

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
POLK COUNTY JOINT COUNCIL LOCAL 774, AFSCME, AFL-CIO
and
POLK COUNTY

Case #120
No. 67953
MA-14061

Appearances:

Steven Hartmann, Staff Representative, P.O. Box 364, Menomonie, WI 54751, appearing on behalf of Polk County Joint Council Local 774, AFSCME, AFL-CIO.

Mindy K. Dale, Weld, Riley, Prenn, & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, WI 54702-1030, appearing on behalf of Polk County.

ARBITRATION AWARD

Polk County, hereinafter County or Employer, and Polk County Joint Council Local 774, AFSCME, AFL-CIO, hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The parties jointly requested that the Wisconsin Employment Relations Commission designate Commissioner Susan J.M. Bauman to serve as the arbitrator of a dispute concerning the distribution of paychecks. The undersigned was so designated. A hearing was held on August 5, 2008 in Balsam Lake, Wisconsin. The hearing was not transcribed. The record was closed on October 3, 2008, upon receipt of all post-hearing written argument

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

The parties were unable to agree on a statement of the issue and agreed that the arbitrator could frame the issue based on the evidence and arguments presented. The Union proposed the following statements of the issue:

Did the County violate the collective bargaining agreement and or past practice when it unilaterally ceased providing paychecks at the worksite on payday? If so, what is the remedy?

Is there a violation of the collective bargaining agreement when by mailing the check, employees are not paid within two weeks?

The Employer proposed the following statement of the issue:

Did the County violate Article 24, Section 24.01 of the Master Agreement by mailing paychecks instead of having checks hand delivered by a designated department representative? If so, what is the remedy?

The undersigned adopts the following statement of the issue:

1. Did the County violate the terms of the collective bargaining agreement by unilaterally changing the manner in which pay is distributed to employees?
2. If so, what is the appropriate remedy?

BACKGROUND and FACTS

This grievance arises out of the County Treasurer's decision to mail checks to employee homes rather than to have them hand delivered to employees at their work sites.¹ Prior to January 2008, employees who did not participate in the direct deposit program received their paychecks at their worksite every other Tuesday. Each department had an individual designated to pick up the checks from the Treasurer's office and hand deliver them to the proper employee. The County had utilized this method for a significant period of time, with the exception that the day of the week for payroll distribution changed at least twice.

¹ This grievance does not affect employees hired after January 1, 2007 who must participate in the direct deposit program nor those who voluntarily participate in that program.

Tom Wishman, Director of Human Resources for the County from March 1993 through December 2002 testified about his involvement, as lead negotiator, in bargaining with respect to Section 24.01 of the collective bargaining agreement. That section of the agreement simply states, "Employees shall be paid every two (2) weeks." Wishman testified that there were two different occasions upon which the Employer approached the Union to change the day upon which employees were to be paid. The first time, the County sought to change the payday from Thursday to Friday in order to build in additional lag time between the end of the pay period and the day money was paid to employees. The understanding between the parties was that employees were to have access to their money on whatever day was payday. During the months that highway employees worked four ten-hour days, and did not work on Fridays, their paychecks were made available to them at the end of work on Thursday, but the checks were dated for Friday.

A few years later, the County sought to further increase the lag time between the end of the pay period and the pay date by changing payday to Tuesday. In discussion with the Union, the issue emphasized was ensuring that employees were able to access the funds on payday.

Steve Hartmann has served as the spokesman for Local 774 since 1993 and was involved in the two bargains where payday was an issue. In both circumstances, when the County sought to change from Thursday to Friday and when it later sought to change from Friday to Tuesday, the only issue at the bargaining table was when the employees would have the money available to them.

Amanda Nissen has served as the Polk County Treasurer since March 2003. Prior to January 2008 employee paychecks were divided up by department and placed in an envelope until payday. A department representative would sign for the checks and distribute them to employees in their department on payday. In June 2007, during a routine audit, the auditors noticed that each month a large number of checks remained uncashed. The auditors recommended that all checks issued by the County, not limited to payroll checks, be mailed to the intended recipient so as to avoid the possibility of checks sitting around uncashed. Treasurer Nissen developed new procedures in accordance with the auditor's recommendation so that her office now processes all checks issued by the County, places them in envelopes, machine seals the envelopes, and deposits them in the mail room to be picked up by the U.S. Postal Service.

