BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MARATHON COUNTY

and

MARATHON COUNTY ADMINISTRATIVE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 2492, AFSCME, AFL-CIO

MARATHON COUNTY HIGHWAY EMPLOYEES UNION, LOCAL 326, AFSCME, AFL-CIO

Case 337
No. 71576
MA-15168

Appearances:

John Spiegelhoff, Staff Representative, 1105 East Ninth Street, Merrill, Wisconsin, appeared on behalf of the Union.

Frank A. Matel, Employee Resources Director, Marathon County, 500 Forest Street, Wausau, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

Marathon County, herein "Employer," and Marathon County Administrative and Professional Employees Union, Local 2492 and Marathon County Highway Employees Union, both affiliated with AFSCME, AFL-CIO, herein jointly "Union," 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 Wausau, Wisconsin, on July 16, 2012. Each party filed a post-hearing brief, the last of which was received September 4, 2012, and the record was closed as of that date.[1]

[1] The parties stipulated as follows:

1. The matter is properly before the Arbitrator

2. This award rendered by the Arbitrator encompasses AFSCME Local 2492 and Local 326.

3. The matter in dispute encompasses the week of 12/25/11 to 12/31/11.

ISSUES

The parties were unable to agree to a statement of the issues: I frame them as follows:

1. Did the County violate the collective bargaining agreement when it deducted the WRS employee contribution for the week of 12/25/11 through 12/31/11 when this work week was paid out via the normal payroll period pay check on 1/13/12?

2. Is so, what is the appropriate remedy?

FACTS

The Employer is a Wisconsin County. The Union represents various highway department employees in a bargaining unit represented by Local 326. It represents various professional and administrative employees in another bargaining unit represented by Local 2492. The parties have a longstanding collective bargaining relationship.

2011 Wis. Acts 10 (herein "Act 10") was adopted in 2011. Under Act 10, employees were required to pay the employee share of their Wisconsin Retirement System (herein "WRS") contributions and employers were prohibited from doing so. However, that provision did not apply where there was a collective bargaining agreement in effect prior to the adoption of Act 10 which required otherwise. The parties' agreements ended on December 31, 2011. Employees' wages for the period December 25, 2011, to December 31, 2011 were paid on January 13, 2012. The Employer and employee WRS contributions as to those wages were determined by the Employer as of that date and, by WRS rules, were payable to WRS as of January 13, 2012. The Employer deducted the employee WRS contribution attributable to the wages earned in that period from the employees' paychecks.

The Union filed a grievance on behalf of both bargaining units. The Union properly pursued those grievances to arbitration. The parties agreed to consolidate them in one proceeding.

RELEVANT AGREEMENT PROVISIONS[2]

---

4. Employees had the employee's share of the Wisconsin Retirement Systems earnings deducted from their paychecks the week of 12/25/11 through 12/31/11.

5. Marathon County paid the employee's wages and Wisconsin Retirement contributions on 1/13/12 for the pay period encompassing 12/25/11 through 1/7/12.

[2] These provisions are from the Highway Department (Local 326) agreement. There are significant differences in some of the same provisions in the Local 2492 agreements, but they do not affect the result in this case. The relevant retirement contribution provisions are substantively similar. The variations do not affect the result in this case. .

Article 2 – Management Rights

Public policy and the law dictate clearly the Department's primary responsibility to the community as being that of managing the affairs efficiently and in the best interests of our clients, our employees, and the community. The employer's rights include, but are not limited to, the following, but such rights must be exercised consistent with the provisions of this contract.

1. To utilize personnel, methods and means in the most appropriate and efficient manner possible.

2. To manage and direct the employees of the department.

3. To hire, promote, transfer, assign, or retain employees in positions within the department.

4. To establish reasonable work rules and rules of conduct.

5. To suspend, demote, discharge, or take other appropriate disciplinary action against employees for just cause.

6. To determine the size and composition of the work force.

7. To order a medical examination of any employee at management's expense at any time prior to completion of probationary period or at any time during employment for reasonable cause.

