BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
IRON COUNTY PUBLIC EMPLOYEES UNION LOCAL 728, AFSCME, AFL-CIO	:	Case 43 No. 47939 MA-7442
and	:	
IRON COUNTY	:	
In the Matter of the Arbitration of a Dispute Between	:	
IRON COUNTY PUBLIC EMPLOYEES UNION LOCAL 728-D, AFSCME, AFL-CIO	:	Case 45 No. 47885 MA-7417
and	:	
IRON COUNTY	:	

Appearances:
Mr. Jack Bernfeld, Staff Representative, AFSCME, Council 40, AFL-CIO, appearing on behalf of the Union.
Godfrey & Kahn, S.C., Attorneys at Law, by Mr. John J. Prentice, appearing on behalf of the Employer.

ARBITRATION AWARD

On August 7, 1992, Iron County Public Employees, Local 728 and 728-D, AFSCME, AFL-CIO, hereinafter Union, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to act as arbitrator in a dispute concerning the cost-of-living adjustments provided for in the collective bargaining agreements between the aforementioned Locals and Iron County. A hearing in the matter was held on January 20, 1993, at which time the parties were afforded an opportunity to present documentary evidence and testimony relevant to the dispute. A stenographic transcript of the proceedings was taken and the parties filed post-hearing briefs and reply briefs with the undersigned by June 25, 1993.

ISSUE:

At hearing the Union stated it believed the issue to be:

> Has the County's calculation and implementation of quarterly cost-of-living adjustments since April 1, 1988, violated the parties' collective bargaining agreements? If so, what is the appropriate remedy?

The County at hearing objected to the Union's inclusion of the date of April 1, 1988, and proposed framing the issue as follows:

> Has the County's calculation and implementation of the CPI violated the parties' collective bargaining agreement, and if so, what is the appropriate remedy?

The undersigned believes the issue should be framed as follows:

> Did the County violate the 1990-92 collective bargaining agreements when it unilaterally switched from the 1967 = 100 standard reference base specified in Article 18 of said agreements to the 1982-84 = 100 standard reference base in calculating quarterly wage increases required by Article 18? If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE:

ARTICLE 8 - GRIEVANCE PROCEDURE

> Section 1 - Definition. A grievance is a claim by an employee or group of employees against the Employer arising out of the meaning, application or interpretation of the terms of this Agreement.
>
> Section 2. The Employer and the Union agree to the following system of presenting and adjusting grievances which must be presented and processed in accordance with the following steps, time limits and conditions. A major policy issue or grievance affecting a group of employees may be commenced by the Union on its behalf at Step 3 of this

procedure.

Step 1: Should an employee feel that his/her rights and privileges under any provision of this Agreement have been violated, they should consult the Union President. The aggrieved employee, with a Union steward/officer if the employee so chooses, shall present the grievance to the employee's immediate supervisor in his/her respective department or division within fifteen (15) working days of the date that the employee knew or should have known of the alleged violation of the collective bargaining agreement. The immediate supervisor shall, within five (5) calendar days or less, submit an answer to the employee and the Union.

. . .

Step 4: If the grievance is not settled in the preceding step, the Union may appeal the grievance to arbitration by giving written notice of its desire to arbitrate to the Employer within ten (10) days after receiving the Employer's written response in Step 3. If the grievance is appealed to arbitration, representatives of the Employer and the Union shall discuss the selection of a (sic) arbitrator. If the parties are unable to agree on an arbitrator within ten (10) working days after the Union has served its written notice upon the Employer, the party seeking arbitration shall request the Wisconsin Employment Relations Commission to appoint a member of its staff to serve as arbitrator. The arbitrator shall have no right to add to, subtract from, delete or change any of the provisions of the Agreement. He/she shall consider and decide only the particular issue(s) presented to him/her in writing by the Employer and the Union. If the matter sought to be arbitrated does not involve an interpretation of the terms or provisions of the Agreement, the arbitrator shall so rule in his/her award. The award of the arbitrator shall be final and binding on the Employer, the Union and the employee or employees involved. The expenses of the arbitrator, including his/her fee, if any,

shall be shared equally by the Employer and the Union.

. . .

ARTICLE 18 - COST-OF-LIVING ADJUSTMENTS

Section 1. All employees covered by the terms of this Agreement shall receive cost-of-living salary adjustments. Said adjustments are to be geared to the Bureau of Labor Statistics, Consumer Price Index.

Section 2. If the Consumer Price Index (National Series) of the Bureau of Labor Statistics, U.S. Department of Labor, Urban Wage Earners and Clerical Workers (1967 = 100), Shall (sic) increase from the November level of 1973, 160.0, there shall be added to the straight-time hourly earnings of each employee a cost-of-living adjustment. Said adjustment shall be in the amount of one cent ($.01) per hour for each three-tenths (.3) of a point change in the Consumer Price Index.

Section 3. Changes shall be made quarterly commencing with the first pay period beginning on January 1, April 1, July 1, and October 1 of each year. Cost-of-living adjustments for the above-listed dates shall be based on the BLS Consumer Price Indexes for the prior November, February, May and August, respectively.

Example: The increase effective April 1, 1974, will be based on the increase in the CPI from November, 1973, at 160.0, to the February, 1974, Index, and shall be in the amount of one cent ($.01) per hour for each three-tenths (.3) of a full point change in the Consumer Price Index.

