

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**CHIPPEWA FALLS AREA UNIFIED SCHOOL DISTRICT EMPLOYEES,
LOCAL 1241, AFSCME, AFL-CIO**

and

CHIPPEWA FALLS AREA UNIFIED SCHOOL DISTRICT

Case 141
No. 68002
MA-14079

(Direct Deposit and Pay Card Grievance)

Appearances:

Mark DeLorme, Staff Representative, AFSCME Council 40, appearing on behalf of the Union.

Stephen Weld and **Anders Helquist**, Weld, Riley, Prenn and Ricci, S.C., Attorneys at Law, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and District or Employer, respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance known as the direct deposit and pay card grievance. A hearing, which was not transcribed, was held on September 11, 2008 in Chippewa Falls, Wisconsin. The parties filed briefs by October 21, 2008, whereupon the record was closed. Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Union framed the issue as follows:

Did the School District violate the Agreement when it eliminated the option of payment to employees by paper paycheck? If so, what is the appropriate remedy?

The District framed the issue as follows:

Did the Chippewa Falls School District violate the second sentence of Article XIX, Section 9, when it switched from paying employees via paper checks to paying employees by either directly depositing an employee's pay into that employee's checking or savings accounts or by giving employees plastic pay (debit) cards? If so, what is the proper remedy?

I have not adopted either side's proposed issue. Based on the entire record, I find that the issue which is going to be decided herein is as follows:

Did the District violate Article XIX, Section 9 when it eliminated the option of paying employees by paper paychecks, and mandated instead that employees be paid by either direct deposit or with pay cards? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2006-09 collective bargaining agreement contains the following pertinent provisions:

ARTICLE II – RECOGNITION

Section 3 Management Rights. It is understood and agreed that the Board of Education possesses the sole right to operate the School District so as to carry out statutory mandates and educational goals; however, such rights must be exercised consistently with other provisions of this Agreement.

Management rights include:

a) The right to utilize personnel, methods and means in the most appropriate and efficient manner possible;

...

e) The right to determine the services and objectives of the system and the method and means necessary to fulfill these services and objectives, including the transfer, alternation, curtailment, or discontinuation of any objectives or services.

...

ARTICLE XIX – WAGES

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Section 9 Payroll Deduction. The Board agrees to deduct the amount indicated by the employee from the pay of the employee and remit such amount to the financial institution of the employee's choice. The Board also agrees to make direct deposit of the entire paycheck to the financial institution of the employee's choice available. Employees desiring such payroll deduction or direct deposit shall sign the necessary payroll deduction forms of the appropriate financial institution and remit such authorization forms to the payroll clerk. New authorization for payroll deductions or direct deposit may be made between the first day of school and September 15 or between January 1 and January 15. In addition, newly hired employees may request payroll deduction or direct deposit within thirty days of their initial employment. The Board shall be held harmless for any errors by the financial institutions.

Section 10 Proration. Those employees who wish to have their wages prorated over a twelve (12) month period may do so by sending a letter to the Board Office before August 1st. Checks will continue to be prorated each year until a letter of request to end proration is given by the employee.

FACTS

The District operates a public school system in Chippewa Falls, Wisconsin. The Union is the exclusive collective bargaining representative for certain support staff employees in the District.

Here's a short summary of the facts which follow. This case involves how employees are paid. For at least the last twenty years, employees have had the option of being paid with paper paychecks or having their pay directly deposited to a bank account. What happened here is that the Employer eliminated the option of employees being paid via paper checks, and instead mandated that they be paid via the electronic means of either direct deposit or debit cards. The Union contends this action violated the collective bargaining agreement.

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Prior to January, 2007, the District's payroll software was GUSTO. In January, 2007, the vendor that had been servicing GUSTO notified the District that for business reasons, it would no longer service GUSTO. As a result, the District decided to change payroll software systems. After researching the payroll system options available, the District decided to contract with SKYWARD to provide payroll and other software services.

The SKYWARD software system has the capability of issuing paper paychecks. Thus, if the District wanted to, it could continue to pay employees with paper paychecks after it converted its payroll system to SKYWARD. The District decided that if it did continue using paper paychecks, it would lose some efficiencies arising out of the use of the new software. As a result, it decided to eliminate the option of employees receiving paper paychecks. The Employer made this decision because it believed it would save money on check distribution costs and by freeing up the staff time needed to manually process paychecks. The District estimates that it saves from \$5 to \$15 per employee per pay period by using direct deposit. It also estimates that it saves \$2 per paycheck per pay period by using plastic pay cards rather than paper checks.

