BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WAUSAUKEE EDUCATION ASSOCIATION

and

WAUSAUKEE SCHOOL DISTRICT

Case 65
No. 71176
MA-15094

(Retirement Payout Grievance)

Appearances:

Mr. Fred Andrist, Northern Tier UniServ Executive Director, 1901 West River Street, P.O. Box 1400, Rhinelander, Wisconsin 54501, appearing on behalf of the Wausaukee Education Association.

Attorney Barry Forbes, Wisconsin Association of School Boards, 122 West Washington Avenue, Suite 400, Madison, Wisconsin 53703, appearing on behalf of the Wausaukee School District.

ARBITRATION AWARD

The Wausaukee Education Association, hereinafter referred to as the "Association", and the Wausaukee School District, hereinafter referred to as the" District" or the "Employer", are parties to a Collective Bargaining Agreement (CBA) which provides for final and binding arbitration of certain disputes, which CBA was in full force and effect at all times mentioned herein. On October 10, 2011 the Association filed a Request to Initiate Grievance Arbitration and asked the Wisconsin Employment Relations Commission to assign a staff arbitrator to hear and resolve the Association's grievance regarding the alleged failure of the District to pay certain sums as retirement benefits (sick leave and life insurance premiums) to various retired teacher employees. The District subsequently joined in that request. The Parties requested a member of the Commission's staff be assigned as Arbitrator to hear and decide the matter and the undersigned was so appointed. Hearing was held on the matter on May 16, 2012 in Wausaukee, Wisconsin, at which time the parties were given the opportunity to present evidence and arguments. This matter is properly before the Arbitrator. The hearing was not

transcribed. The parties filed initial post-hearing briefs and replies by June 29, 2012 marking the close of the record. Based upon the evidence and the arguments of the parties, I issue the following Decision and Award.

ISSUES

The parties were able to stipulate to the issues to be decided by the Arbitrator as follows:

> Did the Wausaukee School District violate the 2009-11 Collective Bargaining Agreement when it refused to pay retiree Farcus and four others sick leave severance pay under Article VIII, B and life insurance premiums under Article VIII C, 2 (first paragraph) for retirees currently under the District's retirement plan?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE VIII – SEVERANCE

A. Teachers retiring at or over the minimum age as allowed by the Wisconsin Retirement System shall receive a severance payment of one-third (1/3) their daily salary per accumulated sick-leave day. Teachers must have served ten (10) years in the District.

Teachers shall have the option to:

1. Take the sick-leave severance payment under this section to extend monthly insurance premiums paid by the District until the calculated severance amount is exhausted, payable under the District's Section 125 cafeteria plan or,

2. Opt to receive an equal cash payment option available under the District's Section 125 cafeteria plan, consistent with IRS rules governing Section 125 plans. (Subject to applicable payroll taxes.)

B. Any teacher in good standing who leaves the employ of the District after seven (7) years (sic) service shall be entitled to severance pay at the rate of thirty-five dollars ($35) for each day of unused accumulated sick-leave days.

C. A plan shall be hereby instituted to provide the opportunity for School District of Wausaukee staff members to elect to take early retirement from the Wisconsin Retirement System pursuant to Wisconsin Statutes 40.02 (42) (f) and Administrative Rules of the Wisconsin Retirement System with compensation under the following guidelines:

1. Requirements:

   a. Ten (10) years or more of full-time or equivalent part-time teaching experience in the School District of Wausaukee. Layoff, suspension, leaves or periods of illness shall not count toward the ten (10) years.

   b. Minimum age as allowed by the Wisconsin Retirement System.

2. Benefits:

   The board shall pay the full life insurance, medical and hospital insurance and dental insurance premiums for the retired teacher under the plan in effect under this agreement (sic) for other bargaining unit employees, for a period of three (3) years. The Board shall contribute each year the necessary dollars to each eligible participant's HSA (Health Savings Account) to keep the single deductible expense for the current health plan at $100 and the family plan deductible at $300. A teacher who retires by the end of the current school year and who is rehired sometime later may begin using this benefit when the district (sic) no longer employs the teacher.

. . .

BACKGROUND

The Wausaukee School District and the Association are parties to a series of Collective Bargaining Agreements, the most recent of which covers the 2009 through 2011 contract term. It is that CBA which is in dispute here. Rob Farcus, Rosie Figas, Jerry Slattery, John Tracy and Sheila Koons all retired at the end of the 2010 school year, each with more than ten years of District teaching service.

