BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NEW HOLSTEIN UTILITIES

and

IBEW, LOCAL 2150

Case 7
No. 68036
MA-14097

Appearances:

Ms. Jill Hartley, Esq., Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, WI 53212, on behalf of the Union.

Mr. Edward J. Williams, Esq., Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, WI 54903-1278, on behalf of the Employer.

ARBITRATION AWARD

The parties jointly and independently selected Arbitrator Sharon A. Gallagher (without a WERC panel being used) to hear and resolve a dispute between them concerning whether Grievant Tom Pafford was improperly denied a retirement health insurance benefit pursuant to Article 24 of the parties' collective bargaining agreement. Hearing on the matter was held by mutual agreement on July 9, 2008 at New Holstein, Wisconsin. A stenographic transcript of the proceedings was made and received by July 22, 2008. The parties agreed to submit their briefs to the Arbitrator for her exchange and to waive reply briefs. The parties' briefs were received and exchanged by August 25, 2008, whereupon the record herein was closed.

STIPULATED ISSUES

The parties agreed that the Arbitrator should decide the following issues:

1). Did the Employer violate the provisions of Article 24 of the collective bargaining agreement when it did not provide retiree health insurance to Mr. Pafford?

2). If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 14

SENIORITY

14.1 Definition: Seniority means an Employee's length of continuous service with the Employer since his/her last date of hire in terms of length of service of the employee with the Utility in "terms of years, months, weeks and days."

14.2 Probation Period: Upon completion of the probationary period, the Employee shall be granted seniority rights from the Employee's most recent date of hire.

14.3 Break in Continuous Service: Upon return to work after time lost which does not constitute a break in continuous service, the Employee's length of continuous service shall not be affected and he shall receive the same fringe benefits that he would have received had he not lost any employment time.

14.4 Loss of Seniority: Seniority and the employment relationship shall be broken and terminated if an Employee:

14.4.1 Quits;

14.4.2 For a non-probationary employee, is discharged with just cause and not subsequently reinstated; and for a probationary employee, is discharged and not subsequently reinstated;

14.4.3 Is absent from work for three (3) consecutive working days without notification to the Employer or is on an unauthorized leave of absence;

14.4.4 Fails to report to work within five (5) working days after having been recalled from layoff;

14.4.5 Fails to report for work at the termination of a leave of absence;

14.4.6 On a leave of absence for any reason for more than one (1) year;

14.4.7 While on a leave of absence accepts employment elsewhere without sanction of the Utility, provided that such sanction shall not be unreasonably denied if the leave is for qualified medical reasons;

14.4.8 Is retired; or

14.4.9 Is laid off and is not recalled to work within twelve (12) months from the date of layoff.

. . .

ARTICLE 24

RETIREMENT HEALTH INSURANCE BENEFIT

An employee who is hired and commences work for the Employer prior to January 1, 2002, who, thereafter, retires as an employee with ten (10) or more continuous years of service with the Utility shall, for every ten (10) years of continuous employment with the Employer, receive one (1) year of health insurance to be prorated to the nearest month when calculating the number of years and months the premium is to be paid. Employees who are hired and commence work for the Employer on or after January 1, 2002, who, thereafter, retire after ten (10) years of continuous service with the Employer, shall receive six (6) months of health insurance for every ten (10) years of employment with the years of employment to be prorated to the nearest month when calculating the number of years and months the premium is to be paid. The Employer will pay up to the amount set forth in the health care (not dental) plan provision of this agreement for Family Plan, Limited Family Plan or Single Plan for health care premiums with the employee being responsible for the remaining portion of the health premium. Dental coverage is not provided under this provision. Said payment shall cease at the earlier of: (a) three (3) years for those employees hired and commencing work with the Employer on or after January 1, 2002; (b) eighteen (18) months for those employees hired and commencing work with the Employer on or after January 1, 2002; or (c) when the employee becomes eligible for Medicare. After the benefit expires, the employee may continue to participate in the health care plan at his/her own expense. In the event of the death of the employee, the employee's spouse and/or eligible dependents under the plan may continue in the health benefit plan for the duration of the employee's earned benefit period so long as they timely pay their share of the premium.

