

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

FOREST COUNTY DEPUTY SHERIFF'S
ASSOCIATION

and

FOREST COUNTY (SHERIFF'S DEPARTMENT)

Case 61
No. 47776
MA-7379

Appearances:

Mr. Patrick J. Coraggio, Labor Consultant, Labor Association of Wisconsin, Inc.,
2825 North Mayfair Road, Wauwatosa, WI 53222, appearing on behalf of the
Association.

Ruder, Ware & Michler, S.C., Attorneys at Law, 500 Third Street, P. O. Box 8050,
Wausau, WI 54402-8050, by Mr. Dean R. Dietrich, appearing on behalf of the
County.

ARBITRATION AWARD

Forest County Deputy Sheriff's Association, hereafter the Association, and Forest County (Sheriff's Department), hereafter the Employer or County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Association, with the concurrence of the County, requested the Wisconsin Employment Relations Commission to appoint a staff member as a single, impartial arbitrator, to resolve the instant grievance. On August 20, 1992, the Commission appointed Coleen A. Burns, a member of its staff, as impartial arbitrator to resolve the instant dispute. Hearing was held on September 29, 1992, in Crandon, Wisconsin. The hearing was not transcribed and the record was closed on December 17, 1992, upon receipt of written argument.

ISSUE

The parties stipulated to the following statement of the issue:

Did the County violate the collective bargaining agreement by denying to pay annual dues to the Wisconsin County Police Association and Northwoods Law Enforcement Association for members of the Forest County Deputy Sheriff's Association?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE II

RIGHTS OF THE COUNTY

Section 2:01: (sic) The Forest County Deputies Association shall recognize that the Civil Service Commission, the Forest County Board of Supervisors, and the Forest County Sheriff, have the right to hire and to discipline employees up to and including discharge, provided that such employees shall not be disciplined or discharged unless for just cause. Examples of conduct which may lead to discipline are as follows:

1. Absenteeism.
2. Working under the influence of liquor, drinking on the job or bringing intoxicating beverages onto the job.
3. Repeated absence due to alcoholism.
4. Failure to comply with instructions and order of department heads.
5. Stealing of County or fellow worker's property or any type of dishonesty.
6. Destroying, defacing or the mutilation in any way of County property through neglect or willful act.
7. Deliberate violation of safety rules and regulations whether affecting himself or co-workers or County property.
8. Continued use of profanity or obscene language.
9. Physical violence or fighting.
10. Refusal to maintain a reasonably clean and neat appearance in personal habits and dress.

Deputies are expected t (sic) obey all other reasonable rules and regulations of the

County. Refusal to obey the stated rules and regulations of the County and/or failure to properly perform the duties of his department may constitute sufficient cause for discipline, including possible discharge.

Section 2.02: The County possesses the sole right to operate the County government and all management rights repose in it, but such rights must be exercised consistently with the rules and regulations of the County Civil Service Commission and in conjunction with the State laws regulating the operating of the Sheriff's Department under the duly elected Sheriff. These rights which are normally exercised include, but are not limited to, the following:

- A. To direct all operations of the Forest County Sheriff's Department.
- B. To hire, promote, transfer, assign and retain officers in positions with the County and to suspend, demote, discharge an (sic) take other disciplinary action, provided with just cause, against Deputies pursuant to the authority and under the rules and regulations of the Forest County Civil Service.
- C. To relieve Deputies from their duties because of lack of work or for other legitimate reasons.
- D. To maintain efficiency of County government operations entrusted to it and to introduce new or improved methods or facilities and to change existing methods or facilities.
- E. To contract out for goods or services.
- F. To determine the methods, means and number of personnel needed to carry out the operations that are conducted.
- G. To take whatever action is necessary to carry out the functions of the County in situations of emergency.
- H. To take whatever action is necessary to comply with State or Federal Law.
- I. To determine when overtime work is necessary and the composition of the force to complete such work.

