

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**SUPERIOR CITY EMPLOYEES UNION LOCAL #244, AFSCME,  
OF THE AMERICAN FEDERATION OF STATE,  
COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO**

and

**CITY OF SUPERIOR**

Case 203  
No. 67134  
MA-13769

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**Appearances:**

**James E. Mattson**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8480 East Bayfield Road, Poplar, Wisconsin 54864, for Superior City Employees Union Local #244, AFSCME, of the American Federation of State, County and Municipal Employees, AFL-CIO, which is referred to below as the Union.

**Cammi Koneczny**, Human Resources Administrator, 1316 North 14<sup>th</sup> Street, Suite 301, Superior, Wisconsin 54880, for the City of Superior, which is referred to below as the City or as the Employer.

**ARBITRATION AWARD**

The Union 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, to serve as Arbitrator to resolve a grievance filed on behalf of Joe Bitner, who is referred to below as the Grievant. Evidentiary hearing, which was not transcribed, was held on November 30, 2007, in Superior, Wisconsin. The parties filed briefs and reply briefs by February 27, 2008.

**ISSUES**

The parties did not stipulate the issue for decision. The Union states the issue thus:

Did the Employer violate the terms of the Collective Bargaining Agreement when it denied the Grievant, upon his retirement, the opportunity to stay on the City's health insurance plan?

The City states the issue thus:

Did the City violate the AFSCME Local #244 union contract by not treating Joe Bitner like a retiree and allowing him to remain on the City's health insurance beyond the COBRA required period?

I adopt the Union's view as that appropriate to this record.

### **RELEVANT CONTRACT PROVISIONS**

#### **ARTICLE 11** **GRIEVANCE PROCEDURE**

Crucial to the cooperative spirit with which this Agreement is made between the Union and the City of Superior is the sense of fairness and justice brought by the parties to the adjudication of employee grievances. Should any employee feel that his/her rights and privileges under this Agreement have been violated, he/she shall consult with his/her Union Grievance Committee. The aggrieved employee and the Grievance Committee shall, within ten working days of the date the grievance occurred, present the facts to the employee's immediate supervisor or department head. . . .

#### **ARTICLE 12** **EMPLOYEE BENEFIT PLAN**

**12.01** A) The City of Superior agrees to participate in the payment of the employees' health plan and dental plan in accordance with the following:

For Local 244 full-time employees hired prior to January 1, 2004, the City shall pay 95% of the family plan, employee plus one dependent plan and single plan premiums.

For full-time employees hire on or after January 1, 2004, the City shall pay 90% of the family plan premium or employee plus one/dependent plan and 95% of the single plan premiums.

- B) The City of Superior shall designate the carrier for the employees' health or dental plan, but in changing carriers, the City must maintain coverage at levels equal to or better than the current coverage. In no case will covered employees or dependents lose coverage as a result of changing insurance carriers.
- C) Retired employees and their dependents may continue to remain under the City's health plan and retired employees and active employees shall be considered as one group, but, such retired employees and their dependents shall pay their own premiums and insured persons must sign up for Medicare payments when first eligible because of age or disability, and failure to enroll for all provisions of Medicare (hospital and medical) will result in termination of coverage in the group health insurance program.

...

**12.02** Life Insurance: The City agrees to participate in the State Group Life Insurance program for public employees and to pay the full cost of basic coverage for the employee premiums. . . .

**ARTICLE 17**  
**CONVERSION OF SICK LEAVE**  
**AND VACATION UPON RETIREMENT**

**17.01** Upon retirement under the Wisconsin Retirement System, forced retirement due to disability, or death of an employee:

...

- A) Conversion of Unused Sick Leave Upon Retirement. The employee or his estate shall have deposited on their behalf in the ICMA VantageCare plan, the value of the employee's unused sick leave, not to exceed 120 days. . . .
- B) No Compensation for Accrued and Unused Sick Leave. There shall be no payment with respect to accrued and unused sick leave except at retirement as provided in subparagraph A) above.
- C) Conversion of Accrued Vacation Pay. Bargaining unit members, upon retirement, will convert any additional unused accrued vacation into additional Group Health Insurance Credit. . . .
- D) Retired employees and their insured dependents may continue to remain under the City's health plan as described below:

For employees who retire prior to January 1, 2009: Retirees may continue the City's health plan beyond age 65 or medicare eligibility and will pay the rates established for active employees. At age 65 or medicare eligible age, the retiree or spouse may discontinue coverage under the health plan and move to a medicare supplement plan offered by the City. . . .

. . .

For employees who retire after December 31, 2008: Retirees may continue the City's health plan beyond age 65 or medicare eligibility and will pay the rates established for active employees. At age 65 or medicare eligible age, the retiree or spouse coverage under the plan will end and the retiree or spouse may opt to continue coverage under a medicare supplement plan offered by the City. . . .

### **BACKGROUND**

The grievance form is dated "2-16-07", alleges that the City violated "Article 12 Paragraph C" by denying the Grievant participation in "the City's health plan . . . based upon his age at retirement (49)", and seeks that the Grievant be allowed "to continue to remain under the City's health plan."

Cammi Koneczny, the City's Human Resources Administrator, denied the grievance at Step 1, noting,

. . . There is no definition of "retirement", written or practiced, other than "retirement" under the Wisconsin Retirement System. It doesn't state anywhere in any policy or contract that "if an employee works so many years for the City" or "if an employee leaves City employment at a certain age" that they would be considered as retiring even if they aren't retiring under WRS. If the Union's argument is to be applied, then a 35-year old who wins the lottery or inherits money and quits employment with the City, never to work again, would have to continue to be covered by the City for health insurance until he was Medicare eligible.

With the mutually-accepted and long-standing past practice of "retirement" meaning retirement under WRS, the City is confident that the proper definition of retirement has been established. . . .

At the second step of the grievance procedure, Mayor Dave Ross offered to settle the grievance by permitting the Grievant and his spouse to be treated as if they had retired under the WRS, without precedent in any future case, if the Union agreed to sign a side letter clarifying that

Section 12.01 C) did not create any other definition of retirement than that applied by the WRS. The Union agreed, but only if the side letter had a duration coinciding with the labor agreement, thus requiring its renegotiation. No informal resolution proved possible.

The City hired the Grievant as a Mechanic on May 24, 1976. He left City service effective January 31, 2007 (references to dates are to 2007, unless otherwise noted). The City offers its employees a deferred compensation program, in which the Grievant was an active participant. He also maintains income properties and considered retiring from City service well before he was eligible under WRS rules.

As early as 2003, the Grievant had checked with City personnel regarding whether or not he would be eligible to continue on the City's health plan. He made the inquiry of Judith Fudally, currently a Senior Accounting Technician for the City. Fudally responded to the inquiry by e-mailing Mary Lou Andresen, then the City's Human Resources Director. Fudally's e-mail, dated November 4, 2003, states:

An employee asked if he can retire and continue his health insurance – the catch is that he would be retiring earlier than the minimum retirement age for WRS. That used to be the criteria for continuation of health insurance – “Retire under the guidelines of WRS”. This person is planning on using his deferred comp \$\$.

So can a person “retire” and continue their health insurance even though it is not a WRS retirement?????

Andresen responded on the same date, “has to be WRS retirement.”

In the summer of 2006, the Grievant phoned Koneczny, indicating his intent to retire in January of 2007. In a letter dated August 31, 2006, the Grievant confirmed the phone conversation, stating, “I am intending to retire in January 2007 and . . . I would like to request two to three weeks of next years vacation to be used this year.” Koneczny responded in a memo dated September 5, 2006, which states:

. . . I am approving your request with the stipulation that you are retiring (leaving employment with the City) in January 2007.

You informed me on the phone today that your tentative plan is to work through December 30, 2006, and then use your remaining 2007 time off hours in January. Your last day of employment with the City would be the date that those hours are depleted.

I will check back with you in December to finalize a last date of employment. Please contact me if you have any questions.

The Grievant and Koneczny discussed the matter by phone sometime in December of 2006, and Koneczny followed the conversation with a memo to the Grievant dated December 19, 2006, which is headed "Last date of employment" and which states:

This memo is in follow-up to our phone conversation on Monday. You had inquired as to your status and end date of employment with the City. . . . the City has accepted your resignation of employment to be effective January 2007. . . .

There are only 22 paid days in January (+1 holiday). You could be off the entire month of January and still be paid out some hours, plus 2008 vacation accrual, with your last check. Any vacation hours you do not use will be paid out to you in cash.

Please let me know, no later than December 29<sup>th</sup>, what your actual last day worked is going to be so that your supervisor can plan for your work assignments. You could use vacation hours beyond your last day worked, as was your original plan. Your last day of employment with the City can not be later than January 31, 2007.

Further discussions followed, and in a memo dated January 8, Koneczny stated:

In my last memo to you, dated December 19, 2006, I asked you to let me know what your actual last day worked was going to be. In a phone conversation with you on December 28<sup>th</sup>, you let me know that you intended on working through January 31, 2007 rather than just drawing on your paid leave hours through January. I requested that information in writing from you but have not received anything as of yet.

Since that phone conversation, I have talked to you again and you stated that you would like to remain employed through February. You have previously stated, in writing and verbally, that you would be separating employment with the City in January 2007 and the City accepted that resignation in writing.

As I have stated to you, both verbally and in writing, you were authorized to use 2007 vacation hours in 2006 based on your leaving employment in January 2007. If that wasn't the case, you would not have been allowed that additional time off. Also based on your leaving employment in January 2007, the City has initiated a recruitment for Mechanics to fill your vacancy. We will be continuing with this action as applications have already been received and candidates have been noticed of a written exam being administered for them this week.

In addition to the above stated explanation, extending your employment past the agreed upon time of January 2007, whether you're physically working or using your paid leave, is an increased cost to the city for another month of accumulated benefits.

To reiterate what I've stated before, there is an agreement in place in which you will be ending your employment no later than January 31, 2007. You have indicated that you will work through that date, therefore, any time that you do wish to take off before the end of January will be handled through the usual department approval process. Because you will not be retiring under WRS in January 2007, your vacation and floating holiday hours will be paid out to you with your last pay check. If you remain employed through January 31, 2007, you will be covered for health/dental insurance through February 2007, at which time you will be offered COBRA coverage for up to 18 months.

The Grievant resigned his City employment effective January 31.

Ross issued a letter dated February 7 to the Grievant noting his thanks for the Grievant's "30 plus years of service with the City" and notifying the Grievant that he would "like to recognize your retirement" at a City Council meeting on February 21. The Grievant received that recognition and a plaque commemorating his City service.

In a letter dated February 12, Health Partners, the City's insurance benefit provider, notified the Grievant that "your or a family member's health care coverage has ended." The letter noted the cancellation of the Grievant's coverage under the City's health plan effective February 28, and advised him, "You are responsible for any health care expenses incurred after the termination date(s)." The Grievant paid for his continuation in the City plan at all times relevant here.

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

### **Joe Bitner**

Bitner has participated in the City's deferred compensation plan since its inception in the 1980's. He decided to resign his City employment to gain access to those funds, which permitted him to retire early. At the time he first advised Koneczny about his desire to retire, he did not anticipate continuing on the City health plan. After shopping for private plans, however, he concluded that the City's was superior if he or his wife had health difficulties. He could not recall Koneczny advising him that his resignation would not be a retirement in the City's view. He understood throughout their discussions that he would have to exercise COBRA rights to continue coverage in the City plan, but hoped to be able to negotiate ongoing coverage. He could not recall receiving a copy of the Fudally/Andresen e-mails of 2003, and knew of no other employee who resigned from City employment under the City health plan without meeting WRS requirements.

### **Judith Fudally**

Fudally has worked for the City for roughly thirty-four years. She manages insurance coverage under the City plan for retirees. She knew of no retirement permitting continuation in the City health plan without meeting WRS eligibility requirements to receive an annuity.

**Jeanne Vito**

Vito has worked for the City for roughly fifteen years, including seven in her current position as Finance Director. The City has never used any retirement date other than that defined by the WRS. Employee use of deferred compensation funds has no bearing on the WRS retirement date. In her view, expanding the definition as the grievance seeks would be fiscally irresponsible.

**Deborah Bergstrom**

Bergstrom serves as an Administrative Assistant for the City, and has worked as a City employee for fourteen years. She was aware of no instance in which the City permitted an employee to use a retirement date other than that set by the WRS to determine eligibility for inclusion in the City health plan as a retiree.

**Cammi Koneczny**

Koneczny has worked for the City for roughly sixteen years. She consistently alerted the Grievant during their discussions on his resignation that he would not be considered a retiree under the labor agreement, since he was retiring too young to qualify for a WRS annuity. The Union and the City have never discussed in bargaining the relationship of Articles 12 and 17.

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

**THE PARTIES' POSITIONS****The Union's Brief**

The Union contends that the "Language of Article 12.01-C is clear and controlling." That section specifies that "retired" employees may remain on the City's health plan. The title of Article 12 underscores its broad applicability to "employees." Article 17 has no bearing on this provision, because it is restricted to employees who "retire under the terms of the WRF." Beyond this, the agreement "does not define an age of retirement." The parties have never negotiated "a minimum retirement age." City offers to settle the grievance recognize that Article 12 has a broader reach than Article 17. That the Grievant would fall under Article 17 had he retired under the WRF when he reached the age of 55 cannot obscure that he retired early, and as a retiree, falls under Article 12.

Even if the language of the agreement is considered ambiguous, there is no persuasive evidence of past practice, since the Grievant's "circumstances are unique." What the City cites as evidence of past practice is simply the reflection of the fact that most "employees financially cannot retire at an earlier age." The Grievant's situation is thus unique, but its uniqueness "does not negate his right to retire early and to exercise his contractual option to



stay on the City's health insurance plan." The uniqueness of his circumstances undercuts any City concern that the grievance will open the floodgates of early retirements. The Grievant must bear the full cost of the insurance "for many years to come." Standing alone, this limits City exposure to Article 12 benefits.

The parties agreed at hearing that they never addressed in bargaining the relationship of Articles 12 and 17. This agreement established that they "never limited or defined a retirement age." Thus, the City seeks through arbitration a benefit it never achieved in bargaining. This prejudices the Union, which "has been given nothing of value for this concession." The normal dictionary meaning of "retire" or "retirement" supports the Union's view that the City seeks a limitation on a bargained term that has no limitation.

The Union filed the grievance on February 16, 2007, which was "within days from the time (the Grievant) received formal notice . . . from the Insurance carrier that he was to be removed from the City's offered health insurance plan." Thus, the grievance is timely.

The remedy appropriate to the City's breach of the labor agreement is "to keep Mr. Bitner on its health insurance plan as per the terms of the Labor Agreement."

### **The City's Brief**

The City notified the Grievant in a letter dated January 7, 2007 that "because he was not retiring under the Wisconsin Retirement System he would not be considered a retiree and would only be offered COBRA health coverage with the City for up to 18 months." This is the event that triggers grievance timelines. In spite of this, the Union did not file a grievance until February 16, "well after the ten working day timeline". Since the grievance was not timely filed, it must be denied on that basis alone.

In the event that the grievance is considered on its merits, the analysis must start with the fact that the Grievant "wants to be treated like a retiree, even though he did not retire under the Wisconsin Retirement System (WRS) when he left his employment with the City of Superior." The WRS does not permit retirement prior to age fifty-five, and that the Grievant can be considered a retiree "because he is withdrawing his 457 deferred compensation benefit is ridiculous." At no point during his separation counseling, did any City employee indicate to the Grievant that his quitting constituted a retirement.

The January 8 memo confirms that the City did not recognize his quitting as a retirement. The Grievant also conferred with the City Finance Department in November of 2003 regarding whether he could "remain on the City's health insurance as a retiree if he didn't retire under WRS." He received a clear response in the negative.

To conclude the Grievant qualifies for benefits opens a retirement option for many potential employees. This "would have devastating effects on the City's health plan, not to mention the financial impact on the City when the health rates are required to significantly increase for everyone on the plan due to the negative retention of non-employees on the plan."

No other employee has ever received the benefit the Grievant seeks. This is significant here, for, “Never is a very long standing past practice.” The evidence establishes that every employee currently on the City’s health insurance plan as a retiree “actually retired under WRS requirements.” No union or employee has ever challenged the City’s view of “retirement.”

Section 12.01 C) states a very broad entitlement which “is much more clearly defined in Article 17.” The titles to Articles 12 and 17 are not in themselves instructive since each concerns matters beyond their title. The Union’s attempt to view the two provisions to establish separate entitlements ignores that there is no evidence to support the view. The assertion that the language clearly affords a benefit to the Grievant ignores that he did not seek a retirement benefit but an early retirement benefit. The Grievant’s testimony acknowledges that he knew when he left the City that he could receive City insurance coverage under COBRA and assumed he would secure insurance from another source. Although he was satisfied to quit City employment knowing this, he changed his mind and seeks through the grievance to “back peddle his way on to the City’s health insurance as a retiree.” The absence of any detail in Article 12 establishes that it must be read together with Article 17.

The grievance must be denied as untimely or on its merit.

### **The Union’s Reply Brief**

The City’s timeliness arguments ignore that the Grievant did not receive “official notification” that he would not be permitted to stay on the City’s health plan until his receipt of a letter dated February 12. The filing of the grievance on February 16 is clearly timely. That the Grievant discussed this matter with City officials prior to February reflects no more than “discussions”. He had no definite answer until his receipt of the February 12 letter.

There can be no past practice since the Grievant’s circumstances “are quite unique.” That he was able to retire early cannot obscure that he retired. Article 12 demands no more than retirement. That the City wants to equate retirement under Article 12 with WRS retirement under Article 17 reflects no more than the City’s position. It is no practice.

City fear that the Grievant would open the floodgates for early retirees ignores that “(f)ew employees would ever be likely to exercise this option.” The grievance seeks no more than Article 12 grants, which is for the Grievant to remain on the City plan at his own expense.

### **The City’s Reply Brief**

The Union’s attempt to link the timeliness issue to the letter of a third party insurer ignores that the City’s January 8 memo unequivocally informed the Grievant “that he would not be considered a retiree because he was not retiring under the (WRS) and that COBRA was his only option to extend his health coverage after leaving employment with the City.” The grievance procedure is for the resolution of disputes between the bargaining parties, and the insurer’s letter did no more than confirm the City’s position under the January 8 memo.

Article 12 does not state an early retirement benefit. Rather, it generally states a benefit that is specified in Article 17. The City's offer to settle says nothing about the interpretation of the labor agreement, rather it "was a gesture of good faith to resolve Mr. Bitner's issue and stop any future challenges to the Article 12.01(C) language by clarifying its intended meaning."

The labor agreement does not specify an early retirement age because it does not have to. Rather, the contract anticipates that WRS requirements specify retirement qualifications. The absence of an early retirement age cannot obscure that there "was never an intention for any language in the union contract to allow for retirement benefits at any age." The uniqueness of the Grievant's circumstances thus reflects nothing more than his singular attempt to create a benefit that does not exist. The Union, not the City, seeks a benefit through arbitration that was never created in bargaining.

The City consistently treated the Grievant's separation as a quit, not as a retirement. He was fully aware of that when he made the decision to quit. Whether treated as a procedural or as a substantive issue, the grievance must be denied.

### DISCUSSION

The issue is not technically stipulated, but there is little difference between the parties' statements. The Union's presumes that the Grievant retired, thus highlighting its view that Section 12.01 C) demands no more regarding eligibility for inclusion in the City's health plan. The City's highlights the act of discretion involved in an eligibility determination, thus highlighting its view that WRS rules reflect the governing discretion. Each party acknowledges that their general statement of the issue presumes a determination that the grievance was timely filed. This manifests the directness and practicality shown throughout the litigation of the grievance. I have adopted the Union's view of the issue because it highlights that Section 12.01 C) is central to the grievance.

This should not obscure the threshold issue regarding timeliness. The prefatory paragraph of Article 11 demands that "(t)he aggrieved employee" present the facts constituting the grievance to the employee's immediate supervisor, "within ten working days of the date the grievance occurred". The City contends the grievance occurred no later than the Grievant's receipt of Koneczny's January 8 memo, while the Union contends the grievance occurred with the Grievant's receipt of the February 12 letter.

The City's view is more persuasive. The Grievant's consideration of retirement was long-standing, tracing back to 2003. His decision-making process acquired momentum in the summer of 2006. The evidence, tracing from Koneczny's September 5, 2006 memo through the January 8 memo, confirms that throughout this process the City informed the Grievant that his early retirement would not be a retirement within the meaning of the labor agreement because he did not meet WRS eligibility requirements. The Union points out that the Grievant felt there was some negotiation on the point and that the City's view was not formalized until

its insurer issued the February 12 letter. Some doubt on this point can be acknowledged, but that doubt was resolved with the issuance of the City's January 8 memo, which unequivocally confirmed that the Grievant would have to exercise COBRA rights to stay within the City's group. The Grievant acknowledged in testimony that he was aware of this when he left City employment effective January 31 and that he did not even plan on taking City insurance prior to his initiation of the early retirement process.

Thus, the Grievant knew the City's position not later than his receipt of the January 8 memo. This establishes that he did not rely on any City representations when he retired from City employment. There were no ongoing negotiations past that point until the processing of the grievance. The insurer's issuance of the February 12 letter did no more than confirm the City's position. The Union's use of the later date is understandable, but poses significant problems. The context of the grievance highlights the significance of the January 8 date. It preceded the Grievant's resignation. Thus, if there had been a doubt on the City's position, that doubt should have been brought forward at a time the Grievant was in a position to rescind the retirement decision if the rules of the game had been altered in a way impacting his decision. Even apart from the policy context, the Union's view strains the labor agreement. As of January 8, the Grievant could be "an aggrieved employee" who could present facts to a supervisor. After January 31, he was an aggrieved retiree, not an employee, and had no supervisor to present facts to. The difficulty of the contractual fit is thus evident as a matter of grammar and as a matter of policy. In sum, the grievance was not timely submitted under Article 11, because it was filed beyond ten working days of the date the grievance occurred, which was no later than the Grievant's receipt of the January 8 memo.

It is "a familiar principle that the law abhors a forfeiture" and a familiar principle of arbitration that "(a)s a general statement, forfeiture of a grievance based on missed time limits should be avoided whenever possible"; see Elkouri & Elkouri, *How Arbitration Works* (Fifth Edition, BNA) at 500-501. The contract and the parties' conduct manifest this. Article 11 does not state how the violation of a time limit is enforced. The City did not raise the timeliness issue during the grievance's processing leading to arbitration and the parties have each entered extensive argument on the grievance's merit. Against this background, it is appropriate to look into the merits of the grievance enough to determine whether the conclusion that the grievance is untimely works the forfeiture of a clear right. That the Grievant has made a number of irrevocable decisions to retire early underscores this.

The Union's case is forcefully stated, but the City's interpretation of the labor agreement is more persuasive. As the Union points out, it poses no strain on the normal meaning of "retire" to conclude that the Grievant retired effective January 31. City correspondence confirms this. The contractual issue is, however, whether Section 12.01 C) grants inclusion in the City's health group based on retirement alone. To prevail on this point, the Union's arguments must establish that Article 12 creates a separate right from those created by Article 17. On this point, the force of the Union's arguments breaks down.

The language of Article 12 cannot be considered unambiguous. Subsection C) refers to “Retired employees” without further guidance. The Union asserts that this clearly establishes that the only requirement of Subsection C) is that an employee be “retired.” The “Retired employee” reference is clearly broad. It is, in fact, sufficiently broad to cover any person who voluntarily leaves the employment of another. This is, however, a statement of the presence of ambiguity rather than of its absence. The Union’s case presumes that the retiree must have been a “City employee”, but the reference does not establish that point standing alone. Even if it did, could a person who retired from the employ of a non-City entity, but who once worked for the City, even seasonally, be considered a “Retired (City) employee”? The “may continue to remain” reference clarifies these points, but this underscores that the “Retired employees” reference is not, standing alone, unambiguous. The City’s first step grievance response highlights the reference’s ambiguity even if it is read in light of the balance of the section.

The Union accurately notes that the uniqueness of the Grievant’s circumstances makes it unpersuasive to conclude that the long-standing absence of any City provision of the benefit the Grievant seeks constitutes a binding practice. In the absence of a prior occurrence, it is unpersuasive to infer Union agreement to past City conduct, and the agreement underlying past conduct is the source of the binding force of past practice. However, this does not resolve the ambiguity in the Union’s favor, since the absence of any prior City provision of the benefit, or bargaining on the point, makes it unpersuasive to infer that the parties mutually agreed to the benefit.

This means the ambiguity must be addressed based on the language of the governing provisions, and that language favors the City’s view. It is not a persuasive reading of the labor agreement to seal Article 12 from Article 17. Rather, the language confirms that they are intertwined. As a general matter, the absence of any detail in Section 12.01 C) makes it unpersuasive to conclude the parties used the subsection to create an independent right to retirement benefits. Eligibility difficulties are noted above. Beyond this, it is a strained reading to erect a separate benefit under Section 12.01 C). It is unlikely that the parties created the provisions of Section 17.01 D) to limit the rights of the vast bulk of City retirees based on date of retirement only to leave an unmodified right existing in Section 12.01 C).

Beyond this, the language of the two articles is common. The Union asserts Article 17 establishes a WRS-based retirement benefit, while Article 12 establishes a non-WRS based retirement benefit. The title of Article 12 does not refer to “retirement”. That of Article 17 does. It is not, however, restricted to “WRS retirement”. Rather, it extends to the conversion of certain benefits “upon retirement.” Section 17.01 specifically refers to “retirement under the Wisconsin Retirement System”, but each of its subsections refers to “retirement” without reference to the WRS. The common usage of “retirement” between the two articles lends little support for their separation regarding retirement benefits.

These general points preface, however, the more significant point that the language of the two articles intertwines them. The title of Article 12 does not specifically refer to retirement because the article addresses the provision of insurance benefits and the apportionment of City and employee payment for them. Section C) places retirees and

employees in “one group” and places full payment on the retiree. As the Union points out, this can be read to establish a unique benefit, but the language of Section 17.01 D) makes this an unpersuasive reading. That section makes it possible for “Retired employees” to “continue to remain under the City’s health plan”. The “Retired employees” reference mirrors that of Section 12.01 C). Significantly, Section 17.01 does not place retired employees into a common group. Rather, Section 12.01 C) does. That Section 17.01 permits retired employees to “continue to remain” thus demands reference back to Section 12.01 C), which establishes a common insurance group for active employees and retirees. This confirms established City practice and makes it unpersuasive to conclude that Section 12.01 C) establishes a benefit separate from Article 17.

Applied to the evidence here, this means that the untimeliness of the grievance has not worked a forfeiture of a clear right. Whether viewed as a procedural or as a substantive matter, the grievance must be denied.

### **AWARD**

The grievance was not timely filed under Article 11, but the untimeliness of the grievance does not work a forfeiture of a clear right because the Employer did not violate the terms of the Collective Bargaining Agreement when it denied the Grievant, upon his retirement, the opportunity to stay on the City’s health insurance plan.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 15th day of April, 2008.

Richard B. McLaughlin /s/

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Richard B. McLaughlin, Arbitrator

