BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN FEDERATION of NURSES AND HEALTH PROFESSIONALS, LOCAL 5001, AFT, AFL-CIO (TECHNICAL CHAPTER, REGISTERED NURSE CHAPTER, SERVICE CHAPTER)

and

WHEATON FRANCISCAN HEALTHCARE - ST. FRANCIS, INC.

Case 48
No. 68469
A-6346

Appearances:

Jeffrey Sweetland, Esq., Hawks, Quindel, S.C., Attorneys at Law, 700 West Michigan Avenue, Suite 500, P. O. Box 442, Milwaukee, Wisconsin 53201-0442, appeared on behalf of the Unions.

John R. Sapp, Esq., Michael, Best & Friedrich, LLP, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202, appeared on behalf of the Employer.

ARBITRATION AWARD

On December 8, 2008 the Wisconsin Federation of Nurses and Health Professionals, Local 5001, AFT, AFL-CIO and Wheaton Franciscan Healthcare – St. Francis Hospital filed a request with the Wisconsin Employment Relations Commission seeking to have the Commission appoint a member of its staff to hear and decide a grievance pending between the parties. The parties subsequently selected William C. Houlihan, a member of the Commission's staff, to hear and decide the matter. Hearing on the matter was held on June 2, 2009, in Milwaukee, Wisconsin. A transcript of the proceedings was taken and distributed on June 10, 2009. Post-hearing briefs were submitted and exchanged by July 27, 2009.

This Award addresses whether or not the Employer violated the collective bargaining agreement when it made modifications to the pension and 403(b) savings plan.

BACKGROUND AND FACTS

This dispute involves grievances filed by the three Unions representing the Registered Nurses, Technical employees and Service employees of St. Francis Hospital, alleging that certain changes made to the pension plan violate the collective bargaining agreements in effect between the parties. The relevant language of the respective collective bargaining agreements is common, and the matters have been consolidated into a single proceeding, with a single Award addressing all claims.

The Registered Nurses were the first unit organized and engaged in bargaining with the Employer, beginning in approximately 1984. Prior to 1997 the employees of St. Francis Hospital, including the Registered Nurses, were covered by a defined benefit pension plan, the St. Francis Pension Plan. Under that plan, a retiring employees annual pension benefit was calculated by multiplying the employee's years of service by 1.0% of his or her average annual earnings over his or her whole career. The collective bargaining agreement then in effect contained the following provisions:

ARTICLE 18
Pcnsion

18.01
The Hospital has a Pension Plan for eligible employees. In general, the employees become eligib1e to participate in the Pension Plan if they have reached age 21 and are compensated 1000 hours or more in their first year of employment, or in any following calendar year of employment. The normal retirement date is age 65, but employees may elect to retire at any time after reaching age 55, if they have completed 15 years of credited service. Retirement benefits are paid under any of three options chosen by the person retiring. The amount of the retirement benefits depends upon the number of years that the employee has been compensated at least 1000 hours per year after becoming a participant in the Plan.

A separate booklet, which describes the Pension Plan, is available to employees.

18.02.
Retirement Bonus. Effective with the first payroll period after January 1, 1995, nurses who retire in accordance with the Pension Plan at age 55 or older with at least 20 years of credited service will receive a retirement bonus equivalent to 50% of the retiring employee's accumulated sick leave.

. . .

ARTICLE 23
Wages and Benefits

23.01.
The minimum rates of pay are shown on Schedule A, which is attached to this Agreement.

23.02.
The wages and benefits specified in this Agreement are minimums and the Hospital may from time to time unilaterally add to or increase the wages and/or benefits.

It was the testimony of Barbara Janusiak, who participated in the early negotiations on behalf of the Union, that the purpose of Article 23.02 was to assure that the hospital did not have the authority "to make changes to the contract, such as maybe our shift differentials or our rate of pay. So we wanted something that would prevent changes. So we had much discussion about it, and we settled with the language saying that what we have in the contract are minimums. If you raise something, that's fine. But to reduce something, that's prohibited."

In 1996 the Union became the representative of the Technical and Service employees of the Hospital, each of whom formed separate bargaining units. By 1996 the Hospital had become a subsidiary of Wheaton Franciscan Services, Inc. (WFSI). The WFSI system includes facilities in Illinois, Wisconsin, Iowa and Colorado.

In the 1996 negotiations leading to a successor contract, the Employer made the following proposals to the Technical unit:

12. Pension. Article 17. Effective January 1, 1997, the St. Francis pension plan/trust will be merged into the WFSI plan/trust and St. Francis employees will thereafter receive retirement benefits according to the terms of the WFSI plan.

13. Tax Sheltered Annuity. Article 18. Delete Hospital match because of greater benefits provided in WFSI plan.

    18.01 The Hospital will make available ~~supplement the pension program with~~ a Tax Sheltered Annuity savings plan. The plan incorporates savings options and certain matching contributions by the Hospital. A separate booklet describing the Tax Sheltered Annuity savings plan is available to employees.

. . .

17. Wages and Benefits. Article 22.

22.01 The minimum rates of pay are shown on Schedule A, which is attached to this Agreement.

22.02 The wages and benefits specified in this Agreement are minimums and the Hospital may from time to time unilaterally add to or increase the wages and/or benefits.

In those same negotiations, the Employer made the following proposals to the Registered Nurses unit:

18. Art. 18. (Pension) Replace with language regarding merger of St. Francis plans into the WFSI plans and providing for St. Francis employees to receive retirement benefits according to the terms of the WFSI plans.

19. Art. 19. (Tax Sheltered Annuity) (Attachment 14)

. . .

ATTACHMENT 14

ARTICLE 19
Tax Sheltered Annuity

19.01.
The Hospital will make available ~~supplement the pension program with~~ a Tax Sheltered Annuity savings plan. This plan incorporates savings options and certain matching contributions by the Hospital. A separate booklet describing the Tax Sheltered Annuity savings plan is available to employees.

While many of the employer proposals in the 1996 negotiations were not well received by the Union the pension changes were regarded as positive. The Union advised its members that the pension would be much improved by the change. The new plan did provide for a more generous pension.

