

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MARATHON COUNTY (PARKS DEPARTMENT)

and

MARATHON COUNTY PARK DEPARTMENT
EMPLOYEES, LOCAL 1287, AFSCME, AFL-CIO

Case 243
No. 54264
MA-9606

Appearances:

Ruder, Ware & Michler, S.C., Attorneys at Law, by Mr. Dean R. Dietrich, Suite 700,
500 Third Street, P.O. Box 8050, Wausau, Wisconsin, appearing on behalf of the
County.

Mr. Phillip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,
7111 Wall Street, Wausau, Wisconsin, appearing on behalf of the Union.

ARBITRATION AWARD

Marathon County (Parks Department), hereinafter referred to as the County, and Marathon County Park Department Employees, Local 1287, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the payment of wages. Hearing on the matter was held in Wausau, Wisconsin on December 10, 1996. Post-hearing arguments and reply briefs were received by the undersigned by February 19, 1997. Full consideration has been given to the evidence, testimony and arguments presented in rendering this award.

ISSUE

During the course of the hearing the parties were unable to agree upon framing of the issues and agreed to leave framing of the issues to the undersigned. The undersigned frames the issues as follows:

"Is the grievance arbitrable?"

If yes,

"Did the County violate the parties collective bargaining agreement when it informed employees it would no longer issue checks on Thursday?"

"If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

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Article 5 - Management Rights

The County possesses the sole right to operate County government and all management rights repose in it but such rights must be exercised consistently with the other provisions of this contract. These rights include but are not limited to the following:

- A. To direct all operations of County Government;
- B. To hire, promote, transfer, assign, and retain employees in positions with the County;

. . .

- E. To maintain efficiency of County Government operation entrusted to it;
- F. To take whatever action is necessary to comply with State or Federal law;
- G. To introduce new or improved methods or facilities;
- H. To change existing methods or facilities;

. . .

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this shall be afforded the opportunity to return to the bargaining unit for a period of six (6) months with the same benefits and seniority rights. Such

an employee shall be assigned to the position of the last person hired whose job the employee is qualified to perform.

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Article 14 - Grievance Procedure

A. Definition of Grievance: A grievance shall mean any controversy which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or dispute of any employee or group of employees concerning this contract. The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits and position classifications.

B. Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent. Time limits shall be exclusive of Saturdays, Sundays and holidays.

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D. Steps in Procedure:

Step 1: All grievances must be presented promptly and no later than fifteen (15) work days from the date the employee knew or should have been aware of the cause of such grievance. In the event of a grievance, the employee shall perform his/her assigned work task and grieve his/her complaint later, except in cases involving the employee's health or safety.

The Employee alone or with one (1) union representative will explain the employee's grievance orally to the employee's immediate supervisor (or his/her designee). The employee alone or with one (1) union

representative shall identify whether any matter being discussed with the supervisor is an actual or potential grievance. The employee's immediate supervisor shall within seven (7) working days orally inform the employee of his/her decision on the grievance presented to him/her.

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Article 39 - Savings Clause

If any article or part of this Memorandum of Agreement is held to be invalid by operation of law or by any tribunal of competent jurisdiction, or compliance with or enforcement of any article or part should be restrained by such tribunal, the remainder of the Memorandum of Agreement shall be affected thereby and the parties shall enter into immediate negotiations for the purpose of arriving at a mutually satisfactory replacement for such article or part.

Article 40 - Entire Memorandum of Agreement

The foregoing constitutes the entire Memorandum of Agreement by which parties intended to be bound and no verbal statement shall supersede any of its provisions. All existing and future ordinances and resolutions of the County Board affecting wages, hours and conditions of employment not inconsistent with this agreement are incorporated herein by reference as though fully set forth. To the extent that the provisions of this Agreement are in conflict with existing the future ordinances or resolutions, this Agreement shall supersede.

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BACKGROUND

The County and Union have been parties to a number of collective bargaining agreements. The normal payday for employees is Friday. However, employees in the Parks Department who, during the summer months, work a ten (10) hour, four (4) day week which ends on Thursday, have for the past eighteen (18) years received their check on Thursday. The paycheck had a

Friday date on it and employees were given the directive that their paycheck was not to be cashed until Friday. On occasion employees did not follow this directive and the matter was brought to the employee's attention. The employee was informed if they continued to cash their check on Friday the Thursday issuance would be discontinued. However, no employee has ever been disciplined for not following the directive.

In June of 1995 the County's Treasurer, Lorraine Beyersdorff, attended a seminar pertaining to payroll issues. Attendees of the conference were informed that there was a potential two percent (2%) penalty if an employer failed to deposit income tax withholdings and social security contributions by the end of the business day following a payday. Attendees were also advised that payday, for purposes of federal tax laws, was the day an employee received a paycheck, not the date the paycheck was dated. On September 20, 1995 Beyersdorff issued a memorandum to all County department heads and employees advising them that effective October 27, 1995 no paychecks would be released from her office until payroll Friday.

