

In the Matter of an
Interest Arbitration
Between

Village of Franklin Park)
)
 and)
)
Fraternal Order of Police)
Lodge 47)

INTEREST ARBITRATION OPINION AND AWARD

On June 23, 1993 a hearing was held in the above-captioned matter before Arbitrator Robert Perkovich having been jointly selected by the parties, Village of Franklin Park ("Employer") and Fraternal Order of Police, Lodge 47 ("Union")¹. The Employer was represented by its counsel, Lisa Lopatka. Testifying for the Employer were Ralph Ivanelli, Anne Grummel, and Robert Long. Appearing for the Union was its counsel, Gary Bailey. Testifying for the Union were Ralph Ivanelli, Gary Bailey, and David Trinka. At the conclusion of the hearing the parties waived their right to file post-hearing briefs and instead engaged in oral argument.

STATEMENT OF THE ISSUES:

The parties stipulated that the unresolved issues before me are as follows:

1. Retroactivity of Wages
2. Sick Leave Penalty Clause
3. Retiree Health Insurance Benefits

THE FINAL OFFERS

1. Wage Retroactivity

The Employer proposes that wages be retroactive to July 1, 1992.

The Union proposes that wages be retroactive to May 1, 1992, the beginning of the collective bargaining agreement.

2. Sick Leave Penalty Clause

¹At the hearing the parties waived their right to a tripartite panel of arbitrators.

The Employer proposes language to the Agreement providing that after the fifth occurrence of sick leave (defined as an incident of work time lost beginning when work is first missed and including any subsequent consecutive scheduled work days or partial days missed) in a calendar year employees be paid sick leave at a fifty percent (50%) rate for the first 8 hour workday of any subsequent sick leave occurrence in that calendar year. The Employer's proposal also provides that in cases of chronic injury or illness (for example, cancer) which necessitate repetitive sick leave absences for documented medical treatment which cannot be scheduled during non-duty hours the penalty shall not apply.

The Union proposes that no such provision be included in the Agreement.

3. Retiree Health Insurance Benefit

The Employer proposes that the Agreement include a provision that retirees shall be entitled to a partial payment by the Employer for health insurance premiums only in those cases where employees retire no earlier than fifty (50) years of age and who have completed at least twenty (20) years of service. The Employer's proposal also includes a provision that in those cases where a retired employee receiving that benefit continues to work for another employer at which he or she has health insurance the employee shall be required to receive insurance from that employer so that it is the primary insurer.

The Union proposes that no such provision be included in the Agreement.

FACTS

BACKGROUND: BARGAINING HISTORY

The Employer and the Union first negotiated a recognition agreement in late 1972. The bargaining unit consists of all sworn officers below the rank of lieutenant excluding probationary officers and any others as defined in the Illinois Public Labor Relations Act². Since then the parties have negotiated nine collective bargaining agreements, the most recent of which expired on April 30, 1992, each covering two year periods. The most

²The Union also represents, in a separate bargaining unit, the Employer's telecommunications operators after defeating the former exclusive bargaining representative in a recent election. Also, the Employer's firefighters are represented by an affiliate of the International Association of Fire Fighters.

recent agreement expired on April 30, 1992. All of those agreements provided for wage retroactivity to the beginning of the agreement and none included provisions relating to sick leave penalties or the restrictions on retiree health insurance sought by the Employer in the instant matter.

During negotiations for the prior contract the Union indicated that it wished to devise some process by which negotiations could be expedited. In this regard the Union suggested that the termination language in the contract be revised and that the parties commence negotiations at an earlier date. Despite the fact that the Employer also expressed a desire to conclude negotiations quicker, it rejected the Union's suggestions citing the fact that if the parties commenced negotiations earlier the Employer might not be prepared to negotiate because the budget process would not be adequately underway to make bargaining meaningful.

Negotiations for an agreement to succeed the 1990-1992 Agreement commenced on February 12, 1992. At that time the parties discussed the ground rules for negotiations and, at their next meeting on March 6, agreed to the ground rules. Also at that meeting the Union presented its first non-economic proposals.

At the next meeting, on March 18, 1992 the Employer presented its first non-economic proposals and for the next five meetings (April 13, May 8, May 26, May 29 and June 15, 1992) the parties negotiated over non-economic matters. During this time they also reached tentative agreements on various items³.