The parties reached an agreement for a 1997-2000 collective bargaining agreement, which included the following among its changes:

ARTICLE 18
Pension

18.01.
The Hospital has a Pension Plan for eligible employees. ~~In general, the employees become~~ Employees will be eligible to participate in the Wheaton Franciscan System Retirement Program ("Retirement Program") starting on the effective date of this Agreement. Plan documents, which describe the Retirement Program, are ~~Pension Plan if they have reached age 21 and are compensated 1000 hours or more in their first year of employment, or in any following calendar year of employment. The normal retirement date is age 65, but employees may elect to retire at any time after reaching age 55, if they have completed 15 years of credited service. Retirement benefits are paid under any of three options chosen by the person retiring. The amount of the retirement benefits depends upon the number of years that the employee has been compensated at least 1000 hours per year after becoming a participant in the Plan.~~

~~A separate booklet, which describes the Pension Plan, is~~ available to employees.

18.02.
Retirement Bonus. ~~Effective with the first payroll period after January 1, 1995, nurses~~ Employees who retire on or before December 31, 1997 and who retire in accordance with the ~~Pension Plan~~ Retirement Program at age 55 or older with at least 20 years of ~~credited~~ credit service will receive a retirement bonus equivalent to 50% of the retiring employee's accumulated sick leave.

ARTICLE 19
Tax ~~Sheltered~~ Deferred Annuity Plan ~~19.01.~~

The Hospital will ~~supplement the pension program with a Tax Sheltered Annuity savings plan~~ make available as part of the Retirement Program a Tax Deferred Annuity Plan. This plan incorporates savings options and certain matching contributions by the Hospital. A ~~separate booklet describing~~ description of the Tax ~~Sheltered~~ Deferred Annuity ~~savings plan~~ Plan is available to employees as part of the Retirement Plan documents.

The provision with respect to wage and benefit minimums (Art. 23) was left unmodified in the agreement.

During the negotiations the Employer provided the Union with the pension Plan Document. That document sets forth the elements of the pension plan. The first three pages of the document chronicle a history of the creation and amendment of the plan. There are provisions, including those set forth below, which establish the calculation of pensions. There are provisions, set forth below, which reserve to the Plan Sponsor, the right to modify or amend the plan. Relevant provisions of the 1996 Wheaton Franciscan system Retirement Plan include the following:

> **Section 2.09.** The term "Average Monthly Earnings" shall mean the greater of (i) 1/12 of the highest average of the Participant's Compensation (as defined in Section 2.15) as determined for any 5 consecutive completed calendar years of employment for the Employers or (ii) 1/12 of the average of the Participant's total Compensation during his last sixty (60) full months of employment. . .
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> . . .
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> **ARTICLE IV**
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> **RETIREMENT INCOME**
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> **Section 4.01—Account Balance.** Each Participant has an Account Balance. A Participant's accumulated Account Balance is the sum of the amounts in Sections 4.01(a) and 4.01(b).
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> **Section 4.01(a). Starting Account Balance**
>
> (i) For an Employee who was employed on December 31 1994 with an Employer who was covered under the Savings Plan, the starting Account Balance on January 1, 1995 will be the account balance from the Savings Plan plus the One-Time Service Contribution determined in Section l2.05(e).
>
> (ii) For an Employee who was employed on December 31, 1994 with an Employer who was covered under the Restated Plan, the starting Account Balance is zero.
>
> **Section 4.01(b). Annual Adjustments**
>
> (i) Each Plan Year, each Participant's Account Balance shall receive a benefit credit as defined in this section as of the last day of the Plan Year, provided that the Employee is credited with at least 1,000 Hours of Service with the Employers in that Plan Year. In the Year of Termination of Employment, an Employee shall receive a benefit credit regardless of Hours of Service. Such benefit credit will be based on the Participant's total Compensation, as provided for in Section 2.15 for that Plan Year.
>
> The amount of benefit credit for each Plan Year shall be the sum of the benefit percentage as determined in accordance with the following schedule times Compensation plus, if any, the benefit percentage times Compensation in excess of 50% of the Social Security Taxable Wage Base. The benefit percentage cannot be less than the benefit percentage specified in Appendix A or B.

The Benefit Service used in the following schedule is Benefit Service as of 12/31 or Termination of Employment, if earlier.

Years of Benefit Service	Benefit Percentage	Benefit Percentage for Compensation In Excess of 50% of the Social Security Taxable Wage Base
Less than 1	0%	0%
1 through 5	3%	3%
6 through 10	4%	4%
11 through 15	5%	4.3%
16 through 20	6%	4.3%
21 through 25	7%	4.3%
26 or more	8%	4.3%

(ii) Interest Credits. Each Plan Year a Participant's Account Balance shall receive an interest credit as of the end of that Plan Year with respect to the Account Balance at the beginning of the Plan Year. The interest credit is the product of the Participant's Account Balance as of the first day of the Plan Year and the interest credit below. The interest credit in the year of distribution will be prorated based on completed months. The interest credit for each Plan Year is:

Plan Year	Interest Credit
1995	6.9%
1996	7.0%
1997 and Subsequent Plan Years	One year constant to maturity. U.S. Treasury Bill Rate as of the close of business on the first business day of December preceding the Plan Year of credit.

Section 4.02 - Savings Account. Each Participant will have a Savings Account under this Plan. The amount of annual credit to a Participant's Savings Account will equal the contribution to an annuity plan under Section 403(b) of the Code while an Employee not to exceed $250.00 in a Plan Year provided that the Employee is credited with at least 1,000 Hours of Service with the Employers. In the Year of Termination of Employment, an Employee shall receive a credit regardless of Hours of Service. The Savings Account will receive interest credits in accordance with Section 4.01(b)(ii).

Section 4.03 - Minimum Benefit. For an Employee in the Restated Plan on December 31, 1994, except as provided in Section 12.05, the Accrued Benefit payable at Normal Retirement Date or Late Retirement Date will not be less than the sum of (i) 1.25% of a Participant's Average Monthly Earnings times his years of Benefit Service plus (ii) 0.639% of his Average Monthly Earnings in excess of Covered Compensation times his years of Benefit Service up to a maximum of 35 years.

. . .

