###### Case A – Employer Brief IRL 402 – Arbitration

Brief – for the Silly Putty Central School District

 SUMMARY OF FACTS AND LAW

# ISSUE

 The basic issue involved is whether the District violated Article 24 of the collective bargaining agreement when it did not pay the grievant, Deborah P. (*P.*), a Service Award upon retirement. The evidence establishes that there was no violation of the collective bargaining agreement and the grievance should be denied.

## CONTRACT ARTICLES

 The relevant provisions of the collective bargaining agreement are:

### ARTICLE 24

SERVICE AWARD UPON RETIREMENT

* 1. One-time Service Award

#### A one-time service award for the first through the third years of the 1997

2002 contract. This provision sunsets on June 30, 2000. Stipulations are as follows:

 • Minimum 20 year of teaching service

 • Minimum 10 years of District service

 • Eligible to retire (Vested and at least age 50)

 • Notice of resignation by April 1, 1998 for 1997-98 award

 • Notice of resignation by April 1, 1999 for 1998-99

 • Notice of resignation by July 31, 2000 for 1999-00 award

• Retroactive payments to be made within 2 weeks of acceptance of resignation by the Board of Education.

 1997-1998 1998-1999 1999-2000 2000-2001 2001-2002

20 years of service $15,000 $15,000 $15,000 No No

25 years of service $16,000 $16,000 $16,000 Service Service

30 years of service $17,000 $17000 $17,000 Award Award

### ARTICLE 19

GRIEVANCE PROCEDUDRE

1. Stage 4: Arbitration

….

(2) The arbitrator shall have the power to interpret any provision of this agreement, but shall have no power to add to, subtract from, or change, any of the provisions of this agreement; nor to render any decision which conflicts with a law; nor to imply any obligation which is not set forth in this agreement.

### ARTICLE 27

MISCELLANEOUS PROVISIONS

* 1. Zipper Clause

The Superintendent and Association agree that all negotiable items have been discussed during negotiations leading to this contract and, therefore, agree that negotiations are not to be reopened on any item during the life of this contract.

### ARTICLE 28

DURATION

* 1. Amendments

This agreement may be amended by mutual consent with written evidence of said consent being presented by each party to the other.

##### SUMMARY OF FACTS

 Although the testimony of one of the Association’s witnesses, Andrew S. (*S.*),

Was at times incredulous in light of his failure to recall basic District proposals despite

Being the Association’s Chief Negotiator, the answers which he gave at the close of his

cross-examination undermine the grievant’s claim. S. testified that the contract

that was negotiated contained a date by when P. should have submitted her notice of retirement, and that she did not submit her notice by the date due and accordingly is not eligible for the Service Award.

 In regard to the proposals made by the School District during negotiations regarding a Service Award, S. appeared to have selective recall – he could remember that the District’s proposals contained as a condition of eligibility length of service, but could not recall that one of the other conditions for eligibility was notice of retirement by a certain date depending upon the school year when the teacher was to retire. However, testimony of the Association’s other witness, Joe O. (*O.*), the testimony of current Superintendent Mario Cocci, former Superintendent James Vandemeer as well as documentary evidence of the School District’s proposals clearly establish that, over three and one-half years of negotiations, there was always in the District’s proposals a condition that had to be met in regard to eligibility for a service award which involved notice of retirement by a certain date.

 Vandemeer testified to the importance of notice of retirement by a certain date because of the concern regarding planning, hiring, and budgeting. Cocci testified that because a Service Award proposal had been previously made at prior negotiation sessions with certain conditions for eligibility, that proposal was continued when he became Chief Spokesman for the District’s negotiating team. He also testified regarding the importance of a deadline for notice of retirement in regard to planning, hiring, and budgeting.

 The importance of a deadline during Cocci’s negotiations with the Association was further confirmed by his testimony as well as his memorandum to the teaching staff. As that memorandum indicated, the April 1 deadline was extended to April 10 in accordance with discussions with O.. That memorandum was distributed prior to any tentative agreement with the Association.

 The importance of a notice of retirement by a certain date is also evident from the fact that it appeared as a condition for eligibility in every proposal conveyed by the District to the Association, including in the proposals which immediately preceded the negotiated agreement. The testimony and documentary evidence establish that the Association was not only aware of those dates when it agreed to them in May, 2000, but also agreed to revisions in them, changing an April 10, 2000 date to July 31, 2000 when agreement was reached in May, 2000.