BACKGROUND

The Employer is a municipal utility (a separate employing entity) located in the small Northeast Wisconsin town of New Holstein. The Union has represented lineman employees of the Utility since 2003,[1] when its initial (2003-06) contract became effective.

It is undisputed that the Utility had a policy from at least 1990 through 1995 which provided for some continued health insurance at retirement, as follows:

[1] The Union began its organizational campaign in 2002, completed the negotiation of the parties' first contract (covering 2003-06) and executed that contract on September 28, 2004.

RETIREMENT:

100% Paid by the Employer. Any employee who retires shall receive, for every ten (10) years of employment, one (1) year of health insurance with the years of employment to be prorated to the nearest month when calculating the number of years and months the premium is to be paid. Said payments shall cease after three (3) years, or when the employee reaches the age of sixty-five (65) years or becomes eligible for Medicare, whichever is earlier. After the benefit expires, the employee may still participate in the insurance plan at his or her own expense.

The Utility changed the policy in 1996 and it reads as follows until 1999:

RETIREMENT:

100% paid by the Employer. Any employee who retires shall receive, for every ten (10) years of employment, one (1) year of health insurance with the years of employment to be prorated to the nearest month when calculating the number of years and months the premium is to be paid. Said payments shall cease after three (3) years, or when the employee reaches the age of sixty-five (65) years or becomes eligible for Medicare, whichever is earlier. After this benefit expires, the employee may still participate in the insurance plan at his or her own expense. In the event of the death of the employee, the employee's spouse and/or family is entitled to the health insurance benefits earned by the deceased.

In 2001, 2002 and 2003 the Utility changed the policy slightly. By 2003, the policy read as follows at the time the parties were negotiating the 2003-06 agreement:

RETIREMENT HEALTH INSURANCE BENEFIT:

95% Paid by the Employer, 5% Paid by the Employee. An employee hired prior to January 1, 2002 who retires shall receive, for every ten (10) years of employment, one (1) year of health insurance with the years of employment to be prorated to the nearest month when calculating the number of years and months the premium is to be paid. Employees hired after December 31, 2001 who retires shall receive, for every ten (10) years of employment, six (6) months of health insurance with the years of employment to be prorated to the nearest month when calculating the number of years and months the premium is to be paid. Said payments shall cease after three (3) years for those employed prior to 2002, or eighteen (18) months for those hired after December 31, 2001, or when the employee reaches the age of sixty-five (65) years or becomes eligible for Medicare, whichever is earlier. After this benefit expires, the employee may still participate in the insurance plan at his or her own expense. In the event of the death of the employee, the employee's spouse and/or family is entitled to the health insurance benefits earned by the deceased.

It is undisputed that the Union proposed to add Article 24 to the parties' initial contract; that the Union based its contract proposal on the above-quoted 2002 Utility policy, for employees hired before the advent of the Union; and that the Union proposed to add a different benefit for those hired after the advent of the Union (January 1, 2002), as reflected in current Article 24. It is also undisputed that the parties never discussed the meaning of the word "retires" used in Article 24. Also, neither the Union nor the Utility offered any explanation why the phrase "retires as an employee," which does not appear in any Utility policies, was added to Article 24.

Finally, the Utility's records showed that the following individuals left employment at the Utility on the dates listed next to their names, having either orally or in writing given the Utility the reason for their separation also listed below and whether they received a retirement insurance benefit:

NEW HOLSTEIN UTILITIES RETIRED/TERMINATED EMPLOYEES[2]