Section 4. Notwithstanding any decrease in the BLS Consumer Price Index, there shall not be any decrease in any cost-of-living adjustment in accordance with this Agreement Unless (sic) the amount of the decrease in the adjustment under such table is at least two cents ($.02), at which time the full amount of

the appropriate decrease shall be made.

Section 5. If the BLS Consumer Price Index in its present form and calculated on the same basis shall be revised therefrom or discontinued, the parties shall attempt to adjust this clause, or, if agreement is not reached, the parties shall request the Bureau of Labor Statistics to provide an appropriate conversion or adjustment, which shall be applicable as of the appropriate adjustment date and thereafter. 1/

FACTS:

This dispute centers around the County Clerk's unilateral decision effective April 1, 1988, to calculate employe wage increases based upon movement of the Consumer Price Index as specified in Article 18 of the parties' collective bargaining agreements using the Bureau of Labor Statistics (BLS) 1982-84 = 100 standard reference base instead of the contractually specified 1967 = 100 standard reference base. The basic facts are not in dispute.

At hearing the parties stipulated the following:

1. The issue of cost-of-living adjustments has not been discussed by the parties from January 1, 1986, up to the date the grievances which are in dispute in this proceeding, were filed.

2. The cost-of-living clause, Article 18 of the contract, is identical in all three agreements.

3. All cost-of-living adjustments under the collective bargaining agreements prior to the April 1, 1988 adjustment used the base of 1967 = 100 index to generate the

1/ The Highway and Forestry Department collective bargaining agreement contains typographical errors in Article 18 as to numbering of the paragraphs. The second "Section 3" should be numbered "Section 4," and then "Section 4" should be numbered "Section 5." This is the correct numbering as it appears in the Courthouse agreement.

wage increases.

4. All cost-of-living adjustments made during the period July 1, 1988 through October 1, 1992, use the base 1982-84 = 100 index to generate the wage increases.

It wasn't until June 25, 1992, when local union representative Mattson and Council 40 Research Analyst Lehtinen spoke with the Deputy County Clerk Grasso that the Union learned for the first time that the County had been using the 1982-84 = 100 standard reference base period in calculating the quarterly wage adjustments generated under Article 18 of the parties' collective bargaining agreement. Subsequent to learning this, on July 1, 1992, the Union filed the subject grievances contending the County was in violation of Article 18 of the collective bargaining agreement in using the aforesaid 1982-84 = 100 standard reference base. It is also apparent from the facts of this case that it wasn't until the Union filed its grievance that County officials, other than the Clerk, were aware that the contractually specified base for calculating cost-of-living (COL) quarterly wage adjustments was not being utilized.

The effect of usage of the 1982-84 = 100 standard reference base period instead of the 1967 = 100 period resulted in an hourly rate of pay to employes as of October 1, 1992, which was $1.58 per hour less than what would have been paid to employes had the contractually specified 1967 = 100 base been used. Furthermore, as additional adjustments are called for under the collective bargaining agreements continued usage of the 1982-84 = 100 base will necessarily result in additional loss of wages to employes when measured against what they would have received had the 1967 = 100 base been used as specified in Article 18.

POSITIONS OF THE PARTIES:

The County argues that until January of 1988, the reference base of the National (U.S. City Average) Consumer Price Index was 1967 = 100. Subsequent to January, 1988, the Index shifted to a new reference base year, 1982-84. Since approximately 1979, Mr. Reed, the Iron County Clerk, and Ms. Grasso, the Deputy Clerk and member of Iron County Public Employees Local 728-D, have been calculating the contractually required cost-of-living adjustments pursuant to the terms of Article 18. In April of 1988, Grasso and Reed began calculating cost-of-living adjustments based on the 1982-84 = 100 base. When they received the new Index, they both reviewed it and devised what they thought was a reasonable method

of calculating the cost of living adjustment (COLA). They did not check the collective bargaining agreement to ascertain their responsibilities under Article 18 because they both believed they were calculating the COLA properly. Subsequent to the 1988 rebasing of the Index the grievants and the County negotiated a successor agreement to the 1988-90 contracts. During negotiations for that successor agreement there was no discussion with respect to wages or the cost-of-living adjustments under Article 18 of the collective bargaining agreement. Also, upon conclusion of those negotiations, the Union was provided with the then-current salary schedules which were incorporated into the printed collective bargaining agreement.

The County contends that while the AFSCME staff representative understood how the COLA worked during his tenure and even though he received the Consumer Price Indexes which were published, he never verified the calculation of the cost-of-living provisions under the terms of the collective bargaining agreements. Also, he never inquired as to how the County was calculating the COLA provisions. In April, 1991, the current Council 40 representative became the representative for Iron County Public Employees Union Local 728 and 728-D. The County contends that he also did not analyze or review the contractual salary schedules vis-a-vis the COLA clause contained in the collective bargaining agreement and never requested nor received any information from the County regarding the calculations of the cost-of-living adjustments. The County also notes that a research analyst for Wisconsin Council 40, AFSCME became knowledgeable that there was a problem with the wages paid to the grievants in this case while developing benchmark comparisons for Highway Department employes in counties throughout Wisconsin in late 1989, when he reviewed the salary schedules for the Iron County employes, who are the grievants in this case. However, it wasn't until June of 1992, that the Wisconsin Council 40, AFSCME research analyst and the current Wisconsin Council 40 business representative conducted an investigation into the calculation of the cost-of-living adjustments pursuant to Article 18 of the 1990-92 collective bargaining agreements. It was as a consequence of this investigation that the subject grievances were filed under Article 8 of the collective bargaining agreement alleging violations of Article 18 in the manner in which the County had calculated and paid cost-of-living adjustments.

