BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

APPLETON PROFESSIONAL POLICE DEPARTMENT

and

CITY OF APPLETON

Case 472
No. ~~71650~~. 72105
~~A 6520~~ MA-15237

AWARD NO. 7883

Appearances:

Mr. Andrew J. Smith and Mr. Frederick Perillo, Attorneys, The Previant Law Firm, S.C., 1555 N. RiverCenter Dr., Suite 202, Milwaukee, Wisconsin appearing on behalf of Appleton Professional Police Association.

Mr. Christopher Behrens and Ms. Ellen Totzke, City Attorneys, City of Appleton, 100 North Appleton Street, Appleton, Wisconsin, appearing on behalf of City of Appleton.

ARBITRATION AWARD

Appleton Professional Police Association, hereinafter "Association" and the City of Appleton, hereinafter "City," requested that the Wisconsin Employment Relations Commission assign a sole arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot of the Commission's staff was assigned. Hearing was held before the undersigned on July 22, 2013, in Appleton, Wisconsin. The hearing was transcribed. The parties filed post-hearing briefs by September 14, 2013, whereupon the record was closed.

Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The City asserted a procedural issue:

1) Is the grievance timely?

The parties agreed that the substantive issues are:

2) Whether WERC's declaratory ruling, Decision 33892-A, regarding the City of Brookfield's decision (to unilaterally discontinue paying the employee portion of the WRS for its newly hired police officers) has any affect upon the settled grievance 11-001 between the City of Appleton and APPA wherein APPA agreed that its members hired after July 1, 2011, would voluntarily pay the employee share of WRS, unless "the prohibition in Wisconsin Statute Section 111.70(4)(cm)5 is repealed or modified by statute, or enforcement thereof is not mandatory due to the action of any court or the executive branch or otherwise"? [1]

3) If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 13 – RETIREMENT CONTRIBUTION

The City shall pay one hundred percent (100%) of the employee portion of required Wisconsin Retirement Fund contributions.

ARTICLE 18 – GRIEVANCE PROCEDURE

Both the Association and City recognize that grievances and complaints should be settled promptly and at the earliest possible steps and that the grievance process must be initiated within fifteen (15) days (Saturdays, Sundays and holidays excluded) of the incident or within fifteen (15) days (Saturdays, Sundays and

[1] The Association in its brief modified its stipulation to the substantive issues as follows:

The Association would note that it stipulated to the issue as prepared by the City of Appleton for the convenience of the parties, but that the City's precise framing of the issue, while not factually incorrect, is somewhat colored by its argument that the Brookfield decision is distinguishable by the fact that the parties here entered into a settlement agreement. The Association does not agree with that position and will address it more fully herein.

holidays excluded) of the Officer or Association learning of the event. Any grievance not reported or filed within the time limits set forth above shall be invalid, provided, however, that the time limits may be extended by mutual consent of the parties.
Any grievance not reported or filed within the time limits set forth above, and any grievance not properly presented to the next step within the time limits set forth below, shall be invalid, provided, however, that the time limits may be extended by mutual agreement.

ARTICLE 23 – AMENDMENT PROVISION

This Agreement is subject to amendment, alteration or addition only by a subsequent written agreement between and executed by the City and the Association where mutually agreeable. The waiver of any breach, term or condition of this Agreement by either party shall not constitute a precedent in the future enforcement of all its terms and conditions.

BACKGROUND AND FACTS

The Association and City were parties to a series of collective bargaining agreements, including an agreement that covered the period 2011-2013. That labor agreement included Article 13-Retirement Contribution which obligated the City to pay the employee portion of the WRS contributions through December 31, 2013. This was standard language and had been a part of the parties' labor agreement for quite some time.

In February 2011, Governor Scott Walker proposed legislation that would effectively eliminate collective bargaining rights for most public sector employees. Wisconsin Act 32 made it unlawful for a public employer to pay the employee portion of employee required contribution to retirement benefits for those public safety employees hired after July 1, 2011. The legislature adopted and Governor Walker signed Act 32 on March 11, 2011. Act 32 was effective July 1, 2011.

