BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/ LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION

and

CITY OF MIDDLETON

Case 38
No. 71460
MA-15140

(Engelhardt Grievance)

Appearances:

Attorney Lucy T. Brown, Staff Counsel, Wisconsin Professional Police Association, 210 DuRose Terrace, Madison, Wisconsin, appeared on behalf of the Union.

Murphy Desmond, S.C., by **Attorney William E. Morgan,** 33 East Main Street, Suite 500, Madison, Wisconsin, appeared on behalf of the City.

ARBITRATION AWARD

At all times pertinent hereto, the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division (herein the Union) and the City of Middleton (herein the City) were parties to a collective bargaining agreement covering the period January 1, 2010, to December 31, 2011, covering a bargaining unit of City law enforcement employees and providing for binding arbitration of certain disputes between the parties. On January 27, 2012, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the alleged failure of the City to pay the appropriate amount of longevity pay to bargaining unit member Robert Engelhardt upon his retirement, and requested a panel of the WERC staff from which to select an arbitrator to decide the issue. The undersigned was subsequently selected to hear the dispute. The hearing was conducted on May 30, 2012. The proceedings were not transcribed. The parties filed initial briefs on July 3, 2012 and reply briefs on July 16, 2012, whereupon the record was closed.

ISSUES

The parties did not stipulate to the framing of the issues. The Union would characterize the issues, as follows:

> Did the City appropriately pay the Grievant his longevity pay in December 2011, pursuant to Article 4, Section 4.2 of the collective bargaining agreement?
>
> If not, what is the appropriate remedy?

The City would characterize the issues, as follows:

Did the City violate the collective bargaining agreement when it paid the Grievant longevity pay based on established past practice?

If so, what is the appropriate remedy?

The arbitrator frames the issues, as follows:

Did the City violate the contract or past practice in the manner and amount in which it paid longevity pay to the Grievant upon his retirement in December 2011?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE IV – WAGES AND COMPENSATION RATES

4.2 – Longevity. Each employee shall receive continuous longevity pay in accordance with the following schedule:

After three (3) years of employment	1% of base pay, annually;
After seven (7) years of employment	2% of base pay, annually;
After eleven (11) years of employment	3% of base pay, annually;
After fifteen (15) years of employment	4% of base pay, annually;
After nineteen (19) years of employment	5% of base pay, annually;
After twenty-three (23) years of employment	6% of base pay, annually.

Payments under this Section shall be made annually on the payday closest to the first of December each year. Employees who retire and are eligible to receive benefits under the Wisconsin Retirement System shall receive longevity payment on a pro rata basis at the time of retirement.

BACKGROUND

The City of Middleton and the Union have participated in a collective bargaining relationship for many years, although the bargaining unit has been represented variously by the Teamsters Union and the Wisconsin Professional Police Association during that time. At the time of the events pertinent hereto, the unit was represented by the WPPA. For much of that

time the parties have included contract language providing for increasing amounts of longevity pay for bargaining unit members after they have reached certain numbers of years of employment. As interpreted and applied by the parties, payment occurs on the payday closest to the first of December in each year in the appropriate amount to officers who reach their qualifying anniversary date prior to December 1. If, therefore, an officer reaches his or her third anniversary at any time between January 1 and November 30, he or she is entitled to longevity pay equivalent to 1% of his or her base pay for that year, which is then paid out in December. On the other hand, an officer whose third anniversary falls after the first payday in December is not eligible for longevity pay until the first payday in December of the following year.

Since the 1997-98 agreement, the contract has also provided for longevity pay to be paid to otherwise eligible officers on a *pro rata* basis at the time of retirement. Since 2006, there are three instances reflected in the record wherein this provision has been applied, apparently due to the small number of retirements during that time period. It appears, however, that upon an officer's retirement the City typically has applied a formula to calculate the officer's longevity pay based on the portion of the calendar year the officer has worked prior to retirement and then has paid it out in a lump sum at retirement, but has not paid longevity for the previous year based on the officer's anniversary date. Officers who retire after the first of December, however, have been paid longevity pay for the entire year. In the past this practice has not been challenged by the Union or any of the retirees.