The Employer goes on to argue that while Article 18 requires that all employes covered by the terms of the agreement receive cost-of-living salary adjustments, the language of Article 18 "1967 = 100" does not identify the index to be used; rather, it relates solely to the base year of the particular index selected. Further, Section 4 of Article 18 provides that should the "Index" be revised or discontinued, the parties shall negotiate an

alternate, and failing to agree, request the Bureau of Labor Statistics to provide an appropriate conversion. It acknowledges that when the Bureau of Labor Statistics changed the base year of the Index from 1967 = 100 to 1982-84 = 100 the change did not obviate the County's duty to continue calculating cost-of-living adjustments. The County, however, believes that the rebasing of the Index clearly constituted a "revision" of the Index under the language of Section 4 of Article 18. The Employer cites as support for this contention the Consumer Price Index 1988 Revision as well as an arbitration award in the matter of Maxwell Communication Corp., 94 LA 516 (1990). In Maxwell the arbitrator stated "continued publication of the 1967 = 100 statistic does not mean that it survived as what the Bureau considers to be a viable base in 1989."

The Employer goes on to assert that the language of Article 18 needs to be construed as a whole, and it would be "patently absurd to conclude that the parties drafted their 'Cost-of-Living' article so as to perpetuate between them reverence for base statistics that the very agency or service they chose to monitor inflation itself does not regard to be an appropriate formula with which to measure the cost of living."

The County also argues that even though the parties had an obligation to negotiate and adjust Article 18 subsequent to the Bureau of Labor Statistics change in the Index. During the interim, however, the County was not required to continue utilizing the Index identified in the agreement because there was no language in Section 2 of Article 18 mandating continued use of this outmoded Index. While Section 4 provides that if the Index is revised or discontinued the parties are to bargain, it does not follow therefrom that they are to discontinue using the rebased Index in the interim. Furthermore, the County asserts that the precise language of Article 18, Section 5, "the parties shall request the Bureau of Labor Statistics to provide an appropriate conversion or adjustment, which shall be applicable as of the appropriate adjustment date and thereafter" assumes that continued cost-of-living adjustments under the revised Index will continue in the interim.

The Employer, in its brief in chief, continues by arguing that even if a violation of the collective bargaining agreement is found the appropriate remedy, as specified in the contract, should be that the parties are required to return to the bargaining table pursuant to the provisions of Article 18, Section 5. The County believes this language clearly imposes a "mutual duty" to bargain upon the parties in this case. Also, in its July 29, 1992 response to the grievants the County responded by offering to negotiate with the grievants. To date, the grievants have not responded to the County's offer. The County goes on to insist

that a back pay award in any form is beyond the authority of the Arbitrator under the terms of the agreement, and would be inappropriate in this case since it would be impossible to determine the appropriate amount. Thus, it would be fruitless to speculate what adjustment or alternative the parties would have achieved as a result of bargaining since they have never actually done so.

The County concludes in its brief in chief that if it is guilty of violating the contract it is only guilty of failing to bargain sooner, and the grievants are equally guilty. If a mistake was made, the mistake was mutual and the remedy should be limited to that which is explicitly provided for in the contract. The remedy is to bargain.

In its reply brief the County, in support of its claim that the only appropriate remedy in this case is an order to bargain, premises that conclusion upon the fact that the grievance was not timely filed. The contract requires that the grievance be filed within fifteen working days of the date that the grievants knew or should have known of the alleged violation. In this case the facts clearly establish that the grievants knew or should have known as early as April 1, 1988, or sometime in early 1989 of the alleged violation of the contract. The County reaches this conclusion because the Consumer Price Index is a federally published statistic which is widely disseminated and commonly known, and the Union is charged with constructive knowledge of those statistics. Further, the two Council 40 AFSCME bargaining agents both testified they received and reviewed the monthly Consumer Price Indexes. Consequently, the Union in fact had actual knowledge of the data upon which wages of the grievants were being calculated. The County also notes that the AFSCME research analyst was aware as early as 1989 that there was a problem with Highway Department employes' salaries.

The County also argues in its reply brief that arbitral authority stands for the proposition that where grievants had knowledge of adverse action, but failed to raise the issue or take appropriate action, they should not be allowed to extend the time limit. In this case, the Union should have investigated sooner than it ultimately did, and filed the grievance within fifteen days of receiving notice of the problem. Thus, if a violation of the contract is found, the remedy should not be retroactive, and to reward the Union for not filing according to the clearly established and mutually agreed upon time limitations gives the Union the ability to freely file whenever it so chooses, and thereby ignores the primary purpose of time limits, i.e., to avoid stalling, accumulating cases and pressing stale claims. The County also notes that the Union has other recourse for addressing its concerns in this matter. That is to raise the point at the

bargaining table, and the parties at the time of reply briefs were in negotiations for a successor agreement.

