

IN RE ARBITRATION BETWEEN:

MIDDLE MANAGEMENT ASSOCIATION

and

STATE OF MINNESOTA

DECISION AND AWARD OF ARBITRATOR

JEFFREY W. JACOBS

ARBITRATOR

January 19, 2010

IN RE ARBITRATION BETWEEN:

MMA,

and

DECISION AND AWARD OF ARBITRATOR
Kreykes and Edwards grievance matters

State of Minnesota

APPEARANCES:

FOR THE UNION:

Jaidee Martin, Attorney for the Union
Ron Rollins, Attorney for the Union
Mary Kreykes, grievant
Sharon Edwards, grievant

FOR THE STATE

Carolyn Trevis, DOER Labor Relations Principal
Paul Larson State Negotiator

PRELIMINARY STATEMENT

The hearing in the above matter was held on January 8, 2010 at the BMS Offices in St. Paul, Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties waived post-hearing Briefs.

ISSUE PRESENTED

The Parties stipulated to the issue as follows: Did the Employer violate Article 17 Section 3C4 of the 2007-2009 Agreement between the parties when it determined that the Grievants were not eligible for the Corrections Early Retirement Incentive? If so what is the remedy?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2007 through June 30, 2009. Article 7 provides for submission of disputes to binding arbitration. At the hearing the parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

UNION'S POSITION

The Union's position was that the State violated the contract when it determined that these grievants were not eligible to participate in the Corrections Early Retirement Incentive, or CERI as it is known. In support of this position the Union made the following contentions:

1. The grievants are Group Supervisors and have been employed by Minnesota DHS in various positions for years. Ms. Kreykes since November 22, 1978 and Ms. Edwards, June 12, 1980. They were both reallocated from an Assistant Group Supervisor to Group Supervisor within DHS on January 11, 2006.

2. They were both added to the Corrections Early Retirement Program, CERP, in June of 2006 and both were already age 55 as of that time. The Union pointed out that because of this chronology neither grievant was eligible for the CERP when they turned 55 and never had the chance to elect to take the ERI option.

3. The parties' 2005 and 2007 labor agreement and agreements prior to that contained an Early Retirement, ERI or CERI (for *Corrections* Early Retirement Incentive) provision as follows:

Any supervisor who attains the age of fifty five (55) after the effective date and before the expiration date of the contract and who is covered by the Corrections Early Retirement Program may opt during the pay period in which his/her fifty-fifth (55th) birthday occurs to take advantage of the early retirement program.

4. This is the so-called "cliff" provision that was designed to provide an incentive to allow people to retire at age 55. If however they worked beyond age 55 they would lose the opportunity to take the ERI. This was the understanding prior to the negotiations leading to the 2007-2009 negotiations.

5. In those negotiations the parties amended the provision and eliminated the "cliff." The new language read as follows: Effective October 24, 2007 any supervisor who attains the age of fifty five (5) and is covered by the Corrections Early Retirement Program may opt during the pay period of their fifty fifth (55th) birthday or any pay period thereafter to take advantage of the early retirement incentive. See Joint Exhibit 2 and 6. The Union pointed out that October 24, 2007 was the date on which the contract was signed and the parties' intended to allow employees to retire at any time after they turned 55.

6. The parties also added to other provisions, which the Union argued, were specific exceptions to the provisions of the first paragraph of the new CERP language. These read as follows:

Any supervisor covered by the Corrections Early Retirement Program who retires prior to October 24, 2007 may take advantage of the early retirement incentive program such supervisor retires in the pay period in which he/she attains the age of fifty five (55).

A supervisor attaining the age of fifty five (55) prior to October 24, 2007 and who elected not to retire during the pay period in which they turned fifty five (55) are no longer eligible for this benefit.

