BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between EAU CLAIRE CITY EMPLOYEES, LOCAL NO. 284, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO and CITY OF EAU CLAIRE	Case 229 No. 54472 MA-9694

Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 1937, Eau Claire, Wisconsin 54702-1937, for Eau Claire City Employees, Local No. 284, American Federation of State, County, and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Stephen L. Weld, with Mr. James M. Ward, on the brief, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 4330 Golf Terrace, Suite 205, P. O. Box 1030, Eau Claire, Wisconsin 54702-1030, for City of Eau Claire, referred to below as the City.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the City agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in grievance number 1996-14, filed on behalf of "Local 284." The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on December 18, 1996, in Eau Claire, Wisconsin. The hearing was not transcribed, and the parties filed briefs and reply briefs by February 17, 1997.

ISSUES

The parties stipulated the following issues for decision:

Did the City violate Section 3.2 when it changed the Fair Labor Standards Act (FLSA) overtime adjustment formula for Special Pays?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Article 3 - UNION SECURITY AND MANAGEMENT RIGHTS

. . .

Section 2. The rights, power and/or authority claimed by the City are not to be exercised in a manner that will cease to grant privileges and benefits, limited to mandatory subjects of bargaining, that the employees enjoyed prior to the adoption of this agreement and that will undermine the Union or as an attempt to evade the provisions of this agreement or to violate the spirit, intent, or purpose of this agreement.

. . .

Article 14 - OVERTIME

Section 1. Employees shall receive one and one-half (1 1/2) times their regular hourly rate of pay for all hours worked in addition to their regular standard work day and/or the standard work week, and a minimum of one (1) hour shall be paid for all overtime. For the purpose of computing overtime pay, vacation, holidays, sick and injury leave shall be considered as time worked.

BACKGROUND

Grievance 1996-14 states the "Circumstances of Facts" thus:

> Management has unilaterally changed the formula for calculating FLSA payments concerning overtime, longivity (sic), wellness, etc.

It lists the "Article or Section of contract which was violated if any" thus: "Article 3, Section 2,

Article 14, Section 1, and any other Articles and/or Sections of the contract that may have been violated." The grievance states the "corrective action desired" thus: "Abide by past practice and make all employees whole for any wages and/or benefits lost by the above actions that resulted in this grievance."

The change referred to in the grievance was communicated in a memo from City Finance Director Rebecca K. Noland to Robert Horlacher, the Union's President. The memo, dated March 29, 1996, states:

> The FLSA adjustment will be included in the April 4th paychecks. Employees who receive any of several special pays like wellness or longevity and work overtime during the year qualify for the payment.
>
> The attached information sheet explains how this payment varies from year-to-year, and in particular, a change in the calculation to conform to Department of Labor regulations. A copy of the information sheet will be given to all employees receiving the FLSA adjustment.
>
> I wanted you to have a copy of the memo in advance, in case you receive any questions from your members. If you would like to talk to me about the change, I will generally be available next week Monday through Wednesday. Dale Peters, Human Resources Director, will also be available if you can't reach me.

The "attached information sheet" states:

> The FLSA overtime adjustment is included in this pay period. The FLSA adjustment is the increase in your overtime compensation that results from the inclusion of special pay categories in the calculation of your overtime rate. This payment varies from year-to-year for the following reasons:
>
> > Differences in the number of hours of overtime you work each year.
> >
> > Changes in your wage rate.

> Changes in the special pay categories you receive. For example, this year you may have qualified for the incentive, longevity or wellness programs.
>
> Overall, this year's FLSA adjustment is not as great as last year's. In calculating the supplemental payment we noted that the formula we used did not conform to federal regulations. The revised calculation results in a lower payment than in previous years. Since the FLSA adjustment is important to everyone, we asked our auditors and the Department of Labor to review the change. Both confirmed that the calculation is now in compliance with the regulations. The change is effective for this year and future years. No retroactive adjustments have been made or are anticipated.

A notice similar to this was sent to all of the City's bargaining units. The grievance posed here is the only grievance filed concerning the change in calculating the FLSA Adjustment.