8. To layoff employees from their duties because of lack of work or any other legitimate reasons.

9. To take whatever action is necessary to comply with State or Federal law.

10. To introduce new or improved methods or facilities.

11. To change existing methods or facilities.

12. To contract out for goods and services.

13. To take whatever action is necessary to carry out the functions of the county in situations of emergency.

Any unreasonable application of the management rights shall be appealable by the Union through the grievance and arbitration procedure.

Article 3 – Grievance Procedure

. . .

6. Arbitration:

A. General: If the grievance is not settled at the fourth step the Union may proceed to arbitration by informing the Employee Resources Director in writing within ten (10) working days that they intend to do so.

B. Arbitration Board: Any grievance which cannot be settled through the above procedures may be submitted to an Arbitration Board comprised of three (3) persons to be selected as follows: The County and the Union shall each select one member of the Arbitration Board and the two members selected by the parties shall use their best efforts to select a mutually agreeable Chair of the Arbitration Board. If the two selected persons are unable to agree on the Chair within thirty (30) days, either party may request the Wisconsin Employment Relations Commission to appoint the third arbitrator. If neither party requests the panel from the Wisconsin Employment Relations Commission within forty-five (45) days from the Notice of Intention to Arbitrate, the grievance shall be considered waived. The parties hereto may mutually agree to waive the panel and proceed directly to the Commission for an arbitrator.

C. Arbitration Hearing: The arbitrator shall meet with the parties at a mutually agreeable date to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing, the arbitrator shall render a written decision to both the County and the Union which shall be final and binding upon both parties.

D. Costs: Both parties shall share equally the costs of the transcript and fees of the arbitrator, if any. Each party, however, shall bear the cost of its witnesses, attorney or professional representative.

E. Transcript: There shall be a transcript prepared for each arbitration hearing.

F. Decision of the Arbitrator: The arbitrator shall not modify, add to or delete from the express terms of the agreement.

. . .

Article 10 – Retirement

> The County agrees to pay the employee's share of his/her Wisconsin Retirement System qualified earnings to the Wisconsin Retirement Fund in addition to the County's share.

. . .

Article 28 – Duration of Agreement

> 1. Terms: This Agreement will be in effect as of January 1, 2009, and will remain in full force and effect through 2011.

POSITIONS OF THE PARTIES

Union

The County's statement of the issue relies on the interpretation of WRS rules and not the agreement. The agreement is ambiguous on whether it is to be paid on earnings earned during the agreement term, or paid only when the payment is due to the employee. The agreement must be read as a whole. Thus, both the provision in dispute and the retirement provision and the duration clause must be read together. The retirement provision requires as follows:

> The County agrees to pay the employee's share of his/her Wisconsin Retirement System qualified earnings to the Wisconsin Retirement Fund in addition to the County's share.

The duration provision reads: "This Agreement shall be in effect as of January 1, 2009 and shall remain in full force and effect through December 31, 2011." It is clear that the County agreed to pay the employee's share of WRS retirement on qualified earnings and agreed to do so during the agreement term. The County's decision to not pay is based on its interpretation of WRS rules. The administrative function of what the WRS considers the monies received has no bearing on the obligation of the County to pay WRS pursuant to the collective bargaining agreement. The County also based its argument on alleged "past practice." These isolated incidents occurred 15 years ago and were unknown to the Union. Although an officer of the Union was involved in the payrolls which occurred then, there is no evidence that he was acting on behalf of the Union at that time or ever told the Union itself about the occurrence. Thus, the County has failed to show that its "past practice" manifests a MUTUAL understanding of the parties. The County could have chosen to structure its schedule of when it pays wages to meet the contractual obligation, by paying the WRS during the contract term. The Union asks that the grievance be sustained and that all relevant employees be made whole.

County

Under Sec. 40.02(22)(a), defines "earnings" as "The gross amount paid to an employee … ." Thus, WRS contributions are due "when paid" not "when earned." Finance Director Kordus testified that WRS credits WRS earnings in the year that they are paid out, not the year that they are earned. Wisconsin Act 10 and Act 32 changed the law and required employees to pay their own share of WRS contributions. Those represented by a current labor agreement were exempted. The parties' agreement expired on December 31. Thus, they were required by law to pay the WRS payment in dispute. Under the management rights provision of the agreement, the County has the right to take actions necessary to comply with law. Further, the evidence of past practice supports the County's view. In 1996, 1997 and 1998, the County took actions consistent with its view here and inconsistent with the Union's. A Union officer actually was involved in those transactions. Accordingly the County asks that the grievance be dismissed.

DISCUSSION

1. Statement of the Issues

The Employer's statement of the issue is:

> Did the County violate the Collective Bargaining Agreement when it deducted the WRS employee contribution for the week of 12/25/11 through 12/31/11 when this work week was paid out via the normal payroll period pay check on 1/13/12?

The Union's statement of the issue is:

> Did the County violate the collective bargaining agreement when the employer deducted from the employee's paychecks the employee's share of the Wisconsin Retirement System earnings for the week of 12/25/11 to 12/31/11?

The Employer's statement of the issue assumes more facts than the Union's. Those facts are undisputed. Therefore, there is no substantive difference between the two statements of the issue. I have taken the Employer's statement of the issue.

2. Merits

The role of the arbitrator is to apply the agreement of the parties as it is written. If the agreement is ambiguous, the role of the arbitrator is to determine what the parties intended the ambiguous provision to mean. If the parties' intent is not clear, the role is to determine what

parties similarly situated would have meant.[3] A contract provision is ambiguous if it is fairly susceptible to more than one meaning. When language is ambiguous, arbitrators look to the past practice of the parties, the scheme of regulation, the time-honored rules of construction, and other methods to determine what parties similarly situated would have intended.

The obligation to pay the employee's share of a WRS contribution is incurred (attaches to) wages when they are earned. Once the wages are earned, it is inevitable that a contribution must be paid. The amount of the WRS contribution which was incurred is calculated not as of the date the wages are earned, but on the date they are scheduled to be paid at the rate in effect on the date they are paid. The contribution thus determined is due to be paid when the wages are paid.

The relevant provision is ambiguous because it can be interpreted in three plausible ways. First, the retirement contribution agreement article could be construed to mean that the Employer is to pay the employee's share of retirement based upon when the wages are earned and the obligation to pay is incurred. Second, it could be construed to mean that the Employer is to pay the employee's share of retirement based upon when the payment is due. Third, it could be construed that the Employer is required to pay the employee's share on either basis, depending upon which benefits the employee the most. I conclude the latter interpretation is the correct interpretation.

There is no indication that the parties thought about the issue in dispute when they drafted the language. The reason is fairly clear: in the context of the practicalities of collective bargaining relationships, it was a situation that was unlikely to occur. The issue involved herein could only arise after the termination of an agreement.[4] Even in hiatus periods between agreements, the law in effect prior to Act 10 (when the agreements were negotiated) required the Employer to effectively administer the provision as if it were still in effect. Thus, the issue would only occur in the unlikely event that the parties' collective bargaining relationship would end. No one anticipated that.

The Employer offered testimony of what it considered the parties' past practice in support of its position. In essence, a past practice is a history of repeatedly interpreting ambiguous language in a consistent way under circumstances indicating that it was a mutual agreement of the parties as to the correct interpretation of the ambiguity. At the time, each applicable collective bargaining agreement provided in relevant part:

---

[3] NAA, The Common Law of the Workplace: The View of the Arbitrators, Sec. 2.2, comment, (BNA, 2d. Ed.): Williston on Contracts, Sec. 30.4, (Wests, 4th Ed.)