On February 28th, 1996 the instant grievance was filed and processed to arbitration in accord with the parties grievance procedure.

Union's Position

The Union acknowledges that the collective bargaining agreement is silent concerning the instant matter. However the Union asserts that the practice of allowing employees to receive their paycheck on Thursday has been longstanding, consistent and mutually accepted, and, that it can be considered to have ripened into a portion of the collective bargaining agreement. The Union argues the practice between the parties has been unequivocal, clearly acted upon and readily ascertainable over a reasonable period of time.

The Union also points out that the County had many collective bargaining opportunities over the years to negotiate changes in this benefit but failed to do so. The Union asserts the County is attempting to achieve through the grievance procedure what it failed to accomplish at the bargaining table. The Union contends this is highly inappropriate and contrary to almost all generally accepted labor relations principles.

The Union asserts there can be little doubt that the practice had been an extremely consistent one and one that became an accepted way of doing things. The Union argues there was mutuality here and that both parties accepted the matter as a norm of operation with both the employer and employees accepting the routine nature of receiving pay checks on Thursday when that was the last workday for the employee.

The Union also asserts bargaining history supports the conclusion that the altered work schedule was preconditioned on the availability of paycheck's on Thursday. The Union asserts the intent of the parties at the time the practice was adopted has been honored for over twenty (20)

years and argues it should be continued to be honored until mutual agreement is achieved to change it.

The Union also argues the undersigned is limited to interpreting the collective bargaining agreement and that the undersigned does not have the authority to interpret or apply federal law. The Union points out that while County Treasurer Beyersdorff testimony suggests the distribution of paychecks on Thursday violates federal law, Beyersdorff was unaware of any case where an offending county was subjected to a fine for distributing checks early.

The Union also points to a similar grievance in the County's Highway Department wherein the Arbitrator found the County's reliance on IRS compliance was not a meritorious one. The Union acknowledges the Highway Department collective bargaining agreement was not silent on the matter but was ambiguous.

County's Position

The County contends the grievance is not timely because the grievance had not been filed no later than fifteen (15) days from the date the employee knew or should have been aware of the cause of the grievance. The County points out Beyersdorff's memo concerning the discontinuance of receiving paychecks on Thursday was issued on September 20, 1995. However, no grievance was filed until February 28, 1996. The County points out this is four months after the memo was issued and therefore the grievance is not timely. The County also argues that the Union claim that no grievance needed to be filed until after May 1, 1996, when the four (4) day work week was scheduled to begin, fails because the grievance was filed prior to May 1, 1996.

The County also argues it had the contractual right to determine when employees would receive their paychecks. In support of its position the County points to the Management Rights provision of the collective bargaining agreement, Article 5, and argues it had the right to determine the day that employees receive their paycheck and the right to change that day when reasonable to do so. Particularly when the agreement is silent as to the date employees receive their paychecks.

The County also argues that to provide employees with their paychecks on Thursdays would result in an irreconcilable conflict with the County Treasurer's statutory authority and would expose the County to monetary penalties. The County also argues the Union contention that a past practice exists which requires the County to provide paychecks on Thursdays is without merit. The County asserts the Union failed to demonstrate that the alleged past practice was mutually agreed to by the parties and unequivocal. The County argues the manner of giving employees their paychecks was a matter of convenience, not a mandate, and further, there have been times when paychecks were not available on Thursdays.

The County also argues the day upon which the employees received their paycheck was an

operational matter and was subject to change at the County's discretion. The County also points out that employees will not suffer a loss of benefit simply because they will be receiving their paychecks on Friday rather than on Thursday. Paychecks are dated for Friday and cannot be legally cashed until Friday. Further, the employees can utilize direct deposit and have their checks deposited on the opening of the Friday business day. The County also contends Article 40, a zipper clause, nullifies any alleged past practice.

Union's Reply Brief

The Union does not dispute that a grievance must be timely filed. However, the Union contends the grievance in the instant matter challenges the application of the policy for the upcoming summer. The Union acknowledges that the past practice has been repudiated by the County and as such would cease at the conclusion of the current collective bargaining agreement unless contract language assuring its continuance is secured by the Union. The Union also asserts that silent employee benefit practices such as the one in the instant matter have been sustained even when there existed a management rights clauses similar to the parties management rights clause.

The Union argues the rejection of the County's argument concerning IRS regulations in the Highway Department grievance should be the same in the instant matter. Further, the Union points out that the party's have a savings clause which would allow the County to depart from any portion of the collective bargaining agreement held to be invalid by any tribunal of competent jurisdiction. The Union also points out that the County has been directed by an Arbitrator to continue Thursday summer paychecks to Highway Department employees. The Union argues it should be no trouble to continue the same in the Parks Department. The County has done so for over twenty (20) years.

The Union asserts there is not any thwarting of the Treasurer's statutory authority. The Union stresses that the instant matter involves the interpretation of the party's collective bargaining agreement, not federal law or the statutory authority of the Treasurer.