7. The Union argued that these provisions were intended to create very specific exceptions to the general enabling provision eliminating the “cliff.” The Union acknowledged that the exact scenario raised by this grievance was not considered in negotiations and never came up. The Union was not aware of the scenario here, i.e. where employees turned 55 before they became eligible for the CERP and who never had a chance to make the election. While these provisions were intended to make sure anyone who already had the chance to elect and who chose not to retire at age 55 they were never intended to exclude those who never had a chance to make the election.

8. The Union argued that the State should have negotiated a specific exception for these people and that the arbitrator should not take away a benefit that should in fairness be extended to the people, like the grievants, who turned 55 before they were placed into positions covered by the CERP but who, because of the vagaries of timing, never had the chance to chose to retire at age 55.

9. The Union argued that the provisos of paragraph 1 of Article 17, Section 4 was intended to be an enabling provision making it clear that anyone eligible and covered by the CERP could retire after age 55 and that the “cliff” had been eliminated so that a person did not have to retire in the exact pay period of their 55th birthday. Paragraph 2 did nothing more than to make it clear that this labor agreement did nothing to change the older agreements. In other words, if one had already retired prior to October 24, 2007, that individual had to have retired in the pay period of their 55th birthday in order to receive the CERI benefits. Paragraph 3 was added to make it clear that anyone who had already opted not to retire, and who was covered under the old provisions, could not have a “second bite at the apple” and get another chance to retire.

10. The Union disagreed with the State's position and argued that the State treats the grievants and others like them as people who had already made a choice not to retire when they turned 55 because these individuals had never had that chance since they were not eligible to opt for the CERI when they turned 55.

11. The essence of the Union's claim here is that the language, while not specifically addressed to these grievants since their situation was not discussed by the parties in negotiations, provides for the elimination of the "cliff" by allowing anyone to retire under the ERI when they turn 55 or at any time thereafter. The language created certain specific exceptions to that but the grievants are not in either of those classes. Accordingly, the Union asserted that the State needs to negotiate an exception not to have the arbitrator create one in language that does not provide for it.

The Union seeks an award of the arbitrator determining that the grievants are eligible to participate in the CERI.

STATE'S POSITION:

The State's position was that there was no contract violation here. In support of this position the State made the following contentions:

1. The State pointed to the history of the negotiations and legislative changes over time and argued that it has always been clearly understood up until the 2007-2009 contract that one had to retire in the pay period in which the employee turned 55 in order to qualify for the CERI. The State also acknowledged the "cliff" in this regard.

2. The State asserted that as positions have been added to the CERP the MMA has not negotiated for a window to include them in the CERI even though other Unions have done so.

3. The State asserted that the MMA however did negotiate for inclusion in the CERI for certain positions in the State Patrol. See State exhibit 4.

4. The State also pointed to the provisions of Article 17 and noted that the elimination of the “cliff,” or the “use it or lose” it provision, whereby an individual had to retire in the pay period in which they turned 55, did not result in the addition of people who had already turned 55. Those individuals were never discussed and there was no agreement to make them eligible for the CERI.

5. The State noted that in the past other Unions who have had their members added to the CERP have specifically negotiated “windows” for people who were already 55 to retire and still qualify for the CERI. The MNA negotiated a special provision in the 1997-99 labor agreement for almost this exact circumstance. See State exhibit 3.

6. MAPE has also negotiated similar provisions that also provided for a window for their employees under very similar circumstances. See Employer exhibit 2.

7. The State argued that these provisions in this contract must be read in the context of the rest of the provisions of this labor agreement. They must also be read in context of these other negotiations in order to determine contractual intent. Clearly, so the argument goes, the parties both knew about these negotiations over time and of the long history of the CERP and CERI provisions. Had the Union wanted to negotiate a window provision it could have but the subject was never brought up in negotiations for the 2007-09 agreement.

8. The State argued that the Union is now attempting to get the arbitrator to add such a provision even though the language is silent with respect to this particular situation.

9. Further, the State argued that arbitration is not a Court of equity and whether it is “fair” to exclude these employees is not germane. The question is whether the State violated the contract by refusing to add them pursuant to these provisions. The Union acknowledged that the language does not cover them specifically and that the issue of whether those who were added to the CERP plan *after* they had already turned 55 never came up in negotiations and was never discussed or considered.