The target date for the switch over to mailing of checks was January 1, 2008. Notification was provided to the Union in December so as to allow time for those employees who wanted to switch to direct deposit to do so.² The actual switch to

² Apparently two payroll cycles are necessary in order for an employee to become a full participant in the direct deposit program.

mailing checks did not occur until the second payroll in January 2008. The Treasurer's office gets the payroll on Monday and puts the checks in out-going mail on Tuesday. Although there are two daily pick-ups by the Post Office, at 10:30 a.m. and 2:30 p.m., the staff tries to get the checks into the 10:30 a.m. pick up.

With the exception of Golden Age Manor employees who did not get the direct deposit materials early enough for implementation and software glitches that caused problems with the payroll due the week of Martin Luther King Jr.'s birthday and the fact that the Federal Reserve and banks were closed for the holiday, employee checks have been mailed every other Tuesday since the second payroll of 2008.

There were some problems with the sealing/postage machine resulting in some checks being sent in unsealed envelopes. The problem was corrected when it was brought to Treasurer Nissen's attention. Since then, no problems with envelopes being unsealed have been brought to her attention. Other than employees questioning the security of paychecks being placed in the postal bins in the unsecured County mail room, no additional security issues have been identified.

Employee Nancy Anderson testified that since the change to the mailing of checks, employees have not had access to their money on payday. She has received her paycheck, and thus access to her earned income, on Wednesdays or Thursdays. She also testified about other employees not receiving their checks until Friday in some weeks.

The Union filed a grievance requesting that the practice of distributing paychecks on payday be continued. The grievance was processed through the grievance procedure, culminating in arbitration.

Additional facts are included in the **Discussion**, below.

RELEVANT CONTRACT PROVISIONS

ARTICLE II – MANAGEMENT RIGHTS

Section 2.01 Management Rights Recognition

The Union recognizes the lawful management rights of the County which include:

A. To direct all operations of the County;

. . .

F. To maintain efficiency of County government operations;

. . .

- I. To determine the methods, means, kinds, and amounts of services to be performed as pertains to County government operations, and the number and kinds of classifications to perform such services and to contract out for goods and services where the work force is not affected or if the work force is affected, there must be a showing of substantial savings to the County.

ARTICLE IV – GRIEVANCE AND ARBITRATION PROCEDURE

Section 4.07 Arbitration:

. . .

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

ARTICLE XXIV – PAY PERIOD

Section 24.01 Definition of Pay Period

Employees shall be paid every two (2) weeks.

Section 24.02. Direct Deposit.

All employees hired after January 1, 2007 shall be paid through direct deposit. If an error is made and an individual employee is overpaid on a check that is direct deposited, the County shall work with the employee and Union to develop a reasonable recoupment schedule.

ARTICLE XXXI – ENTIRE MEMORANDUM OF AGREEMENT

Section 31.01 Entire Agreement

This agreement constitutes the entire Agreement between the parties and no verbal statements shall supersede any of its provisions. Any amendment supplemental thereto shall not be binding upon either party unless executed in writing by the parties hereto. The parties further acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the areas of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and that opportunity are set forth in this Agreement.

DISCUSSION

Factually, this is a rather straightforward case. The County Treasurer decided that instead of hand distributing paychecks on Tuesday paydays, the checks would be mailed to the employees by depositing the checks in the mail on scheduled paydays.³ It is the position of the Union that the language of the collective bargaining agreement, the bargaining history, and past practice that employees are to have actual use of the money on payday without being required to participate in the direct deposit program.

