BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO, LOCAL 1740

and

MARQUETTE COUNTY

Case 57
No. 63686
MA-12674

(Fifth Week of Vacation Grievance)

Appearances:

Mr. Bill Moberly Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin, appearing on behalf of Local 1740.

Mr. James R. Macy, Davis & Kuelthau, S.C., 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin, appearing on behalf of Marquette County.

ARBITRATION AWARD

AFSCME, Local 1740, hereinafter "Union," requested that the Wisconsin Employment Relations Commission appoint Lauri A. Millot of the Commission's Staff to hear and decide the instant dispute between the Union and Marquette County, hereinafter "County," in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The hearing was held before the Undersigned on October 5, 2004, in Montello, Wisconsin. The hearing was not transcribed. The parties submitted written briefs and the County submitted a reply brief. The Union notified the Undersigned on January 4, 2005, that it did not intend to file a reply brief. Based upon the evidence and arguments of the parties, the Undersigned makes and issues the following Award.

ISSUE

The parties were unable to agree that there was a procedural issue, but were able to stipulate to the substantive issue.

The County asserts a procedural challenge and frames it as:

Did the Union comply with the provisions of Article 8 with regard to the timelines for filing and processing the grievance?

The stipulated substantive issue is:

Did the County violate the 2002-2003 collective bargaining agreement when it implemented the fifth week of vacation effective January 1, 2003? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 8 – GRIEVANCE PROCEDURE

A) Procedures: A dispute concerning the interpretation or application of specific provisions of this Agreement shall be handled as follows:

B) Subject Matter: Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a statement of the grievance, the issue involved, the specific provisions of the Agreement allegedly violated, the relief sought, the date the incident or violation took place, the signature of the grievant and the date.

C) Settlement of Grievance: A grievance not presented within the time limitations or procedural requirements of this Article shall be considered dropped. Failure by the Employer to answer a grievance within the time limit set by the Agreement shall cause the grievant to proceed to the next step of the Grievance Procedure.

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

E) Steps in Procedure:

1. The employee, Union Committee, and/or the Union Representative shall present the grievance to the Highway Commissioner within five (5) days after the employee and/or the Union knew or should have known of the

cause of such grievance. In the event of a grievance, the grievant shall continue to perform his/her assigned task and grieve his/her complaint later. The grievant shall inform the Commissioner that his/her statement is meant as the first step in the grievance procedure. The Commissioner shall, within three (3) working days, orally inform the employee and the Union president of his/her decision.

2. If the grievance is not settled at the first step, within five (5) days of the decision of Step One, the employee and/or the Union shall prepare a written grievance and present it to the Highway Commissioner. The Commissioner shall confer with the employee, Union Committee, and/or Union Representative in relation to the grievance. Following said conference, the Commissioner shall respond within five (5) days in writing with a copy given to the grievant and the Union president.

3. If the grievance is not settled at the second step, the employee and/or Union may appeal the written grievance to the Marquette County Highway Committee within seven (7) days after receipt of the written decision of the Commissioner. The Committee shall discuss the grievance with the employee. Following said conference, the Committee shall respond within ten (10) days in writing; a copy given to the grievant and the Union president.

F) Arbitration: If a satisfactory settlement is not reached in Step Three, the Union shall notify the Highway Committee in writing within ten (10) days that the Union intends to process the grievance to arbitration. Only those grievances directly arising from disputes concerning the interpretation, application or enforcement of this contract may be processed to arbitration.

. . .

5. Decision of the Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance. The arbitrator shall not modify, add or delete from the express terms of this Agreement.

. . .

BACKGROUND AND FACTS

The facts are not in dispute.

The Union and the County were negotiating a successor agreement to encompass the time period 2002-2003. The parties met a number of times, but were unable reach agreement and a petition for interest arbitration was filed with the Wisconsin Employment Relations Commission. An investigator was assigned the case, met with the parties on two occasions and ultimately concluded that they were at impasse in their negotiations. Prior to the submission of final offers, the Union membership and members of the County Finance Committee, without representation by either of their representatives (Bill Moberly of Wisconsin Council 40 and Jim Macy of Davis & Kuelthau, S.C.). This session was unsuccessful in reaching a successor agreement. Prior to certification of final offers, the parties reached agreement on a number of issues including a change in the health insurance carrier. Michael Collard, then the County Administrator, prepared the following Letter of Agreement:

