**EDWARD B. KRINSKY, ARBITRATOR**

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| In the Matter of the Petition of | : | |
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| Cudahy Professional Fire Fighters | : | |
| Association, Local 1801, AFL-CIO | : | Case 109 |
| | : | No. 66709 |
| For Final and Binding Arbitration Involving | : | MIA-2770 |
| Fire Fighter Personnel in the Employ of | : | Decision No. 32675-A |
| | : | |
| City of Cudahy (Fire Department) | : | |

Appearances: The Law Office of John B. Kiel, LLC, by Mr. John B. Kiel, for the Association

Michael Best & Friedrich LLP, by Mr. Robert W. Mulcahy and Mr. Luis I. Arroyo, for the City.

By its Order of March 12, 2009 the Wisconsin Employment Relations Commission appointed Edward B. Krinsky as impartial arbitrator to issue a final and binding award in the matter pursuant to Sec. 111.77(4)(b) of the Municipal Employment Relations Act.

A hearing was held on June 23 and June 24, 2009 at Cudahy, Wisconsin . A transcript of the proceedings was made. At the hearing the parties had the opportunity to present evidence, testimony and arguments. The record was completed on October 13 , 2009 with the receipt by the arbitrator of the parties' reply briefs.

The parties' final offers are identical with the exception of two issues which the arbitrator is asked to resolve. The first issue involves the question of what obligation, if any, the City has to continue the payment of health insurance to duty disabled fire fighters who are under the age of 50. The Association's final offer on this issue is:

> Amend ARTICLE 22 DUTY INCURRED INJURY PAY to incorporate the health care premium practice historically in effect, except as modified below, by incorporating the following language as the Article's last paragraph:
>
> Medical and hospital insurance coverage shall be available to all full-time employees who are disabled under Section 40.65 Wis Stats. This coverage shall be identical to the coverage provided to the regular full-time employees for either the single or family plan. The City shall pay 75% of

> the lowest cost qualified plan in the Milwaukee County area for those employees who qualify for benefits under Section 40.65 Wis. Stats.
>
> The City will continue to pay these premiums for disabled employees up to the age of Medicare, provided said employee is not employed elsewhere and receiving hospital and surgical care insurance paid for by another employer or receiving hospital and surgical care insurance paid for by another source. If the disabled employee receives paid hospital and surgical care insurance from another source or gains other employment and is receiving hospital and surgical care insurance paid by his/her new employer, the City will not be obligated to provide health insurance.

The City's final offer on this issue is: Retain Status Quo on Contract.

Virtually all of the testimony, exhibits and arguments in briefs and reply briefs were focused on this issue. In its brief and reply brief, the Association identified a second issue, involving how much the City will pay for health insurance for retired employees. This issue is described and discussed at the conclusion of this decision.

**Facts and Discussion**:

The parties are in agreement with respect to the municipalities which they use for comparison purposes: Franklin, Greendale, Greenfield, Oak Creek, St. Francis and South Milwaukee.

In making his decision in this matter, the arbitrator is required by Section 111.77(6) to give weight to the factors enumerated there. There is no issue in this matter, and no arguments made with respect to several of the factors and they will not be considered further: (a) the lawful authority of the employer; (b) stipulations of the parties; the portion of (c) pertaining to the financial ability of the community to pay; that portion of (d) pertaining to comparison of wages, hours and conditions of employment of the employees involved in the arbitration with those "in private employment in comparable communities"; and (g) changes in circumstances during the pendency of the arbitration proceedings. The remaining factors are discussed below.

Factor (c): That portion of (c) pertaining to the interests and welfare of the public

Each party asserts that the interests and welfare factor supports its position. The Association argues that the public "has a continuing interest in making sure that its fire fighters know that they and their families will be adequately protected in the event their fire fighters suffer a career ending injury." The Association asks, "why would a newly

hired fire fighter make a long term commitment to risk not just his or her health but also his or her family's economic future in Cudahy when he or she can take the same risks elsewhere for largely the same pay without the risk of post employment economic ruin in the event of a career ending duty disability?" It argues that selection of the City's final offer will have a negative affect on the "hiring, retention and recruitment of well-motivated employees." It will also negatively affect employee morale. The Association argues that its final offer should be adopted giving both fire fighters and Cudahy residents peace of mind necessary to the effective delivery of emergency services," and not shifting the whole burden of duty disability on to the backs of affected fire fighters.

The Association acknowledges that the benefit which it is seeking is an expensive one but, it argues, the City can cover these costs as indicated by the fact that the external comparable municipalities do it. "The City fails to show that it is so radically different from the comparables that it should be excused from providing this important benefit."

