whole I hereby enter the following

AWARD

The District did not misinterpret or inequitably apply the language of the Collective Bargaining Agreement by asserting that Article IV, Paragraph N, does not provide health insurance benefits for dependents or surviving spouses of retirees who die prior to receiving the full benefit to which they would have been entitled. The grievance is, therefore, denied.

Dated at Fond du Lac, Wisconsin, this 11th day of December, 2003.

John R. Emery /s/

John R. Emery, Arbitrator

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