NAME	COLLECTIVE BARGAINING	YEARS OF SERVICE WITH UTILITIES	DATE OF RETIREMENT	AGE AT RETIREMENT	RETIRED UNDER WRS WHEN LEFT UTILITIES	RECEIVED RETIREE HEALTH INSURANCE
Boll, Terry	No	23	Termination 01/03/2000	49	No	Yes
Greuel, Ron	No	10	Retired 6/1/1999	59	Yes	Yes
Gustafson, Eugene	No	34	Retired 6/22/1990	55	Yes	Yes
Hansen, Eugene	No	34	Retired 1/31/1990	61	Yes	Yes
Hubbard, Regina	No	22	Retired 6/30/1992	62	Yes	Yes
Kapellan, Roger	No	33	Retired 12/31/1999	62	Yes	Yes
Meier, Melvin	No	35	Retired 12/31/1997	57	Yes	Yes
Moore, Brian	Yes	13	Termination 10/23/2003	46	No	No
Shaver, Charlotte	No	22	Retired 3/30/1990	62	Yes	Yes
Thelen, Sharon	No	11	Retired 5/31/2003	58	Yes	Yes(Cash Payout)

[2] The Utility submitted letters from non-unit employees Kapellan and Thelen which showed that the former notified the Utility he was "retiring" while the latter submitted a "notice" of resignation (ER Exhs 2 and 4). On October 22, 2003, Brian Moore submitted a "letter of resignation" to the Utility (ER Exh. 3).

Ron Gruel and Melvin Meier[3] also testified herein. Both Gruel (at age 59) and Meier (at age 57) stated that they retired from Utility employment and that they then received a WRS annuity consistently thereafter. Gruel, a Utility manager at his retirement, admitted that he worked part-time for Wisconsin Public Service, a private company, doing engineering/consulting work starting 6 months after his retirement from the Utility and continuing until his 65th birthday; that he had not planned to work for WPS when he retired from Utility employment; that for one year after his retirement from the Utility he received paid health insurance under the Utility retirement insurance policy; that thereafter, he received a prorated health insurance benefit from WPS as a part-time employee.

Meier stated that he retired from the Utility as a Line Foreman at age 57 and he received a WRS annuity consistently thereafter; that under the Utility's policy he also received 36 months of retirement health insurance; that beginning more than 30 days after his retirement, he returned to work part-time for the Utility at the Utility's request and he worked for them part-time during the Summers of 1998 and 1999; that after his Utility retirement Meier also worked part-time for private companies putting in milking parlors and doing landscaping. Terry Boll submitted the following separation letter prior to leaving employment with the Utility at age 49:

. . .

> Due to personal differences between myself and various personnel that are presently employed by New Holstein Utilities, I must regretfully inform you of my decision to take an early retirement with New Holstein Utilities, effective January 3, 2000. I feel that I no longer can contribute effectively in my present position and I do not want to stay where I am not wanted.
>
> I had offered to step down as Foreman if I could have been placed in the Meter Dept., but I was told that option was not available to me. I feel my services are no longer wanted or appreciated and therefore feel that it would be in my best interest and the best interest of New Holstein Utilities that I seek employment elsewhere.
>
> At this time I would like to thank the Commission for the past 23 years of employment (most of which has been enjoyable) and sincerely wish that the New Holstein Utilities will be there for it's customers in the future.
>
> In closing I would just like to say, that sometimes a change is good, and in this case I sincerely hope it will be beneficial to all parties involved.

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[3] Gruel did not submit a letter of resignation. In his letter of resignation, Meier stated he was "retiring to pursue my hobbies" (Jt. Exh. 4).

The Utility Office Manager, Paula Pethan, stated herein that she paid Boll a retirement health insurance benefit under Utility policy, in error. Pethan stated she did not check the policy nor did she read Boll's letter closely.

Regarding Brian Moore, Pethan stated he left Utility employment prior to the execution of the parties' initial labor agreement to take a job at the Menasha Utility (also a WRS employer) and that Moore never requested to receive the Utility's retirement health insurance benefit. Union Representative Sawicki stated in this case that Moore never came to him to request receipt of a retirement health insurance benefit under the parties' new contract. Thus, Moore was never paid the benefit.

Also, Pethan testified herein, regarding the facts underlying Thelen's termination in May, 2003. Significantly, Pethan admitted that the Utility knew that Thelen had no intention of retiring from the work world. Rather, Thelen had made it clear that she was going to take a part-time position at New Holstein City Hall and that she intended to work part-time in real estate after she left her Utility position. Thelen also received a cash payout of her retirement health insurance benefit (under the policy) because, Pethan stated, Thelen's husband had insurance coverage to cover her.