The Union would have the undersigned sustain the grievance and direct the County to continue the practice.

County's Reply Brief

The County points out the Union has acknowledged that the collective bargaining agreement is silent with respect to providing employees with their paychecks on Thursdays when working the four (4) day, ten (10) hour day, work week. The County contends the practice can not modify clear and unambiguous contract language. The County further contends the Management Rights provision of the agreement vest the County with the right to determine the day upon which employees will receive their paycheck. The County also asserts the alleged past practice cannot override the County's clear contractual right to comply with the Federal tax laws.

The County also points to Article 40 and asserts the zipper clause is clear and unambiguous. The County argues this provision clearly provides that no verbal statements can supersede any of the provisions of the collective bargaining agreement.

The County also asserts the Union's reliance on the Highway Department arbitration award is misplaced. The County points out the arbitrator based his interpretation upon a provision which

specifically addressed the receipt of paychecks on Thursdays.

The County would have the undersigned deny the grievance.

DISCUSSION

The County has argued that the instant matter is not arbitrable because the Union did not file the grievance in a timely manner. The record demonstrates that the County Treasurer issued her memo concerning paychecks in October of 1995. The instant grievance was not filed until February 2, 1996. However, the impact of the Treasurer's memo had no impact on employees represented by the Union until the commencement of the four (4) day work week in May of 1996. The undersigned finds that at most the grievance was filed prematurely and had the hearing on the matter been held prior to May of 1996 the undersigned would have dismissed the grievance on that basis. Since the County has acted on the memo and it was aware the Union disputed its actions the undersigned concludes the grievance is arbitrable.

The pertinent facts in the instant matter are not in dispute. The County payday is Friday. The County has for at least the last twenty (20) years allowed employees who, during the summer months, work a ten (10) hour, four (4) day work week which ends on Thursday to receive their paychecks, which are dated for Friday, on Thursday. The Union has pointed to an arbitration decision in the County's Highway Department which directed the County to continue allowing employees to receive their Friday dated paychecks on Thursday if the checks are available. However, as both parties have noted, in that matter there was a specific written provision concerning paychecks and in this matter there is no written provision. Therefore the undersigned finds it is not controlling in the instant matter.

The testimony presented by the Union demonstrating that there was an unwritten agreement between the parties to allow employees who worked a four (4) day week ending on Thursday to pick up their paychecks, if available, on Thursday also demonstrated there was not an intent to change the payday from Friday to Thursday because the checks had a Friday date on them. Employees were directed not to cash the check until Friday. If the County became aware an employee cashed the check on the Thursday they received it the employee was informed if they continued to do so they would no longer be able to receive the paycheck on Thursday. Allowing employees to pick up paychecks on Thursday was clearly convenient for employees. They would not have to make an unnecessary trip to their workplace on Friday or have to wait until the following Monday to receive their paycheck.

There is no question that the convenience of allowing employees to pick up their paychecks on Thursdays has been long standing, has been consistent, and has been mutually accepted by the parties. However, the intent of this practice is also clear, to make it unnecessary for employees to travel to work on Friday to receive paychecks or wait until the following Monday to receive paychecks. Furthermore, even though employees have been obligated to wait until Friday to cash

their paycheck, the record demonstrates employees have not always complied with this requirement.

The Union has argued that the County must continue the practice of allowing employees to pick up their paycheck on Thursday. In effect the Union has argued this is the way it was done and it is the only way it can be done. However, the Union has not demonstrated how the change the County has implemented alters the intent of the practice or how direct deposit places an undue hardship on any employee. The management rights provision of the agreement clearly gives the County the right to introduce new methods or ways of doing things. Herein, it has informed employees it will no longer allow employees to pick up their paycheck on Thursday but has provided the use of direct deposit to have their paycheck available for Friday. The undersigned finds such an action still accomplishes the original intent of the practice, to allow employees to have their paycheck without making an unnecessary trip to their workplace on Friday or having to wait until Monday to receive their paycheck.

Thus, had the County ceased allowing employees to receive their paycheck on Thursday without putting into place the alternative of direct deposit the Union would be correct in claiming the County had violated the intent of the original agreement between the parties concerning the four (4) day workweek. Further, if any employee can demonstrate that the direct deposit program places an undue hardship on them, e.g., if the County cannot direct deposit to the employee's financial institution or the employee does not have a financial institution, the County cannot require the employee to use a financial institution that will accept direct deposit, the County must continue the practice of making the check available on their last day of work.

Therefore, based upon the above and foregoing, and the testimony, evidence and arguments presented the undersigned concludes the County did not violate the collective bargaining agreement when it ceased making paychecks available on the Thursday of the four (4) day, ten (10) hour work day work week. The grievance is denied.

AWARD

The grievance is arbitrable.

The County did not violate the parties collective bargaining agreement when it informed employees it would no longer issue checks on Thursday.

Dated at Madison, Wisconsin, this 29th day of July, 1997.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator

