BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WISCONSIN PROFESSIONAL POLICE ASSOCIATION,
LAW ENFORCEMENT RELATIONS DIVISION,
FOR AND ON BEHALF OF THE
GREEN COUNTY DEPUTY SHERIFF'S ASSOCIATION**

and

GREEN COUNTY, WISCONSIN

Case 152
No. 63128
MA-12502

Appearances:

Robert E. West, Consultant for WPPA/LEER, 340 Coyier Lane, Madison, Wisconsin 53713, appearing on behalf of Wisconsin Professional Police Association, Law Enforcement Relations Division, for and on behalf of the Green County Deputy Sheriff's Association, referred to below as the Association.

Howard Goldberg, Murphy Desmond, S.C., Attorneys at Law, 2 East Mifflin Street, Suite 800, P.O. Box 2038, Madison, Wisconsin 53701-2038, appearing on behalf of Green County, Wisconsin, referred to below as the County.

ARBITRATION AWARD

The Association and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin as Arbitrator to resolve Grievance No. 02-445, filed on behalf of the Green County Deputy Sheriff's Association. As discussed below, the parties agreed to process the grievance jointly with a grievance filed on behalf of Green County Pleasant View Home Employees Local 1162, WCCME, AFSCME, AFL-CIO, Green County Human Services Employees, Local 1162-A, AFSCME, AFL-CIO, and Green County Courthouse Employees, Local 3813, Wisconsin Council 40, AFSCME, AFL-CIO.

These units are referred to below individually by the name of the local and collectively as AFSCME. Hearing was held on August 17, 2004, in Monroe, Wisconsin. The hearing was not transcribed, and was held open for the parties to consider the need to supplement the record. The parties were able to stipulate to the admission of certain evidence, but were not able to stipulate to the admission of information regarding the processing of certain individual claims for which there was no waiver of confidentiality from the individual claimant. To assist in a potential stipulation, the parties suggested that I issue a document entitled "Order For Protection – Confidential Information". I declined to sign the order, and offered to withdraw as arbitrator. The parties did not accept my offer to withdraw and agreed to submit argument based on the evidence without the information regarding the processing of the individual claims for which there was no waiver of confidentiality from the individual claimant. The parties filed briefs and reply briefs by December 16, 2004.

ISSUES

The parties stipulated the following issues:

Were the grievances processed in a timely fashion pursuant to the governing labor agreements?

If so, did the October 30, 2002 memorandum (Joint Exhibit 7) constitute a unilateral change of the Green County Medical Benefit Plan?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

The Association/County Collective Bargaining Agreement

ARTICLE III – MANAGEMENT RIGHTS

3.01: The Association recognizes that the County retains all rights, power and authority that it had prior to the Agreement, except as herein modified. The County has the sole right to plan, direct and control the working force, to schedule and assign police work to employees, to determine the means, methods and schedules of operation for the continuance of its operations, to establish standards, and to maintain the efficiency of its employees . . .

ARTICLE IV – MAINTENANCE OF STANDARDS

4.01: All benefits and working conditions that are primarily related to wages, hours and conditions of employment (mandatory bargaining subjects)

that employees now have and are not specifically mentioned in this contract shall remain in full force and effect unless changed by agreement of the parties. . . .

ARTICLE XVIII – EMPLOYEE MEDICAL BENEFIT PLAN

18.01: Effective January 1998, the County of Green Employee Medical Benefit Plan, established April 1, 1991, shall be amended as described in plan amendment #9 attached hereto as Appendix A. . . .

ARTICLE XXIII – GRIEVANCE PROCEDURE

23.01 – Definition: A grievance shall be defined as any matter involving the interpretation or application of the terms of this Agreement. . . .

23.03 – Steps of the Grievance Procedure: Grievances shall be processed in the following manner, and shall be timely filed and processed or shall be deemed barred. (Time limits shall be exclusive of Saturdays, Sundays and holidays set forth in this Agreement.)

Step 1: . . . An employee, or the Association . . . shall orally present the grievance to his/her immediate supervisor outside the bargaining unit within fourteen (14) days of the date of the incident or learning of the incident. If the grievance is not settled within forty-eight (48) hours after such discussion, the grievance shall be reduced to writing and submitted to the Sheriff within five (5) days.

Step 2: The Sheriff shall meet with the grievant, and an Association representative (if the grievant so desires) in an attempt to resolve the grievance within seven (7) days of receipt of the grievance by the Sheriff. If not satisfied with the Sheriff's response, or if the Sheriff fails to respond, the grievant, or the Association, may further process the grievance as provided in **Step 3**, within five (5) days.

Step 3: The grievant, or the Association, shall present the grievance in writing to the Green County Personnel and Labor Relations Committee. The Personnel and Labor Relations Committee will prepare a written response to the grievant and Association representative within ten (10) work days after its submittal. This Committee may decide to hold a meeting on the grievance, in which event, the Committee must notify the grievant and the Association representative of that decision within ten (10) working days of its receipt of the grievance. The meeting shall be held within a reasonable time after the date of such notice not to exceed thirty (30) days or as agreed upon by the parties. . . .

Step 4 – ARBITRATION PROCESS: In the event a grievance is not settled in any of the foregoing steps, the matter may be appealed by either party to arbitration within twenty (20) work days of the conclusion of the **Step 3** proceedings by sending notice of intent to arbitrate to the other party. The Association shall request the Wisconsin Employment Relations Commission to appoint a staff arbitrator, or Commissioner, to hear the grievance. . . .

23.04: The time limits in this Article are maximum time limits, and grievances and disputes shall be settled immediately, whenever possible. However, the time limits may be extended by mutual agreement of the parties in writing . . .

23.05: . . . The Arbitrator shall not have the authority to add to, detract from, or modify, in any way, the terms of this Agreement. . . . Upon mutual agreement by the parties, more than one grievance may be heard by the same arbitrator.

The Local 1162/County Collective Bargaining Agreement

ARTICLE 2- MANAGEMENT RIGHTS

2.01 The Union recognizes the rights and responsibilities belonging solely to the County, prominent among, but by no means wholly inclusive are . . . (t)he right to decide the work to be done, and the location of the work consistent with the terms of this Agreement. The County has the right to plan, direct, and control the work force, to schedule and assign work to employees, to layoff employees for economic reasons, to determine the means, methods and schedules of operation for the continuance of its operations, to establish standards and to maintain the efficiency of its employees. The Union also recognizes that the County retains all rights, powers or authority that it had prior to this Agreement except as modified by this Agreement. . . .

ARTICLE 6- GRIEVANCE PROCEDURE

6.01 In case any dispute or misunderstanding relative to the provisions of this Agreement arise, it shall be handled in the following manner. Time periods established herein shall be deemed of the essence, and failure by Grievant to follow them shall render the grievance null and void.

All grievances subjected to the Grievance Procedure must be commenced within fourteen (14) days of the date of the events giving rise to the grievance, or within fourteen (14) days of the date the grievant obtains knowledge of the facts giving rise to the grievance. In all events, no grievance may be commenced later than one hundred eighty (180) days after the events giving rise to the grievance. The running of the one hundred eighty (180) days limitation period shall not be deemed a waiver of subsequent grievances of the exact same nature which may occur at a later date.

STEP 1. Any employee who has a grievance shall report such grievance to their proper supervisor, who shall thereupon attempt to make mutually satisfactory determination within a reasonable length of time, not, however, to exceed five (5) calendar days. If the grievance pertains to subject matter that the employee's supervisor has no authority to correct, then the grievance may be commenced at Step 2.