The City argues that the Association's final offer has a multimillion dollar cost, and this at a time of serious economic problems at all levels of government and where the City's health care costs are already substantial. It cites its actuary's calculation that under the Association's final offer the City's 75% share of the cost, for currently disabled fire department employees, will be almost $ 900,000 and much higher if, as anticipated, the City's other units would succeed in achieving the same benefit. [Those costs are estimates of what it would cost for currently disabled firefighters until they reach Medicare eligibility. The cost for 2008 is $ 13,411 and for 2009 is $ 14,288].

The City does not claim an inability to pay, but notes that among the comparables Cudahy residents have the lowest adjusted gross income, and pay the 3rd highest (of 7) overall tax rate, and have the 2nd lowest equalized value of property. It does not view the addition of the substantial cost of the Association's final offer as serving the interests and welfare of the public.

The City argues that the Association has provided no evidence that the City is having trouble attracting and/or retaining fire department employees, or that there has been any attrition as a result of the "alleged 'substandard' duty disability benefit."

The City argues [as discussed further below] that the external comparables which pay continuing health benefits for duty disabled firefighters have age and length of service requirements not found in the Association's final offer. Such restrictions, it argues, "could have balanced the interest and welfare of the public's pocketbook against the alleged interest and welfare of the public's concern over the positive morale of its fire department." It argues, the Association didn't explain why it didn't propose any of these things or why, if it had, it would have negatively affected the interests and welfare of the public.

Factor (d): Comparisons of wages, hours and conditions of employment with those of other employees performing similar services and with other employees generally in public employment.

Internal comparisons: In addition to the fire fighters bargaining unit, the City negotiates agreements with four other bargaining units. None of those agreements include the language of the Association's final offer, or any similar language, pertaining to continuation of City paid health insurance benefits for a duty disabled employee who is under age 50. The City's non-represented employees also do not receive such a benefit. It is particularly noteworthy that the other protective services bargaining units representing police officers and detectives, and police supervisors do not have this benefit.

Given that the benefit being sought here by the Association does not appear in any of the other collective agreements covering Cudahy employees, the internal comparisons clearly favor the City's final offer.

External comparisons: The external comparable communities present a mixed picture.

The collective bargaining agreement in Greenfield does not provide for continuation of health insurance for duty disabled firefighters.

The agreement in St. Francis provides for the Employer to pay 80% of the health insurance premium which is in effect at the time of the employee's duty disability retirement, for employees who are age 51 or older, and those payments are to be paid for 144 consecutive months.

The agreement in Franklin provides for the Employer to pay 75% of the health insurance premium which is in effect at the time of the employee's duty disability retirement.

The agreement in South Milwaukee provides for the Employer to pay 80% of the health insurance premium for a duty disabled retired firefighter until the employee qualifies for Medicare.

The agreement in Greendale provides for the Employer to pay 75% of the health insurance premium for a duty disabled retired fire fighter until the employee qualifies for Medicare.

The agreement in Oak Creek provides for the Employer to pay 90 or 95% of the health insurance premium for a duty disabled retired firefighter with 10 years of service.

In summary, one of the comparable communities offers no benefit [Greenfield ]; one offers an identical benefit [Greendale] to what the Association is proposing; three offer a lower benefit [St. Francis, Oak Creek and Franklin] and one offers a higher benefit [South Milwaukee]. Thus five of the six comparable communities offer a benefit, but only 2 of the 6 offer a benefit which is the same or better than the Association has proposed in its final offer. Looked at conversely, 4 of the 6 comparable bargaining units have a health insurance continuation benefit which is not as good as the one which the Association is proposing. There is no consistent pattern.

In the arbitrator's view, the external comparables do not compel selection of either final offer. The fact that all but one of the external comparables has such a benefit favors the Association's final offer that there should be continued health insurance payments for duty disabled fire fighters. However, most of the comparables either pay a smaller percentage of the cost or have greater restrictions than what the Association is seeking, thus favoring the City's final offer. There is no compelling reason at this time to put into place what the Association is proposing which is one of the least restrictive and most expensive provisions.

Factor (e): cost of living: In their arguments, the parties have not focused on the cost of living factor because, it appears, the wage and benefit increases to which they have agreed exceed the increase in the cost of living. Since selection of the Association's final offer would result in still higher costs, the cost of living factor favors the City's final offer.

Factor (f) overall compensation: Both parties presented data and drew comparisons between the overall compensation paid to Cudahy firefighters and that paid to the comparable fire fighter units. The focus of the Association's argument with respect to this factor is that while Cudahy's overall compensation may be comparable in most respects, there is no justification for Cudahy being at a marked disadvantage with respect to the payment of health insurance continuation for duty disabled firefighters. The arbitrator does not find this argument persuasive [see discussion of external comparables above], and thus does not view the overall compensation factor as favoring either party's final offer.

Factor (h) other factors which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining [and]...arbitration...

There are three such factors which are relevant in deciding the current dispute: 1) bargaining history, 2) past practice and 3) the need for a *quid pro quo*:

1) bargaining history:

The parties' Agreements in 1989-90 and 1991-93 provided health insurance for all "retired" full-time employees, but did not define "retired" and also had no language pertaining to health insurance for members who left the department because of a duty disability. In 1997 the parties negotiated a side letter which by its terms went through 1999. The letter linked retirement under the collective bargaining Agreement to retirement eligibility under the Wisconsin Retirement System. The parties subsequently extended the side letter as part of their one year 2000 Agreement. The 2001-03 Agreement resulted from an interest arbitration decision in which the Association's final offer was selected. The Association's offer continued the language of the side letter without modification.

In the 2004-06 Agreement the parties agreed to drop the side letter language and agreed to change Article 25, Section E to say that health insurance benefits for those who retire are to be continued only for employees "who retire at or above the minimum retirement age and not less than age 50, as outlined under the Wisconsin Retirement System."

In the bargaining which led to the present arbitration, the Association proposed that the City incorporate into the Agreement what it viewed as the long-standing past practice of the City paying health insurance benefits to fire fighters who retired before reaching age 50 due to a duty disability. The City did not concur, and denied the existence of such a past practice. These opposing positions resulted in the parties' final offers which are in dispute in this matter.

In summary, prior to the present proceeding the bargaining history was clear. The parties did not bargain an agreement to provide continuing health insurance benefits for fire fighters who retired due to a duty disability prior to reaching age 50. When they did include language, it provided that health insurance benefits would be continued only for employees "who retire at or above the minimum retirement age and not less than age 50, as outlined under the Wisconsin Retirement System."

2) past practice

A long-standing mutually understood past practice may become binding on the parties even though it does not appear in their Agreement. The Association maintains that there has been such a past practice which should be construed as binding. In the present proceeding, it argues, it is not changing that practice but has simply put the past practice into its final offer to become part of the Agreement. The City maintains that there has not been a binding past practice, and that on numerous occasions over the years it has communicated that fact to the Association. Moreover, it argues, the language of the Agreement has been changed since the alleged practice went into effect.

One basis for the Association's claim of past practice is reliance by individual fire fighters on what they were told by the Chief[s] at the time they were hired.

LeDoux, a retired duty disabled firefighter testified that when he was hired as a "paid on-call" fire fighter in August, 1990 he was told by Chief Olson that if he became disabled on the job, he would receive a disability benefit paid by the State and health insurance paid for by the City. He testified further that when he became a full-time fire fighter in January,1996 Chief Belter told him that he would never get rich as a fire fighter, but there were benefits, one of which was that if he were injured in the line of duty and could no longer work as a fire fighter, the State has a disability pension and the City pays your health insurance.

Retired fire fighter McGaver testified that when he was hired in 1987 Chief Olson told him that if he were to be injured on duty the City, as it had done in the past, would continue to take care of him.

Association President Bloor testified that when he was hired in June, 1997 Chief Belter told him that he wouldn't get rich as a fire fighter, but if something happened to him, he'd be taken care of, which he understood to mean that he would receive health insurance if he were duty disabled. Also, Bloor testified, it was common knowledge among the fire fighters that Slivinski, a duty disabled fire fighter, was continuing to receive health insurance benefits paid for by the City.

The arbitrator does not question the credibility of the fire fighters who testified about what they were told at the time of their hiring, but he cannot give their testimony significant weight in deciding the outcome of this dispute. There is no documentation of what precisely was told to these fire fighters. Moreover, at all times covered by their testimony, the terms and conditions under which fire fighters work were determined through collective bargaining where fire fighters were represented by the Association, and the Fire Chief was part of the City's management structure represented by the City in its bargaining relationship. The parties had collective bargaining agreements in place at all relevant times, and those Agreements specified the benefits which had been negotiated. It is the parties' Agreements', the bargaining history and their mutually acknowledged practices which are entitled to weight in this proceeding, not undocumented conversations between individuals who were not bargaining representatives and who had no authority to offer economic benefits not specified in the collective bargaining agreement.

