BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BLOOMER LOCAL OF THE
WISCONSIN PROFESSIONAL POLICE ASSOCIATION

and

CITY OF BLOOMER, WISCONSIN

Case 28
No. 65150
MA-13136

Appearances:

Gary Gravesen, Bargaining Consultant, WPPA/LEER, 16708 South Lee Road, Danbury, Wisconsin 54830, for the Bloomer Local of the Wisconsin Professional Police Association, referred to below as the Association.

James M. Ward, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, for the City of Bloomer, Wisconsin, referred to below as the City or as the Employer.

ARBITRATION AWARD

The Association and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, as Arbitrator to resolve a grievance filed on behalf of the Local and Greg Loew. Hearing on the matter was held on December 7, 2005 in Bloomer, Wisconsin. The hearing was not transcribed. The parties filed briefs by February 22, 2006.

ISSUES

The parties did not stipulate the issues for decision. The Association states the issues thus:

Did the City of Bloomer violate the labor agreement when it failed to compensate the Grievant for unused accumulated sick leave Grievant earned from the Grievant's date of hire until the time of the Grievant's voluntary separation of employment?

If so, what is the appropriate remedy, if any?

The City states the issues thus:

Did the City violate Article 23 of the collective bargaining agreement when it refused to pay the Grievant, Greg Loew, his unused sick leave balance when he left his employment for reasons other than retirement but after 10 years of service?

If so, what is the remedy?

I adopt the City's statement of the issues as that appropriate to the record.

RELEVANT CONTRACT PROVISIONS

ARTICLE XVII – INSURANCE

. . .

Section 17.03 – Retirement: Upon retirement, health insurance premiums shall be paid by the City for a period of one (1) year for each three (3) years of employment . . . For employees hired after January 1, 1992, at the time of retirement, unused illness time will be used to pay for health insurance until unused illness time is depleted. Then the one (1) for three (3) provision will apply. . . .

ARTICLE XXIII – SICK LEAVE

Section 23.01: Each employee shall accrue four (4) hours of sick leave for each pay period during the year with unlimited accumulation.

. . .

Section 23.03: Unused sick leave shall be paid to employees at the time of retirement. In the event of the death of an employee, any unused sick leave shall be paid to the employee's estate. Employees terminating their employment for reasons other than retirement or death shall be paid for the unused sick leave provided that the employee has been employed for at least ten (10) years. The payout provided for in this section shall not exceed 1040 hours or 130 days.

The provisions of this article shall be applicable to those employees who are forced to retire due to a job-related injury or illness disability.

. . .

Section 23.05: For employees hired after January 1, 1992, unused illness time up to 1040 hours shall be used to pay for health insurance for any employee who retires (pay rate at the time of retirement). Any employee terminating employment with the City before retirement shall not receive unused illness hours.

Section 23.06: Employees leaving the employment of the City after ten (10) years of service will be paid all of their unused illness time up to and including 1,040 accumulated during their employment, provided the employee notified the City at least two (2) weeks in advance of his/her departure. Failure to comply with this notice requirement shall result in the employee's forfeiture of any and all unused illness time. Monies paid for unused illness time will be paid out over a twenty-four (24) month period, to be paid in equal installments on a monthly basis. The provisions of Article XXIII, Section 23.06 shall also include the estate of an employee, and the parties agree the notice requirement will not be applicable.

BACKGROUND

At hearing, the parties stipulated the following facts:

1. Greg Loew's employment dates are March 3, 1993 through November 26, 2004.
2. Greg Loew left his employment with the City for reasons other than retirement.
3. Greg Loew gave more than two weeks' notice of his impending resignation.
4. At the time Greg Loew left his employment, he had 891 unused sick leave hours, at the applicable rate of $18.35 per hour, for a grand total of $16,349.85.
5. If the grievance is sustained, then this sum is payable to Greg Loew in twenty-four equal installments over a twenty-four month period.
6. The contract language at issue in this case, Sections 23.05 and 23.06, have remained unchanged since originally negotiated in the fall of 1991 or early 1992.
7. There is no past practice in the City of Bloomer to serve as an aid in the interpretation of the language of Sections 23.05 and 23.06 as agreed to in the fall of 1991 or early 1992, since this is the first time an employee has left the Bloomer Police Department after ten years of service but before retirement.

