

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**LABOR ASSOCIATION OF WISCONSIN, INC. and
TOMAHAWK DEPARTMENT OF PUBLIC WORKS
EMPLOYEES' ASSOCIATION, LOCAL 706**

and

CITY OF TOMAHAWK

Case 28
No. 67665
MA-13979

(Longevity Pay Calculation Grievance)

Appearances:

Mr. Thomas Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., 206 South Arlington, Appleton, Wisconsin, appearing on behalf of LAW, Inc.

Mr. Paul Garner, City Clerk-Treasurer, City of Tomahawk, P.O. Box 469, Tomahawk, Wisconsin, appearing on behalf of City of Tomahawk.

ARBITRATION AWARD

Labor Association of Wisconsin, Inc. hereinafter "Association," and City of Tomahawk, hereinafter "City," requested that the Wisconsin Employment Relations Commission assign a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was designated to arbitrate the dispute. The hearing was held before the undersigned on June 12, 2008, in Tomahawk, Wisconsin. The hearing was not transcribed. The parties agreed to submit post-hearing briefs, no later than July 18, 2008. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute and agreed to the following substantive issues:

Did the City violate the terms and conditions of the collective bargaining agreement when the City calculated and paid out longevity to the Grievant in an amount less than what the bargaining agreement states? If so, what is the appropriate remedy?

The parties further agreed to bifurcate the hearing and will address the issue of remedy in a subsequent proceeding, as necessary.

RELEVANT CONTRACT LANGUAGE

. . .

Article XVI – Longevity

- 16.1** After completion of five (5) years continuous service with the Employer, each eligible regular full-time employee shall be entitled to longevity pay on the basis of one dollar and fifty cents (\$1.50) per month for each year the employee has worked for the Employer. Longevity pay shall be paid in a lump sum to each eligible employee on or about November 15th of each year.

. . .

Article XXII – Grievance Procedure

. . .

- 4. Decision of the Arbitrator:** the decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to the interpretation of the Agreement in the area where the alleged breach occurred. The Arbitrator shall not modify, add to, amend, or delete from the express terms of the Agreement. The decision of the arbitrator shall be final and binding on both parties.

. . .

BACKGROUND AND FACTS

The Grievant, Eric Martin, was hired by the City on September 9, 2002 and completed five years of consecutive full-time service on September 9, 2007. On November 6, 2007 the Grievant approached the Union Steward and questioned the amount of his longevity payment in the amount of \$22.50.

As a result of the Grievant's questions, the Association investigated the longevity calculation and payment method utilized by the City. The Association learned that the City calculated longevity payments consistent with a "cheat sheet" which reads as follows:

Longevity is actually a monthly stipend, paid out once a year per contract. To begin receiving pay, the employee must work 5 years. On the month following the 5 years of service, the employee begins to receive \$5.00 per month and is paid on or about Nov. 15 for the # of months he/she has coming. All established employees are the same – once you establish their pay you can simply add \$12.00 (crossed out) \$15.00 per year to existing pay as the pay increases \$1.00 (crossed out) \$1.25 per month ... Example for a new longevity
Hired 5/2/90 – Eligible for longevity pay on 6/1/95 so in Nov. employee is paid \$35.00 i.e. \$5.00 Jun
5.00 July
5.00 Aug
Etc thru Dec.

The following year - the employee is due \$5.00 for January-May (\$25.00) then \$6.00 for June-December (\$42.00)

$\$25.00 + \$42.00 = \$67.00$

Following year	Jan-May @6.00	\$30.00
	Jun-Dec @\$7.00	<u>49.00 or +12.00</u>
	\$79.00	\$79.00

The Association filed a grievance on November 12, 2007 on behalf of the Local 76 alleging that the City was violating Article 16 of the labor agreement. The remedy sought by Association was:

1. That the employer shall immediately cease and desist from calculating longevity by the formula they are currently using.
2. That the Employer shall pay Wastewater Operator Eric Martin up to \$94.50 for longevity pay he had earned according to the collective bargaining agreement.
3. That the Employer shall recalculate the longevity pay and reimburse any Employee of the Tomahawk Public Works Department Employee's Association for any loss of longevity pay.

The grievance was denied at all steps placing it properly before the Arbitrator.

Additional facts, as relevant, are contained in the DISCUSSION section, below.

POSITIONS OF THE PARTIES

Union

The City's method of calculating longevity pay is contrary to the provisions of Article 16 of the collective bargaining agreement. The language states that the City is "required to compensate employees' longevity pay on the basis of one dollar and fifty cents (\$1.50) per month for each year the employee has worked for the employer". This calculation implies that the City will pay a five-year employee \$1.50 per month for each year the employee has worked for the City. Therefore, a five year employee has worked for the City for 60 months and is entitled to 60 times the monthly amount.

The Union was never given a copy of the note that provides guidance to the City employee when calculating longevity pay. As a result, the Union never had the opportunity to challenge the manner of the City's method of calculating longevity pay.

The City's improper method of calculating longevity cannot be allowed to override or amend the clear language of the agreement. If there is a conflict between the language of the agreement and the past practice, the language of the agreement, which represents the most direct and best evidence of the parties' intentions, must govern.

City

The City has a history of following the terms of the collective bargaining agreement. The language in question predates the 1989 collective bargaining agreement and was part of the employment manual. The City has calculated longevity pay in this manner for greater than 10 years time. The method of calculation has never been questioned nor has the issue arisen during negotiations.

When calculating longevity pay, the City applies the language "one dollar and fifty cents (\$1.50) per month for each year the Employee has worked for the Employer". The City takes the number of years an employee is employed, multiplies that by \$1.50 and then multiplies that number by the number of months earned. The clause "for each year" modifies the number of years the employee has worked. The difference between the City and Union's calculation of longevity is exactly \$18 per year except during the first year of an employee's eligibility for longevity when it is vastly different.

This dispute comes down to how the Association wants the language to read in comparison to how the contract actually reads. In order to reach the result desired by the Union, it is necessary to replace the word year with month, but basic English differentiates between a month and a year.

The contract language in dispute is clear and supports denial of this grievance. In the event the arbitrator finds the language ambiguous, then past practice and the lack of bargaining history support the City's position.

DISCUSSION

The issue in the case concerns the method of calculation of longevity pay. The Association argues that the methodology utilized by the City is inconsistent with the labor agreement. The City disagrees.

This is a contract interpretation case. Analysis begins with the language of the labor agreement. If the language is clear and unambiguous, then it is unnecessary to look to extrinsic evidence. The language of the agreement provides that:

After completion of five (5) years continuous service with the Employer, each eligible regular full-time employee shall be entitled to longevity pay on the basis of one dollar and fifty cents (\$1.50) per month for each year the employee has worked for the Employer. Longevity pay shall be paid in a lump sum to each eligible employee on or about November 15th of each year.

The City views the language as first establishing a threshold of 5 years of employment for eligibility purposes to longevity payments. Once an employee has bypassed his/her five years of service, the City determines the number of months between the anniversary date and the end of the calendar year, although the payment is made on November 15th. The City then establishes a value for each month by multiplying the monthly amount in the contract at the time, currently \$1.50 by five, one for each of the five years completed, to each of those months. That monthly amount is multiplied by the number of months between the anniversary date and the end of the calendar year, to determine the amount of longevity pay due the employee.

In the subsequent year, the City starts with the number of months that it did not credit the prior year (the monthly amount in the contract at the time, currently \$1.50 multiplied by five years), applies its five year value to each month and then adds that amount to the partial payment it made the year before. That total is then added to an annual value, currently \$15.00 (12 months at \$1.50 per month). This is a plausible interpretation and application of the language.

I now move to the Union's challenge. The Union maintains that the City's method of calculation is in error and asserts that the calculation method that should be followed recognizes the completion of five years of employment is as the initial calculation, thus the employee is credited with 60 months initially. Then the Union adds an additional \$1.50 for each month beyond the five year anniversary date through the end of the year. The Union maintains that this is the total due an employee during the first year the employee attains longevity eligibility. The Union would then add \$15 (12 months at \$1.50 per month) for each

year thereafter to the initial total. This method of calculation is also a plausible interpretation from the labor agreement.

For purposes of further understanding, application of the City's calculation methodology results in the following. Assume the employee reaches his/her five years of employment and has an anniversary date of March 10. Under the City's interpretation of the longevity language, the employee would have 9 months remaining in the five year anniversary year. That nine months is then multiplied by \$7.50 (assuming the monthly amount is \$1.50 for each of the five years) for a total of \$67.50 due the employee.

Applying the same facts to the Union's methodology, the employee reached five years in March. The Union would then start with 60 months multiplied by the \$1.50 monthly amount reaching a total of \$90. The Union would then add the monthly amount for all months remaining in the year amounting to a total due the employee of \$103.50. There is a significant difference in the amount an employee receives in that fifth year of employment, especially if they were hired late in the year.

Given that both interpretations of the language are plausible and that they result in different amounts due the employee, I conclude that the language is ambiguous. As such, it is necessary to look to extrinsic evidence to attempt to determine the parties' intent when the language was included in the parties' collective bargaining agreement. Relevant extrinsic evidence includes past practice and bargaining history in this case.

A past practice is binding on the parties when it is 1) unequivocal; 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period of time and accepted by the parties. Elkouri and Elkouri, *How Arbitration Works*, 6th ed. (2002) p. 608. Applying the facts of this case, the City has paid out longevity pay, without deviation, since at least 1989. Albeit one erroneous calculation (exhibit Union 5), the record supports a conclusion that the City has implemented this language in the same manner since at least since 1989 for the bargaining unit, and for an unknown number of years prior to 1989 for the remainder of the City employees covered by the employee manual. The Union membership received a check every November 15th for longevity pay. At no time prior to this grievance did they question, complain or express their discontent with the way the longevity was distributed. While they now indicate dissatisfaction with the manner of calculation, for almost 20 years the City has calculated longevity pay in this manner without challenge.

I acknowledge the Union's argument that the parties' intent when negotiating contract language must trump a longstanding practice, but the parties did not draft this language. Rather, this is language was contained in the employee manual that existed within the City prior to organization of the labor unit. In 1989, the labor unit was organized and the language addressing longevity from the employee manual was included in the collective bargaining agreement, as previously written and without modification. The record establishes that at no time subsequent to 1989 did the parties negotiate regarding the language of Article 16 nor did either side indicate a desire to modify the language.

I acknowledge the Union's argument that the parties' intent when negotiating contract language must trump a longstanding practice, but the parties did not draft this language. Rather, this is language that was contained in the employee manual that existed within the City prior to organization of the labor unit. In 1989, the labor unit was organized and the language addressing longevity from the employee manual was included in the collective bargaining agreement, as previously written and without modification. The record establishes that at no time subsequent to 1989 did the parties negotiate regarding the language of Article 16 nor did either side indicate a desire to modify the language.

I am therefore presented with a longstanding past practice based on language that has never been bargained, in the traditional sense of exchanging proposals or modifying language. The language, while ambiguous, has been defined by the parties' prolonged practice and is entitled to continue until such time and the parties negotiate a different methodology of calculation.

AWARD

The grievance is denied.

Dated at Rhinelander, Wisconsin, this 30th day of September, 2008.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