> This Letter of Agreement is entered into between Marquette County, Wisconsin (hereinafter "County") and the Marquette County Highway Employees Union, Local 1740, AFSCME, AFL-CIO (hereinafter "Union"). In exchange for mutual consideration contained herein, the County and the Union agree as follows:
>
> 1. The County and the Union have engaged in collective bargaining for the purpose of reaching a successor agreement to the agreement covering the period January 1, 1999 through December 31, 2001. The parties have made substantial progress in negotiations, and have reached tentative agreement on several points, but have been unable to reach agreement regarding the wage rates during the term of the successor agreement. The parties now wish to put into effect their tentative agreements while reserving all rights to bargain further regarding wages.
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> 2. The County and the Union agree that the successor collective bargaining agreement will incorporate the following modifications to the 1999-2001 agreement:
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> A. Appendix A-Classification and Wages. Modify as follows:
> The County will pay up to four employees in the following classifications ~~$200.00~~ $250.00 annually for toolbox and/or coverall allowances.
>
> B. Article 23 – Funeral Leave. Modify paragraph A as follows:
> Each employee shall be granted up to three (3) days of paid leave of absence to prepare for and attend the funeral of an immediate family member. Immediate family shall be defined as: father, mother, spouse, children and stepchildren, grandchildren, brother, sister, father-in-law, and mother-in-law of the employee.

C. Article 12 – Holidays. Modify paragraph A as follows:
Each employee shall be granted the following holidays off with pay:

New Year's Day	Good Friday
Memorial Day	Independence Day
Labor Day	~~Columbus Day~~
~~Presidents Day~~	Veteran's Day
Thanksgiving Day	Last four (4) hours of December 24
Christmas Day	Last four (4) hours of December 31

In addition, each employee shall be entitled to two (2) personal holidays, to be scheduled in the same manner as vacation days.

D. Safety Equipment: Add a new article to read as follows:

Employees may be required to wear safety shoes of a type approved by the Highway Commissioner. The County agrees to pay up to 75% of the cost of one pair of safety shoes per employee per year not to exceed a total annual County payment of $100.00 per employee to be paid on July 1 of each year.

E. Appendix A-Classification and Wages. Modify as follows:
Employees assigned to lead duties shall receive an additional ~~twenty cents ($.20)~~ thirty cents ($.30) per hour while so assigned, including all overtime hours. Effective January 1, 2003, employees assigned to lead duties shall receive an additional forty ($.40) cents per hour while so assigned, including all overtime hours.

F. Article 9 – Dues Deduction. Add a new paragraph B as follows:

B) Fair Share. The County hereby recognizes the "Fair Share" principle as set forth in Wisconsin Statute 111.70, as amended. A deduction from each employee shall be made from the paycheck each month in the amount as certified by Local 1740 treasurer, as the uniform dues of the Union.

The Union, as the exclusive representative of all the employees in the bargaining unit, will represent all such employees, Union and non-Union, fairly and equally, and all employees in the unit will be required to pay, as provided in this Article, their proportionate share of the costs of representation by the Union. No employee shall

be required to join the Union, but membership in the Union shall be made available to all employees who apply consistent with the Union constitutions and bylaws. No employee shall be denied Union membership because of race, creed, color or sex.

The Union shall indemnify and hold the County harmless against any and all claims, demands, suits, judgments, or other forms of liability that shall arise out of, or by reason of, action taken under this Section.

G. Article 10 – Vacations. Amend paragraph A as follows:

A) Each full-time employee shall receive one (1) week vacation with pay each year after one (1) year of employment; two (2) weeks vacation with pay each year after two (2) years of employment; three (3) weeks vacation with pay after nine (9) years of employment; ~~and~~ four (4) weeks vacation with pay after fifteen (15) years of employment; and five (5) weeks vacation with pay after twenty–seven (27) years of employment.

H. Article 15 – Insurance. The following language shall be added at the end of paragraph A of this Article:

Effective January 1, 2003 the County may replace the current health insurance plans with the Wisconsin Public Employers' Group Health Insurance Program. The County will pay 95% of the cost of the premiums for any of the regular HMO plans in that program, and 90% of the cost of the Standard Plan or the State Maintenance Plan. If this change is made, the County will also offer, and pay 75% of the premium for any employee who elects to enroll in, a dental plan as offered by Delta Dental (Base Plan 01, Option 2) or any dental plan with benefits substantially similar as a whole to that plan.

