BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 73, AFSCME, AFL-CIO

and

CITY OF APPLETON

Case 444
No. 64179
MA-12828

Appearances:

Mary Scoon, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Ellen Totzke, Deputy City Attorney, City of Appleton, appearing on behalf of the City.

ARBITRATION AWARD

The Union and City named above are parties to a 2004-2005 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned to hear and resolve a dispute over direct deposit of paychecks. A hearing was held on March 1, 2005, in Appleton, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on May 11, 2005.

ISSUE

The parties did not agree on the framing of the issue. The Arbitrator prefers the City's framing of the issue, which is:

> Did the City violate the collective bargaining agreement when it terminated the past practice of paying via paycheck and implementing direct deposit? If so, what is the appropriate remedy?

BACKGROUND

The City employs about 800 people. It started using direct deposit of paychecks in 1995. At first, the direct deposit was voluntary except for new hires. There were only nine people in the Union that were still getting a paycheck when the City discontinued the practice. The grievance is over the discontinued practice.

In the 1985-86 collective bargaining agreement for the waste water division, the contract stated: "All hourly paid Waste Water Treatment Division employees will be paid bi-weekly every other Thursday. If Thursday is a holiday, pay day shall be on the day preceding, if possible. The pay checks will be issued in envelopes." The last sentence was deleted in the 1987 contract. The Union voluntarily agreed to get rid of the envelopes, and the paychecks were brought out to the plant. However, shortly after that language was removed, management went back to using envelopes to ensure privacy.

On August 29, 2003, the Union notified the City of its intent to open negotiations for a successor agreement (2004-2005), even through the current agreement was not settled. The parties received an interest arbitration award on March 22, 2004, and on April 2, 2004, the parties opened negotiations for the successor contract. The City wanted to address paychecks with the Union and in its June 16, 2004 proposal, it notified the Union that the practice of paying employees via paycheck would be changed to direct deposit for all employees. It was not a proposal but rather a notice. According to Sandra Neisen, the Human Resources Director for the City, who took part in labor contract negotiations, the Union did not ask to negotiate over the issue or the impact of the issue. Neisen did not believe that the direct deposit was a bargaining issue because it did not affect wages, hours or working conditions for employees. She interprets the contract as referring only to the time one receives pay.

The parties met in a mediation session on June 16, 2004, and reached a tentative agreement which was put in writing by Neisen's office and sent to the Union. The tentative agreements listed notice regarding two items – one, for the direct deposit, and two, for safety shoes. The Union representative, Mary Scoon, notified Deputy Director Debra Keckeisen that the notice items should be in a separate notice to employees but not in the tentative agreements. The City sent separate notices on August 26, 2004, to employees regarding the direct deposit and asked them to submit the direct deposit form by September 17, 2004.

Robert Lutz has been an employee at the City for more than 25 years. He is with the Department of Utilities, Waste Water Division. Lutz was president of the Local for about 21 years. Lutz recalled that during contract negotiations, the City notified the Union that employees would no longer have the option of receiving a paycheck. The Union responded by stating that it was a mandatory subject of bargaining, and if the procedure was implemented, the Union would grieve it. When Lutz receive his notice of August 26, 2004, to sign up for direct deposit, he did not do so until he got another letter threatening discipline.

Terry McKee has been an employee at the City for nearly 27 years and is the current president of the Local. He chose to use direct deposit around 1996 or 1997. He noticed that on during the week of Labor Day in 2004, his deposit was not made until September 10, which was a Friday. The contract calls for receiving the paycheck on Thursday. The Union had objected after Memorial Day that employees were getting their checks on Friday instead of Thursday (unless they were on direct deposit), and the City agreed that employees would be given their checks on Thursday when Monday is a holiday, with the understanding that funds might not be in the City's account until Friday, depending on the financial institution's processing.

The City's Deputy Finance Director is Tony Saucerman. His department pushed for direct deposit. Employees on direct deposit still receive an earnings statement, showing gross pay, deductions or other pieces of information, which is printed on regular paper by a laser printer. When issuing paychecks, the Department has to print checks, match up the check to the earnings statement manually. With the small number of paychecks being issued, it's a very manual process and the Department hand-stamps the signatures. Saucerman said it's not cost effective is issue checks now because of the fixed fees for the account that is left open just for these checks. The annual cost to keep open the account was $744, and with the per-check cost running 25 cents a check, the total annual banking costs to write checks for 9 people is about $800. Personnel costs run about $400 a year, so the total cost to the City is about $1,200 a year. Saucerman noted that when a holiday falls on a Monday, it is a short turnaround time to get the payroll done by Tuesday afternoon, whether the money in transferred for direct deposit or a paycheck account.

The Union did not grieve the direct deposit when it started in 1995 and it never bargained over it.

THE PARTIES' POSITIONS

The Union

The Union contends that the long standing practice of paying employees via a paycheck interprets the language in the bargaining agreement, and the Employer cannot unilaterally implement direct deposit without bargaining with the Union, as this is a condition of employment. It is a benefit to the employees who choose to receive their pay via a check. The Union expects the City to argue that this is nothing more than a past practice, and that by putting the Union on notice during negotiations of a successor agreement, the burden is then on the Union to bargaining it into that successor agreement.

