

TERMINATION PAY

RETIRED MEMBER

RESIGNED VOLUNTARILY BEFORE disability PENSION WAS APPROVED.

-----X	
In the Matter of the Arbitration	X
between	X
COUNTY OF NASSAU	X Re: B. McKenna
"County"	X
-and-	X
POLICE BENEVOLENT ASSOCIATION	X
"Association"	X
-----X	

APPEARANCES

For the County

BEE & EISMAN
Daniel E. Wall; Esq., of Counsel

For the Association

SOLOMON RICHMAN GREENBERG P.C.
Harry Greenberg, Esq., of Counsel

BEFORE: Martin F. Scheinman, Esq., Arbitrator

BACKGROUND

This grievance protests the County's refusal to pay Police Officer B. McKenna termination pay and pay for unused sick leave after McKenna was approved for a disability pension. The Association argues that the County's refusal to pay McKenna for these items violates Section 8.12-1(A) of the parties' Collective Bargaining Agreement. At the hearing in this matter the Association also objected to the County's refusal to give McKenna his shield and I.D. card. The Association maintains that the County's refusal to give McKenna these items violates the parties' past practice. It asks that the County be directed to pay McKenna \$22,916.50 in termination and unused sick leave pay and to give McKenna his shield and I.D. card.

The basic facts are undisputed. McKenna was hired by the County Police Department on July 18, 1986. On July 21, 1993, McKenna applied for disability retirement. On August 25, 1993, McKenna applied to voluntarily resign his position with the Department effective September 3, 1993, due to what McKenna described as "injuries suffered in the line of duty" (Joint Exhibit No. 2). McKenna's voluntary resignation was approved and on September 3, 1993, he resigned from the County Police Department. Following McKenna's resignation, his application for a disability pension was approved effective September 24, 1993.

Shortly after his resignation, McKenna applied for termination and unused sick leave pay pursuant to Section 8.12-1(A) of the parties' Agreement. Believing that McKenna was not eligible to

receive any monies pursuant to that provision of the Agreement, the County denied the request. It is undisputed that if McKenna were eligible to receive monies pursuant to Section 8.12-1(A) of the Agreement, he would be entitled to receive \$22,916.50 (County Exhibit No. 1).

The Association grieved the County's refusal to pay McKenna any monies pursuant to Section 8.12-1(A) of the Agreement. When the parties were unable to resolve this dispute at the lower stages of their grievance procedure, the Association demanded arbitration.

A hearing in this matter was held before me on December 13, 1994. McKenna was not present at the hearing. However, the Association was authorized by McKenna to proceed on his behalf. At the hearing, the parties were afforded a full opportunity to present evidence and arguments in support of their positions. They did so. Subsequent to the hearing, the parties filed briefs in support of their respective positions. Upon my receipt of same, the record was declared closed.

DISCUSSION AND FINDINGS

The Issue

The issue to be decided is as follows:

1. Did the County violate Section 8.12-1 of the parties' Collective Bargaining Agreement by refusing to pay Police Officer Brian McKenna termination pay and pay for unused sick leave?
2. If so, what shall be the remedy?

Relevant Contract Language**8.12-1 Termination Pay and Pay For Unused Sick Leave.**

(A) Upon separation from service after ten (10) years, for any reason or upon the death in service of any employee or upon retirement qualifying for either ordinary or job related or accidental disability under the Retirement and Social Security Law of New York State, such employee or his/her legal representative, shall be entitled to cash payment for accumulated terminal leave computed on an entitlement basis of five (5) days for each year of completed service. An employee's entitlement to termination pay shall be pro-rated on a portion of a completed year worked pursuant to limitations of Section 431 of the New York State Retirement and Social Security Law. Years of completed service shall only include time served as a member of the Police Force of the County on a full pay status, while on a military leave of absence pursuant to Section 243 of the Military Law of New York State and time actually credited toward retirement benefits for service during World War II as provided in Ordinance No. 298-1970. In addition, an employee or his/her legal representative entitled to cash payment for accumulated terminal leave, shall be paid in a lump sum, the value of his/her accumulated and unused sick leave to the extent of fifty (50) percent thereof, but not to exceed a total of two hundred thirty five (235) working days.

(B) This benefit shall not apply to any employee who separates from service for cause or with charges pending.

Positions of the Parties

The Association maintains that the County has violated the clear and unambiguous language of Section 8.12-1(A) of the parties' Agreement by refusing to pay McKenna termination pay and pay for unused sick leave. It points out that Section 8.12-1 clearly states that "upon retirement qualifying for either ordinary or job related or accidental disability under the Retirement and Social Security Law of New York State," an employee shall be entitled to termination pay and pay for unused sick leave. The Association contends that it is undisputed that McKenna has qualified for a disability pension. It also notes that there is no dispute that McKenna has retired from his position with the Department.

Therefore, the Association argues that McKenna is clearly entitled to termination pay and pay for his unused sick leave pursuant to Section 8.12-1 of the Agreement.

The Association maintains that it is irrelevant the McKenna retired less than one (1) month before he qualified for a disability pension. It contends that Section 8.12-1 of the Agreement contains no requirement that an employee qualify for a disability pension before retiring in order to be eligible for termination pay and pay for unused sick leave. The Association claims that Section 8.12-1 only requires that an employee be retired and that he or she qualify for a disability pension. It submits that the order in which those events occur is irrelevant for purposes of Section 8.12-1. Since McKenna has satisfied both requirements of Section 8.12-1, the Association insists that he is entitled to termination pay and pay for unused sick leave.

The Association notes that Section 8.12-1 explicitly states that the benefit of the Section "shall not apply to any employee who separates from service for cause or with charges pending" (Joint Exhibit No. 1 at pg. 33). It maintains that these are the only relevant factors which could disqualify an employee, such as McKenna, who otherwise qualifies for the benefit provided by Section 8.12-1. The Association contends that McKenna did not separate from service for cause or with charges pending. Therefore, it argues that McKenna may not be disqualified from receiving termination pay and pay for unused sick leave.

The Association maintains that McKenna attempted to obtain a

leave without pay during the period of time when his application for a disability pension was pending. It contends that if McKenna had been granted such a leave, he would not have had to retire before being granted his disability pension. However, the Association claims that McKenna was told by his Commanding Officer and by other supervisors, that the Department did not grant leaves without pay. It asserts that the injuries McKenna suffered in the line of duty prevented McKenna from adequately performing his job duties. Therefore, the Association claims that the Department's refusal to grant McKenna a leave without pay, left him with no choice but to retire before being approved for a disability pension. It argues that since Departmental policies forced McKenna to retire before qualifying for a disability pension, it would be grossly unfair to use the timing of McKenna's retirement as a reason to deprive him of termination pay and pay for unused sick leave. Thus, the Association insists that McKenna must be granted termination pay and pay for unused sick leave.

The Association maintains that the parties have a longstanding practice of allowing Police Officers who retire in good standing to keep their shields and I.D. cards. It notes that it is undisputed that McKenna retired in good standing. Therefore, the Association argues that McKenna should be given his shield and his I.D. card.

Accordingly, the Association requests that its grievance be sustained.

The County, on the other hand, maintains that it has not violated the parties' Agreement by refusing to pay McKenna

termination pay and pay for unused sick leave. It contends that McKenna did not satisfy the contractual requirements for receipt of those benefits. Therefore, the County argues that McKenna is not entitled to receive them.

The County maintains that the benefits set forth in Section 8.12-1 of the Agreement are provided to employees who fall into one (1) of three (3) categories: separation from service after ten (10) years of employment; death in service; or retirement qualifying for either an ordinary or job related or accidental disability pension. It contends that McKenna does not fall into either of these categories. The County points out that it is undisputed that McKenna separated from service before having worked for ten (10) years. It notes that it is obvious that McKenna did not die in service. The County also claims that it is undisputed that McKenna had not qualified for any type of a disability pension when he voluntarily resigned his position with the County. Therefore, it insists that McKenna is not entitled to termination pay and pay for unused sick leave.

The County maintains that it is irrelevant that McKenna qualified for a disability pension after he resigned from his position with the Department. It contends that in determining an employee's entitlement to benefits pursuant to Section 8.12-1, the only date of significance is the effective date of the employee's separation from service. The County claims that the date of separation triggers whatever right to benefits an employee might have. It notes that it is undisputed that McKenna had not

qualified for a disability pension on September 3, 1993, the effective date of his separation from service. Thus, it argues that McKenna did not qualify for benefits pursuant to Section 8.12-1 on the effective date of his resignation from the Department. The County insists that subsequent events, such as qualifying for a disability pension, cannot alter the fact that McKenna did not qualify for benefits pursuant to Section 8.12-1 on the day he resigned his position with the Department.

The County also notes that the language of Section 8.12-1 relied upon by McKenna and the Association, explicitly states that an employee shall be eligible for benefits "upon retirement qualifying for" a disability pension (Joint Exhibit No. 1 at pg. 32). It contends that McKenna did not retire from service with the County. Rather, the County points out that it is undisputed that McKenna chose to voluntarily resign. Thus, it argues that McKenna is not entitled to any of the benefits provided under Section 8.12-1 of the Agreement. Therefore, the County insists that McKenna is not entitled to termination pay or pay for unused sick leave.

; Finally, the County maintains that McKenna was no longer an employee of the County after he resigned. It contends that following his resignation, McKenna was no longer covered by the terms of the Agreement. Thus, the County argues that after his resignation, McKenna could no longer become eligible for benefits under the Agreement. Therefore, it insists that after his resignation, McKenna could not become eligible for termination pay and pay for unused sick leave as set forth in Section 8.12-1 of the

Agreement.

Accordingly, the County requests that the Association's grievance be denied in its entirety.

Opinion

After carefully considering the evidence and arguments presented, I find that McKenna is entitled to termination pay and pay for unused sick leave pursuant to Section 8.12-1 of the Agreement. This is so for several reasons.

First, there can be no dispute that McKenna retired from the County's service. An employee cannot qualify for and receive a disability pension unless the employee retires. Receipt of a disability pension is equivalent to retirement. It is undisputed that McKenna has qualified for and is receiving a disability pension under the Retirement and Social Security Law of New York State. Thus, I find that McKenna has retired from the County's service.

Second, McKenna retired qualifying for a disability pension. As the County notes, McKenna did not retire on the date that he resigned his position with the County. Resignation and retirement are distinct concepts. An employee can resign his position and apply for retirement benefits years later. McKenna had applied for a disability pension prior to resigning his position with the County. However, McKenna's disability retirement had not been approved as of the date of his resignation. Thus, I find that McKenna had not retired as of the date of his separation from

service with the County. McKenna's retirement did not take place until his application for a disability pension was approved. Thus, I find that McKenna retired at the same time that he qualified for a disability pension. Therefore, I also find that McKenna retired "qualifying" for a disability pension as that phrase is used in Section 8.12-1 of Agreement.

In so finding, I do not intend to imply acceptance of the County's position that an employee who retires and then subsequently qualifies for a disability pension may not qualify for benefits pursuant to section 8.12-1 of the Agreement. Since, I have found that McKenna did not retire until his application for a disability pension was approved, I need not address this alternative theory advanced by the County.

Third, nothing in Section 8.12-1 of the Agreement requires that an employee retire qualifying for a disability pension on the same day that he or she separates from the County's service, in order to qualify for termination pay and pay for unused sick. Section 8.12-1 provides that an "employee or his/her legal representative, shall be entitled" to termination pay and pay for unused sick leave upon the occurrence of one (1) of three (3) separate events: "[u]pon separation from service after ten (10) years ... or upon ... death in service ... or upon retirement qualifying for [a disability pension]" (Joint Exhibit No. 1 at pg. 32) The phrase "upon separation from service" is part of the same clause and modifies the phrase "after ten (10) years of service." Notwithstanding the County's suggestion to the contrary, the phrase

"upon separation from service" does not modify and is not part of the clause containing the phrase "upon retirement qualifying for" a disability pension. Thus, an employee, such as McKenna, may be entitled to benefits pursuant to Section 8.12-1 "upon retirement qualifying for" a disability pension, even if that retirement takes place after the employee has separated from the County's service.

Admittedly, the usual course of events is for an employee to remain in the County's service until his or her application for a disability pension has been approved. In those instances, an employee separates from service at the same time that the employee retires qualifying for a disability pension. However, it is certainly possible that a Police Officer may need to resign before his or her disability retirement pension has been approved.

More importantly, the language of Section 8.12-1 does not require the result preferred by the County. That language clearly and unambiguously states that an employee shall be entitled to certain benefits "upon retirement qualifying for" a disability pension. It contains no requirement that such retirement be simultaneous with an employee's separation from service. Thus, McKenna may qualify for benefits pursuant to Section 8.12-1, even though he resigned his position with the County less than thirty (30) days before "retirement qualifying for" a disability pension.

Fourth, the County is unpersuasive when it argues that an individual must be an employee of the County at the time that he or she qualifies for benefits pursuant to Section 8.12-1 of the Agreement. Section 8.12-1 does not require that an individual be

an employee of the County at the time that he or she qualifies for benefits under that section. Section 8.12-1 explicitly states that an employee's legal representative may be entitled to benefits pursuant to that section, even if the employee is deceased and no longer employed by the County. Thus, Section 8.12-1 explicitly contemplates that individuals who are not presently employees of the County may qualify for benefits under that section. Therefore, I find that former employees, such as McKenna, who retire with a disability pension which satisfies the requirements of Section 8.12-1 may also qualify for benefits under that section of the Agreement.

Thus, for all of the above reasons, I find that McKenna satisfies the requirements of Section 8.12-1 for termination pay and pay for unused sick leave "upon retirement qualifying for either ordinary or job related or accidental disability under the Retirement and Social Security Law of New York" (Joint Exhibit No. 1 at pg. 32) I find that pursuant to the clear and unambiguous language of Section 8.12-1, it is irrelevant whether McKenna's application for a disability pension was approved on the day he separated from the County's service or approximately one (1) month later. Accordingly, I shall order the County to pay McKenna, forthwith, \$22,916.50 in termination pay and pay for unused sick leave.

Finally, the evidence concerning McKenna's alleged entitlement to his shield and I.D. card is inconclusive. Since this aspect of the parties' dispute was not raised by the Association until late

in the parties' grievance process, neither party had an adequate opportunity to marshal evidence concerning this issue. A hearing shall be scheduled, forthwith, on this remaining aspect of the Association's grievance, if necessary.

AWARD


1. The County violated Section 8.12-1 of the parties' Collective Bargaining Agreement by refusing to pay Police Officer Brian McKenna termination pay and pay for unused sick leave upon his retirement qualifying for a disability pension.

2. The County shall pay to McKenna forthwith \$22,916.50 in termination pay and pay for unused sick leave.

3. A hearing shall be scheduled, forthwith, concerning the issue of McKenna's entitlement to his shield and I.D. card, if necessary.

4. The Association's grievance is sustained to the extent indicated in this Opinion and Award.

March 24, 1995.

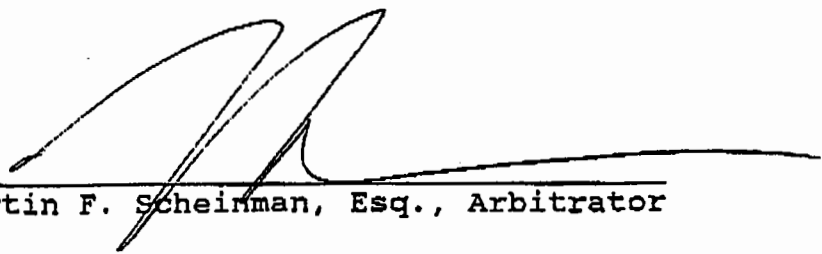


Martin F. Scheinman, Esq., Arbitrator

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

I, MARTIN F. SCHEINMAN, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

March 24, 1995.



Martin F. Scheinman, Esq., Arbitrator