Had the City continued to use the formula it had in prior years, the total FLSA Adjustment for this entire unit would have been $11,425.13. Under the formula change announced in Noland's memo, the payments made to the unit totalled $3,337.09.

The City made its first FLSA Adjustment payment in 1986. The payment was not initiated through collective bargaining. Rather, the City made the payments in response to Garcia v. San Antonio Metropolitan Transport Authority, 469 U.S. 528 (1985), which applied provisions of the FLSA to municipalities. The City adjusted the overtime rate it paid certain employes to include "Special Pays." Special Pays reflect financial inducements, such as longevity, incentive and wellness pay, by which the City enhances the hourly pay of certain of its employes. The impact of Special Pays on an employe's hourly rate is calculated and paid to employes for their total annual overtime hours. This annual payment has been made during April or May of each year since 1986.

Dale Clark has served the Union in a variety of leadership positions. In 1986, unit employes first noticed the FLSA Adjustment and sought clarification of the payment from the Union. Clark, on the Union's behalf, called the City's business office to determine the basis of the payment. He took notes from that phone conversation on two pages from a desk calendar. The two calendar pages are for January 27, 1987. His notes detail the components of a formula to calculate the FLSA Adjustment and state "Fair Standards & Labor Act of '86 eff. 4-15-86." The components of the City's formula are stated on each page of Clark's notes. The clearest delineation of the formula states it initially as a division problem with a divisor of 2,080 and a dividend of "Total $ Longevity + Wellness." A comma appears in his notes after the statement of this problem. The notes continue as "X 1.5" then "X Hr. of O.T. worked." Clark reported the

results of this conversation to the unit.

The City's formula, as reflected in Clark's notes, was applied on an employe by employe basis. The first calculation of the formula was to divide the total annual payments attributable to Special Pays by 2,080. This yielded a regular hourly rate for an employe's Special Pays. The second calculation was to multiply the regular hourly rate for an employe's Special Pays by 1.5 to yield an overtime hourly rate for an employe's Special Pays. The third calculation was to multiply the overtime hourly rate for an employe's Special Pays by the employe's total number of overtime hours worked. The resulting product was the individual employe's annual FLSA Adjustment, which was designed to bring the City into compliance with the FLSA by compensating the employe for otherwise unpaid hourly overtime pay attributable to Special Pays.

The City consistently applied the FLSA Adjustment formula between 1986 and 1996. It was never discussed during the collective bargaining for any of the contracts in effect for that period of time.

The City periodically reviews all of the formulas which require it to make regular payments. Employes responsible for such reviews attend seminars relevant to their duties. At one of these seminars, a City employe became convinced that the City was not calculating its FLSA Adjustment as the seminar would indicate it should. This eventually came to Noland's attention, and she contacted the Department of Labor (DOL). She described the City's FLSA Adjustment formula to DOL, and understood DOL to view the formula as "incorrect." She asked them how to correctly calculate the payment, and understood the DOL response to be "the formula you must use." That formula altered the divisor which yielded the quotient which was an employe's hourly rate for Special Pays. The second change was to change the factor multiplied times the hourly rate for Special Pays from 1.5 to .5.

Noland's conversation with DOL prompted the change in formula which prompted the grievance.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the evidence, the Union notes that the FLSA "has nothing to do with this case." Rather, the "real issue is whether the City can unilaterally reduce a mandatory employee benefit of long-standing practice."

The Union contends that Article 3, Section 2 consists of three elements. Since each element has been met, the Union concludes the City cannot be permitted to alter the formula underlying Special Pays. More specifically, the Union argues that "special payments represent money paid out on an overtime basis for various 'benefits' which the employees have bargained and/or earned: contractual longevity, wellness program participation bonuses, and incentive pays." These constitute valuable benefits, which are mandatorily bargainable whether viewed as FLSA payments, past practice or a form of incentive pay. Beyond this, the Union contends that unit employes enjoyed the benefit prior to the adoption of the current contract. There can be no question, according to the Union, that the benefit formula is covered by Article 3, Section 2.

