

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

MARATHON COUNTY HIGHWAY  
DEPARTMENT EMPLOYEES UNION  
LOCAL 326, AFSCME, AFL-CIO

and

MARATHON COUNTY (HIGHWAY  
DEPARTMENT)

Case 242  
No. 53914  
MA-9486

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,  
appearing on behalf of the Union.

Ruder, Ware & Michler, S.C., by Mr. Dean R. Dietrich and Mr. Jeffrey T. Jones,  
appearing on behalf of the County.

ARBITRATION AWARD

The Employer and Union above are parties to a 1995-97 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the pay check grievance filed by Local President Ken Ressel on behalf of all employees.

The undersigned was appointed and held a hearing on August 21, 1996 in Wausau, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs and reply briefs, and the record was closed on October 30, 1996.

Issues:

The Union proposes the following:

1. Did the Employer violate the collective bargaining agreement by ceasing the distribution of paychecks on Thursday during the summer time?

The Employer proposes the following:

1. Did the County violate the provisions of the Appendix/Memorandum of Agreement by the manner in which it provided paychecks to employees during the summer months?

The parties stipulate that the second question is "if so, what is the appropriate remedy?"

Relevant Contract Provisions:

Article 2 - Management Rights

Public policy and the law dictate clearly the Department's primary responsibility to the community as being that of managing the affairs efficiently and in the best interests of our clients, our employees, and the community. The employer's rights include, but are not limited to, the following, but such rights must be exercised consistent with the provisions of this contract.

1. To utilize personnel, methods and means in the most appropriate and efficient manner possible.
2. To manage and direct the employees of the department.  
...
9. To take whatever action is necessary to comply with State or Federal law.
10. To introduce new or improved methods or facilities.
11. To change existing methods or facilities.

...  
Any unreasonable application of the management rights shall be appealable by the Union through the grievance and arbitration procedure.

Discussion:

The facts are not significantly disputed. Approximately ten years ago, the County began to propose at intervals that employees work a four-day, ten-hour schedule in the Highway Department

in the summer time. In the 1992 round of negotiations, a side letter was agreed to which provided for this schedule on a trial basis. It is undisputed that this schedule was

controversial within the Union. The disposition of that controversy was an agreement between the parties that the Union members might take an annual vote as to the continuance of this schedule for the succeeding summer of each year, and if they voted it down, the schedule would not be in effect. Each year since 1992 such a vote has been taken, and each year the vote has been in favor of continuing the schedule for another year.

On May 22, 1992, the parties signed a Memorandum of Agreement 1/ providing a number of terms for implementation of the four-day week during those months when it was applicable. Among those terms was the following, regarding paychecks:

8. Pay Check

- a. Pay checks will be provided to employees on Thursdays, provided they are available to the supervisors by 1:00 P.M. If the supervisors have not received them by 1:00 P.M., the County will not be liable if pay checks are not delivered to all employees. Pay checks that were undelivered on Thursday will be available at the office on Fridays from 8:00 A.M. to 4:00 P.M.
- b. Any employee who cashes a pay check on Thursdays will be barred from receiving a pay check on Thursdays. Their check will have to be picked up at the office on Fridays.

County Treasurer Lorraine Beyersdorff testified that during the eight years that she has been treasurer, there have been five occasions when paychecks have not been prepared by noon Thursday. Beyersdorff supervises one Assistant Treasurer, and testified that she can hire and fire that individual. In June, 1995, Beyersdorff went to a seminar offered state-wide for County Treasurers. She testified that at this seminar, she was informed that employees who received pay checks early could trigger an adverse chain of consequences under which the County could be fined for failing to deposit income tax and FICA deposits within one day of issuing pay checks. Beyersdorff testified further that the County's practice is to date payroll checks on a Friday and to deposit the FICA and income tax deposits on Monday. She stated that it was her understanding

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1/ In a later round of negotiations the Memorandum was incorporated into the contract.

that if these amounts were considered late by Federal officials, within a period of one to five days of lateness, a penalty of two percent of the amount deposited could be levied. Beyersdorff testified that the County's FICA and income tax payments are about a quarter of a million dollars each time.

The parties stipulated that between July, 1995 and November, 1995, fourteen pay checks were deposited in banks prior to the date on the check. These pay checks were all from the Highway Department, and the majority, but not all, were from bargaining unit members.