The Association and the Deputies agree that they will not attempt to abridge these

management rights and the County agrees it will not use these management rights to interfere with rights established under this Agreement. Nothing in this Agreement shall be construed as imposing an obligation upon the County to consult or negotiate with the Association concerning the above areas of discretion and policy, subject, however, to the mutual obligation of the parties to bargain impact. Nothing herein contained shall divest the Association from any of its rights under Chapter 111 of the Wisconsin Statutes.

...

ARTICLE IV

GRIEVANCES

Should differences arise between the Employer and the Association concerning the interpretation of (sic) application of the written provisions of this Agreement, every reasonable effort shall be made to settle such differences. . .

...

Section 4.08: Any grievance which cannot be settled through the above procedures may be submitted to an Arbitration Board. If the written decision of the Personnel Committee is not agreed to by the Association, the Association must notify the Personnel Committee in writing within ten (10) days of the date of the written decision that they intend to proceed to take the grievance to arbitration. The procedures for arbitration are as follows:

...

- D. Authority of Arbitrator: The decision of the Arbitration Board shall be limited to the subject matter of the grievance and shall be restricted solely to the interpretation of the terms of this contract.

...

ARTICLE XXV

ENTIRE MEMORANDUM OF AGREEMENT

This Agreement constitutes the entire Agreement between the parties and no verbal statements shall supersede any of its provisions. Any amendment supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto. The parties further acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matters

not remed (sic) by law from the areas of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and the opportunity are set forth in this Agreement. Therefore, the County and the Association for the life of this Agreement, each voluntarily, unqualifiedly waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to in this Agreement, as well as any specific proposal which was made by either of the parties and subsequently dropped by the parties during the course of negotiations for this agreement. Waiver of any breach of this Agreement by either party shall not constitute a waiver of any future breach of this Agreement.

BACKGROUND

For more than twenty years, the Chief Deputy for Forest County has requested the County's Audit and Claims Committee to pay, on behalf of each full-time bargaining unit employe, the annual membership fees for three law enforcement associations, *i.e.*, the Wisconsin County Police Association, the Northwoods Law Enforcement Association and the Wisconsin Sheriff's and Deputy Sheriff's Association. For more than twenty years, the Committee has approved payment of these fees.

On April 15, 1991, the County Clerk issued the following:

TO: ALL DEPARTMENT HEADS
FROM: AUDIT & CLAIMS COMMITTEE
RE: County Paid Dues to Only One organization Annually

At the Audit and Claims Committee meeting on April 9th, a new policy was adopted by the Committee regarding annual dues to various organizations.

In the future, the Audit and Claims Committee will approve dues to one organization annually. If you or a member of your department wish to belong to more than one organization, it will be the responsibility of the individual to pay the dues.

In the Sheriff's Department, the Sheriff will select only one organization where the County will pay the dues.

If you have any questions in regard to this policy, please put your comments in writing and give to the County Clerk before the next Audit and Claims Committee meeting on May 14, 1991.

It is not evident that any bargaining unit employe, or representative of the Association, received a copy of this notice.

Prior to January 10, 1992, the Sheriff and the Chief Deputy advised the employes that the County had decided to pay for the dues of only one organization, which organization was to be chosen by the employes. The employes chose the Wisconsin Sheriff's and Deputy Sheriff's Association.

On January 10, 1992, Association President Anthony Jakubiec sent the following:

TO: Audit & Claims Comm. Shf. Knoll and Dora James.

From: Forest County Dep/Shfs Assoc.

REF: County dues paid to only one organization.

Forest County has paid the dues to three organizations for the Dep/Shf's for over twenty years. This past practice has went (sic) on for much longer but no one knows how long. We feel the County should continue to pay these dues, because of this past practice, the small amount involved, and this is an item that should be taken up at future negotiations. The amount involved is only a total of \$16.00 times 10 deputies per year.

We would appreciate a written response as soon as possible so we can get this business settled.