FACTS

The Grievant, Tom Pafford, began employment with the Utility as an apprentice lineman on February 28, 1991. When Pafford left the Utility on February 29, 2008, he was a Line Foreman. On February 15, 2008 Pafford (then age 46) submitted the following letter to the Utility

. . .

> Please accept this letter as formal notification that I am retiring from my position with New Holstein Utilities, effective February 29, 2008. I have made a decision to accept a position as a strategic career move and take on new challenges. This was a difficult decision to make because of the loyalty I have towards New Holstein Utilities, yet this new opportunity gives more time for my family and self confidence of a safer position.
>
> I trust that I will be receiving my vacation pay (4 weeks) and retirement health insurance benefits that I have earned while being employed at New Holstein Utilities.
>
> Thank you for the opportunities to gain such valuable experience and friendship for professional and personal development that you have provided me over the 16 years. I have enjoyed working for the Utilities and appreciate the support provided me during my tenure with the company. This has been a rewarding experience.

. . .

Pafford stated herein that he decided to "retire" from the Utility to take another position where he would not have to perform occasional lineman work on weekend call-out rotations as he had to do at the Utility. Pafford also spoke to Utility Manager Jaeckel shortly after submitting the above-quoted letter and told Jaeckel his reason for leaving the Utility was that he did not feel safe performing occasional line work on call-out/stand-by duties for the Utility.

Pafford stated herein, that the Utility never gave him a reason why he was denied 18 months of the retirement health insurance benefit he believed he was due; that he went to work for H & H Utility Excavating (a private sector company) as a Superintendent, effective March 5, 2008; that from March 1, 2008 to July 1, 2008, Pafford had health insurance coverage through his wife's employer (Metko Manufacting). Pafford stated he and his wife did not suffer any unusual health events or injuries during this time period but that he and his wife had increased premium and out-of-pocket payments, deductibles and co-pays under his wife's policy, higher than those he had had at the Utility.[4] Pafford stated that effective July 1, 2008, H&H Utility Excavating began covering him and his family on its health insurance policy. Pafford stated that he filed the instant grievance because he believed he had retired from Utility employment, because other similarly situated employees had been given the retirement health insurance benefit but that he was refused same for no reason.

The Utility answered the grievance on March 7 and April 25, 2008, respectively, as follows:

. . .

> In Mr. Pafford's employment separation letter, dated February 15, 2008, he states "I have made a decision to accept a position as a strategic career move and take on new challenges." It is apparent from his letter that Mr. Pafford plans to continue his employment in the workforce. At this time, he is not planning to remove himself from the workforce on a permanent basis or in other words, retire.
>
> Therefore, it is the position of New Holstein Utilities that Mr. Pafford is not retiring in the sense that would allow him to be eligible for the Retirement Health Insurance Benefit as noted in Article 24 in the current labor agreement.
>
> . . .
>
> (Utility letter dated April 25)

. . .

[4] Pafford stated herein that he had no idea the total of these amounts.

> On April 22, 2008, in accordance with the provisions of Article 7, Section 7.6, Step 3 of the Collective Bargaining Agreement, the New Holstein Utilities Commission met with you and your Business Representative, Randy Sawicki, regarding your grievance dated February 29, 2008. After hearing from you and Mr. Sawicki, as well as reviewing the provisions of the Collective Bargaining Agreement, the New Holstein Utilities Commission has unanimously determined to deny your grievance on the basis that the Collective Bargaining Agreement has not been violated.

The case was then brought forward to arbitration before the Undersigned who was jointly and independently selected by the parties.

POSITIONS OF THE PARTIES

Association:

The Association asserted that Article 24 does not require that employees must attain a certain age, be eligible for a WRS annuity or retire from the work world entirely in order to receive the retirement health insurance benefit – all an employee must do is be hired and commence work before January 1, 2002 and "retire as an employee with ten (10) or more continuous years of service with the Utility …" to receive the benefit. The Union noted that there is no contractual definition of "retire" and that Pafford met all conditions precedent specifically stated in Article 24 so he should have been granted the retirement insurance benefit.