The County also asserts in its reply brief that if the Arbitrator finds that a continuing violation of the agreement existed, the remedy should not be retroactive or, in the alternative, limited to when the grievance was filed. The County acknowledges that labor arbitrators have concluded that certain types of alleged contract violations are continuing in nature, and therefore, the contract time limitations may be inapplicable. It notes also, however, that where there is such a continuing violation that does not preclude arbitration of the grievance, retroactivity of the remedy should be limited to the time of filing the grievance. Also, the record in this case indicates that if the County did improperly calculate the quarterly cost-of-living adjustments, it did so unintentionally and without malice or intent to conceal its actions. Thus, plainly the grievants in this case were "asleep at the wheel" and are not entitled to compensation for the period of time prior to the filing of the grievance.

Again, the County insists that even if there is a continuing violation in this case, the remedy should be limited to an order to mutually agree to negotiate an adjustment to the cost-of-living clause or in the alternative the County should be required to pay future cost-of-living payments or back pay from the date of the grievance. It should not be found liable for back pay where it operated in good faith and without challenge. The County also indicates that the cases cited in support of total retroactivity being advanced by the Union in continuing violation cases are inapposite to the facts in this case. In this case, there are issues of timeliness whereas there were no timeliness issues involved in the cases cited by the Union.

Furthermore, the County argues, contrary to the grievants' assertion, that they are not entitled to compensation for any wages found owing under the provisions of the 1990-92 contracts because they effectively waived their right to any compensation in excess of the wages and salary schedules of Joint Exhibits 1 and 3. By incorporating the figures contained in the salary schedules into the collective bargaining agreement and subsequently executing the agreement, the grievants explicitly agreed to the wage rates contained therein and should not be heard to complain now. Also, it was the grievants responsibility to cost the agreement to insure that the data was accurate. However, the grievants' excuse that they did not review the wage schedule or that they did not appreciate the impact of the salary schedule does not in any way change the fact that when the salary schedule was incorporated into the contract it established the rates of pay upon which future cost-of-living adjustments during the 1990-92

contract term should be applied. Although the County agrees that reformation of contract language may be appropriate in some cases, it is not appropriate in the instant case since the explicit language of Article 8, Step 4 of the bargaining agreement states "The arbitrator shall have no right to add to, subtract from, delete or change any of the provisions of the Agreement." Just as with language when the wage scales were included in the collective bargaining agreement, the agreement was subsequently executed those wage rates became part of the agreement. Finally, the County argues that there is no question that owing to the grievants' failure to police and enforce its contract the County was deprived of the opportunity to mitigate its damages early on.

The Union contends that the County has been in violation of the collective bargaining agreements in existence since April 1, 1988, when the County Clerk and his Deputy mistakenly decided to utilize the 1982-84 = 100 all items Consumer Price Index reference base. The County Clerk made this unilateral determination without consultation with the Union or apparently any other County official. This is the standard reference base period that the County continues to use, notwithstanding the provisions of the parties' collective bargaining agreement requiring use of the 1967 = 100 standard reference base. The effect of using the 1982-84 = 100 standard reference base period as opposed to the 1967 standard reference base period since April of 1988, has been to understate the wage increases employes covered by these collective bargaining agreements should have received by $1.58 per hour. Continuing to use the 1982-84 = 100 standard reference base period subsequent to the grievance has resulted in incorrectly stated increases beyond $1.58. The Union argues that this unilateral change violated and continues to violate the subject collective bargaining agreements as well as preceding collective bargaining agreements wherein Article 18 - Cost-of-Living Adjustments provided for calculating those adjustments using the 1967 = 100 standard reference base.

In the Union's initial brief, it contends that it is difficult to discern the County's position inasmuch as the County did not take a formal position at the arbitration hearing, and did not produce any witnesses to support its position which it now takes in its brief. The Union notes that up to the time of the hearing the County did not take the position that it acted correctly when the County Clerk began using the 1982-84 = 100 standard reference base period, notwithstanding the contract's requirement to use the 1967 = 100 standard reference base period. Rather, the County claimed in its July 29, 1992 grievance response that the grievance was untimely filed and that the Union had failed to meet its mutual obligation to request a change in the published index. Furthermore, in that response to the grievance the County asserted that the 1982-84 = 100 standard

reference base index was an alternative index and "not" a revision or discontinuation of the 1967 = 100 index. The Union agrees with the County's assertion regarding the language of Article 18, Section 5, not being applicable to the current case, and concludes that the alternative index used by the County was improper and violative of Article 18.

The Union notes that the BLS frequently updates and revises its measuring tools. In recent decades such changes were made in 1978, 1983 and in 1987. The BLS publishes a variety of Consumer Price Indexes and they publish such indexes using different reference base periods, such as December 1977 = 100, 1967 = 100 and 1982-84 = 100. However, despite the frequent changes made to the indexes by the BLS in the past, the parties have continued to use the 1967 index as the basis for wage adjustments. There is no evidence in the record to support a notion that the creation of the 1982-84 index in 1987 is subject to Article 18, Section 5, which provides:

> If the BLS Consumer Price Index in its present form and calculated on the same basis shall be revised therefrom or discontinued, . . .