On July 12, 2011, City Deputy Human Resources Director Debra Van Den Bogart (previously known as Shufelt) sent an email to the Association leadership informing them that the City intended to immediately start deducting the employee portion of Wisconsin Retirement System (hereinafter "WRS") contributions for newly hired public safety employees. The Association grieved this on July 27, 2011, asserting a violation of Article 23 of the parties' collective bargaining agreement relying on section 9315 which delayed implementation until the parties current collective bargaining agreement expired, or was

terminated, extended, modified or renewed. The parties met and ultimately settled the grievance on September 26, 2012 (hereinafter referred to as "September Settlement") wherein they agreed:

> Pursuant to Article 23 of the parties' 2011-2014 collective bargaining agreement, the City of Appleton and the Appleton Professional Police Association agree to the following understanding:
>
> The City will not pay the employee share of the required contribution to the Wisconsin Retirement Fund for employees hired on or after July 1, 2011, as provided and defined in Wis. Stats. Sec. 111.70(40(mc)5., for the duration of this agreement; however, in the event the prohibition in Wis. Stats. Sec 111.70(4)(mc)5, is repealed or modified by statute or enforcement thereof is not mandatory due to the action of any court or the executive branch or otherwise, the City will immediately resume paying 100% of the employee portion of required contributions to the Wisconsin Retirement Fund, provided further, that this understanding shall not affect employees hired before July 1, 2011 in any way, and the City shall continue its obligation to pay 100% of the employee share of any required contribution, for the duration of the agreement. (underline added for emphasis)

On December 19, 2012, the Wisconsin Employment Relations Commission issued a declaratory ruling in City of Brookfield, Dec. 33892-A (WERC, 12/12) (hereinafter, "City of Brookfield") wherein it found as a conclusion of law:

> 3. During the term of the 2010-2012 collective bargaining agreement Section 40.05(1)(b)1, Stats. does not invalidate or restrain the City of Brookfield's Article X obligation to pay the employees' share/contribution under the "Retirement program established under Chapter 40 of Wisconsin Statutes" for full-time sworn police personnel hired on or after July 1, 2011.

The Commission issued a declaratory ruling:

> The City of Brookfield is obligated under Article X of the 2010-2012 collective bargaining agreement to pay the employees' share/contribution under the "Retirement program established under Chapter 40 of the Wisconsin Statutes" for full-time sworn police personnel hired on or after July 1, 2011.

Further, the Commission explained:

> …we conclude that Section 9135 of Act 32 serves to postpone the applicability of Sec. 40.05(1)(b)1, Stats. to the post-June 30 new hires until the 2010-2012 agreement expires because both the "covered" and "inconsistent" requirements of Section 9135 are present. Thus, we issue a declaratory ruling that the City is not prohibited by Sec. 40.05(1)(b)1, Stats. from honoring its contribution obligations under Article X of the 2010-2012 agreement.

In February 2012, Association President John Ostermeier became aware of the City of Brookfield decision. On February 27 Ostermeier e-mailed Van Den Bogart and asked what the City intended to do in light of the decision. Van Den Bogart initially responded indicating that the City would need to internally discuss the issue, but on March 1, 2013 replied as follows:

> The City does not believe the BROOKFIELD decision impacts our agreement outlined in the letter dated September 26, 2011. Brookfield took the position that the statute precluded them from paying the employees' share/contribution, on July 1, 2011, prior to the expiration of the Collective Bargaining Agreement. In an effort to work with the City, on September 26, 2012, APPA entered into a voluntary agreement to have employees hired on or after July 1, 2011 pay the employee WRS contribution.

The Association filed a grievance on March 19, 2013 asserting that the City was obligated to honor the September Settlement and that the City should resume paying the employee contribution to WRS for the new hires. The Association requested that the City make whole Officers Coonen, Taschner, Hoffman, Cash, Kolosso, Voss and Bloy. The City denied the grievance at all steps placing it properly before the Arbitrator.

Additional facts, as relevant, are contained in the DISCUSSION, section below.

POSITIONS OF THE PARTIES

Association

The Association maintains that pursuant to the September Settlement the City must make 100% of the WRS contributions for new hires.

After passage and the effective date of Act 32, the City unilaterally implemented the deduction of pension contributions for new hires. After the Association filed a grievance challenging the City's interpretation of Act 32, the parties negotiated and reached an agreement. The spirit of the agreement was to allow other parties to bear the expense of litigation and the City and Association would live by the outcome as evidenced by the portion of the September Settlement, if "enforcement thereof is not mandatory due to the action of any court or the executive branch or otherwise, then the City will immediately resume paying 100% of the employee portion…"

The Wisconsin Employment Relations Commission (hereinafter, "WERC" or "Commission") issued City of Brookfield which was factually identical to this case. The Commission concluded that the "City is not prohibited by Sec. 40.05(1)(b)1, Stats. from honoring its contribution obligation" under the terms of the parties' collective bargaining agreement. As a result of this ruling, the requirement contained in Act 32 that municipalities must make WRS deductions for new hires "…is not mandatory due to the action of any court or the executive branch or otherwise."