Following their retirement they were given severance pay under Article VIII (A) of the existing Collective Bargaining Agreement. Article VIII (A) requires that a retiring teacher must have served a minimum of ten years in the District. Article VIII (A) also provides

teachers the opportunity to choose one of two retirement options: (1) receipt of an extension of monthly insurance premiums payable until the calculated severance amount of one-third of the teacher's daily salary per accumulated sick-leave is paid out, or (2) the receipt of an equal cash payment consistent with IRS rules governing payouts under Section 125. They could choose one or the other, but not both.

They were *not* given benefits under item VIII (B) which provides that a teacher leaving the employ of the District after seven years of employment with the District is entitled to the receipt of severance pay at the rate of thirty-five dollars for each day of unused accumulated sick-leave days.

They were also *not* given full life insurance premiums as provided in Article VIII (C) (2) but were given full premiums for medical, hospital and dental insurance premiums, also required by Article VIII (C) (2).

This grievance followed. More facts will be developed in the body of the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Association

The Association maintains that the language of the Collective Bargaining Agreement (CBA) is clear and unambiguous. It provides, under Section B of Article VIII, that teachers who leave the District after having taught in good standing for a period of seven years or more should receive the benefits provided for in that Article *in addition to* the benefits in Article VIII A. In other words, a retiring teacher is not required to make a choice between Sections A and B but rather is entitled to both benefits automatically.

Although the District argued at hearing that a retiree is eligible for either Section A or Section B, it is clear that no language in the CBA says that. Everyone involved in the negotiation of this Agreement had considerable negotiating experience and could have easily placed language in the Agreement clearly expressing a choice between the two Sections. It is clear that "they knew how to express a choice between two pieces of language when they included the word "or" in another part of this Article."

The second dispute lies in paragraph two of Article VIII, Section C. This "language clearly says the District will pay the **full life insurance,** medical and hospital insurance and dental insurance premiums for the retired teacher under the plan in effect under this Agreement for other bargaining unit employees, for a period of three (3) years. [emphasis added]"

Bargaining notes acknowledge that both parties agreed to place the word "full" in front of the word "life" in Article VIII, C and not limit it to just medical, hospital and dental insurance.

Clear and unambiguous language trumps the practices of the District. Even though prior employees (who retired from the District) did not utilize these provisions, the Association was not aware of that, and is not limited to enforcing the Agreement now that the issue is known. The issue has never come up before so this arbitration is about determining what the parties meant by the language. Past practice in not appropriate since the meaning of the contractual language is clear and unambiguous.

As for the District's argument that because the Association has never grieved this issue it is precluded from doing so now, the Agreement states that potential violations must be advanced "within thirty (30) days after the event upon which the grievance is based first occurred or when knowledge was first gained." (Association's emphasis) This was the first time Rob Farcus knew about this and the District "will admit that if Mr. Farcus knew about this prior to his retirement, the matter would have been raised."

The District

The dispute in this arbitration is one of contract language interpretation. The District argues that it is the intent of the parties that retiring teachers should receive either Article VIII, A or B benefits, but not both. "The fact that the Association cannot see that obvious intent in this contract language is proof that the contract language is ambiguous, at least with regard to the question of whether teachers should receive both the Article VIII, A and B severance benefits or one or the other." There is significant evidence that the contract is ambiguous in regard to this question:

> The fact that the District and the Association have drawn diametrically opposed interpretations of the Article VIII, A and B language is in itself, some evidence of ambiguity in the language.
>
> Every teacher who retired prior to the 2010-11 school year accepted the District's interpretation of the language. This is further evidence of ambiguity. If the language is so clear and unambiguous, some of the retiring teachers should have made that claim.
>
> The Association's best argument for the contract being clear and unambiguous is that the parties would have inserted an "or" between sections A and B if they intended that retirees receive one or the other but not both. One can just as easily argue that the parties should have inserted an "and" between sections A and B if they had intended that retirees receive both severance benefits.
>
> The Article VIII, A severance benefit of 1/3 day of pay for each day of sick leave is a bigger amount than the Article VIII, B benefit of $35. If the District pays under Article VIII, A it has already paid a larger amount than $35 per day. If the parties had intended that retirees under Article VIII, A would receive both

the Article VIII, A and B benefits, they might have written that into Article VIII, A. This is further evidence of the ambiguity of the language.

It is reasonable to look at past practice for guidance on interpretation of ambiguous contract language. The evidence here is significant:

There is clarity and consistency in the practice.

There is longevity and repetition of the practice.

There is acceptability of the practice.

The practice of paying of retirees under Article VIII, A but not also under Article VIII, B in the past has been consistent, longstanding and accepted by the parties since the 2007-2008 contract. The evidence shows 29 instances of such.