The Employer contends that pursuant to Sec. 59.25, Wis. Stats., the County Treasurer has control over the disbursement of County funds and that the Wisconsin Supreme Court has made clear that an arbitrator must yield to statutory authority specifically given to an elected official, *RACINE COUNTY AND INTERNATIONAL ASSOCIATION OF MACHINISTS*, Case No. 2006AP964 (decided June 26, 2008). The Union argues that this contention cannot be found in Sec. 59.25 but that even if it were, the Treasurer would not have an unfettered right to make disbursements in any manner that she wants. Sec. 59.25(3), Wis. Stats., provides the following duties with respect to disbursement of funds by a County Treasurer:

(b) Pay out all moneys belonging to the county only on the order of the board, signed by the clerk and countersigned by the chairperson, except when special provision for the payment thereof is otherwise made by law; and, except in counties having a population of 500,000 or more, pay out all money belonging to the county road and bridge fund on the written order of the county commissioner of highways, signed by the clerk and countersigned by the chairperson of the board.

(c) Pay all county orders described in par. (b) in the order of time in which they are presented for payment; but when 2 or more are presented at the same time, give precedence to the order of the oldest date, but the treasurer shall receive of municipal treasurers all county orders issued in the county, which the municipal treasurers may present in payment of county taxes, to the amount of the county taxes actually collected by any municipal treasurer in the year for which the orders are offered in payment, which amount shall be determined by the affidavit of the municipal treasurer.

³ Although there was undisputed testimony from the Treasurer that the decision to mail the checks was based on an auditor recommendation which, if not followed, could result in liability to the County, the Union questions that this was the result of an auditor recommendation as there was no direct testimony from the external auditor nor any documentary evidence in support of the proposition that such a recommendation was made. Regardless, I credit the testimony of Treasurer Nissen that she was acting upon the recommendation of an external auditor.

(d) Keep a true and correct account of the receipt and expenditure of all moneys which come into the treasurer's hands by virtue of the treasurer's office in books kept therefore, specifying the date of every receipt or payment, the person from or to whom the same was received or paid, and the purpose of each particular receipt or payment; . . .

The County is correct that the Treasurer is, pursuant to statute, to control disbursement of County moneys. However, the statute does not specify that the Treasurer has the authority to determine, or modify, the manner of making payroll disbursement if such is in violation of the collective bargaining agreement. In RACINE COUNTY, unlike in this situation, there was specific statutory authority for the actions taken by the Employer's agent. Such is not the case herein.

The County also argues that the collective bargaining agreement is silent with respect to the manner in which payroll is to be met, stating simply, at Section 24.01, "Employees shall be paid every two (2) weeks." Accordingly, it is the Employer's contention that it has the authority, pursuant to the management rights clause of the collective bargaining agreement, to change from hand delivery to mail delivery of paychecks. Because the action of the County cannot be deemed arbitrary, capricious, discriminatory, or unreasonable, it must be upheld and the grievance must be dismissed.

It is true that the action of the County is not arbitrary, capricious, discriminatory, or unreasonable, but the County has failed to consider the bargaining history and past practice of ensuring that employees are in receipt of their funds on payday. The County cites MARATHON COUNTY (PARKS DEPARTMENT), MA-9606 (Bielarczyk, July 19, 1997) in support of its actions. In that case, the collective bargaining agreement was silent with respect to paydays. There was a history of paying Parks Department employees who worked four ten-hour days during summer months on Thursdays. The Arbitrator found

Thus, had the County ceased allowing employees to receive their paycheck on Thursday without putting into place the alternative of direct deposit the Union would be correct in claiming the County had violated the intent of the original agreement between the parties concerning the four (4) day workweek. Further, if any employee can demonstrate that the direct deposit program places an undue hardship on them, e.g., if the County cannot direct deposit to the employee's financial institution or the employee does not have a financial institution, the County cannot require the employee to use a financial institution that will accept direct deposit, the county must continue the practice of making the check available on their last day of work.

That case arose when the Marathon County Treasurer attended a seminar that led her to believe that the issuance of checks on Thursday, dated for Friday, could result in penalties to the County. Arbitrator Honeyman reached a different decision in MARATHON COUNTY (HIGHWAY DEPARTMENT), MA-9486 (January 30, 1997) under the same facts except that with respect to employees working four ten-hour days in the highway department a Memorandum of Agreement had been reached (and later incorporated into the collective bargaining agreement) that provided:

8. Pay Check

a. Pay checks will be provided to employees on Thursdays, provided they are available to the supervisors by 1:00 P.M. If the supervisors have not received them by 1:00 P.M., the County will not be liable if pay checks are not delivered to all employees. Pay checks that were undelivered on Thursday will be available at the office on Fridays from 8:00 A.M. to 4:00 P.M.

b. Any employee who cashes a pay check on Thursdays will be barred from receiving a pay check on Thursdays. Their check will have to be picked up at the office on Fridays.