The Union then contends that the formula underlying the Special Pays meets all of the criteria traditionally considered to establish a binding past practice. The City unequivocally communicated the specifics of the formula to the Union in January, 1987, and consistently applied that formula from 1986 through 1996. Nor can this practice be considered a "mistake." The formula, unlike a one-time mistake in an employe paycheck, constitutes a binding past practice. To eviscerate a binding practice on this basis would, the Union argues, fly in the face of arbitral precedent and put many contractual benefits at risk.

Nor can Article 3, Section 2 be applied to require proof that the City specifically intended to undermine the Union and to evade the language and purpose of the contract. Proof of a binding practice, unilaterally altered by the City is the essence of Article 3, Section 2. Since there has been no proof that the DOL mandated the change, the Union concludes the City's position on the grievance has no support.

The Union concludes thus:

> The Union requests that the Arbitrator sustain the grievance, make all employees whole for all money lost in the 1996 special payment, and order the City to cease and desist from changing the special payment formula unless such changes are properly bargained in the future.

The City's Initial Brief

After a review of the evidence, the City contends that Article 3, Section 2 can be broken into four elements. Those four elements "are stated in a conjunctive sense." Even assuming the first three of those elements have been met, the fourth has not. This precludes, the City contends, applying Article 3, Section 2 to its change in the formula underlying Special Pays.

More specifically, the City argues that the fourth element can be broken into three sub-

components. None of these sub-components has been established. The City did no more than correct a mistake when it changed the formula. Since the parties mutually recognized that the City never intended to pay more than the FLSA minimum, it cannot be said that it sought to "undermine" the Union, to "attempt to evade . . . the agreement," or to "violate the . . . intent of the agreement." This precludes finding the fourth element to the operation of Article 3, Section 2 has been met, and thus precludes the application of the section to the grievance.

Nor can the formula underlying the Special Pays be considered a binding past practice. Arbitral precedent underscores this contention. The City argues that "(o)f controlling significance is the fact that the City's old methodology for computing overtime pay on 'special pay' categories focused exclusively on literal compliance with the FLSA - no more and no less." There is no practice, unless "paying no more than was statutorily required" is considered the practice.

Nor should the City's mistake preclude redressing that mistake on a prospective basis. Arbitral precedent recognizes the possibility of recoupment when an employer has made an overpayment based on a mutual mistake or on a mistake of fact. In this case, the City made a mistake of law. The City notes that "most arbitrators will not allow recoupment" in cases involving a mistake of law. Since the City seeks no more than prospective relief from its mistake of law, the City concludes its actions are consistent with the weight of arbitral authority.

The City concludes that the "grievance is therefore without merit and should be dismissed accordingly."

The Union's Reply Brief

The Union asserts that the City's contention that it took no interest in the City's initial implementation of the formula is misplaced. The Union sought the formula, including all the necessary specifics, and consciously decided to accept it. The benefit is mandatorily bargainable, but the Union chose not to bargain more than the City provided. Nor is it accurate to assert the old formula was "erroneous." Rather, the City paid above the minimum. Nothing in law or the contract prohibits this.

Even assuming Article 3, Section 2 can be read to require proof that the City sought to undermine the Union or to evade the agreement, the Union argues that the evidence shows an "insidious . . . attack on the contractual maintenance of standards clause." This attack, according to the Union, is for no greater purpose than to save money, even at the cost of undercutting bargained language and binding practice. Beyond this, the Union contends that the precedent cited by the City is inapposite, and the alleged "mistake" is, in fact, a "practice."

The City's Reply Brief

The City contends that the Union's reading of Article 3, Section 2 flies in the face of its language and of the precedent the Union cites. City of Oshkosh, MA-4236 (McLaughlin, 5/87) is rooted on a maintenance of standards clause which could be broken into three elements. That decision was not, however, "meant to have global application," and turns on language distinguishable from Article 3, Section 2. More specifically, the City contends the citation is part of a Union attempt to avoid the application of the fourth element to Article 3, Section 2. This

attempt unpersuasively reads the "and" of that section as "or."