Robert Engelhardt, the Grievant herein, was employed as a police officer by the City from April 4, 1988 until his retirement on December 16, 2011, making him eligible for longevity pay at the 23 year level, or 6% of his base pay, for his final full year of employment. On December 1, 2011 Engelhardt was paid longevity pay on a *pro rata* basis through December 16, 2011, his announced date of retirement. He subsequently objected to not receiving an entire year of longevity pay, since he had reached his anniversary before December 1, and the City thereupon issued him a second check representing longevity pay for the balance of the year. Thereafter, on December 22, the Union filed a grievance, arguing that, under the contract language, not only was Engelhardt entitled to a full year of longevity pay as of his April 4 anniversary date, but also that, according to the retirement provision, he was also entitled to *pro rata* longevity pay equivalent to 6% of his base pay from April 4, 2011 to the date of his retirement. The City denied the grievance and the matter thereupon proceeded to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Union

The Union contends that according to the contract language and longstanding practice, an officer's entitlement to longevity pay "vests" on his or her qualifying anniversary date, even though payment is not made until December. The contract language specifically states that longevity pay is received "after (x number) years of employment," representing service prior

to the qualifying anniversary date. Historically, the City has operated on this understanding regardless of whether the anniversary date occurs on January 1 or November 30, and has paid a full year's longevity pay to any officer whose anniversary date falls within that window. Officers whose anniversary dates fall in December do not receive longevity pay until the following year. Conversely, when calculating longevity pay for retiring officers, the City uses the calendar year as the basis for calculation of the *pro rata* payment, and bases the payment on the number of days the officer worked since December 31 of the previous year. The Union contends that the anniversary date is the appropriate basis for both calculations and that a retiring officer is entitled to not only a full year of longevity pay based on reaching his or her anniversary date, but is also entitled to a *pro rata* payment representing time worked from the anniversary date until the date of retirement.

Section 4.2 of the contract contains a schedule defining eligibility for longevity pay as occurring "after (x number) years of employment." This is not altered by the fact that the payment is not actually made until December. Any *pro rata* payment must, therefore, be tied to the officer's anniversary date, as well. It makes no sense to calculate an officer's longevity pay on any basis other than the schedule established by Section 4.2. The right to receive longevity pay, and the amount of longevity pay, are explicitly linked to the length of service. The Agreement does not say or imply that officers earn longevity on December 1 following a certain number of years of service. A second paragraph states that the longevity payment occurs in December, but that language does not speak to eligibility, but only to administrative convenience in making the payment. The final sentence of the provision calls for a longevity payment "on a *pro rata* basis at the time of retirement," but does not set forth the basis for the proration. Common sense dictates, however, that this payment represents the period of time between the anniversary date and the date of retirement. It is certain, moreover, that the parties did not intend this language to result in inequity in calculating longevity pay. The City has chosen to adopt a calendar year basis for making this calculation for retirees, but there is no basis for this formula in the contract and its implementation has resulted in inequity to retiring officers.

Should the arbitrator conclude that the language of Section 4.2 is ambiguous, rules of contract interpretation support the Union's position. Bargaining history is silent as to the intent of the parties when the longevity provision was added, but amendments to the language over the years have linked longevity pay to length of service, not to the December 1 payment date, or to a calendar year basis for calculation. The language existing in 1976 did not include the *pro rata* language, but did state that longevity pay was "effective" on the payday closest to December 1. This was changed in 1981, when the word "effective" was dropped and longevity pay was tied to a schedule indicating that longevity pay vested after specified years of service. The *pro rata* language was added in 1997, making no reference to a calendar basis for calculation, and has remained unchanged ever since.

Past practice, as the City characterizes it, does not support the City's position. To be binding, past practice must be reasonable, mutually recognized and well established. In the first place, there is no connection between the contract language and a formula for basing a retiree's longevity pay on the calendar year. To base the payment on dates other than those

contained in the contract is not reasonable. Past practice that conflicts with contract language is not enforceable. Further, there is no mutuality. The Union did not participate in the payment of retirement longevity and the City admits that it neither explained its method of calculation to the Union, nor did it provide the Union with statements of longevity payments. Finally, only three officers have retired and received longevity payments between 1988 and Engelhardt's retirement. Three instances in 23 years do not create a practice, especially when the Union was not informed of the City's method of calculation. Further, the fact that the City may have used this practice with other bargaining units and non-represented employees has no weight in establishing a practice for this unit.

Finally, the City's *pro rata* scheme is inequitable because it ties the payment to the calendar year rather than actual time in service. There is nothing fair or equitable about a scheme that denies longevity pay to an officer hired after December 1, or that pays more longevity to a retiree the closer he or she is hired before December 1, which ties longevity for retirees to the hire date rather than the length of the officer's service, in violation of the contract language. It is axiomatic that an interpretation of the contract that leads to harsh, absurd, or nonsensical results is not to be preferred over one that is reasonable.

The City

The City contends that the language of Section 4.2 is ambiguous and that its interpretation was proper under the circumstances. Arbitrators have determined that language that is capable of more than one interpretation is ambiguous. The City contends that the ambiguity here is latent, that is, that it is only apparent when applied to a specific set of facts.

Under Section 4.1, an officer reaches the top of the wage schedule after 48 months. In order to provide an incentive for officers to remain for the long term, therefore, longevity pay was added to reward officers beyond three years of employment. The longevity pay concept has been largely unchanged since 1979 and the current language has been in place since 1997. The same or nearly the same language has also been used with the City's other bargaining units and non-represented employees. Employees become eligible for longevity pay after three years of service and the payments increase over time based on years of service. The payments are made annually on the payday closest to the first of December. Employees who retire during a contract year receive a *pro rata* longevity payment at the time of retirement. The language appears clear on its face. It has been applied repeatedly over the years and has not been challenged or materially changed. The filing of this grievance revealed an alternative possible interpretation, however, leading to the possibility of latent ambiguity.

If the contract is ambiguous, the ambiguity should be resolved by recourse to the bargaining history of the parties, the scheme of the contract as a whole, the context of the terms used and the parties' past practice. Wisconsin arbitrators have said that to be enforceable a past practice must be clear and consistent, must have been applied a number of times over an extended period of time and must be acceptable to the parties, which may be determined by acquiescence over time. In this case, the clear intent of the language is to reward employees

for long service in an understandable and predictable way. Unlike the Grievant's request, the provision calls for payment in December, however, not on the officer's anniversary date and, in fact, makes no reference to the anniversary date at all, although eligibility is based on years of service and to that extent the anniversary date is relevant. The contract also calls for a partial longevity payment at the time of retirement to employees who are eligible for benefits under the Wisconsin Retirement System (WRS). The retirement provision also makes no reference to the anniversary date.

The Union asserts, in effect, that retirees are shorted a portion of their longevity pay because they do not receive full consideration for their first year of employment. The Union believes the Grievant should get an additional longevity payment on a *pro rata* basis for his eight months of service between his anniversary date in April and his separation in December. That is not what the contract says or requires, nor is it how the language has been applied in the past. The longevity scheme is not tied to an employee's anniversary date. Every year employees who have been employed at least three years as of December 1 receive a longevity payment, even if they retire between December 1 and January 1, which is what happened in the Grievant's case. City witnesses testified that this practice has been followed since at least 1998, thus establishing a consistent practice.

In this case, there is an existing practice for applying this language to retirees. Practices may be bargained away by the parties, but that has not happened here, even though the issue was raised by the City in the last bargain. Nevertheless, if the Union wants to eliminate this practice, it must bargain for it and cannot seek recourse in arbitration. Until the parties negotiate a replacement for the current method of calculating retirees' longevity, therefore, the current practice should be followed.