ARTICLE VIII

RESERVATION OF RIGHTS AND LIMITATIONS ON RIGHTS OF PARTICIPANTS

Section 8.01—Plan Voluntary. Although it is the intention of the Plan Sponsor that this Plan shall be continued and contributions made regularly, this Plan is entirely voluntary on the part of the Plan Sponsor and the continuance of the Plan and the payments thereunder are not assumed as a contractual obligation of any Employer. None of the Employers guarantees or promises to pay or cause to be paid from its general assets any of the benefits provided by this Plan.

Section 8.02—Reservation of Right to Suspend or Discontinue Contributions. The Plan Sponsor specifically reserves the right, in its sole discretion, to modify, suspend, in whole or in part, at any time or from time to time, and for any period or periods, or to discontinue at any time, the contributions of this Plan.

. . .

Section 8.07—Plan Sponsor May Amend Plan. The Plan Sponsor reserves the right, by action of its Board of Directors, to modify or amend, in whole or in part any or all provisions of the Plan. The Plan Sponsor may exercise this right at any time and from time to time, without consent of any Employer, Participant or Beneficiary. Such amendments may be made effective retroactively if necessary to bring the Plan into compliance with government regulations for tax purposes. No such modification or amendment shall make it possible to use or divert any part of the Plan assets for purposes other than the exclusive benefit of Participants and Beneficiaries under the Plan, prior to the satisfaction of all liabilities pertaining to such Participants and Beneficiaries, except as indicated in Sections 8.06 and 9.04 hereof.

The parties agreed to fold their pension plan, the St. Francis Plan, into the WFSI Plan. On January 1, 1997, the WFSI Pension Plan document was amended as follows:

> **Section 12.06 – St. Francis Hospital**. Effective as of January 1, 1997, the St. Francis Hospital, Inc. Pension Plan ("St. Francis Plan") was merged and shall be governed by the terms and provisions of this Plan, including Section 4.03, and the Trust Agreement, subject to the special provisions hereinafter set forth in this Section 12.06.
>
> **Section 12.06(a) – Participation**. The participation requirements set forth in Section 3.01 hereof shall apply to any Employee who was first hired on or after January 1, 1997. The participation requirements set forth in the St. Francis Plan as in effect prior to January 1, 1997 shall apply to any employee who was first hired prior to January 1, 1997.
>
> **Section 12.06(a) – Benefit Service**. An employee of St. Francis Hospital, Inc., Villa St. Francis or the Terrace at St. Francis ("St. Francis") employed on December 31, 1996 shall receive Benefit Service for hours of service prior to January 1, 1997 under the credited service provisions of the St. Francis Plan in effect on December 31, 1996. Effective January 1, 1997, a Participant who is an Employee of St. Francis on January 1, 1997 shall receive Benefit Service in accordance with the provisions of Section 2.11.
>
> **Section 12.06(c)- Vesting Service**. An employee of St. Francis on December 31, 1996 shall receive vesting service for employment prior to January 1, 1997 under the vesting provisions of the St. Francis Plan in effect on December 31, 1996. Effective January 1, 1997, an Employee of St. Francis shall receive Vesting Service in accordance with Section 2.44.
>
> **Section 12.06(d) – Minimum Benefit**. Notwithstanding any other provision contained in this Plan to the contrary, in no event shall the benefits of an employee of St. Francis on December 31, 1996 who became a Participant in this Plan be less than his accrued benefit as of December 31, 1996 based on the provisions of the St. Francis Plan as of December 31, 1996.

It is the testimony of Tom Scrivner, the chief negotiator for the Hospital in 1996 that the pension plan was " … a complex plan that had many entities participating. It was a system plan. It was intended to be a uniform system plan. It was presented as such." Scrivner testified that there was no discussion relative to the possibility of changing the plan.

Section 401(b) has a provision which sets the interest rate used to calculate the earnings of the plan. In 1996 the interest rate is identified as 7%. Below the reference to 7% is a provision which returns the interest rate to the U.S. Treasury Bill Rate effective 1997 and thereafter. In subsequent years the Plan Sponsor amended the plan to reflect an interest rate higher than the Treasury Bill Rate, but the provision returning the plan to the Treasury Bill Rate remained a part of subsequent plan documents.

It was Scrivner's testimony that the Union periodically requested, and was given, current pension plan documents and/or summaries.

The language of the collective bargaining agreement has remained relatively constant from 1996 to the onset of this dispute. In 2004 the parties negotiated a package of system wide benefits called BenefitsSmart into the agreements as a replacement for previously existing benefits. Article 22.02, which reflects that change is set forth below.

The language of the Retirement Plan Document remained essentially the same through 2008. Amendments were made, and noted. In 2001 the Union proposed to change the plan to modify the rule of 80 to a rule of 75. The proposal was rejected.

Annually the plan sent participants a letter accompanying the retirement benefit estimate. The 2003 letter is illustrative of the letters sent:

> May 2003
>
> Dear Colleague:
>
> There are plenty of great reasons to build your career with WFSI. One of the best reasons is our Retirement Program, a valuable part of your total compensation. The longer you work in the WFSI System, the longer the Retirement Program can work for you - and the greater your benefits. When it comes to your financial future, it really does pay to stay with WFSI.
>
> I'm pleased to present your 2003 Retirement Program Benefit Estimate. Annual benefit estimates are a valuable reference tool for retirement planning. By looking at your current and projected benefits, you can see how staying with WFSI really pays off at retirement. You may wish to share this estimate with your financial advisor.
>
> As you know, our Retirement Program consists of three separate plans:
>
> • Account-based pension plan (cash balance plan);

• Tax-deferred annuity (TDA) plan with employer match, also known as a 403(b) savings plan; and

• 457(b) deferred compensation plan (for those who contribute at least $12,000 to the TDA plan in 2003).

While participation in the TDA and deferred compensation plans is optional, all eligible employees automatically participate in the pension plan.

Pension Account Continues To Earn a Healthy Return
At a time when most personal retirement accounts have lost value, it's good to know your account-based pension plan remains rock-solid. Your pension account will earn a guaranteed 6.5% interest credit for 2003. While the 6.5% interest credit is slightly lower than in past years, it's still well above the minimum rate required by the pension plan (1.46% for 2003). It's also a substantially higher return than you'll find just about anywhere else.