10. Since contractual intent can be determined both by language and by negotiation history, the Union's claims must fail since the language is silent and there was no negotiation history on this subject. Moreover, it would be unfair to give CERP benefits to these grievants since they have only been in the Plan for a short time when there are many others who have been in the Plan for years. Thus, the "fairness" argument cuts both ways here and is not a compelling argument on these facts.

11. The State asserted that the Union can certainly bring this topic up in the negotiations for the next labor agreement but that it would be inappropriate for an arbitrator in a grievance setting to add these employees under these circumstances.

12. The essence of the State's argument is that the elimination of the "cliff" was not intended to allow coverage for people who never would have been covered and that the third paragraph of Article 17, section 4 implicitly, if not explicitly, excludes anyone who attained age 55 prior to October 24, 2007 and who had not retired.

Accordingly the State seeks an award of the arbitrator denying the grievance in its entirety.

DISCUSSION

The essential facts of the case are undisputed. Indeed, the parties stipulated to virtually all of the salient facts as follows:

The governing statute for the CERP is M.S. 352.90. The policy underlying this statute is to provide special retirement benefits and contributions for certain correctional employees who may be required to retire at an early age because they lose the mental or physical capacity required to maintain the safety, security, discipline and custody of inmates at State correctional facilities or of patients at the Minnesota Security Hospital or at the MSOP or of patients in the Minnesota Extended Treatment Options program.

Grievant Mary Kreykes is employed at the DHS Security Hospital facility in St. Peter. Grievant Edwards is employed at the MSOP in St. Peter. Ms. Kreykes has been employed in various positions since November 1978 was an Assistant Group Supervisor, AGS, until January 11, 2006 when she was reallocated to a Group Supervisor. She turned 55 in December 2005. The parties stipulated that on her 55th birthday Ms. Kreykes was not covered by the CERP. She was not therefore eligible to elect early retirement under the CERI at that time since she was not in a covered position.

Ms. Edwards has been employed since June 1980 and is employed at the MSOP in St. Peter. She was an AGS until January 11, 2006 when she too was reallocated to a Group Supervisor. She turned 55 in September 2002. The parties stipulated that on her 55th birthday Ms. Edwards was not covered by the CERP. She was not therefore eligible to elect early retirement under the CERI at that time since she was not in a covered position.

In early June 2006 the Commissioner of DHS recommended to the State legislature that a number of job classifications used in DHS, including the Minnesota Security Hospital and MSOP program and the Minnesota Extended Treatment Options, be added as job classifications covered by the CERP. See Joint Exhibit 1. The proposed additions of job classifications to CERP included the Group Supervisor classification and were approved by the Legislative Commission on pensions and Retirement effective June 14, 2006. It was on that date that these two grievants were added to the CERP. The parties agreed that as of that time both grievants were over the age of 55.

On June 14, 2006 the 2005-07 agreement was in effect and the provisions of Article 17 Section C.4 provided for the “cliff,” as follows: “Any supervisor who attains the age of fifty five (55) after the effective date and before the expiration date of the contract and who is covered by the Corrections Early Retirement Program may opt during the pay period in which his/her fifty-fifth (55th) birthday occurs to take advantage of the early retirement program.” This was the old “use it or lose it” provisions in place prior to the 2007-09 amendments to the labor agreement and required that anyone wanting to take the CERI had to retire in the pay period of their 55th birthday.

The CERI provides that an eligible supervisor can exercise the option with health and dental insurance, which the supervisors were entitled to at the time of retirement, subject to any changes in coverage in accordance with the labor agreement or subsequent agreements. Employees eligible to receive the Employer Contribution for medical and dental coverage continue to receive an Employer contribution until the eligible employee attains the age of 65.

