BEFORE THE ARBITRATOR

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In the Matter of a Dispute Between

LOCAL 67, AFSCME, AFL-CIO

and

CITY OF RACINE

Case ID: 53.0007
Case Type: MA

AWARD NO. 7927

(City Hall / Police Department Clericals Units)

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Case ID: 53.0008
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(DPW / Parks Units)

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**Appearances:**

Mark DeLorme, Staff Representative, AFSCME Wisconsin Council 32, 701 North 8th Street, Manitowoc, Wisconsin, appearing on behalf of Local 67, AFSCME, AFL-CIO.

Scott Letteney, City Attorney, City of Racine, 730 Washington Avenue, Racine, Wisconsin, appearing on behalf of the City of Racine.

## DECISION ON ARBITRABILITY

The parties have agreed that the question of whether the grievances in these matters are arbitrable should be resolved by the undersigned. An agreed upon stipulation of facts, together with the applicable collective bargaining agreements and grievances have been submitted. Briefs on behalf of both the Unions and the City of Racine have been received.

## BACKGROUND

Prior to January 1, 2015, the City of Racine was a party to collective bargaining agreements with Local 67, AFSCME, AFL-CIO, units covering City Hall Clericals, Police Department Clericals, and DPW / Parks employees. The grievance numbered 19-14 arises from the two clerical units and the grievance numbered 20-14 from the other unit. For ease of readability, I will refer to the groups collectively as the "Union" and the two grievances as a singular matter.

The Union had agreements with the City going back many years which addressed health insurance for active employees and retirees. The collective bargaining agreements which are the subject of this dispute expired on December 31, 2014. Each provided *inter alia*:

> All employees who retire on or after January 1, 1994 shall be subject to placement within the insurance program established for active bargaining unit employees and as further modified by active bargaining unit employees.[1]

The City asserts that over the years both the premium share and coverages changed for both active employees and retirees.

Two intervening events occurred which triggered this dispute. In July of 2011, 2011 Act 10 became effective. By its terms, application to these units became effective January 1, 2015.[2] As a consequence of the application of Act 10 to these units of Local 67, the Union could no longer bargain over any issue except wages and then only over the limited concept of base wage rates. Traditional bargaining over benefits was no longer permitted for those units.

In light of the changes ahead, the Racine Common Council, on August 4, 2014, adopted a resolution authorizing various changes in health insurance coverage to be effective on January 1, 2015. On December 30, 2014, the Union filed a grievance challenging the City's

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[1] The language in the DPW contract is identical save for the date applicable to retiree coverage.

[2] Act 10's application was delayed as to employees covered by agreements in effect at the time of enactment. Until the agreement "expires or is terminated, extended or modified or renewed whichever occurs first." 2011 Wis. Act 10 § 9332(1); 2011 Wis. Act 32 § 9332(1q). *See also Local 321, IAFF v. City of Racine*, 2013 WI App. 149, 352 Wis.2d 163.

action in adopting the resolution. On January 1, 2015, the City did in fact unilaterally make changes in the employer-provided health care plan.[3]

## ARBITRABILITY

An arbitrator's authority is derived from the contract between the parties who have agreed to arbitration of their disputes. *Milwaukee Bd. of School Directors v. Milwaukee Teachers' Ed. Assn.*, 93 Wis.2d 415, 431, 287 N.W.2d 131 (1980). A party cannot be compelled to arbitrate a matter in the absence of a contractual obligation to do so. *Nolde Bros. v. Local 338, Bakery and Confectionary Workers Union 430*, U.S. 243, 250-51, 97 S.Ct. 1067, 51 L. Ed. 300 (1977).

It is relatively easy to recite those general principles but the question of what disputes survive the expiration of the contract is more vexing. Particularly so in light of the application of Act 10 which makes it unlawful to even enter into a collective bargaining agreement for arbitration of disputes. We do know that disputes which arose out of discipline imposed prior to the expiration of the collective bargaining agreement may be arbitrated and remedied post the application of Act 10. *School Dist. of Kewaskum v. Kewaskum Educ. Ass'n*, 2013 WI App 136, 351 Wis.2d 527.

The Union here argues that this dispute arose prior to the expiration of the 2013 - 2014 contract. It reasons that the Union does not have to wait until a "violation" actively occurs because the time to file starts to run fifteen days after the Union "knew or should have known" of a violation. The Union reasons that a threatened violation is sufficient to give rise to a grievable event. That reasoning escapes me. A threat to violate a contract is not a violation of a contract. The City Council's action in August of 2014 was an expression of what it intended to do after the contract expired. The Union clearly could have (and perhaps did) lobby the Council to change its position. The final action altering the benefit plan did not occur until January 1, 2015, after the contract expired.

The Union also argues that past action by the City in settling a lawsuit involving changes in retiree benefits for non-union employees amounts to a concession that those benefits are vested and therefore not subject to change. It references a case which was apparently settled in 2008 while the matter was pending at the state trial court level. Litigants settle lawsuits for a variety of reasons and I am reluctant to draw any conclusion from newspaper accounts of settlements.

I am satisfied that this dispute arose after the expiration of the 2013 – 2014 labor agreement. If a Union member had suffered a physical injury on December 31, 2014, the

[3] The City describes the changes as modest increases in deductibles and a $1,000 increase in annual out-of-pocket payments. Premium contribution levels were increased but not for retirees who continued to pay the percentage share in effect at the time of their retirements.

medical care would be covered under the 2014 plan and the converse would be true if the injury occurred on January 1, 2015. That concept does not however resolve the issue. The City concedes that under *Litton Financial Printing Division v. NLRB,* 501 U.S. 190, 206, 111 S.Ct. 2215, 115 L. Ed. 2d 177 (1991), there are limited circumstances where a party's obligation to arbitrate can survive the expiration of the contract. They are situations that involved:

(1) facts and circumstances that arose before expiration;

(2) action taken after expiration that infringes a right which accrued or vested under the contract; or

(3) normal principles of contract interpretation that apply to create a right that survives the expiration of the remainder of the agreement.

The facts and circumstances giving rise to the dispute occurred after the expiration as discussed above. The contract language itself does not create a right that expressly survives the expiration of the agreement. Assuming that the *Litton* exceptions are even applicable under state law, I agree with the City's view that the only exception which could apply would be the vesting provision. If I were to conclude that the health insurance benefit language in the expired contract created a vested right in the retirees, then arguably the *Litton* exception would result in a conclusion that this dispute is arbitrable.

Both state and federal case law however definitively establish that the language at issue here does not create a vested right in retirees to receive the benefit plan described in the 2013 - 2014 agreement.

We begin our examination with *Schwegel v. Milwaukee County*, 2015 WI 12, 360 Wis.2d 654. The county had by ordinance provided that retired employees who met certain criteria would receive certain health insurance benefits. These retiree benefits changed over the years and in 2011 the county discontinued a provision that otherwise eligible retirees would receive reimbursement for Part B Medicare premiums. The changes were made prospectively. The Wisconsin Supreme Court rejected the argument that the right to receive the benefits vested at the time of hire.

In *Reider v. Milwaukee County*, 2015 WI App 58, 364 Wis.2d 526. Several retired Milwaukee County deputy sheriffs disputed the changes made by the county in benefit coverage after their retirement, including increased deductibles, copays and other benefit changes. The employees argued that they were entitled to receive the benefits that were in place at the time of their retirement. The court rejected that argument reasoning that the county was only obligated to provide the retirees with the same plan that active employees received. Therefore, if the county changed the benefit coverage for active employees, it could change the retiree plan as well. The language in the City of Racine agreements is essentially the same. It obligated the City to provide bargaining unit retirees with the same "insurance program

established for active bargaining unit employees and as further modified by active bargaining unit employees."

A "vested right" is a "right that so completely and definitively belongs to a person that it cannot be impaired or taken away without the person's consent." *Stoker v. Milwaukee County*, 2014 WI 130, ¶ 24, 359 Wis.2d 347. "The concept of vested rights is conclusory – a right is vested when it has been so far perfected that it cannot be taken away by statute." *Neiman v. Am. Nat'l Prop. & Cas. Co.*, 2000 WI 83 ¶ 14, 236 Wis.2d 411. The contract language in the 2013 – 2014 agreement only guarantees that the City will provide the retirees with the same plan provided to the active employees. That is a contractual right not a vested right to continued coverage at a particular level. Federal courts applying federal labor law have reached the same results. In *M & G Polymers USA, LLC v. Tackett*, ___ U.S. ___, 135 S.Ct. 926, 190 L. Ed. 2d 809, the court addressed the question of when, under a *Litton* analysis, retiree health benefits are considered to be vested. It concluded that retiree health benefits under an expired collective bargaining agreement are considered vested only when the contract explicitly references the duration of the benefit. Lifetime benefits may not be inferred. *Id.* at 135 S.Ct. 937.

To summarize I conclude that the grievance is not arbitrable because the City's action took effect after the contract expiration and it does not fall within the limited exceptions to the general rule that such grievances are not arbitrable. As a result of this decision, retirees represented by the Union are foreclosed from pursuing a remedy under the expired collective bargaining agreement. There may however be other options available under contract law. To the extent this opinion touches on the merits of any such claim, it is incidental and made without the development of a full factual record. I also note this decision is limited to the health care benefit question and does not address premium contributions. I accepted the City's representations that retiree contribution levels will continue to be set at the level in effect at the time of the retirement.

## AWARD

That the grievances numbered 19-14 and 20-14 are dismissed.

Dated at Madison, Wisconsin, this 23rd day of June 2016.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

James R. Scott, Arbitrator