BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

FOREST COUNTY DEPUTY SHERIFFS' ASSOCIATION

and

FOREST COUNTY (SHERIFF'S DEPARTMENT)

Case 82
No. 59476
MA-11311

(Health Insurance Premium Grievance)

Appearances:

Ms. Carol J. Nelson, Executive Director, Northern Tier UniServ-East, P.O. Box 9, Crandon, WI 54520, appearing on behalf of the Forest County Deputy Sheriffs' Association.

Ruder, Ware & Michler, S.C., by **Attorneys Dean R. Dietrich** and **Bryan Kleinmaier**, 500 Third Street, P.O. Box 8050, Wausau, WI 54402-8050, appearing on behalf of Forest County.

Mr. Richard Thal, General Counsel, Wisconsin Professional Police Association, 340 Coyier Lane, Madison, WI 53713, appearing on behalf of the Forest County Courthouse Employees' Association, Grievants in Case 81, No. 59424, MA-11291.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Forest County Deputy Sheriffs' Association, (hereinafter referred to as the Union) and Forest County (hereinafter referred to as the County) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute over assessment of health insurance premium payments to employees in the Union's bargaining unit. An arbitration request over the identical issue was received from Forest County Courthouse Employees' Association (Case 81, No. 59424, MA-11291). The undersigned was designated as the arbitrator in both matters, which were consolidated for hearing and decision. A hearing was held on February 13, 2001, at the County Courthouse in Crandon, Wisconsin, at which

time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. A stenographic record was made of the hearing for use by the County, but the parties did not agree to use the transcript as the official record of the case, and the Arbitrator did not receive a copy of the transcript. The parties submitted post-hearing briefs, which were exchanged through the undersigned on April 16, 2001. On April 23, the parties advised the Arbitrator that they were waiving the submission of rely briefs, whereupon the record was closed.

Now, having considered the testimony, exhibits, other evidence, contract language, arguments of the parties and the record as a whole, the undersigned makes the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The parties agreed that the matter is properly before the Arbitrator. The substantive issue before the Arbitrator is stipulated to be:

> Did Forest County violate the Collective Bargaining Agreements when it billed employees and deducted from their pay premium payments that were based on an amount that was greater than the premium contributions that the County was actually paying to the insurance carrier?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

Courthouse Employees Collective Bargaining Agreement

ARTICLE I – RECOGNITION

Section 1.01: The County recognizes the Association as the exclusive bargaining representative for all regular full-time and regular part-time employees of the Courthouse and Annexes, Sheriffs, Highway and Social Services Departments for the purposes of conferences and negotiations pertaining to matters of wages, hours and conditions of employment. Excluded from the bargaining unit are

professional, confidential, supervisory and managerial employees, non-clerical employees of the Highway Department, employees of the Sheriff's Department with powers of arrest, elected officials and temporary employees.

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ARTICLE XVIII - INSURANCE

Section 18.01: For the calendar year 1995, the Employer agrees to pay the full premium for single and family health insurance. Effective January 1, 1996, the Employer will provide a three tier premium schedule consisting of a Single rate, Single Plus 1 rate and a Family rate. Also effective January 1, 1996, provided the Employer has made available an IRS Section 125 Plan for premiums only, employees will pay three percent (3%) of the health insurance premium for the Single Plan or for the Single Plus 1 Plan. Employees who qualify for the Single Plus 1 Plan, or the Family Plan will pay three percent (3%) of the Single Plus 1 Plan premium and the Employer will pay the balance of the health insurance premiums for employees. Effective July 1, 1997, the employees will pay five percent (5%) of the health insurance premium for the Single Plan or Single Plus 1 Plan. Employees who qualify for the Single Plus 1 Plan or the Family Plan will pay five percent (5%) of the Single Plus 1 Plan and the Employer will pay the balance of the health insurance premiums for the employees. In the event of a change in carrier, there shall be no change or lowering of current benefits. The parties recognize that insurance deductibles may be renegotiated in a successor Agreement. Employees under the single plan shall receive fifteen dollars ($15.00) per month, and employees who are not covered by the insurance offered by the County shall receive twenty five dollars ($25.00) per month. However, if a husband and wife are both employed by Forest County, in no case shall the cost to Forest County per family for hospital and health insurance, exceed the family plan rate.