The Audit and Claims Committee denied the Association's request to approve payment for the membership fees of the Wisconsin County Police Association and the Northwoods Law Enforcement Association. Thereafter, the Association filed a grievance alleging that the County had violated Article II, and any other appropriate article, by failing to pay for the membership fees of the Northwoods Law Enforcement Association and the Wisconsin County Police Association. The grievance was denied at all steps and, thereafter, submitted to arbitration.

The Wisconsin County Police Association membership fees are \$5.00 per person per year, totaling \$50 for all ten members of the Association. The membership fee for the Northwoods Law Enforcement Association is \$4.00 per person per year, totaling \$40 for all members of the Association.

POSITIONS OF THE PARTIES

Association

The parties have a long standing practice of paying the membership fees of the Wisconsin County Police Association, the Northwoods Law Enforcement Association and the Wisconsin

Sheriff's and Deputy Sheriff's Association. This practice has become an implied condition of employment which cannot be unilaterally changed by the County.

Section 2.02 of the labor contract clearly requires the County to bargain on any changes on wages, hours or conditions of employment which derive from the unilateral action of the Audit and Claims Committee of the County Board. Inasmuch as the County never gave the Association any written notification that the benefit would be discontinued and the County never offered to bargain the change or the impact of the change in the benefit, the County has violated the express terms of Section 2.02. The County's unilateral decision to discontinue the membership fee benefit is an unreasonable exercise of the County's management rights. The Arbitrator should sustain the grievance and award an appropriate remedy.

County

The Association's claim of a violation of the labor agreement is based upon its contention that there exists a binding past practice. Under the terms of the labor contract, the grievance and the arbitrator's authority is limited to the interpretation or application of the written provisions of the labor agreement. Inasmuch as no provision of the labor contract mentions, in any manner whatsoever, payment of membership fees for bargaining unit members, the grievance is not subject to arbitration and, therefore, should be summarily dismissed. Under arbitrable law, the County can raise the issue of arbitrability of a grievance at any point in the arbitration proceedings because the arbitrability of a grievance relates to the jurisdiction of the arbitrator to hear the matter. (Cites omitted.)

Article XXV, entitled Entire Memorandum of Agreement, is commonly referred to as a "zipper clause." It is well recognized that such clauses are enforceable and nullify any practices existing outside of the labor agreement. This is particularly true where, as here, the labor agreement is silent as to the matter at issue. The labor agreement does not contain a "maintenance of standards" provision. To conclude that the past practice alleged by the Association is binding, would create an unwritten and unexecuted "amendment" to the Agreement, in direct contradiction to the terms of Article XXV.

It is not evident that the Association and the County ever discussed, or negotiated, the payment of the membership fees. Nor is it evident that the deputies ever requested, or submitted a claim, to the Audit and Claims Committee for payment of membership fees. Rather, the evidence demonstrates that the Chief Deputy, a non-union employe, submitted the request for payment to the Audit and Claims Committee. The evidence mandates the conclusion that the County unilaterally implemented the procedure for payment of membership fees and voluntarily paid those fees. Given that there is absolutely no evidence that the County and the Association "mutually" agreed to the alleged practice, the Association's claim of a binding past practice is without merit. Moreover, payment of the membership fees was a "gratuity," and not a major condition of employment and, thus, cannot be considered to be a binding past practice.

In refusing to pay the dues for the other two law enforcement associations, the County did

not exercise or rely upon a management right set forth in Section 2.02. Rather, in taking that action, the County exercised its statutory authority to control its financial affairs as set forth in Chapter 59 of the Wisconsin Statutes.

The grievance did not claim that the County was required to bargain the impact of its decision to pay for the dues of only one law enforcement association. Nor did the Association ever request to bargain on the impact of its decision. Since the Association did not ask to negotiate on the payment of the membership fees, it is obvious that the County did not refuse to negotiate with the Association.

Given the language of Article XXV, it must be concluded that the County is required to bargain with the Association when it exercises a management right, as set forth in Section 2.02, which impacts upon a matter set forth in a labor agreement. The County has not exercised a "management right" set forth in Sec. 2.02. Nor has the County's conduct impacted upon any matter set forth in the labor agreement.

The Association claims that the County committed a prohibited practice in violation of Sec. 111.70, Stats. The grievance arbitration forum is not the proper forum for the resolution of this claim. The Association's arguments are without merit and the grievance should be dismissed in its entirety.

DISCUSSION

Prior to the start of the arbitration hearing, the parties stipulated to the statement of the issue to be presented to the Arbitrator. The stipulated statement of the issue did not raise an issue of arbitrability. Nor did the County make any opening statement which raised an issue of arbitrability. Rather, the County raised the issue of arbitrability for the first time in its post-hearing written brief.

By entering into a stipulation of the issue which does not raise the issue of arbitrability and by raising the arbitrability claim for the first time in post-hearing written argument, the County was waived its right to argue arbitrability herein. Accordingly, the undersigned has not considered the merits of the County's arbitrability claim.

The collective bargaining agreement is silent on the issue of the payment of dues to the Wisconsin County Police Association, the Northwoods Law Enforcement Association, and the Wisconsin Sheriff's and Deputy Sheriff's Association. The Association maintains, however, that there is a past practice of paying the dues to the Wisconsin County Police Association, the Northwoods Law Enforcement Association, and the Wisconsin Sheriff's and Deputy Sheriff's Association which is entitled to be given effect as an implied term of the contract.

As the County argues, Article XXV, Entire Memorandum of Agreement, functions as a "zipper clause". By including this clause within the agreement, the parties have mutually agreed to be bound only by the terms of the written agreement. Since the practice relied upon by the

Association exists outside of the terms of the written agreement, the County is not bound by the practice. Contrary to the argument of the Association, the practice relied upon by the Association cannot be given effect as an implied term of the labor contract.

Article II states, *inter alia*, that "The Association and the Deputies agree that they will not attempt to abridge these management rights and the County agrees it will not use these management rights to interfere with rights established under this Agreement." As the County argues, the collective bargaining agreement does not establish a right to have dues to the Wisconsin County Police Association, the Northwoods Law Enforcement Association, and the Wisconsin Sheriff's and Deputy Sheriff's Association paid by the County. Since there has not been any interference with "any rights established under this Agreement", the undersigned rejects the Association's argument that the County's conduct involved an unreasonable exercise of the County's management rights in violation of Article II.

Article II also states, that "Nothing in this Agreement shall be construed as imposing an obligation upon the County to consult or negotiate with the Association concerning the above areas of discretion and policy, subject, however, to the mutual obligation of the parties to bargain impact." Contrary to the argument of the Association, this language does not require the County to provide advance notice to the Association of an intent to change wages, hours, or conditions of employment. Nor does this language contractually obligate the County to bargain changes in wages, hours, or conditions of employment.

Assuming arguendo, that the parties intended the "mutual obligation of the parties to bargain impact" to be enforceable as a term of contract, the record does not warrant the conclusion that the County violated any duty to bargain impact. The County's duty to bargain impact is triggered by an Association request to bargain the impact. As the County argues, the record fails to establish that the Association ever made a request to bargain the impact of the County's decision to pay for membership in only one law enforcement association.

Article II also states that "Nothing herein contained shall divest the Association from any of its rights under Chapter 111 of the Wisconsin Statutes." Recognition that the Association has Chapter 111 rights, is not an incorporation of those rights into the contract. As the County argues, the issue of whether or not the County has violated its statutory duty to bargain must be litigated in another forum.

In summary, given the language of Article XXV, the past practice relied upon by the Association is not entitled to be given effect as an implied term of contract. Contrary to the argument of the Association, the County did not violate Article II by denying to pay the annual dues to the Wisconsin County Police Association and the Northwoods Law Enforcement Association.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The County did not violate the collective bargaining agreement by denying to pay annual dues to the Wisconsin County Police Association and Northwoods Law Enforcement Association for members of the Forest County Deputy Sheriffs Association.
2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 12th day of March, 1993.

By Coleen A. Burns /s/

Coleen A. Burns, Arbitrator