STEP 2. In the event that no mutually satisfactory decision has been reached in said period of time, the employee shall then refer the grievance to the Union on a written form furnished by the Union. The Union shall thereupon bring the issue before the Nursing Home Administrator within ten (10) calendar days of the completion of STEP 1. The Nursing Home Administrator shall respond within ten (10) calendar days.

STEP 3. If the parties cannot reach a mutually satisfactory resolution, the Union shall within ten (10) calendar days, request that the grievance be brought before the County Personnel Committee. A meeting between the Union and the Green County Personnel and Labor Relations Committee shall be held at a mutually agreeable time within thirty (30) calendar days. The County shall deliver its response to the Union within twenty (20) days of the meeting.

STEP 4. If the County and the Union cannot reach a mutually satisfactory decision within thirty (30) days, the Union may, within thirty (30) calendar days after being advised that the grievance has been denied, request that the Wisconsin Employment Relations Commission appoint an arbitrator to hear the matter. If the Commission finds it necessary to appoint an arbitrator not a member of the Commission staff, the parties shall equally share the expense of the arbitrator so appointed. The decision of the arbitrator shall be final and binding on both parties.

6.02 The provisions of this Article, with respect to filing grievances, shall be available to employees, to the Union, and to the County. . . .

ARTICLE 23 – EMPLOYEE MEDICAL BENEFITS PLAN

23.01 The medical benefit plan for 1997 is the current medical benefit plan referred to as County of Green Deductible Plan B. . . .

Effective January 1, 1998 the County of Green Employee Medical Benefit Plan, established April 1, 1991 shall be amended as described in plan amendment #9 attached as Appendix B herein. . . .

ARTICLE 28 - MAINTENANCE OF STANDARDS

28.01 The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at not less than the highest minimum standards in effect at the time of the signing this Agreement, and conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement.

It is agreed that the provision of this Section shall not apply to inadvertent or bona fide errors made by the employer or the Union in applying the terms and conditions of this Agreement if such error is corrected within ninety (90) days from the date of error.

The Local 1162-A/County Collective Bargaining Agreement

ARTICLE 5 - GRIEVANCE PROCEDURE

5.01 In case any dispute or misunderstanding relative to the meaning or application of the provisions of this Agreement arise, it shall be handled in the following manner. Time periods shall be deemed to be of the essence, and failure by grievant to follow them shall render the grievance null and void. Failure to follow time limits by Employer automatically moves the grievance to the next step. The following time periods may be waived by mutual consent of the parties.

A. The employee, Union steward, officer or representative, shall present a written grievance to the most immediate supervisor within ten (10) workdays of the alleged

grievance or knowledge thereof. The supervisor shall prepare a response within ten (10) workdays of receipt of the grievance.

B. If the initial response is unsatisfactory to the grievant, the grievance shall be submitted to the department head within ten (10) workdays of the date of response or expected response. The department head will submit a written response to the grievance within ten (10) workdays of its submittal.

C. If the grievant does not find the department head's response to be satisfactory, or if the department head does not respond to the grievance within ten (10) work days after the date the grievance is submitted to the department head, then the grievant may within ten (10) calendar days submit the grievance to the Green County Personnel and Labor Relations Committee for review. A meeting between the Union and the Committee shall be held at a mutually agreeable time within thirty (30) calendar days if reasonably possible. The Committee shall provide its response to the Union within twenty (20) work days after the meeting.

D. If the Union does not find the Committee's response to be satisfactory, it shall, within twenty (20) workdays of said response request the Wisconsin Employment Relations Commission (WERC) to appoint a member of its staff . . .

ARTICLE 18 – EMPLOYEE MEDICAL BENEFITS PLAN

18.01 The medical benefit plan for 1997 is the current medical benefit plan referred to as County of Green Deductible Plan B. . . .

Effective January 1, 1998 the County of Green Employee Medical Benefit Plan, established April 1, 1991 shall be amended as described in plan amendment #9 attached as Appendix D herein. . . .

ARTICLE 23- MAINTENANCE OF STANDARDS

23.01 Protection of Conditions. The Employer agrees that all conditions of employment relating to mandatory subjects of bargaining shall be maintained at not less than the highest minimum standards in effect at the time of the signing this Agreement, and conditions of employment shall

be improved wherever specific provisions for improvement are made elsewhere in this Agreement. It is agreed that the provisions of this section shall not apply to inadvertent or bona fide errors made by the Employer or the Union in applying the terms and conditions of this Agreement if such error is corrected within ninety (90) days from the date of error.

23.02 Extra Contract Agreement. The Employer agrees not to enter into any agreement or contract with his/her employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement. Any such agreement shall be null and void. . . .

The Local 3813/County Collective Bargaining Agreement

3.01 Rights of Management. It is agreed that the management of the County and the direction of its employees is vested exclusively in the County and that this includes, but is not limited to the right to direct and supervise the work of employee . . . to plan, direct and control operations; to determine the amount and quality of work needed, by whom it shall be performed and the location where such work shall be performed; to determine to what extent any process, service or activities of any nature whatsoever shall be added or modified; to change any existing service, practices, methods and facilities . . .

ARTICLE 5- GRIEVANCE PROCEDURE

5.01 Definition. In case any dispute or misunderstanding relative to the meaning or application of the provisions of this Agreement arises, it shall be handled in the following manner. Time periods shall be deemed to be of the essence, and failure by grievant to follow them shall render the grievance null and void. Failure to follow time limits by Employer automatically moves the grievance to the next step. The following time periods may be waived by mutual written consent of the parties.

5.02 Step 1. Immediate Supervisor. The employee, Union steward, officer or representative of the grievant, shall present a written grievance to the most immediate supervisor of the grievant (or in the case of a class grievance, to the County Clerk) within ten (10) workdays of the alleged grievance or first knowledge thereof. The supervisor (or County Clerk, as the case may be) shall prepare a response within ten (10) workdays of receipt of the grievance.

5.03 Step 2. Department Head. If the initial response is unsatisfactory to the grievant, the grievance shall be submitted to the department head within ten (10) workdays of the date of response or expected response. The department head will submit a written response to the grievance within ten (10) workdays of its submittal.

5.04 Step 3. Personnel and Labor Relations Committee. If the response from the Department Head, or the County Clerk if a class grievance, is unsatisfactory to the grievant, the grievance may be submitted to the Green County Personnel and Labor Relations Committee within ten (10) workdays of the date of the response or expected response. The Personnel and Labor Relations Committee will prepare a written response to the grievance within ten (10) workdays after its submittal. This Committee may decide to hold a meeting on the grievance, in which event, the Committee must notify the grievant of that decision within said ten (10) day period. The meeting shall be held within a reasonable time after the date of such notice not to exceed thirty (30) days as agreed upon by the parties. Both parties agree to participate in such a meeting.

5.05 Arbitration. If the Union does not find the Personnel and Labor Relations Committee's response to be satisfactory, it may, within twenty (20) workdays of said response, or the date the response was due, request that the Wisconsin Employment Relations Commission (WERC) appoint a member of its staff as an arbitrator of the dispute. The decision of the arbitrator shall be final and binding on both parties. The arbitrator shall have no authority to add to, subtract from, or modify any provisions of this Agreement. . . .

ARTICLE 18 – EMPLOYEE MEDICAL BENEFITS PLAN

18.01 Premium Contributions. The medical benefit plan for 1997 is the current medical benefit plan referred to as County of Green Deductible Plan B. . .

Effective January 1, 1998 the County of Green Employee Medical Benefit Plan, established April 1, 1991 shall be amended as described in plan amendment #9 attached as Appendix C herein. . . .