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Deputy Sheriffs' Collective Bargaining Agreement

ARTICLE I
RECOGNITION AND REPRESENTATION

Section 1.01: The County hereby recognizes the Association as the exclusive bargaining agent for all the Forest County full-time Deputies, Investigators, Jailer/Dispatchers and Deputized Clerk-Matron, (excluding the Sheriff, elected officials, supervisors, managers and confidential employees) hereinafter called the Association for the purpose of bargaining collectively on the matters pertaining to wages, benefits and working conditions.

Section 1.02: The Association shall be represented in all such bargaining or negotiating with the County by such person or committee as the Association may deem advisable.

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ARTICLE XI
INSURANCE

Section 11.01: All full-time deputies after six (6) months of service, shall be included in the Wisconsin County Association Group Health Trust Insurance Plan with a two hundred dollar ($200.00) deductible per person, three (3) per family (maximum out of pocket cost, six hundred dollars ($600.00) per family), with the County paying one hundred percent (100%) of the cost of the family plan and one hundred percent (100%) of the cost of the single plan. The level of benefits set forth in the health insurance plan offered by the County shall not be modified or changed unless agreed to by the Association. Employees who elect to take a single plan but are eligible for a family plan, shall be reimbursed fifteen dollars ($15.00) per month. **Effective January 1, 1999**, the employees will pay five percent (5%) of the health insurance premium for the Single Plan or Single Plus One Plan. Employees who qualify for the Single Plus One Plan or the Family Plan will pay five percent (5%) of the Single Plus One Plan premium and the Employer will pay the balance of the health insurance premium for the employees.

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BACKGROUND

The County is a municipal employer providing general governmental services to the people of Forest County in north central Wisconsin. Among the services provided are the operation of a courthouse and a Sheriff's Department. The exclusive bargaining representative for the courthouse employees is the Wisconsin Professional Police Association/LEER Division. The exclusive bargaining representative for the deputy sheriffs is Northern Tier UniServ-East.

Both unions have collective bargaining agreements with the County. Both agreements provide health insurance benefits, and provide that employees are to pay 5% of the premium and that "the Employer will pay the balance of the health insurance premiums for the employees." The Wisconsin County's Association Group Health Trust Insurance ("GHT") is the County's vendor for insurance. A representative of the GHT, Bob Wurtz, met with the County's Finance Committee on October 25, 1999, to review their insurance experience and present options to hold down a large anticipated increase in premiums. One of the options

under consideration was a retrospective system, whereby the County would pay a "minimum" monthly premium approximately 9% lower than the premium calculated by the insurance company. If claims experience during the year was less than expected, a savings would be realized. However, if experience exceeded the premiums paid, the County would be liable for the difference at the end of the year. The minutes of the October 25th Finance Committee meeting generally reflect the committee's discussion of the topic in an open session:

FINANCE COMMITTEE MINUTES

DATE: October 25, 1999
PLACE: County Board Room
TIME: 7:00 P.M.

Members Present: David Wilson, Marlyn Zuehike, William Kalata and Erhard Huettl

Visitors Present: Bob Wurtz and Dora James

Meeting was called to order by Chairman Wilson at 7 P.M. Notice of meeting and agenda were read by Chairman. Motion by Zuehike, seconded by Kalata to accept agenda as read. All voting aye. Motion carried.

Motion by Kalata, seconded by Zuehike to accept the minutes of previous meetings held on August 31; October 8 and October 14. All voting aye. Motion carried.

Bob Wurtz, Representative from the WCA Group Health Trust Insurance, addressed the committee regarding health insurance premiums for 2000. Mr. Wurtz explained what has been going on with the insurance over the past three (3) years. For the years 1997 and 1998, our claims were much higher than premiums paid and this will result in a required substantial increase in our premium for 2000, if we maintain the same coverages. Mr. Wurtz explained a couple of options the county could consider to keep premiums lower. Since these options would have to be presented to the unions, it was tentatively decided to have Karen Reynolds of the WCA Group Health Trust meet with employees and union representatives to explain the various options available for the 2000 renewal rates.