In addition, the alleged conversations took place prior to the 2004-2006 Agreement which specifically addressed entitlement to continuing health insurance benefits and the age at which such entitlement occurs. Thus the alleged practice, even had it been documented and given weight prior to the 2004-2006 Agreement, would not have continued in force and effect after the 2004-2006 language became effective, since as of that date the alleged past practice was in conflict with the newly negotiated language of paying continued health insurance benefits only to those who had retired and had reached age 50.

It is undisputed that Slivinski began receiving health insurance benefits after his termination for duty disability at the age of 44. The City argues that these payments, which it is acknowledged were made over some 14 years, were made in error. The error was discovered by Plan Administrator Neary in 2003 after the City became self-insured in 2000. In 2003 Slivinski was 56 years old. He had become entitled to receive such benefits upon reaching the age of 50. The City took no steps to recover the benefits which had previously been paid to him in error.

There is nothing in the record that suggests that these payments were ever discussed between the parties and there was never any mutual agreement to recognize a past practice with respect to such payments, or to keep it in effect . There is also nothing in the record to suggest that at the time of the 2004-2006 negotiations, the Association brought to the City's attention what the Association viewed as an existing past practice which should be retained even in the face of what the parties had negotiated which was not consistent with what had been done in the Slivinski case. The City could reasonably expect, under the newly negotiated language, that it had no obligations to pay continuing health insurance benefits to anyone retiring prior to age 50.

The Association is persuaded that the City's health insurance benefit payments to Slivinski (and to two police officers in the same manner) were not made in error, and that the City only asserted, but did not prove, that an error was made.

The arbitrator believes the City's contention that the payments to Slivinski (and to the two police officers) were made in error. Even for argument's sake, however, if the payments over the years to Slivinski had been known to City administrators and were not viewed as being erroneous, the alleged past practice would not have continued to exist and could not have applied to any new instances of duty disability for a fire fighter under age 50 after the parties' specifically addressed the issue of continuing health insurance benefits in their 2004-2006 Agreement

In addition to the language specifying entitlement as beginning at age 50, there is additional negotiated language which negated the alleged practice of paying continuing health insurance benefits to a duty disabled fire fighter. The parties' 2000 Agreement contains language at "Article 22-Duty Incurred Injury Pay" which remained in effect also in the 2004-2006 Agreement which states, in relevant part, "If an employee reaches a point of maximum recovery and is unable to return to duty, the employee shall be entitled to all accrued benefits (including all accrued sick days to that date, but shall not accrue additional benefits from that date forward)." The entitlement under that language was to accrued benefits only, not continuing benefits.

In 2005, during the period covered by the 2004-06 Agreement firefighter LeDoux was injured while on duty. In the 2006 bargaining which led to the present arbitration, it is

undisputed that when the LeDoux case was discussed, the City made clear to the Association its view that he would not be entitled to continued health insurance benefits paid by the City when he separated from City employment and that there was no past practice which required such payments.

After it became clear to the City that LeDoux could not return to his job, and that there was no other work available that he could do, he was terminated in November, 2007. He was denied City paid post employment health insurance payments, and the Association filed a grievance on his behalf based on its contention that such benefits were due him based on past practice. The Chief denied the grievance, contending both that it was untimely filed and not meritorious. The Association did not appeal the grievance to arbitration.

In its brief the City argues that it is significant that the Association did not pursue the grievance, and the City views this as recognition by the Association that there was not a past practice which would obligate the City to pay continuing health insurance payments for LeDoux. The Association denies any such acknowledgment, and cites the fact that in December, 2007 the parties were in a contract hiatus period. It argues that it could not pursue the matter to arbitration for that reason and thus it chose to pursue the issue in final offer interest arbitration.

The arbitrator does not have to decide which party's argument on this point is correct. He has concluded, above, that there was not a binding past practice in effect in 2005 or thereafter which would obligate the City to continue payment of health insurance premiums for LeDoux or any other duty disabled firefighter under the age of 50.

3) *quid pro quo*

Another factor which is contested by the parties is the issue of *quid pro quo*. There are circumstances under which a party seeking to make a significant change in an existing benefit is expected to offer a *quid pro quo* to the other party. The parties are in dispute about which of them needs to offer a *quid pro quo*.

The Association views the decision by the City to deny LeDoux continuing health insurance benefit payments as discontinuation of a past practice, and it argues that the City has offered nothing in return. The City's position is that it had no obligation to pay such benefits, and that its denial of such payments now does not require a *quid pro quo*. In fact, it argues, the Association should be offering a substantial *quid pro quo* in return for its final offer to require City paid continuing health benefits, and the Association has not made such an offer. In the Association's view, its voluntary agreement in the current bargaining to raise the age of retirement to age 53 for new hires, and to have employees pay a 5% share of health insurance premiums effective at the end of 2009 constitutes an adequate *quid pro quo* intended to accomplish a voluntary agreement with respect to the duty disability continuation of health insurance benefits issue.

Given the arbitrator's conclusion that since 2000 there clearly has not been a past practice which would mandate payment by the City of the contested health insurance benefits, the City is not now ending a past practice and does not have to offer a *quid pro quo* for its refusal to accept the Association's final offer. In the arbitrator's opinion it is the Association which has the burden of persuading the arbitrator to award the disputed health insurance benefits.

There is nothing in the record to suggest that in bargaining prior to the formulation of its final offer the Association articulated to the City that its acceptance of age 53 as the retirement age, and the 5% payment share of health premiums, was a *quid pro quo* for continuing health insurance benefits for duty disabled firefighters The Association's agreement to these items was voluntary, and not conditioned on acceptance by the City of other matters. In its brief the Association argues that the Association's agreement to the 5% premium sharing was "a good faith effort to address some City concerns over the cost of continuing the duty disability health insurance benefits into the future." While this may have been the Association's thinking, there is nothing in the record which indicates that this intent was conveyed across the bargaining table.

Even if, for argument sake, the arbitrator were to view the Association's voluntary acceptance of these changes as being an offer of a *quid pro quo,* it is not at all clear that the cost savings which the City would realize from them would be sufficient to persuade it to accept them in return for offering continuing health insurance benefits for duty disabled fire fighters, regardless of age or length of service. In the arbitrator's view, the Association has not offered a sufficient *quid pro quo* to persuade him that the Association's final offer should be selected on that basis.

The Second Issue:

The Association's final offer includes the following as part of Article 25 - Medical and Hospitalization Insurance, Section E:

"The City shall pay 95% of the lowest cost qualified plan in the Milwaukee County area for those employees hired on or after January 1, 2009, who retire at not less than age 53 and with at least 15 years of continuous service with the City of Cudahy."

The City's final offer includes proposed language for Article 25, Section E as follows:

"The City shall pay 95% of the lowest cost qualified plan in the Milwaukee County [sic] for those employees hired into the Cudahy Fire Department on or after December 31, 2009 or the rate paid by the City for active employees, whichever is less and who retire at not less than age 53 and with at least 15 years of continuous service with the City of Cudahy."

These final offers differ with respect to the implementation date. They also differ in that the City's language includes, "or the rate paid by the City for active employees, whichever is less" which language is not included in the Association's final offer.

In the 2004-2006 Agreement the language specified "95% of the lowest cost qualified plan in the Milwaukee County area."

The Association is correct that in its final offer the City has changed the language, to refer to "...or the rate paid by the City for active employees." The City did not address this change in its brief or reply brief. The Association appears to be correct also that the City did not offer anything in return for this change.

Neither party presented evidence or arguments about the importance of this change, the costs attached to it, and/or what the effect is likely to be on the bargaining unit. It is clear to the arbitrator that neither party views this change as being as significant as the duty disability issue, and the arbitrator concurs. Therefore, regardless of the arbitrator's view of the City's proposed change on this second issue, it is clear that the disposition of the second issue does not affect the outcome of the dispute. For this reason, the arbitrator will not discuss the second issue further.

Conclusion:

The statute requires the arbitrator to select one of the party's final offers in its entirety. In the arbitrator's view the comparables, both internal and external, and the other factors including the parties' arguments about bargaining history, past practice, *quid pro quo* and cost considerations favor the City's final offer more than the Association's final offer. In his view, they outweigh the Association's arguments that the interests and welfare of the public are not well served by the City's failure to address the immediate needs of duty disabled fire fighters and will have a detrimental effect on those personnel, as well as a negative effect on recruitment, retention and morale.

It is clear to the arbitrator, in view of what the external comparables have already put into place, that the City will have to recognize the need to agree to include some form of health insurance continuation benefit for younger duty disabled fire fighters in a future bargain. What is tragic, however, is that there is an affected duty disabled fire fighter who needs financial relief now because of his increasingly difficult financial circumstances. The arbitrator cannot compel the City to do something about his situation without selecting the Association's final offer, but he urges the parties do something to ease LeDoux' s financial plight, perhaps on a non-precedent basis, until they can agree on a provision to be put in their Agreement.

Based on the above facts and discussion, the arbitrator hereby makes the following AWARD:

The City's final offer is selected.

Dated this 28th day of October, 2009 at Madison, Wisconsin

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Edward B. Krinsky
Arbitrator