After this decision was made, District officials had several meetings with local union officials and discussed the new SKYWARD software. In those meetings, District officials stated that the new payroll system would reduce payroll processing time and therefore cost. They also stated that the District was going to eliminate paper paychecks as a payroll option and just have electronic payment via direct deposit. In response, the Union indicated it wanted to retain the option of employees being paid by paper paychecks.

On February 27, 2008, the District notified employees that later that year it would be implementing the new payroll system. That letter indicated that one of the changes that would be taking place as a result of going to the new payroll system was that employees would be required to go on direct deposit.

When the District took the action just referenced, the District knew that some employees did not have bank accounts and/or did not want direct deposit. To address these concerns, the District also implemented a pay card option as an alternative to direct deposit. The pay card option is similar to a debit card; it's a plastic (payroll) pay card. It's another form of electronic fund transfer whereby an employee's pay is deposited in a personal account set up by the employer and accessed by the employee with a debit card. Payroll debit cards can be used at banks, financial institutions and automated teller machines to get cash. While some banks charge a fee for accepting pay cards of non-account holders, the District ensured that employees would not be charged fees when they used their pay cards. The District also ensured that the pay cards would not restrict an employee's access to their pay.

As a result of the changes just noted, employees can now have their pay either directly deposited in their bank account, or have it credited to a pay card. They can no longer receive a paper paycheck though. That option no longer exists.

In response to the District's actions referenced above, the Union filed two grievances. The first grievance challenged the mandatory direct deposit of paychecks and the elimination of paper paychecks. The second grievance challenged the use of pay cards in place of paper paychecks. The grievances were processed to arbitration and were consolidated for the purpose of hearing. At the hearing, the parties essentially combined the two grievances into one, which they denominated as the direct deposit and pay card grievance.

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At the time of the hearing, seven of the approximately 200 employees in the bargaining unit were paid via pay cards. The rest of the employees were being paid via direct deposit.

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The record indicates that in the last round of bargaining, the District made a bargaining proposal dealing with Article XIX, Section 9 (Payroll Deduction). The proposal was to strike Section 9 as written and replace it with the following new language:

Section 9. Payroll Deductions. Direct deposit is used for payment of wages and salaries. The deposit will be made to the bank or financial institution of the employee's choice. The payroll earnings statements will be distributed on pay day. Employees shall sign the necessary payroll deduction forms for the appropriate financial institution and remit such authorization forms to the payroll clerk. The Board shall be held harmless for any errors by the financial institutions.

The first sentence in this proposal mandated that employees be paid by direct deposit. By making direct deposit mandatory, it was implicit that the Employer was proposing to eliminate the existing option of employees receiving a paper paycheck. The Union did not accept the District's bargaining proposal and, as a result, it was not incorporated into the parties' current collective bargaining agreement.

POSITIONS OF THE PARTIES

Union

The Union contends that the District violated the collective bargaining agreement when it eliminated the option of paying employees by paper paychecks. It elaborates as follows.

First, the Union interprets Article XIX to require the District to continue providing a paper paycheck to employees if that is their choice. To support that reading of the language, it notes that both Sections 9 and 10 in Article XIX include the word "paycheck". The Union implies that this word's existence in those sections means that a paper paycheck is required (as opposed to an electronic fund transfer).

Second, the Union notes that in the last round of bargaining, the District made a bargaining proposal to eliminate the option of a paper paycheck, and that the Union rejected this proposal. According to the Union, this shows that the District is now attempting to get through arbitration what it could not get through negotiations. It cites Elkouri for the proposition that "where a party has expressly attempted but failed to exclude a particular clause, the arbitrator may well be inclined to view the inclusion of that clause as a clear

indication of the success of the proponent.” How Arbitration Works, (5th Ed., BNA 1997, at p. 502).

Third, the Union contends that the parties’ past practice supports its interpretation of the contract as requiring the option of a paper paycheck. It notes in this regard that employees have had the option of receiving a paper paycheck, in addition to direct deposit, for 20 years. According to the Union, this practice establishes how the language in Article XIX, Sec. 9 has been interpreted by the parties’ themselves (namely, that employees have the option of receiving a paper paycheck). The Union argues that “for the District to deny now this longstanding interpretation of the language is simply disingenuous.”

