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May 17, 2010

Attorney Name, Esquire[1]
Address

Re: MI/Labor Law/Arbitration/Retirement Pay

File: 33-xxxxx-019 Your File: Candyland

Dear Name:

We have no access to Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works*, through Westlaw, and it is unavailable at the law school. Accordingly, I have cited other secondary sources and some additional case authority directed to the arbitrator's authority specifically.

Please advise if I may be of further service.

Very truly yours,

Timothy J. Snider
Senior Attorney

TJS:cfb
Enclosure

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[1]**Names, addresses, and other identifying information have been redacted to protect privacy.**

ARBITRATION PROCEEDING

IN RE: The Lollipop Guild Local 12345,

***Grievant*,**

City of Candyland, MI,

***Respondent*.**

NOW COMES the Respondent, the City of Candyland, MI ("the City"), through counsel, and submits this Memorandum in Opposition to Grievance.

SUMMARY OF DISPUTE

For 30 years or more, the Lollipop Guild Local 12345 ("the Guild") has represented the workers in the City's Department of Public Works, comprising the collective bargaining unit. The collective bargaining agreement ("the CBA") of the parties throughout that period has contained a provision substantially equivalent, if not identical, to the following provision in the current CBA:

> 9.7 SICK LEAVE PAY ON RETIREMENT: An employee, upon retirement, shall be entitled to be paid for one-half of unused sick leave or to the employee's beneficiary of record at the time of death except the maximum of pay shall be for thirty (30) days.

(CBA eff. July 1, 2008 ¶ 9.7.)

The current CBA was executed on or about Date, 2009. At no time during the negotiation of the CBA was ¶ 9.7 made the subject of bargaining by either side. For about 30 years, this provision had been interpreted by both parties as requiring that employees

would be paid one-half of their unused sick leave, with the maximum payout limited to 30 days. Employee Marcus Munchkin, a member of the bargaining unit, retired on Date, 2009, at a time when the ink on the CBA was hardly dry. He was paid by the City the maximum pay of 30 sick leave days in accordance with the CBA.

The Guild, however, objected to the amount of the City's payment to Mr. Munchkin of his accrued sick leave pay and took the position for the first time that Mr. Munchkin was entitled to receive the full one-half of his unused sick leave, without regard to the 30 days' unused leave limit. The Guild had never taken this new position during the negotiations leading to the execution of the current CBA. Furthermore, the Guild had never taken this position previously with respect to any other members of the collective bargaining unit who had retired prior to the retirement of Mr. Munchkin. The issue is whether the Guild's new position should be sustained in arbitration, although it was denied during the grievance proceeding.

ARGUMENT

I. INTERPRETATION OF THE TERMS OF THE CBA IS WITHIN THE AUTHORITY AND COMPETENCE OF THE ARBITRATOR.

This case requires the arbitrator to interpret the terms of the CBA, a charge which is within the arbitrator's competence. "It is well established that arbitrators are charged not only with deciding factual disputes but also with interpreting the collective bargaining agreement." *Salary Policy Employee Panel v Tenn Valley Auth*, 731 F2d 325, 332 (CA 6, 1984). It is the

obligation of the arbitrator to ratify the actions of an employer if those actions are authorized by the CBA. "[The arbitrator] sits to interpret the contract and cannot hold invalid action by an employer which conforms to the provisions of the contract." *Wright-Austin Co v Int'l Union, UAW*, 422 F Supp 1364, 1370 (ED Mich, 1976).

Here, that is all the City is asking the arbitrator to do. The essence of the arbitration process is to interpret and apply the terms of the CBA, particularly where, as here, the CBA is ambiguous.

> With regard to whether the arbitrator's award otherwise drew its "essence" from the CBA, in the present case, the terms of the agreement were ambiguous . . . . Under our precedent, "[i]t is a well-recognized principle that, except where expressly limited by a labor agreement, an arbitrator may consider and rely upon extrinsic evidence, including negotiating and contractual history of the parties, evidence of past practices, and the common law of the shop, when interpreting ambiguous provisions." *Champion Boxed Beef Co. v Local No. 7 United Food & Commercial Workers Int'l Union*, 24 F.3d 86, 88-89 (10th Cir. 1994). Indeed, the very nature of the arbitrator's role in settling disputes under collective bargaining agreements is to examine such practices. [*Local No. 7 United Food & Comm'l Workers Int'l Union v King Soopers, Inc.*, 222 F3d 1223, 1228 (CA 10, 2000).]