Regarding Retiree Life Insurance, this dispute is also one of contract language. The Association contends that the language is clear and requires the District pay the full amount of retiree life insurance. There is no evidence that the Association intended that the Board (District) change its contribution toward retiree life insurance in the current Agreement. The parties did not intend to require the District to now pay for life insurance for retirees. "Perhaps someone should have done a better job of editing the tentative agreement, but that should not be a reason for ignoring the clear intent of the parties." The District contends that this is a case of mutual mistake. In cases of mutual mistake arbitrators have the authority to recognize the mutual mistake and reform the contract.

The Association's Reply

Simply because the parties do not agree on the interpretation of the subject sections of the Agreement does not mean that the language is ambiguous. The Association also disagrees that the past practice here determined the parties' intentions. There is a written agreement here and it is clear and unambiguous.

Regarding the District's argument that there is no "and" between Sections A and B to clarify that a retiree gets both, this is not consistent with the rest of the Agreement. If an "and" was necessary, wouldn't there need to be an "and" between each Article of the contract?

When the District suggested that "perhaps someone should have done a better job of editing the tentative agreement" the Association responds that it did carefully review it and it reflects exactly what the parties agreed to.

There was no "mutual mistake" here. It was the District which placed the word "full" in front of the term "life insurance" and the Association believes that is what the District

agreed to. "A unilateral mistake by one party does not provide a sufficient basis for a contract reform."

The District's Reply

The Association's assertion that the subject language is clear and unambiguous is erroneous. None of the 29 retirees thought they had a right to Article VIII A and B benefits and none who took life insurance objected to being invoiced for their life insurance (premiums). None ever complained to Rob Farcus about the retirement benefits they received and none filed a grievance because of not receiving those benefits. "There is nothing else of substance worth commenting on in the Association brief." The District believes the Association's grievance is without merit and requests that the grievance be denied.

DISCUSSION

This matter requires the undersigned to consider two separate contractual provisions and to determine whether they are ambiguous.

Article VIII A and B reads as follows:

A. Teachers retiring at or over the minimum age as allowed by the Wisconsin Retirement System shall receive a severance payment of one-third (1/3) their daily salary per accumulated sick-leave day. Teachers must have served ten (10) years in the District.

Teachers shall have the option to:

1. Take the sick leave severance payment under this section to extend monthly insurance premiums paid by the District until the calculated severance amount is exhausted, payable under the District's Section 125 cafeteria plan

or,

2. Opt to receive an equal cash payment option available under the District's Section 125 cafeteria plan, consistent with IRS rules governing Section 125 plans. (Subject to applicable payroll taxes.)

B. Any teacher in good standing who leaves the employ of the District after seven (7) years (sic) service shall be entitled to severance pay at the rate

> of thirty-five dollars ($35) for each day of unused accumulated sick-leave days.

The District argues that there is significant evidence leading to the conclusion that the above language is ambiguous. It sets forth four distinct items it says supports the conclusion that the question ". . .whether a retiree who qualifies for Article VIII, A severance benefits should also qualify for Article VIII, B severance benefits." is ambiguous:

First:

> It argues that "the fact that the Board and the Association have drawn diametrically opposed interpretations of the Article VIII, A and B contract language is in itself some evidence of ambiguity in the language."

The undersigned has consistently employed the so-called "plain meaning rule" in contract interpretation cases. This rule states that if the words are plain, clear and convey a distinct idea there is no occasion to resort to interpretation. The meaning of the words set forth in the language is to be derived entirely from the nature of the language used. See Ralphs Grocery Co., 109 LA 33, 35-36 (Kaufman, 1997). An arbitrator may not "ignore clear-cut contractual language" and "may not legislate new language, since to do so would usurp the role of the labor organization and employer." Clean Coverall Supply Co., 47 LA 272, 277 (Witney, 1966). Even when both parties declare a provision to be ambiguous, the arbitrator may not find it so. *E.g.,* Andrew Williams Meat Co., 8 LA 518, 524 (Cheney, 1947). The undersigned agrees with these conclusions and is not persuaded by the District's argument in this respect.

Second:

> The District argues that "Twenty-nine teachers accepted retirement benefits that did not include Article VIII, B severance pay. Not one complained to the Board." Not one of these filed a grievance and, if the language was so clear and unambiguous, some of these should have done so.

