

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
MARINETTE COUNTY COURTHOUSE EMPLOYEES
LOCAL 1752, AFSCME, AFL-CIO

and

MARINETTE COUNTY

Case 163
No. 54882
MA-9819

(Sheriff's Department)

ARBITRATION AWARD

Marinette County Courthouse Employees Local 1752, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Marinette County, hereinafter referred to as the County, are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an arbitrator to hear and decide a dispute reflected in a grievance filed on behalf of nine then-current and former male civilian corrections officers. The undersigned was so assigned.

Hearing on the matter commenced on August 12, 1997, in Marinette, Wisconsin at which time the Union presented evidence on the merits of its grievance and rested its case, subject to its right to submit testimony and evidence in rebuttal and/or additional direct testimony based on any new information that might be discovered.

After the Union put in its case, the County moved for summary dismissal of the grievance.

On October 9, 1997, the Arbitrator conducted a mid-hearing conference at the Commission offices in Madison, Wisconsin.

Thereafter, the parties submitted briefs on the County's motion for summary dismissal of the grievance.

On April 20, 1998, by written opinion the Arbitrator denied the County's motion for summary dismissal. In discussions prior to re-commencement of hearing, the parties were able to reach a settlement of the grievance, and authorize the undersigned to issue a consent award setting forth their agreement.

Now, having considered the settlement agreement and finding it fully consistent with the relevant provisions of the aforesaid collective bargaining agreement, the Arbitrator makes the following Consent Award.

CONSENT AWARD

1. The County will pay the sum of \$30,000.00 to the Grievants in settlement of all claims. Said sum shall be considered liquidated damages and shall not be subject to withholding taxes. However, the Grievants assume any responsibility and liability for any taxes which may be owed as a result of said payments.
2. Each Grievant shall be designated by one of the letters from (A) through (I), inclusive, solely for purposes of distributing the aforesaid settlement amount. The distribution of said settlement amount shall be as set forth in "Exhibit A" annexed hereto and incorporated by this reference as if fully set forth herein.
3. The Union shall withdraw the pending grievance (WERC Case 163, No. 54882, MA-9819), and said grievance shall be dismissed with prejudice upon execution of the terms and conditions of this Award.
4. Contemporaneous with the execution of this Agreement, each of the Grievants shall sign a Release of Claims, a copy of which is annexed hereto as "Appendix B" and incorporated by this reference as if fully set forth herein.
5. The parties' participation in this Agreement is not to be construed as an admission of any wrongdoing or liability whatsoever by or on behalf of the County or its agents.
6. This Agreement is intended for the sole purpose of resolving the dispute between the parties concerning the issues asserted by the Union in the pending grievance. It is not intended for any other purpose and shall not be used by any other party for another reason. The parties agree that this Agreement shall not be construed to set any precedent.

Dated at Madison, Wisconsin this 11th day of August, 1998.

A. Henry Hempe /s/

A. Henry Hempe, Arbitrator

Approved as to form

Approved as to form

Chester Stauffacher /s/

Chester Stauffacher,
Marinette County Corporation Counsel

David A. Campshure /s/

David A. Campshure
Staff Representative
Council 40, AFSCME, AFL-CIO

APPENDIX A**PAYMENT OF LIQUIDATED DAMAGES**

Employee	Hours Worked Between 8/5/89 and 2/11/95	Percentage of Total Hours Worked	Liquidated Damages Payment
A	6,797.22	14.81	\$4,443.00
B	1,656.90	3.61	\$1,083.00
C	0.00	0.00	\$0.00
D	8,676.00	18.90	\$5,670.00
E	3,614.80	7.88	\$2,364.00
F	10,585.70	23.07	\$6,921.00
G	699.90	1.53	\$459.00
H	11,754.40	25.61	\$7,683.00
I	2,109.90	4.59	\$1,377.00
TOTALS	45,894.82	100.00	\$30,000.00

APPENDIX B

RELEASE OF CLAIMS

The following Release of Claims refers to the action entitled WERC Case 165, No. 54924, MA-9830, and resolved by the attached Consent Award.

In exchange for satisfactory fulfillment by Marinette County of the promises contained in the attached Consent Award, I, _____, agree not to file any claims or demands nor institute any legal action against Marinette County or its agents based on the allegations asserted in WERC Case 165, No. 54924, MA-9830.

The parties agree that this Release of Claims may be specifically enforced by a court or the Wisconsin Employment Relations Commission and may be used as evidence in any subsequent proceeding before a court or the Wisconsin Employment Relations Commission in which either of the parties allege a breach of the Consent Award or this Release of Claims.

This Release of Claims, along with the attached Consent Award, constitutes the complete understanding between myself, Marinette County Courthouse Employees Union, Local 1752, AFSCME, AFL-CIO, and Marinette County concerning the allegations set forth by the grievance entitled WERC Case 165, No. 54924, MA-9830. No other promises or agreements shall be binding unless signed by both parties.

Date

Signature

rb
5720

James R. Meier
Chairperson
A. Henry Hempe
Commissioner
Paul A. Hahn
Commissioner



Mailing Address:
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State of Wisconsin
Wisconsin Employment Relations Commission

April 20, 1998

Mr. David A. Campshure
Staff Representative
1566 Lynwood Lane
Madison, WI 54311

Mr. Charles Carlson
6666 Odana Road
Box 246
Madison, WI 53719

Re: Grievance
Marinette County (Sheriff's Department)
Case # 165, No. 54924, MA-9830

Gentlemen:

Following the filing of a grievance on behalf of nine male civilian corrections officers employed by Marinette County, an arbitration hearing on the matter commenced on August 12, 1997, in Marinette, before the undersigned as arbitrator.

The Union presented testimony as to the merits of its grievance, then rested, subject to the right to present rebuttal testimony and/or additional direct testimony based on any new information that might be discovered. After the Union put in its case, the County moved for summary dismissal of the grievance. The undersigned reserved ruling on said motion.

On October 9, 1997, the arbitrator conducted a mid-hearing conference. The County renewed its motion for summary dismissal. At the arbitrator's request, both parties agreed to submit briefs on the motion. Each party did so on a schedule mutually agreeable to them; the last brief was received by the undersigned on March 23, 1998.

The Union views the motion as presenting the sole issue of whether the grievance before the undersigned is substantively arbitrable. That issue, however, has been disposed of in a prior proceeding. *Marinette County Courthouse Employees Union, Local 1752, AFSCME, AFL-CIO v. Marinette County (Courthouse)*, Case 154, No. 53337, MP-3103, Dec. Nos. 28783-A & 28783-B. In the two decisions emanating from that proceeding, both the hearing examiner and a Commission

majority concluded that the collective bargaining agreement " . . . gives the parties the right to arbitrate 'differences' between them," and specifically determined that the grievance which is the subject of this proceeding " . . . is a difference between the parties."

Thus, I do not perceive the County's Motion to Dismiss as going to the issue of arbitrability. I view it, instead, as akin to a motion to dismiss in a civil action on the grounds that the plaintiff has failed to make a *prima facie* case. Put another way, the County's motion claims that based on the pleadings and proof adduced thus far, the grievance has no merit and there is no reasonable basis on which the Union could prevail. In deciding it, however, I must view the evidence in the light most favorable to the Union.

The County supports its motion with five arguments: A) the County did not violate Section 1.03 of the Agreement, B) the Union acquiesced in the payment of the award to the female CCOs and should (thus) be precluded from filing a grievance after the fact, C) the Union's "last gasp" attempt to find a substitute contractual violation at the arbitration must fail, D) the Union's grievance was not timely filed and therefore is not eligible for the grievance process or arbitration, E) there is an underlying issue of jurisdiction in this case, and the arbitrator may not have authority to consider the grievance.

The Union disputes each argument offered by the County. It discounts the County's assertion that there was no violation of Section 1.03 of the parties' agreement because that argument goes to the merits of the grievance, not to whether the grievance is arbitrable. The Union denies that it acquiesced or otherwise waived its right to file this grievance, claiming the Union was never a party to the proceedings commenced by the Equal Employment Opportunity Commission (EEOC) following complaint from female CCOs employed by the County. The Union denies any "last gasp" attempt to find an additional contract violation. The Union further contends that the County's failure to raise previously the issue as to whether the grievance was timely filed constitutes a waiver. Finally, the Union asserts that the grievance is properly before the Arbitrator instead of a federal court because the issue herein is an alleged contract violation between the County and the Union and does not involve the EEOC as a party.

In my opinion, the County's Motion to Dismiss must be denied.

The grievance alleges that "women corrections offices received earned wages in a settlement with Marinette County dating back to the year 1990." This, according to the written grievance, violates "Article 1.03 Equal Opportunity" (of the contract between the parties). The requested settlement recited on the grievance form is to "make the employees (nine male CCOs) whole."

At hearing, the Union's Statement of the Issue essentially mirrored its written grievance, but added specificity, to-wit: did the County violate the party's collective bargaining agreement and discriminate against male civilian corrections officers (CCOs) when, by means of voluntary settlement, it paid female CCOs back pay in addition to the negotiated hourly rate for the CCOs' position? If so, what is the appropriate remedy. The remedy sought by the Union was to make the grievants whole, such remedy to include paying each of the male CCOs a "back pay" amount to be calculated on the same basis as the back pay amounts paid to the female CCOs.