Section 5 clearly relates to a situation where the BLS would cease publication of the 1967 index or revise it to such an extent that it no longer represented or measured what the parties intended. There is no evidence that past revisions made by the BLS have triggered the use of Section 5, most recently the 1987 revisions. Thus, the Union concludes that Section 5 is inapplicable to the publication of the new Consumer Price Index 1982-84 = 100. Had the BLS ceased publications of the 1967 index and not provided the public with conversion formulas to recreate it, then the Union believes Section 5 clearly would have been utilized to resolve the predicament. The Union also argues that it is significant that the County took the same position as the Union in this respect in responding to the grievance in July of 1992.

The Union states that publication of a new index period does not in any way alter the obligation to use the contractually required 1967 index. The publication of a new index using a different base is far different than significant revisions in the 1967 index that might trigger the use of Section 5. The parties clearly could not have intended to permit automatic index changes. The impact as demonstrated in this case is obviously too great. It would create an absurd result. Had the parties desired to automatically change the index each time BLS produced another, they would have written that direction into their collective

bargaining agreements.

Also, the Union argues that its grievance, contrary to the assertion made by the County in its July 29, 1992 grievance response, is not a request to bargain. The Union believes no bargaining is necessary because the continued use of the 1967 index by BLS, despite publication of the 1982-84 index, does not cause Article 18, Section 5, to become operative in this case.

The Union goes on to argue that Article 2, Section 2, of the parties' collective bargaining agreements mandates that any agreement between the parties is only effective when signed by authorized representatives. In this case, no agreement exists that permits the County to use any index other than the 1967 index specified in the contract. Furthermore, the Union believes that the facts in this case do not support a claim that the parties have established a past practice by using the 1982-84 index because the Union and its employes had no knowledge that the County had changed the index until June of 1992. Except for the County Clerk and his Deputy, there is no evidence that any other County official was aware of the change either. The Union believes that a practice cannot change unambiguous or clear contract language as there is in this case in Article 18 where it specifies the use of the 1967 = 100 standard reference base period.

The Union also contends that the County's claim that the grievance were untimely is without merit. The Union disagrees with all of the Employer's claims relative to the timeliness issue. The Union filed the grievance as soon as they became aware of the error. The Union contends it did not delay the processing of its grievances in any way. Furthermore, it is not realistic to argue that the Union or the County's employes should have known of the error before June of 1992. If that be the case, so should the County officials have been aware of the error. Obviously, that is an unreasonable assumption. Employes assume that the County is competently preparing the payroll and that their pay, including all deductions and add-ons, etc., is accurate. The employes similarly relied upon the County to compute and implement quarterly cost-of-living increases, and information about their calculation of such increases was never provided by the County to employes or the Union. Also, while the cumulative impact of the County's error is significant, taken quarter by quarter, it was fairly subtle, and the employes had no reason to be suspicious.

The Union also contends that the Arbitrator is not limited to deciding this case only within the context of the current collective bargaining agreements commencing on January 1, 1990. In the Union's view, the Arbitrator has jurisdiction to interpret and apply the parties' collective bargaining agreements in effect

during the period of the entire violation, dating back as early as April 1, 1988 through the present. Although the 1988-89 contracts have expired, arbitration is available to the Union for certain violations that occurred under those agreements, and continues under the present agreement. In support of its contention the Union cites the Arbitrator to Nolty Brothers vs. Bakery and Confectionery Workers Local 358, 94 LRRM 2753 (1977) where the Court ordered the parties to arbitrate a dispute over severance pay even though the agreement had expired finding that although the dispute arose after the expiration of the contract, it arose under the contract. The Union goes on to argue that the Supreme Court in Litton Financial Printing, 111 S.Ct. 2215 (1991) reaffirmed that a post-expiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where under normal principles of contract interpretation, the disputed contract rights survives expiration of the remainder of the agreement. The Union believes that the facts of this case support a finding that the Arbitrator has jurisdiction to remedy the Employer's violation that occurred under the 1988-89 collective bargaining agreement. To reach any other conclusion, the Union asserts, would reward the County for their actions.

Respecting the Arbitrator's remedial powers should a violation be found in this case, the Union first notes that the Arbitrator is not limited to going back beyond January 1, 1990, the effective date of this contract, and remedying the County's violation. The Union believes that the Arbitrator has jurisdiction to interpret and apply the parties' collective bargaining agreements in effect during the entire period of the violation starting on April 1, 1988 and through the present as noted earlier. Consequently, the Union believes the Arbitrator has authority to go back and order the County to pay employes wages lost dating back to April 1, 1988.

The Union argues that even if the Arbitrator believes he is not able to order all lost wages paid back to employes to April 1, 1988, then he must order that all wage rates be restored to the level that would have been in effect had the 1967 base been used in calculating cost-of-living adjustments since April 1 of 1988. Under that theory, as of July 1, 1992, the date the grievances were filed, employes should be paid $1.51 per hour more than they were receiving. By October 1, 1992, that figure would change to $1.58 and any additional increases generated under the cost-of-living clause thereafter must also be ordered to be paid pursuant to using the 1967 base up to the present. To do otherwise, the Union concludes, would unjustly enrich the County because of the error of its Clerk, and the County is not entitled to such a windfall.