II. THE GUILD'S INTERPRETATION OF THE CONTRACT IS UNREASONABLE AND CONTRARY TO THE CONSTRUCTION PUT ON THE LANGUAGE BY THE PARTIES.

The parties disagree on the interpretation of the phrase "except the maximum of pay shall be for thirty (30) days." The City and the Guild consistently for 30 years have treated this phrase as meaning that in all cases of retirement, the retiree shall be paid for no more than 30 days of sick leave, regardless of how much sick leave the retiree may have accrued

at the time he retired. Without prior notice to the City during bargaining, the Guild now takes the position that the quoted phrase modifies only the phrase "the employee's beneficiary of record at the time of death." In other words, the employee, if he survives, is entitled to be paid for all of his accrued sick leave time. Only if the employee dies after retirement but before he receives his check is his beneficiary limited to receiving payment for no more than 30 days of the deceased retiree's accrued sick leave.[2]

The Guild apparently also argues that the beneficiary of an employee who dies before he retires is entitled to receive the deceased employee's accrued sick leave, subject to the 30-day limitation. The problem with that interpretation, of course, is that an employee who dies while working has not "retired." There is no vesting provision, so before an employee qualifies to receive the retirement benefit, he must have "retired," not died while still employed. See, e.g., MCL 38.20(3) ("If a retirant dies before receiving payment"); MCL 38.16(4) ("If a member becomes a retirant or dies, he or she ceases to be a member."); *Clexton v City of Detroit*, 179 Mich App 209; 445 NW2d 201 (1989) (former city employee, who was entitled to deferred vested pension under city charter upon his resignation, was "retiree" entitled to hospitalization and medical insurance benefits under city council resolution, though he was not "retirant" entitled to accumulated unused sick leave payout).

The practical effect of the Guild's interpretation of the language is that the retired employee will always receive one-half of all his accrued sick leave unless he has the misfortune of dying before he receives his check. Then his beneficiary would be limited to

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[2]If he dies before he retires, then he has not "retired" at all. In this particular case, the City tendered the retirement pay to the retired grievant, who is still alive.

30 days' worth of accrued sick leave. The implausibility of the Guild's interpretation is patent. The situations when this special case could arise will be extremely rare, so rare that it is unreasonable to assume that the parties would even have provided for it.

The City's position is that all retirees are treated equally. No retiree is entitled to receive payment of more than one-half of his accrued sick leave, to a maximum of 30 days. In that rare case where the retiree qualifies for the payment but dies before he can receive it, the entire payment is made to his beneficiary. The provision states no more than the obvious—if a retiree dies before he can be paid, then the payment should go to his beneficiary. Whether the retiree lives or dies during that brief interval makes no difference in how much the retiree is qualified to receive. The reference to his "beneficiary" is in the provision only to clarify to whom the payment should be made if it cannot be made to the retiree because of his death. Even accepting the Guild's "implied vesting" interpretation of the contract, it will be rare that an employee dies before he retires. Even in that case, there is no reason why a deceased employee should be treated differently from a surviving retiree.

To be sure, the language used by the parties is inartful, even ungrammatical. But that does not necessarily mean that the language is ambiguous. As stated in *Holmes v Holmes*, 281 Mich App 575, 594; 760 NW2d 300, 311 (2008):

> Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. The language of a contract should be given its ordinary and plain meaning. [*Meagher v Wayne*

State Univ, 222 Mich App 700, 721-722; 565 NW2d 401 (1997) (citations omitted).]

It is axiomatic that "[i]n interpreting contracts capable of two different constructions, we prefer a reasonable and fair construction over a less just and less reasonable construction." *Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 188; 565 NW2d 887, 894 (1997). The City's interpretation would apply the 30-day limit in all cases and to all retirees. The Guild's interpretation would restrict that 30-day limit to a tiny minority of cases, none of which has ever occurred previously. In all cases of which the City has recollection, the retired employee's retirement pay has been augmented by one-half of the retiree's accrued sick leave, not to exceed 30 days of accrued sick leave. The Guild's "special case" has never arisen and probably never will occur. The Guild's construction of the language is unreasonable, impractical, and unprecedented.

The City's construction of the clause is one which has been applied in practice for years and without exception. The Guild's interpretation is one that has never been applied or even suggested (until now). "Between two constructions, each probable or possible, one making a contract reasonable and fair, as applied to the subject matter, and the other unjust and unreasonable, the former is to be preferred." *B Siegel Co v Codd*, 183 Mich 145, 153; 149 NW 1015, 1018 (1914). Even to reach the Guild's interpretation of the provision requires distorting the language out of all context and meaning. Moreover, it is wholly unreasonable to suppose that the parties bargained and put into a contract a provision that would almost never apply.