The Union in Reply

The Union reiterates that inasmuch as there is only one reasonable interpretation of Section 4.2, the language is not ambiguous. The City asserts that the language is latently ambiguous because the parties interpret it differently, but ambiguity requires that the language be fairly susceptible of more than one interpretation. Here there is only one reasonable interpretation. The fact that the City's practice is based on a different interpretation does not mean that it is reasonable. Further, past practice cannot be used to interpret unambiguous language.

The City makes its case by adding language to the contract that is not there. It asserts that the language provides *pro rata* longevity pay for employees who retire during a contract year, but the contract does not use the language "during a contract year" in Section 4.2 or anywhere else. Nothing in Section 4.2 suggests that the *pro rata* calculation is to be based on a calendar year or contract year. The fact that the City has interpreted the language in this way does not make the interpretation reasonable.

The Union does not concede that the language is ambiguous, as the City suggests, but only that it is not *crystal clear* until read in context, which then results in only one reasonable

interpretation. The Union's argument is that Section 4.2 defines entitlement to longevity pay on a "schedule," which is set forth therein. The schedule links the entitlement to an employee's start date, but then says that the actual payments shall be made on the payday closest to the first of December. The payment date is, therefore, separate from the vesting date, which is the anniversary of the date of hire. Thus, the later reference to a *pro rata* payment at retirement can only refer to the portion of longevity pay earned, but not yet paid, between the retiree's anniversary date and the date of retirement. To interpret the language as the City does would lead to inequitable results by denying retirees longevity benefits they have earned.

Even were the language determined to be ambiguous, however, the City still could not prevail. The City correctly states the standard for establishing a binding past practice, but cites no authority for upholding a practice that in no way accords with a reasonable interpretation of the contract language. Further, the City also fails to provide support for its assertion that contract language can be interpreted in accordance with the employer's actions toward employees who are not members of the bargaining unit. Where there is no identity of parties to the practice there can be no mutuality or acceptability. It is also notable that the language in the other contracts regarding longevity payouts is significantly different and so could not be used to establish a practice here in any event. The only practices that bear on the Grievant's case are those involving members of his union. In this case, there are only three such instances going back over many years, so there cannot be a binding past practice based on these few occurrences.

Finally, the Union disputes the City's assertion that the issue of longevity pay at retirement was raised during the last bargain. The Union officers have no notes or recollections that support this contention. There is no evidence of the method of calculating longevity pay at retirement ever being discussed and the City witnesses conceded that they were unaware of any knowledge on the Union's part of how the calculations were made. Thus, there was no mutuality, and this fact cannot be altered by the City's vague and unsupported assertions.

The City in Reply

The City asserts that the Union misunderstands the nature of longevity pay in the contract. The Union speaks in terms of when longevity pay is earned. In fact, it is not "earned," but is a benefit for which employees become eligible after a specified period of time. Longevity is not like vacation or sick leave benefits, which are earned. Unlike here, in those provisions the language explicitly states that the benefits are "earned" and ties them to an employee's anniversary date.

The Union argues that any interpretation of Section 4.2 different than its own would be inequitable and unfair, but this is difficult to see. The parties bargained for a method of encouraging employees to stay and rewarding them for doing so. The longer the employee stays with the City, the more valuable he or she becomes, and so the larger the incentive payment. WRS eligible employees who retire receive an added reward of a *pro rata* longevity payment, which is not available to employees who are not WRS eligible. Longevity is not tied

to the anniversary date and is not a step increase in disguise. It was intended to reward employees under specific circumstances and is not the additional form of compensation envisioned by the Union.

The Union's assertion that three instances cannot establish a binding practice is a misstatement of both fact and law. The City provided evidence of five incidents of the practice having been applied since 2004. Further, the language has been in effect since 1998, but the City was unable to locate records going back that far. Only in the case of Officer Kromm is there a possibility that the practice was not correctly applied. Further, the Union notes that the language has changed a number of times over the years, but never has there been a request to add language linking the *pro rata* payment to a retiree's anniversary date. The record, therefore, supports the City's position that this practice has been in place since at least 1998, and perhaps as far back as the 1970's because had it not there would undoubtedly have been a grievance filed at some time to clear the matter up. Finally, because this practice does not establish a benefit, but only serves to clarify how the benefit language is to be implemented, it does not require the same quantum of proof to establish its existence.

DISCUSSION

The issue in this case involves the proper interpretation and application of the language in Article IV, Section 4.2 of the contract concerning the computation of longevity pay for retiring members of the bargaining unit. Both parties have advanced arguments based on what they perceive as the plain meaning of the contract language and both have alternatively asserted that, should the language prove to be ambiguous, standard rules of contract interpretation support their respective positions. In sum, the Union contends that the paragraph clearly ties entitlement to longevity pay to an employee's anniversary date. When an employee retires after his or her anniversary date, therefore, the Union argues that the retiree is entitled to a full year's longevity pay based on passing his or her anniversary date, plus a *pro rata* longevity payment for the period between the anniversary date and the date of retirement. The City counters that longevity pay exists as an inducement for employees to remain in their positions and that, read in that context, longevity pay is a gratuitous benefit to retirees and they are only entitled to a single *pro rata* payment representing the portion of their final calendar year of employment that they actually worked.

Arbitrators have determined that contract language is ambiguous if, on its face, it is capable of more than one reasonable construction. This, however, does not mean that any time parties disagree about the proper meaning of contract language it is ambiguous, *per se.* This is only the case where each interpretation is reasonable. Here, the language of Section 4.2 is awkward, at best. It specifies that longevity pay in increasing amounts is based on achieving specified numbers of year of employment, but then states that the payments will be made annually in early December. This could be read to mean that longevity pay either accrues on the employee's anniversary date, or when it is paid out. The matter is further complicated by the provision for longevity pay for retirees, which was added later, and which merely states that eligible employees will receive longevity pay on a *pro rata* basis at the time of retirement, without specifying the baseline for determining the proration. On its face, a reasonable

argument could be made that the language supports either party's position. The language is, therefore, ambiguous and in order to determine the proper interpretation of this confusing language it is necessary to engage in a process of construction involving reference to the contract as a whole, the bargaining history of the parties and past practice.

As noted, over the years this language has undergone many modifications. The original provision, contained in the 1979-80 contract, stated, in pertinent part:

> 4.02 Longevity. Each employee shall receive continuous longevity pay at the rate of $15 per year (on a once per year basis) after three (3) years of continuous service up to twenty (20) years of continuous service. The longevity pay shall be effective on the pay date closest to the first of December.

In 1981, the language was modified, as follows:

> 4.02 Longevity. Each employee shall receive continuous longevity pay in accordance with the following schedule:
>
> 3 years to 10 years service – 1% of Annual Base Salary
> 11 years to 20 years service – 2% of Annual Base Salary
> 21 years service and over – 3% of Annual Base Salary
>
> Payments under this section shall be annually on the pay day closest to the first of December of each year.

In the 1997-98 contract, the following language was added to the provision:

> Employees who retire and are eligible to receive benefits under the Wisconsin Retirement System shall receive longevity payment on a pro rata basis at the time of retirement.

In the 2004-06 contract, the language was modified to its present form. This sequence of amendments is significant in a number of relevant ways. First, it is clear that from the outset longevity pay was tied to the employee's actual time of service. This is reflected in the reference in the 1979-80 contract to "years of continuous service." This clearly means that after they have served the requisite number of years of continued employment, employees shall receive longevity pay. A year of service is typically computed from the time an employee is hired until the anniversary of the date of hire. Thus, the anniversary date is the triggering event for eligibility for longevity pay. In subsequent years, although the language was modified in some respects, the reference to years of service as the benchmark for longevity pay has remained.