At the May 29 meeting the Union provided its first economic proposals which were discussed at that time as well as in the subsequent meeting on June 15. At the next meeting, on June 29, the Employer provided to the Union its first economic proposals which included the provisions at issue in this matter. The parties discussed the various economic and non-economic proposals on the table at this time, and again at a meeting on July 17, during which time tentative agreements were reached on various non-economic proposals. Finally, at the July 17 meeting the Union proposed an off-the-record side bar meeting between the parties chief negotiators. The Employer agreed.

On August 7 the Employer's attorney, Robert Long, and the

³During this period a dispute arose whether the Employer could present additional non-economic proposals after a specified date. When it did the Union initially refused to bargain over the additional items and the parties filed unfair labor practice charges against one another.

Union's chief negotiator, David Trinka met and agreed to all non-economic matters on the table. At the next meeting between the full negotiating teams on August 21, the teams reviewed the off-the-record settlement proposal that Long and Trinka had discussed on August 7. However, no formal tentative agreement was reached between the two teams at that time.

The parties then agreed to seek mediation from the Federal Mediation and Conciliation Service and first met with the mediator on November 17. When the mediator commented on the large number of outstanding issues, Long informed him of the agreements that he and Trinka had reached in their off-the-record meeting of August 7 and Trinka confirmed Long's representation. A second mediation session was conducted on December 1 but no tentative agreements were reached.

On January 5, 1993 the parties met once again at which time the parties reached a tentative agreement on an overall contract⁴. On January 8 representatives of the parties signed off on the tentative agreement. However, on January 12 the bargaining unit rejected the tentative agreement. In a subsequent meeting the Employer proffered another proposal, accepted by the Union, which the parties agreed would remain off-the-record if rejected by the membership. On January 28 the membership did indeed vote to reject that tentative agreement. At that point interest arbitration proceedings commenced⁵.

WAGE RETROACTIVITY

As noted above the parties disagree regarding the point to which agreed upon wage increases should be retroactive⁶. Besides the evidence described above regarding the bargaining history of retroactivity negotiations, the record also reflects that the parties have agreed that all provisions of the Agreement but for

⁴This tentative agreement included wage retroactivity to July 1, 1992 and the sick leave penalty and retiree health insurance provisions that the Employer urges that I accept.

⁵The record also reflects that during the negotiations the Employer canceled three meetings. Also two meetings were aborted when Long arrived late on one occasion and changed the starting time of another meeting without informing the Union negotiators.

⁶The monetary value of their difference is \$8,558.20. The parties have also agreed to various other economic provisions, including sick leave buy back and tax sheltering devices which appear to be proposals offered by the Employer.

wages will be retroactive to May 1, 1992.

In negotiations for the most recent agreement between the Employer and its firefighters, the parties agreed that wages alone would not be retroactive to the beginning of the agreement which is the date on which the agreement was executed. However, the firefighters also received a "signing bonus" which was agreed to by the Employer because the firefighters were the first to settle their contract. The agreement between the Employer and the firefighters also provides that the wage retroactivity agreement is "...for special reasons..." applicable only to the settlement of that particular contract and that the history of negotiations between those parties has included full retroactivity on wages⁷.

The evidence shows that the firefighters contract provides for wage increases of 13% over three years (3%, 5%, and 5%). The tentative agreement between the Employer and the Union in this matter provides for wage increases totalling 13.15% over three years. Also, during all relevant periods employees of the Employer who are not represented by a union received wage increases of 2.5%, including the Comptroller and various department heads. An unidentified employee received more than 2.5%, but that wage increase appears to have been associated with a promotion.

Various other lodges of the Union have recently agreed to collective bargaining agreements with less than full wage retroactivity. These agreements include those negotiated with the Villages of Glen Ellyn, Hoffman Estates, River Grove, and North Chicago⁸.

SICK LEAVE PENALTY

The Employer proposes a sick leave penalty provision to the Agreement to combat single day absences, often taken in conjunction with an approved vacation or a shift change, which it believes

⁷Long explained that these special reasons relate to the firefighters' agreement to delete the "past practices" clause in their contract which resulted in provisions that could not be made retroactive. Long further explained that the tentative agreements with the Union herein could be made retroactive if necessary.

⁸No evidence was provided to establish whether these communities are "comparable" with that of the Employer.

demonstrates an abuse of the employees sick leave benefit⁹. In 1992 these types of sick leave patterns caused the Employer to pay overtime for 424 hours and to pay officers acting out of rank for another 150 hours. So far during 1993 the Employer has paid overtime pay for 210 hours and has paid 30 hours to officers acting out of rank due to staffing shortages as a result of sick leave usage¹⁰. In 1993, through June 20, 122 days were taken in sick leave of which 54% were used to extend a vacation.

The Employer explained that it chose to use the fifth occurrence before any sick leave penalty is assessed based on the pattern of sick leave use, what it believed to be a reasonable period, and the practice, described below, elsewhere. Also, so that the policy would be uniform and objective, personal days and days verified by a doctor slip are included as "occurrences." However, in order to avoid any hardship to employees with continuing illnesses, exceptions to the policy are allowed where treatment for the continuing condition is verified and cannot be scheduled during off-duty hours.

The record also reflects that the evaluation instrument by which bargaining unit employees are evaluated provides that in those cases where an employee uses 12-15 days of sick time he or she still "meets all requirements" and is evaluated as "acceptable."

Finally, there is evidence in the record that in agreements with three other employers affiliates of the Union have agreed to sick leave penalty provisions of varying degrees.

RETIREE HEALTH INSURANCE

During the bargaining relationship between the parties there have been two cases in which the issue of employer paid premiums for health insurance for retirees younger than fifty years of age has been raised. In one case, in 1989, a bargaining unit employee inquired whether he could continue to participate in the Employer's health insurance plan if he retired before the age of fifty. In response the Employer ultimately indicated to the employee that he

⁹The Employer also agreed to various other sick leave provisions, which it proposed, including a sick leave buy back estimated to cost the Employer approximately \$53,000 over the life of the contract.

¹⁰Bargaining unit employees are also provided a short-term sickness and accident benefit whereby they receive \$400 each week after a waiting period of seven days.

could continue to be enrolled in the Employer's insurance plan so long as he paid the entire premium. In the second case, in 1990, a non-bargaining unit employee was told the same thing. It appears from the record that in both cases the employees retired before fifty years of age and were required to pay the entire health insurance premium if they wished to continue to participate in the Employer's plan.

There is no similar provision in the agreement between the Employer and the firefighters and the matter was not a subject of negotiations between the parties.

POSITIONS OF THE PARTIES

WAGE RETROACTIVITY

The Employer contends that the Agreement should provide for wage retroactivity only to July 1, 1992. In support of its claim it argues that the Union, in the tentative agreement of January 5, 1993 agreed to such a provision and therefore it should be held to its agreement¹¹. Moreover, it argues that less than full wage retroactivity is necessary so that the Union and the bargaining unit can be convinced that protracted negotiations, as exemplified by the rejection of two tentative agreements, are not desirable. The Employer also contends that less than full wage retroactivity is justified because the agreed upon wage increases with the Union will then be in line with those extended to the firefighters and other non-union personnel. Finally, the Employer points out that the Union has agreed to less than full wage retroactivity with other employers.

The Union on the other hand argues that the bargaining history between the parties supports full wage retroactivity and that any delay to negotiations has been caused by the Employer. Moreover, with respect to the rejection of tentative agreements the Union points out that in doing so the membership has simply exercised its right to do so. Finally, the Union contends that any agreements for less than full wage retroactivity between the Employer and the firefighters or between other affiliates of the Union and other employers are or may be distinguishable.

SICK LEAVE PENALTY

To justify its proposal that the Agreement include a sick

¹¹Because the Employer's last best offer on each of the three issues were included in the tentative agreement the Employer takes this position with respect to all three issues.

leave penalty provision the Employer argues that such a provision is necessary to remedy sick leave abuse and that its proposal does so in a clear and even-handed manner. The Employer also points out that it has agreed to other beneficial provisions regarding sick leave and that employees will not be harmed in cases of serious illness because of the exception to the penalty and the Employer's sickness and accident insurance.

The Union urges that the status quo be preserved so that the Agreement exclude any sick leave penalty provision. In support the Union argues that the Employer's proposal is harsh and overbroad and will not correct any problem that the Employer may perceive. Moreover, the Union points out that there has been no discipline levied against employees for sick leave abuse and that the Employer's own evaluation instrument allows for usage that would otherwise be covered by the penalty.

RETIREE HEALTH INSURANCE

On this point the Employer asserts that its proposal merely codifies existing practice so that the contract will conform.

The Union however disagrees that there is any such practice and instead characterizes the Employer's proposal as an attempt to secure a new provision that, because it impacts on an important benefit of employment, should be allowed only through bilateral negotiations. Therefore, the Union urges that the Agreement contain no provision sought by the Employer.

DISCUSSION

MUST THE EMPLOYER'S FINAL OFFER BE IMPOSED BECAUSE IT WAS WAS THE BASIS FOR A TENTATIVE AGREEMENT?

As noted above the Employer urges that its final offer on the three disputed issues be imposed because it was agreed to by the Union's negotiating team only to be rejected by the Union membership. The Employer argues that if I do not impose its offer under these circumstances bargaining unit employees will perceive tentative agreements to constitute a "floor" for final agreements and will be encouraged to reject tentative agreements. As a result free and bilateral collective bargaining will be impaired contrary to the public policy of Illinois as set forth in the Illinois Public Employee Relations Act. The Union on the other hand simply points out that ratification is a right enjoyed by the membership and that they should not be prejudiced for exercising that right.

The bilateral resolution of collective bargaining differences is not only the public policy of Illinois, but has long been a bulwark of labor relations on a national level as well for decades. For this reason the parties have invest their efforts and interests, and indeed may subordinate other interests, in favor of a joint resolution. Therefore, interest arbitration is regarded as an extension or supplement of this bilateral effort such that it has been said that the arbitrator should regard the inquiry as one to determine what the parties would have agreed to had they done so. Accordingly, to award something significantly superior to that which the parties would have likely agreed to through bargaining will entice the winner to eschew collective bargaining the next time in favor of arbitration.

In the instant case these precepts might be viewed as particularly compelling because the Employer's final offer was tentatively agreed to by the Union's negotiating team. However, the negotiations were undertaken with the knowledge that both teams were bargaining under conditions where ratification by the principals was necessary¹². Therefore, any tentative agreement was simply an agreement between the agents and not the principals and the parties assumed the risk of rejection irrespective of the terms of the tentative agreement. Under such circumstances, it is not enough to say that because the agents reached a tentative agreement the terms of that agreement must be imposed by a third party when they were rejected by the principals. To do so would render the right of ratification illusory. I decline to do so.

WAGE RETROACTIVITY

In keeping with the important statutory goal of free collective bargaining, it has been said that routine retroactivity may reduce the incentive on a union to agree to a contract before expiration of the preceding contract¹³. Also, under such circumstances negotiations may be unduly delayed and/or protracted. However, there is no evidence in the instant case that the rejection of the tentative agreements was in bad faith nor that the Union delayed negotiations.

On the other hand, the evidence conclusively shows that the bargaining history between the parties has provided for total wage

¹²Accordingly, ratification is an essential part of the free collective bargaining process that the Employer seeks to preserve.

¹³Similarly, since protective service employees such as police officers are prohibited from striking there are inducements and the absence of constraints on an employer to expedite bargaining.

retroactivity and, in accordance with that history, the parties agreed that all provisions of the Agreement but for wages would be retroactive to the effective date of the Agreement. Moreover, the record also shows that the bargaining history between the Employer and its firefighters, with one exception, includes total wage retroactivity. In that one exception, limited to the most current contract, the parties did not agree to total wage retroactivity because, inter alia, certain portions of their contract made total wage retroactivity impracticable. However, by the Employer's own admission such circumstances were not applicable to the instant matter. In light of the foregoing, any deviation from the parties' history and expectations must be conclusively demonstrated.

In my opinion the Employer's other arguments fail to carry the day on this point. Although partial retroactivity will cause the total wage package agreed to with the Union to equal that agreed to with the firefighters, nothing requires that comparative wage packages be equal, only that they be comparable. Indeed a 3% wage increase versus a 2.5% increase and a total economic package of 13% versus 13.15% is comparable. More importantly, any disparity is insufficient to upset the long-standing bargaining history between the parties.

To the extent that the Union may have agreed to partial wage retroactivity in its contracts with other employers, the record does not demonstrate whether these communities are sufficiently comparable with the Employer nor is there evidence whether partial retroactivity was necessary because of the fiscal year under which those employers were operating.

Accordingly, I find that the wages for the 1992-1994 Agreement should be retroactive to May 1, 1992.

SICK LEAVE PENALTY

Based on what it perceives as an abuse of the sick leave benefit the Employer proposes that after the fifth occurrence of sick leave the sick leave benefit be reduced by one-half. However, the current Agreement makes no provision for a sick leave penalty.

As noted above, the interest arbitration process is to be regarded as an extension or supplement of the parties' bilateral negotiations. Therefore, if the arbitration process is to work the result should not be one that is substantially different than that which could be obtained through bargaining. Accordingly, it is not the function of the arbitrator to embark on new ground or to create or adopt some new innovative procedure or benefit unless the party seeking such a procedure or benefit can show it is necessary.

Here, the Employer has provided evidence of the sick leave usage of the bargaining unit employees over an eighteen month period. However, there is no evidence in the record how this experience compares to any period of time prior to the past eighteen months or to the experience of sworn personnel in other communities. In other words, I am asked to award this new procedure without knowing if it is appropriate for some reason other than the experience of the last eighteen months. Moreover, in evaluating bargaining unit personnel the Employer has adopted a standard that is deemed acceptable for evaluation purposes, but would be inappropriate under the operation of the penalty provision urged by the Employer¹⁴. This point is further underscored by the fact that no disciplinary action has been taken in cases of perceived sick leave abuse.

In light of the foregoing I adopt the Union's proposal that the Agreement not contain any sick leave penalty provision.

RETIREE HEALTH INSURANCE

This issue in my opinion turns on whether the Employer's proposal represents a codification of the current practice on this matter. If so, it does not represent a new procedure or benefit requiring a justification by the Employer to award it as something that the parties would not have agreed to during bilateral negotiations¹⁵.

The evidence is that there have two instances when employees who retired before the age of 50 inquired about premiums that would be paid by the Employer. In both cases the employees were told that in order to continue to participate in the Employer's plan they would be required to pay the entire premium.

The Union argues that these two instances do not constitute some sort of binding practice. Specifically, it argues that they do not because in one case the employee was not a member of the

¹⁴I am aware of the fact that Chief Ivanelli testified that the standard in the evaluation should be changed and that it does not represent his thinking on this issue. However, the evaluation instrument is an official instrument of the Employer and is in fact that standard applied with respect to bargaining unit employees.

¹⁵Also, because a contractual codification of current practice would not materially change the benefit in question, the Union's argument that the Employer's proposal can be gained only in bargaining is no longer applicable.

bargaining unit and because in the other the Union was not aware of the circumstances. However, I believe that the Union's argument goes more to a past practice that would be binding in the nature of a contractual commitment often in dispute in grievance arbitration. In such a case a demonstrable on-going practice is necessary to bind a party to an implied obligation.

However, the matter before me is not a "rights" dispute, it is an "interests" dispute and the binding nature of the Employer's conduct requiring the two employees to pay the total premium is not at issue. Instead, I am asked only to determine if the parties, knowing that the two cases had in fact occurred would have agreed to the provision sought by the Employer. I believe that they would have so agreed. The Union does not dispute that these two cases took place nor does it dispute that the Employer took the position that it did and required that the two employees pay the total premium. In light of these two uncontroverted facts I can only conclude that when the Employer sought such a provision in the Agreement it merely wished to make as a matter of contract that requirement.

Accordingly, I find that the Agreement shall include the retiree health insurance provisions included by the Employer in its last best offer.

AWARD

My award in this matter is as follows:

1. ARTICLE 19: SALARIES, RANK DIFFERENTIAL, EDUCATION shall read, in relevant part, as follows:

* * *

...Any wage increase which may become effective as a result of the above schedule shall be retroactive to May 1, 1992..

* * *

2. ARTICLE 18: SICK LEAVE INCOME AND PERSONAL DAYS shall read, in relevant part, as follows:

* * *

Any employee who accumulates more than 45 days in his sick leave bank as of the last day of the fiscal year shall be paid for all accrued and unused sick leave days at 50% of the employee's regular hourly rate of pay in effect on the last day of the fiscal year. Payment for sick leave days in excess of 45 shall be made by separate check within 30 days at the end of each fiscal year.

Notification of absence due to sickness shall be given to the individual designated by the Police Chief (normally the shift commander on duty) as soon as possible on the first day of such absence and every day thereafter (unless this requirement is waived by the Chief in writing), but no later than one (1) hour before the start of the employee's shift. Failure to properly report an illness may be considered as absence without pay and may be subject the employee to discipline, as well.

* * *

3. ARTICLE 22: HOSPITALIZATION INSURANCE shall read, in relevant part, as follows:

* * *

Section 22.2 Provision for Retired Personnel

Employer agrees to pay 50% of the premium charged for the individual hospital plan or 40% of the premium charged for the family plan as of May 1, 1992, until the retired officer attains age 65. The provi-

sions of this Section apply only to employees who retire during the term of this Agreement who are at least fifty (50) years of age and who have completed at least twenty years of service with the Village's Police Department in a position covered by this Agreement.

Should a retired officer, who has opted to continue with this medical insurance plan, take employment elsewhere and a group medical plan is available to him at that place of employment, it is required that he take that plan so it becomes the primary policy. He may also continue with the Village plan if he so desires, as the secondary policy, so that should he eventually lose the other coverage, he could still have the Village's plan to age 65.

* * *

A handwritten signature in cursive script, appearing to read "Robert Michael", is written above a horizontal line.

DATED: August 19, 1993