The City's argument that the parties did not anticipate litigation or executive action to clarify Act 32 directly contradicts the plain language of the September Settlement. Not only does the agreement include a specific sentence addressing action by a court, the executive or "otherwise", but the City's own witness testified as such. The City's Deputy Director of Human Resources admitted that the parties contemplated judicial or executive action.

> Q: And so, you envisioned any number of things could happen to change sort of the interpretation or enforcement of the statute, correct?
> A: Correct.
> Q: So it could be change with the legislature, judiciary, executive branch, anything like that, correct?
> A: Correct.
>
> Tr. 47.

Moreover, the Association rejected the City's opening offer to settle the July 2011 grievance asked the Association to adopt the City's "interpretation" of Act 32. The September Settlement was intended to resolve the dispute between the City and the Association as to the meaning of Act 32 and the intent was not to limit resolution to solely a change or repeal of the statute.

As to the City's claim that the existence of the September Settlement prevents its terms from being enforced is flawed. The City is applying circular logic. The WERC is an agency of the executive branch thus its decision is binding. The City concludes that it is not obligated to follow City of Brookfield because it has an agreement in place, yet that agreement

specifically states the parties will follow the lead of the executive branch on review of Act 32 implementation and application. If the City's argument was correct, that would mean that no agreement to abide by the outcome of other parties' litigation would ever be enforceable.

Finally, in response to the City's argument that the grievance is untimely, the Association maintains that the grievance was not only filed timely, but that the City waived its right to assert a procedural flaw when it first brought forth the timeliness challenge for the first time at the arbitration hearing. The City informed the Association it was refusing to pay the new hires their employee portion of WRS on March 1, 2013. The grievance was filed March 19, 2011, which was well within the 15 working day limit since there were six non-working days between March 1 and March 19. Moreover, "…[t]he continuing violation doctrine is especially viable for cases involving compensation, because it can be argued that each improper paycheck is a new violation." ELKOURI & ELKOURI, *How Arbitration Works*, 7th Ed. (p. 5-28 (2012) and the seven employees have received bi-weekly paychecks since March 1, 2011 with each paycheck constituting a new grievable event.

The Association requests that the grievance be sustained and that the Arbitrator order the City to pay one hundred percent (100%) of the newly hired employees' WRS contributions from January 1, 2012 through the expiration of the 2011-2013 collective bargaining agreement. The Association requests the retroactive repayment for all WRS employee share contributions deducted from all newly hired employee paychecks retroactive to January 1, 2012.

City

The City first argues that the grievance is untimely. Association President Ostermeier testified he first became aware of the City of Brookfield decision in January of 2013. The grievance wasn't filed until March 2013. Whether the date when City of Brookfield (December 19, 2012) was issued or the date when Ostermeier first became aware of the decision is used, both are well beyond the 15-day time period required for filing a timely grievance.

At the time grievance 11-001 was pending and ultimately settled, Acts 10 and 32 were in their infancy and the longevity of this controversial legislation was uncertain. Against this backdrop, the parties negotiated a resolution to the grievance. The City agreed it would pay the newly hired officers' share of Wisconsin Retirement System if Wis. Stats. Sec. 111.70(4)(mc)5, Stats. was repealed or modified by statute or "if enforcement thereof is not mandatory." The City was well within its rights to comply with the terms of Act 32 and the September Settlement.

The City of Brookfield decision has no impact on the September Settlement. The Association's reliance on "enforcement thereof is not mandatory due to the action of any court or the executive branch or otherwise…" is misplaced. The City of Brookfield decision does not amend, repeal or stay enforcement of the controlling statutes and therefore is not a

triggering event according to the ordinary meaning of the language. When each of the parties has a different understanding of what is intended by certain contract language, the party whose understanding is in accord with the ordinary meaning of that language is entitled to prevail. ELKOURI & ELKOURI, *How Arbitration Works*, 7th Ed. p. 9-22 (2012).

