BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, A.F.S.C.M.E, AFL-CIO

and

ST. CROIX COUNTY, WISCONSIN

Case 189
No. 61830
MA-12077

Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin 54751, appearing on behalf of Wisconsin Council of County and Municipal Employees, A.F.S.C.M.E, AFL-CIO, which is referred to below as the Union.

Mr. Stephen L. Weld, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of St. Croix County, Wisconsin, which is referred to below as the County.

ARBITRATION AWARD

The Union and the County jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to act as Arbitrator to resolve a grievance filed on behalf of Diane Northrup. The parties stipulated that the grievance affects the agreements covering the General Government Support Services and the Human Services Non-Professional bargaining units, and that the grievance should be treated as common to each unit. Hearing on the matter was conducted on June 30, 2003, in Hudson, Wisconsin. The parties entered opening and closing arguments at the hearing, and discussed whether I should issue a bench decision. The parties agreed that the decision should be issued in writing, as soon as practicable following the close of the hearing.

ISSUES

The parties stipulated the following issues for decision:

Did the County violate the Collective Bargaining Agreement when it refused to pay a third employee representative to attend bargaining sessions, the third employee being the alternate?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 23 - DURATION

. . .

Section 23.04 Bargaining Representatives. The County shall be represented by a committee and/or representative(s) of its choice. In addition to any designated AFSCME staff representative(s), the Union shall be represented by two (2) employee representatives and one (1) alternate.

Bargaining meetings shall be scheduled by mutual agreement of the County and the Union, to commence between the hours of 9 a.m. and 2 p.m. and shall conclude at such time as either party desires to do so. Authorized employee representative(s) as defined herein shall be paid their regular day's pay if bargaining occurs during their usual work schedule.

No overtime payments will be made on negotiation days except for time spent performing normal duties.

BACKGROUND

Diane Northrup filed the grievance form, dated October 23, 2002, that was submitted into evidence. The form states the alleged violation thus: "Employer refuses to allow 2 representatives plus 1 alternate on paid time at contract negotiations." The form seeks that the County "restore all PTO time used for negotiations and make employee whole."

Debra Kathan is the County's Personnel Director, and responded to the grievance thus:

> It is the County's contention that its obligation for the payment of wages to union members engaged in active bargaining is limited to two employees. If one of the two designated union members cannot attend the bargain and an alternate is sent as a substitute, the County will provide for wage payments for that person – assuming that the situation meets the requirements set forth in 23.04.

Kathan and Janet Smith, the President of Human Services Non-Professional bargaining unit testified at the arbitration hearing.

Smith has been a County employee for ten years, and has served the Union as President and as Chief Steward during her tenure. She was one of two Union designated representatives for the bargaining for a 2000-2002 labor agreement. The predecessor to that agreement was a 1997-1999 "Joint Labor Agreement." The two units covered by the grievance were part of a joint bargaining committee that negotiated the Joint Labor Agreement. The bargaining for a successor to the 1997-1999 Joint Labor Agreement was done on a unit-by-unit basis.

The first paragraph of Section 23.04 of the 1997-1999 Joint Labor Agreement reads thus:

> The County shall be represented by a committee and/or representative(s) of its choice. In addition to any designated AFSCME staff representative(s), the Union shall be represented by up to two (2) employee representatives per bargaining unit.

The second and third paragraphs of Section 23.04 in the Joint Labor Agreement are the same as the corresponding sections in the agreements covering the two units affected by the grievance.

During the course of bargaining the 2000-2002 labor agreement, the parties discussed altering Section 23.04 of the Joint Labor Agreement to reflect unit-by-unit bargaining. The Union proposed that the section be amended to permit the Union to designate an alternate representative. Smith reviewed the bargaining notes taken by Kim Dupre, a member of the Union's team. Smith testified that the notes detail a dialogue between Smith and the Union's Vice-President, who questioned whether the alternate would be an unpaid member of the team. Smith, in the presence of County representatives, answered in the negative to highlight that all three team members would be in pay status during negotiations. She could not recall if an alternate attended any of the bargaining sessions for the 2000-2002 agreement, and could not recall any prior cases in which the County paid any other than the two members designated by the Union as representatives at the start of bargaining. Neither the County's legal counsel nor any AFSCME representative were at the table when the parties agreed to the revision of Section 23.04. The County prepared the tentative agreements.

Smith noted that the Union's proposal sought to make it possible to have the alternate representative function as a note-taker if the two named representatives were present. From her perspective, if the alternate did not attend the sessions, then the alternate could not meaningfully fill-in for a representative. This function was not significant during the negotiation of the Joint Labor Agreement since the bargaining team was large enough to provide spokespersons and note-takers. Smith believes the Union supplied Dupre's notes to Kathan.

