BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE COUNTY (FIRE DEPARTMENT)

and

MILWAUKEE COUNTY FIRE FIGHTERS' ASSOCIATION LOCAL 1072

Case 761
No. 70619
MA-14998

(Hareng)

Appearances:

Attorney Roy Williams, Office of Milwaukee County Corporation Counsel, 901 North 9th Street, Milwaukee, Wisconsin, 53233, appearing on behalf of Milwaukee County.

Attorney John Kiel, Law Office of John B. Kiel, LLC, 3300 252nd Avenue, Salem, Wisconsin, 53168, appearing on behalf of the Milwaukee County Fire Fighters' Association Local 1072.

INTRODUCTION

Milwaukee County ("County") and the Milwaukee County Fire Fighters' Association Local 1072 ("Association") are parties to a collective bargaining agreement that provides for binding arbitration of disputes arising thereunder. On February 9, 2011, the Association filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning a pension calculation issue related to the Grievant, Daniel Hareng. The filing requested that the Commission appoint a commissioner or staff member to serve as sole arbitrator in this matter, and the undersigned was so appointed. A hearing was held on May 23, 2011, in Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. A transcript of the proceeding was made. The County and the Association each submitted an initial brief; the Association submitted a reply brief; and the County elected not to do so. Consistent with the undersigned's notice to the parties, the record in this matter was closed on September 6, 2011.

ISSUE

The parties stipulated to the following as a statement of the issue to be heard:

Did the County violate the collective bargaining agreement when it refused to calculate Mr. Hareng's projected retirement benefit on the basis of his annual earnable compensation? If so, what is the appropriate remedy?[1]

BACKGROUND

At all times relevant to this matter, section 2.15 of the collective bargaining agreements between the County and the Association has pertained to the pension benefit available to members of the collective bargaining unit represented by the Association. In the collective bargaining agreement dated of January 1, 1998, through December 31, 2000, the following provision appeared in Section 2.15:

> (10) For service earned as fire fighter after 12/31/1998 by the below listed employes, the pension multiplier shall be increased from 1.5% to 2%. If otherwise eligible for a normal pension, the calculation shall be based on a 5 high year average of base salary. (Base salary does not include any overtime compensation or any other payments in excess of the employes [*sic*] annual wage.)
>
> Bujanovich Jr., Daniel N.
> Lutzen, Laura D.
> Plumb, David S.
> Calhoun, Alan J.
> Erdmann, Kevin S.
> Birmingham, Jeffrey L.
> Benson, Roger T.
> Hareng, Daniel W.
> Wisniewski, Scott A.
> Citro, Michael L.
> Banda, George F.
> Wilson Jr., Frank A.
> Rabenberg, Frank A.
> Salbashian, Victor S.

In the fall of 2000, the County and the Association were engaged in negotiations for what would become the 2001 collective bargaining agreement. During the course of negotiations, the parties made several changes to Section 2.15. Among these changes, the parties added the following provision to Section 2.15:

> (14) Effective January 1, 2003 Final Average Salary means the annual earnable compensation for the three consecutive years of service during which the members' earnable compensation was the highest.

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[1] In its post-hearing brief, the County identified the following statement of the issue:

> Did Milwaukee County properly calculate Dan Hareng [*sic*] pension when it used the average of three years of his base salary and excluded overtime compensation or other payments in excess of his base salary?

This statement of the issue is different from that to which the parties stipulated at the outset of the hearing in this matter. The County provides no explanation regarding the proposed change in the statement of the issue. Thus, the issue in this case remains that to which the parties stipulated at hearing.

When subsection 2.15(14) was added to the 2001 agreement, subsection 2.15(10) was not removed. Subsections 2.15(10) and 2.15(14) both continued to appear in the subsequent agreements between the parties up to and including the 2007-2008 collective bargaining agreement that is a part of the record in this case as the latest agreement between the parties.

The Grievant was employed as a County firefighter and was a member of the bargaining unit represented by the Association. In late 2009 the Grievant began to prepare for retirement from his employment with the County, and he contacted the Milwaukee County Employees' Retirement System to receive a pension estimate. The estimate provided to the Grievant based his pension calculation on the base pay the Grievant had received. It did not account for overtime or other supplemental earnings the Grievant had received. When the Grievant challenged the calculation on that basis, the County responded in correspondence of April 30, 2010, with the following:

> We disagree with your position with respect to inclusion of overtime and supplemental pay in the calculation of final average salary. Section 2.15(10) of the collective bargaining agreement specifically states that for Mr. Hareng the pension calculation shall be based on a five year average of base salary, excluding overtime compensation or any other payments in excess of annual wage. We recognize that section 2.15(14) changes the calculation from a five year average to a three year average. However, that section does not override the provision in section 2.15(10) that bases the calculation on base salary only. Therefore, Mr. Hareng's pension benefit will be based on a three year average of his base salary.

A grievance filed by the Association disputing the County's position with regard to the Grievant's pension calculation has led to the present case.

DISCUSSION

The Association's position in this case is that the Grievant's pension calculation should have been based on subsection 2.15(14) of the agreement and that the "annual earnable compensation" measurement set forth in that provision should be interpreted to require the inclusion of overtime and other supplemental earnings in the calculation. The County does not take the position here that, because the Grievant is among the fourteen firefighters named in subsection 2.15(10), his pension benefit is to be strictly calculated under subsection 2.15(10). Indeed, even at the outset of this dispute, the County acknowledged that the Grievant was entitled to the three-year average allowed for in subsection 2.15(14), as opposed to the five-year calculation required in subsection 2.15(10). The heart of the County's argument, rather, appears to be that the Grievant's pension calculation should be based on a hybrid application of subsections 2.15(10) and 2.15(14). Specifically, it contends that the Grievant's pension should be based on the three-year average set forth in subsection 2.15(14) and on the "base salary" measurement set forth in subsection 2.15(10), which expressly excludes overtime and other

supplemental earnings. The County's position is based on its contention that the "annual earnable compensation" measure set forth in subsection 2.15(14) is undefined. Thus, it argues, because the Grievant is one of the fourteen firefighters identified at subsection 2.15(10), his pension calculation should revert to the clearly-defined "base salary" measurement provided for at that provision.

The County is accurate in its assertion that the phrase "annual earnable compensation", as it is used in subsection 2.15(14), is not defined. The phrase is not defined anywhere in the agreements between the parties. Nevertheless, the undisputed evidence on the record indicates that the County has interpreted the "annual earnable compensation" measurement used in subsection 2.15(14) to allow for consideration of overtime and other supplemental earnings. The record shows that Robert Heindl is a former Milwaukee firefighter who retired from his employment in April of 2010. His pension benefit, which apparently was calculated under subsection 2.15(14), was based on his base salary as well as overtime and other supplemental earnings. Although Heindl admittedly was not one of the fourteen firefighters named in subsection 2.15(10), the record also indicates that the County has included the overtime earnings in the pension calculations of another firefighter who was. George Banda, whose name is included on the list of fourteen, retired in 2006. Although Banda's pension benefit initially was calculated not to include overtime earnings, the County responded to his complaints regarding that issue by recalculating his pension to account for such earnings. The County placed no evidence on the record that would suggest that the testimony provided by Heindl and Banda with regard to this point was inaccurate; nor did it provide any explanation that would distinguish these situations, and particularly Banda's, from the Grievant's; nor did it provide evidence showing that it has calculated the pension benefit for any other similarly-situated firefighter in a manner that is consistent with the position it has taken with the Grievant.

The Association argues that an interpretation of the phrase "annual earnable compensation" that includes overtime and other supplemental earnings makes sense, because that exact phrase has been defined since 1981 in the Milwaukee County ordinance pertaining to the retirement of County employees to include overtime and other supplemental earnings. Although, as established on the record, it is permissible for collective bargaining agreements between the County and the Association to deviate from these ordinances, there is nothing on the record before me indicating that it was the parties' intent to do so. The County agreed to the use of the "annual earnable compensation" phrasing in drafting the 2001 agreement, and the manner in which the pensions have been calculated for Heindl and Banda since then would suggest that the County has interpreted that phrase to have the same meaning as in the ordinance. The County provides no evidence that would suggest otherwise.

It is fair to wonder why, if all or part of subsection 2.15(10) was not intended to have some permanent application to the fourteen named firefighters, that provision would continue to appear in the agreements between the County and the Association. Scott Wisniewski, the president of the Association who was involved in the bargain that resulted in the addition of subsection 2.15(14), testified that subsection 2.15(10) was left in the 2001 agreement because

2.15(14) was not to take effect until 2003. Subsection 2.15(10) was to apply to any individual identified therein who retired in the interim, between 2001 and 2003. Wisniewski further testified that subsection 2.15(10) was not removed from the agreements after 2003, because those agreements have been implemented pursuant to interest arbitration awards, and the parties apparently have not engaged in the clean-up editing that would accompany agreements achieved through voluntary resolution. I find this explanation to be reasonable and, again, the County provided no evidence on the record to the contrary.

Given the evidence on the record, it is only appropriate to give some meaning to use of the phrase "annual earnable compensation" in subsection 2.15(14), to conclude that the phrase requires the consideration of overtime and other supplemental income, and to find that the phrase so defined is applicable to the Grievant.

Now, having considered the record as a whole, the undersigned makes and issues the following award.

AWARD

The grievance is sustained. The Grievant's pension shall be recalculated in a manner consistent with this award, and the Grievant shall be made whole for any loss associated with the prior miscalculation.

JURISDICTION

The undersigned will retain jurisdiction over this matter for a period of sixty days following the date of this award for the sole purpose of resolving disputes over the remedy.

Dated at Madison, Wisconsin, this 5th day of December, 2011.

Danielle L. Carne /s/

Danielle L. Carne, Arbitrator

DLC/gjc
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