I. Article 29- Duration. The article shall be amended to reflect a term from January 1, 2002 through December 31, 2003.

3. The County and the Union agree that the contract modifications listed above in paragraphs 2A through 2I of this Letter of Agreement shall take effect January 1, 2003, except that the increase in lead worker pay from twenty

to thirty cents per hour shall take effect retroactively to January 1, 2002, and enrollments from health and dental insurance may take place immediately.

4. The issue of wages during the term of the successor agreement remains open, and the County and the Union both reserve all rights to argue this issue throughout the remaining course of negotiations, including any mediation or arbitration proceedings, including the right to argue the impact on wages of the other provisions of this Letter of Agreement.

. . .

After both sides signed the Letter of Understanding, the County implemented the terms that were effective prior to January 1, 2003. The County paid the lead man payment retroactive to January 1, 2002, and completed the enrollment procedure to change transfer the membership from the old to the new insurance provider.

On February 7, 2003, the Union sent the following letter to the County Finance Committee Chair:

. . .

Dear Mr. Wade:

On November 11, 2002, Michael Collard, then Marquette County's Administrative Coordinator, presented a Letter of Agreement (LOA) to representatives of AFSCME Local 1740 which he represented as an effort to memorialize Tentative Agreement's reached between the Local Union and Marquette County during contract negotiations. Based on Mr. Collard's representation that the document was an accurate reflection of what had been previously agreed to, it was signed by the Local Union President Todd Pruess. It wasn't until the first of this year that Todd realized that the LOA did not reflect what the Union and the County had agreed to at the bargaining table.

The issue is the effective date of the Tentative Agreements. Paragraph #3 on the third page of the LOA states in part, "The County and the Union agree that the contract modifications listed above in paragraphs 2A through 2I of this Letter of Agreement shall take effect January 1, 2003, except..." It is the position of the Union that all the Tentative Agreements were based on a January 1, 2002 effective date and not a January 1, 2003 date. All of the Union's written proposals to the County reflect a January 1, 2002 effective date. Our records from bargaining show that at no time did the County ever propose any other effective date. The County's Initial Proposals, submitted

December 12, 2001 show no proposed effective date. During a mediation session (5/29/02) the County proposals presented to the Union by Investigator John Emery were to be effective 1/1/02. Further, Todd and Russ Gray, Secretary-Treasure [sic] of Local 1740, both assure me that at no time during their meeting with Mr. Collard did he point out the effective date change from the Tentative Agreements.

The changes the parties agreed to that were not made effective 1/1/02 and should have been are:

1. Appendix A – Classification and Wages: The County will pay up to four employees in the following classifications $250.00 annually for toolbox and or coverall allowance.

2. Article 23 – Funeral Leave: add stepchildren and grandchildren to the definition of immediate family.

3. Article 12 – Holidays: delete Presidents Day and Columbus Day from list of standing holidays and replace with 2 personal holiday [sic] to be scheduled in the same manner as vacation days.

4. Safety Equipment: County to pay for safety shoes, 75% of cost up to $100.00 per member, to be paid July 1 of each year.

5. Article 10 –Vacations: add a fifth week with pay after 27 years of employment.

The Union must insist the County immediately retract the LOA of 11/11/02 and implement the terms of the Tentative Agreements as negotiated by the parties with an effective date 1/1/02 for all the above. If you have any questions please feel free to contact me.

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The County responded to Moberly's letter on February 13, 2003 as follows:

Dear Bill:

This letter is a follow-up to your letter of February 7, 2003 to Marquette County as it relates to the interpretation of the Letter of Agreement entered into between the County and the Union. In reviewing this matter with the County, the County believes that the Letter of Agreement has been properly

> implemented. We have been told that following Mike Collard's drafting of the Letter of Agreement, he met with two members of the Union, one of which was the President, Todd Pruess. He indicates that the parties specifically discussed the retroactive application of these items and that the Union was in agreement with the interpretation to be applied by the County. The document was signed only after this discussion and clarification of how the retroactivity would occur.
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> The County then implemented the retroactivity based upon those discussions and the parties' understanding of the Letter of Agreement.
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> Therefore, the County believes that the Letter of Agreement has been properly implemented. If I can provide any additional information, please let me know.

