Brooks #5

VOLUNTARY LABOR ARBITRATION

IN THE MATTER OF THE ARBITRATION BETWEEN:

Employer (Michigan)

-and

Union

Grievance No. Employee,—Grievant Article XXIII, Section 9: (Direct appointment of Arbitrator)

DECISION AND AWARD

DECISION

The undersigned was selected by the parties by direct appointment to arbitrate this matter and issue a final and binding Award. The Agreement out of which the dispute arises covers the period of July 1, 1980 - June 30, 1982. The undersigned conducted an evidentiary hearing at the City A City Hall in this matter on July 14, 1983 at which time the parties had the opportunity to examine and cross-examine witnesses under oath and to offer documentary evidence pertinent to the case.

The instant grievance is directly related to, and grows out of, Grievance No. XX. The companion Decision and Award by the undersigned dated today relates the circumstances out of which the instant case arose. At issue is Article XXIII. SICK LEAVE, Section 9, of the Agreement, Pay for Unused Sick Leave, which states:

> Unused accumulated sick leave shall be paid to employees who resign or retire with ten (10) years or more of continuous service, to a maximum of eighty (80)[1] days at the rate of One Dollar ($1.00) per day times the years of continuous service for employees retiring, and at the rate of Fifty Cents ($.50) per day times the years of continuous service for persons resigning.

It will be recalled that Grievant was suspended on February 7, 1983. On February 15, while still suspended, she went to the Employer's Personnel Office and attempted to invoke the necessary procedures to retire immediately. On February 16, her hearing in the Employer Manager's office was held and on the same day she was notified by the Employer Manager that she was discharged effective February 7, the date her suspension commenced.

Notwithstanding the cause of her separation from the active payroll, Grievant was entitled to, and has been receiving, her full pension benefits effective from February 8, 1983. Discharged employees who at the time are otherwise eligible to retire are entitled to pension benefits as if they voluntarily retired. However, the Employer has never paid the sick leave benefits specified in Article XXIII, Section 9 to employees who were discharged and it argues that Grievant's status under Section 9 is that of a discharged employee. The Union argues that Grievant retired within the meaning of Section 9.

Presumably because there is none to reveal, the record is silent concerning any statements significant to the issues in the instant case which were made at the bargaining table when Article XXIII, Section 9 initially was adopted into the Agreement. Likewise, except for the fact that discharged employees have never been awarded any benefits under Section 9, the record does not reveal the circumstances in which the provision has or has not been applied in the past.

Article XXVIII, PENSIONS, merely recites that the amended pension plan shall continue for the life of the Agreement and provides for retirement eligibility upon thirty years of eligible

[1] The parties stipulate this should read ninety (90)-days,

service, regardless of age. The undersigned's conclusions in the case are based solely upon his reading within the four corners of Section 9.

The Union's position is that Grievant has been receiving an Employer pension since the first day after her active employment ceased; necessarily, she had to be retired from her employment with the Employer to receive a retirement pension from it. Because she retired, the Union argues, under the plain terms of Section 9, she was eligible for the benefits provided therein.

The Employer observes that Section 9 explicitly applies only to employees who either "resign" or "retire" and it is undisputed that Grievant did not resign - that is; voluntarily cease to be an active employee. As the Employer sees it, Grievant was discharged and, the Employer's action in companion Case No. XX having been upheld, just cause for Grievant's separation existed. According to the Employer, Grievant's application for a pension did not negate the discharge action and did not constitute an act of retirement; to retire, an employee must submit a resignation and the Employer has the right to refuse to honor a resignation during the pendency of discharge action against the employee. As the Employer interprets Grievant's legal status, she is drawing a pension only because she is legally entitled to do so and this is different from being retired.

According to the terms of Section 9, unused accumulated sick leave shall be paid to an employee with ten or more years of continuous service if the employee resigns or retires. These are alternative conditions and if the employee satisfies either one of them, the employee is eligible for the benefits. An employee who properly has been discharged has not effectively resigned. It is clear the intention of the Agreement is that an employee who is not eligible to retire and who properly is discharged is not to receive the Section 9 benefits. But for employees

in Grievant's position, the alternative exists: Even though the employee doesn't resign, the employee is eligible for the Section 9 benefits if the employee retires. As the undersigned reads Section 9, the parties viewed retirement to be distinct from resignation when they adopted that provision in the Agreement.

By adopting the concept of "resignation", rather than "separation", the parties expressed the intention that involuntary separation for proper cause of an employee not eligible to retire would disqualify the employee from Section 9 benefits. But in creating an alternative condition of eligibility, namely, retirement, nowhere did the parties indicate that only voluntary retirement by an employee in good standing would suffice. The word "'retire" in Section 9 is unqualified by any modifying adverbs and appears to apply to any retirement.

The Employer argues that an employee must resign to be eligible to retire. This is not the common meaning given to the concept of retirement and no reason appears in the record before the undersigned to justify the conclusion that the parties intended such a limited concept of the word. It is noted in this respect that the word "retire" in Section 9 would be superfluous if in every case an employee had to resign before being eligible to retire. As indicated earlier, retirement is a second alternative, a different basis for eligibility for Section 9 benefits.

When Grievant applied for her pension on February 15, 1983, she was still an employee, although suspended. She had the right at that time to start receiving the pension. Indeed, as noted by the Union, her hearing at the Employer Manager's office was not scheduled until the next day and it was possible that the Employer Manager would conclude, in all the circumstances, that she should not be separated from Employer employment. Ultimately, it was recognized that Grievant was eligible for her pension and its effective date was made retroactive to February 8.

In the opinion of the undersigned, a person who receives pension benefits under the Employer's pension plan is in a state of retirement for purposes of determining eligibility for Section 9 benefits.

An adequate basis does not exist for the undersigned to read the unrestricted term "retire" in Section 9 to apply only to individuals seeking to retire under circumstances in which a basis to discharge for proper cause does not exist. The undersigned concludes that Grievant was eligible for the benefits enumerated in Section 9 when she was severed from the Employer's active payroll.

AWARD

1) Grievance No. XX1, dated February 23, 1983 on behalf of Employee, alleging violations of Article XXIII, Section 9 and Article XXVIII of the July 1, 1980 - June 30, 1982 Collective Bargaining Agreement is meritorious.
2) Grievant retired within the meaning of Article XXIII, Section 9 of the Agreement and was eligible for the benefits enumerated therein.

The Employer is directed, without undue delay, to pay Grievant for her unused accumulated sick leave as of the date the Employer pension was awarded to her to a maximum of ninety (90) days at the rate of one dollar ($1.00) per day times the years of continuous service she had earned.

The undersigned reserves jurisdiction over this matter for the sole purpose of resolving any dispute which either party may raise before him pertaining to the interpretation or application of this Award. If neither party raises any such dispute before the undersigned within sixty days of the date of this Award, his jurisdiction shall cease.

Article IX, Section 3, Step 2.B(c) of the Agreement provides that the arbitrator's fee and expenses shall be paid by the party which loses the appeal to arbitration except as the arbitrator directs otherwise. The two grievances were consolidated for hearing purposes and each party "lost" one of the cases. In these circumstances, the undersigned concludes that his fee and expenses should be borne equally by the parties and he so directs.

Jerome H. Brooks

Arbitrator

Dated: August 2, 1983