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While the Committee anticipated setting up a meeting with the various unions and a representative of the insurance company, no such meeting was ever held, and no union was notified of the Committee's plans to explore insurance options. Forest County Board Chairman Erhard Huettl, a member of the Finance Committee, was a strong proponent of the retrospective plan, even though the insurance company's representatives advised him that the full premium quoted was accurate, and warned him that the County would be incurring a substantial risk of paying more at the end of the year under the retrospective plan than it would over the course of the year if it simply accepted the premium as quoted.

On December 8, 1999, the Finance Committee met again in open session, and voted to adopt the retrospective plan, with the County paying 95% of the lower rate, but employees paying 5% of the higher, originally quoted premium:

FINANCE COMMITTEE MINUTES

DATE: December 8, 1999
PLACE: County Board Room
TIME: 7:00 P.M.

Members Present: David Wilson, Marlyn Zuehlke, William Kalata and Erhard Huettl

Visitors Present: Linda Turner, Leah Van Zile, David and Cory Campbell, Roger Wilson, Dan Hagelin, Rick Huber and Dora James

Meeting was called to order by Chairman Wilson at 7 P.M. Notice of meeting and agenda were read by Chairman. Motion by Zuehike, seconded by Kalata to accept agenda as read. All voting aye. Motion carried.

Motion by Kalata, seconded by Zuehlke to accept minutes of previous meeting. All voting aye. Motion carried.

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Motion by Kalata, seconded by Zuehlke that Forest County go with the minimal renewal rates for health insurance for 2000 with employees to pay percentage on maximum rates. It is legal for the county to do this as long as all funds are in an insurance account and if there are any surplus funds at the end of the year, the surplus funds would be applied to next years insurance premiums and not rolled over into the General Fund (Clerk received information from Shawano County to support this action.) All voting aye. Motion carried.

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The net effect of the Committee's vote was that the employees paid 5.5% of the monthly premiums being paid by the County during 2000. The excess employee contributions were accounted for under the insurance line in the County's accounting system, although there was no segregated insurance account separate from the County's general fund. No meeting was ever held with County employees or the unions to discuss this arrangement, and no notice was provided to any bargaining representative. 1/

1/ There was a meeting in July involving the various unions and a representative of GHT, and possible cost increases for the future were discussed. However, the subject of monthly premiums for calendar year 2000 and the retrospective plan was not discussed.

Payroll, including insurance deductions and the payment of premiums, is processed through the County Clerk's office. When staff members in her office, both members of the WPPA bargaining unit, asked whether the Unions and employees should be told of the retrospective plan, County Clerk Dora James instructed them that they had not been directed to do that, and that the Finance and Personnel Committee would take care of notifying the interested parties.

James retired in the summer of 2000, and was replaced by Betsy Ison. Ison noticed what appeared to be a discrepancy between the deductions shown on payroll records and the premiums actually paid to the insurance company. She asked Sue Miller, the Deputy Clerk, about it, and was told that the staff had been ordered not to discuss it.

In the fall of 2000, the parties prepared to bargain successor contracts. The WPPA asked for insurance information and on October 2nd, the County's labor attorney sent them data, including the rates then in effect. The local president of WPPA noticed that the premiums did not match the deductions being made from employee checks. She contacted S. James Kluss, the Executive Director of WPPA and business agent for the Forest County local. Kluss investigated, and discovered that the County was using different premium amounts for its payment and for employee deductions. The instant grievance was filed on October 5th. The Deputies Association became aware of the dispute, and filed its grievance on October 17th.

In December, 2000, the GHT advised the County that the claims experience for the year had been such that the full premium had to be paid for the year. A bill for $68,864.03 was sent on December 15th. Another bill for $6,104.89 was sent in January of 2001. The County paid both bills. With these additional payments, the employee contributions collected during the course of 2000 equaled 5% of the County's overall payments for health insurance.