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An arbitration hearing was held on July 22, 2003, before Arbitrator William W. Petrie for the sole purpose of determining the general wage increase for the second year of the two-year agreement. Each side filed an initial brief and a reply brief thereafter, and Arbitrator Petrie issued his decision on December 11, 2003, finding in favor of the County.

The Union filed a grievance on March 8, 2004 alleging a violation of "Article 10 vacations eligible employees did not receive 5th week of vacation for the year 2002." The grievance was denied on the merits on March 24, 2004. In a letter dated April 28, 2004, the new Administrative Coordinator/Finance Director, Veronica VanDerhyden, reaffirmed the County's denial of the grievance on the merits, but also added the following reason:

> The committee would like you to understand that in regards to the grievance about the fifth week of vacation for the year 2002, which contradicts the letter of agreement signed by Todd Preuss, it too should have also been rejected due to being untimely. Again, the grievance should have been filed with the Marquette County Highway Commissioner within five (5) days of the decision of arbitrator, when the contract was final.

In addition to the fifth week of vacation grievance, the Union also filed a grievance alleging the tool allowance should have been effective January 1, 2002. On May 21, 2004, Moberly informed the County via e-mail that the Union was withdrawing its tool allowance grievance because of timeliness, but that it believed the vacation grievance was timely and, therefore, the Union would proceed to arbitration.

Additional facts, as relevant, will be included in the DISCUSSION section.

POSITIONS OF THE PARTIES

The Union

As to the issue of timeliness, the Union disagrees with the County's position. As was communicated to the Union on April 28, 2004, the County maintains that the clock started on December 11, 2003, the day Arbitrator Petrie signed the arbitration opinion and award. This position fails to acknowledge that the Union did not receive the award on that day, only that it may have been mailed on that date. Moreover, it ignores the fact that the County and Union thereafter drafted and proofed a final collective bargaining agreement incorporating the terms of the arbitrator's award. The agreement was not signed until March 3, 2004, and the Union timely filed its grievance on March 8, 2004.

As to the merits, the County unilaterally included the alternate effective date in the Letter of Understanding. This alternate date was never communicated or explained to the Union. The Union President testified that at no time did the County's representative, Collard, either notify or explain the change in the effective date. Preuss believed he was signing a document that would allow the County to implement the health insurance changes. At no time did Preuss understand that he was signing off on the other tentative agreements, much less agree to a later effective date for the fifth week of vacation benefits. It was incumbent on Collard to advise the Union that he had added language to the Letter of Understanding.

The language of the 2002-2003 collective bargaining agreement is clear and supports the Union's position. Article 30 provides that the effective date for the agreement is January 1, 2002, and Article 10 provides that employees with 27 years of employment are entitled to five weeks vacation. There is no reference to an alternate effective date for vacation. In contrast, Article 15 provides that the health insurance will change effective January 1, 2003, one year after the effective date of the agreement. The County prepared the 2002-2003 labor agreement and its failure to include a differing effective date is evidence of the County's initial intent. Moreover, the parties have a history of including specific language in the labor agreement regarding alternate effective dates as evidenced by Article 21.

For all of the above reasons, the Arbitrator should find in favor of the Union and sustain the grievance.

The County

The County maintains that the grievance is untimely. The specific language of Article 8 states that if a grievance is not presented within the time limitations, it is dropped. That is what has occurred in this instance. Arbitral case law supports the expectation that parties to a labor agreement must follow timelines. Just as Arbitrator Schiavoni determined when presented with another timeliness failure by this Union, this grievance should be dismissed. MARQUETTE COUNTY (HIGHWAY DEPT), CASE 27, NO. 37294, MA-4261 (SCHIAVONI, 1986)

The Union failed on numerous occasions to timely address this dispute. The Letter of Understanding was signed by the parties on November 15, 2002, and retroactive payment for 2002 was made to lead workers. The Commission has long held that the Letter of Understanding is a binding and enforceable part of the collective bargaining agreement. Given that the Letter of Understanding was an enforceable part of the labor agreement and the Union knew or should have known that the fifth week of vacation had not been retroactively credited while the lead workers were paid, the Union dropped the issue by not filing a grievance.

The next time the Union failed to file a timely grievance was after the County's February 13 letter wherein the County stated that it believed the Letter of Understanding had been properly implemented.

The third grievance filing failure occurred after Arbitrator Petrie issued his written decision on December 11, 2003, and the County made payment to all employees on retroactive issues by December 26, 2003. No grievance was filed by the Union.