ARTICLE 23- MAINTENANCE OF STANDARDS

23.01 Protection of Conditions. The Employer agrees that all conditions of employment relating to mandatory subjects of bargaining shall be maintained at not less than the highest minimum standards in effect at the

time of the signing of this Agreement, and conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement.

It is agreed that the provision of this section shall not apply to inadvertent or bonafide errors made by the Employer or the Union in applying the terms and conditions of this Agreement if such error is corrected within ninety (90) days from the date of error.

23.02 Extra Contract Agreement. The Employer agrees not to enter into any agreement or contract with any employees in the bargaining unit, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement. Any such agreement shall be null and void.

BACKGROUND

The Association filed Grievance 02-445 on behalf of the "Green County Deputy Sheriff's Association", alleging that the County had violated Articles III and XVIII. The grievance form alleges, "A memo dated October 30, 2002 has reduced existing health insurance benefits by changing the wording from course of employment to self employed" and, "This change in language is a reduction of benefits for members whose spouses were covered under their medical plan and will no longer be covered." The form states the "Requested Remedy" thus: "Keep language in the plan document on page 36 paragraph 6 as employment rather than self employed." The Association dated the grievance "11/13/02". The date received stamp on the form reads "Corporation Counsel Office . . . Nov 15 2002".

The memo referred to in the grievance form is entitled "Self employed spouses" and is referred to below as the Memo. Jane Leach, the Director of Operations for Medical Benefit Administrators (MBA), authored the Memo, which reads thus:

> As clarification on the issue of work related injuries for self-employed spouses of Green County employees covered by the **County of Green Employee Medical Benefit Plan,** please be advised that these work related injuries are NOT covered under this health insurance plan. The limitation is included in the plan document on page 36, paragraph 6:
>
> > "Charges incurred as the result of any Injury, Illness, occupational disease, or other loss which arises out of and in the course of

> **employment**, or for which the Covered Person is reimbursed or entitled to reimbursement under any federal or state law, including a workers' compensation law or similar law."

If you have any questions regarding this issue, please contact Mike Stollfuss . . .

When she authored the Memo, Leach was an Account Manager for MBA and had received an inquiry regarding coverage of the self-employed spouse of a County employee who was insured under the County's health plan. After discussion with County officials, she authored the Memo, which the County distributed to employees covered by its health plan.

The President of one of the AFSCME locals faxed the Memo to Thomas Larsen, an AFSCME Staff Representative, voicing concerns that the Memo altered existing insurance benefits. Larsen voiced those concerns to the County's Corporation Counsel, William E. Morgan. Similar concerns prompted the filing, by the Association, of Grievance 02-445.

Morgan issued a letter to Association representative Len Jaglarski dated December 18, 2002, which states:

> As you know, our first meeting of Personnel following my receipt of this grievance was on November 27, 2002. At that time, you had indicated that you would prefer that it be taken up at another time since that was the night before Thanksgiving. I did, however, advise the Personnel Committee at that meeting that I had received the grievance. We have not set the time for our next Personnel meeting because it would normally be on December 25, 2002. The earliest we will have a Personnel Committee meeting would be January 2, 2003, though at this point, we have a relative lack of business to conduct . . . and may, in fact, push it off until later in January.
>
> With that being the case, I would have no objections to your bypassing the next step of the grievance procedure and proceeding to arbitration if you so chose. I will leave the decision up to you whether to go forward, either to Personnel, arbitration or to dispose of the matter entirely. Please advise me at your convenience as to your decision.

Jaglarski did not respond to this letter.

In a letter to Morgan dated February 4, 2003 (references to dates are to 2003, unless otherwise noted), Larsen stated the status of AFSCME's concerns thus:

> Pursuant to our previous discussion on this matter please find enclosed a grievance being filed jointly on behalf of the members of the AFSCME bargaining units represented by Locals 1162, 1162A and 3813. This grievance covers only the issue related to coverage in outside employment situations. I am filing it direct with you as it is a matter of countywide concern. . . .

The enclosed grievance alleged that the County "has unilaterally modified the provisions of the Green County Health Benefits Plan to exclude coverage for injuries or illnesses arising out of employment" in violation of "the Maintenance of Standards provisions of the collective bargaining agreements." Morgan responded in a letter to Larsen dated February 6, which states:

> I received your letter of February 4, 2003, regarding the above-entitled matter. I think it would be best if we simply file for arbitration. I appreciate that you have filed it as a matter of County-wide concern and I would agree with that assessment. I do not believe that meeting with Personnel or any lesser action other than arbitration would resolve this. I will do whatever I can to make sure that it moves forward as quickly as possible. . . .

In a letter dated February 6, William Sangermano, the Association's Grievance Officer, submitted Grievance 02-445 to the County's Personnel and Labor Relations Committee (the Committee), requesting "to proceed to Step #3 of the Grievance Procedure" and requesting that the Committee "respond within the time period as stated in the grievance procedure." Morgan responded to Sangermano in a letter dated February 7, 2003, which states:

> I received your letter to the Personnel Committee . . . I would suggest that this be submitted to arbitration rather than going to Step 3, inasmuch as the Personnel Committee has stated their stance on several occasions. Namely, they believe that it has never been part of the benefit plan that self-employed individuals received what is, in essence, worker's compensation coverage through our health care plan. I would also note that the AFSCME units have filed the same grievance and I have made the same suggestion to them. Whether you want them to take this forward or you believe that two separate arbitrations are necessary, I will leave to you, though that does seem to be somewhat redundant. Perhaps we can simply combine the issue into one. . . .

In a letter to Morgan dated May 9, 2003, John Parr, an Association Bargaining Consultant, stated the status of the grievances thus:

> In accordance with . . . Article XXIII Grievance Procedure, 23.03, Step 4 the Association . . . is proceeding to arbitration of the above captioned matter. In our telephone conversation

> on May 8, 2003 . . . (y)ou agreed to the WPPA and AFSCME jointly arbitrating the above captioned matter. The WPPA will be the lead Union in this arbitration . . .

The Commission received the Association's request for arbitration on December 22.

The County has had, at all times relevant here, an insurance plan whose effective annual term starts on April 1. Prior to April 1, 1991, the County paid a premium for a group health insurance plan offered through Wisconsin Physician's Service (WPS). On April 1, 1991, the County started a self-funded plan, which is referred to below as the Plan. Under the Plan, the County paid claims covered by the Plan document up to a specified dollar limit. To protect against claims covered by the Plan document, but exceeding that limit, the County purchased a stop-loss insurance policy. The County set up the Plan to mirror the benefits provided by the WPS plan in effect the prior year. As established on April 1, 1991 and as revised on October 9, 1991, the Plan included the following "Exclusions":

> The Plan provides no benefits for:
>
> 1. Treatment, services and supplies for any injury or illnesses covered by Worker's Compensation or similar laws, even if the participant doesn't choose to claim such benefits.

The parties stipulated that this exclusion mirrors the WPS plan. From its inception, the County has employed a third party administrator to process claims covered by the Plan. MBA is the current administrator. In 1998, the County and MBA revised the Plan, amending the "Exclusion" quoted above to read as stated in the Memo. The parties stipulated that this revision does not constitute a substantive change in the Plan.

> At all times relevant here, MBA has used the following form to document a claim:
>
> YOUR CLAIM WILL NOT BE PAID IF THIS FORM IS NOT COMPLETED AND RETURNED.
>
> We have received a claim for services received by the patient listed above from the indicated below. This letter is a request for additional information needed to determine benefits for this claim.
>
> Regarding services at . Please advise if the above referenced claim for the dates of service and provider are related to an:

Accident or Injury?	Yes___	No___
Motor vehicle accident	Yes___	No___
Work related injury	Yes___	No___

If Yes, provide the details below . . .
All expenses related to this claim will be held until this information is received.