8. Thomas VandeBerg, the last Bloomer Police officer to receive a lump sum payment of unused sick leave after ten years of service but before retirement, left his employment with the Bloomer Police Department on January 25, 1990 and at that time he received a lump sum payment for his unused sick leave balance of 910 hours.
9. Thomas VandeBerg was paid under language in effect prior to the negotiation of Sections 23.05 and 23.06 in the fall of 1991 or early 1992.

The balance of the evidence is best set forth as an overview of witness testimony.

Greg Loew

Loew left both City employment and law enforcement after his resignation. While a City employee, he served as a member of the Association's bargaining team. He could not recall collective bargaining concerning Sections 23.05 or 23.06 during his tenure. At the time he gave notice of his resignation, he approached Michael Bungartz, the City's Police Chief, and asked whether he would receive a sick leave payout. The two of them reviewed the labor agreement and Loew noted that either section might apply to him. After roughly a twenty minute conversation, Bungartz told Loew that Section 23.06 probably applied, resulting in a payout of his accrued sick leave. Loew did not learn until after his retirement that the City had determined not to pay out his sick leave balance.

Joseph Wynimko

Wynimko has served in the City Police Department since May of 1980. He was on the Association's bargaining team when the parties agreed to insert Sections 23.05 and 23.06 into the 1992-93 labor agreement. He recalled that the City's primary concern was to spread the payment of accrued sick leave over a twenty-four month period, and did not believe the parties discussed changing the underlying entitlement to the payout. He thought the City proposed the changes that became codified in Sections 23.03, 23.05 and 23.06, and could not recall the "quid pro quo" for these changes. In his view, the final sentence of Section 23.05 precludes any employee with less than ten years of service from receiving a sick leave payout.

Michael Bungartz

Bungartz has served as Chief since January of 1996. Prior to becoming Chief, he served the City Police Department from May of 1985 as a Patrol Officer and a Sergeant. While a unit employee, he served as Association President, and he served in that position as a member of the Association collective bargaining team which negotiated the 1992-93 labor agreement.

Section 23.03 governed the VandeBerg resignation and preceded the negotiations which created Sections 23.05 and 23.06. At those negotiations, the then-incumbent Mayor raised a concern with the lump sum payment of accrued sick leave and a concern with the payment being used for purposes other than the payment of insurance premiums. At that time, it was

customary for the parties to discuss language broadly, with the Association preparing a draft of agreed-upon changes. He did not recall the Mayor suggesting specific language, but recalled the City proposing the concepts that became Section 23.06. To his recall, the City wanted to stop the payment in cash of accrued sick leave to employees hired post-1991 and to spread lump sum payments over twenty-four months.

Bungartz could not recall what, if any, "quid pro quo" was traded to achieve these changes. The Association did not, at that time, have any employees affected by them. He also stated that VandeBerg had complained about the amount of taxes withheld on his lump sum payment. Bungartz thought the Association may have agreed to the changes on the assumption that spreading the payments out after retirement would produce a tax benefit.

Bungartz acknowledged he initially indicated to Loew that Section 23.06 would yield a payment to him. He did not consider Loew's start date when he told this to Loew. In any event, after further research involving discussions with the Mayor who bargained the changes and his own recall of the bargaining, he concluded he had misread Sections 23.05 and 23.06.

Further facts will be set forth in the **DISCUSSION** section.

THE PARTIES' POSITIONS

The Association's Brief

The Association contends that the Grievant met the two requirements of Section 23.06, and thus is entitled to City payout of his accumulated sick leave. There is no relevant past practice, and the determination of the grievance must turn on the language of the agreement, with limited evidence regarding bargaining history. Sections 23.05 and 23.06 were added to the parties' 1992-93 agreement. Section 23.06 clearly establishes the Grievant's entitlement to a sick leave payout, since the stipulated facts establish he worked more than ten years for the City and gave the required two weeks notice. Significantly, Section 23.06 does not mention the hire date established by Section 23.05.

The City's failure to question the application of Section 23.06 from the 1992-93 agreement to the present establishes the weakness of its reading of Section 23.05. That the City did not bring the matter up during the most recent round of bargaining also undercuts its position. The City's view ignores that "the clear and unequivocal meaning of the language in Article XXIII of Section 23.06 leaves no room for interpretation".

