

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**INTERNATIONAL ASSOCIATION OF FIREFIGHTERS
LOCAL 407, AFL-CIO**
and
CITY OF WAUKESHA

Case 167
No. 65009
MA-13085

Appearances:

Mr. John Fuchs, Fuchs, DeStefanis & Boyle, S.C., Attorneys at Law, 620 North Mayfair Road, Milwaukee, Wisconsin 53226-4253 appearing on behalf of the Union.

Ms. Donna Hylarides Whalen, Assistant City Attorney, City of Waukesha, 201 Delafield Street, Waukesha, Wisconsin, 53188, appearing on behalf of the City.

ARBITRATION AWARD

The Union and Employer named above are parties to a 2004-2006 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to hear and resolve a dispute over wages. The undersigned was appointed and held a hearing on October 14, 2005, in Waukesha, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. At the conclusion of the hearing, the parties gave oral arguments in lieu of filing briefs. The transcript of the hearing was received on October 26, 2005, at which time the record was closed.

ISSUE

The issue to be decided is:

Did the City violate the collective bargaining agreement by adding \$12.00 per pay period on October 1, 2004, and \$5.60 on January 1, 2005 to firefighter

pay schedules as an offset for health insurance concessions? If so, what is the appropriate remedy?

BACKGROUND

During the contract term prior to the current contract, the City decided to change health insurance carriers. The parties found that the benefits were not the same, that there were a number of complaints, and the parties started meeting over the insurance issue on December 18, 2003. They held several meetings through 2003 and 2004, which included all the bargaining units in the City. The parties ultimately went with a self-insured plan. The City had determined that employees would pay something toward the premium and that it would be retroactive to 2004.

Union President Dan Holehouse recalled the negotiations in October, November and December of 2004. Eventually, the City offered to pay employees 15 cents across the board to all unions in exchange for employees paying \$40 for a family plan and \$14 for a single plan for the last three months of 2004. In 2005, employees would pay \$20.75 for a single plan, \$62.25 for a family plan, and the City would pay employees an additional 7 cents per hour.

On November 4, 2004, the parties signed a Memorandum of Understanding regarding the wage and insurance agreement for all the bargaining units. The Memorandum states:

It is the understanding of the parties indicated by signatures below that with regard to the Health plan and Wages component of the Union contracts with all Bargaining Units currently working for the City of Waukesha, for the 2004 through 2006 contract years, the Administration of the City of Waukesha and the representatives of the Bargaining Units shall recommend to the Common Council for the City of Waukesha and the rank and file of the Bargaining Units, respectively, as follows;

1. Health Plans

- a. The City agrees that in calendar year 2004, employees shall have all insurance plans available as of January 1, 2004.
- b. In calendar years 2005 and beyond, except as modified and amended by Exhibit "A," attached to this Memorandum and hereby incorporated by reference, the City shall provide to all Bargaining Units benefits equal to or better than those provided by United Healthcare, Inc. to City employees in 2003 under the UHC PPO plan or UHC POS plan, whichever provides the higher level of benefits.
- c. In calendar years 2005 and beyond, except as modified and amended by Exhibit "A," the city shall provide to all Bargaining

coverage equal to or better than the coverage set forth in the U.C. and R. that was in force and effect in 2003.

- d. 2004 Employee Contribution. All employees of the Bargaining Units shall contribute \$40 to the premium assessed for health insurance for a family and \$14 to the premium assessed for health insurance for a single person for the year 2004, with such contribution assessed for the months October, November, and December.
- e. 2005 Employee Contribution. Effective January 1, 2005 and beyond, with regard to the option referred to in Exhibit "A" as PPO 1, all employees of the Bargaining Units shall contribute five (5) percent of the premium assessed for health insurance up to a maximum of \$62.25 for the family plan, and \$20.75 for the single person plan option.
- f. No Contribution For High Deductible Plan. With regard to the option referred to in Exhibit "A" as PPO 2, no premium contribution for health insurance shall be required.

2. Wages

- a. For contract year 2004, all Bargaining Unit employees shall receive a 2.95 percent wage increase across the board, retroactive to January 1, 2004.
- b. For contract years 2005 and 2006, all Bargaining Unit employees shall receive a 2.95 percent wage increase A.T.B. effective January 1 of each contract year.
- c. Effective October 1, 2004, all wage rates shall increase by fifteen (15) cents per hour A.T.B. as a "quid pro quo" in return for the premium contributions described in paras. (1)(d) and (1)(e) of this Memorandum.
- d. Effective January 1, 2005, all wage rates shall increase by seven (7) cents per hours A.T.B. which shall be applied following the application of the 2.95 percent A.T.B. wage increase for contract year 2005 as a "quid pro quo" in return for the premium contributions described in paras. (1)(d) and (1)(e) of this Memorandum.