As noted above, the parties amended the language of Article 17 to eliminate the “cliff” and, effective October 24, 2007 to allow a supervisor who attains the age of 55 and who is covered by the CERP to opt to take the CERI during the pay period he/she turns 55 or at any time thereafter. The parties understood that after October 24, 2007 any eligible supervisor who attained the age of 55 and who was covered by the CERP on their 55th birthday would be able to opt to take advantage of the early retirement incentive at any time between the employee’s 55th birthday and until they turn 65 provided they met all other eligibility criteria.

The parties agreed that they did not discuss during the bargaining in 2007 how the CERP language as agreed to in the 2007-09 contract would apply to the situation raised by this grievance.

The parties further agreed that the State has consistently not offered an early retirement incentive to employees who have attained the age of 55 prior to entering a CERP covered position, unless otherwise negotiated with the appropriate exclusive bargaining representative. The State’s position is that these employees are not eligible for the incentive.

The evidence further showed that other Unions have negotiated “windows” to allow employees who had turned 55 prior to the effective date of their classifications to chose to take an early retirement incentive. The MMA did so in the past as well for certain employees in their Union. See Employer exhibit 4. The evidence showed that no such window was discussed or negotiated for these employees during the negotiations for the changes in language to Article 17 for the 2007-09 labor agreement however.

The parties agreed that there were two recent examples of individuals in a supervisory unit covered by the MMA that entered the CERP after attaining the age of 55 and who subsequently retired at a later age with no early retirement incentives offered to them. One employee entered the CERP on June 14, 2006 (as did the grievants in this matter), and retired on November 3, 2006. The other also entered CERP on June 14, 2006 and retired on September 5, 2007. The Union argued though that these situations are not strictly applicable since they both retired before the effective date of the new language of Article 17, October 24, 2007. This, the Union asserted was covered by the language of the second paragraph providing that any supervisor retiring *before October 24, 2007* may take advantage of the CERI *only* if they did so in the pay period of their 55th birthday. There was some merit to this argument since both these employees retired before October 24, 2007.

The parties further stipulated that the employees in the CERP are entitled to a higher retirement pension benefits than employees in the general State Retirement Plan. See Joint exhibit 3.

The State denied the grievance brought by these grievants on the basis that the language of Article 17 requires that a supervisor who attain the age of 55 when they are covered by the CERP can elect the CERI and that these grievants had turned 55 prior to the time they were covered. Moreover, the State asserted that a supervisor who attained the age of 55 prior to October 24, 2007 and who did not elect to take the CERI was no longer eligible for this benefit.

The evidence showed too as noted above, that the parties neither discussed this scenario nor made any provision for it in the language of Article 17 even though in the past the State and this Union as well as other Unions have negotiated special windows to allow for people to take advantage programs like this but who had turned 55 before they were eligible to be in the program. It is against this backdrop that the case is presented.

As in all contract interpretation cases the ultimate question is to determine the intent of the parties. There are several significant difficulties here. First, negotiation history can be a significant source of information about what that intent is. Here there is none that can be relied upon to aid in this inquiry. The parties never discussed this scenario.

Second, since this is a new provision there is further no history of the application of this provision to aid in the inquiry either. As will be discussed below, there is a history of the application of the old provisions but that is only of indirect benefit in this case.

Third, both parties made essentially the same argument with respect to the arbitrator's power. The Union argued that the arbitrator would be taking something away from these employees if the State's position is granted. The State on the other hand argued quite the opposite; that the arbitrator would be granting them a benefit the contract does not confer upon them if the Union's argument is accepted.

The Union argued that the first paragraph of Article 17 cited above is a general enabling provision and that it allows any qualified employee to elect to take the CERI any time, even though they had already turned 55 by the time they were included in the CERP. This however is too simplistic a view of the language and of the evidence as a whole in this case. It was apparent that the parties understood that the language does not directly cover this situation.

The State on the other hand points to the third paragraph of the relevant language of Article 17 and asserted that this implicitly covers this situation as well. This is a somewhat too simplistic an analysis for many of the same reasons. The language itself implies that there is an "election" not to retire. These employees never had that opportunity and it was clear that the language does not cover this scenario.

The State argued that the language must be construed in light of the remainder of the contract and that it must also be construed in light of the context in which it was negotiated. This case calls for an analysis of the history of this clause and of the negotiation history going back several levels between these parties as well as between the State and other Unions with which the State also has contracts.

Here the evidence showed that other units have dealt with this issue or very similar issues in the past. Both the Minnesota Nurses Association, MNA, and the Minnesota Association of Professional Employees, MAPE, have negotiated similar versions of the early retirement programs that also are based on age 55. The State showed that in both cases those Unions negotiated special windows allowing for certain employees who had already turned 55 to make the election after the effective date of the contract. See e.g. Employer exhibits 2 & 3. There was further some evidence that the MMA also negotiated something similar for certain State Patrol employees as well. See, Employer exhibit 4.

On this record and these quite unique facts it was this evidence that was most persuasive. The parties have a long negotiation history and while this is something of a subjective determination, the assumptions about what a provision covers can be determined based on the assumptions under which it is negotiated. Further, the determination of contractual intent can sometimes be made based on the outward manifestations of the other party in negotiations. Here the State could legitimately have assumed that only the specific groups of employees referenced in the language regard the elimination of the “cliff” would be entitled to the additional coverage and that since the MMA did not bring up a window for others who may have already turned 55 when they were placed in CERP eligible positions, the conclusion can reasonably be made that the parties did not intend for that benefit to be conferred on those employees. Further, arbitrators must be cautious in conferring a benefit where there is no clear language granting it and no practice upon which such a benefit can be inferred. Obviously any award must draw its essence from the labor agreement.

Here it was clear that the Union was not aware that this class of employee existed during the negotiations and was thus not aware that there needed to be negotiations over any rights to these benefits on behalf of these employees. The Union's argument was akin to one based on the notion of *expressio exclusio*. The Union argued that the general rule is that now anyone who is otherwise eligible and who is over the age of 55 can retire on the CERI. The remainder of the language sets forth a set of specific exclusions to the general rule and since this class of employees is not expressly *excluded* they should thus be *included* in the more general rule set forth in paragraph 1, which eliminated the "cliff." If the language itself had been the sole and only piece of evidence here, this argument might well have had more traction.

However, on this record it was apparent that the parties did not intend the language to be interpreted this way. The evidence showed that the purpose of paragraph 1 was to allow those who turned 55 *after* the insertion of this change in the contract to be eligible for the CERI. Moreover, it may not be an appropriate use of that interpretive tool to essentially add something that the parties had not contemplated into their agreement. Thus, on this record, it would be arguably an amendment to the labor agreement to grant such a benefit in violation of the jurisdictional clause on the grievance procedure.

The Union of course argued just the opposite; that it would be to work an unfair forfeiture to take away a benefit from these employees that the language arguably granted. As noted above though, it was clear that these employee never had this benefit prior to October 24, 2007 and that the language itself does not grant to them the right to retire now and get the CERI. Thus, the Union's assertion does not find sufficient contractual support to be awarded.

Clearly too, the parties recognized that this creates something of an unfair situation for these employees who clearly did not have the right to make an election of coverage since they were already 55 when they were placed in the CERP eligible positions. There is some cogency to that argument but on this record this is an appropriate argument to be made in negotiations for them to be granted a window that they might use to elect to retire rather than a contractually conferred benefits to be enforced in a grievance setting.

Hopefully the parties can find a way to negotiate a satisfactory resolution to this dilemma in further discussions and or negotiations. That however must await a future negotiation and is not a benefit that can be granted in this setting. Accordingly, the grievances must be denied.

AWARD

The grievance is DENIED.

Dated: January 19, 2010

MMA and State of Minnesota, Edwards and Kreykes, award

Jeffrey W. Jacobs, arbitrator