The City's view of Section 23.05 reads Section 23.06 out of existence. Section 23.05 "talks about those employees hired both on and after January 1, 1992 . . . not getting paid for unused illness time, but such unused illness time must go toward the purchase of retiree health care." That section denies the option of a cash payment to "that specific category of employees." Section 23.06 contains no hire date reference, and thus must be applied to all employees. The two sections can be reconciled by concluding that the final sentence of

Section 23.05 applies only to employees who do not have ten years of service with the City. In sum, the grievance should be granted and the City should be ordered to pay the Grievant's accumulated sick leave, totaling $16,349.85, as demanded by the labor agreement.

The City's Brief

The City contends that bargaining history establishes that the Grievant is not entitled to a payout of accumulated sick leave. Section 23.03 governed this benefit at VandeBerg's retirement, and there is no dispute he was entitled to a sick leave payout. The creation of Sections 23.05 and 23.06 "were meant to alter the status quo in that regard." Wynimko's and Bungartz' testimony highlight that the parties differ "over the extent to which those new provisions altered the status quo." More specifically, the testimony highlights a dispute as to whether Section 23.06 can be applied to "post-1991 hires." While Bungartz did not assert this view when Loew first approached him, evidence and governing rules of contract interpretation support his of view of bargaining history.

The final sentence of Section 23.05 is pivotal to the grievance. Though the first sentence of the section establishes the date, it is evident from the context of the section that each sentence applies to post-1991 hires. The parties agree that the second sentence does not apply to pre-1992 hires. Wynimko attempted to give meaning to the sentence by claiming it applied to officers with less than ten years of service, but this view ignores that, "historically speaking, police officers with less than ten years of service have never been eligible for any payout of unused sick leave benefits if they left prior to retirement."

The City's view, unlike the Association's, gives meaning to each section. That 23.06 would, standing alone, grant the benefit sought by the Association cannot obscure that it must be reconciled with Section 23.05. The City's view permits the first sentence of Section 23.06 to apply to pre-1992 hires and the final sentence of Section 23.05 to govern post-1991 hires. The Association's view reads the final sentence of Section 23.05 out of existence and thus cannot be considered persuasive.

The Association's view produces an absurd result. That view applies Section 23.06 to all employees who leave after ten years of service. Under Section 23.05, however, employees hired post-1991 are ineligible for a cash payout. This means that an officer who leaves City employment prior to retirement, but has a working spouse with health insurance would receive a payout option only by quitting "just short of retirement". This "borders on the absurd."

Beyond this, the evidence indicates the Association drafted the language of Sections 23.05 and 23.06. Ambiguities in these sections accordingly must be construed against the Association. Because the Grievant elected to leave City employment before retirement and was hired post-1991, it follows that the "grievance is without merit and must be dismissed".

DISCUSSION

I do not perceive a significant difference between the parties' statements of the issues, and have adopted the City's because it underscores that Article XXIII is the grievance's contractual focus. The seventh stipulation noted by the parties at hearing underscores that Sections 23.05 and 23.06 govern the grievance.

The final sentence of Section 23.05 and the first sentence of Section 23.06 state the interpretive issue. The stipulations establish that the first sentence of Section 23.06, standing alone, grants the Grievant the entitlement the Association seeks. No less clear, however, is that the final sentence of Section 23.05 denies the Grievant the entitlement the Association seeks. This fundamental dilemma was evident in Loew's conversation with Bungartz when he notified the City of his resignation. Neither individual was sure which sentence governed, with Bungartz initially agreeing that Loew would receive a sick leave payout, only to reach a contrary conclusion after further research, including discussions with a former Mayor. Standing alone, neither provision is ambiguous enough to require interpretation. However, the two do not stand alone and the fundamental ambiguity posed is how to reconcile them.

On balance, the City's view is preferable because it grants meaning to each sentence, while the Association's does not. Some discussion of this conclusion is necessary, since the evidence affords significant support for the Association's view.

Stating what arguments are not helpful in reaching this conclusion prefaces the reasons supporting it. As noted above, the relationship of Sections 23.05 and 23.06 poses an ambiguity. Past practice and bargaining history are the most persuasive guides to resolve ambiguity, since each focuses on the bargaining parties' conduct. Here, however, the parties stipulated that there is no past practice. There is bargaining history evidence, but that evidence is unhelpful. Wynimko and Bungartz played a role in the bargaining which created Sections 23.05 and 23.06. Wynimko's recall of the bargaining, admittedly a distant memory, was limited. Bungartz' recall was more detailed, but less helpful. His recall affords more insight into the City's present denial of the payment than into its past role in creating the sections. His testimony affords no reason to understand why the Association agreed to a grandfather clause defeating Loew's entitlement to a sick leave payout. The absence of a clear reason for the Association to agree to the grandfather clause is the most significant weakness of the City's position and the fundamental strength of the Association's.