Nor is City of Eau Claire, MA-6164 (Crowley, 10/90) applicable here. In that case "the practice . . . of allowing employees to park indoors represented a conscious decision on the part of management." The City, in that case, effected a change based on nothing more than a desire to terminate the benefit.

City of Eau Claire, A/P M-95-193 (Stern, 7/95) establishes that wellness pay, which falls within the Special Pays, "has been deemed a mandatory subject of bargaining." This point is not in dispute, and the case affords no guidance for this one.

In Manitowoc County, MA-929 (Knudson, 11/77), an employer attempt to eliminate a ten year practice of adding longevity pay to hourly rates prior to the calculation of overtime was denied. The maintenance of standards clause in that case was, however, stronger than Article 3, Section 2. Beyond this, the change in Manitowoc County "came about not due to a material change in circumstances, but due to management having simply changed its mind."

Dodge County, MA-3882 (Burns, 8/87) affords no guidance here. That case did not involve a maintenance of standards clause, and the employer sought to justify its actions on statutory, not contractual, grounds. Because the City does not contend the FLSA mandates a specific formula, this decision "is easily distinguishable."

DISCUSSION

The stipulated issue focuses on the interpretation of Section 3.2. This establishes what is in dispute, and clarifies what is not in dispute. It establishes that Section 1 of Article 14, which was cited in the grievance, cannot be considered in dispute. Even in the absence of the stipulation, Article 14 has no direct bearing on the grievance. The stipulation of the issue also establishes that the FLSA has no direct bearing on the grievance. Whether either City formula conforms to the FLSA is not relevant to the stipulated issue, which poses a contractual, not a statutory question. Finally, the stipulation establishes that past practice is relevant not in itself, but as a function of Section 3.2.

Section 3.2 limits the exercise of the City's management rights. The limitation is that those rights "are not to be exercised in a manner that will cease to grant . . . benefits." To invoke this limitation, the Union must demonstrate (1) that the benefit is a mandatory subject of bargaining; (2) that the benefit predates the adoption of the current agreement; and (3) that the City's exercise of its rights "will undermine the Union," or attempts to evade the agreement, or violates the agreement's "spirit, intent, or purpose."

The parties' arguments focus on the final element to the operation of Section 3.2. The City

does not assert that the FLSA Adjustment is "primarily related" to the "formulation or management of public policy" rather than to "wages, hours and conditions of employment." 1/ Thus, the FLSA Adjustment must be considered a mandatory subject of bargaining. There is no dispute the City has paid the benefit since 1986. It has, then, been "enjoyed" by unit "employees prior to the adoption of this agreement." As the parties' arguments indicate, this leaves the final element of Section 3.2 in dispute.

It is undisputed that the FLSA Adjustment did not originate as a function of contract language. Rather, it is a function of the City's attempt to comply with the FLSA. Thus, the second of the three sub-components of the final element of Section 3.2 is not applicable. There are no "provisions of this agreement" to evade. The issue on the application of the final element is whether the City's alteration of the formula "will undermine the Union" or will violate "the spirit, intent, or purpose of this agreement."

To apply the final element, it is necessary to define what the disputed benefit is. More specifically, the parties dispute whether the benefit to which Section 3.2 is to be applied is the FLSA Adjustment or the formula underlying it. Section 3.2 limits the City's authority to "cease to grant" a benefit. If the benefit at issue is the FLSA Adjustment, then the City has not ceased granting it. If the benefit is the underlying formula, then the City has ceased granting it.

As the parties' arguments demonstrate, the benefit can be characterized either way. The evidence, however, favors the City's view that the benefit is the FLSA Adjustment. Under this view, the benefit dictates the formula, not the reverse.

Several evidentiary factors support this view. The City's implementation of the FLSA Adjustment in 1986 was unilateral, yet provoked neither Union opposition nor a formal demand to bargain. It appears from this that the Union did not perceive the unilateral implementation of the benefit to undermine its status as the unit's bargaining representative. Rather, it appears that the Union saw the creation of the benefit as a windfall.