Kathan has served as Personnel Director since 1981, and has attended all bargaining sessions during her tenure. She testified that she appeared as the County's spokesperson for the 2000-2002 labor agreement. The Union and the County discussed the alteration of Section 23.04 to pare down the eleven person bargaining team that negotiated the Joint Labor Agreement. At the commencement of the bargaining process, each party identified the members of its negotiating team. When the parties discussed the alteration of Section 23.04, the Union sought to create an alternate. The County questioned what the alternate would do, and understood the Union's response to indicate that the use of an alternate in the negotiation of separate labor agreements would reflect the past practice in the negotiation of a Joint Labor Agreement, in which a substitute would fill in for a named representative who was unable to attend a bargaining session. Kathan and the Personnel Committee did not understand the discussion to reflect a Union demand for payment for the alternate, or to increase the size of the Union's bargaining team.

Kathan stated that she could not recall formally receiving a copy of the Union's notes, and that she could not recall the conversation between Smith and the Vice-President as recorded in Dupre's notes. The Union may have supplied those notes to the County during the processing of a grievance unrelated to that posed here. None of her committee members understood the Union's proposal to demand expansion of the Union's bargaining team or payment of an alternate unless the alternate was substituting for a named team member.

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

THE PARTIES' POSITIONS

The Union's Arguments

The Union contends the grievance is simple and straightforward. In the last round of collective bargaining, the parties went from a coordinated bargaining system in which separate bargaining units negotiated a master agreement to a system where each bargaining unit negotiated its own labor agreement. In making the change to the first paragraph of Section 23.04, the parties agreed to use "and", which clearly and unambiguously enlarges the committee from two to three paid members beyond any AFSCME representative(s). The Union expressly stated this position in the presence of County representatives, and the agreement's unambiguous terms need to be enforced, not interpreted. Even if interpretation is

required, the dictionary definition of "and" demands the conclusion that paid representatives went from two, to two plus one. Any other conclusion would lead to the untenable position that the alternate could effectively step in to bargain without having attended any sessions.

Bargaining minutes establish that the Union took the position that the alternate was to be present and paid for each session. The Union took this position in across the table discussions with County representatives present. Under the old language, neither party could dictate the identities of the members of the other party's bargaining team. To adopt the County's view effectively permits the County a veto over the Union's selection and use of an alternate, and effectively renders the bargained language change meaningless.

The County's Arguments

The County contends that the crucial term is "alternate." The term clearly establishes that there is one representative designated to fill in for, not to supplement, the two named representatives. The Union proposed the language change and any ambiguity must be construed against the Union. The County agrees that the changed language demands payment for the alternate, but only for those bargaining sessions in which the alternate fills in for a named representative. At no point in the bargaining did the Union clearly communicate that it was proposing to increase the bargaining team from two to three employee representatives.

If the Union wished to change the established payment practice, it should have replaced the old reference from "two" to "three" representatives. Rather, the Union argued to add an alternate to its team. The County agreed to the change, but never agreed to pay any more than two representatives. The clear meaning of "alternate" establishes that the presence of a third member of the bargaining team increases its number rather than permitting a fill-in. To the extent the reference to "alternate" demands interpretation, the dictionary meaning of the adjective form of the term is "succeeding each other" or "every other"; the noun form of the term is "a substitute"; and the verb form of the term is "to do or use by turns" or "to act, happen, etc. by turns" or "to take turns regularly." The noun form is used in the agreement, and it is apparent that the language sought to do no more than to codify the prior practice of paying for two representatives, whether or not a substitute was involved.

DISCUSSION

Each party asserts clear and unambiguous language demands their interpretation. Each is, in a sense, correct. "And" is a conjunctive reference. Two "and" one is three, not two. By the same token, "alternate" in its noun form means "a substitute." It is not apparent how an individual can simultaneously be a "representative" and a "substitute" for a representative. If, however, one interpretation is to prevail, the parties cannot each be correct.

The clarity of the cited terms rests on viewing them out of their context. Ambiguity creeps into Section 23.04 because the two unambiguous terms do not stand alone, but appear in the same sentence. The sentence, in turn, appears within a three paragraph section. Placing the terms into context creates the ambiguity.

Past practice and bargaining history are, in my view, the most appropriate guides to resolve contractual ambiguity since each focuses on the conduct of the bargaining parties whose intent is the source and the goal of contract interpretation. The persuasive force of each guide is rooted in the agreement manifested by the bargaining parties' conduct.

Here, the evidence affords no basis to conclude either guide is determinative. The County has historically paid two Union representatives. However, the stipulated issue questions the initial agreement following the negotiation of Joint Labor Agreements. Practice affords no insight into why the language was changed beyond the deletion of references to joint bargaining.

Evidence of bargaining history is no more illuminating. Smith had a conversation with a Union Vice-President, within the hearing of County representatives, on whether the alternate representative was to be compensated. This affords some basis to infer County understanding of the point. However, no inference is required to note that the payment of the alternate was a debatable topic, even within the Union team. In any event, the evidence falls short of establishing County agreement on the point. It is not evident what, if anything, Kathan or any other County representative heard of this dialogue, much less whether they agreed to it. Kathan has no recall of the dialogue. Smith "believes" the notes were shared with the County, but it is not clear when or how this happened, much less whether the sharing demonstrates County agreement or County unwillingness to get into a dispute over Dupre's notes.

The parties cite other guides, such as construing ambiguity against the drafter. In my view, this guide is better suited to commercial cases where a sophisticated drafter or a drafter of typically unread forms attempts to assert the agreement against an individual after something other than a negotiation between equals. The labor agreement here is a shared obligation negotiated by equals. In any event, the evidence is unclear. The original proposal was the Union's, but the draft of the tentative agreement appears to have been the County's.

This returns the analysis to the language of Section 23.04, read in context. The force of the County's case is that the Union failed to clearly communicate its desire to alter the payment mandate of Section 23.04 from two to three representatives. The persuasive force of this position must be acknowledged. However, because the Union's interpretation fits better into the context and content of the section, I favor it over the County's.

The first two paragraphs of Section 23.04 govern the grievance. The first defines the parties' negotiating teams and the second states a payment obligation. The final sentence of the second paragraph mandates payment to "Authorized employee representative(s) as defined herein". This turns the focus to the final sentence of the first paragraph, which defines the representatives thus: ". . . the Union shall be represented by two (2) employee representatives and one (1) alternate."

The Union's reading of that sentence reflects my own perception of how the terms would normally be read: two "and" one is three. The County's view focuses on the term "alternate." The County defines "alternate" as "substitute" and infers from this that only two employee representatives can seek payment for bargaining. The strength of the point grammatically is noted above. It is, however, worthy of some note that it is not clear on the face of the section whether the "alternate" reference is an adjective or a noun. If an adjective (i.e. "alternate" representative), the County's grammatical point is weakened, since the Union representatives are clearly not "succeeding each other".

The grammatical point prefaces the more significant point that the County seeks to read a substantive payment limitation into a definition that states none. This strains the terms of the final sentence of the first and the second paragraphs, and the content of the first paragraph. The payment obligation is set forth in the final sentence of the second paragraph and does not distinguish between "representative" and "alternate" or "alternate representative." Nor does the sentence distinguish the functions of a representative. Rather, it extends payment to "Authorized employee representative(s)". Nothing in the first paragraph indicates the parties use it to permit either party an interest in specifying a particular individual who can be a representative. In the 1997-1999 Joint Labor Agreement, the parties allowed the Union to be represented by "up to" two representatives. There is nothing to indicate that in any labor agreement, the authorization of the representatives was anything other than an internal Union matter. That the parties did not change the language of the second paragraph counsels against concluding that the parties granted the County a greater interest in defining an "authorized" Union representative in the 2000-2002 agreement than in its predecessor.

Further complications surround the County's reading of the paragraphs. The parties deleted "up to" and "per bargaining unit" from the 1997-1999 Joint Labor Agreement, adding "and one (1) alternate." The deletion of "per bargaining unit" reflects the change from joint to unit-by-unit negotiations. The strain in the County's view is reflected in the difficulty for explaining the addition of "and" coupled with the deletion of "up to". Had the parties inserted "three (3)" where "two (2)" appeared in the predecessor agreement, they would have stated the same obligation asserted by the Union. The County asserts its payment obligation remained at two without regard to the change in language.

Finding this persuasive renders agreement terms meaningless. If the parties had deleted "per bargaining unit" from the first paragraph and left the reference to "up to two (2) employee representatives" intact, the result would be the same as the interpretation urged by the County, whose practice argument acknowledges that the use of alternates was assumed in "up to two (2) employee representatives." This renders "and one (1) alternate" superfluous. Under the Union's view, the parties agreed to permit the attendance of the alternate as a note-taker, serving as needed to fill in for a spokesperson. Under this view, the alternate is kept abreast of the negotiations, and thus is in a position to meaningfully fill in as needed as a spokesperson. Whatever is said of the policy merit of this view, it accounts for the insertion of "and one (1) alternate" into the labor agreement and for the deletion of "up to."

Neither party asserts an unreasonable reading of the labor agreement, and it is regrettable that face to face bargaining produced something other than clarity on this point. The lack of clarity makes the dispute, in certain respects, like determining "how many angels can dance on the head of a pin." However, contract language is the cornerstone of agreement, defining what an arbitrator must begin and end with to define agreement when none is otherwise evident. The statement of the payment obligation in the final sentence of the second paragraph of Section 23.04 survived the negotiation of the 2000-2002 labor agreement, and mandates payment for "Authorized employee representatives as defined herein". There is no dispute an "alternate" is an authorized employee representative. The weakness of the County's view or the strength of the Union's should not be overstated. At root, the Union's strains the language of Section 23.04 somewhat less than the County's, and affords meaning to each term in the final sentence of the first paragraph.

There is no reason to believe remedy poses an issue demanding discussion. The parties litigated the interpretive issue as an all or nothing issue, and did not enter argument or evidence on remedy. The Award entered below thus states a general make whole requirement.

AWARD

The County did violate the Collective Bargaining Agreement when it refused to pay a third employee representative to attend bargaining sessions, the third employee being the alternate.

As the remedy appropriate to the County's violation of the collective bargaining agreement, the County shall make the authorized employee representative(s) serving as an alternate whole.

Dated at Madison, Wisconsin, this 3rd day of July, 2003.

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

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