 The importance of a deadline for submissions of a notice of retirement in order to be eligible for a Service Award was also evident by the fact that when the parties agreed to an Addendum to the expired contract, teachers had to submit their notice of retirement by a specified date in order to be eligible for a Service Award. That Addendum specifically made eligibility for a Service Award contingent upon notice of resignation to retire by a specified date. Two teachers, Betty Boop and Popeye Pierce, took advantage of the agreement by submitting their letters of retirement by the deadline of June 24, 1997.

 Shortly thereafter, by memorandum dated November 24, 1997 to S. and the Association President, the District proposed a Service Award for the 1997-98 year. That proposal also had in it as a condition for eligibility that a letter of resignation for the purpose of retirement be received by a specified date (January15, 1998).

 In the Association’s negotiations proposals for January 28, 1998, the Association had proposed that there be a letter of resignation by a specific date for purposes of retirement in order to receive a Service Award. Further, the Association had prepared a proposal dated September 22, 1999 after receipt of the factfinder’s recommendations. The Association agreed to accept the District’s proposal on Service Awards, a proposal which contained in it as a condition for eligibility a notice of retirement deadline.

 In the Association’s proposal dated 2/01/00, the Association proposed that the District offer the same Service Award in 2001-2002 as in 2000-2001. Since the District’s Service Award proposal had always contained as a condition for eligibility notice of retirement by a certain date, the Association’s proposal was an acknowledgment of the acceptance of a deadline for a notice of retirement.

 In the District’s proposal of 2/03/00, the District continued to propose as a condition for eligibility for a Service Award that a notice of resignation to retire must be received by a certain date. That proposal contained a March 10 date for 1998, 1999, 2000, or 2001.

 In the proposal of 4/27/00, the District had proposed a Service Award only for the third and fourth years of the new contract. *There will be no retroactive payments*. In regard to that proposal, notice of retirement was supposed to be received by April 10, 2000 for the 1999-2000 award and by April 1, 2001 for the 2000-2001 award. It is significant that the District’s subsequent proposals which were accepted by the Association went back to including a Service Award (i.e., retroactivity) for teachers who had retired in earlier years but only if the notice of retirement had been received by a specific date.

 As stated in the District’s negotiations proposals for 5/24/00, the Service Award was initially withdrawn at that meeting, but was subsequently placed back on the negotiations table. In the 5/31/00 Tentative Agreement, the parties specifically agreed to a Service Award which contained in it various conditions for eligibility, including notice of resignation by April 1, 1997 date for the 1997-98 award. The evidence establishes that the April 1, 1997 date for the 1997-98 award was a typographical error which was subsequently pointed out to O. by Joan Ryan (*Ryan*) and changed by agreement with the Association along with correcting the typographical error of April 1, 1998 for the 1998-99 award to April 1, 1999.

 O. indicated that his meeting with Ryan was to ensure that the draft of agreement conformed with the agreement of the parties. He was aware of the changes that were to be made and had no objection to them.[[1]](#footnote-1)\* Indeed, the Association’s copy of the May 31 tentative agreement indicates that it was already aware of the typos since on its copies which it submitted at the arbitration a line appears beneath the inaccurate dates.

 With the exception of typos in regard to the year when the notice of retirement was supposed to be received, the Service Award proposal which was agreed to by the Association was the proposal which had been agreed to in May, 2000, conceptually the same as had been proposed at prior negotiation sessions, and the same was set forth in the final draft of the collective bargaining agreement which was ratified by both the Association and the Board of Education. It is also important to note that he Association had several months to review the initial draft of the collective bargaining agreement. Not only did the Association have substantial time to review the draft before it was finalized, printed, and distributed, but it had suggested that minor revisions be made in it. The changes were made in order to conform the document to the agreement reached by the parties.

 The testimony of all witnesses establishes that Article 24 as appeared in the finalized collective bargaining agreement conformed with the agreement of the parties. Further, the provisions of Article 24 were made retroactive since payments were made to those teachers who had previously retired and were eligible to receive a Service Award.