Had the Guild intended that its novel construction of the contract be applied henceforward, it was incumbent upon it to so advise the City and to initiate bargaining over that provision to attempt to persuade the City to agree with its position. Instead, the Guild seeks to achieve indirectly through the grievance procedure what it never could have achieved through bargaining.

III. THE GUILD'S INTERPRETATION OF THE CONTRACT IS INCONSISTENT WITH PRIOR PERFORMANCE BY THE PARTIES.

One of the arbitrator's tools in ascertaining the meaning of a contract is to look at the past practices of the parties.

> Reliance upon past practice in the face of ambiguous provisions in a collective-bargaining agreement is not only permissible, but is an important tool through which an arbitrator may discover the intent of the parties. Where there is ambiguity, the arbitrator may attempt to discern the intent of the parties, and thus resolve a dispute over a contract interpretation, by considering the actions of the parties as evidence of their interpretation of the terms of the collective-bargaining agreement. [21 Summ Pa Jur 2d, Employment and Labor Relations, §12:76 (2009).]

Accord *Holloway Constr Co v State*, 44 Mich App 508, 533; 205 NW2d 575, 587 (1973) ("When parties to a contract have given a practical interpretation to the provisions of that contract, such an interpretation is entitled to consideration by the Court."). Here, for 30 or more years, the parties have agreed or at least consented to the interpretation of the contract urged by the City. Now, with no renegotiation of the contract and with no notice that its position has changed, the Guild has adopted an interpretation of the contract's language that is wholly at odds with the position it had taken previously. If the language were wholly

unambiguous, then arguably the parties' construction by performance might be of less significance. But how can it be said that the language here is entirely free from ambiguity?

In labor contracts in particular, courts place a strong emphasis on the practical construction put on the contract by the parties. The Guild cannot simply reverse course without bargaining for new contract language. Courts will not permit it.

> [P]laintiff has offered evidence that in the past, when filling bargaining unit vacancies in the Department, the relevant Hospital and Union representatives interpreted Article 18 § 6(a) to mean that seniority was the threshold inquiry and not seniority group. Twice before, when considering applications for vacancies, the person responsible for hiring, after consultation with the Department's Union representative, hired supervisory personnel who had more seniority than bargaining unit members who had applied. The hiring of those supervisors was never grieved by the Union. It is significant that those entrusted by the Hospital and the Union to interpret provisions relevant to hiring did so in a way contrary to the interpretation that defendants now urge. [*Casey v Lifespan Corp*, 62 F Supp 2d 471, 481 (DRI, 1999).]

Accord 48B Am Jur 2d, Labor and Labor Relations, §2538 (2009) ("[A]n arbitrator may consider and rely upon extrinsic evidence, including negotiating and contractual history of the parties, evidence of past practices, and the common law of the shop, when interpreting ambiguous provisions.").

Having created the dispute that gives rise to this grievance, the Guild, contrary to its prior practice, has adopted a position that supports the grievance. In other words, the Guild's interpretation follows the grievance; the grievance does not follow the contract. *See Bagsby v Lewis Bros of Tenn*, 820 F2d 799, 802 (CA 6, 1987) ("[W]e should hesitate to disagree with the interpretation agreed upon by both parties to the Agreement—the Union and the Company—at least where, as here, the Agreement is ambiguous on its face and the parties

acted on their interpretation before the issue became a subject of litigation."); *NLRB v Universal Servs, Inc & Assocs*, 467 F2d 579, 585 (CA9, 1972) ("[A] practical interpretation placed upon an agreement by the parties is often of dispositive importance in determining their intent and the purposes of the obligation.").

The Guild's position in this grievance is not supportable. It is inconsistent with the position that both the Guild and the City have adopted previously. For years the parties have acted consistently with the City's interpretation of the contract, and the Guild has never filed a grievance over any other employee similarly situated to Mr. Munchkin who has been treated precisely as Mr. Munchkin has been treated in this case. The Guild's position is novel, unprecedented, and without support in the language of the contract. This grievance arose scarcely more than 30 days after the CBA had been executed by the parties. If the Guild had intended to change its position and revise ¶ 9.7, it could have done so during bargaining. A change in employee compensation is precisely one of those issues that should be the subject of bargaining.

Thus, and for all the foregoing reasons, the denial of the grievance should be affirmed.

Respectfully submitted,

_____

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Facsimile:
E-Mail:

Counsel for the City of Candyland