While Brookfield and Appleton may have started with similar issues and uncertainties, how they resolved those issues was very different. Brookfield unilaterally withheld the WRS employee contribution from officers hired after July 1, 2011. The City and Association mutually agreed to address the issue by amending their collective bargaining agreement. The WERC's declaratory ruling was specific to Brookfield's unilateral decision to withhold retirement contributions contrary to its contract and should not undo the agreement reached between the City and the Association.

The City respectfully requests denial of the grievance.

DISCUSSION

Before addressing the language of the Settlement Agreement, it is necessary to put it in context. There is no question that the environment following presentation, enactment and the ultimate effective dates of Acts 10 and 32 was contentious and wrought with uncertainty. At the same time, there was a concerted effort by many employers and labor organizations to solidify their relationship to work together to implement the statutory changes in a productive manner.

I start with the City's procedural challenge. The City argues that the grievance was not timely. The grievance was filed on March 19, 2013. Article 18 of the parties' collective bargaining agreement provides that grievances shall be filed within 15 days of the incident or of when the Officer or Association learns of the incident. The Association, via President Ostermeier, learned on March 1, 2013 that the City did not believe that the City of Brookfield decision impacted the September Settlement and therefore that the City did not intend to start paying the employee contribution to WRS for bargaining unit members hired after July 1, 2011. That is the date of the incident and therefore, recognizing that Saturdays and Sundays are excluded when counting days, the grievance is timely.

The issue in this case is what, pursuant to the September Settlement agreement, "triggers" the City paying the employee contribution to WRS for bargaining unit members hired by the City after July 1, 2011? The September Settlement provides:

> The City will not pay the employee share of the required contribution to the Wisconsin Retirement Fund for employees hired on or after July 1, 2011, as provided and defined in Wis. Stats. Sec. 111.70(4)(mc)5., for the duration of this agreement;

> however, in the event the prohibition in Wis. Stats. Sec. 111.70(4)(mc)5, is repealed or modified by statute, or enforcement thereof is not mandatory due to the action of any court or the executive branch or otherwise, then the City will immediately resume paying 100% of the employee portion of the required contribution to the Wisconsin Retirement Fund, provided further, that this understanding shall not affect employees hired before July 1, 2011 in any away, and the City shall continue its obligation to pay 100% of the employee share of any required contribution, for the duration of the agreement.

The Association concedes that Sec. 111.70(4)(cm)5, Stats. was neither repealed or modified, but argues that the decision reached in City of Brookfield, "triggers" the City's obligation to pay the employee portion of WRS consistent with the Settlement Agreement . Specifically, the Association argues that "enforcement … [of Sec. 111.70(4)(mc)5] is not mandatory due to the action of any court or the executive branch or otherwise" as a result of the Commission's City of Brookfield decision. [2]

Sec. 111.70(4)(cm)5, Stats. specifically disallows or prohibits a municipal employer from paying any employee required contribution to the public employee trust fund, otherwise known as WRS. Enforcement of Sec. 111.70(4)(cm)5, Stats. would be deemed not "mandatory" if a court, the executive branch or "otherwise" took affirmative action and

---

[2] Chapter 40, which addresses the Public Employee Trust Fund, and specifically Sec. 40.05(1)(b)1, Stats. contains language that similarly prohibits a municipal employer from paying an employee's contributions to WRS as that contained in Sec. 111.70(4)(cm)5, Stats. Sec. 40.05(1)(b)1, Stats. provides:

> Except as otherwise provided in a collective bargaining agreement entered into under subch. IV or V of ch. 111 and except as provided in subd. 2., an employer may not pay, on behalf of a participating employee, any of the contributions required by par. (a). The contributions required by par. (a) shall be made by a reduction in salary and, for tax purposes, shall be considered employer contributions under section 414 (h) (2) of the Internal Revenue Code. A participating employee may not elect to have contributions required by par. (a) aid directly to the employee or make a cash or deferred election with respect to the contributions.

Sec. 111.70(4)(cm)5, Stats. provides:

If the collective bargaining unit contains a public safety employee who is initially employed on or after July 1, 2011, the requirement under ss. 40.05 (1) (b), 59.875, and 62.623 that the municipal employer may not pay, on behalf of that public safety employee any employee required contributions or the employee share of required contributions, and the impact of this requirement on the wages, hours, and conditions of employment of that public safety employee. If a public safety employee is initially employed by a municipal employer before July 1, 2011, this subdivision does not apply to that public safety employee if he or she is employed as a public safety employee by a successor municipal employer in the event of a combined department that is created on or after that date.

decided that the City was permitted to pay the employee required share of the employee contribution to WRS.