The 6.5% interest credit applies to both your pension plan benefit account and your TDA match account. (TDA match contributions are held within the pension plan, while your own TDA contributions are held in your TDA account and invested according to your elections.)

We can't promise that such high interest credit rates will continue. Interest credits above the minimum rate are discretionary and are influenced by the investment performance of the plan's assets. In the past few years, the plan has had investment losses. Historically however, the plan's assets have earned a better return than expected. WFSI continues to share the benefit of those higher returns with employees.

Security In Uncertain Times
Most of us have watched our personal investments tumble over the last few years. You've probably seen losses in your TDA and/or deferred compensation accounts. In times like these, we have even more reason to appreciate the security of WFSI's pension plan. Remember these key plan features:

- Your account balance can never go down no matter what the markets are doing. Annual interest credits are guaranteed, so there's no investment risk to you.

- Pension plan funds are managed by the WESI lnvestment Committee, which follows a disciplined investment policy aimed at achieving solid growth while managing risk.

- Thanks to successful investing and conservative funding practices, our pension plan is well funded. The plan funds are held in trust and used only to pay plan benefits and plan expenses.

One more security note: to help protect your private information, Social Security numbers will no longer appear on the Benefit Estimates.

Working Together for Retirement Security
Building retirement security is a shared responsibility. WFSI does its part by providing the pension plan at no cost to you, by offering optional tax-deferred savings plans, and by matching your TDA contributions. You need to do your part by taking advantage of the savings plans and making appropriate long-term investment decisions.

You also need to take responsibility for retirement planning. That means carefully reviewing your annual Retirement Program Benefit Estimate. As your benefits grow year by year, you'll see how much it pays to stay with WFSI.

If you have questions about the Retirement Program or any of your WFSI benefits, please call your local Human Resource Department.

Sincerely,

John D. Oliverio /s/
John D. Oliverio
President and Chief Executive Officer

In 2003 the plan had reduced the interest rate from 7% to 6.5%. The reduction was accomplished by an amendment of the plan. This is the single interest rate reduction which appears between 1996 and the end of 2008. No grievance was filed.

In 2008 the pension plan ran into financial problems. In the spring, the Plan Sponsors determined that the rate of interest would be reduced to 3.5%. In October, 2008 the stock market fell dramatically, causing a loss in pension fund investments in the range of $150-160 million. In mid-2008 the fund stood at approximately 88% funded. By year's end the fund stood at approximately 57% funded. There was an approximately $268 million shortfall.

In 2007 the Employer contributed $36 million to the plan. In 2008 the contribution was $33.7 million. The two year total is approximately $70 million. With no changes in the plan the projected Employer contribution for 2009-10 was $124.5 million, a $50 million increase. The employer determined that it lacked the resources to make such a contribution. As a consequence, the governing board of the plan made certain plan changes, which lowered the employers anticipated contribution for 2009-10 to $80.6 million.

On December 30, 2008 the Hospital sent employees the following letter, which summarizes the plan changes. That letter provides:

Date: December 30, 2008
To: Wheaton Franciscan Healthcare Associates
From: John Oliverio, President and Chief Executive Officer
Re: Changes to Pension and 403(b) Savings Plans

Your retirement benefits are important to you and Wheaton Franciscan Healthcare. We're committed to our strategic goal of being a healthcare employer of choice, which includes providing competitive pay and benefits.

For years, health care providers have tried to balance budgets and provide competitive pay and benefits - all while being under reimbursed by Medicare and Medicaid. The current national economic recession and the substantial decline in the value of our investments, including our pension fund, have made it necessary for us to reduce our expenditures on pension and payroll savings plans.

In accord with our Value of Stewardship and our strategic goal of financial viability, we will be making the following changes to our retirement benefits program effective January 1, 2009. These changes will not impact any pension benefit you have earned as of December 31, 2008.

What's Changing:

- **We are reducing the guaranteed interest credit to 1.31% for 2009**. In October, we communicated the guaranteed interest credit would be 3.5% for 2009. According to the pension plan, we are required to credit at least the one-year Treasury bill rate as of the close of business on the first business day of November that precedes the plan year of credit. In previous years, we were able to provide more than the minimum requirement. Because of the losses our pension plan sustained and the economic forecast, the plan can only afford to credit the minimum required rate for 2009.

- **We are capping the pension contribution credit.** You receive a contribution credit to your pension plan account each calendar year, from 3% to 8%, based on your years of service. For 2009 and future years, the new pension contribution credit schedule is:

Years of Benefit Service	% of Pay
1-5	3%
6-10	4%
11+	5%**

**If you meet the Rule of 80 on December 31, 2008 (your exact age on 12/31/08 plus your Benefit Service as defined in the pension plan equals 80 or more), your pension contribution credit will continue to be based on the 3% - 8% formula.

**If your pension contribution credit as of December 31, 2008 is greater than 5%, your credit for 2009 and future years will be capped at your 2008 rate.

- **We are changing the grandfathered annuity benefit.*** The current five year average pay formula will change to an annual pay formula starting in 2009. The grandfathered annuity formula applies to associates who were hired before January 1, 1995 (or January 1, 1997 for St. Francis) by an entity who was participating in a prior annuity plan as provided for under the terms of our pension plan.

  If you meet the Rule of 80 on December 31, 2008, (your exact age on 12/31/08 plus your Benefit Service as defined in the plan equals 80 or more) the current five year average pay formula will continue.

- **We are eliminating the 403(b) match in 2009.** As we previously communicated due to IRS rule changes, we can no longer contribute the match into your pension plan account. Our intent was to contribute the match directly into your 403(b) account for 2009, but the current economic situation has forced us to eliminate the match altogether.

What Action You Need to Take

Although there is nothing you need to do, it's important that you understand the changes to the Pension and 403(b) Savings Plans and their impact on you.

. . .

At a time when many companies have completely discontinued their pension programs, we believe the changes we are making will continue to afford you a highly valuable and competitive retirement benefits program. We understand these are very challenging times financially, but if we strive to provide the highest quality of patient care and service, Wheaton Franciscan Healthcare will be successful. Thanks for your loyalty and commitment to our Mission.

At approximately the same time, the Hospital issued a Q&A document explaining the rationale of the changes and how they would impact employees.

Q&A on Pension and 403(b) Savings Plans Changes
December 29) 2008

1. **Why is Wheaton Franciscan Healthcare making changes to the pension and 403(b) savings plans?**

   With the national economic recession and substantial downturns in the markets, we needed to revise retirement benefits immediately in order to manage our costs in a responsible manner. Without these changes, our organization's pension costs would have escalated from the $35 million range to the $60 million range. The combined savings from these changes are $7.1 million for the current fiscal year (changes are effective 1/1/2009 so ½ year of savings will be realized in the current fiscal year), and $15.2 million for FY10. Even with these changes, our pension costs are projected to be $45 million in FY10. The revised plan was approved by the Human Resources Committee of the Wheaton Board just last week.

2. **What happens to the pension benefit I have already earned in the pension plan?**

   Your benefit as of December 31, 2008 will not be impacted by these changes. Your account balance for 2008 will be calculated based on the following:

   - 6.5% interest credit on your January 1, 2008 account balance,
   - A contribution credit of 3% - 8% based on your total service as of December 31, 2008 if you had 1,000 paid hours in 2008,
   - 403(b) match into the pension plan based on your 2008 403(b) contributions.

3. **Are our pension benefits being frozen?**

   No, your pension benefits are not being frozen. Your benefit will continue to grow each year.

4. **What is the Rule of 80?**

   The Rule of 80 is used to determine how your future pension benefits will be calculated. The Rule of 80 is calculated by adding your exact age on December 31, 2008 plus your Benefit Service under the pension plan as of December 31, 2008. If the total is 80 or more, your future pension benefits will continue to be based on the current plan formulas.

5. How can I tell if I meet the Rule of 80?

The Rule of 80 uses your exact age (whole age and decimal fraction) and your Benefit Service (as defined in the pension plan) on December 31, 2008. To see your Benefit Service:

. . .

6. Why is WFH protecting those who meet the Rule of 80?

Using an age plus service rule like the Rule of 80 is a common way for pension plans to protect the benefits of employees who may be nearing retirement and may have already made retirement planning decisions based on the current formulas.

7. How does the 5% cap on the pension contribution credit work?

Today you receive a pension contribution credit of **3%** - 8%, based on your Benefit Service, to your pension plan account each calendar year. The future pension contribution credit is being capped at 5% - or at your December 31, 2008 contribution credit if it's greater than 5%. If you meet the Rule of 80 on December 31, 2008, your pension contribution credit will continue to be based on the 3% - 8% schedule. The old and new contribution credit schedules are shown below.

. . .

8. I have 20 years of service on December 31, 2008. I receive the 6% pension contribution credit, but do not meet the Rule of 80 on December 31, 2008. What will my 2009 pension contribution credit be if I will have 21 years of service on December 31, 2009?

Your 2009 and future contribution credit rate will stay at 6%. It would have increased to 7% under the old schedule but will remain at 6% under the new schedule, which is higher than the 5% cap.

9. How do I know if I have the grandfathered annuity benefit?

There are approximately 3,200 pension plan participants out of our total 14,000 active participants who have the grandfathered annuity formula apply, as a minimum benefit. The grandfathered annuity benefit applies to associates who were hired before January 1, 1995 (or January 1, 1997 for St. Francis) by an entity which was participating in a prior annuity plan as provided for under the terms of our pension plan. The grandfathered annuity is simply a minimum calculation. The final account balance for those with the grandfathered annuity is the greater of the account based on the contribution formula as stated in question 7 and the lump sum value of the annuity had the old grandfathered plan continued.

10. If I qualify for a grandfathered annuity benefit, how will my benefit be affected?

If you are eligible for the grandfathered annuity benefit, you will have the December 31, 2008 annuity benefit calculated using the five year average formula. In 2009 and each calendar year after in which you have 1,000 paid hours, you will receive an additional benefit based on your pay for that year. If you are vested and terminate employment during a calendar year, you will receive a benefit for that year regardless of your number of paid hours for that year.

Here is an example of how the annual pay formula will be calculated:

. . .

11. Why is WFH eliminating the 403(b) match?

As we previously communicated, we are no longer allowed to contribute the match into your pension plan account starting in 2009 due to IRS rule changes. Our intent was to contribute the match directly into the 403(b) accounts for 2009, but the current economic situation has forced us and many other companies to eliminate the match altogether. WFH still sponsors the 403(b) plan, and there will be no impact on your own contributions to the plan.

12. WFH announced in October that the 2009 interest credit will be 3.5%. How can it be reduced to 1.3%?

The 3.5% that we communicated in October was set before the market declines that occurred in the last few months. According to the pension plan, we are required to credit at least the one-year Treasury bill rate as of the close of business on the first business day of November that precedes the plan year of credit (i.e., the interest rate for 2009 is based on the one-year Treasury bill rate as of the close of business on the first business day in November 2008, which was 1.31%). In prior years, the pension plan was able to provide an interest credit that exceeded the minimum required by the plan. However, because of the recent losses the plan sustained and the economic forecast, the pension plan can only afford to credit the minimum required rate for 2009.

13. How can I see the impact these plan changes will have on my benefit?

We are working to reprogram the pension Web site to reflect these plan changes. Once the site is ready later this spring, you will be able to run personal benefit projections at future ages. You will only see projections for the new benefits. Our goal in 2009 is to offer tools and materials to help associates better understand the WFH retirement programs and how to plan for retirement.

14. Does WFH expect to make more changes to the plan benefits in the future?

Even though we intend to maintain the pension and 403(b) savings plans in the future, we will continue to review and monitor the performance of the plans and our financial situation. We continue to have the right to make any additional necessary changes to the plans in the future. Like all other employers during these challenging economic times, WFH is working hard to balance our strategic goal of financial viability with providing competitive pay and benefits to our associates.

Please note that the memo and frequently asked questions document are intended to provide an explanation of the applicable changes to the pension and 403(b) savings plans. Complete plan provisions are contained in the official plan documents (including the plans and any amendments thereto), which govern in the case of any differences or conflicts between them and these documents.