The Union urged that the Utility has imposed inappropriate conditions upon the receipt of the Article 24 benefit, not required by the terms of Article 24 – being WRS eligible, reaching age 55 and retiring from work and public life. Here, Pafford "retired" as a Utility employee, ceasing all Lineman (unit) work to take a position as a Superintendent for a private sector excavating company shortly after terminating his employment with New Holstein Utility. Pafford was then a Utility employee with more than 10 years' continuous service, hired prior to January 1, 2002 at the time he retired from lineman work and therefore, he should have received the Article 24 benefit. The fact that Pafford was 46 years old, not eligible for WRS and intended to work in a different position elsewhere when he notified the Utility of his retirement were irrelevant to Pafford's right to collect the Article 24 benefit.

The Union noted that dictionary definitions of "retire" do not require that the employee receive a retirement pension or annuity, contrary to the Utility's assertions herein. The Union urged that the words of Article 24 are clear and unambiguous and they must be given their ordinary meaning. As Article 24 makes no specific reference to WRS, none should be read into Article 24 by the Undersigned, as such an action by the Arbitrator would violate Article 7 of the parties' agreement. Had the parties wished to require that Utility employees attain a certain age or be WRS – eligible when they withdraw/retire from Utility employment, the Union urged, they could have clearly stated these requirements in Article 24. They chose not to do so.

In this case, the language of Article 24 was taken directly from Utility policy in effect before the Union came on the scene. As such, the Union contended, the language must be construed against the drafter, the Utility.

The Union also asserted that the evidence of past practice in this case, which is relevant here because of ambiguity in Article 24, supports Pafford's right to receive an Article 24 benefit. The Union observed that the ambiguity in Article 24 is limited to the fact that the contract does not define the word "retire." The Union urged that the evidence of past practice here establishes that the Utility has granted employees the Article 24 benefit regardless of age, future employment status or receipt of retirement benefits. The Union noted that over the past 20 years, the Utility granted the Article 24 benefit to at least four employees, Thelen, Boll, Gruel and Meier, all of whom worked at least part-time after receiving the benefit and one of whom, Boll, was not eligible for and did not collect WRS after receiving the Article 24 benefit.

The Union also noted that the only reason the Utility gave Pafford (prior to the filing of the grievance) for denial of his Article 24 benefit was that Pafford was leaving the Utility to take another position. And yet, the Utility paid the Article 24 benefits to Thelen and Meier, both of whom took jobs, Thelen with the City part-time and Meier with the New Holstein Utility part-time, after "retiring" from Utility employment.

The Union pointed out that 8 of the 10 employees listed on Employer Exhibit 1 who had retired were 55 or older and WRS eligible. The Union urged that the Brian Moore example is factually different from the instant case as Moore quit at a time when the parties' first labor agreement was not in effect. So even if Moore had notified the Union that he wanted to pursue an Article 24 benefit he would not have been able to do so.

Thus, in the Union's view, only the Terry Boll example is fairly comparable to Pafford's situation. In this regard, the Union asserted that Pethan's explanation of her error in Boll's case just did not ring true: Across the eleven years they worked together Pethan would have known Boll's age and eligibility for WRS at the time Boll notified the Utility he was retiring early to "seek employment elsewhere" and that he felt this action would be in his and the Utility's "best interest" (Jt. Exh. 4). In the circumstances, the Union urged Pethan's testimony on this point was incredible and that the Boll situation is the only past practice applicable to Pafford's case.

Therefore, the Union urged the Arbitrator to sustain the grievance and make Pafford whole "either by providing him with the benefit or reimbursing him for the value of the benefit that he should have received" (U. Br. p. 15).

Utility:

The Utility argued that Article 14 distinguishes retirement from quitting employment – that the former is an intentional separation from employment in order "to withdraw from business or publc life" while the latter does not contemplate such a withdrawal. In this case, in order to receive an Article 24 health insurance benefit, the Utility asserted, an employee must not only "retire" but also meet the "Retirement – WRS" requirement stated in Article 31. The Utility then cited several cases and urged that they are directly on point, CITY OF APPLETON, MA-10501 (MCGILLIGAN, 2000); CITY OF ASHLAND, MA-5769 (BIELARCZYK, 1991); and CITY OF MILTON, MA-11183 (MORRISON, 2001).[5]

These cases, the Utility argued, make clear that retirement must be treated differently from quitting to take another position elsewhere and specifically that for Wisconsin municipal employers, like the Utility, whose employees are covered by WRS, retirement also means that employees must be eligible for and receive a WRS annuity before they are entitled to collect the Article 24 benefit.