 The Association’s unique and convoluted understanding of *full* retroactivity appears nowhere in Article 24. No objection was raised by the Association that Article 24 did not contain the full agreement of the parties. Only months later and only after the Association first became aware that P. was not eligible for a Service Award was a claim asserted on her behalf. The testimony of all witnesses confirms that no names of teachers who had retired and who might be eligible for a Service Award were mentioned during the course of negotiations, particularly not the name of Deborah P.. If the Association was aware of Ms. P.’s claim as well as that of any others, and if it intended *full retroactivity* to include payment of all such claims whether or not the teachers met all of the conditions for eligibility, it had the responsibility and the opportunity to clarify its understanding before Article 24 was finalized and the contract ratified and implemented. It did not do so, and the Arbitrator should not permit the Association to renegotiate a contract that took over three years to negotiate.

 The testimony of P. as well as of the other Association witnesses also establishes that the Association’s membership, including P., was kept apprised of the District’s proposals, which included copies of the proposals being sent by the negotiating team to its membership. Indeed, P. testified to an Association meeting in June, 1997, ten months prior to writing her first letter regarding a Service Award.

 Since the District’s proposals had contained as a condition for eligibility for a Service Award notice of retirement by a specified date, the membership, including P., was aware that if an agreement was reached, a Service Award might include a deadline for a notice of retirement. Several teachers did submit such notices by the appropriate date during the various school years while the contract was being negotiated (Penny Dandelion; Elsie Pierce; Andrew Pierce; Harry Henderson), but P. did not. When an agreement was finally reached in May, 2000, subsequently executed by the Superintendent and the Association, and ratified by the Association and the Board of Education, those teachers did receive a Service Award because the provision was applied retroactively and because those teachers were eligible. P. was not eligible not because the provision was not applied retroactively, but because she did not submit her letter of retirement in a timely manner in accordance with the negotiated agreement.

 Not only was the Association aware of the deadlines in the District’s proposals for the submission of a notice of retirement, but the testimony of P. and O. establish that the Association through O. helped P. draft her April and May letters. The Association thus was, or should have been, aware that P. did not meet an April 1 deadline when it negotiated Article 24.

 Further, the Association’s testimony establishes that P.’s letters were intended to be modeled after the Penny Dandelion letter. However, unlike Penny Dandelion who submitted her letter in a timely manner, P. did not.

 In addition, P.’s April and May letters establish that P. was aware that there was an eligibility requirement in order to receive a Service Award. In both letters, she referred to a Service Award. *Which I am eligible to receive*. As stated by the Superintendent in his letter dated September 15, 2000 to P., the Board of Education determined that P. did not meet the criteria for awarding the service award. *The criterion for awarding the service award was to present your letter of resignation by April 1, 1998.*

 In P.’s letter dated April 24, 1998, she also acknowledged that her main concern *depends on receiving the State’s early retirement incentive. Without that, I will plan on returning to my duties at Silly Putty Central School District.* There is no reference, or even implication, that she was assured by Vandemeer or by anyone else that she would receive a Service Award.

 Further, in Vandemeer’s response to P. dated April 27, 1998, Vandemeer informed her that the District was not likely to adopt the State’s retirement incentive program. Vandemeer then referred P. to her Association, and concluded by stating his understanding based upon her letter that she will be returning in the fall. This letter and the testimony of Vandemeer clearly establish that Vandemeer did not assure P. that she would receive a Service Award as alleged by her testimony. (Even assuming *arguendo* that he had, the negotiated agreement involved in this arbitration is with current Superintendent Cocci, not with previous Superintendent Vandemeer.

 In addition, in her letter dated May 21, 1998 to Vandemeer, P. states that *it is time for one final and very difficult decision,* informing Vandemeer of her intention to retire from the District as of June 30, 1998. She further states her retirement is contingent upon several items, including any and all Service Awards and/or retirement incentives granted by the District *which I am eligible to receive*. Again, her correspondence contradicts her testimony that she was assured by Vandemeer that she would receive a Service Award.

### LEGAL DISCUSSION

 The parties agreed in the collective bargaining agreement that no arbitrator shall have the power to add to, subtract from, or change any of the provisions of the agreement, nor to imply any obligation which is not set forth in the agreement. To grant P.’s grievance would be to add to and change Article 24 since the granting of the grievance would in effect be eliminating the collectively bargained agreement that a teacher retiring at the end of the 1997-98 school year would have to submit her notice of resignation by April 1, 1998. The Arbitrator has no authority to do so:

Asserting that the arbitrator’s award violates the clear language of the agreement remains one of the most often cited explanations for a court’s refusal to uphold an award....The courts often note that an arbitrator has failed to follow the express, unambiguous terms of the contract....How Arbitration Works (Fifth Edition), Elkouri &Elkouri, pages 38-39.