On December 30, 2009 the Union grieved the changes in the plan. It was the testimony of Union witnesses that the impact of each of the changes was to reduce future pensions of bargaining unit employees. Ms. Janusiak testified that many Nurses reduce their hours of work as they approach retirement. As a consequence, the elimination of the rule of 5 in favor of the last year of employment has an adverse impact on those who reduce their hours in anticipation of retirement.

ISSUE

The parties stipulated the issue:

Did the Employer violate the collective bargaining agreements by the actions taken as described in Joint Exhibit #3 (Jt. Ex. #3 is the December 30 letter outlining the benefit changes)?

If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 15
Fringe Benefits

15.01
Full-time and regular part-time employees shall be able to participate in the program of fringe benefits that is made available by Wheaton Franciscan Healthcare to employees of WFH and WFH affiliated organizations. The WFH benefits program, currently called Benefits SMART, may be changed during the term of the Agreement for employees covered by the Agreement when such

changes are also made for other employees of WFH or WFH affiliated organizations. During the term of the Agreement, the benefit programs will be substantially similar to the 2007 Benefits SMART program, or later modified Benefits SMART programs which the parties accepted as substantially similar.

15.02
The WFH benefits program currently involves multiple health plans, a vision plan, a dental plan, short-term disability, long-term disability, and life insurance/accidental death and dismemberment benefit. When relevant, the employee may designate his or her beneficiary. A conversion plan is available for the life/AD&D benefit after an employee leave employment.

15.03
The WFH benefits program includes certain benefits employee may elect to participate and pay for. The current elective benefits programs are optional employee life insurance, optional life insurance for the employee's spouse or children, long-term care and pre-paid legal services.

. . .

<u>ARTICLE 17</u>
Pension

17.01
Employees will be eligible to participate in the Wheaton Franciscan System Retirement Program ("Retirement Program") starting on the effective date of this Agreement. Plan documents, which describe the Retirement Program, are available to employees.

<u>ARTICLE 18</u>
Tax Deferred Annuity Plan

The Hospital will make available as part of the Retirement Program a Tax Deferred Annuity Plan. This plan incorporates savings options and certain matching contributions by the Hospital. A description of the Tax Deferred Annuity Plan is available to employees as part of the Retirement Plan documents.

. . .

<u>ARTICLE – 22</u>
Wage and Benefits

22.01
The minimum rates of pay are shown on Schedule A, which is attached to this Agreement.

22.02
The wages and benefits (excluding BenefitSmart programs) specified in this Agreement are minimums and the Hospital may from time to time unilaterally add to or increase wages and/or benefits. Such changes may be made by the Hospital after consultation with the Union.

POSITIONS OF THE PARTIES

It is the view of the Union that the uncontradicted testimony of Janusiak is that the original pension plan was subject to Article 22's minimum standards provision. There have since been no changes to Article 22 as it relates to the pension provision. The original contractual reference to the pension plan did not specify the benefits, but rather referred the reader to another document. The format is alleged to be the same as is presented in this dispute. The Union points to the Employer proposal of 9/19/96 and argues that the Employer wanted the pension benefits subordinated to the plan document, but failed to get its proposed language in the contract.

It is the view of the Union that the pension benefits are subject to the minimum benefits provision of Article 22. Article 17 makes specific reference to the Wheaton Franciscan Retirement Program and further to the Plan documents. It is the view of the Union that these references operate to incorporate the Plan into the collective bargaining agreement. The plan document contains detailed explanations of the retirement benefits that are the subject of this dispute. The Union cites arbitral authority for the proposition that the plan has been incorporated into the contract, and that the plan provisions are enforceable through the collective bargaining agreement. (See Basin Electric Power Cooperative, 91 LA 675, John Morrell & Co., 75 LA 1119, and Seattle School District, 119 LA 1145.)

The Union acknowledges that the term "specified" which is the key term in Article 22.02 means "to state explicitly or in detail". The text of Article 17.01, standing alone does not state in any detail what retirement benefits are provided under the WFSI plan. It is the incorporation of the retirement plan that specifies the benefit details that satisfies Article 17.

The Union points to the 2004 negotiations that led to the adoption of the BenefitsSmart fringe benefit package to the parties' agreement. BenefitsSmart is a system wide program of fringe benefits, including health insurance, vision, dental, disability, life and other benefits described in Article 15. All parties agree that the pension plan is not a part of BenefitsSmart. It is the view of the Union that when BenefitsSmart was added to the contract it was specifically excluded from the reach of Article 22.02. During the course of the 2004 negotiations the Employer demanded that Art. 22.02 be modified to specifically exclude BenefitsSmart. No such clarification was ever made for the pension provision. The Union argues for an application of the *expressio unius est exclusion alterius* interpretive doctrine. (The expression of one thing is the exclusion of the other.) It is the view of the Union that the parties know how to draft exclusionary language.

The Union points to the 1997-2000 negotiations where the Hospital abandoned its initial proposal that would have required bargaining unit employees to "receive retirement benefits according to the terms of the WFSI plan." It is the view of the Union that had this language been place in the contract it would have been dispositive of this dispute. The language was not made a part of the agreement. Rather, argues the Union, the language adopted resembled the language previously used by the parties. It is the view of the Union that I should not be willing to award to the Hospital that which it was unable to achieve through negotiations.

The Union makes a parallel argument related to the treatment of Tax Deferred Annuity. The 1997 negotiations produced a Tax Deferred Annuity provision that is substantively identical to the prior Tax Sheltered Annuity provision. In light of the testimony that the prior provision was covered by Article 22.02, the substantively identical Article 18 should also be deemed to be covered by Article 22.02.

It is the view of the Union that the Collective Bargaining Agreement's Article 22 should control over the unilaterally implemented Plan documents right to modify provisions in the plan document.

It is the view of the Hospital that the 2009 changes to the plan were expressly permitted by the Agreements. It is the view of the Hospital that Article 17 makes reference to the plan document but provides no details describing benefits, funding, or Plan terms or conditions. It is the view of the Hospital that the Union accepted the Plan as the Plan was written. That includes the stated rights to modify the plan as needed. The Hospital cites Arbitral support for the proposition that where an external plan is incorporated into a collective bargaining agreement, all of the plans provisions, including a reservation of rights clause is so incorporated. (BP Amoco v. NLRB, 217 F. 3d 869, 2000, Sandusky Limited, 122 LA 1195).