Furthermore, the Utility urged, that the cited cases stand for the following propositions: 1) that the Union has the burden of proof to show that the grievant has met all contractual conditions precedent for benefit eligibility and 2) that the existence of provisions (like Article 31) in those cases require the grievants to prove they retired under the WRS – that is, that they had reached age 55, were vested under WRS, and that when they terminated employment they were eligible to receive and had applied for a WRS annuity.

Here as in ASHLAND, SUPRA, Pafford was 46 when he took a new position, 5 days after terminating his Utility employment, with a non-WRS employer and; although Pafford described his separation as a "retirement", Pafford explained in writing and verbally to his supervisor that he was leaving Utility employment to take another (safer) job. The facts also showed that Pafford did not, in fact, retire and that he was not eligible for and never applied for a WRS annuity.

Also, the Utility asserted that the evidence of past practice in the instant case was insufficient (as in MILTON, SUPRA), to show that the Utility had granted retiree health insurance benefits to employees who simply quit to take other employment or who had the intention of working for others after retiring from the Utility. Indeed, of the 10 employees who had been paid an Article 24 benefit in the past, all but two (Moore and Boll), had applied for, were eligible to receive and did in fact receive a WRS annuity after applying for the Article 24 benefit from the Utility.

[5] The Association also cited various cases in its brief. (U. Br. pp. 7-10).

The Utility also proffered, through Ms. Pethan, data regarding each Utility employee who retired from the Utility since 1990 and whether they sought and were paid the Article 24 benefits (ER. Exh. 1). In the Utility's view, the fact that several former Utility employees began working either for the Utility or for others more than 30 days after retiring, while continuing to draw on their WRS annuities, neither ran afoul of WRS regulations nor of contractual provisions.

Thus, the one instance involving Terry Boll was a mistake and it could not, standing alone, constitute a valid past practice in support of the Union's case herein. Citing several cases, the Utility asserted that the evidence herein failed to show an unequivocal pattern, clearly enunciated practice which was acted upon and readily ascertainable by both parties over a reasonable period of time to pay the Article 24 benefit upon termination of Utility employment to take another position.

The Utility observed that the parties placed Article 24 into the parties' contract at the Union's suggestion; that the Union took the provision from Utility policy in effect from at least 1990 on; and that no discussions were held at bargaining between the parties regarding what the parties meant by using the verb "to retire" in Article 24. In these circumstances, in the Utility's view, for the Undersigned to grant an Article 24 benefit to Pafford would amount to granting unit employees a benefit not bargained for and it would go against the arbitral rule of construction that contract language should be construed against the party proposing it.

Also, the Utility contended, Pafford must have known that reaching age 55 and being WRS eligible were required for other Utility employees (Thelen, Meier and Gruel) to receive their Article 24 benefit. Given the distinction made in Article 14 between quitting and retiring and the fact that Article 31, by its title, requires that "Retirement" necessarily means retiring under "WRS," the Arbitrator must find that the word "retires" in Article 24, does not include quitting to take another job elsewhere.

Finally, the Utility argued that the instant case is similar to two cases recently decided by this Arbitrator, RIVER FALLS S.D., CASE. NOS., MA-13683 AND MA-13529 (GALLAGHER, 2008) wherein one of the involved employees (Ammann), did not "retire" as required by that agreement. Rather, he terminated his employment and went to work for another employer (as did Pafford). In all the circumstances, the Utility urged the Arbitrator to deny and dismiss the grievance in its entirety.

DISCUSSION

This is a contract interpretation case in which both parties have argued that the relevant language of the disputed provision, Article 24, is ambiguous. It is the meaning of the phrase, "…. retires as an employee" in Article 24 that is at the center of the controversy between the parties.[6]

[6] Both the Utility and the Union have cited cases they believe are on point. As the cited cases contained and presented different facts and different contract provisions for interpretation, the cases are not particularly helpful except in terms of the arbitrators' approach to their analysis of the disputed provisions before them.

The Utility has argued that past practice under Utility policy in effect before the advent of the Union as well as the ordinary meaning of the verb "retires" when read along with Article 31, "Retirement – WRS," require that employees must withdraw from the working world and they must also be 55 years of age and eligible to receive a WRS annuity in order to be eligible for an Article 24 benefit upon leaving Utility employment. In contrast, the Union has argued that the past practice evidence and the language of the contract, read as a whole, support the Grievant's right to receive an Article 24 benefit as the parties failed to make age and WRS eligibility express requirements for receipt of an Article 24 benefit. In addition, the Union urged, that as Pafford, in fact, retired and withdrew from all lineman work when he left the Utility and took a different position with a private sector company, he was strictly entitled to an Article 24 benefit.

As a general rule, in contract interpretation cases such as this one, arbitrators closely study the parties' agreement as a whole to determine the parties' mutual intention in including disputed contract language into their agreement. After such study, if the arbitrator can fairly find that the language is clear and unambiguous, she is bound to confine herself to applying the clear terms of the agreement to the facts before her. However, if the disputed language is ambiguous, the arbitrator may look to extra – contractual evidence, such as evidence of bargaining history and past practice, to assist her in determining the parties' true intent in including the disputed language in their contract.

There is no definition of the word "retires" in the parties' agreement and this is essentially the reason why both parties have argued Article 24 is ambiguous. I agree that Article 24 is ambiguous but I also believe that I must interpret the phrase or "… retires as an employee…" to fairly determine whether the Grievant is entitled to an Article 24 benefit in this case.

In their arguments, both parties have cited dictionary definitions of the verb "retire." This is appropriate as arbitrators often look to the ordinary meaning of contractual terms in trying to discern the parties' intent and meaning where language has been disputed. The RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (UNABRIDGED COLLEGE ED., 1968) AT PAGE 1127, defines "retire" as follows:

> 3. to withdraw from office, business, or active life...5. to withdraw, leave, or remove oneself.

The definition of to be "retired" in this dictionary is as follows:

1. withdrawn from or no longer occupied with one's business or profession.
2. due or given a retirement pension. Ibid.

Although the above-quoted definitions are of assistance in deciding the meaning of the verb "retires" in this case, the particular provisions of the effective labor agreement are of greater pertinence and assistance. The Utility has argued that the title of Article 31, "Retirement – WRS" requires a conclusion that the verb "retires" in Article 24 must be read to mean that the employee must be at least 55 years of age and WRS eligible in order to be entitled to the Article 24 benefit. The Union resists this argument, urging that as Article 24 does not expressly state an age or WRS eligibility requirement, none should be read into Article 24 by the Undersigned.[7]

In my view, the Utility's argument on this point goes too far. The fact that the title of Article 24 is "Retirement Health Insurance Benefit," (emphasis supplied), and that Article 31 is entitled "Retirement – WRS" is simply insufficient evidence to support a conclusion that under this agreement, "…retires as an employee" necessarily means the individual must be at least 55 years of age and eligible for a WRS annuity.[8] Had the parties intended to limit access to Article 24 benefits to individuals who were both 55 years old and WRS eligible, they should have said so by clearly stating these limitations in Article 24. Under Article 7.7.5 it would be inappropriate, and I therefore refuse, to read these limitations into this labor agreement.

But in this contract there are two contract provisions which provide additional, persuasive evidence that if the parties had wished to grant the Article 24 benefit to employees like Pafford, who resign or are terminated and then take employment elsewhere, the parties could have drafted language to clearly state this intention. Thus, in my view, Article 14.4 supports a conclusion that the parties knew how to maintain the difference between quitting and retiring when they described and defined how Utility seniority could be broken in Article 14.

In addition, in Article 19.5, the parties employed clear and broad language to describe how the payment of accrued vacation would be done, as follows:

> Employees who retire, resign or who are otherwise separated from their employment shall be entitled to accrued vacation pay.

In my view, Article 19.5 provides strong evidence that when the parties wished to do so, they were quite able to state broad employee entitlement to benefits – at resignation, retirement and separation (either voluntary or involuntary termination). The parties did not use this broad entitlement language in Article 24. They chose to use only the phrase "retiring as an employee" in Article 24. Therefore, based upon the specific language of Article 24, read in

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[7] No evidence of bargaining history was submitted herein regarding Article 24 or the use of the verb "retires" therein or the choice of the words for the title of Article 31.

[8] My RIVER FALLS SCHOOL DISTRICT (AMMAN) award is distinguishable. There, the phrase construed was "employees retiring" which was contained in the same Article (entitled "Retirement") where the District's WRS benefit appeared.

light of the whole agreement and the particular facts of this case, Pafford was not eligible for an Article 24 benefit because he chose to terminate his employment to take a (safer) position elsewhere, and such termination is necessarily different from the act of retiring as an employee. Were it not for the clear language of Articles 14.4 and 19.5, the Union's argument that Pafford was entitled to the Article 24 benefit because he retired from lineman work would be more persuasive. However, because the parties clearly distinguished between quitting and retiring and because they failed to use the broad entitlement language of Article 19.5 in Article 24, the Union's argument on this point must fail.

The Utility has argued that because the Union proposed that Article 24 be placed in the parties' initial agreement, it should be construed against the Union. The Union has argued the opposite – that because the language of Article 24 came from the Utility's (pre-Union) policy, it should be construed against the Utility. Here, I note that the Utility did draft the basic policy language, which the Union proposed and which later became Article 24. However, no evidence was proffered to show how or why the phrase "retires as an employee" was used in Article 24 instead of the 2002 Utility policy language, "(a)n employee…who retires." Given the lack of bargaining history evidence in this area, I do not believe it is fair to construe the language of Article 24 against either party as the "drafter" or "proposer" of the disputed language.

The Utility offered Employer Exhibit 1 as evidence of "past practice" – showing employees, from 1990 through 2003, who had terminated or retired from the Utility and whether or not they received a retirement insurance benefit under the then – effective Utility policy. In my opinion, the record evidence fails to demonstrate that a consistent, mutually accepted, long-standing past practice exists here which could be used to assist in interpreting Article 24.

In this regard, I note that Employer Exhibit 1 covers Utility policy/pre-contract situations and that the parties' labor agreement does not contain a maintenance of standards clause; that no evidence was submitted to show when the Utility first granted WRS to its employees; and no evidence was submitted herein to show that the Utility inquires of those intending to terminate or retire whether they intend to work elsewhere after leaving the Utility.[9] Furthermore, assuming that Pethan made an error in Terry Boll's case,[10] I note that the Thelen situation in May, 2003 demonstrates that neither age, nor WRS eligibility, nor actual retirement from the working world were required of Sharon Thelen by the Utility and that the Utility was fully aware of Thelen's intention to work in real estate and at City Hall and yet it gave her a cash payout of her Article 24 benefit when she terminated her Utility employment. Finally, it is significant that the Brian Moore situation was never brought to the Union's attention. Thus, the evidence concerning Moore's situation was insufficient to support either party's past practice arguments herein. In these circumstances, I have not relied upon the parties' evidence of practice in reaching this Award.

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[9] I note that the record showed that at the time of their separation, Gruel and Meier retired from the Utility. The fact that they later decided to return to some form of work (decisions they could do so without jeopardizing their WRS annuities) were decisions they were free to make.

[10] I have credited Pethan, there being insufficient evidence to undermine her credibility.

Therefore, based on the above analysis and the circumstances of this case, I issue the following

AWARD

The Employer did not violate the provisions of Article 24 of the collective bargaining agreement when it refused to provide retiree health insurance to Thomas Pafford who quit his Utility position to take a job elsewhere.

The grievance is, therefore, denied and dismissed in its entirety.

Dated in Oshkosh, Wisconsin, this 26th day of September, 2008.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

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