 As noted by the Appellate Division in *Civil Service Employees Association v.*

*County of Steuben,* 50 A.D. 2d 421 at 425

In effect, the questions can be stated as follows: Did the arbitrator merely interpret the existing Agreement or did he, in fact, create a new contract...?

In *New York City Transit Authority v. Patrolmen’s Benevolent Association,* 129

A.D. 2d 708, The Court stated the question as follows:

Whether the agreement expressly limits the arbitrator’s power has been held to be a basic factor in determining whether an arbitrator has exceeded his power.

In cases where arbitrators have relied on *past practice* to interpret provisions of collective bargaining agreements, courts have vacated those decisions if an express provision of the contract was involved. In the *New York City Transit Authority* case above, the Court stated (page708):

Despite the explicit limitation contained in the agreement, the arbitrator found a violation of the agreement based on his interpretation of it by considering past practices of the parties...

While it is not irrational for an arbitrator to consider past practices...to interpret provisions of the contract....he may not do so, as here, to the extent of bypassing express contract provisions and relying on these practices so as to make then an implied part of the contract.

In reasoning similar to the Court’s reasoning in the New York City Transit Authority case, the Court in Hunsinger v. Minns, 197 A.D. 2d 871, stated:

When an arbitrator does not “Draw his conclusion from the agreement itself” or goes beyond the contract to add a new provision, the arbitration award must be vacated.

 In a case involving a collective bargaining agreement similar to ours where the arbitrator was given the authority only to interpret the agreement, the Court vacated the arbitrator’s award, stating:

 ...Fundamentally, “[p]ast practices may be considered by an arbitrator only when interpreting a specific contractual provision covering the issue in dispute or when the agreement expressly allows for the inclusion of past practices....Here, the contract contains no authority for the inclusion of past practices; quite the contract, it expressly provides that an arbitrator’s decision shall be final and binding only as to the interpretation of the contract. Nor are we persuaded that the arbitrator merely considered past practices as an aid to interpretation of the contract. Rather, acknowledging that the contract did not cover the situation before him, the arbitrator relied upon past practices so as to make them an implied part of the contract....As such, we conclude that his decision “derived not from the contract\*\*\*but, rather, apparently from his deliberate and intentional consideration of matters dehors the contract”. In the Matter of the Arbitration between Franklin Central School District and Franklin Teachers Association, 238A.D. 2d 848, emphasis added.

 The admonition that an arbitrator not consider matters outside the contract precludes considering the Association’s baseless and convoluted testimony of its understanding of the meaning of *full retroactivity* in our case:

Under the parol-evidence rule a written agreement may not be changed or modified by any oral statements or arguments made by the parties in connection with the negotiation of the agreement. A written contract consummating previous oral and written negotiations is deemed, under the rule, to embrace the entire agreement, and, if the writing is clear and unambiguous, parol-evidence will not be allowed to vary the contract. This is said to be a rule of substantive law which when applicable defines the limits of a contract.

Sometimes the collective bargaining agreement will provide specifically against verbal agreements that conflict with it.

While some might argue that arbitrators should consider any evidence showing the true intention of the parties and that this intention, as found by the arbitrator, should be given effect whether expressed by the language used or not, the general denial of power to add to, subtract from, or modify the agreement provides special justification for the observance of the parol-evidence rule by arbitrators…. How Arbitration Works (Fifth Edition), Elkouri and Elkouri, page 598, emphasis added.

The evidence establishes no basis for creating an exception to the parol-evidence rule, since no fraud or mutual mistake is alleged or involved. The evidence clearly establishes that the contract which the Association negotiated is what it got.

 For all these reasons, the grievance must be denied.

 Respectfully submitted

 Attorney for the District

1. \* If the changes had not been made, no previously retired teacher would have received a Service Award since the uncorrected dates would have required a notice of retirement a year earlier for teachers such as Dandelion, Pierce, and Henderson. [↑](#footnote-ref-1)