Instances of past practice and custom are widely used to interpret ambiguous contract language. The fact that past practice and custom obviously exists in this case would be compelling evidence *if* the language were ambiguous. It is not, though. As such, the Undersigned is constrained from employing evidence of it in order to aid in its interpretation; an aid which is not required. A ". . .party's failure to file grievances or to protest past violations of a clear contract rule does not bar that party, after notice to the violator, from insisting on compliance with the clear contract requirement in future cases." See Rock County, Wis., 80 LA 1217, 1220 (Briggs, 1983). The undersigned is mindful of the fact that the parties may amend their Agreement by the use of long-standing and mutually understood past practice. However, to amount to an amendment of the Agreement, this kind of practice must be *mutual* and there must be clear evidence that the parties fully intended, jointly, to amend

their Agreement thereby. Because the Association has credibly argued that it was not aware that prior retiring teachers had not received both A and B benefits, this practice is not mutual and cannot support the conclusion that the parties have modified their Agreement thereby.

Third:

> It says that the Association's best argument for the language being clear and unambiguous is that the parties would have inserted an "or" between sections A and B if they had intended that retirees receive one or the other, but not both. The District maintains that it could just as easily be argued that the parties should have inserted an "and" between sections A and B if they had intended that retirees receive both benefits. It says that each argument is compelling and that this supports the District's conclusion that the language is ambiguous.

I agree that the parties could have inserted an "or" or an "and" between sections A and B. In fact, they could have inserted any number of things, but they did not. They are thus stuck with the language they did insert, which, of course, is no language at all. That is clear and leaves no reasonable argument regarding its construction or interpretation.

Fourth:

> The District argues that the fact that the benefit in section A is a larger dollar amount than that found in section B means that payment of section A benefits would exceed those payable in section B, and, if paid in addition to section B benefits, would result in an additional payment "on top of" the 1/3 benefit found in section A. This is further evidence, it says, of ambiguity.

This is not evidence of ambiguity. It is evidence of inequity. While the fact that payment of the section A benefits and the section B benefits would result in what amounts to a double payment, and as much as the Undersigned may believe this result to be inequitable, the scope of my authority is limited and does not extend to legislation beyond the parameters of the Agreement. I believe that Arbitrator Chalfie stated the proposition correctly:

> ["The arbitrator's] function is not to rewrite that Agreement and certainly it is not to suggest, imply nor to inform the Parties of what changes should be effected, renegotiated or changed even if his sense of justice and fairness so dictate, or even if he believes the Agreement contains inequities. Nor can the Arbitrator allow the economic consequences of an Award [to] influence him in his ultimate decision. The Arbitrator's Award . . . must derive its essence from the Agreement, and . . . tell the Parties what they can or cannot do inside of that Agreement. Lorrillard, Inc., 87 LA 507, 512 (Chalfie, 1986)

Article VIII, C, 2 reads as follows:

. . .

> The Board shall pay the full life insurance, medical and hospital insurance and dental insurance premiums for the retired teacher under the plan in effect under this agreement (sic) for other bargaining unit employees, for a period of three (3) years. The Board shall contribute each year the necessary dollars to each eligible participant's HSA (Health Savings Account) to keep the single deductible expense for the current health plan at $100 and the family plan deductible at $300. A teacher who retires by the end of the current school year and who is rehired sometime later may begin this benefit when the district (sic) no longer employs the teacher.

. . .

The District argues that the parties did not intend to have the District pay for retiree life insurance (premiums) is supported by the practice immediately following the settlement of the 2007-09 Agreement. Ten teachers retired in 2007-08 and two more in 2008-09. The District did not pay for their life insurance premium payments and none of them filed a grievance. This is a matter of "mutual mistake" in the drafting of the language, says the District, contrary to the real intent of the parties. As such, the Arbitrator has the authority to reform the Contract.

First, the undersigned is not persuaded by the arguments of the District and, second, even if he were so persuaded, he is constrained from considering the past practice for the same reasons he was constrained from using past practice to clarify VIII A and B above: the language is not ambiguous and hence consideration of past practice would be irrelevant and would exceed his authority.

This language is not ambiguous in any respect. It clearly requires the District to "pay the full life insurance . . . premiums for the retired teacher . . . for a period of three (3) years."

Based on the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The Wausaukee School District did violate the 2009-11 Collective Bargaining Agreement when it refused to pay retiree Farcus and four others sick leave severance pay under Article VIII, B and life insurance premiums under Article VIII C, 2 (first paragraph) for retirees currently under the District's retirement plan.

2. The District shall make the following retirees whole: Rob Farcus, Rosie Figas, Jerry Slattery, John Tracy and Sheila Koons.

Dated at Wausau, Wisconsin, this 11th day of September, 2012.

Steve Morrison /s/

Steve Morrison, Arbitrator

SM/gjc
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