The County first argues that it did not violate Section 1.03 of the parties' collective bargaining agreement. That section provides as follows:

1.3 Equal Opportunity. The parties of this Agreement agree that they shall not engage in any act of employment discrimination as specified in the Wisconsin Statutes against any individual on the basis of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record or conviction record, and that such persons shall receive the full protection of this Agreement. Wherever in this Agreement one gender is used, it shall include the opposite gender and the singular shall include the plural, where applicable.

Wis. Stats. 111.321 provides in part:

111.36 Sex, sexual orientation; exceptions and special cases. (1) Employment discrimination because of sex includes, but is not limited to, any of the following actions by any employer, labor organization, employment agency, licensing agency or other person:

(a) Discriminating against any individual in promotion, compensation paid for equal or substantially equal work, or in terms, conditions or privileges of employment or licensing on the basis of sex where sex is not a bona fide occupational qualification.

The Union has demonstrated that Marinette County has employed female Civilian Correction Officers since 1988 and male Civilian Correction Officers since 1991. It has further shown that in 1989 the female CCOs complained to county authorities that the female CCO wages reflected gender discrimination. Specifically, the female CCOs alleged that they performed substantially the same jailer duties as male sworn deputy sheriffs but were paid substantially lesser wages. When no immediate corrective action was taken by the County, the female CCOs ultimately approached the Equal Employment Opportunity Commission offices in Milwaukee in the same year.

Three years later the EEOC commenced an action against Marinette County on behalf of the female CCOs. In 1995, the County entered into a voluntary settlement agreement with the affected female CCOs. Under the terms of the settlement a total of \$160,000 was divided among the women officers, one half of which was designated as wages dating back to August 1, 1988 and one-half of which was designated as punitive damages. Each female CCO who participated in the settlement received two checks reflecting these designations. The checks were in varying amounts apparently based on length of service as a CCO during the period of time covered by the settlement. This one-time payment of two checks to each of the participating female officers represented the entire settlement; there were no wage schedule or other adjustments.

Initially, both male and female CCOs in Marinette County were under the impression that the males were also to be included in the EEOC action. As matters turned out, the males were never a part of the EEOC litigation, although depositions were sought and taken from them. In fact, one of the male CCOs testified that he was advised by an EEOC attorney that he and his fellow male CCOs were not participating in the settlement because the male CCOs "had penises" and, further, that the EEOC was not "trolling for clients."

The basis of calculations for the voluntary settlement with the female CCOs remains unclear. It does appear, however, that 1) to some extent individual settlements reflected actual hours employed as a CCO in some fashion, and 2) even female CCOs hired after the County phased out male deputy sheriff jailers (by hiring male civilian corrections officers) and the date of settlement financially benefited from the settlement. It is also clear that no male CCO received any benefit from the settlement.

At all times, the basis of the EEOC suit was the disparity between the wages paid to the female CCOs and the male sworn deputy sheriffs assigned to the jail division. In 1991 the County hired its first male CCO and began to phase out its male sworn deputy sheriffs out of jailer duties. (There was one exception: one jailer continued his jailer responsibilities as an "accommodation" to his apparently weakened condition; neither party has argued that is a material fact herein.) It further appears that the wage schedule for the male CCOs and the female CCOs has applied to males and females, alike.

In my opinion, these facts are sufficient for the establishment of a *prima facie* case.¹ The male CCOs have claimed that the County violated Section 1.03 of the collective bargaining agreement. Section 1.03 prohibits each party from ". . . any act of employment discrimination as specified in the Wisconsin Statutes against any individual on the basis of . . . sex." Wis. Stats. 111.36 defines employment discrimination as including discrimination against any individual in compensation paid for equal or substantially equal work. It is undisputed that the male and female CCOs perform equal or substantially equal work. It is further undisputed that the County paid the female CCOs wage rates that exceeded the contractual wage schedule applicable to all CCOs. Finally, according to uncontested testimony presented by the Union, the reason that the males did not participate in the largess was because "they had penises."

Moreover, this is not a case where to grant the males relief would obviate the relief from alleged employment discrimination against the females that the settlement sought to impose. The male wages chosen as the standard against which the female CCO wages were measured and found wanting were not the wages of fellow (male) CCOs, but male sworn deputy sheriffs with similar jailer duties as those of the females.²

¹ This is not to say the proof submitted contains anything more than a bare outline of the settlement basis for the females. (See Union Exhibit 2, Gallagher Decision, Findings of Fact 7 & 8.) More data would certainly be helpful. Of greatest help, of course, would be the EEOC basis for its settlement calculations. I understand that obtaining this information may be problematic.

