BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 133, AFSCME, AFL-CIO, DISTRICT COUNCIL 48	
and	Case 68 No. 43692 MA-6046
CITY OF ST. FRANCIS	

Appearances:

Ms. Monica M. Murphy, Podell, Ugent & Cross, S.C., Attorneys at Law, 207 East Michigan Street, Suite 315, Milwaukee, Wisconsin 53202, appearing on behalf of Local 133, AFSCME, AFL-CIO, District Council 48.

Mr. Richard H. Staats, City Attorney, Staats & Staats, Attorneys at Law, 4702 South Packard Avenue, P.O. Box 288, Cudahy, Wisconsin 53110, appearing on behalf of the City of St. Francis.

ARBITRATION AWARD

Local 133, AFSCME, AFL-CIO, District Council 40 (hereinafter Union) and the City of St. Francis (hereinafter City or Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of matters involving the interpretation, application or enforcement of the terms of the agreement by an impartial arbitrator appointed by the Wisconsin Employment Relations Commission (hereinafter Commission). On February 20, 1990, the Union filed a request with the Commission to initiate grievance arbitration. Said request was concurred in by the City. On May 7, 1990, the Commission appointed James W. Engmann, a member of the Commission's staff, as the impartial arbitrator in this matter. A hearing was held on May 17, 1990, in St. Francis, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. No transcript was made of the hearing. The parties submitted briefs, the last of which was received on June 12, 1990, and they waived the filing of reply briefs. Full consideration has been given to the evidence and arguments of the parties in reaching this decision.

STATEMENT OF FACTS

On May 12, 1989, the parties entered into a collective bargaining agreement for 1989 and 1990. As part of that agreement, the parties deleted a provision for the payment of task rates of fifteen cents per hour for employes performing various duties, which rate was paid to the employes in the pay period in which it was earned. In addition, the parties agreed to language which provided a clothing allowance of $160 per year for various employes. The addition of a clothing allowance in the contract was in exchange for the deletion of the task rates from the agreement.

The City properly paid the clothing allowance of $160 in May 1989. On or about December 12, 1989, the Union filed a grievance with the City alleging that the City violated the agreement by not paying the 1990 clothing allowance on the first pay period in December 1989. The City denied the grievance. The Union processed the grievance through the grievance procedure. Said grievance is properly before this arbitrator.

PERTINENT CONTRACT LANGUAGE

ARTICLE 22 - MISCELLANEOUS

. . .

> 22.06. Effective on the date of signing this Agreement, a clothing allowance of One hundred-sixty dollars ($160.00) per year, shall be paid to each Equipment Operator of the Highway Department and to the Engineering Technician in the Engineering Department. Payment shall be made during the first pay period after the date of signing this Agreement. Thereafter, payment shall be made on the first pay period in December. Task rates shall be deleted as of signing of the Agreement.

ISSUE

The parties were unable to stipulate to formulation of the issue. The parties did stipulate that the Arbitrator had authority to frame the issue in his Award.

The Union would frame the issue as follows:

Did the City violate the collective bargaining agreement, specifically Article 22.06, when it failed to pay a clothing allowance in December 1989?

The City would frame the issue as follows:

Does the contract call for three payments (May 1989, December 1989 and December 1990) or two payments (May 1989 and December 1990) of the clothing allowance?

The Arbitrator adopts the formulation as framed by the Union.

POSITIONS OF THE PARTIES

1. Union

The Union argues that the language of the collective bargaining agreement is clear on its face; that said language states that the employes were to get their second clothing allowance payment in December 1989; that the agreement provides that the first clothing allowance payment was to be made as soon as the agreement was signed; that, thereafter, payment shall be made in the first pay period in December; that there is no exception for December of 1989; that there is no provision stating that thereafter payment shall be made in the first pay period of December 1990; that it was at the request of the City that the payments be made in December because the City felt that it would simplify its bookkeeping; that the City chose the December language; that at the time the provision was agreed to, the parties understood that the first payment would be made in the spring of 1989; that the language provides that after the first payment is made in the spring, the payments will be made in the first pay period in December, no exceptions; and that the plain meaning of the words should apply.

The Union also argues that the clothing allowance was intended to be a prospective benefit; that the provision provided that the first such payment should be made at the signing of the agreement; that the agreement covers the time period of January 1, 1989, through December 31, 1990; that even though the agreement was not signed until May 1989, the agreement is viewed as having taken effect in January 1989; that the legal fiction is that the provisions of this agreement were in place as of January 1, 1989; that the clothing allowance was to be paid at the start of the agreement; that it should be viewed as having been paid in January 1989; that since the clothing allowance was to be paid at the start of the contract, it must be viewed as a prospective benefit, not a retroactive one; that the payment made in May 1989 was to help employes with their clothing expenses for 1989; that the payment made in December 1989 was to help employes with their clothing expenses in 1990; that because the Highway Department employes work outside year-round, they need warm clothes in the wintertime; and that the clothing allowance was to help them purchase those clothes before the needed time, not after.

Finally, the Union argues that the Highway Department employes gave up an ongoing benefit to get the clothing allowance payment up-front; that under previous agreements the Highway Department employes were paid a task rate of fifteen cents per hour while performing various duties; that these employes were paid this task rate at the end of the pay period in which they performed those tasks; that the City wanted the task rate eliminated because of the bookkeeping headaches involved with it; that the Highway Department employes agreed to give up the task rate in exchange for the clothing allowance; that this is obvious from the language in the agreement which deletes the task rate in the same paragraph that adds the clothing allowance; that the employes gave up a benefit they got on an ongoing basis; that it was a benefit they saw every pay period and was cash in their pockets now; that the employes intended and expected that they were giving up an ongoing benefit for an up-front benefit; that the bargaining team could not in good conscience negotiate and recommend to fellow employes a provision that made the employes give up something they had on an ongoing basis for something they would get down the road; that the Union felt an up-front clothing allowance was a fair bargain for giving up a task rate that the employes had for a number of years and which the City wanted badly to eliminate; and that since the Union gave a quid pro quo in the form of elimination of the task rate for contract language they considered beneficial, a prospective benefit, the Union is entitled to the benefit of that bargain.

2. City

The City argues that the language in this contract is unambiguous; that the contract is for two calendar years, 1989 and 1990; that the disputed clause clearly states that the payments will be $160 per year; that the first payment will be moved up from December 1989 to May 1989; and that, thereafter, the payment will continue in each December.

The City also argues that if the language is determined to be ambiguous, it should be construed in favor of the City; that it is a standard rule of contract interpretation that the construction should be selected which gives effect to each word or provision of the contract in preference to a

construction which results in surplusage; that the Union seeks to have the clause interpreted so as to omit the words "per year"; that under this rule of construction, such words must be given effect; that in a two-year contract, there is but one payment per year; and that the payments in calendar years 1989 and 1990 occur in May 1989 and December 1990.

Finally, the City argues that the testimony conflicts; that, however, the testimony within the Union's case conflicts while the City's testimony is identical; that there is unrebutted testimony that the language used was proposed by the Union and incorporated into the contract; that a fundamental rule of contract construction is that any ambiguity must be construed most strongly against the drafting party; and that if there is found to be an ambiguity, and both interpretations are found to be reasonable, then this rule of construction dictates that the clause must be construed against the Union.

DISCUSSION

The Union makes three arguments to support its position that a clothing allowance payment was due in December 1989. First, the Union argues that the collective bargaining agreement is clear on its face. Second, the Union argues that the clothing allowance was intended to be a prospective benefit. Third, the Union argues that the Highway Department employes gave up an ongoing benefit to get the clothing allowance payment up-front.

As to the first argument, the Union asserts that the agreement states that the first payment shall be paid during the first pay period after the date of signing the agreement and that, thereafter, payment shall be made on the first pay period in December. However, the language is not as clear as the Union asserts, for it does not state specifically that the employes were to get a second clothing allowance payment in December 1989. In fact, the City also argues that the language is clear in that it states that a clothing allowance of $160 shall be paid per year and that, having paid the 1989 payment, the City was not required to make a second payment in 1989. What is clear is that the clear language that both parties read into the agreement comes to clearly opposite results. So as to the Union's first argument, the language is not clear on its face that the City violated the agreement by not paying a clothing allowance in December 1989.

As to the second argument, the Union argues that since the first payment was made at the signing of the contract in May 1989 and since the contract begins in January 1989, then the payment at the signing was meant to be for the following year and that the payment for 1990 was meant to be paid in December 1989. However, the Union's testimony in support of this argument runs counter to the City's testimony which stated that this benefit was to be paid to this unit in the same way it was paid to other units -- retrospectively -- except for the 1989 payment which was to be paid early to help the Union sell the agreement to its membership. Neither side presented any documentary evidence to support its position on this point. If it was the Union's intent that the benefit be prospective, it does not appear to have been the City's intent, nor has the Union shown that the language or bargaining history supports its perspective.

As to the third argument, the Union argues that the task rates it gave up to get the clothing allowance were paid on an on-going basis, and that it could not in good conscience negotiate and recommend a provision to delete said rates unless it was granted an up-front benefit. Again, the testimony is in conflict on this point and, again, no documentary evidence was presented to support the Union's claim that the clothing allowance was to be an up-front payment.

Indeed, the language of the agreement suggests a different result. The parties signed this agreement on May 12, 1989. At that time two things happened. "Effective on the date of signing this Agreement, a clothing allowance of One hundred-sixty dollars ($160.00) per year, shall be paid to each (eligible employe). . . . Task rates shall be deleted as of signing of the Agreement." One benefit was given for the other. For that reason, it is clear that the clothing allowance was not meant to cover the period of January 1, 1989, the first day of the contract, to May 11, 1989, the day before the signing of the agreement, since the task rates were in effect during that time. The clothing allowance only went into effect when the task rates were deleted; that is, May 12, 1989. Thus, the City agreed to pay a clothing allowance of $160 per year effective May 12, 1989, presumably through May 11, 1990. The City also agreed to pay a clothing allowance of $160 for the second year, which runs from May 12, 1990, through May 11, 1991.

The question as to when these payments must be made becomes clearer. No one disputes that the first payment was due "during the first pay period after the date of signing this Agreement." The contract is clear on that. That payment was paid. And that payment was for the clothing allowance year of May 12, 1989, through May 11, 1990. The agreement then continues: "Thereafter, payment shall be made on the first pay period in December." The "thereafter" does not refer to the first payment but to the first year. In essence, the agreement states, "(In the following year), payment shall be made on the first pay period in December." This is consistent with the language granting a $160 clothing allowance "per year." It does not make sense for the

City to make a payment in December 1989 for a clothing allowance year of May 12, 1990, through May 11, 1991. Therefore, it is clear that the City's obligation to pay a clothing allowance of $160 per year did not include a payment in December 1989.

For the above stated reasons, the Arbitrator issues the following

AWARD

1. That the City did not violate the collective bargaining agreement, specifically Article 22.06, when it failed to pay a clothing allowance in December 1989.

2. That the grievance is denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 30th day of August, 1990.

By _____
James W. Engmann, Arbitrator