Beyersdorff testified that she received a memo with a copy of "Payroll Practitioners Monthly" (dated July, 1994) at the June, 1995 seminar; the County introduced this document into the record. Beyersdorff stated that she waited until October of 1995 to enforce the principle she now felt necessary because some departments worked summer hours and she wanted to wait until employees had the alternative of direct deposit. Beyersdorff testified further that she did not know of any other County in Wisconsin being penalized for early deposits by employees. She has never supervised any employee in the Highway Department, and her memo to all employees announcing that beginning with the October 27, 1995 payroll no checks would be released until the payroll Friday was a rare example of direct communication between her and employees in the Highway Department.

Steve Schlund, President of the Union in 1992, testified that in negotiations over the side agreement on summer hours, the pay check issue was a major point to the Union because many employees would be inconvenienced if they had to drive in on Friday when they were not scheduled to work. He testified that Glen Speich, the Highway Commissioner, had indicated he would consider the issue, and that within a day or two Speich had replied that he had reservations about committing to issue pay checks on Thursdays because he had concerns about the possibilities of a computer malfunctioning. Schlund stated that for this reason the Union agreed to the language concerning supervisors having the checks "available" by 1:00 p.m.

Speich testified that the pay check issue was only one of a series of issues raised by the Union, all of which appeared to be important to the Union, but agreed with Schlund that a glitch involving computers was his major concern at the time, and that he "probably" didn't speak to Schlund about anything else being a problem in the distribution of pay checks. The Union elicited testimony from one employee, Mike King, currently Union President, to the effect that he has no direct deposit account or bank debit card, and has to drive 17 miles each way to pick up his pay checks in the wake of the County Treasurer's decision. Speich testified that he had on various occasions disciplined three employees for cashing pay checks early.

The Union's first contention is that the evidence shows that Beyersdorff is a supervisor within commonly accepted meanings of that term, and that therefore the contract language is clear and unambiguous in supporting the Union's position that management must deliver the pay checks on Thursdays. In the alternative, the Union argues that if the language is found ambiguous, the

parties' past practice demonstrates that employees have always received their checks on Thursdays during the years 1992 through 1995, at least during the applicable period of the year, and that Union witnesses Schlund and Ressel testified to that effect without challenge. The Union further contends that the testimony of Schlund and Highway Commissioner Speich both demonstrate that in the negotiations leading to the agreement on summer hours, the only event that Speich identified which could hold up the checks was a computer breakdown. The Union contends that, therefore the bargaining history, like the past practice, supports the Union's contention that management is not free to decide not to forward the checks on Thursdays. In its reply brief, the Union takes issue with the County's contention that the contract language unambiguously extends to the County the freedom to cease providing pay checks on Thursdays, arguing that the language relating to ten-hour days in the contract is ambiguous because it does not specify exactly which "supervisors" need to receive the pay checks by 1:00 Thursday. The Union further distinguishes this matter from the Langlade County case argued similar by the County, on the ground that the Langlade matter involved only whether a single check was received, or two separate checks totalling the same amount. The Union contends that the arbitrator's ruling in Langlade that what occurred was merely an "inconvenience" to employees, and not the loss of a contractual benefit, does not apply here because employees' receipt of pay checks on Thursdays is a clear benefit. The Union further distinguishes this matter from a series of case cited by the County in its brief where method or day of pay check distribution was unilaterally changed without a violation of contract being found, on the grounds that in each of those cases, the contracts were silent as to the particular method or date when pay checks were to be distributed. The Union requests as a remedy a make-whole order covering monetary losses incurred by employees as a result of the County's action (such as extra trips to the work place on Fridays by workers who reside outside of Wausau) including overtime rate for the time involved plus travel costs.

The County contends first that the language of Article 8 of the Memorandum of Agreement is clear and unambiguous in supporting its position, arguing that because of the Treasurer's action, the supervisors of the Highway Department did not receive the pay checks on Thursdays by 1:00 p.m. and that the supervisors in question logically must be the Highway Department supervisors. The County argues that the Union's claim that Beyersdorff is a supervisor within the meaning of Item 8 is specious, because she has never worked in the Highway Department or supervised any Highway Department employee, and because Union witnesses testify that they had never envisioned her as a supervisor within the meaning of that term during the negotiations. The County argues that the past practice argued to exist by the Union cannot modify the clear and unambiguous language of a contract provision, and that in any event the employees have not "unequivocally" received their pay checks on Thursdays, because Beyersdorff testified that on several occasions in the past she did not have the employees' payroll checks prepared on time and that employees received the pay checks on Fridays in those instances.

The County argues that the employees are not suffering a loss of a benefit, contending that this matter is closer to a line of cases in which employers were found not to have violated collective bargaining agreements by changing methods of operation. In this context the Employer

argues that the employees do not suffer a loss of benefit simply by receiving their pay checks -- which are dated for Friday anyway -- until Friday. The County cites Langlade County (Highway Department) 2/ to the effect that a decision by an employer to pay an annual longevity payment combined with regular wages in a single check, rather than in a separate check as in the past, constituted a mere "inconvenience" to employees, not a loss of a personal benefit "of the sort that the County could not eliminate without violating the implied covenant of good faith and fair dealing that is ordinarily deemed a part of all agreements". The County notes that only one employee testified to having to drive into the Highway Department on Fridays to pick up his check, questioning whether any other employees in fact did so. The County notes that the management rights clause supports its view that this matter falls within several rights traditionally reserved to management, including "to take whatever action is necessary to comply with State or Federal law" as well as several provisions relating to changes in existing methods, and using personnel and methods in the most appropriate and efficient manner. The County further argues that requiring the County to provide these employees with their pay checks on Thursdays would result in an irreconcilable conflict with the County Treasurer's statutory authority to make such determinations, and would expose the County to substantial monetary penalties. The County contends that Beyersdorff did not consult Highway Department officials, and made her decision independently based on information she received at the June 1995 seminar. The County argues that Beyersdorff was aware that 14 Highway Department employees who had received their pay checks on Thursdays had cashed their pay checks on that day, and that the County was exposed to a potential penalty of two percent of withholdings and contributions because it was its practice to deposit income tax withholdings and social security contributions on the following Monday. The County contends that Beyersdorff's action was in accord with her authority as County Treasurer, and that to direct the County to provide pay checks to employees on Thursdays would in essence require Marathon County to violate the law.

In its reply brief, the County contends that the evidence, contrary to the Union's brief, is not to the effect that the pay check issue was crucial to the Union's 1992 agreement to accept the four-day work week in the summer, and that the Union's statement that the record showed that the employees have always received their pay checks on Thursdays since that agreement until the present dispute was incorrect, since Beyersdorff's testimony showed that Schlund and Ressel were wrong in believing that employees had done so on all occasions. The County further reiterates its contention that the exception in item 8 for supervisors not receiving pay checks by 1:00 p.m. was formulated with the notion of inability to deliver, but refers to inability to deliver on the part of Highway Department supervisors only. The County requests that the grievance be denied.

Some arbitration cases, upon review of the record, turn out to contain more than immediately meets the eye. This one is an example of the reverse. Neither the risks run by the County in delivering pay checks on Thursdays, nor the harm suffered by employees from the County's decision no longer to do so, appear to justify the alarm registered. While I conclude for

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2/ Arbitrator Marshall L. Gratz, November, 1987.

the reasons stated below that the County violated the collective bargaining agreement, the scope of the remedy is therefore modest.

To begin with, I find Item 8 of the Memorandum of Agreement less than perfectly clear but am unpersuaded of the logic of either party's contentions concerning how to interpret it. The cases cited by the County do not involve any similar contract language. It is clear that the agreement does not provide absolutely for distribution of pay checks on Thursdays. The parties have argued extensively over whether Beyersdorff is a supervisor within the meaning of the exception to that clause. But in so doing, they have both used terms to describe the situation which divert attention away from a term in that clause which on review I conclude is more central to this matter.

That term is the word "available". The Union's contentions as to this clause add up to the proposition that because Beyersdorff supervised an assistant treasurer, checks were "available" to a supervisor within the meaning of that clause. The County's contentions add up to the proposition that because Beyersdorff is not a supervisor in the Highway Department, the checks were unavailable. I find that the more difficult question is what is meant by the term "available", not what is meant by the term "supervisor".

I am prepared to credit Beyersdorff's testimony that on some occasions prior to 1995, the pay checks were not delivered on Thursdays because of administrative difficulties. Her recollection of such an event is likely, in the normal course of things, to be more precise than that of the employees affected. There is no evidence, however, that prior to October, 1995 any such failure to deliver was volitional. It is equally clear that after that date the refusal to provide pay checks was volitional on the part of a senior official of the County. It is also clear that in the 1992 negotiations, the discussion of whether the County would be held to an absolute requirement to provide pay checks on Thursdays occurred in terms of whether a computer breakdown might prevent such distribution. This supports the concept that the word "available" referred to non-volitional reasons.

To include within that concept a policy decision or willful refusal by a senior County official to provide what the contract appeared to provide seems to be an improbable interpretation of the parties' intent as revealed by their collective bargaining. It could even vitiate the clause entirely; for example, a finding that Beyersdorff is not a supervisor within that clause's meaning (certainly a more probable interpretation of that clause than the Union's interpretation) would be certainly no more logical than to find that the County Board did not constitute supervisors within that clause's meaning. It would be a strained interpretation of such contract language to conclude that the County, having negotiated such language, could unilaterally abrogate it simply by having the County Board vote to order the distribution of pay checks to Highway Department supervisors occur only after 1:00 p.m. on Thursdays. The contract, by its own terms, is with the County as an entity, and to find that senior County officials were excluded from any responsibility of compliance with it would open the doors to far more serious problems than those contained in this

matter. I note further that item 8(b) identifies on its face those employees who are not entitled to receive a paycheck on Thursdays -- i.e. those who have previously cashed a check early. Upholding the County's action here would effectively rewrite that clause to enlarge the bar to "all employees."

The County might yet be excused compliance with this clause if in fact, as the County argues, compliance would violate Federal law. Article 26 of the Agreement, in particular, explicitly provides contractual grounds for refusal to honor such a clause. But careful review of the evidence concerning such a claim is warranted. I find, following such review, that the County's claim to illegality of continued pay check distribution on Thursdays is doubtful, and certainly not established by the evidence before me. Beyersdorff testified that she was unaware of any employer in the State of Wisconsin being prosecuted for such an alleged violation. The County has in place mechanisms designed to ensure compliance with the intent of Section 8, and Speich testified that employees had been disciplined on several occasions for violating that clause. Employer's Exhibit 2, the "Employer's Tax Guide" of the Internal Revenue Service, states at page 18, under "trust fund recovery penalty", the following which I find relevant:

The Trust Fund recovery penalty may be imposed on all persons who are determined by the IRS to be responsible for collecting, accounting for, and paying over these taxes, and who acted willfully in not doing so . . . Willfully means voluntarily, consciously, and intentionally.

There is no evidence in this record that any employer who had taken the steps the County has -- including specific negotiation of a penalty in the agreement as well as subsequent enforcement of that penalty -- has ever been held to have "wilfully" violated the requirement of the law. Also, the record is devoid of any evidence that the County could not buttress its apparent compliance with the intent of the Statute by paying in its Highway Department taxes on Friday, if it so chose. Finally, the level of alarm in the County's presentation of this evidence is called into question by the evidence that Beyersdorff, upon discovering in June, 1995 that there might be an issue raised, delayed through another entire summer's pay checks before deciding to refuse to hand over the pay checks on Thursdays. Since the matter was within her immediate control, her testimony that she opted to wait until direct deposit of employees' pay checks had been implemented as an option was kindly, but calls into question the level of risk involved.

Employees were, however, notified in October of 1995 of a decision which did not become effective for practical purposes until the following summer. And the fact that Beyersdorff did delay the implementation until employees had the ability to have checks deposited directly combines with the relatively paltry evidence of significant inconvenience to employees. The one employee who testified to driving in to collect the pay checks appeared aware that direct deposit was an option, but gave only a vague explanation of why he did not take it. For these reasons, I find the Union's claims of significant monetary harm to be as dubious as the Employer's claims of significant



monetary risk. I accordingly find that a "cease and desist" order is the extent of the appropriate remedy.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the County violated the collective bargaining agreement by willfully determining not to provide pay checks on Thursdays during the applicable summer period.
2. That as remedy, the County shall prospectively cease willfully refusing to make pay checks available to Highway Department supervisors by 1:00 p.m. on Thursdays during the summer period.

Dated at Madison, Wisconsin this 30th day of January, 1997.

By Christopher Honeyman /s/  
Christopher Honeyman, Arbitrator