The grievances were not resolved in the lower steps of the grievance procedure. They were consolidated for hearing and decision, and an arbitration hearing was held on February 13, 2001. At that time, in addition to the facts recited above, the following testimony was taken:

S. James Kluss, Executive Director of WPPA

S. James Kluss testified that he had been the business agent for the Forest County locals for 16 years, and had until recently also represented the Sheriff's Deputies. In his time representing the Forest County locals, the County had never proposed more than one insurance rate, and prior to this case, Kluss had never been approached about a retrospective premium plan. Kluss testified that he first became aware of the discrepancy in premium amounts when the local president contacted him in October, and that he promptly filed a grievance.

Kluss reviewed the October 25, 1999 Finance Committee minutes, and stated that the list of attendees did not include any members of the bargaining units. Although the minutes state that the unions will be contacted and a meeting will be held, in fact no one ever contacted him about the retrospective premium plan and no meeting was ever held. Kluss expressed the opinion that he would have been willing to negotiate over paying lower premiums during the year, with the possibility of a lump sum payment at the end of the year, had he ever been approached with the idea. On cross-examination, Kluss agreed that minutes of the Finance Committee were prepared by the County Clerk's office and that insurance payments were made through the County Clerk's office. He also agreed that WPPA had two members working in the County Clerk's office. He reiterated, however, that the first time he or any official of the local union became aware of the insurance premium discrepancy was in October of 2000.

Dora James, Former Forest County Clerk

Dora James testified that she never told anyone to hide information about the premiums, though she did advise her staff when they asked that the Finance and Personnel committee would see to notifying employees, and that the County Clerk's office had not been directed to do so. James said that the County had intended to schedule a meeting with the unions to discuss the retrospective premium option, but that there were conflicts with other County committee meetings and ultimately "it just didn't get put together." James testified that insurance funds were not placed in a segregated account, although they were listed as separate accounting entries. She did not know whether the County received interest on its accounts.

Betsy Ison, Forest County Clerk

Betsy Ison appeared under subpoena. She testified that, when she first noticed the apparent discrepancy in the premium deductions and the premium payments, she was concerned that it was not ethical to keep quiet about it. Ison stated that she paid the additional invoices from GHT in December of 2000 and January 2001, and that she believed the total amount paid for insurance for 2000 eventually exceeded what would have been paid if the County had paid the full premium throughout the year.

Erhard Huettl, Forest County Board Chairman

Erhard Huettl testified that he argued in favor of the retrospective payment procedure, because he thought that it presented a chance to get the lowest rate possible for the County. He acknowledged that the insurance company warned him against this, and told him the County would be taking a big risk of higher than anticipated costs if experience was

unfavorable. Huettl testified that the County's experience in 2000 was bad enough that insurance costs exceeded even the full premium amounts originally quoted by GHT, though he wasn't sure if the County or the insurer paid the overage.

Huettl testified that he was not familiar with the County's accounts, but did not believe there was a segregated trust fund for insurance monies. He had told the County Clerk to keep the premium amounts separate, though he did not know if this was done. Huettl was not sure why no meeting was ever held with the unions and the employees to discuss the retrospective premium plan, but expressed the opinion that everyone knew what was going on with insurance.

Additional facts, as necessary, are set forth below.

ARGUMENTS OF THE PARTIES

The Position of the WPPA

The WPPA takes the position that the County deliberately overcharged its members for health insurance during the course of 2000, and should be obligated as a remedy to disgorge the excess amounts that were collected. The County assessed the employees 5% of the "maximum" rate is was quoted by the insurance company. However, the County itself elected to instead pay a "minimum" rate that was 10% lower. The County did so in hopes that the claims experience during the year would warrant the lower rates. It never advised the employees nor the unions of this scheme. Sometime after the scheme was discovered, the County was forced, because of adverse experience, to pay retrospective premiums for the year to the insurance company, and the overall charges equaled what it would have paid under the "maximum" rate.