3. Miscellaneous Provisions

- a. The Bargaining Unit representatives hereby understand and acknowledge that as a component of these measures receiving approval by the common Council for the City of Waukesha, it is the desire of the Common Council that all other economic issues presently at issue in individual Union contracts be dropped.

understand and acknowledge that nothing in para. (3)(a) of this Memorandum prohibits any Bargaining Unit from raising and negotiating any issue it deems subject to bargaining during negotiation sessions.

- c. Transition Plan. City Administration shall provide all Union employees with specifics of the formulary plan or plans which shall be applied starting January 1, 2005 no later than December 1, 2004 so as to permit employees time to take steps to rectify any problems created by any change to the formulary.
- d. Out-of-Network Reimbursement for Reduction of Reimbursement by Humana. With regard to out-of-network reimbursements made by Humana in 2004, in the event that employees were reimbursed for less than eighty (80) percent of U.C. and R. coverage, if an employee can substantiate a claim that the provider and the amount charged were the same by no later than April 15, 2005, the City shall reimburse the difference.
- e. “Pre-65” Retirees in Same Risk Pool. Starting January 1, 2005, City retirees who have not attained age sixty-five (65) shall be included in the same “risk pool” as active employees.
- f. Rights of Married Persons Who Both Work for the City. In the event two married individuals work for the City and one individual retires, the active employee’s insurance shall cover all members of the family. At such time as neither individual is an active employee of the City, each individual shall retain all health insurance payment rights under the applicable Union contract at the time of each individual’s retirement.
- g. ‘Pre-65” Retirees Not Subject to Premium Copays. Persons who retire prior to age 65 and are eligible for health insurance premium payment by the City at fifth (50) percent will not be subject to payment of premium copays.
- h. All parties understand that the City Administrator does not have the authority to execute any contract binding to the City without Common Council approval, and that this Memorandum therefore does not constitute a contract, but is simply a statement in writing as to the components of the health care plan and wages to be provided in all contracts with all Bargaining Units for the 2004-2006 contracts.
- i. All parties further understand the provisions set forth in this Memorandum cannot go into effect until such time as the parties mutually ratify such changes.
- j. The City agrees to include in its health insurance coverage all past, present and future “State Mandated Benefits” as described by Chapter 63 of the Wisconsin Statutes to the extent that the State

The Memorandum was signed on November 4, 2004 by the City Administrator James Payne and five representatives of the bargaining units, include Holehouse. There were three drafts of the above memorandum before the final draft was signed. The reference to wages never changed in any of the drafts. The City never asked the Union to make any adjustment to the 15 and 7 cents per hour based on the fact that the firefighters work more hours in a week. They work 52.3 hours in a rotating schedule. There is one person in the bargaining unit that works 40 hours a week. During bargaining for the wages and insurance, no one from either side raised the issue of how many hours the firefighters work.

The collective bargaining agreement was not signed until June 8, 2005. The contract contains an attachment – called “H” – regarding health insurance. Attachment H begins by saying:

Below is a restatement of the joint November 4, 2004 Memorandum of Understanding (MOU) describing only the Health Plan component of the MOU. Other MOU provisions are incorporated in the contract or are matters of mutual understanding.

Attachment H does not deal with any wages. The collective bargaining agreement also contains an attachment regarding compensation required by the Fair Labor Standards Act, and because of the hours over 204 in a 27 day work period, the affected employees will get additional holiday hours.

The contract underwent a few drafts before it was signed. The City drafted the salary schedule as well as the contract and sent it to the Union sometime before February 14, 2005, when the Union responded. The City replied on February 23, 2005. The Union again sent a letter on March 2, 2005, and this letter shows that the salary scheduled of biweekly salaries had been attached. It shows there is a \$12.00 increase on October 1, 2004, which would be 15 cents for 80 hours. The Union did not point out at that time that the \$12.00 increase would not cover 15 cents an hour for all hours, or for 52.3 hours. The Union sent another letter on May 31, 2005, with some changes for the final draft. None of the correspondence between the parties flags anything about the dispute over the number of hours and the cents per hour for the quid pro quo for insurance.

Holehouse said he read the contract before he signed it but he did not do the math. When bargaining unit members found out that the cents per hour was closer to 11 and 5 cents rather than 15 and 7 cents per hour, due to their longer work week, they filed a grievance. They figured they were being cut out of 12.3 hours per week for the 15 and 7 cents. The difference would be \$1.84 an hour for the 15 cents, or an error of one-tenth of 1 percent.

The wage increase for the quid pro quo for insurance contributions was implemented

the bargaining units pay the same amount on the insurance premiums, except for the difference of whether they are taking family or single coverage. There are 8 bargaining units represented by 5 unions.

Payne said it was the City's intention to treat all employees the same with respect to health insurance regardless of which bargaining unit they were in. Payne's understanding of the quid pro quo was that the additional cents per hour were to offset the contribution to the insurance premium. Both police and firefighters are salaried, the rest of the units are hourly employees. Payne used calculations for the firefighters starting with a 2.95% increase of \$38.04. Then he took 15 cents per hour, multiplied it by 2,080 hours and divided that number by 26 (pay periods) which resulted in \$12.00 per pay period. He used the same calculation for the 7 cents increase, which resulted in \$5.60 increase per pay period, on top of the 2.95% increase. He used the same calculation for both the police and fire bargaining units, both of which are salaried employees.

POSITIONS OF THE PARTIES

The Union

The Union asserts that the City may have had one intention regarding the quid pro quo for premium contributions but it reached an agreement with the Unions stating simply that it was 15 cents an hour and then 7 cents an hour, and that was the deal. What the City may have intended is not what both parties intended and not what they signed. If the City had intended a flat amount, it could have said that, but the MOU says 15 and 7 cents per hour. There is no ambiguity because of a schedule that has an error in the math. The Union is asking for the 15 and 7 cents per hour. If the City wanted to do something other than that, it should have bargained for it.

The City

The City contends that there is no mutual mistake, and that the Association is asking for a reformation of the agreement. The history of the negotiations shows that the employees would be treated equally. They have the same contributions toward premiums, and the intent was to provide an equal offset for all bargaining units. The parties traded drafts of the contract, and when the Union told the City there were no problems, the City had a right to rely on that representation.

DISCUSSION

The Union essentially is asking the Arbitrator to look only at the MOU and ignore the contract. If the Arbitrator were to enforce the MOU of November 4, 2004, the Union would

as a quid pro quo and then by 7 cents the next year as a quid pro quo. There is no limitation that the 15 and 7 apply only to 40 hours a week. And, I do not necessarily agree with the City's position that the qualifier is the quid pro quo. Quid pro quo's can be anything – not necessarily a dollar for dollar exchange. The quid pro quo may be whatever is acceptable to a party. In this case, what was acceptable to one bargaining unit may not have been acceptable to another.

However, the Arbitrator is charged with enforcing the contract. To determine whether the MOU is an extension of the contract or not, the Arbitrator has looked at the language the parties drafted on the MOU. The first sentence indicates that this is an understanding of the wage and insurance components, and that the parties will recommend it to their respective bodies. Late in the MOU, under Section 3, h, a statement is made that all parties understand that the City Administrator does not have the authority to execute any contract binding to the City without Common Council approval, and “that this Memorandum therefore does not constitute a contract, but is simply a statement in writing as to the components of the health care plan and wages to be provided. . .” Section 3, i, then states that all parties understand that the provisions cannot go into effect until the parties both ratify such changes.

Clearly, the MOU is not a contract itself, but a draft of tentative agreements of wages and health insurance. Like many tentative agreements, later drafts may change them and the parties must still agree on the final draft of the contract, not the draft of the tentative agreements. This MOU does not have the status of a settlement agreement that would be an extension of the contract, because it was a statement of the understanding of the parties' negotiations that were to be ratified later. Thus, the Arbitrator cannot enforce the MOU, because there is a contract that may be in conflict with the MOU, and the contract is the ultimate document that is enforceable.

When the contract was drafted, the City drafted it just as it intended to be implemented – that the 15 and 7 cents would be paid on a 40 hour work week. If the Union missed that element because the difference in money was minuscule, it was still responsible for reviewing the contract. It is difficult to believe that Holehouse did not do the math, because the 2.95% is not a number that most people can easily calculate in their heads. Certainly 15 cents an hour on 52.3 hours needs a sharp pencil.

The City does not believe there was an error in the contract. The City understood that all employees would be paying the same amount for insurance and be compensated by the same amount in the quid pro quo for the insurance contribution. Almost all of the employees in the City work 40 hours a week, and the City intended that all pay the same amount for the insurance contribution and be given the same amount in the quid pro quo. If the City or other bargaining units believed that the firefighters would have been getting more, there would have been objections based on equity. Thus, there is no proof of a mutual error on the record. The Arbitrator cannot give the Union the strict “per hour” terms of the MOU where the parties have a signed contract that implements the terms of their MOU. The Arbitrator must enforce

the contract.

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AWARD

The grievance is denied and dismissed.

Dated at Elkhorn, Wisconsin this 24th day of January, 2006.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator

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