In the instant case, there is contract language that governs the matter, although it is not as specific as in the Marathon Highway case. In Polk County, the language, combined with the bargaining history and a very clear, very well understood and agreed upon past practice of the parties, was that employees were to be in receipt of their wages on payday, which was to occur every two weeks. Thus, the fact that direct deposit is available to employees does not, in the view of the undersigned, permit the County to make a change that results in employees receiving their pay on a day other than the regular payday, Tuesday. The County cites the “Zipper Clause”, Section 31.01, for the proposition that such past practice is not binding. However, inasmuch as the practice continued over many years and many subsequent collective bargaining agreements, and the County made no attempt to renounce the practice during negotiations for the 2007 – 2008 contract, but only attempted to modify the practice during the term of the contract, I find the County’s reliance on Section 31.01 to be unpersuasive.

The County contends that there is nothing in the collective bargaining agreement to prevent the County from making the change it did. I agree that the County has the authority under the contract to change its practice from hand delivery of paychecks to mail delivery. However, in so doing, the County must continue to ensure that employees are in receipt of their wages on payday. The County argues that once a check is mailed, it is deemed delivered. The County cites no authority for this statement and, indeed, there is no universal authority or rule that governs the situation.

It is well known that, for example, payment of taxes to the Internal Revenue Service are considered to be timely if postmarked by April 15, the due date. On the other hand, filing of a complaint of a prohibited practice with the Wisconsin Employment Relations Commission (WERC) is not filed unless and until “the complaint and fee have been actually received by the commission at its Madison office during normal business hours. . .” ERC 12.02, WIS. ADMIN. CODE. Thus, here where the established practice and understanding of the parties is that employees are to be in receipt of their money on payday, it cannot be found that the depositing of a check in the United States mail on payday is the equivalent of actual access to the funds in question.

If the County were to deposit the paychecks in the mail on Monday, most, if not all, of the employees would have access to their wages on payday Tuesday. However, the County would not be in a position to guarantee that all employees would receive payment every two weeks, as provided for in the collective bargaining agreement. Additionally, the County rightfully has some concerns about post-dating checks for Tuesday and mailing them on Monday. I do not believe, however, that the concern appropriately runs to the employees being able to intercept the mail and get their check from the postmaster. Indeed, given the apparent lack of security in the mail room, there is a greater likelihood that employees are able to access paychecks from the mail bins in the County mail room, thereby receiving them on whatever date they are deposited in the mail.

While it is true that employees could avoid the problem they are currently experiencing of not knowing on what day their paychecks will arrive by participating in the direct deposit program, employees hired prior to January 2007 are not required to participate in that program. Although the County may, for good reason, wish to have all employees participate in the direct deposit program, that is not what the parties negotiated into their collective bargaining agreement. The bargaining history of Sec. 24.02 is not of record, but it is likely that the County sought to have all employees participate in the direct deposit program, not just those hired since January 2007. This was not achieved in bargaining and it is unacceptable to, in essence, coerce employees to participate in direct deposit by telling them they will not receive their pay on Tuesday payday unless they do so.

As a remedy for the unilateral change in the manner in which employees are paid, and the date that wages are received, the Union has requested that interest be awarded to the employees for the time between the Tuesday payday and the date employees received the money. The Employer objects to this requested remedy as being neither functional nor appropriate. I agree. The amounts of money in question, even if accurately ascertainable, are paltry. The County has not been unjustly enriched as a result of this practice, and there has been no showing that any employee has been significantly disadvantaged. Accordingly, I decline to award interest.⁴

⁴ In any event, it is not clear that the collective bargaining agreement provides authority for me to do so.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

The County violated the terms of the collective bargaining agreement by unilaterally changing the manner in which pay is distributed to employees. As a remedy, the County shall prospectively ensure that employee pay is available to employees on payday.

Dated at Madison, Wisconsin, this 1st day of December, 2008.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator