

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
WEST BEND POLICE PROTECTIVE ASSOCIATION

and

CITY OF WEST BEND

Case 44
No. 65193
MA-13150

Appearances:

Wisconsin Professional Police Association, **Mark R. Hollinger**, Staff Attorney, 340 Coyier Lane, Madison, Wisconsin, appearing on behalf of the Association.

Mary L. Schanning, City Attorney, 1115 South Main Street, West Bend, Wisconsin, appearing on behalf of the Employer.

ARBITRATION AWARD

West Bend Police Protective Association, herein referred to as the "Association," and City of West Bend, herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission (herein WERC) to serve as the impartial arbitrator to hear and decide the dispute specified below. The undersigned held a hearing on June 23, 2006, in West Bend, Wisconsin. Each party filed post-hearing briefs, the last of which was received August 23, 2006.

ISSUES

The parties stipulated to the following issues:

1. Does the 2004-05 collective bargaining agreement between the City of West Bend and the WPPA provide benefits, under Section 11.05 A 3, to Randy Kessler who took a duty disability annuity under Sec. 40.65, Stats?
2. If so, what is the appropriate remedy?

FACTS

The Employer is a Wisconsin municipality. It operates a police department. The Association is the representative of the professional police officers employed by the Employer. The Association became the representative of the professional police officers of the Employer by succeeding a different labor organization. It appears that this occurred in about 2000.

Grievant, Detective Randy Kessler was employed by the Employer in the police department as a sworn police officer. He was in the bargaining unit represented by the Association until he left employment. He left the police department on September 23, 2005, because of a duty-related injury. He was at least 50 years old at the time he left employment with the Employer. The duty-related injury qualified him for duty-disability benefits under Sec. 40.65, Stats. He continues to receive benefits under this provision. He had accumulated at least 1500 hours of sick time at some time during his employment. He was covered by health insurance obtained through his wife's employment at all times since he left employment with the Employer.

The Association filed a grievance on July 26, 2005 seeking health insurance under Sec. 11.05 upon Detective Kessler's retirement. The situation presented by this grievance was the first time this issue has arisen between the parties. The grievance was properly processed through all of the steps of the grievance procedure.

RELEVANT AGREEMENT PROVISIONS

ARTICLE 11

INSURANCE

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SECTION 11.05

Group Health Upon Retirement

- A. Retirees are eligible for the Group Health Plan provided to current employees up to the age when Medicare shall take effect, under the following conditions:
 - 1. The employee retires at age 55 or later:
 - a. The employee has accumulated a minimum of 92 or more sick days at the time of retirement, or has accumulated a total of 1,500 hours of sick time at any time during his/her employment with the City.

- b. The retiree pays to the City, on a monthly basis, the same employee contribution to premium (if any) that he/she was subject to at the time of retirement.
- 2. The employee retires at ages 52, 53, or 54:
 - a. The employee has 25 years of service with the West Bend Police Department at the time of retirement.
 - b. The employee has a medical condition certified by a physician necessitating retirement.
 - c. The employee has accumulated a minimum of 92 or more sick days at the time of retirement, or has accumulated a total of 1,500 hours of sick time at any time during his/her employment with the City.
 - d. The retiree pays to the City, on a monthly basis, the same employee contribution to premium (if any) that he/she was subject to at the time of retirement.
- 3. The employee is at least 50 years of age and has a minimum of 20 years of service with the West Bend Police Department.
 - a. The employee has accumulated a minimum of 92 or more sick days at the time of retirement, or has accumulated a total of 1,500 hours of sick time at any time during his/her employment with the City.
 - b. Between separation of service and age 55, the retiree pays to the City, on a monthly basis, the current continuation premium rate.
 - c. At age 55, the retiree pays to the City, on a monthly basis, the same employee contribution to premium (if any) that he/she was subject to at the time of retirement.
- B. If an employee who leaves employment and qualifies under A above, is eligible for fully paid hospitalization insurance through another employer or through his/her spouse's employer or through any other source, this obligation on the part of the City will cease. The City will have the right to demand periodic reports from the retiree regarding his and his spouse's employment and insurance status. Failure to respond to a report request by the City within thirty (30) days will result in the City

no longer paying the premium for that particular employee. Should the employee desire reinstatement into the insurance program after having had insurance through another source and having lost that coverage, he shall be reinstated into the program upon request. In the event a retiree is eligible for hospitalization insurance under this Section and if said retiree should die prior to becoming eligible for Medicare or Medicaid, then his spouse and dependents shall receive hospitalization insurance coverage under this section under the same terms and conditions as if said retiree had lived. If the spouse remarries, he/she is no longer eligible for coverage as of the date of marriage although dependents shall remain eligible for such coverage. Coverage shall not continue beyond such date as said Retiree would have been eligible for Medicare or Medicaid had he/she lived.

- C. If an employee is ineligible for hospitalization coverage as a result of inability to furnish necessary accumulated amounts of sick time, said employee will have a right to a hearing before the Common Council of the City of West Bend and if said Council feels that an exception is justified, said Council may then waive the minimum number of sick days requirement and allow coverage of said employee. If the employee has not achieved the aforementioned requirements, the City shall make the group health insurance plan available to the retiree and the retiree shall pay the cost of the insurance program on a monthly basis to the City.

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ARTICLE 12

RETIREMENT

SECTION 12.01

The Employer shall participate in the Wisconsin Retirement System (WRS). The Employer shall pay to the WRS an amount equal to the full employer contribution for all employees. The employer shall pay to the WRS an amount equal to the full required employee contribution for all employees.

POSITIONS OF THE PARTIES

Union

The Employer violated Section 11.05 A of the agreement when it failed to pay Detective Kessler's health insurance premiums when he left his employment with the Employer. There is no dispute that he was fifty years old, had accrued 1500 hours of sick time and had

twenty years of service. There is no dispute that he would have qualified under Section 11.05A.3 for paid health insurance. The sole reason the Employer has declined to pay the benefit is because Detective Kessler accepted duty disability benefits under Sec. 40.65, Stats. The language of the agreement is clear and unambiguous. It does not provide an exception for duty disability benefits. It uses the word "retire." If there were any question about the meaning, the article should be construed as a whole. Section 11.02 B refers to an employee ". . . who leaves employment" interchangeably with the term "retire" and, therefore, the term is defined by the context of the article. Similarly, Section 12.01 entitled "Retirement" provides that the Employer will pay the full cost of WRS benefits. This suggests that all WRS benefits, including disability, constitute "retirement" within the meaning of the agreement. The Employer's proffered evidence of "past practice" does not support its position. The notes offered from the 1987-89 negotiations related to a different bargaining representative. The Employer never mentioned the point when it entered negotiations with this representative for the 2001-2003 agreement. Not only were personal negotiation notes proffered by the Employer describing a supposed conversation with a different union during the 1980's for a different contract, Mr. Siikarla's bargaining notes describe very different proposals from what was eventually agreed to by the parties. That representative proposed that the employer pay the whole health insurance benefit of an employee, including increases, when the employee retired at age 50 under "normal" or "disability annuity." Finally, the Employer's position herein is a strained or harsh construction of Sec. 11.05. It is very unlikely that the parties would negotiate a provision which grants benefits to employees who are injured off the job (Sec. 11.05(2)), but not grant similar benefits to those who are injured on the job. The Association believes that the appropriate remedy is a finding of violation and an order that the Employer return Detective Kessler to eligibility should he lose his wife's insurance.

Employer

The only issue in this case is whether a person who receives a duty disability benefit under Sec. 40.65, Stats, qualifies as a "retiree" under Sec. 11.05 A as a "retiree." Sec. 11.05 provides the group health insurance benefit to "retirees." The term "retirees" does not include duty disability annuitants. While the term has not been defined in the Agreement, the term has been interpreted in other labor arbitration awards to not include disability annuitants. Other arbitrators interpreting other agreements with similar issues have concluded that disability annuities are different than full retirements and, therefore, the health benefit does not apply. Because the language of Section 11.05 refers to retirement and does not refer to duty disability annuities, one must conclude that the benefit does not apply to disability annuitants.

Even if the language of the labor agreement is vague, the bargaining history between the parties shows the parties never intended someone on duty disability to qualify for retiree benefits. The negotiations for the 2004-2005, contract did not involve a discussion of this topic. There is evidence that the idea of extending retiree coverage to disability annuitants was discussed during the 1988-1989 negotiations. The Union proposed:

"Hospital insurance will be paid by the City whenever an employee retires under a normal annuity or disability annuity, under the Wisconsin Retirement System . . ."

The Employer's notes show an emphatic "no." That union ultimately deleted the words "under a normal annuity or disability annuity." The union made a similar proposal under the 1990 agreement.

DISCUSSION

The issue in this case is the meaning of "retirement" as used by the parties in the collective bargaining agreement. Arbitrators determine the meaning of a word by looking to its common definition or, if it is a technical term, its technical definition, from dictionaries or professional sources. They may also determine the meaning of a word by looking at the context of its usage in the disputed provision or at its use in other provisions of parties' agreement. Arbitrators may also look at the bargaining history to help define a word.

Both parties agree that the term "retirement" as used in Sec. 11.05 of this agreement refers to someone who is at least 50 years old and leaves employment with the Employer. For the purposes of this case, they agree retirement relates only to someone who is also collecting benefits under the Wisconsin Retirement System (herein WRS). They just disagree as to which benefits under the WRS system constitute "retirement" within the meaning of the agreement.

The parties have heavily relied upon the part of the definition based on the receipt of WRS benefits. This is because the common or dictionary definition of the term does not contribute to the resolution of this dispute. The dictionary definition of the term is based upon the action of leaving employment. The term can be broadly construed as anyone leaving employment. It could be construed less broadly as someone leaving employment after long service for the purpose of ending their career. It could be narrowly construed as someone leaving employment after long service for the purpose of essentially ending their work career. The Miriam-Webster on-line dictionary defines the term "retire" in relevant part as:

" . . . to withdraw from one's position or occupation: conclude one's working or professional career . . ."

Thus, the concept can include ending one's career, leaving one's occupation or merely leaving one's job after long service, but still pursuing one's career. Section 11.05B specifically contemplates that employees who "retire" within the meaning of the agreement might engage in employment substantial enough to earn them health insurance benefits. Thus, from the perspective of the function of leaving employment, the parties have very broadly defined the concept of "retirement." This broad definition is significant, but not conclusive, evidence in the agreement that parties similarly situated would have included duty disability retirement in the definition of "retirement."

I turn to the context of the current agreement. The term "retirement" is used in other parts of the agreement in a number of ways. The title of Article 12 is entitled "Retirement" and refers to the Employer's contribution to the WRS. This tends to indicate that the term refers to all benefits under WRS, but other distinctions could be drawn.

The parties are using the term "retirement" in Sec. 11.05 based on the receipt of WRS benefits. Accordingly, it is not unreasonable to believe that the reference to the term "retirement" in Sec. 11.05 is intended to be the same as in the WRS statutes. The statutory definition of "retirement," Sec. 40.02(49), Stats, defines "retired employee" as:

(49) "Retired employee" means a former insured employee who is not a participating employee and who is retired on an immediate or disability annuity or who receives a lump sum payment under s. 40.25 (1) which would have been an immediate annuity if paid as an annuity or who is an eligible employee under sub. (25) (b) 6., 6e., or 6g.

This definition includes both types of retirees, but excludes employees who leave employment and become re-employed under the WRS. However, even the statutes contain some ambiguity. Sec. 40.02(50) defines "Retirement Annuity" as "any annuity payable under Sec. 40.23. . . ." This definition excludes a disability retirement. If the parties intended to use the statutory definition, the term "retirement" most likely includes duty disability retirement.

The context of the use of the term "retirement" in Section 11.05 also tends to include duty disability retirement. Section 11.05 A 2 provides an important clue to the parties' use of the term "retirement." That provision provides that employees who retire at age 52, 53, or 54, with a "medical condition certified by a physician necessitating retirement" and 25 years of service will receive a paid health insurance benefit similar to those of employees who retire at age 55. There is no distinction in that provision between medical conditions caused by duty related injuries and those which are not. It is very likely that the term "retirement" is used in Sec. 11.05(2) to include duty disability retirement. The contrary conclusion would be a very strained construction.

The Employer relied heavily upon the fact that the predecessor union unsuccessfully sought language expressly covering duty retired employees under these benefits as evidence that both parties understood that the term "retirement" as used in the agreement does not include duty disability retirement. However, the better view of the bargaining history is that the parties intended to include duty disability retirement in the meaning of "retirement."

The predecessor union first made proposals of that nature in negotiations for the successor to the 1986-87 agreement. The 1986-87 agreement contained essentially the same benefit as provided in Section 11.05A of the current agreement. The 1986-87 agreement provided as follows:

ARTICLE 11

INSURANCE

. . .

SECTION 11.05

Group Health Upon Retirement

- A. Hospital insurance will be paid by the City after retirement age 55 up to the age when Medicare shall take effect, if the employee has accumulated a minimum of 92 or more sick days at the time of retirement, or has accumulated a total of 1,500 hours of sick time at any time during his/her employment with the City.
- B. If the retired officer is eligible for fully paid hospitalization insurance through another employer or through his/her spouse's employer or through any other source, this obligation on the part of the City will cease. The City will have the right to demand periodic reports from the retired officer regarding his and his spouse's employment and insurance status. Failure to respond to a report request by the City within thirty (30) days will result in the City no longer paying the premium for that particular employee. Should the retired officer desire reinstatement into the insurance program after having had insurance through another source and having lost that coverage, he shall be reinstated into the program upon request. In the event an officer has retired and is eligible for paid hospitalization insurance under this Section, if said retiree should die prior to becoming eligible for Medicare or Medicaid, then his spouse and dependents shall receive paid hospitalization insurance under this section under the same terms and conditions as if said officer had lived. If the spouse remarries, he/she is no longer eligible for coverage as of the date of marriage although dependents shall remain eligible for such coverage. Coverage shall not continue beyond such date as said Retiree would have been eligible for Medicare or Medicaid had he/she lived.
- C. If an officer is ineligible for hospitalization coverage as a result of inability to furnish necessary accumulated amounts of sick time, said officer will have a right to a hearing before the Common Council of the City of West Bend and if said Council feels that an exception is justified, said Council may then waive the minimum number of sick days requirement and allow coverage of said employee. If the retiree has not achieved the aforementioned requirements, the City shall make the group

health insurance plan available to the retiree and the retiree shall pay the cost of the insurance program on a monthly basis to the City.

The issue of duty-disability was not relevant to the parties in that provision because a person 55 or over would only receive a normal retirement.¹ The Union made the following proposal:

Section 11.05, Page 13, Group Health Upon Retirement, line 26, rewrite as follows: "Hospital insurance will be paid by the city [after age 50] whenever an employee retires under a normal annuity or disability annuity, under the Wisconsin Retirement System up to the age when Medicare shall take effect, provided that the employee has accumulated a minimum of 92 or more sick days at the time of retirement, or has accumulated a total of 1,500 hours of sick time at any time during his/her employment with the city. If the employee has not accumulated this amount, he/she shall be entitled to a prorated amount of the insurance premium paid by the employer." [The words in brackets were in handwriting and there is no evidence as to when they were added.]

Personnel Director Siikarla has been the Employer's chief labor negotiator for all relevant times in the past. No one from the former union was called to testify. He testified that that union dropped the proposal relating to changes in health insurance for retirees.² It appears that no changes to the benefit were made in the agreement which was negotiated. This evidence is insufficient to support a conclusion that the parties understood the term "retirement" as used in the agreement to not include duty disability. The proposal without the bracketed material would have created an extensive new benefit. For example, a newly hired police officer who incurred a duty disability and was forced to retire would have been eligible for paid health insurance for many years. The addition of the bracketed material added still adds five years of coverage to the existing benefit. The proposal was not made for the purpose of clarifying the definition of retirement and the emphatic "no" in Mr. Siikarla's notes relate to the new costly benefit and not to the definition of retirement.

That union again sought changes to the benefit in the negotiations for the successor to that agreement. The negotiations with respect thereto were of the same type as in the previous negotiations. The union proposed:

ARTICLE 11 – INSURANCE

Section 11.05, lines 17-22, rewrite as follows: 'Hospital Insurance will be paid in full by the City for any employee who retires on a normal annuity or disability pension under the Wisconsin Retirement System. Said insurance to cover the retiree and dependents.'³

¹ See, Sec. 40.63(1), Stats.

² Tr. 37

³ Jt. ex 8

Mr. Siikarla's notes show that the proposal was again dropped. Thus, the retirement health benefit remained the same as it had been in prior agreements. This proposal would have created a very costly new benefit. The proposal was not made for the purpose of clarifying the definition of retirement, but for the purpose of establishing the new benefit. Resolution of the definition of the term "retirement" was not relevant to the provision which remained in effect. This evidence is insufficient to support an inference that the term "retirement" did not include duty disability retirement.

There were changes to Sec. 11.05 in subsequent agreements. What is substantially A 3 in the current agreement was added at some time after the above referenced negotiations and appears in the 2001-2003 agreement.⁴

. . .

An employee not covered by A-1, above who is at least 50 years of age, has a minimum of 20 years of service with the West Bend Police Department, meets the above sick requirements, and who leaves the employment of the City of West Bend may continue to stay in the group health plan provided he/she pays the current continuation premium rate to the City on a monthly basis between their separation from service and age 55.

This benefit was not restricted to retirees and, therefore, it applied to those who took a duty-incurred disability retirement.⁵ The benefit did not clearly state whether or not the employee would receive the paid health insurance benefit starting at age 55 or would merely continue to receive the unpaid benefit.

The benefit for 50 year old employees of the 2001-3 agreement was modified to apply only to "retirees" in the negotiations leading to the current agreement. The history of this change is as follows. In April, 2003, a dispute arose between the former union and the Employer concerning whether a 50 year old officer who left and took a job elsewhere with health benefits would be eligible to return to the Employer's health plan under the provision stated above when he was no longer was covered by the new employer's plan. In a letter dated April 9, 2003, Mr. Siikarla responded to the former union's letter concerning the dispute. In that letter, Mr. Siikarla noted, as an aside, that this benefit was not restricted to "retirees" as it

⁴ The benefit which is now Sec. 11.05 A.2, health insurance for retirees age 52-55, also appears in the 2001-3 agreement.

⁵ Mr. Siikarla acknowledged that this provision was not limited to retirees in his letter of April 9, 2003.

was phrased.⁶ He agreed that the Employer would allow this employee to return to the Employer's health plan as a non-precedent setting resolution of the dispute. He suggested that the parties address the issue in their upcoming negotiation. Ultimately, the parties did make changes to Sec. 11.05 in the successor agreement to deal with the issue for future employees. The parties also agreed to restrict the benefit of Sec. 11.05 A. 3 to "retirees." There is no evidence in the bargaining history that the addition of the restriction was for the purpose of eliminating duty disability retirees from the benefit. The better view is that the term was intended to be consistent with the benefit in Sec. 11.05 A.2, which includes duty disability retirement. Accordingly, I conclude that the term "retirement" as used by the parties in Sec. 11.05 includes duty disability retirements.

The appropriate remedy in this case is to direct that the Employer allow Detective Kessler to participate in its health plan should Detective Kessler lose the coverage through his wife's employer.

AWARD

The Employer is required to provide Detective Kessler with benefits under Sec. 11.05 A 3 of the current agreement. The Employer shall provide the benefits to Detective Kessler under Sec. 11.05 A 3 if his health coverage under his wife's policy through her employer terminates.

Dated at Madison, Wisconsin, this 22nd day of February, 2007.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator

⁶ The letter reads in relevant part: ". . . . There is no provision in the labor agreement that grants this second group of individuals health insurance coverage from age 55 to 65 (Note that these individuals are not referred to as "retirees".)

That said, I could take the position that should Detective Shane leave our employment at age 50, that his only health benefit from the City is that he gets to remain in our plan up to age 55 if he pays the premiums. However, I committed at the bargaining table that this second group of individuals would be eligible for health insurance from age 55 to 65 if they remained in our plan up to age 55, and I honor my commitments.

. . .

I believe, from an actuarial standpoint, the obvious answer is #2. So, my offer to you is to allow Detective Shane to do what he proposes on a non-precedential setting basis and to deal with this language issue during upcoming labor negotiations." [emphasis writer's]