² In *Ende et al. v. Board of Regency Universities, et al.*, 257 Fed. 176 (1985) relief was denied male professors who had filed a reverse discrimination claim against the University Board of Regents. These plaintiffs alleged that the compensation scheme introduced to remedy salary discrimination against female professors violated the Equal Pay Act. The Seventh Circuit Court of Appeals affirmed the judgment entered for the defendant Board of Regents and held that

The County's contention that the Union acquiesced in the settlement and thus waived its right to grieve this matter is not persuasive. The record before us specifically disavows any Union participation in the EEOC litigation. The Union may have known of the matter informally; it was not a party to it, however, and none of its bargaining unit members who were parties to it as individual employees were Union officers of sufficient standing to commit the Union to acquiescence.

The County also alleges a "last gasp" Union effort to find an additional contractual violation as a basis for relief. Suffice to say that if the effort was made it was so subtle as not to be recognized by me. In my opinion, the *prima facie* case made by the Union is based on the undisputed evidence that female CCOs received back wage payments in partial settlement of a legal action brought by the EEOC and that such wage payments were in excess of the wage schedule applicable to CCOs. This is clearly reflected in the Union's Statement of the Issue asserted at the beginning of the hearing in this matter.

The County further asserts that the Union filed its grievance in this matter in an untimely manner. The County does not suggest when the suspense date occurred. For that matter, neither does the Union. The collective bargaining contract between the parties, of course, provides that grievances be filed within 10 days of the incident of which complaint is made. The County may be thinking of July 10, 1995 as the date on which the 10-day period began. Yet that was merely the date on which the female CCOs received their checks. The Union was not attempting to undo those payments. The gravamen of the Union's grievance is to provide the male CCOs with the same amenity as to wages. Under this view, every day following the issuance of checks for back wages to the female CCOs is simply another day in a continuing episode in which male CCOs continued to suffer a wage disparity. Viewed in this manner, the Union's filing of this grievance on July 31, 1995, was timely.

Moreover, although authority is split as to this issue, it appears the greater weight of authority would find the County has waived or given up its right to assert untimeliness as a defense since it failed to bring it up earlier. See *Winnebago County and Park View Rehabilitation Pavilion and Pleasant Acres Employees Union, Local 1'280, AFL-CIO, (Gratz) Case 184, No. 43833, MA-6098 (WERC, 1990)*.

Finally, the County contends that the arbitrator may not have jurisdiction to decide this matter. The County does not argue that the court-approved settlement under which it made the payments to the female CCOs gives it a license to pay disparate wages for the same work to its male and female CCOs. Neither does the County argue that inasmuch as the court-approved payments supposedly represented restitution for the alleged employment discrimination against the female

male faculty Equal Pay Act rights were not violated by the University action in developing and applying affirmative action equity adjustment formula to female faculty members' pay salaries to remedy the effects of past discrimination. The appellate court found it made no sense to apply the formula to men in the context of the case, for to do so would only serve to continue the discriminatory differential, albeit at a higher level of compensation.

In the instant matter, however, providing male CCO's the same back pay awarded the female CCOs would not continue any discriminatory differential between the female CCOs and male sworn deputy sheriff jailers that the settlement was apparently designed to overcome.

CCOs such payments are privileged, and the County thus immunized from any subsequent contention that these payments may constitute a new and separate basis for employment discrimination against another group. (For that matter, the County has not conceded any employment discrimination took place in the context of this matter>)

Instead, the County merely points to the retention of jurisdiction by the federal District Court as to the EEOC litigation and settlement as a basis for its last argument. But the answer here must be that that case was premised on federal statutory rights (under which it does not appear the male CCOs are a protected class) and did not involve any alleged violation of the collective bargaining agreement. Indeed, there is nothing in the record that suggests the Court (or the EEOC) ever considered the County's responsibilities to its male CCOs under the non-discrimination article of the collective bargaining agreement. Thus, although some of the facts of this matter may overlap those of the EEOC litigation, the issue presented by this grievance is separate from that in the former case, is proceeding on a different legal theory, and does not appear to be ripe for referral to the federal district court.

This is not to say that I have reached a final determination of this case. All I have decided is that viewed in the light most favorable to the Union the evidence the Union has presented constitutes a *prima facie* case. The County is now entitled to its turn at bat.

Accordingly, the County's motion to dismiss is denied. The County is directed to proceed with presenting any testimony or evidence it may wish to introduce on its behalf. I shall contact each of you with respect to possible hearing dates.

Sincerely,

A. Henry Hempe
Arbitrator

AHH:h