The Union's initial contact with the City supports this view. The Union, through Clark, inquired regarding what prompted the 1986 benefit. This is something less than a formal demand to bargain. Beyond this, the inquiry appears to have come well after the benefit had been provided. In any event, there is no persuasive evidence that the Union was interested in the formula in any detail beyond that necessary to determine how the FLSA Adjustment had been calculated. The Union asserts it consciously accepted the formula as the appropriate means to

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1/ The "primarily related" standard distinguishes mandatory from permissive subjects of bargaining. See Beloit Education Asso. v. WERC, 73 Wis.2d 43 (1976); Unified School District No. 1 of Racine Co. v. WERC, 81 Wis. 2d 89 (1977); and West Bend Education Ass'n v. WERC, 121 Wis.2d 1 (1984).

calculate the benefit. If this is the case, the absence of further contact between the Union and the City is difficult to understand. Presumably, if the formula's specifics were a significant point, the Union would have wanted the City to know it concurred in them. The evidence, however, points toward a communication of information. Clark wished to learn, and the City informed him, how the benefit had been calculated. He then communicated this information to the unit. Under this view, the absence of further discussion is understandable.

Beyond this, the evidence indicates the formula was intended to do no more than bring the City into compliance with the FLSA. Clark's notes establish that the FLSA figured prominently in the conversation. Unless FLSA compliance was the reason for the formula, there would be no need for the reference to it in his notes. Nothing in his notes or testimony would indicate the parties discussed anything more than compliance with the FLSA. Nor is there any indication the parties discussed alternative means to secure compliance.

The parties have not, at any point following the initial implementation of the benefit, mutually analyzed its underlying formula. This underscores the view that the FLSA Adjustment, standing alone, has been treated as the benefit. The formula, until March of 1996, was not given meaningful consideration.

Thus, the evidence establishes that the benefit afforded the Union was the FLSA Adjustment, not the specific formula underlying it. This conclusion is the necessary background to a determination whether the City's alteration of the formula "will undermine the Union" or violates the spirit of the agreement. Both of these sub-components of the final element to Section 3.2 turn on the presence of objectionable unilateral City action. The labor agreement is the result of bilateral negotiations. Objectionable unilateral City action violates the bilateral spirit of the agreement and undermines the Union's status as an exclusive bargaining representative.

In this case the unilaterally set nature of the FLSA Adjustment formula has never been challenged, and cannot be considered objectionable under Section 3.2. As noted above, the Union did not seek to bargain the benefit when it was first implemented. It has never sought to alter or to address the benefit or the formula underlying it in collective bargaining. The grievance underscores this. It does not seek bargaining on the formula underlying the FLSA Adjustment. The grievance challenges not the unilateral origin of the formula, but the reduction in the size of the benefit. The grievance does not seek bargaining, but the restoration of a larger FLSA Adjustment.

Ultimately, the difficulty with the Union's view is that the City's action in 1996 is qualitatively the same as it was in 1986. In each instance, it acted unilaterally to comply with the base requirements of the FLSA. The Union's interpretation of Section 3.2 turns less on the unilateral nature of the City's acts than on their impact.

The final element of Section 3.2, however, focuses more on the quality of the City's

actions than on the quantity of the benefit involved. The Union's view would be stronger if it focused less on the alteration of the formula than on how that alteration was made. The application of Section 3.2 to a unilaterally set formula which has been unilaterally changed is problematic. Presumably, the Union would not assert Section 3.2 as a bar to the City's unilateral alteration of the formula underlying the FLSA Adjustment if the "mistake" demanded the inflation rather than the deflation of the multiplier applied to the hourly rate for Special Pays. This exemplifies the difficulty of basing an application of Section 3.2 on the size of a change in a benefit rather than on the quality of the City action which prompted the change.

In sum, the City acted unilaterally in March of 1996 to pay a FLSA Adjustment which meets the base requirements of the FLSA. This action is qualitatively indistinguishable from its unilateral creation of the benefit in May of 1986. The benefit afforded to the Union in 1986 and in 1996 was a FLSA Adjustment, not a specific formula to calculate it.

This conclusion is arguably decisive, and in any view, significant in the application of Section 3.2 to the grievance. Arguably, the conclusion can be seen as threshold to the application of Section 3.2. Thus viewed, the City did not "cease to grant" a benefit within the meaning of Section 3.2. Rather, since the FLSA Adjustment is the benefit at issue, and since the City continues to afford the benefit to unit employes, Section 3.2 is not applicable.

This view, as the Union argues, obscures that the City unilaterally and significantly reduced the size of the FLSA Adjustment by altering its underlying formula. However, even the formula alteration cannot be considered a violation of Section 3.2 on the facts posed here. The Union has shown that the formula alteration can be considered a mandatory subject of bargaining which was enjoyed by unit employes prior to the adoption of the agreement governing the grievance. The City's alteration of the formula cannot, however, be considered to undermine the Union, to evade the terms of the labor agreement or to violate the spirit of the agreement. The formula alteration does not, then, meet the third element to the operation of Section 3.2 and cannot be considered to violate it.

Before closing, it is appropriate to tie this conclusion more closely to the arguments of the parties. Initially, it should be stressed that the conclusion stated above does not establish the validity of either formula under the FLSA. Rather, it establishes that the benefit preserved under Section 3.2 is City compliance with the base requirements of the FLSA. This means, for example, that if the current formula improperly deflates the multiplier applied to the hourly rate for Special Pays, then Section 3.2 does not bar the unilateral alteration of the formula to inflate the multiplier to bring it into compliance with the FLSA.

The Union notes that the City can voluntarily afford the Union more than the FLSA requires and still comply with it. There is, however, no persuasive evidence the City ever sought to give, or the Union ever requested to receive, any amount over the base requirements of the FLSA. This is the weakness of the Union's position. As the Union forcefully points out, many

practices can start with events an employer would, in hindsight, wish to characterize as a mistake. The essence of the binding force of past practice lies, however, in the agreement manifested by the bargaining parties' conduct. In this case, no agreement can be found beyond the implementation of a FLSA Adjustment to meet the base requirements of the FLSA. If the evidence showed the Union participated, or meaningfully sought to participate, in the creation of the underlying formula, the conclusion stated above would be different.

On the facts posed here, "benefit" is indistinguishable from "practice." The formula underlying the FLSA Adjustment is no more enforceable as a binding practice than it is as a benefit subject to Section 3.2. In either case, the difficulty is that the parties' agreement never extended beyond the FLSA Adjustment to its underlying formula.

None of the authority cited by the parties is binding in this case. The parties did not question, and Arbitrator Crowley did not address, the final element of Section 3.2 in MA-6164. The result in this grievance does not, however, conflict with the result reached in that case. Cessation of the FLSA Adjustment would violate Section 3.2 no less than the change in practice addressed by Crowley. The difficulty in this grievance is that the FLSA Adjustment, not the formula underlying it, is the benefit subject to Section 3.2. If the evidence showed the underlying benefit was the specific level of the FLSA Adjustment, then the change in the level of the benefit would violate Section 3.2. In this case, however, the formula underlying the FLSA Adjustment was an incidental detail in 1986 and cannot be made more than that in 1996. MA-4236, regardless of its authorship, is not directly applicable here. The contract language at issue in that case is different from that posed here. Words are the tools of negotiators, who use those tools with care. Their words must be interpreted with care. It necessarily follows that differences in language between contracts must be applied with respect for the differences.

The implications of not applying Section 3.2 to this reduction in a benefit have been forcefully stated by the Union. The persuasive force of this argument cannot be ignored. That this may be a close case cannot, however, obscure that the result must be an all or nothing conclusion. The Union is properly concerned that a unilateral City reduction in a benefit can undercut Section 3.2. No less of a concern, however, is that Section 3.2 should not be read to create bilateral agreement on a benefit where no prior agreement in word or practice can be found.

AWARD

The City did not violate Section 3.2 when it changed the FLSA overtime adjustment formula for Special Pays.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 28th day of May, 1997.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator