BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

COLUMBIA COUNTY (SHERIFF'S DEPARTMENT)

and

COLUMBIA COUNTY SHERIFF'S DEPARTMENT EMPLOYEES' UNION , LOCAL 2698-C, AFSCME, AFL-CIO

Case 295
No. 68886
MA-14388

Appearances:

Neil Rainford, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin, appeared on behalf of the Union.

Joseph Ruf, III, Columbia County Corporation Counsel/Human Resources Director, 120 West Conant Street, P.O. Box 63, Portage, Wisconsin, appeared on behalf of the Employer.

INTERIM ARBITRATION AWARD

Columbia County Sheriff's Department Employees' Union, Local 2698-C, AFSCME, AFL-CIO herein referred to as the "Union," and Columbia County (Sheriff's Department), herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Portage, Wisconsin, on January 26, 2010. Each party filed a post-hearing brief, the last of which was received March 2, 2010, and the record was closed as of that date. WERC intern Ari Bar-Lev, intern participated in the drafting of the decision pursuant to an agreement of the parties.[1]

[1] The parties originally agreed to have the arbitrator mediate this dispute. Mediation ultimately proved unsuccessful.

ISSUES

The parties disagreed as to the statement of the issues. They agreed that I might state them. I state them as follows:

1. Did the Employer violate Article 17 Section 5 of the collective bargaining agreement when it refused to implement a plan to exempt employee payouts used for qualified medical expenses from taxation?

2. If so, what is the appropriate remedy?

RELEVANT AGREEMENT PROVISONS

" . . .

ARTICLE 15 – SICK LEAVE

. . .

Section 6: Retirement Payout: Employees who retire as an annuitant of the State Retirement Fund shall be paid ninety percent (90%) of the accumulated sick leave at their regular hourly rate.

The parties agree to explore and to implement a mutually agreed plan, consistent with the rules of the Internal Revenue Service, in which payouts provided herein may be available to employees on tax-free basis to be used to pay for qualified medical expenses; in the event no such vehicle can be found or no agreement is reached, the parties agree that such payouts will be made to the employees in cash.

. . .

ARTICLE 17 – GROUP HEALTH AND LIFE INSURANCE PLAN

Section 5. Retired Employees: Employees may remain in the group insurance after retirement until age 65 by submitting the full premium payment to the insurance company.

Notwithstanding the above, an employee who retires from the County at age sixty (60) with a minimum of twenty (20) years of continuous service with the County shall be allowed to continue under the group hospital and surgical plan up to the minimum age at which Medicare begins, but at least until 65. The County agrees to pay an amount towards health insurance for qualified retirees, pursuant to the schedule below:

Four Thousand Dollars ($4000.00) per year for 2007;

Four Thousand Five Hundred Dollars ($4500.00) per year for 2008 and 2009;

A maximum of Five Thousand Dollars ($5000.00) per year beginning in 2010 and continuing at that annual amount.

Employees classified as Jailers who retire from the County at age fifty-seven (57) with at least twenty (20) continuous years of service with the County at the time of retirement shall be entitled to this benefit for a maximum of five (5) years. The retired employee shall pay the difference between the County's contribution, above, and the full premium cost of the single or family health plan.

The parties agree to explore and to implement a mutually agreed plan, consistent with the rules of the Internal Revenue Service, in which payouts provided herein may be available to employees on tax-free basis to be used to pay for qualified medical expenses; in the event no such vehicle can be found or no agreement is reached, the parties agree that such payouts will be made to the employees in cash.

. . .

Section 7. IRC §125 Program: The County will implement a IRC §125 Program in which employees shall be permitted to pay for uncovered medical, dental, vision, disability, and child care benefits with pre-tax earnings. Employees shall not be permitted to overdraw their accounts. Employees choosing to participate in a long-term disability plan through the §125 program shall pay the full cost of such coverage. It is understood that the administration costs (if any) of the §125 program shall be paid by the County.

. . . ."

FACTS

The Employer is a Wisconsin county. One of its departments is the Sheriff's Department. The Union is the collective bargaining representative of various non-sworn employees in the Sheriff's Department. The parties first incorporated the disputed provisions of Article 17, Section 5 in their 2005-2007 agreement which was signed November 14, 2006. They carried the substantively identical provisions into their 2007-2008 collective bargaining agreement which was signed May 21, 2008. David White was the staff representative who represented the Union at all material times until about May 1, 2008. He was succeeded by Jack Bernfeld and later succeeded by Neil Rainford.

There is no evidence as to whether anyone took any action under the disputed provision until about April, 2008. In April, 2008, the Union presented Daniel Dodd, Financial Consultant, of Retirement Plan Advisors, to a meeting of the County Board Human Resources Committee (herein "Committee"), to present a proposed plan under the disputed provision. Retirement Plan Advisors is a provider of benefits of the type contemplated by the disputed provision. The Committee is the subcommittee of the County Board which has the authority to effectively recommend adoption of benefits to the entire County Board.

The Committee took no action on the Union's proposal after that meeting and directed Joseph Ruf III, Human Resources Director to respond. On May 23, 2008, he responded on behalf of the Committee in relevant part as follows:

> The County's understanding of and agreement with the Union concerning the non-sworn VEBA benefit is as follows: 1) participation will be limited to AFSCME Local 2698-C members; 2) benefit will be limited to a) pay out of accumulated sick leave balance at retirement; b) employer's post retirement contribution toward health insurance premium; and 3) participation will be mandatory for all AFSCME Local 2698-C members.
>
> I was first informed in April of this year by past AFSCME Staff Representative David White, and again in your May 19, 2008, voicemail, that a condition of adding the non-sworn VEBA benefit is apparently that the County will have to offer the Security Benefits Group IRS 457 (deferred compensation) product to the entire County workforce. The expansion of the County's deferred compensation benefit to offer a second provider to the entire County workforce is a subject that was never discussed as part of 2007-2008 AFSCME Local 2698-C contract negotiations and that is not part of the 2007-2008 contract language.
>
> The County HR Committee has every intention of complying with the contract language "to explore and to implement a mutually agreed [VEBA] plan". However, the County HR Committee has no interest in expanding the County's IRS 457 (deferred compensation) benefit.

Bernfeld and Ruf arranged another meeting. This meeting was conducted on October 1, 2008. It involved a presentation by Bruce Nelson of Precision Retirement Group and the Committee. Precision Retirement Group is a different provider of benefits than that previously presented to the Employer. Nelson presented a proposal and all necessary information for the parties to adopt Precision's Prime Choice plan for retirees. The Union approves the plan. The Committee referred the matter to the Employer's accounting department to determine the financial benefit that the program actually would have to the Employer.

On November 5, 2008, the Committee met to consider the plan as presented. The Committee voted to decline to participate in the plan. The reasons provided to the Union were:

1. The actual savings of such a plan to the county would be small.

2. The expansion of government employee benefits in the current difficult economic conditions could not be justified to the public.

On December 1, 2008, the Union filed the instant grievance and the same was properly processed to arbitration. During the processing, the Employer reviewed the plan proposed by the Union and concluded that the same was a lawful plan which did qualify under IRC Sec. 125.

POSITIONS OF THE PARTIES

Union

The Employer's rejection of the plan violates the last paragraph of Article 17, Section 5. Although the agreement leaves some discretion to the parties not to implement such a plan, the reasons that the Employer has refused to implement the Precision Retirement Group Plan are inconsistent with and violated the provisions of the agreement. The agreement has only two conditions, that the employees may use the payouts on a tax-free basis and that the plan be consistent with Internal Revenue Service rules. That these conditions were met are not disputed. The Employer has now attempted to add new conditions to this agreement and, in doing so it has violate the spirit and letter of the agreement. The Employer has rejected the plan because it does not believe that the plan saves the county enough money and because it feels the public does not support any more benefits for employees. There is no provision that the plan save the Employer any money or that the plan have absolutely no cost impact at all on the Employer. The Employer's own study of the savings indicates that the plan would have saved the Employer $23,499. The Employer has not acted in good faith, but has instead acted to undermine this provision. The Employer has also argued that the Union should have attempted to change the language in bargaining. But the Union has no need to bargain what has already been agreed to. The Union seeks to have the arbitrator order the Employer to adopt the disputed plan. It notes that the cash payment provision is only an interim remedy and not the final remedy to an impasse.

Employer

The Union suggests that the Employer's failure to adopt two benefit plans proposed by the Union constitutes a violation of the collective bargaining agreement. However, the plain language of the collective bargaining agreement does not require the Employer to agree to a plan proposed by the Union after a specified number of proposals within any time limit. It merely requires that the Employer "explore" that benefit. The language of Article 17, Section 5, states, in relevant part:

> The parties agree to explore and to implement a mutually agreed plan. ...in the event no such vehicle can be found or no agreement is reached, the parties agree that such payouts will be made to the employees in cash.

On four separate occasions, the Employer reviewed and rejected the two plans offered by the Union. However, the Employer's four separate efforts to review and consider the Union's two proposals should not be characterized as a refusal to "explore" the issue. Nothing in the collective bargaining agreement guides, restricts, or limits the Employer's right to reject benefit plans proposed by the Union. Nothing in the collective bargaining agreement sets the proposed benefit plan limit at two plans. No collective bargaining agreement violation can exist where the Employer took an action that is necessarily permitted under the terms of the collective bargaining agreement.

The collective bargaining agreement does not provide for any consequences, such as the automatic implementation of a plan of the Union's choosing, based on the Employer's failure to "explore," "implement," or "mutually agree" on a plan within some fixed time period. The collective bargaining agreement is clear and unambiguous on this point, and the parties need look no further than the plain language of the collective bargaining agreement to determine what happens if a retiree plan is not adopted. The collective bargaining agreement expressly provides for cash payments to retirees in the event that the parties do not find, agree on and implement a benefit plan, which is what has happened thus far.

While the Employer does not dispute that the type of benefit plan contemplated by Article 17, Section 5, would provide some tax savings (FICA and Medicare) to both the Employer and retired employees, the Employer has raised legitimate fiscal concerns about implementing the Precision Retirement Group plan. Specifically, those concerns are that: 1) Precision Retirement Group is an out-of-state company in business since only 2000; 2) A variety of fees are charged to both the Employer and retired employees who use the benefit plan; 3) The Employer's questions about administrative fees received incomplete answers, indicating that Precision Retirement Group has little or no experience with items such as governmental audits; 4) The plan is used by a limited number of government employers in Wisconsin; 5) The company principals/partners appear to be changing; 6) It is not entirely clear how Precision Retirement Group gets paid; and, 7) The security and stability of the investments in which retiree funds will be placed is unknown. The Employer does not dispute that the type of benefit plan contemplated by Article 17, Section 5 would provide some income tax savings (FICA and Medicare) to both the Employer and retired employees. However, that 7.65% or 7.67% savings would be offset by the unknown administrative burden of implementing and opening the plan and a variety of administrative costs that may be charged by the plan.

The real impetus for the Union's interest in this plan was that the Sheriff's Sworn Unit (WPPA) bargained a similar benefit in a collective bargaining agreement several years ago.

Other general reasons significant to the Employer's decision against adopting the benefit plans include the general public perception that public employees have too many benefits, and there is no reason to establish more. Additionally, in these bad economic times, it is not proper to establish new benefits for government employees. The Employer asks that the grievance be dismissed in its entirety.

DISCUSSION

1. Contract Standards and Ambiguity

The role of the arbitrator is to apply the parties' agreement as it is expressed. When language is clear and unambiguous, the arbitrator applies it as it is written. When language is reasonably susceptible to alternative meanings, it is said to be "ambiguous." Ambiguities are of two common types; patent and latent. A "latent" ambiguity is one which is not obvious from the face of the agreement. When language is ambiguous arbitrators determine the parties' intent by looking at the history of the language, past practices, if any, of the parties, the purposes of the provisions, the context of the language, and the rules of construction applied by courts.

Article 17, Section 5 is an agreement to defer an issue from the collective bargaining process for later action. These agreements are very important to the bargaining process and must be enforced according to their terms. There are two primary types, those which involve future study without a binding commitment to particular terms and those which involve the future implementation of terms. This provision tends to fall in the latter category. It contains the words ". . . agree . . . to implement. . ." which in this context means that the parties had questions about the details but agreed that if they could answer those, the benefit would be implemented.

At the same time, the parties agreed to and did reserve to the Employer the right to refuse to agree to a specific plan or benefit.

2. Alleged Violation

The Union offered two different benefit plans to the Employer at two widely separate times. The Union has not protested the first declination by the Employer and, indeed, found a different vendor to present. The current proposal was presented to the Board's Human Resources Committee on October 1, 2008, at which meeting there were questions and answers. The Committee tabled the matter for further study. There is no evidence as to whether there was any further study and, if so, what the specific results were.[2] At a meeting between this and the November 5 meeting, the Committee held a meeting and stated with respect to another benefit that it was not considering "new" benefits at this time. The Employer through its counsel alleged that this reason also applied to the issue in dispute as noted above. The decision was made by the Board's Human Resources committee at its meeting on November 5, 2008. The committee gave its stated reason as: ". . . it does not provide a significant enough savings to the County."

I conclude both reasons are outside the scope of the reasons allowed under Article 17, Section 5. While the provision recognizes that the parties might not reach agreement for unforeseen reasons, it expresses the intent that the benefit be implemented. The agreement expresses some of the reasons which might prevent implementation. I do not agree with the Union that there might not be other unforeseen reasons. However, the reasons expressed demonstrate that the concerns are essentially legal, technical or administrative and not reasons known to the parties, but rejected by the Employer in making its choice to enter into the agreement. The Employer had the choice to not agree to this contract provision or to seek its removal in subsequent negotiations on the basis that it no longer wanted to create "new benefits" for public employees. That reason is outside the scope of those contemplated by the provision. Similarly, the general nature of the savings which would inure to the Employer were known at the time the provision was negotiated and a decision to refuse to accept a provider on the basis that the savings were not enough is outside the scope of the provision.

Attorney Ruf has developed other concerns through cross examination, but there is no evidence these reasons were considered by the Committee. Even if they were, the evidence indicates that the Committee did not act with the level of good faith required by the nature of this provision. There is no evidence that there was any communication by the Employer with the Union about any of those reasons or any other form of mutual exploration. I conclude that the Employer violated Article 17 by refusing to accept the proposal of the Union in dispute for reasons not permitted under Article 17 and that it did not act at the required level of good faith in dealing with any of its concerns with the Union as to this benefit.

3. Remedy

The Union seeks to have me order that the Employer accept and implement the Precision Retirement Group plan. It is undisputed that the terms of Article 17 Section 5 of the Collective Bargaining Agreement allow the Employer to evaluate potential plans and use its judgment as to whether there are legitimate and/or unforeseen reasons within the scope of the provision which make any specific plan unacceptable. Moreover, though the agreement contemplates that a plan be implemented, it also allows for a situation in which the Employer determines that no plan is adequate. In this context, the remedy sought by the Union is an

[2] The Employer may have had its accounting department determine what, if any, savings would inure to the Employer by adopting this plan. There is no indication the Employer did anything else.

extreme remedy under the terms of the provision, and it will only be ordered if there is no other reasonable way of effecting the intention of this provision.

Attorney Ruf has stated several reasons why the existing plan may not be acceptable to the Employer. One of the main concerns he has identified is the cost of administration. In addressing this concern, some of his argument is outside the scope of the provision, and some is not. For example, the direct cost of $1,000 to implement the plan is a legitimate factor upon which the Employer may reject. The parties agreed that there would be no direct cost to the Employer. However, direct costs were not the main thrust of the Employer's concern. Rather, the Employer focuses on a concern that the 7.65% or 7.67% income tax savings to both the Employer and retired employees would be offset by the unknown administrative burden of implementing and opening the plan and a variety of administrative costs that may be charged by the plan. Incidental costs include fielding employee inquiries, bookkeeping costs, auditing costs required by law and holding the exit conferences and other incidental expenses. There is no evidence to support a conclusion that these would have been unusual for this type of plan or any new benefit. Since incidental costs are part of any plan, the concept of "will agree" implies that the Employer has agreed to accept normal incidental costs. Therefore, those ordinary indirect costs do not serve as a legitimate reason to reject the plan, and rejection of the plan on those grounds is outside the scope of the Article 17 Section 5 provision, unless the Employer can demonstrates that those costs are clearly in excess of the costs of implementing any reasonable plan.

Other reasons listed by Attorney Ruf for the Employer's rejection of the plan may be legitimate, but are as yet unsubstantiated. Specifically, the Employer has a right to reject a plan where the funds and potential income from them are at a risk outside the normal risks allowed to fiduciaries in Wisconsin. The Employer also has the right to reject the plan if there are excessive hidden costs or fees to employees outside those normally charged in the financial industry under like circumstances. Finally, the Employer has the right to determine if the stability of the providers presents any risk to the employees (principal and income) or the Employer unless the plan's finances are adequately bonded or insured.

The Employer has to be afforded a reasonable opportunity to evaluate these concerns and to contact the Union in regards to its concerns. So far, the Employer's concerns have been raised and used as a pretext for not following this provision. If the Employer has concerns, it has to identify them to the Union and give the Union an adequate opportunity to provide more information or other alternatives.

The remedy of ordering the Employer to accept the Precision plan is premature. Therefore, the Union shall gather all of the information that it intends to present. Once the Union presents all of its information to the Employer, the Employer will have ninety (90) days to explore those concerns. Thereafter, I will set this matter for further hearing or proceedings, as necessary, upon the request of either party.

INTERIM AWARD

The grievance is sustained. The Employer shall identify the information it seeks within fifteen (15) days of this interim award. The Union shall respond and, if necessary, meet with the Employer as soon thereafter as the Employer can place this issue on its committee's agenda. Thereafter the Employer shall have ninety (90) days to discuss the matter.

Dated at Madison, Wisconsin, this 15th day of April, 2010.

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Arbitrator

SHM/gjc
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