. . .

The background stated to this point is undisputed. The balance of the background is best set forth as an overview of witness testimony.

Thomas Larsen

Larsen has served AFSCME as a Staff Representative since 1975. Within a month of the issuance of the 1998 revisions to the Plan he spoke with the County's claims adjuster to determine whether the revisions had substantively altered the Plan. He was assured the Plan had not changed. Pensinger alerted him to the Memo in November of 2002. She and other unit employees were concerned about the impact of the Memo on self-employed spouses.

The Local 1162-A unit had a bargaining session set with the County for November 12, 2002. At that session, Larsen asked Morgan what the Memo's purpose was, and what the County wished to do about it. Morgan informed him that Morgan would look into the matter. After this session, they discussed the Memo by phone and during bargaining sessions. At this time, the Local 1162 unit had reached a tentative agreement with the County, but the parties had not ratified it. The Local 3813 unit was seeking interest arbitration. Larsen and Morgan discussed whether AFSCME would have to file a complaint of prohibited practices. They continued their discussions until Larsen filed the February 4 grievance. After the filing of the grievance, Morgan informed Larsen that the Committee stood behind the Memo. This was the County's first definitive statement of its position. On Morgan's suggestion, AFSCME determined to process the grievance jointly with Association grievance 02-445. Larsen viewed the exchange of letters between himself, Morgan and Parr as the documentation that established waiver of contractual time limits. Until the arbitration hearing, no County representative voiced a timeliness concern to him. He did not know why the request for arbitration took so long to file. He considered the County to have played a role in delaying the hearing process.

Kristin Leonard

Leonard works in the County Extension office as an Activities Assistant. Her husband, who does not carry a Worker's Compensation insurance policy, is a self-employed dairy and

beef farmer. In April of 2002, he cut his finger in his shop repairing a farm implement. The cut became infected, ultimately requiring his hospitalization for two days. Leonard gave her insurance card to the hospital, which submitted a claim on her behalf. She filled out the claim form, stating "Yes" to the "Work related injury" portion. MBA paid the claim. After receiving the Memo, she and her husband purchased a Worker's Compensation insurance policy.

Shirley Purdue

Purdue works in the County's Zoning Department. Her husband is a masonry contractor. Annually for several years, Purdue would call MBA and ask an employee named Tina whether her husband was covered by the Plan while he was working. Tina always responded in the affirmative. On her most recent call, however, she reached another employee who informed her that her husband was not covered by the Plan while he was working. Because the masonry business has employees covered by a Worker's Compensation insurance policy, Purdue was able to add her husband to the policy after the issuance of the Memo. He had no claims against the Plan for injuries sustained while on the job.

Cynthia Miller

Miller works at the County's nursing home as a Medical Records Secretary. Her husband is a self-employed dairy farmer. In October of 1995, while filling a silo, he caught his finger in a blower, severely cutting it. He received stitches to close the wound. In July of 1997, while repairing a tool, he suffered another injury that required stitches. In each case, MBA paid the claim. After she received the Memo, she called Larsen to alert him that the Memo effected a change in Plan benefits.

Rose Durtschi

Durtschi works in the Treasurer's Office as a Financial Clerk. Her husband is a self-employed farmer. In January of 1998, while attending to a downed calf, he broke his leg and chipped a bone in his ankle. She filled out the claim form honestly, noting that the injury was work related. Her husband had surgery and the claim was paid by MBA in full. After receiving the Memo, she and her husband obtained a Worker's Compensation insurance policy.

Karen Pfeuti

Pfueti works for the County as a Payroll Clerk. Roughly one and one-half years ago her husband, a self-employed farmer, became eligible for social security benefits. In December of 2001, her husband injured his knee while working with his cattle. He went to a hospital, and eventually had surgery on the knee. MBA paid the claim, which totaled roughly two thousand dollars.

William Morgan

Morgan has served as County Corporation Counsel since December of 1997. Jaglarski filed grievance 02-445 with his office. He could not specifically recall, but did not think Jaglarski ever discussed the grievance with the Sheriff. After receiving the grievance, he forwarded it to the Committee. He and Jaglarski discussed whether the Association should present the grievance to the Committee, but had difficulty coordinating calendars due to the Committee's meeting schedule and the Thanksgiving and Christmas holidays. Those conversations probably extended into December. He issued the December 18, 2002 letter to clarify how the matter would proceed. He did not get a response from the Association until Sangerman's letter of February 6.

He discussed AFSCME's concerns with Larsen during bargaining sessions that took place perhaps as late as January. He issued the February 6 letter on the date he received the AFSCME grievance. Larsen did not respond in writing to the February 6 letter, although they may have discussed the matter after that date. Throughout his discussions regarding the Memo, Morgan believed his presentation of the matter to the Committee was to determine if it was willing to extend the benefit to unit members. Its refusal to do so doomed the grievances, since the Plan provided no such benefit. Since further discussions with the Committee would be futile, he offered the unions the possibility of proceeding directly to arbitration.

Morgan spoke with Jaglarski at the end of March, and Jaglarski alerted him that the Association and AFSCME would pursue Grievance 02-445 jointly. The absence of a definitive union response prior to that time had led him to believe the grievances were withdrawn. Under its standard procedure, the County had sought insurance proposals in December to be effective on April 1. Since the County had accepted an offer for insurance to be effective on April 1, he felt the grievances were time barred and authored a memo to the file "to remember to raise that as a defense in terms of timeliness." He did not issue the memo to the Association or AFSCME. He stated that he viewed his letters offering arbitration not as a waiver of grievance timelines, but as a defining point to trigger their operation. Delay beyond County acceptance of an insurance proposal prejudiced the County since it could not secure insurance to cover the benefit the grievance sought.

This is the first time the County has agreed to permit unions to join in the processing of an arbitration request, and reflects the County-wide significance of the issue. He did not inform the Association or AFSCME of his timeliness concerns and did not seek to actively prod them to process the matter as quickly as possible. He did not feel the Sheriff could have granted the grievance even if the Sheriff believed it had merit.

Jane Leach

Stollfus works as an insurance broker and is not an employee of MBA. The County and MBA coordinated their efforts in the development of Plan language. MBA sought, on the County's behalf, re-insurance for the stop loss portion of the County's Plan design, which is triggered at $60,000 per employee.

From her perspective, all work-related claims are excluded from the Plan, and she stated this was "always the case to my knowledge." She added that the County has denied such claims consistently for as long as MBA has administered the Plan. She obtained from MBA records a printout indicating that since 2000, over 120 individual claims have been denied because they were work related. MBA coding does not, however, establish whether the individual claimant was a self-employed spouse of an employee covered by the Plan. The denial of such a claim should be routine, triggered by a "Yes" response on the claim form inquiry concerning whether the injury was work related. She could not account for the payment of the claims noted by other witnesses, unless the claim form had not been correctly filled out or had been paid in error. The "Tina" that Perdue contacted was an adjuster for County claims and was not an MBA employee. In Leach's view, the Plan did not require an employee to actually purchase Worker's Compensation insurance to trigger the operation of the exclusion. Rather, the eligibility for Worker's Compensation insurance triggered it.

Michael Stollfuss

Stollfuss has worked with O'Donahue & Associates since 1977. He has worked with the County since 1991 to secure insurance and re-insurance coverage for the County. A re-insurance policy states its own exclusions, and typically incorporates those of an underlying insurance plan. The County could have, but chose not to make coverage of the self-employed spouse of a County employee a Plan benefit. In Stollfuss' view, the Plan mirrored the WPS contract and no County insurance plan ever provided the benefit sought in Grievance 02-445.

To grant the grievance, in Stollfuss' view, prejudices the County in a number of ways. The County would have to amend the Plan to cover Worker's Compensation-covered injuries. The amendment itself would impose drafting and consulting costs. The County would also have to address the amendment with its re-insurer. He estimated the re-insurer would seek to raise the premium for its coverage by ten percent over the current thirty to forty thousand dollar premium. Beyond this, the County would expose itself to additional claims falling below the reinsurance threshold. That not all re-insurers would provide the added benefit would limit the range of bidders available to the County and could also increase County insurance costs.

The County plays no role in claim administration. If certain individuals have had an uncovered claim paid, then responsibility is traceable to claimant error in submitting a claim or to adjuster error in evaluating it. In his view, the exclusion of Worker's Compensation illness or injury is "mainstream" in insurance policies, whether created by an insurer or through self-funding of an insurance plan.

He acknowledged that a Wisconsin Public Employers Group (WPEG) insurance policy for 2004 covers certain Worker's Compensation covered injuries under the following language:

> Services to the extent a Participant receives or is entitled to receive, any benefits, settlement, award or damages for any reason of, or following any claim under, any Worker's Compensation act, employer's liability insurance plan or similar law or act. Entitled means you are actually insured under Worker's Compensation.

Similarly, he acknowledged that an insurance policy for certain Rock County employees covered certain Worker's Compensation injuries under the following language:

> This *plan* does **not** provide benefits for:
>
> . . .
>
> 5. Any *injury* or *sickness* arising from or sustained in the course of any occupation or employment for compensation, profit or gain. Provided:
>
> a. benefits are provided or payable, regardless of whether a claim was filed for such benefits, or
> b. coverage would have been available, had you or your employer chosen to take such coverage (where required by law to take this coverage),
>
> under any Workers' Compensation or Occupational Disease Act . . .

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

THE PARTIES' POSITIONS

The Association's Brief

After a review of the evidence, the Association notes that the County's "threshold issue of timeliness" challenges whether AFSCME failed to initially file the grievances and whether the Association failed "to send the notice of arbitration to WERC on a timely basis." The County's concerns regarding the AFSCME grievances are misplaced, since Morgan and Larsen discussed the "permanency of the self-employment change" for "a period of three months" and since Larsen filed the grievances as soon as Morgan gave a final opinion denying them.

Since "(w)ith every day that passes, the potential exists" for a recurrence of the events prompting the grievance, "it is a continuing grievance", which arbitral precedent permits to be filed when the insurance change was announced; when it was implemented; or when it adversely impacts unit members. Once the County prompted the grievance, an agreement was reached over time by which the Association "would take the lead and submit the matter to arbitration." That the notice to arbitration did not occur until December has no significance under the Association's agreement, which has no time limit governing this step, and no significance considering the processing of the matter as a joint arbitration. That the County never raised a timeliness concern "until several weeks before the arbitration hearing in pre-arbitration conference" undercuts the strength of its position. To accept the County's argument would make arbitration a trap for the unwary and would undermine the purpose of grievance arbitration.

The issue on the merits "is not really particularly complex." A number of employees have had "claims for self-employed spouses for injuries resulting from their work . . . paid by the County medical benefits plan." Each of the witnesses put forth by the Association in person or through stipulation "checked the work-related injury box on the claim form as they had no reason to do otherwise because they were confident that it was covered." Purdue checked with the County's claim administrator annually for years to confirm the existence of the benefit. She never received a negative answer until MBA succeeded PAS as administrator.

The 1991 insurance changes have no bearing on this, since the changed plan was to mirror the WPS plan, and MBA assured Larsen that "there were no substantive changes". This meant that "if you were covered by Worker's Compensation, you could not get benefits from the County." MBA, however, gave the old plan "a new feature" that treated eligibility to purchase Worker's Compensation as sufficient in itself to deny County coverage. Leach's testimony, if followed, overturns MBA's earlier representation to Larsen that the changes were not substantive. If Leach's interpretation is correct, then there is no way to account for the County's claim history, for any employee who checked the "work-related" box should have

been automatically denied coverage. The County's defense of Leach's interpretation "is purely financial" and obscures that its true fight should be with "its insurance underwriter" rather than with its partners in collective bargaining.

Stollfus' testimony regarding the cost of providing the benefit granted in the past as part of the plan is debatable; obscures that the benefit was bargained-for; and ignores that the Rock County and the WPEG plan "include the benefit enjoyed by Green County employees for many years." That this is not an interest arbitration in which comparables play a role cannot obscure that the provision of the benefit in other plans undercuts the assertion that the benefit poses a catastrophic cost. The evidence establishes that MBA took the lead in changing the County's plan, while the County "sat back and let it happen." This conduct should not be condoned in arbitration.

That the County cannot supply any evidence indicating support for MBA's action underscores the strength of the Association's position. The Association concludes the evidence establishes "that Green County has unilaterally altered the medical benefit that had been extended to its employees and its self-employed spouses for many years." The Association states the remedy appropriate to this violation thus:

> At this point, to the knowledge of the Unions, no employee has been denied benefits for a self-employed spouse injured or ill as a result of this self-employment exclusion; however, several employees have purchased Worker's Compensation Insurance at considerable cost. This insurance provides benefits in excess of those the Unions seek to maintain here, and, therefore, the Unions request the Arbitrator to order the employees be made whole and allow 60 days for the parties to attempt to fashion a satisfactory settlement while maintaining jurisdiction.

The Association also requests that the County be ordered to direct MBA to "grant any claims for self-employed spouses injured or ill as a result of self-employment" consistently with past practice; that the County post a compliance notice; and that the notice provide "any employees who may have additional claims to submit them for review within 60 days of the posting."

The County's Brief

The County notes that the threshold issue must be resolved against it to permit a determination of the merit of the grievance. Of the six County bargaining units, four have supported the grievance, with the Association assuming primary responsibility for its processing. The language governing the processing of the grievance varies from agreement to agreement, but each agreement demands that grievances be timely filed to permit determination of their merit by an arbitrator.

Of the four steps specified in the Association's labor agreement, the Association arguably met the time requirements of Step 1 only. It only arguably met the time requirements, since it ignored contractual requirements regarding where to file the grievance. Even if Morgan waived the requirements of Steps 1 and 2, no Step 3 meeting "ever took place" much less within the contractual time limits. In the December 18, 2002 letter, Morgan did offer an Association representative the opportunity to meet with the Committee at its January meeting, or to proceed directly to arbitration. The Association never took definitive action on either option at any point within the contractual time lines.

A deputy did re-file the grievance in February, seeking a meeting within the time limits of Step 3. Morgan "responded immediately", stating that the County "had already indicated its opposition to the grievance" and suggesting "that the matter be taken directly to arbitration if that is what the Union wanted to do." Even if this re-filing activated the grievance, the County never waived the time limits of Step 4, and the Association failed to meet them.

A review of the AFSCME labor agreements establishes that the grievance was untimely processed under their terms. AFSCME never responded to Morgan's February 6 denial, and the Association's notice of intent to arbitrate was itself untimely.

The Memo is the triggering event for the grievance under any of the labor agreements. Because of "the seriousness of this grievance" the County permitted each union "ample opportunity to review and evaluate their position." This cannot be made into a County agreement "to extend the time to file for arbitration." To conclude otherwise prejudices the County, which "calculates its new premium rates effective as of April 1 of each year" and was in no position to purchase the re-insurance necessitated by the grievance. This prejudice, governing contract language and arbitral precedent demand that the grievance be found untimely.

Beyond this, the Association "has pursued the wrong remedy." If the grievance questions unilateral County change of working conditions, then the appropriate "remedy is to file a prohibited practice complaint". More specifically, each of the underlying labor agreements demands that a grievance specify the specific contract provision the County has violated. Here, the Association has failed to identify any such provision. This reflects the absence of contractual language for the arbitrator to interpret. In the absence of such language, the arbitrator has nothing to interpret or to enforce.

In the event the grievance is found arbitrable, it lacks merit. The exclusion questioned by the Association concerns Worker's Compensation. The Association's view "inexplicably" would require the County to separately purchase Worker's Compensation insurance for its employees, but provide such coverage "for spouses or dependents of employees who are hurt in other employment." The past practice cited by the Association concerns a few examples

spread over many years, and "if any such payments had been made, then such payments would have been made in mistake."

The language of this exclusion, under any version of the Plan, excludes from coverage the types of claims the Association seeks. In fact, "There is no way to read the exclusion any other way." The forms the Association uses to establish a past practice on their face establish the lack of coverage because they demand that an employee state whether an injury is work related: "if there was coverage for these types of claims, then there would be no reason to make this inquiry." Any other conclusion results in an absurdity, since no employee would purchase worker's compensation coverage if the Plan already provided for it. The past practice evidence is no more than claims wrongfully granted. That the County does not seek reimbursement does not convert the mistake into a practice.

Any mistake is ultimately traceable to MBA. The County and its unions have little role in this process due to the confidentiality of the underlying individual claims. The County has not taken any action to amend the Plan in any way, and there is no reliable evidence the County and its unions have bargained regarding Plan benefits. MBA's inconsistency on the exclusion at issue cannot be made into a contractual obligation binding on the County. The grievance must, therefore, be denied as untimely or as without merit.

The Association's Reply Brief

The Association argues that the County's brief takes "numerous liberties with the facts". More specifically, there is no evidence to suggest the County Clerk requested that Leach issue the Memo. Rather, Perdue's annual question concerning coverage provoked it. Beyond this, County support of the Memo rather than the Memo itself altered the Plan. County assertion of the clarity of the exclusion cannot ignore the ambiguity of what facts constitute "self employment." What is clear is that "management interpretation is vague and shifts to fit its needs."

What the record makes clear is that the parties "have no dispute with regard to the history of the current language and terms of the current insurance plan." The 1998 changes cannot obscure that the meaning of the Plan was set by the 1991 agreement to establish a self-funded plan that mirrored the preceding WPS plan. The sole issue is whether the exclusion at issue here requires "all employees and covered spouses to purchase Worker's Compensation Insurance even though not required to do so by law." If this requirement existed in 1991, it would have been more clearly stated and would have been stated in the labor agreements. The 1998 changes make the exclusion clearer, but cannot substitute a meaning other than that created in 1991 and through the WPS plan. That Leach may have written the Memo in good faith and that the 1998 Plan "could easily be interpreted to her meaning" cannot overcome evidence concerning the bargaining parties' intent. Larsen's testimony is the sole reliable

evidence regarding the exclusion, since none of the County witnesses were part of the bargaining process.

The County's assertion that the Association should have pursued a complaint of prohibited practice "was never raised prior to this brief and would appear to be 'a last ditch' effort to avoid a decision on the merits." The County's "belated challenge to arbitrability" in any event ignores that the Association does not seek to correct a unilateral change made when no contract was in force. Rather, the Association seeks to correct a unilateral change that violated the labor agreements while they were in effect.

The County's timeliness challenge fundamentally ignores that the parties created a unique procedure over time to funnel several grievances into a single proceeding. County officials took several months to clarify whether they were going to support the Memo. Morgan's April 1 memo concerning his timeliness concerns is self-serving and ignores that he never communicated the concerns to the unions. The request for arbitration, if late, was made on a County provided form to reflect agreement on a novel procedure that took some time to create. Ultimately, the procedure was consensual, reflecting a County offer of "a procedure not found in the Collective Bargaining Agreements" which the unions accepted. The Association concludes by requesting that "the Arbitrator dismiss the Employer procedural objections and find in favor of the Unions on the merits."

The County's Reply Brief

The Association's assertion of a continuing violation theory to avoid waiver of the grievance cites authority which has no bearing on the grievance. The authority concerns the filing of a grievance and the untimeliness at issue here concerns the processing of a grievance. The underlying labor agreements deny an arbitrator authority to modify the agreements, each of which make timeliness a condition to a determination of a grievance's merit. Under any view of any agreement, the Association's or AFSCME's filing of the notice to arbitrate was grossly beyond contractual time limits.

The assertion that the County misled the Association has no support in the evidence. It could have ignored that the February letter seeking to revive the grievance was filed by a deputy rather than his "designated bargaining representative." It "offered to cooperate by permitting the WPPA Union and the AFSCME Union to join their separate grievances . . . so as to avoid unnecessary duplication of effort." It had no obligation to urge any of the unions to proceed to arbitration. The grievance "is potentially very expensive to the County" and it should not be required to put itself "in financial jeopardy of having to pay thousands of dollars of uninsured claims because the various unions were careless in not following the time periods set forth in the various labor agreements." In any event, the assertion that the County misled the unions "is totally inappropriate and disingenuous."

Nor will the evidence support the assertion that the County waived its right to challenge the timeliness of the grievance. The challenge was raised as soon as the County contacted outside counsel and as soon as the Commission assigned the file to an arbitrator.

If the merits of the grievance can be considered, then the Association must show either a binding past practice of paying the type of claims questioned by the grievance or actual coverage under Plan terms. Since the exclusion in the Plan is clear on its face, there is no evidence of actual coverage. Provisions of plans offered by WPEG or by Rock County involve different language and thus have no bearing on the Plan. Beyond this, Leach's testimony regarding the exclusion stands unrebutted. She noted MBA has consistently enforced the exclusion. The exceptions noted by the Association are clerical mistakes, and even ignoring the hearsay nature of the testimony, Perdue's inquiries were directed to a clerical employee of MBA. Leach and Stollfus have worked for MBA and its predecessors who obtained or provided insurance to County employees. Their testimony reliably establishes that the exclusion has never been applied as the Association seeks. That Stollfuss testified without effective rebuttal that the stop-loss premium to cover the benefit the Association seeks would run at least $30,000 underscores that the Association seeks to create, not to enforce, a benefit.

Arbitral precedent will not permit the few exceptions brought into evidence to constitute a binding past practice. The evidence shows nothing more than that a handful of individual claimants over a period of many years "may have been paid for their on-the-job medical claims." There is no reliable evidence that anyone beyond these individual claimants realized the claims had been paid. Nor can such knowledge be imputed to the County.

Association contentions that the County was obligated to direct MBA to interpret the exclusion other than in the Memo have no support in the evidence. The County was unaware that the exclusion had been interpreted inconsistently and never agreed to the interpretation urged by the Association. Rather, the Memo did no more than respond to an employee inquiry in a manner "intended to give all plan participants ample warning so that they could protect themselves." Larsen's testimony establishes no more than that the County did not intend to alter the Plan substantively in 1998, but to update it "in order to meet the new HIPPA requirements." The County concludes the grievance must be denied as untimely or as lacking merit.

DISCUSSION

The threshold issue is whether the grievance was timely processed under the governing labor agreements. The contractual background is mixed, and complicates addressing the issue. Section 23.03 of the Association agreement demands that a grievance be "timely . . . processed, or shall be deemed barred." Section 23.04 permits the time limits to "be extended

by mutual agreement of the parties in writing." Section 5.01 of the Local 3813 agreement makes time limits "of the essence", and enforces them by stating "failure to follow them shall render the grievance null and void." The section also makes a waiver of the time limits possible "by mutual written consent of the parties." Section 5.01 of the Local 1162-A agreement contains an identical sanction for failure to follow time limits, and provides for waiver of the time limits by "mutual consent of the parties". Section 6.01 of the Local 1162 agreement contains the "null and void" sanction for failing to follow time limits, but is silent on the possibility of waiver of the time limits by mutual consent. Unique among the labor agreements, Section 6.01 notes that the untimeliness of a grievance will not work a waiver "of subsequent grievances of the exact same nature" which may arise later.

The parties agree that the various contract provisions can be addressed in common. The County urges that "null and void" type references are common to each agreement and that the Association's filing of the intent to arbitrate or the actual arbitration request are untimely under any view of the facts. The Association contends that the common thread is either that the County waived the timeliness argument by failing to raise it promptly or that there is no timeliness issue since the underlying violation is continuing.

The grievance questions the Memo, and is a policy grievance comparable to a challenge of the reasonableness of a work rule prior to its application to any employee. Here, the Memo stated the County's view on how to enforce the Worker's Compensation exclusion. There is no individual claim denial posed, and this impacts the timeliness issue.

More specifically, the evidence will not support the assertion that the Association or AFSCME complied with the governing time limits or that the County somehow misled them. If the "null and void" type references are not to be applied, it must reflect County waiver of the time limits. One of the agreements demands only mutual consent, and one does not expressly address the point. The remaining two demand a written waiver.

In my view, the common thread on the timeliness issue is that a written waiver satisfies each contract. The May 9 letter constitutes, for jurisdictional purposes regarding this policy grievance, a written waiver of strict application of the time limits of the underlying agreements. The context and content of the letter underscore this. The letter notes County agreement during a May 8 telephone conversation to allow joint arbitration of the AFSCME/Association grievances, with the Association serving as "the lead Union". The letter does not refer to procedural or substantive objections. Whatever reservations Morgan had about timeliness in April were not voiced to the Association on May 8 or following the issuance of this letter, until the matter was being scheduled for arbitration. Beyond this, the context of the letter supports treating it as a waiver. The policy grievance has potentially County-wide application, and the parties treated it as a mutual and ongoing discussion of a unique issue. Morgan's February 6 letter reflects this, suggesting that "we" file for

arbitration. That a mutual intent to proceed to arbitration has contractual significance beyond the issue of waiver is underscored by Section 6.02 of the Local 1162 agreement. The processing of the grievance reflects that it did not implicate a specific claim denial, but a fundamental difference over Plan administration. At times, the issue was drawn into the bargaining process of the AFSCME agreements, and at times the issue posed forum choices regarding grievance arbitration and the prohibited practice process. The development of a single process reflects concern for a single answer to a single policy issue that crossed unit and forum lines.

The conclusion that the May 9 letter constitutes an agreement to waive strict application of grievance timelines moots the Association's contention that the grievance is timely because it is continuing in nature. Apart from its persuasive force as a theory of timeliness, this contention has some factual bearing on the context of the May 9 letter, and the less than rigorous processing of the grievance. The delay in the process reflects a number of issues, some more practical than legal, but ultimately that the interpretive issue, outside of the denial of a specific claim, had significance to both parties. The Memo states the County's view of the appropriate interpretation of the Plan document. The grievance questions whether the bargaining agreements have an impact on that interpretation. Enforcing the "null and void" sanction leaves that interpretive issue alive, whether considered continuing or not. Section 6.01 of the Local 1162 agreement highlights that the issue could be brought again, at least when unit members had to again purchase insurance to cover the benefit they thought the Plan provided. Past that, the County's attempt to use its interpretation as a basis to deny an individual claim could prompt another grievance under any of the agreements. The parties' processing of the grievance indicates a shared willingness, if not enthusiasm, to put the merit of the grievance to arbitration. The delay reflects a shared acknowledgement that if the grievance could not be worked out, something had to be done with it.

Against this background, it is unpersuasive to invoke the "null and void" sanction sought by the County. The most persuasive support for it is the strict application of the grievance timelines, but the evidence shows little indication that either party was concerned through the processing of the grievance with strict application of the grievance timelines. As noted above, the May 9 letter establishes that the parties intended to litigate the merit of the grievance, and thus to waive strict application of grievance timelines.

The scope of this conclusion demands some discussion. It addresses only the "null and void" jurisdictional claim of the County. Morgan testified that he did not view his conduct to constitute a waiver of grievance timelines and that the delay prejudiced County ability to hedge potential financial exposure to the grievance. The prejudice he notes can impact the grievance as a jurisdictional matter or on the merits of the grievance. In my view, the processing by the parties of this grievance indicates the matter is better addressed on its merits. Here, this means it impacts the issue of remedy, if the grievance is sustained. As noted above, the content and context of the May 9 letter establishes a waiver of strict application of grievance timelines.

It is thus necessary to address the stipulated issue on the merits, which questions whether the Memo changed the Plan. To be addressed by a grievance arbitrator, this must have a contractual focus. The Association's contention that it does is persuasive. The County is correct that the focus is arguable, since the labor agreements are between the unions and the County, while the Plan is a document created by the County and its insurance consultants, which supplanted a WPS insurance policy. The insurance contract including an insurer and an employer as parties does not necessarily incorporate the collective bargaining agreement including as parties a union and the same employer.

Here, however, the parties stipulated that the Plan was bargained to mirror and does mirror the WPS plan. Beyond this, each labor agreement incorporates the Plan: the Association, Local 1162-A and Local 3813 agreements at Section 18.01; and the Local 1162 agreement at Section 23.01. Beyond this, each agreement contains a Maintenance of Standards provision that arguably covers the point. Thus, the stipulated issue does have a contractual basis. The issue is whether the Memo changed the Plan so that it no longer mirrored the WPS plan, in violation of the collective bargaining agreement provisions incorporating the Plan or its benefit levels.

This focus narrows the interpretive issue. There is no persuasive force to the County's assertion that the Association should have brought a complaint of prohibited practice. The contractual focus noted above puts the matter squarely within the underlying agreements. Because the agreements cover the point, there can be no meaningful statutory issue regarding a unilateral change, since collective bargaining during the effective term of a labor agreement fulfills the parties' bargaining obligation as to matters covered by the agreement, see CITY OF RICHLAND CENTER, DEC. NO. 22912-B (WERC, 8/86), and CADOTT EDUCATION ASS'N V. WERC, 197 Wis. 2D 46 (1995).

The contractual issue is even more focused, since application of the Maintenance of Standards provisions beg the interpretive issue posed by the incorporation of the Plan into the labor agreements. The parties' positions question whether or not past claim payments made to the spouses of a number of County employees reflect the appropriate interpretation of the Plan rather than inadvertent error. Resolution of this point addresses the issues posed by the Maintenance of Standards provisions, which presume the payments were neither inadvertent nor inconsistent. Under those provisions, the payments must have been deliberate or sufficiently consistent to be considered a condition of employment. This is true even with regard to the AFSCME agreements containing an "inadvertent errors" provision.

The factual scope of the issue must also be focused. The Memo excludes illnesses and injuries subject to Worker's Compensation as eligible for benefits. This view essentially requires an individual County employee to purchase a Worker's Compensation insurance plan for the non-County work of individuals covered by the Plan or requires their representative to

bargain with the County to include such a benefit in the Plan for unit members as a whole. Thus, the issue does not address the Plan as a commercial contract or the Plan's application to any particular set of facts.

On balance, the evidence favors the County's assertion that the Memo did not change the Plan. Since the parties have stipulated that the 1998 amendment did not change the exclusion as a substantive matter, I will review the language at issue as that stated in the 1991 Plan.

The County's assertion that this language is clear and unambiguous overstates the point. Testimony establishes that Worker's Compensation insurance can be required or can be the choice of certain self-employed individuals. The Association's reading of the "even if" phrase is plausible. Under that view, the "claim of such benefits" presumes that a person eligible to buy a Worker's Compensation plan has actually done so. An eligible person who had not chosen to do so would have no "benefits" to decline to "choose." Thus, the exclusion language cannot be considered clear and unambiguous.

Regarding labor agreements, bargaining history and past practice are the most meaningful guides to resolve ambiguity, since each focuses on the conduct of the parties whose intent is the source and the goal of contract interpretation. In this case, their application is difficult.

Each party contends past practice supports their view, but the evidence will not confirm either. The difficulty posed is that the agreement manifested by the bargaining parties' conduct is the source of the persuasive force of past practice. Here, the evidence falls short of establishing a shared understanding. The Association offered examples of paid claims beyond those summarized above. The evidence arguably connotes agreement. However, Purdue's contacts with Tina, although troublesome, fall short of establishing an understanding. The contacts on both ends of the conversation did not involve the authorized representatives of the bargaining parties. Tina's relationship to the County and to MBA is unclear, but what evidence there is on the point indicates MBA never authorized Tina to offer a binding opinion on the Plan. Purdue's contacts never involved a union representative. Thus, she acted on her own behalf in a contractual sense. That she made the contact annually establishes at best that she did not see the response to carry binding contractual weight. More importantly, neither the Association nor the County can be bound as a matter of practice by the conduct of individuals unauthorized to bind them. Section 23.02 of the Local 3813 and 1162-A agreements underscore this.

Nor is the evidence of the claims sufficient to establish a consistent pattern of conduct that warrants the inference of agreement. The examples are isolated and spread over a long period of time. Although Leach's spreadsheet cannot establish how many times MBA denied a

claim for a work related injury of the spouse of a County employee, she testified that MBA has denied such claims as a matter of routine to her knowledge. Stollfuss testified that the County could have, but has never purchased re-insurance to cover the benefit sought by the grievance. MBA and the County drafted the Plan and he stated the Plan has never afforded the benefit. The evidence of practice falls short of establishing a shared understanding and thus falls short of establishing a binding practice.

Bargaining history evidence is no less troublesome. There is no evidence that the parties discussed the creation of the benefit at the table. The Association's view is that the language of the exclusion is broad enough to supply the coverage it seeks. From the Association's view, the evidence of practice coupled with the County's representation to Larsen that the 1998 changes were not substantive is sufficient to demonstrate the Plan changed. It falls short, however, of establishing that the coverage existed under the WPS plan and was incorporated into the Plan.

Viewed against this background, the weight of the evidence slightly favors the County's view. Taken in isolation, the language of the exclusion favors the County. The exclusion reads as a coordination of benefits provision. The "covered by" reference is to "laws", not to a policy or eligibility to purchase a policy. Read thus, the "even if" phrase clarifies that no individual claimant has the ability to choose whether the Plan or Worker's Compensation covers an injury or illness by "choosing" to file a particular claim. Rather, the issue is legal, with the Plan obligated only for non-Worker's Compensation based claims. The Association forcefully notes that not all individuals are statutorily obligated to purchase Worker's Compensation insurance. Granting this, however, cannot clarify why the same exclusion should read one way regarding a County employee in work status and a different way for the employee's spouse or the employee in non-County work status. As the County points out, its reading clarifies why it buys a separate Worker's Compensation insurance policy for its employees. The Association's reading creates the odd result that a County employee has less coverage under the Plan than the spouse providing the coverage. Nor can the Association's view clarify why a County employee or their spouse who does not purchase a Worker's Compensation insurance policy to cover non-County work, enjoys coverage under the Plan that would be denied them if they did purchase such a policy.

The evidence of bargaining history slightly favors the County. There is no persuasive evidence that the parties ever discussed the benefit at issue here at the bargaining table. The County's decision not to purchase insurance or re-insurance to cover the benefit is consistent with the contention that it was never agreed to at the table. That MBA forms have consistently asked whether or not a claim was work related underscores this. It is somewhat unclear why the forms would seek this information if the exclusion under the Plan or its predecessor read as the Association asserts. The significance of this point should not be overstated, since the absence of clear bargaining history affords dubious support for the County's view. The issue here,

however, is whether the labor agreements created or incorporated the benefit. As noted above, the evidence is troublesome, but there is no persuasive evidence to establish that the benefit was ever created at the bargaining table. It is thus less than apparent how it can be enforced in arbitration, which is designed to give parties the benefit of their agreement.

The language of the WPEG and Rock County plans that do create the benefit afford more support to the County than to the Association's view. They establish that the benefit is commercially available. However, they also exemplify that where the benefit is provided, it is provided through language that addresses the point more clearly than the exclusion at issue here. The WPEG plan clarifies that coverage is not a matter of legal eligibility, but means "actually insured under Worker's Compensation." The Rock County plan uses different terms to reach the same result. The issue posed here is not whether the benefit could be provided, but whether the parties ever agreed to do so. On balance, the evidence establishes that they did not. The claims honored in the past were, then, granted in spite of rather than under Plan exclusions.

Before closing, it is appropriate to tie the conclusions reached above more closely to the parties' arguments. The Association aptly argues that the County's reading of the exclusion follows its perception of potential liability. The exclusion's breadth, and more specifically, its application to a specific claim remain significant issues beyond the scope of this proceeding. As the Association points out, the application of the exclusion to specific facts may prove troublesome. More to the point, the grievance questions whether the Memo altered the Plan. The evidence will not support the assertion that it did. The fact remains that the Memo states no more than the County's reading of the Plan in the abstract. Denying the grievance clarifies that if the underlying risk of the Memo's application needs to be addressed, then it must be addressed either by individual purchase of Worker's Compensation insurance for non-County work or by the addition of the benefit through collective bargaining. Whatever ambiguity is implicit in the exclusion remains.

The development of past practice evidence suffered from the difficulty or impossibility of securing waivers regarding the processing of individual claims. Ambiguity is inevitable in any record, and the presence or absence of such waivers cannot alter the fundamental conflict between Leach's and Stollfuss' understanding of past claim handling and that of the witnesses produced by the Association. The precise numbers of denied versus granted claims cannot be determined, but the force of past practice is traceable to a shared understanding manifested by the bargaining parties' conduct. The evidence is sufficient to establish that there was no shared understanding.

That the benefit might prove costly for the County to provide, or that the County's consultant feels the benefit is outside of the mainstream in insurance policies has no bearing on the interpretation of the labor agreement. Nor does insurance-industry practice factor into the conclusions reached above. Rather, the issue is whether the parties, through collective

bargaining as codified in the agreements noted above, ever agreed to create the benefit at issue here. As noted above, the evidence favors the County's view that the parties never agreed to incorporate the benefit into the Plan.

AWARD

The grievances were not processed in a timely fashion pursuant to the governing labor agreements, but the parties agreed in writing to waive strict application of agreement timelines.

The October 30, 2002 memorandum (Joint Exhibit 7) did not constitute a unilateral change of the Green County Medical Benefit Plan.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 26th day of January, 2005.

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

RBM/gjc
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