The Union states that where practice has established a meaning for language contained in past contracts and continued by the parties in a new agreement, the language will be presumed to have the meaning given it by that practice. Another benefit that is affected by the

City's action is what day of the week employees are to be paid. The contract language says that employees will be paid bi-weekly every other Thursday. However, with the direct deposit, funds may not be available until 7:00 a.m. on Fridays, and when a holiday falls on a Monday, the funds will not be in the City's account until Friday. The City never negotiated those changes with the Union. The change in when employees are to be paid also violates the contract.

The Union made it clear in bargaining that it did not have to bargain to keep what it already had based on the long standing practice of receiving a check. The inconvenience of the manual process and the costs incurred cannot over shadow the historical practice of employees receiving their pay via a check, and the clear language of when employees are to be paid cannot be ignored.

The City

The City states that the collective bargaining agreement is silent on the subject of direct deposit versus paychecks, and merely recites that the pay period is bi-weekly every other Thursday, and if Thursday is a holiday, on the day preceding if possible. The only reference to paychecks was removed during bargaining for the 1987 contract. The Union never articulated why it felt this was a mandatory subject of bargaining. Lutz was asked if the change to direct deposit affected his wages, hours or working conditions and he answered no.

The City points out that Elkouri states that a practice not subject to unilateral termination during the term of a bargaining agreement is subject to termination at the end of the term by giving due notice, and after being so notified, the other party must have the practice written into the agreement to prevent its discontinuance. The City gave notice to the Union and gave notice during mediation and gave separate notice to Union members not on direct deposit. There was no attempt to ever bargain the change to direct deposit or the impact of that change. If the Union believed this was a mandatory subject of bargaining, why didn't it make an effort to change the contract to address the concerns? In the face of a timely repudiation of a practice by one party, the other must have the practice written into their agreement it if is to continue to be binding.

In Reply, the Union

The Union maintains that the City does not have the right to unilaterally implement direct deposit for employees hired before the 1995 implementation date despite the fact that it did not grieve the direct deposit when implemented in 1995 for new hires. The Union continues to argue that the past practice of receiving a paycheck is an implied term of the contract and clarifies the contract language. The burden is on the Employer to negotiate with the Union the change the past practice as it is a mandatory subject of bargaining. A decision in

favor of the City will modify the clear language that states that all employees will be paid bi-weekly every other Thursday, because funds will not be available until Friday when there is a Monday holiday.

In Reply, the City

While the Union argued that the practice interprets the contract language, the City reiterates that the language does not mention the word "paycheck." The only reference to "paycheck" was removed during a time when paychecks were put in envelopes. In 1995, when the direct deposit was implemented, the Union did not feel the need to change the contract language to accommodate for that change. There was no need to bargain a change in the language because the language made no reference to the method of payment, merely to the pay period and the pay day. The Union also argued that changing to direct deposit will affect what day of the week employees are paid. Violating of the payday provision of the bargaining agreement is not the subject of this grievance. That is a separate issue from the change from paper paychecks to direct deposit.

DISCUSSION

The parties agree that the only language at issue is in Article XV, where it states: "All employees will be paid bi-weekly every other Thursday. If Thursday is a holiday, pay day shall be on the day preceding, if possible." The Union attempts to argue that ***how employees are paid*** is the past practice that interprets that language. A past practice may be useful in interpret ambiguous language, but this particular piece of language is not ambiguous in the first place. It simply states ***when*** employees are to be paid. It does not deal with the method of payment. It says nothing about paper paychecks as opposed to electronic deposits.

The past practice in this instance is a gap filler – it does not interpret contract language but is a past practice that exists outside of the contract. It is a long-standing past practice and one the City recognized. In fact, the City recognized that the proper way to get rid of the past practice was to repudiate it during bargaining, thus giving the Union the opportunity to bargain it back by obtaining contract language to protect it, if the Union wanted the past practice to continue.

As the Elkouri's state in How Arbitration Works, 6th Edition, page 619:

> . . . an impressive line of arbitral thought holds that a practice that is not subject to unilateral termination during the term of the collective bargaining agreement is subject to termination at the end of the said term by giving due notice of intent not to carry the practice over to the next agreement; after being so notified, the other party must have the practice written into the agreement to prevent its discontinuance.

In this case, the City gave timely notice of its intent to terminate the past practice. The Union had ample opportunity to bargain over it but did not. The Union failed to ask for language to seek the continuance of the practice. It needed to do so in order for the practice to continue. Once the City repudiated it, the past practice lost the mutuality upon which it rested in the first place. It was no longer an established practice accepted by both parties. Without the parties agreeing to contract language to secure the practice, it was gone. The City could, without violating the contract, discontinue the practice and force everyone to accept direct deposit as a means of receiving their paychecks.

The issue of whether pay is actually in employees' accounts by Thursday during weeks when the holiday falls on a Monday is a separate issue, as the City notes. There is little, if any, real evidence in this case to deal with that issue, and the Arbitrator has no comment on it.

AWARD

The grievance is denied and dismissed.

Dated at Elkhorn, Wisconsin, this 17th day of May, 2005.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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