The Plan document authorizes pension changes. The interest rate was reduced in 2003, without a grievance.

It is the view of the Hospital that Art. 22.02 does not preclude a pension change. The Hospital does not believe that Art. 22.02 is applicable because it contends that there are no pension benefits "specified" in the agreement.

The Hospital notes that Article 18 does make a reference to "certain matching contributions." However it is the view of the Hospital that such reference does not override the broad plan document rights to amend or modify the plan. The Hospital cites Spirit Airlines, 124 LA 1382,(2007) in support of this claim.

The Hospital recites the economic circumstances that led to the changes. It contends that it had to act, and that it limited its reaction so as not to be retroactive, and to provide some cushion to those approaching retirement. The Union joined the plan in good times and enjoyed the benefits. It is the view of the Hospital that it can not now ignore its bargain and separate from the group in hard times.

DISCUSSION

There is no dispute in this proceeding that the Hospital's actions in making the various modifications in the pension plan were unilateral. As noted by the Union, each of the adjustments led to a reduced benefit. That was the purpose of the modifications. The Plan experienced financial distress, and reacted. Two things occurred. The plan was modified to pay out less. The level of contribution was increased. The critical question raised in this proceeding is whether the plan design changes violated Article 22.02's directive that "The wages and benefits… specified in this Agreement are minimums …"

Article 22.02 makes reference to the wages and benefits specified in this Agreement. Article 22.02 does not specify wages or benefits. Rather, it makes reference to other provisions of the Agreement. It is in those other provisions that the specification of wages and benefits must occur to trigger the application of Article 22.02. Article 17 (Pension) and Article 18 (Tax Deferred Annuity) are the substantive contract provisions which address the subjects of this dispute.

On their respective faces, neither Article specifies a wage or benefit. The Union essentially acknowledges this fact in its analysis of the literal reading of the Articles. There are Articles of the Agreement which do specify wages or benefits. Article 22.01 provides; "The minimum rates of pay are shown on Schedule A, which is attached to this Agreement". Schedule A lists classifications, next to which are listed wage rates with a range minimum, midpoint, and maximum. Additionally there are differentials for PM, Noc, and Weekends. These rates of pay and differentials were specifically noted in the testimony of Ms. Janusiak.

Article 20, the Inservice and Tuition Reimbursement provision provides; "Annually, the Hospital will provide $300 per RN with a maximum of $30,000 (bargaining unit total) and 200 paid seminar days per calendar year for benefit eligible persons." Article 22.03 provides for an "additional Twenty Five Dollars ($25) per day when sufficient translation services are provided…" Article 7 has an on call provision which directs that "Employees required to be "on call" shall be paid at the rate of $2.00 per hour…" There are additional bonuses paid when employees are called back to work. Article 7 has a market differential of $2.00 hour applicable to ICU Nurses.

The structure of Article 17 and Article 18 is different in approach to the covered benefits. Both Article 17 and 18 make reference to the retiree program. Neither articulates nor defines a benefit, but rather each makes reference to the retirement program.

There are provisions of the contract which use the term "wage" or "benefit". The title of Article 22 is Wages and Benefits. Art. 22.01 goes on to specify wages and shift differentials. Article 15 is titled Fringe Benefits. Article 16 is titled Health and Dental Benefits. Article 10 is Paid Time Off. Art. 10.01 describes the time off as "a benefit of pay for time off…" Neither Article 17 nor Article 18 use the term "wage" or "benefit" to describe the pension or TDA.

The Union points to the testimony of Janusiak that Article 22 was intended to cover the pension. Ms. Janusiak's testimony sweeps broadly. Her examples were wages and shift differentials. Her direct testimony on the topic of pensions consisted of the following;

Q; And during that time was the pension provision covered by 22.02?
A; Yes.

There is no indication that the applicability of Art. 22.02 to the pension clause was ever tested. The original Pension clause is not a detailed articulation of the pension provided under the plan. A reader has to turn to a separate book to see the detail of the plan. However, the original language does have more substance than does the current language. The prior language did define age eligibility, work threshold, normal retirement age, early retirement age and service.

It is the view of the Union that the Pension Plan is incorporated by reference into the collective bargaining agreement. I agree that Article 17 references the Pension Plan. However, it does not incorporate the plan into the Agreement in the way certain other documents are incorporated. For example, Schedule A, which sets forth the wages and shift differentials is made a physical part of the agreement. Similarly, there is a side letter of agreement which resolves 15 issues, including a number of financial matters, a substance abuse provision, and an attendance provision, which is physically attached to the agreement. There is also a RN Weekend Program provision which is made a physical part of the agreement. The three physically attached documents are more firmly incorporated into the agreement.

The Union cites three cases for the proposition that the Pension Plan is both incorporated into the agreement and enforceable through the grievance arbitration provision. I do not agree that the cases cited support the claim. In Basin Electric Power, the Company instituted a hospital pre-certification program unilaterally. The collective bargaining agreement provided;

> It is further agreed that the Group Medical Insurance Plan for hospitalization and Major Medical coverage extended to the employees covered by this Agreement will be continued during the period covered by this Agreement.
>
> The description of the above benefit programs provided by the Cooperative will be presented in the Benefits Handbook.

During negotiations leading to the contract the Company assured the Union that the current plan and existing benefit levels would be retained. The Arbitrator found that the language of the collective bargaining agreement, clarified by the bargaining notes, resulted in the incorporation of the benefits book into the contract to measure the standard of benefits committed. It appears to me that the contract committed to "continue" a certain level of benefits. The Arbitrator concluded that the company committed to retain the then existing level of benefits in negotiations. In that context, the conclusion that the benefits book was incorporated by reference so as to determine the committed level of benefits seems logical. That is not the record here. It is worth noting that the Arbitrator in Basin Electric noted:

> The Arbitrator concurs that when the pertinent language requires only that the Company provide medical insurance, and contains no restrictive language or negotiated benefit levels, the Company is not restricted from modifying the plan, particularly when past modifications have not been grieved by the Union.

In John Morrell & Co. the language of the collective bargaining agreement incorporated a provision found in a different collective bargaining agreement. The dispute concerned whether all, or only a portion, of the external document had been incorporated. The Collective Bargaining Agreement provided;

> Severance Pay - The Company Plant Plan shall be extended to employees covered by this Agreement. …

The Arbitrator concluded that ;

> At first blush, the language of Section 35 of the Agreement appears to be clear and unambiguous. It incorporates by reference all of the "Morrell Hourly Employee Severance Plan" contained in …"

The Arbitrator went on to discuss the perceived ambiguities presented, including a provision of the plan that could not possibly apply to the employees in question, but ultimately concluded that the plain meaning of the words served to incorporate all of the referenced plan, not just a portion of that plan. In John Morrell, the parties did not dispute that the external plan had been incorporated by reference. Their dispute was over how much of that plan had been incorporated.

In the Seattle School District case the collective bargaining agreement provided;

. . .

> Discipline will be carried out in accordance with Board Policies on: Hostility, Defamation or Discrimination and Anti-Harassment…

This language caused the Arbitrator to examine the policies referenced to determine whether or not they had been complied with. The Arbitrator went on to enforce those policies as a part of her Award. While this is the result sought by the Union in this matter, the question of whether or not the Board was free to amend its policies is not addressed in this decision.

The structure of Article 17 does not suggest that the elements of the pension plan have been incorporated into the agreement such that there can be no diminution of benefits. The Article says that employees are eligible to participate in the plan. The Retirement Program existed before the St. Francis employees joined. The Retirement Program exists for a large number of people; St. Francis employees constitute only one of many participants. The employer represented the plan as a system wide plan, not susceptible to negotiated change. In fact there has been no meaningful effort to negotiate changes in the plan.

Unlike Basin Electric, this contract does not indicate that there is a level of benefits to be continued. In Basin Electric the Arbitrator construed the words of the contract to "continue in force the plan in existence at the time the contract was signed." The reference to the Handbook was to describe those benefits. Here, the contract is silent as to the benefits. This contract refers to the Plan document as the source of the Plan. The relationship between the collective bargaining agreement and the pension Plan document is reversed as between the cases.

Article 17 indicates there are plan documents which are available. The plan documents have changed annually. The clause does not specify any of the detail of the plan, not even to the extent the prior contract identified age, eligibility, retirement ages, etc.

It is the position of the Union that the two references to the plan serve to incorporate the Plan into the collective bargaining agreement. Once in, it is the position of the Union that the Plan document specifies the benefits, and that Article 22.02 then bars the Company from reducing benefits. The structure of the Plan document does not support this claim. The Plan, and its documents, exists to serve a number of entities. The benefits and formulas are stated. There is no indication within the Plan that major benefits are differentiated by employer. There are provisions of the plan specific to individual employers, but none appear to bear on the major calculations of pensions. The Plan Document reserves broad rights to manage its affairs and to make changes it regards as appropriate. Sec. 12.06 of the Plan document is specific to St. Francis, and provides that the St. Francis plan is governed by the terms and provisions of this Plan. Sec. 8.07 of the Plan document says that the Plan sponsor may modify the Plan without consent of any employer or participant.

The plan has been modified annually. There is an annual amendment to state and possibly change the rate of interest credited. There has been at least one decrease, which was widely made known to employees. Many of the amendments improved the benefits or were benefit neutral. However, there was an interest rate decrease. In March 2005 there was an amendment which decreased the automatic distribution from $5,000 to $1,000. While not an earth shattering amendment, it did reduce options for some participants. A number of amendments merge other entities into the plan. Those mergers have a potential impact on the financial strength of the plan.

There is nothing in the Plan or its behavior that suggests that it is prepared to accommodate nuanced benefits from St. Francis, other than the very specific grandfathering of pre January 1, 1997 employees amended into the plan. The structure of the Plan is not determinative of the meaning of the words of the collective bargaining agreement. It does operate to support the contention of the Hospital that the plan is systemic, and not subject to local control.

The annual letters to participants and the Reservation of Rights provision contained within the Plan document put the Union on notice that the Plan sponsors believed they were free to operate without contractual restriction.

The Union points to the Employers initial proposal and says that the Hospital didn't get the language which would have explicitly subordinated the employees pension rights to those described by the plan. However, the language of the proposal described the intent of the proposal. The subsequent negotiations led to a grandfather situation with respect to certain St. Francis employees which preserved vesting credit under the St. Francis Plan. It led to an amendment of the Plan document which provided that the St Francis plan is governed by the provisions of the WFSI. The language bargained by the parties simply identifies the plan and indicates the employees can participate.

The union points to BenefitsSmart, and the exclusion of that system wide package of benefits from the reach of Article 22.02. There is no similar exclusion for the pension provision, and the Union concludes that this should support a conclusion that the pension plan is not excluded. It is true that the parties could have extended the Article 22 exclusion to pensions had they chosen. There are parallels between the pension plan and the BenefitsSmart package. Each is a system wide benefit. However, the parties have treated the two benefits differently in terms of how they are incorporated into the collective bargaining agreement.

Article 17 makes a reference to the employees right to participate in the pension plan. It says little else. Article 15 refers to the BenefitsSmart plan, and goes on to say that changes may be made under certain circumstances. It further says that there exists a substantially similar standard. It is in that context that the parties modified Article 22.02. There is simply a more substantial contractual treatment of the BenefitsSmart plan. I am not willing to draw the inference sought by the Union as a matter of contract construction. It goes beyond what this record will support.

I believe the deal the parties struck was to move into the WFSI system plan. There has been no real bargaining over benefits. The words they used allow them to participate in that plan. Those words do not reserve a benefit standard. They did not structure Article 17 to specify benefits.

The pension plan document is the sole source of the specified benefits. If it is to be incorporated into the contract, it comes with the reservation of rights to amend. Nothing in Article 17 draws a distinction between and among the provisions of the pension plan.

The administration of the pension plan is a dynamic process, and these parties acquiesced to that fact. If the collective bargaining agreement articulated benefits, the Union's claim that the reservation of rights provision found in the pension plan document should be subordinated to the benefits identified in the collective bargaining agreement would be more compelling.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 1st day of September, 2009.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

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