The Arbitrator must reject the County's claim that there is no violation, or at least no remedy due, because in the end it paid an amount that totaled 19 times what it collected from employees (the equivalent of 95% of the premium). What the County did was clearly wrong. It hoped for a windfall at the expense of its workers. At a minimum, it forced the employees to float interest free loans to it during the course of the year. Had it not concealed its plans from employees and their bargaining agents, there would have been an opportunity for an orderly and informed system of allocating the risks presented by the County's desire to pay only a minimum premium. Instead the County acted unilaterally. The Arbitrator has broad remedial powers, and in this case there must be a meaningful remedy for the violation, one that will deter this type of conduct here and elsewhere in the future. The only appropriate remedy is to reimburse the employees for the amount that they were overcharged, plus interest.

The Position of the Northern Tier UniServ-East

The UniServ Council takes the position that, whatever its subjective intentions, the County acted wrongfully in deducting amounts from employee paychecks that were more than 5% of what the County was paying for insurance. Whether the Arbitrator believes that the County was acting in bad faith, seeking to retain any savings from insurance for its own purposes, or was acting in good faith, hoping to generate a savings that might benefit both itself and employees, is irrelevant. What is important is that the County acted secretly and unilaterally. It overcharged employees during the course of the year. The Arbitrator must order a meaningful remedy, in the form of an order refunding the overpayments, with interest.

The Position of the County

The County takes the position that there is no contract violation in this case. The contract obligates the County to pay 95% of the cost of health insurance. For the year 2000, the County paid 95% of the cost of health insurance. That is the only obligation the contract imposes. There is no language obligating the County to make its payments on any specific schedule. The fact that the County elected to pay smaller monthly increments, then made larger lump sum payments at the end of the year, is of no account under the contract. The Unions have no right to dictate the method or schedule of payment by the County to its insurance provider, and the Arbitrator cannot invent such a right under the guise of interpreting the contract. Given that the undisputed evidence establishes that the County satisfied its obligations, there is no violation and the grievances must be dismissed.

Even if there was a problem with the County's manner of payment in this case, the Unions cannot legitimately challenge it. This is because both acquiesced in the County's decision to pay the "minimum" rates. Acquiescence occurs when a party is aware of a plan or a decision, and does not protest its implementation. In this case, the County's plan to pay "minimum" rates was discussed at a public meeting of the Finance Committee on December 9, 1999. The decision was memorialized in the minutes of that meeting, which are on file in the County Clerk's office. The actual processing of insurance payments is done in the County Clerk's office, which employs members of the WPPA bargaining unit. Plainly, the amounts being paid for health insurance were known or should have been known to the Unions in late 1999 or early on in 2000. Under the labor agreement, there is a ten-day time limit on grievance filing. These grievances were filed in October of 2000. The lack of any response to the County's plan for ten months after it was announced demonstrates that employees acquiesced in the decision.

The Arbitrator must reject the Unions' contentions that the County somehow tried to hide what it was paying for insurance. Although one witness, County Clerk Betsy Ison, testified that Deputy Clerk Sue Miller claimed she was ordered not to discuss the matter, that contention does not hold up under scrutiny. The retired County Clerk, Dora James, testified

that she had never told anyone to keep quiet about the County's payment of the "minimum" rates. Ms. James, being retired, has no part in this dispute, and has no reason to lie. Moreover, it makes no sense that employees would be told to keep quiet about a plan that was discussed and approved in a public meeting. What is significant about Ison's testimony is that Miller, a member of the WPPA bargaining unit, admitted to knowing of the County's payment of "minimum" rates virtually from the start. Again, acquiescence occurs when a party knows of a decision and does not dispute it. The evidence clearly establishes that the Unions knew of the decision to pay "minimum" rates, and did not contest it. Accordingly, the Arbitrator must dismiss the grievances in their entirety.

Assuming solely for the sake of argument that the payment of "minimum" rates during the year in 2000 somehow violated the collective bargaining agreement, the County argues that there is no remedy available. As previously noted, the County paid every penny that it was contractually obligated to pay for insurance in 2000, and the employees paid exactly 5% of the total, just as the contract provides. Thus, there can be no question of rebating premium amounts. The only plausible remaining theory for monetary relief would be a claim for interest on the "excess" sums paid by employees during the course of the year. However, this arbitrator and others have commented in the past that interest is not a generally available remedy in arbitration, and should only be granted where the parties themselves have bargained to make interest a part of the arbitrator's remedial authority. There is nothing in the contracts here to suggest that these parties have ever contemplated an award of interest in an arbitration proceeding. Neither is there anything in the record of this case to suggest that interest is appropriate because of some peculiarity in the facts of the case. Again, the decision to pay "minimum" rates was made in an open meeting, and was openly administered. It was intended to benefit both the County and the employees by holding down insurance costs. Given these facts, an award of interest is not appropriate. Instead, the Arbitrator must conclude that all parties paid exactly what the contract required them to pay, and that no monetary relief of any type is appropriate.

DISCUSSION

Three questions are presented by these grievances. The first is whether the County's decision to charge employees deductions for health insurance based on premiums that were 10% higher than the monthly premium actually being paid was a violation, given that the County ultimately paid lump sums that brought its contribution to 95% of the actual annual premium, and the employees share to 5% of the actual annual premium. The second is whether the employees and/or the labor organizations acquiesced in the allocation of premiums, and thereby waived any remedy. The final question is, if there is a violation, and a remedy has not been waived, what remedy is appropriate. Each is addressed in turn.

Did the County Violate the Collective Bargaining Agreement?

The collective bargaining agreements provide that employees will pay 5% of the premium and the County will pay the balance. For calendar year 2000, the County was quoted premium costs of $309.93 per month for Single coverage, $619.89 per month for Single Plus One coverage, and $840.13 per month for Family coverage. Employees were assessed monthly deductions from their checks for 5% of these amounts. However, these premiums were 10% higher than the premiums the County itself elected to pay. Had claims experience during the year justified the lower rate, there would have been no additional assessment to the County.

The contract language is clear as to be parties' respective obligations: "Employees who qualify for the Single Plus One Plan or the Family Plan will pay five percent (5%) of the Single Plus One Plan premium and the Employer will pay the balance of the health insurance premium for the employees." This language cannot be reasonably read to mean that the employees will pay something other than 5% of the amount the County is paying to the insurance company. On its face, the County's actions in charging employees more than 5% of what it was paying in monthly premiums violates the contract.

The County's position is essentially that, since it had to pay assessments at the end of 2000 that brought its costs up to what the original quote was, there has been no contract violation. With all due respect to the County, this amounts to a claim that it meant to violate the contract, took steps to violate the contract, violated the contract for 11 months, but in the 12th month was forced by the insurance company to come into compliance with the contract. The County Board Chairman testified that he was confident that they would save money by paying the lower premium. The Finance Committee took the action to save money against future insurance premium costs. The December 8th minutes state their intentions as to any savings:

> Motion by Kalata, seconded by Zuehlke that Forest County go with the minimal renewal rates for health insurance for 2000 with employees to pay percentage on maximum rates. It is legal for the county to do this as long as all funds are in an insurance account *and if there are any surplus funds at the end of the year, the surplus funds would be applied to next years insurance premiums and not rolled over into the General Fund . . .*

From this, it does not appear that excess employee contributions were to be rebated to employees, nor even that there would be a future credit for employees, other than indirectly. Applying the savings to future insurance premiums would benefit the employees, in the sense that they would be paying 5% of a lower premium, but would more greatly benefit the County, since it pays 95% of the premium and thus garners 95% of the savings. If those "savings" actually represent unwitting advance payments by employees, rather obviously there is a contract violation. The contract does not provide for advance employee payments against future insurance costs, and those payments cannot be collected without the consent of the bargaining representatives.

The subjective intent of the County's representatives is in issue, because the question of a contract violation depends in part on whether the County planned to simply structure its payments over the year, as it contends in its brief, or instead sought to pay an amount less than the amount used to calculate the employee contributions. The County is perfectly entitled to make agreements on its schedule of payments to the insurer, so long as those agreements do not implicate employee costs and coverage. However, that is not a plausible interpretation of what happened here. The minutes of the Finance Committee and the testimony of Chairman Huettl make it clear that the County believed it would realize lower annual costs through the minimum rate plan. While the County ultimately had to pay lump sums, it never intended to do so, and made the payments only because the insurance company compelled the payments. In short, the County set out on a course of action that had employees paying more than 5% of the premium it was paying on a monthly basis, and it proceeded on this course of action in the belief that it would not have to make any payments in addition to the monthly premiums. This is a clear violation of the contract. The lump sum payments at the end of 2000 were not the County's doing, and while they impact the remedy, they do not erase the continuing violation of the contract during the first 11 months of the year.

Did the Employees and/or the Unions Acquiesce or Waive Their Right to Any Remedy?

While the County's claim that it was just structuring its payments puts its subjective intent in issue, the further question of good motive or bad motive is not directly in issue on the question of whether there was a contract violation. No matter whether the County acted from altruism or consciously sought to overcharge employees, the basic fact is that the County believed the rate would be the lower one, they intended that the rate be the lower one, they contracted to pay the lower one, and they charged employees for the higher one. However, the question of whether the County acted in an above board fashion does directly come in issue in connection with the argument that the employees acquiesced in this arrangement and thereby waived their right to object. The County asserts that bargaining unit members knew or should have known about the difference in monthly rates from the beginning, and that if they had an objection they were bound to raise it at the earliest possible point. The source of this asserted knowledge is twofold — first, that employees in the County Clerk's office directly knew of the arrangement, and second that the information was public knowledge, having been discussed at a public meeting and recorded in the minutes, which are public records. This is not a persuasive argument.

The record evidence clearly indicates that the County took steps to prevent employees and the bargaining representatives from learning of the lower monthly rates. While former County Clerk Dora James testified that she never told anyone to hide the retrospective rate, when her employees asked if they should tell other County employees about it, she did tell them in essence that it was not their business to do so, and that the Finance Committee would take care of that. This would be reasonably understood in the same manner that her Deputy Clerk Sue Miller interpreted it when later asked by Ison – that she was told not to discuss it. If

the employees were so advised by a County official, and I find that they were, the County cannot argue that they should have ignored their supervisor's orders and have publicized the insurance rates.

The conclusion that the County sought to hide the lower insurance rates is buttressed by the fact that the Finance Committee started off the process by acknowledging that a meeting with the unions would be required, and by specifying who from the insurance company should be present for the meeting, but then never actually scheduled a meeting. The explanation that there were schedule conflicts and the like is not particularly compelling, given that 11 months passed between the first notation that a meeting should be scheduled and the date on which the Unions actually became aware of the retrospective rates. Scheduling conflicts do not explain why the representatives of employees could not have been notified in writing and asked for comment, nor why the topic was not raised even as late as July when the insurance company representative met with the employees to discuss future premiums.

It is true, as the County argues, that these comments were made and these votes were taken at public meetings and were recorded in the minutes of those meetings. It is also the case that the County Clerk and the County Board Chairman were present at those meetings, and knew full well who was and was not in attendance. Something hidden in plain sight is nonetheless hidden. Waiver is not lightly inferred, and the suggestion that the employees and unions waived their right to object by failing to ask the right question or look in the right places for information is not sound. I am not concluding in this discussion that a plan was made to disguise the retrospective premium plan from the outset. Neither do I conclude that the County had some evil motive for its actions. Rather, it appears that County officials initially intended to discuss the matter with the Unions, but that as time went on either decided that it was more advantageous to simply proceed unilaterally or that it was too awkward to tell the labor organizations that action had already been taken. Whatever the case, the result was the same. The premium payments went forward, without notice to the Unions or the employees.

Based on the foregoing discussion, I conclude that the County did violate the collective bargaining agreement, and that the employees and the labor organizations did not waive their right to a remedy for the violation. The question then is what remedy, if any, is appropriate.

What is the Appropriate Remedy?

The remedy question in this case is muddied by the events after the grievances were filed. Had the County not been forced to pay lump sums at the end of the year that brought its contribution up to a level of 95% of the premium that employees were charged, the appropriate remedy would clearly be to order a full reimbursement of the excess amounts paid by employees. That would be the minimum needed to make the employees whole, and to enforce the contract's promise that they would pay only 5% of the premium. That is the remedy urged

by the Unions. However, that remedy poses very significant problems. Arbitral remedies are compensatory, not punitive. While the contract obligates the County to pay all but 5% of the premium, it equally obligates employees to pay 5% of the cost. Even though it was not what the County intended, the monthly cost of insurance in 2000 was, ultimately, 20 times the amount the employees paid. Thus, the employees paid 5%, just as they were obliged to, and the County paid the full balance, as it was obliged to. An order to reimburse employees would yield an employee insurance contribution of less than 5%. The contract is jurisdictional, and absent extraordinary circumstances, the Arbitrator has no more right to order a contract violation in favor of employees than he does to ignore a violation that disadvantages employees. /2

2/ In making this observation, the Arbitrator would caution that there may be cases in which it is not possible to craft a remedy that conforms to each separate provision of the contract. Employees have an obligation to pay 5% of the premium. Given the language of this contract, employees also have the right to expect that insurance deductions will be in equal monthly amounts. Fortunately for the County, this is not a case where the gamble on rates results in much higher than projected premiums and lump sum payments that exceed the original worst case scenario. In that case, an attempt to retroactively enforce the employees' obligation to pay 5% of the cost by collecting a balloon payment at the end of the year would directly implicate the employees' contractual right to make their insurance payments on a current basis in equal monthly payments.

To find that a reimbursement of overpayments conflicts with the contract is not to say that there is no remedy. In practical terms, the County forced employees to unknowingly lend it money during the course of the year. The County was banking their excess payments rather than passing them along to the insurance company. There is a value to the use of money, and that value is generally reflected in the payment of interest on borrowed amounts.

The County argues that interest is not generally awarded by labor arbitrators, and cites numerous awards, including one by this arbitrator, for that proposition. The awards cited by the County reflect the general view of arbitrators, including this arbitrator. However, those awards are not on point. The awards relied upon by the County discuss the granting of interest on monetary remedies, such as backpay awards. In those cases, the compensatory remedy is the backpay, and the claim for the payment of interest is in addition to the compensation. Even though an economically rational argument can be made for paying interest on those sums, it is not available, principally as a matter of custom. In this case, the payment of interest is not an adjunct to the compensatory remedy – it <u>is</u> the compensatory remedy. The loss to the employees was not the whole of the excess payments, since those payments were ultimately applied to the insurance and not retained by the County. The loss to the employees was in the use of the money before it was paid to the insurance company, and this loss was improperly imposed by the County. Failure to award interest would be failure to remedy the specific violation. Moreover, any interest earned on these excess amounts before they were paid to the insurance company represents an illegitimate gain to the County. Allowing the County to retain those sums would be rewarding it for the contract violation.

Given the peculiar facts of the case, the appropriate remedy is to order the County to pay each employee interest on the excess sums. The record does not reflect whether the County actually received interest, nor the rate of interest it may have received. The appropriate rate of interest in this case is the higher of: (1) the rate the County received on its deposits during this time or (2) the highest rate generally available for deposits in local financial institutions during this time. The higher rate is specified because it represents either what the employees could have earned, and thus lost, or what the County illegitimately earned and must disgorge to avoid unjust enrichment. Given the uncertainty of the rate of interest, the Arbitrator will retain jurisdiction over this matter for a period of sixty (60) calendar days from the date of the Award for the sole purpose of resolving any disputes over the remedy.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. Forest County violated the Collective Bargaining Agreements when it billed employees and deducted from their pay premium payments that were based on an amount that was greater than the premium contributions that the County was actually paying to the insurance carrier;

2. The appropriate remedy is for Forest County to make the affected employees whole by paying each of them interest on the amounts they paid in excess of 5% of the monthly premiums the County was actually paying in 2000, at the higher of (a) the interest rate the County received on its deposits during this time or (b) the highest interest rate generally available for deposits in local financial institutions during this time.

3. The Arbitrator will retain jurisdiction over the grievances for a period of sixty (60) days following the dates of this Award, for the sole purpose of resolving disputes over the remedy.

Dated at Racine, Wisconsin, this 20th day of July, 2001.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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