BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**ELLSWORTH POLICE DEPARTMENT EMPLOYEES' ASSOCIATION – LOCAL 318**

and

**VILLAGE OF ELLSWORTH**

Case 5
No. 65787
MA-13324

*(Boot Allowance Grievance)*

**Appearances:**

**Mr. Thomas A. Bauer**, Labor Association of Wisconsin, Inc., 206 South Arlington Street, Appleton, Wisconsin 54915, appearing on behalf of the Ellsworth Police Department Employees' Association - Local 318.

Weld, Riley, Prenn & Ricci S.C., 3624 Oakwood Hills Parkway, Eau Claire, Wisconsin 54702, by **Attorney Stephen L. Weld**, appearing on behalf of the Village of Ellsworth.

## ARBITRATION AWARD

The Ellsworth Police Department Employees' Association - Local 318, hereinafter referred to as the Union, and the Village of Ellsworth, hereinafter referred to as the Employer or the Village, are parties to a collective bargaining agreement (Agreement) which provides for final and binding arbitration of certain disputes, which Agreement was in full force and effect at all times mentioned herein. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the Union's grievance regarding the boot allowance. The undersigned was appointed as the Arbitrator and held a hearing into the matter in Ellsworth, Wisconsin, on July 12, 2006, at which time the parties were given the opportunity to present evidence and arguments. The hearing was not transcribed. The parties filed post-hearing briefs by September 18, 2006 at which time the record was closed. Based upon the evidence and the arguments of the parties, I issue the following decision and Award.

## ISSUES

The parties did not stipulate to a statement of the issues. The Union frames the issue as follows:

> Did the employer violate the terms and conditions of the collective bargaining agreement when the Employer discontinued the boot allowance in January, 2006?
>
> If so, what is the appropriate remedy?

The Village frames the issue as follows:

> Did the Village violate Article 21, Section 2, when it refused to pay a boot allowance in 2006?
>
> If so, what is the appropriate remedy?

I adopt the issue as stated by the Union.

## RELEVANT CONTRACTUAL PROVISION

### ARTICLE 21 - UNIFORMS

. . .

21.2 A boot allowance of Three Hundred Twenty-Five Dollars ($325.00) per year will be paid to full-time employees in 2004 and a boot allowance of Four Hundred Fifty Dollars ($450.00) per year will be paid to full-time employees in 2005.

## BACKGROUND

The parties are subject to a collective bargaining agreement covering the years 2004, 2005 and 2006. This Agreement was negotiated by the parties, with the assistance of WERC Mediator Commissioner Sue Bauman, during the early part of 2004 and eventually executed by the parties.

During the negotiations various settlement offers and proposals were exchanged and the final draft of the Agreement, the one ultimately signed by the parties and entered into evidence here as Joint Exhibit 1, was prepared by the Union and forwarded to the Village for ratification. The Village executed this final draft without making any changes to it. The Agreement contains the boot allowance clause referenced above.

The Village paid the boot allowance in 2004 in the amount of $325.00 and in 2005 paid another allowance in the amount of $450.00. In January of 2006 the Village notified the Union that it would not pay any boot allowance monies to the employees during the year 2006. This grievance followed in a timely fashion and was properly taken through the steps of the contractual grievance procedure to arbitration and the case is properly before the Arbitrator.

## POSITIONS OF THE PARTIES

### The Union

The Union says the facts here are clear. Simply stated the parties negotiated an Agreement which, in pertinent part, increased the boot allowance from $200.00 in year 2003; to $325.00 in year 2004; and to $450.00 in years 2005 and 2006. It relies on the language in Article 21 - Uniforms cited above and says that this language provides for a $450.00 boot allowance in 2006 because the language refers to a "per year" payment for that amount in 2005 and thus must continue into the next year, 2006. This interpretation is clear and unequivocal, argues the Union, and the application of the "plain meaning rule" (if words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived from the nature of the language used) should lead the Arbitrator to conclude that the boot allowance payment for the year 2006 is $450.00.

The language here also clearly shows that the intent of the parties was to "increase the boot allowance to a maximum of $450.00 per year commencing in 2005 and to continue the $450.00 boot allowance through year 2006." In support of this proposition the Union looks to prior contracts which it says uses the same type of boot allowance language as used in Joint Exhibit 1. The 1995-96-97 contract, the 1998-99-00 contract and the 2001-02-03 contract all refer to the "per year" language to designate the amount of the allowance to be paid in subsequent years. Since the current Agreement also contains "per year" language it implies that employees should receive the allowance in January of each year of the Agreement. Further Association Steward and Officer Darrin Foss testified that the continuation of the boot allowance payment into year 2006 was the intent of the Union, which is consistent with past Agreements.

The Union notes that Mediator Bauman did not provide any proposal from the Village which might imply that the increases in the allowance in years 2004 and 2005 constituted a "buy out" of the boot allowance and says that if the Village had intended that the allowance be discontinued in 2006 it would have specifically said so. Joint Exhibit 12, the Village's Summary of Tentative Settlement, does not specifically say that the allowance would be discontinued in 2006. Furthermore, Joint Exhibit 3, an e-mail to Mr. Bauer from Village Trustee Neil Gulbranson states that he (Gulbranson) "can't remember during negotiations this (boot allowance) was discussed as a one time offer or ongoing" (sic) but at hearing he testified that it was the intent of the Village to discontinue the allowance. If Gulbranson could not remember seven months earlier that it was the Village's intent to discontinue the allowance, then the Union questions how he could be so sure of it at the hearing.

Mr. Gulbranson testified that he thought the Union was trying to "put one over" on the Village because the Village Trustees were so inexperienced in the art of negotiations and felt "overwhelmed" (Gulbranson's words) during the mediation session. The Union points out that by the time of their second mediation session they had Attorney Weld in their corner and that it was at this session that the final deal was struck, so any inexperience on the part of the Trustees should not be seriously considered. The final Agreement was drafted by the Union and sent to the Village Trustees for ratification. Gulbranson testified that none of the Trustees, including himself, reviewed the final draft prior to execution. The Union finds this point to be implausible because all of the Trustees have participated in negotiations with this unit in the past and there have been occasions when the parties were required to make changes prior to execution. In response to Gulbranson's assertion that the Village never sent the final document to Attorney Weld for his review, the Union also suspects otherwise.

The parties had a meeting of the minds following the negotiations. The parties "clearly intended to continue the boot allowance into and including 2006." The Village cannot obtain a change to the contractual language via grievance arbitration which it did not bargain through negotiations. There was never any indication from the Village bargaining team that they wished to buy out the boot allowance and that the allowance would be discontinued in year 2006. The Village asks the Arbitrator to award to them something for which they did not bargain and it cannot be allowed to do that.

The Union asks the Arbitrator to order the Village to compensate all bargaining unit employees $450.00, plus interest, as a boot allowance for year 2006.

**The Village**

The Village asserts that the issue is not what the agreed to language means but, rather, what language did the parties agree to. The Village did not agree to pay a boot allowance in year 2006 and felt that the boot allowance in previous years in the amount of $200.00 was "way out of bounds", especially in light of the fact that the Village pays for the officer's uniforms. Gulbranson testified that the Village proposed to treat boots as part of the uniform providing an initial pair of boots with replacements as necessary.

The language in the boot allowance portion of the Agreement referring to "per year" is a drafting error which should be construed against the drafters, here the Union. It points to Joint Exhibit 10, a three year Settlement Offer, and Joint Exhibit 11, a Final Offer as evidence of the true intent of the parties. Joint Exhibit 10 reads in pertinent part as follows:

> **Revise Section 21.2 to read:**
>
> **A boot allowance of $325.00 will be paid to full-time employees in 2004 and a boot allowance of $450.00 will be paid to full-time employees in 2005.**

Joint Exhibit 11, the Final Offer, proposed no change in the boot allowance. The prior language, found in Joint Exhibit 4C, reads in pertinent part:

> **A boot allowance of Two Hundred ($200) per year will be paid to employees.**

The Union accepted and ratified the three-year Settlement Offer as found in Joint Exhibit 10. The next day Attorney Weld sent a Summary of Tentative Settlement (Joint Exhibit 12) to Mr. Bauer providing for the revision as set forth in Joint Exhibit 10. Gulbranson testified that he reviewed the Summary of Tentative Settlement, Joint Exhibit 12, and felt that it was "right on the money."

The Union drafted the final Agreement and sent it to the Village. It did not copy the Village's attorney. The Union did not notify the Village or its attorney that it had inserted the "per year" language into the Agreement. The final Agreement language, as modified by the Union, reads as follows (emphasis is mine and highlights the Union's additions):

> **A boot allowance of Three Hundred Twenty-Five Dollars ($325.00) per year will be paid to full-time employees in 2004 and a boot allowance of Four Hundred Fifty Dollars ($450.00) per year will be paid to full-time employees in 2005.**

The Village asserts that it should not be forced to pay thousands of additional dollars due to the Union's insertion of the above language. If the Union questioned the payment of a boot allowance in year 2006 it should have ironed this out at the mediation sessions. At the very least the Union had an obligation to notify the Village of its (the Union's) unilateral change in the language.

In any event, says the Village, the language is not ambiguous. Assuming that the Union's language modification is found to be appropriate it makes little difference because the specific reference to years 2004 and 2005 in the Agreement means that the "per year" language refers to those years only and requires payments only in years 2004 and 2005. Union Representative Foss's testimony supports such a conclusion. He testified that the Village had agreed (in mediation) to increase the boot allowance by $125.00 in 2004 and another $125.00 in 2005. The Village now asks if the Union's position is that the Village should add an additional $125.00 in year 2006 as well?

In conclusion, the Union erred when it unilaterally and without notice to the Village amended the language in the Agreement. Even so, there is no reference to any annual payment in year 2006 and the grievance should be denied.

## DISCUSSION

The Union asserts that the language of Article 21, Section 21.2 is clear and unequivocal and that it defines the parties' intent to continue the $450.00 boot allowance through contract year 2006. The Village, on the other hand, also says the language is clear and that it means that the boot allowance payment runs only through year 2005. The fact that the parties draw differing conclusions from the present language does not, in itself, make the language unclear. The job of determining language clarity, or lack thereof, is left to the Arbitrator.

Language is normally considered to be clear and unambiguous if it is susceptible to but one plausible interpretation or meaning. If it is capable of being understood in two or more different senses or if plausible arguments may be made for a competing interpretation then the language is considered to be ambiguous. If the Arbitrator finds the language to be clear and unambiguous he or she must apply the plain meaning to the facts. If found to be ambiguous, the language must be interpreted by the Arbitrator to discover the true intent of the parties and then applied to the facts of the case. In the former case, no extrinsic evidence is required or proper. In the latter, extrinsic evidence is necessary.

The language giving rise to the controversy here are the words “per year”. They have been inserted following the dollar amounts set forth for each year of the contract. They were inserted by the Union during drafting and were not modified (nor discovered) by the Village prior to its execution of the Agreement. The Union argues that the reference to “per year” means that the $450.00 boot allowance paid in 2005 should also be paid in 2006, while the Village says that because there is no reference to any payment due in year 2006, the payments obviously run only through year 2005.

The parties introduced extrinsic evidence in their attempts to support their arguments that the parties mutually intended the language to mean what each party wanted it to mean. None was necessary. The language is not ambiguous. It is not capable of being understood in two or more different senses nor may a reasonable argument be made for any competing interpretation. The intent of this language is obvious. It means that $325.00 per year (i.e. throughout the year) will be paid in 2004 and $450.00 per year (throughout the year) will be paid in 2005. No payment is contractually due in 2006. No provision is made for a payment in year 2006 and the Union's argument that the $450.00 payment in 2005 should be continued throughout 2006 is not reasonable. It stretches too far. If the parties had intended to provide for a payment in year 2006 they could have easily, and clearly, done so, just as they did for years 2004 and 2005. They didn't, though.

In light of the fact that the language is unambiguous and not plausibly or reasonably susceptible to competing interpretations there is no reason for me to address the extrinsic evidence produced by the parties. Nor is there a reason to examine the assertion that the “per year” language supplied by the Union needs to be construed against it. The “per year” language inserted by the Union constituted, at worst, nothing more than mere surplusage and did not change the clear meaning of the Agreement at all. Said another way, it did not create

an ambiguity. (If it had, the familiar rule that a contract ambiguity be construed against the drafting party would perhaps apply here, although I do not address that issue here.) Hence, the Village was not harmed and the integrity of the intent of the parties was not disturbed.

In light of the above, it is my

**AWARD**

The Village did not violate the terms and conditions of the collective bargaining agreement when it discontinued the boot allowance payment in January, 2006.

The grievance is dismissed in its entirety.

Dated at Wausau, Wisconsin, this 23rd day of October, 2006.

Steve Morrison /s/
Steve Morrison, Arbitrator

SM/gjc
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