[4] If the language had been in the parties' first agreement, the issue would have occurred as to wages earned in the year before the agreement started but paid during the term of the agreement. However, the language in dispute was an amendment to existing language.

> The County agrees to pay up to six and two tenth percent (6.2%) of the employee's gross earnings to the Wisconsin Retirement Fund in addition to the County's share.

In 1995, the employee contribution required by the WRS was 6.2%. This was equal to the maximum amount of employee contribution the contracts required of the Employer. The WRS increased the retirement contribution from 6.2% to 6.5% for wages paid in 1996. Section 40.02(22), Stats, requires that the amount due to the WRS for employer and employee contributions is determined by the applicable WRS rate in effect on the date the wages are paid, not when they are earned. In 1995, the last payroll periods of the year were December 17, 1995, to December 30, 1995 and December 31, 1995 to January 13, 1996. They were paid respectively on January 5, 1996 and January 19, 1996. The WRS assessed the 6.5% rate on all of the wages paid on those dates and the Employer deducted the additional .3% from the employees' wages on those payment dates. In 1997, the WRS reduced the employee contribution from 6.5% to 6.4%. The last two periods of the 1996 year were December 15, 1996 to December 28, 1996 and December 29 to January 11, 1997. They were paid on January 3, 1997, and January 11, 1997. The Employer paid the WRS at the reduced rate and deducted .2% instead of .3% from employees' wages. Finally, the last payrolls in 1997 were December 14, 1997, to December 27, 1997, and December 28, 1997, to January 11, 1998. These were paid on January 2, 1998, and January 16, 1998. For 1998, the WRS required contribution dropped from 6.4% to 6.2%. The Employer paid at the 1998 rate and did not deduct anything from the employees because the collective bargaining agreement required that the Employer pay 6.2%.

The practice thus reflected took place under the former collective bargaining agreement provision rather than the one at issue here. It depends upon a factor -- the amount the WRS has determined to be the employee contribution – that is irrelevant under the current contract language. Under the current contract language, there is no need to know the amount of the employee's contribution because, whatever that amount, the employer has agreed to pay it. The practice relates to the date on which the WRS amount was determined because, under the previous contract language, the date could change the employee contribution rate and that in turn could affect the amount of the employer's obligation. Under the current contract language, the employer's obligation is the same (the full employee rate) regardless of what that rate is or the date on which it was set. Accordingly, the past practice evidence about which date applies is not pertinent because the date itself is no longer pertinent. It is also important to note that although the parties later changed the operative collective bargaining provision to its current (full payment of the employee's share) form, neither party sought to include a provision dealing with the precise issue in dispute here. This is a second reason that the practice evidence does not assist in resolving the dispute at hand.

Turning to the current contract language itself, the assumption underlying the Employer's position is that the contract provision could not provide a benefit to the employees if the payroll was paid after the contract expired, where the WRS contribution was assessed as of that date and credited to the 2012 year by WRS. However, the contract provision is not

expressly tied to the dates used by the WRS. It is undisputed that the wages were earned in the 2011 collective bargaining year even though, because it was the last payroll of the WRS/calendar year, WRS might change the exact rate that would apply to those wages. . The parties specifically chose to use the phrase "the employee's share" instead of specifying that it be a set percentage. The provision automatically benefited employees every time the WRS increased the amount of the employee contribution and, by the same token, could never result in a reduction of an employee's pay.[As a matter of law prior to Act 10, this also occurred in a hiatus between agreements.] The contract language clearly requires the Employer to pay whatever the employees' share turned out to be and the Employer therefore clearly violated the retirement contribution provisions of the applicable agreements.

AWARD

The Employer violated the retirement contribution provisions of the applicable agreements when it withheld the employees' share of retirement contributions for the period in dispute. It shall make the employees whole for improper deduction. I reserve jurisdiction over issues arising from the specification of the remedy.

Dated at Madison, Wisconsin, this 20th day of November, 2012.

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

SHM/gjc
7838