The Wisconsin Employment Relations Commission is an administrative agency and thus part of the executive branch. In City of Brookfield, the WERC interpreted Section 9315 of Act 32 and concluded that under the specific facts set forth, the employer was required to honor its pre-Act 32 contractual obligation until the "day on which the agreement expires or is terminated, extended, modified, or renewed, whichever occurs first." This decision delayed or postponed the administration of the Sec. 111.70(4)(cm)5, Stats. ban on a municipal employer from paying the employee contribution to WRS. This "action" by the WERC constituted an action by the executive branch that decided "enforcement" of the Sec. 111.70(4)(cm)5, Stats. prohibition was not mandatory.

The City argues that when WERC issued City of Brookfield, it did not impact the mandatory versus non-mandatory enforcement of Sec. 111.70(4)(cm)5, Stats. because it did not repeal, amend or stay enforcement of the statute. The parties' September Settlement does not require that the "executive branch" repeal, amend or stay enforcement of the statute. WERC does not have the authority to repeal or amend the statute. WERC did not stop or suspend enforcement of Sec. 111.70(4)(cm)5, Stats., but rather interpreted application of Act 32 given the specific facts of the case concluding that Act 32 specifically delayed enforcement of the prohibition contained in Sec. 111.70(4)(cm)5, Stats.

The City's witness testified that it was her "understanding that we came to an agreement that Brookfield implemented." Tr. P. 48. She was wrong. The parties included the phrase, "…or enforcement thereof is not mandatory due to the action of any court or the executive branch or otherwise…" As Arbitrator Updegraff stated in John Deere Tractor Co., 5 LA 631, 632 (Updegraff, 1946)

> It is axiomatic in contract construction that an interpretation that tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect.

Counsel for both the City and the Association reviewed the September Settlement agreement and I am confident that neither would have included a phrase which they did not intend to have meaning. This conclusion does not give credence to the City's claim that there was a lack of understanding as to the meaning of the September Settlement. The same City witness testified that she understood that "the legislature, judiciary [and/or] executive branch" could change "the interpretation or enforcement of the statute." Tr. P. 47.

The underlying facts of the City of Brookfield case are the same as this case. In both cases the parties had a collective bargaining agreement in effect at the time Act 32 became

effective that contained an article which obligated the employer to pay the employee required contribution to the WRS. After the July 1, 2011 effective date of Act 32, both employers informed the public safety employees that it intended to immediately start deducting the employee portion of WRS contributions from the paychecks of all employees hired after July 1, 2011. Brookfield and Appleton part ways when Brookfield immediately began deducting the employee WRS contribution and Appleton entered into the September Settlement. The City's decision to enter into the September Agreement does not negate its obligation to comply with the underlying terms of the Settlement Agreement.

In conclusion, the September Settlement clearly stated that the City was not required to pay the employee portion of WRS unless specific conditions were met "triggering" the City paying the employee WRS contributions for the newly hired bargaining unit members. The condition precedent was met when the WERC issued City of Brookfield, Dec. 33892-A (WERC, 12/12) and the City is obligated to pay the employee required contribution to WRS for employees hired after July 1, 2011 for the duration of the 2011-2013 agreement.

AWARD

Yes, the WERC's declaratory ruling, Decision 33892-A, regarding the City of Brookfield's decision (to unilaterally discontinue paying the employee portion of the WRS for its newly hired police officers) has any affect upon the settled grievance 11-001 between the City of Appleton and APPA wherein APPA agreed that its members hired after July 1, 2011, would voluntarily pay their employee share of WRS, unless "the prohibition in Wisconsin Statute Section 111.70(4)(cm)5 is repealed or modified by statute, or enforcement thereof is not mandatory due to the action of any court or the executive branch or otherwise."

The City of Appleton violated the terms of the Grievance 11-001 Settlement Agreement when it failed to pay the employee required contribution to WRS for bargaining unit members hired after July 1, 2011. The parties stipulated that January 1, 2013 is the start date to be used for calculating back pay. The City shall make all bargaining unit members hired after July 1, 2011 whole without interest.

I shall retain jurisdiction over this dispute for 60 days to resolve any disputes over remedy, should the parties be unable to reach agreement.

Dated at Rhinelander, Wisconsin, this 13th day of December, 2013.

Lauri A. Millot, Arbitrator
LAM:ckl