In response to an anticipated argument by the County that the specified rates in the 1990-92 contract binds the Union to living with those rates as the product of their bargain the Union asserts is incorrect. The Union believes it is uncontradicted that the wage rates attached to that agreement were merely to identify the rates being paid employes as of October 1, 1989. It is undisputed, however, that these rates were not the product of negotiations, but rather were the consequence of the County's incorrect computation. An attachment of such rates to the 1990-92 collective bargaining agreement was the result of a mutual mistake. Arbitrable standards permit the reformation of a contract provision resulting from mutual mistake argues the Union. This then means the Arbitrator may reform the wage and salary schedules of the 1990-92 contract to reflect the rates as of October 1, 1989, had the correct 1967 index base been used in calculating those rates, as opposed to the 1982-84 index base which was incorrectly used by the Clerk. Reformation, the Union believes, is appropriate in this instance because those rates were included in the contract by mistake, and did not reflect the mutual intention of the Union and the County.

The Union concludes that to deny employes the ability to recoup their entire loss would be to penalize employes for the County's error. The use of the wrong index was the County's mistake, not the employes', and to reach any other conclusion respecting recouping their losses would be to grant the County a windfall to which they are not entitled. Other arbitrators have ordered full recoupment of losses due to errors and the Union believes that that is what the Arbitrator in this case should order.

In its reply brief, the Union takes exception to the County's claim for the first time that the publication of the Consumer Price Index-W with a base year of 1982-84 constituted a "revision" of the index as provided for in Article 18, Section 2. The Union believes the Arbitrator cannot allow the County to belatedly shift its position on such a significant, substantive matter. The fact is that the 1982-84 = 100 index is an alternative index, and not a revision or discontinuation of the 1967 = 100 index. This was not disputed by the parties until after the hearing, and first appears in the County's brief in chief. Furthermore, the Union believes that in any event the County's new position is wrong and unsupported by the facts. The Union returns to its initial assertions in its brief in chief, wherein it noted that there were numerous index options available to the parties, yet they selected and identified the index to be used as 1967 = 100. Whether or not the 1967 = 100 reference base continues to be the Bureau of Labor Statistics "official" reference base is not relevant to this dispute because the Bureau of Labor Statistics uses different base periods, and the parties could have chosen a different base period

but did not.

The Union continues, contrary to the County's assertions, to believe that Article 18, Section 5, is inapplicable to this case, and a bargaining order would be inappropriate. The Union believes the parties do not need to adjust the clause because the index referred to in Section 2, 1967 = 100 is still available on the same basis as in the past. That index has not been revised, discontinued or changed. Section 5, in the Union's opinion, would be relevant only if the Bureau of Labor Statistics were to cease publication of the 1967 index or radically revised it. Such is not the case. Furthermore, even if the County is correct in its reading of Article 18, Section 5, nothing therein permits the County to unilaterally implement changes in the cost-of-living calculations if an index is revised or discontinued. To the contrary, the parties are required to attempt to resolve any problems, and if that fails to seek assistance from the Bureau of Labor Statistics. In that context, the Union's grievance constitutes the Union's effort at resolving any dispute and processing the grievance constitutes bargaining. Thus, the Union believes it has met any burden that it had under Section 5, and without any agreement the County has continued and is bound to continue to utilize the 1967 index.

For all of the foregoing reasons, the Union believes the County has violated the parties' collective bargaining agreements dating back to 1988-89 contracts and employes should be made whole for their losses as a consequence of the County's unilateral action.

DISCUSSION:

From approximately 1979, the County Clerk and Deputy County Clerk had calculated the cost-of-living adjustments pursuant to Article 18 of the parties' collective bargaining agreement using the Consumer Price Index standard reference base of 1967 = 100. However, in April of 1988, they unilaterally decided to use the 1982-84 = 100 standard reference base. There is no dispute that this decision was unilaterally made, and that the Union was not apprised of the decision to deviate from the Article 18 requirement that the standard reference base of 1967 = 100 be used. Also, apparently no County Board members were ever advised by the Clerk of the change. Consequently, inasmuch as the County elected officials were not advised of the change they were in no position to preclude it from happening or countermand the Clerk's decision. Nonetheless, the Clerk has been the County agent responsible for calculating the wage adjustments for bargaining unit employes pursuant to changes in the Consumer Price Index since approximately 1979.

There is no explanation in the record as to why the Clerk decided to switch to a base not referenced in the collective bargaining agreement without first reviewing that decision with any County Board members or Personnel Committee or Union officials. He, in conjunction with discussions with the Deputy Clerk, determined it to be a reasonable method of calculating cost-of-living adjustments, notwithstanding that the only base specified in the collective bargaining agreement was 1967 = 100.

The County contends that the grievances filed by the Union contesting this change were untimely filed. It points to the language of the grievance procedure at Article 8, Section 3, wherein it provides:

> The aggrieved employee, . . . shall present the grievance to the employees' immediate supervisor and his/her respective department or division within fifteen (15) working days of the date that the employee knew or should have known of the alleged violation of the collective bargaining agreement.

The County asserts that had the Union representative and/or the employes been diligent in their administration of the collective bargaining they would have realized in or about April of 1988, when the County Clerk began using the 1982-84 = 100 standard reference base, that the contract was not being followed. Because a grievance was not filed until July 1, 1992, the County believes the Union is now time barred from pursuing the issue relative to the switch in standard reference bases that occurred in April, 1988.

While the undersigned agrees with the County that the Consumer Price Indexes are widely disseminated as published by the Bureau of Labor Statistics, and both AFSCME Representatives Musial and Mattson acknowledge receiving those indexes, it does not necessarily follow therefrom that the Union had knowledge or should have had knowledge that the County had made a change in the manner of calculating the quarterly wage adjustments. What is known is that AFSCME Research Analyst Lehtinen acknowledged he had some concerns about the contractual wage rates for Highway Department employes which he was provided in 1989, as being the correct rates knowing that there was a cost-of-living clause in effect. However, suspicion is not knowledge, and furthermore Lehtinen was not the regional AFSCME representative responsible for administering the Iron County collective bargaining agreements. There is no evidence that the AFSCME representatives administering the contract or employes in the bargaining unit were

aware that the County Clerk had switched standard reference bases. Indeed, County elected officials were equally unaware.

Furthermore, every time a quarterly wage adjustment was made using the incorrect standard reference base another contract violation occurred. As such, the nature of the violation is continuing and each instance wherein the County uses the incorrect base in calculating wage adjustments gives rise to another cause of action for breach of contract. The Union's grievance filed on July 1, 1992, was filed within fifteen days of Mattson and Lehtinen's meeting with Deputy County Clerk Grasso on June 25, 1992, where she advised them that the 1982-84 = 100 standard reference base was being used to calculate cost-of-living generated quarterly wage increases for bargaining unit employes. Therefore, the undersigned believes that the subject grievances are not time barred as argued by the County, and the actual filing date will have significance with regard to any remedial relief ordered upon a finding of a contract violation.

While the County does not assert that it was precluded from using the contractually specified 1967 = 100 standard reference base merely because of the publication of the new 1982-84 = 100 standard reference base, it does contend that it was free to discontinue utilizing the "outmoded" index until such time as the parties could bargain a change in the contract cost-of-living clause pursuant to the language of Article 18, Section 5. The undersigned finds this argument to be an unpersuasive assertion without any footing in the contract, or bargaining history evidence adduced in this proceeding. The mere fact that BLS began publication of a different standard reference base than the one specified in the contract does not give the Employer the right to unilaterally change that provision of the agreements. Here, the Clerk chose to ignore the language specifying use of the 1967 = 100 standard reference base in favor of using a newer 1982-84 = 100 standard reference base. Even had the change not been detrimental to employes, the County and/or its agents are not free to unilaterally ignore or modify provisions of the agreement during its term. That can only be accomplished through collective bargaining.

It is also not the case that the Bureau of Labor Statistics regards the 1967 = 100 standard reference base as an inappropriate formula by which to measure the cost of living. While the County may believe that it makes more sense to use the 1982-84 = 100 standard reference base because it will significantly reduce the size of the quarterly wage increase, the fact remains that the base required to be utilized pursuant to Article 18 of the contract was being published in April of 1988, and continues to be published today by the Bureau of Labor Statistics. Thus, notwithstanding that a newer base had been published by the Bureau

of Labor Statistics, the 1967 = 100 standard reference base specified in Article 18 as the base to be used in calculating cost-of-living adjustments was and is still being published, had not been revised, or discontinued, and consequently, was and is the base which the County is obliged to utilize until such time as it can bargain a change to a different standard reference base. There are no impossibility of performance or necessity claims available here to justify the Clerk's unilateral action.

Thus, the County Clerk's unilateral decision to not calculate quarterly wage adjustments using the 1967 = 100 standard reference base specified in Article 18, and instead use the 1982-84 = 100 standard reference base violated the 1990-92 collective bargaining agreements.

Turning to the more complex issue of remedy, the Employer argues that the only appropriate remedy, should they be found guilty of violating the contract as they have been, is an order from the Arbitrator that the parties return to the bargaining table pursuant to the provisions of Article 18, Section 5. That section provides that:

> If the BLS Consumer Price Index in its present form and calculated on the same basis shall be revised therefrom or discontinued, the parties shall attempt to adjust this clause or if an agreement is not reached, the parties shall request the Bureau of Labor Statistics to provide an appropriate conversion or adjustment which shall be applicable as of the appropriate adjustment date and thereafter.

The Union, however, correctly notes in its brief, that the Employer explicitly stated in its only response to the grievance on July 29, 1992, that the 1982-84 = 100 standard reference base index was "an alternative index" and "<u>not</u> a revision or discontinuation of the (1967 = 100) index." For that reason, the Union believes, contrary to the County's assertions, that Article 18, Section 5, is not applicable to the subject grievances and concludes that it made no demand to bargain to adjust this clause "because that was not necessary or required by the contract." The undersigned concurs that the publication by the Bureau of Labor Statistics of the 1982-84 = 100 standard reference base was not a "revision" or "discontinuation" as specified in Article 18, Section 5, of the parties' agreement. Consequently, Article 18, Section 5, did not become operative due to the BLS publication of a 1982-84 = 100 standard reference base, and no bargaining during the term of the agreement was contractually

required.

Also, even if the County were correct that bargaining is the appropriate remedy, generally one of the conditions of a bargaining order is to return the parties to the status quo ante prior to the commencement of bargaining. In this case, it would mean correcting the mistakes of the County in using the wrong index, making employes whole and then ordering bargaining. However, as noted earlier, the undersigned agrees with the Union that the tests for a bargaining remedy as set forth in Article 18, Section 5, have not been met in this case.

The undersigned does, however, believe, as the County asserts, that were I to find a violation, as I have, I cannot grant relief back to April, 1988. The undersigned believes it is only appropriate to grant relief back to the date that the Union discovered the error, which was June 25, 1992, which was within fifteen days of the date on which they filed the grievance, i.e. July 1, 1992. To those employes who suffered a loss of wages as a consequence of the unilateral change from the contractually specified 1967 = 100 standard reference base this may seem like a harsh result inasmuch as they are obviously out a considerable sum of money. However, they have a responsibility, as do their representatives, to be vigilant in the administration of the gains won at the collective bargaining table. To reward them for their lack of vigilance would be equally as harsh a result for the County. Obviously, both parties have responsibilities with respect to the administration of these collective bargaining agreements. Aside from these equitable considerations, the determining factor in not going back beyond the effective date of the 1990-92 collective bargaining agreements is that the undersigned believes that absent a submission agreement granting him wider jurisdiction, I have no jurisdiction to remedy violations occurring under earlier collective bargaining agreements.

The final question relative to remedying the County's violation concerns what is the appropriate wage rate to be used in calculating a make-whole remedy for the aggrieved employes. The undersigned is persuaded that the wage rates appearing in the subject collective bargaining agreements that were in effect as of October 1, 1989, and upon which the cost-of-living adjustments under these contracts were to be applied, were included as a consequence of a mistake made by both parties--a mutual mistake. At the time of the negotiation of the subject collective bargaining agreements neither party was aware that the County Clerk had unilaterally stopped using the contractually specified 1967 = 100 standard reference base in calculating the quarterly wage adjustments. Consequently, the rates that were published in the subject collective bargaining agreements as being in effect on

October 1, 1989, were incorrect rates inasmuch as they were derived from the previously specified contractual wage rates as adjusted by the cost-of-living clause provisions contained in Article 18 and the 1982-84 = 100 standard reference base instead of the 1967 = 100 base. Obviously, neither party was aware of that fact, and equally as obvious they mistakenly believed that the rates they were agreeing to were generated by following the terms of Article 18 during the predecessor collective bargaining agreement. No other conclusion is plausible and neither party adduced evidence to the contrary. Also, there is no record evidence of bargaining history establishing that by agreeing to the publication of the incorrect rates in the 1990-92 agreements the parties intended to modify the method for calculating quarterly wage adjustments under Article 18 of these agreements.

The standard remedy for a mutual mistake is reformation of the agreement. In this case the undersigned believes that the contractually specified wage rates contained in the salary schedules of the 1990-92 collective bargaining agreements must be replaced with the correct rates--the rates which were the product of the parties' bargain as set forth in Article 18. The undersigned is mindful of the language of Article 8, Step 4, that "The arbitrator shall have no right to add to, subtract from, delete or change any of the provisions of the agreement." By ordering the County to recalculate the quarterly wage increases as they should have been calculated to generate the wage rates that should have been in effect on October 1, 1989, the undersigned does not believe he is exceeding his authority as set forth in Article 8, Step 4. The recalculated rates will reflect the parties' intent as specified in the clear and unambiguous language of Article 18, Sections 1, 2, 3 and 4. This order does not add to or modify the parties' agreement, i.e., that employes' wages will be adjusted quarterly based on increases in the cost of living using the BLS standard reference base of 1967 = 100.

The correct rates will be determined by going to the salary schedule of the predecessor agreement and calculating Article 18 quarterly cost-of-living wage adjustments using the 1967 = 100 standard reference base as specified in the contract at the appropriate times. The resulting wage rates then will be substituted for the wage rates appearing in the 1990-92 collective bargaining agreements. Then, the appropriate quarterly cost-of-living wage adjustments that have occurred under the 1990-92 agreements must be recalculated using the 1967 = 100 standard reference base. The resulting wage rates are those which should have been in effect on June 25, 1992, and thereafter. This is then the starting point for calculating the make-whole remedy ordered by the undersigned in this case. Thus, the County must go back to June 25, 1992, in calculating the amount of back pay owed employes and move forward making the contractually specified

adjustments in their wage rates thereafter using the 1967 = 100 standard reference base. Also, in addition to any retroactive wage payments which must be made to employes, the Employer must also adjust employes' earnings for Wisconsin Retirement System benefits and make the appropriate contributions to the fund, as well as adjusting the employes' social security earnings and in every other respect making employes whole, both in the area of wages and fringe benefits. In other words, any employe whose fringe benefits were adversely impacted as a consequence of the County paying them the incorrect wage rate must be made whole.

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

AWARD

The County violated the 1990-92 collective bargaining agreements when it unilaterally switched from the 1967 = 100 standard reference base specified in Article 18 of the collective bargaining agreement to a 1982-84 = 100 standard reference base in calculating the quarterly wage adjustments required by Article 18. Therefore, the County is directed to immediately make employes whole for any losses in wages and fringe benefits occasioned by this violation, and in the manner specified in the "Discussion" portion of this decision. Also, the undersigned retains jurisdiction for six months from the date of this Award to resolve any disputes arising over implementation of the Award.

Dated at Madison, Wisconsin, this 10th day of November, 1993.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator