

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
 : Case 13  
 LOCAL 60, AFSCME, AFL-CIO : No. 45622  
 : MA-6676  
 and :  
 :  
 VILLAGE OF OREGON :  
 :  
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Appearances:

Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1734 Arrowhead Drive, Beloit, Wisconsin 53511-3808, for the Union.  
Melli, Walker, Pease & Ruhly, S.C., Box 1664, Madison, Wisconsin 53701-1664, by Ms. JoAnn M. Hart, for the Village.

ARBITRATION AWARD

The above-captioned parties, herein the Union and the Village, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. The matter was submitted upon a stipulation of facts. The parties filed briefs, the last of which was received September 8, 1992.

ISSUE

The arbitrator frames the issue as follows:

Did the Village violate the 1990-1992 collective bargaining agreement by paying grievants Richard Krueger and Daniel Crapp \$270 (rather than \$350 and \$310, respectively) longevity pay in December, 1990? If so, what is the appropriate remedy?

BACKGROUND

During the course of bargaining for a successor to their 1987-1989 collective bargaining agreement, the parties met on October 9, 1989. Several proposals were exchanged. One of the issues in dispute was the Union's proposal to modify the predecessor contract's longevity provision which read as follows:

"19.05 Longevity. Regular full-time employees who have completed three (3) full years of employment by December 1 shall receive an annual bonus of Fifty-Dollars (\$50.00). Subsequent longevity bonuses will be increased by Twenty Dollars (\$20.00) for each full year of employment thereafter, up to a maximum longevity payment of \$250.00 per year."

During the course of bargaining, the Village submitted a package proposal that included a counter-proposal to increase the maximum longevity payment to \$350. The package was rejected by the Union which then offered a counter-proposal that was rejected by the Village.

The Village then offered a new counter-proposal that included a modification of an item not relevant here and in presenting its proposal, the

Village representative stated that its proposal to increase the longevity maximum to \$350 meant that anyone at the maximum at that time would get \$20 more the next year, not more than \$20. No further discussion took place between the parties regarding the longevity issue and after some questions and a Union caucus, the Village's counter-proposal was accepted.

The mutual understanding of the parties at that time was addressed in Stipulation 12 of the parties' Stipulation of Facts which is directly quoted below:

12. At the time the Union agreed to the Village's package offer on October 9, 1989, the Union understood that under the portion of the Village's package offer concerning longevity, the Village would add, for each employee at the \$250 cap, an additional \$20 in longevity for 1990, and each year thereafter for the next four (4) years, until the employees reached the new cap of \$350.00.

On December 4, 1989 the parties executed the tentative agreement and the 1990-92 collective bargaining agreement. The tentative agreement contained the following paragraph:

ARTICLE 19: LONGEVITY

19.05 Amend the last sentence to provide for a maximum longevity payment of \$350.00 per year.

The 1990-92 collective bargaining agreement contained the following provision:

19.05 Longevity. Regular full-time employees who have completed three (3) full years of employment by December 1 shall receive an annual bonus of Fifty Dollars (\$50.00). Subsequent longevity bonuses will be increased by Twenty Dollars (\$20.00) for each full year of employment thereafter, up to a maximum longevity payment of \$350.00 per year.

On or about November 30, 1990 the Village paid employes longevity pay under the terms of the 1990-92 contract. Payments were limited to \$270, which was \$20 over the 1989 maximum. Grievances were filed by employes Richard Krueger and Daniel Crapp, asserting their longevity payments should have been \$350 and \$310, respectively, based on their years of service. The matter remained unresolved throughout the grievance procedure and is the subject of this arbitration award.

POSITIONS OF THE PARTIES

The Village

The Village argues the disputed payments accurately reflects the agreement of the parties as reflected in the parties' stipulation regarding the discussions at the bargaining table. If the arbitrator were to adopt the Union's position, the Union would in effect be allowed to deny its bargain and seek more in arbitration, and the parties' relationship would be harmed by the encouragement of such sharp practices.

The Union

The Union relies upon the "zipper clause" of the contract, arguing that the Village's method of calculating the longevity payments, which was not expressly provided for in the tentative agreement document, cannot be considered part of the agreement. It asserts the Village's proposed phase-in of the increased longevity maximum was merely a unilateral statement which was never acknowledged by the Union. It points to the parties' inclusion of a note on the premium payment to the sewer plant operators, implying that details of implementation were noted in the tentative agreement document if they were mutually acceptable. It concludes that the "phase-in" of the longevity payment was never part of the agreement and the Village violated the agreement by not crediting the grievants for all their prior service, up to the \$350 maximum.

#### DISCUSSION

The contract provision at issue does not clearly address the implementation of the longevity pay. However, the factual stipulation cited above clearly indicates the Union understood that the Village's proposal involved phasing-in the implementation of the new maximum longevity payment by increasing the payment \$20 a year until the new maximum was reached rather than paying \$350 in the first year of the contract.

The Union acknowledges that it accepted the Village's last package proposal. Since it understood that the Village's proposal involved a phased-in method of implementation, the Union had the responsibility to affirmatively state it was not accepting that portion of the proposal, if it had such an intent. Instead, the Union was silent and the Village relied upon the Union's silence in believing the Union was accepting the Village's implementation plan. Had the Union objected to the phased-in implementation, the Village would have had the options of accepting the Union's counter-proposal of immediate full implementation, or maintaining its position of phased-in implementation, even, if it chose, to the point of impasse.

The Union, however, stood silent. The Village reasonably relied upon that silence as an indication that the Union was accepting its package proposal as presented and as explained, including the phased-in implementation. By its silence, the Union waived its right to later claim that it had not agreed to the phase-in.

This conclusion is not altered by a consideration of Article 25: Scope of the Agreement, which provides as follows:

#### ARTICLE 24: SCOPE OF THE AGREEMENT

24.01 The Agreement sets forth the entire understanding and agreement of the parties and may not be modified in any respect except by writing subscribed to by the parties. Nothing in this agreement shall be construed as requiring either party to do or refrain from doing anything not explicitly and expressly set forth in this Agreement; nor shall either party be deemed to have agreed to promised to do or refrain from doing anything unless this Agreement explicitly and expressly sets forth such agreement or promise.

Without commenting on the effect of this zipper clause in other fact situations, the undersigned concludes that when the Union remained silent as to the Village's proposed phase-in of increased longevity, its silence acted to waive its right to rely upon this clause to nullify the understanding that the increased longevity would be phased-in.

Finally, the undersigned rejects the argument that the specification of the dates for the implementation of the premium pay for sewer plant operators and the side letter regarding hours in the Clerk's Office give rise to an inference regarding the parties' intent regarding implementation of longevity. Under other circumstances, an inference might be drawn, but in this circumstance, however, the best evidence comes from the bargaining table conduct. This Arbitrator concludes the record of the negotiations clearly indicates that the parties agreed to phase-in the implementation of the increased longevity maximum.

In the light of the record and the above discussion, the Arbitrator issues the following

AWARD

1. The Village did not violate the 1990-1992 collective bargaining agreement by paying grievants Richard Krueger and Daniel Crapp \$270 rather than \$350 and \$310, respectively, longevity pay in December, 1990.

2. The grievance is denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 7th day of December, 1992.

By Jane B. Buffett /s/  
Jane B. Buffett, Arbitrator