The date the labor agreement was released to the bargaining unit is irrelevant. The Union knew well before that date that the County did not and would not be offering retroactive payment for vacation benefits. The only way the Arbitrator can find in the Union's favor is to add to or modify the express language of the parties' agreement which is forbidden by the labor contract.

The language of the parties' agreement is clear and establishes that implementation of the fifth week of vacation was effective January 1, 2003. The award issued by Arbitrator Petrie represents the terms of the parties' agreement. When Arbitrator Petrie issued his award, he did so adopting the Letter of Understanding that both parties incorporated in their final offers. The Union signed the Letter of Understanding that had been reviewed by their Representative. The Union had fair notice and entered into the Letter of Understanding voluntarily. Bargaining history supports the County's position since the Letter of Understanding specifically provided for the effective date for those benefits that were retroactive to January 1, 2002.

For the reasons noted, the grievance is untimely and should be dismissed. In addition, there is no contract violation and the grievance should be denied.

DISCUSSION

The County has challenged the timeliness of the grievance, thus that is the threshold question to be addressed.

The parties have negotiated timelines for the filing of grievances with the consequence that untimely grievances are considered dropped. Contractual limitations regarding timeliness are strictly enforced and failure to comply with the time periods will generally result in a

dismissal of the grievance if the failure is protested. Elkouri and Elkouri, How Arbitration Works, 6th Edition, pps. 217, 220 (2003). I find that the Union has failed to comply with the negotiated time limitations and the grievance is dismissed.

In its briefs, the County identifies multiple dates in which it asserts the Union knew or should have known that the County did not intend to provide the fifth week of vacation retroactive to January 1, 2002, and, thus, should have filed the grievance. The County in its letter of April 28, 2004, states that the grievance is untimely because it should have been filed "within five (5) days of the decision of the arbitrator, when the contract was final." I will address the County's timeliness challenge as it relates the Union's failure to file the grievance within five days of Arbitrator Petrie's December 11, 2003, decision.

It is well-settled that computation of time begins when the events giving rise to the grievance are discovered. The Union signed the Letter of Understanding on November 15, 2002.[1] The Letter specified that lead man pay was effective January 1, 2002, health insurance changes were effective January 1, 2003, with enrollment to begin immediately and all other contract modifications were effective January 1, 2003. The Letter was a part of both the Union and the County's final offers. Arbitrator Petrie issued his Award on December 11, 2003 and adopted the Letter of Understanding submitted by both parties. The Award was then mailed to the County Representative and the Union Representative. Arbitrator Petrie's decision was final and specified that the fifth week of vacation was effective January 3, 2003. Under the circumstances of this case, the five-day limit for filing the fifth week of vacation grievance commenced on or about December 17, 2003, when the representatives would have received a copy of the Arbitrator's Award. The filing of the grievance on March 8, 2005, was well beyond the five-day time period within which the Union had to file a grievance and, therefore, was untimely.

Acknowledging the desire of most arbitrators to avoid dismissing a grievance on procedural grounds, the facts in this case do not support offering the Union any flexibility. Any uncertainly regarding the effective date for the fifth week of vacation was resolved first in December of 2002, when the County implemented the terms of the Letter of Understanding and paid the lead worker increase retroactive to January 1, 2002. The County did not provide the fifth week of vacation benefit retroactive to January 1, 2002. This is not a situation where there was a delay between the announcement of the County's intent as it related to the fifth week and when the County acted. The Union knew when the County retroactively paid the lead worker that the County did not credit the eligible employees the fifth week of vacation. Moreover, there is no evidence to establish that these parties have been lax in the past as to filing timeliness. To the contrary, these parties arbitrated a grievance timeline challenge in 1986 and Arbitrator Schiavoni found the grievance untimely.

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[1] I do not accept that this is a situation where the local Union leadership was led astray by management. This same leadership was confident enough in its own abilities to bargain in the absence of its AFSCME bargaining representative. Had the parties been successful on that occasion, the leadership would have signed a tentative agreement, possibly similar to that contained in the Letter of Understanding.

Having found that the grievance is procedurally defective, it is inappropriate to address the substantive issue.

AWARD

No, the Union did not comply with the provisions of Article 8 with regard to the timelines for filing and processing the grievance. The grievance is dismissed.

Dated in Rhinelander, Wisconsin, this 3rd of May, 2005.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

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