That the City has not sought to clarify the language in any round of bargaining following the Fall of 1991 or early 1992 affords no assistance in resolving the grievance. The ambiguity was a shared flaw which neither party sought to fix. This is not surprising, since each party believes the contract supports its view. Nor does it help to conclude either view produces "absurd" results. Payout options state rules to which payees will conform their conduct. That an employee might consider how or when to terminate to receive a payout is unremarkable. The interpretive issue is whether the parties intended to create such a rule.

The evidence is less than clear on which party proposed or drafted the sections. Even if this was not the case, concluding that either or both sections should be construed against their drafter affords little guidance. This axiom is most reliably left to contracts of adhesion or form contracts, where no true bargaining takes place and a party with disproportionate power takes advantage of the other party to the agreement. There is no similar reason to protect either the City or the Association from the other's bargaining conduct.

This leaves the fundamental proposition that contract provisions should be construed to give meaning to each provision and to deny meaning to none, see for example, *How Arbitration Works*, Elkouri & Elkouri, (BNA, 2003) at 462-464. This axiom assures that the intent of the bargaining parties is respected. The fundamental flaw in the Association's view is that its reading of Section 23.06 affords no meaning for the final sentence of Section 23.05. The City's view reads Section 23.05 as a grandfather clause, restricting the sick leave payout to pre-1992 hires with ten years of service. This permits the first sentence of Section 23.06 to apply to such hires, while limiting the application of the final sentence of Section 23.05 to post-1991 hires. As the City points out, the Association's view that the final sentence of Section 23.05 precludes a payout to those employees with less than ten years of City employment grants the sentence no meaning since those employees never had the entitlement.

As noted above, the City's view is flawed by the fact it cannot readily explain why the Association agreed to the two sections. The City's view does, however, have some support in the context of the 1991-92 bargaining. During that bargaining, the parties agreed to a number of provisions that established grandfather clauses, and more specifically, grandfather clauses emphasizing the significance of retiring from City employment. At a minimum, it is evident the parties created Sections 17.03 and 23.05 to eliminate, for post-1991 hires, employee choice of a sick leave payout upon retirement. The twenty-four month payment period of Section 23.06 spreads City obligations over time, away from the lump sum payments of earlier agreements. The change to Section 17.03 brought about a similar result for retirees, by deferring the "one for three" payment until the depletion of a retiree's sick leave bank. The parties also amended Section 23.03 to clarify that a sick leave payout would extend to retirements forced by "job related injury or illness disability." This is consistent with the City's view that the parties sought to tighten the agreement to limit payouts to those employees who retire or are forced to retire as contrasted to those who voluntarily leave City employment prior to retirement. The extent of this support for the City's view should not be overstated, but highlights that the City's view, if weak on explaining the Association's reason for agreeing to Sections 23.05 and 23.06, is not without support in the bargaining context of 1991-92.

Fundamentally, however, the Association's view cannot be accepted without reading the second sentence of Section 23.05 out of existence. The second sentence is tied to the first. The first addresses employees who retire from City employment and the second addresses those who terminate City employment for non-retirement reasons. The second sentence uses the "unused illness . . . hours" reference of the first. Thus, the two sentences must be read to apply to "employees hired after January 1, 1992" as the City asserts. This establishes that the payout benefit set forth in Sections 23.03 and 23.06 is "grandfathered" to those employees

hired pre-1992. As noted above, reaching this conclusion is less than comfortable, given the language at issue and the conflicting evidence supporting its creation. Although uncomfortable, the evidence makes the City's reading of the last sentence of Section 23.05 and the first sentence of Section 23.06 preferable to the Association's, which grants meaning to first sentence of Section 23.06 by denying meaning to final sentence of Section 23.05.

AWARD

The City did not violate Article 23 of the collective bargaining agreement when it refused to pay the Grievant, Greg Loew, his unused sick leave balance when he left his employment for reasons other than retirement but after 10 years of service.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 21st day of April, 2006.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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