The City attempts to distinguish this provision from others addressing accrual of vacation and sick leave, which it argues are tied to the employee's anniversary date. The vacation provision in Section 5.1 does, in fact, specifically reference the employee's anniversary date, but the sick leave provision does not. Rather, it states that sick leave accrues ". . . at the rate of one (1) day for each month of service," which the City contends requires the application of the employee's anniversary date. I agree with that interpretation of the sick leave language, but see no meaningful distinction between that and the "continuous years of service" reference in the longevity provision. As with the sick leave provision, computation of eligibility for longevity pay must also, of necessity, refer back to the employee's anniversary date in order to calculate "continuous years of service." Further, while the reference to "continuous years of service" was later amended to "years of employment," I see this as a distinction without a meaningful difference. Years of employment, to my mind, is not distinguishable from years of service. For employees remaining in the bargaining unit, therefore, entitlement to longevity pay accrues annually on the employee's anniversary date, but is paid out in December, which makes sense from the standpoint of administrative efficiency. Longevity pay, then, rewards bargaining unit employees after the fact when they have worked for the City for the requisite number of years.

The question then becomes how to properly apply the retirement language against this backdrop. The City asserts that the longevity provision exists as an inducement to employees to remain in their jobs and not as a means of providing additional compensation for employees who have reached the top of the wage scale. It maintains, therefore, that retirees who are leaving employment generally have no entitlement to longevity pay, but this provision was added to provide an extra benefit specifically for retirees based on their service in their final calendar year of employment. The problem is that the City does not cite authority supporting this assertion as to the purpose of longevity pay, generally, nor does it cite any bargaining history reflecting the intent of these parties to interpret the language in this way. Under the language, however, once an employee reaches an eligible anniversary date, longevity pay in the appropriate amount is to be paid in December for the previous year's service and the employee begins accruing time toward the next year's payment. Applying the language as the City proposes, therefore, has the effect of reducing the longevity pay of an employee, such as the Grievant, who has reached his or her anniversary date, but then retires later in the year. In my view, this is an unreasonable interpretation of the language. Rather, ordinarily the proper application of the language should result in the retiree receiving longevity pay for the year of employment ending on the previous anniversary date and a *pro rata* payment for that portion of the next year that the employee worked from his or her anniversary date until the date of retirement.

The City further maintains, however, that there is an existing practice of applying this language to provide longevity pay in just the way it has done in this case and cites to a number of retirements in recent years where this was done to support its claim. The problem is that it appears that the City never explained its method of calculating longevity pay for retirees to the Union and no retiree ever raised the issue in the past. Thus, the Union maintains that until the

present case it was unaware that such a practice was in place. It is axiomatic that, to be binding, a practice must be clear and unequivocal, longstanding and consistent, and mutually accepted by the parties. Where one party is unaware of the practice, therefore, it cannot be binding upon it. Here, the practice regarding retirees was applied three times over a period of several years and the Union appears not to have been adequately informed of its application such that it could agree to its terms. Thus, to my mind, there are two problems with the City's argument. First, there have only been three retirements where this language was used since its adoption, which is scant evidence of a longstanding practice, and, second, there was no mutual acceptance. I do not find, therefore, that the City's application of the language has the necessary elements to make it binding upon the Union. The City buttresses its argument by pointing out that it has also used this formula for paying longevity to retirees from other bargaining units, or who were unrepresented. There is no evidence that the Union was aware of this, however, and, even if there were, the City's practice with respect to those employees cannot be binding on this bargaining unit, which had no voice or interest in those decisions. Finding no binding practice, therefore, I am left with the conclusion that the contract language, properly applied, requires that the Grievant receive not only a full year's longevity pay for his year of service ending April 4, 2011, but that he also receive a *pro rata* payment for his partial year of service from April 4 until his date of retirement.

For the reasons set forth above and based upon the record as a whole, I hereby enter the following

AWARD

The City violated the contract in the manner and amount in which it paid longevity pay to the Grievant upon his retirement in December 2011. In addition to paying him a full year's longevity pay representing his twenty-third year of employment ending on April 4, 2011, it shall also pay him longevity pay on a *pro rata* basis for the portion of his twenty-fourth year that he worked from April 4, 2011 until his date of retirement.

The arbitrator will retain jurisdiction over this award for a period of thirty (30) days to resolve any issues arising in the implementation of this award.

Dated at Fond du Lac, Wisconsin, this 27th day of August, 2012.

John R. Emery /s/
John R. Emery, Arbitrator

JRE/gjc
7821