Fourth, the Union argues that the contractual Management Rights clause (which the Employer relies on) does not apply to this case because that is essentially general language which is outweighed by the more specific language in Article XIX, Section 9 dealing with paper paychecks. Aside from that, the Union questions the efficiencies and claimed cost savings of the new payroll system. It notes in this regard that the new system was only several months old as of the time of the hearing. As the Union sees it, this was not enough time to ascertain the efficiencies and claimed cost savings of the new system. According to the Union, “it seems imprudent to eliminate paper paychecks if you do not even know the additional costs, if there are any, of continuing to offer them.”

Finally, the Union avers that the decision to eliminate a paper paycheck and instead implement direct deposit and pay cards for employee pay is a mandatory subject of bargaining. Building on that premise, the Union argues these changes can only be implemented through (voluntary) agreement with the Union or interest arbitration. It notes that here, though, that did not happen. Instead, the District simply unilaterally imposed what it failed to get in bargaining (i.e. mandatory direct deposit). The Union asserts that “later, in an attempt to demonstrate superficial compliance with the contract, they offered the ‘choice’ of a pay card.” As the Union sees it, the pay card was no option at all because it’s just another form of electronic fund transfer.

In sum then, it’s the Union’s position that the District violated Article XIX when it eliminated the option of paper paychecks unilaterally. In order to remedy this contract violation, it asks that the District be ordered to offer employees the option of receiving their wages by paper paycheck.

District

The District’s position is that it did not violate any provision in the collective bargaining agreement when it switched from paying employees via paper checks to paying employees by either directly depositing an employee’s pay into that employee’s checking or savings accounts or by giving employees plastic pay (debit) cards. It elaborates as follows.

It notes at the outset that the reason it eliminated the paycheck option for employees was because it had to change payroll software systems, and the system which it implemented - SKYWARD - significantly reduces payroll costs if the pay is directly deposited into the employees' bank accounts. The District acknowledges that the SKYWARD software can issue paper paychecks, but it determined that having all employees use direct deposit would save it money. As the Employer put it in their opening statement at the hearing, paper paychecks have gone the way of the albatross. The Employer also emphasizes that it knew that some employees did not have bank accounts or did not want direct deposit, so it offered plastic pay cards as an alternative to direct deposit.

Next, the Employer contends that no language in the collective bargaining agreement requires the issuance of a paper paycheck. In making this argument, it acknowledges that the second sentence in Article XIX, Section 9 does contain the word "paycheck". However, as the Employer sees it, that word was not meant to mandate paper paychecks "in lieu of other modes of payment - cash, plastic or whatever." Instead, the sentence simply authorizes direct deposit as a payroll option (i.e. it "gives the District the right to implement direct deposit as a pay alternative.") According to the Employer, Article XIX, Section 9 "does not establish the method or form of an employee's pay - in addition to direct deposit - that decision is left to the District's discretion." The Employer anticipates that the Union will cite those arbitration awards wherein it was held that the word "paycheck" requires a paper paycheck. It argues those decisions can be distinguished on the grounds that the contract language involved here is different, namely that this language does not require "mutual agreement" regarding a change in the method of payment.

Next, building on the premise that this contract does not require the issuance of a paper paycheck, the Employer contends that the Management Rights clause gives it the right and ability to change the method/means of paying employees and to implement (mandatory) direct deposit and/or pay cards. According to the Employer, this right is subsumed into those portions of the Management Rights clause which give it the right to "promote general efficiency in the public school system", to ". . .utilize . . .methods and means in the most appropriate and efficient means possible. . ." and "to determine the services and objectives of the school system" including the right to transfer, alter or discontinue any of those services. It argues that if the arbitrator uses the reasonableness standard to review the Employer's actions herein relative to exercising its management rights, it's the Employer's view that it exercised its authority to implement direct deposit and pay cards reasonably (and did not do so arbitrarily, capriciously or in bad faith). It also maintains that arbitrators have long held that employers possess the ability to adjust the method and mode of payment. In support thereof, it cites the almost 50 year old decision in DIAMOND ALKALI CO., 38 LA 1055 (1962), wherein the Company changed the method of payment from cash to check. Arbitrator Rubin held therein that, absent a contractual prohibition on doing so, the Company could change from cash payments to checks. The Employer reasons that if a change from cash payments to checks passed contractual muster in that case, then a change from paychecks to direct deposit and pay cards should similarly pass muster here.

Finally, the District anticipates that the Union will argue that the District's bargaining proposal dealing with direct deposit in the last round of bargaining establishes that the District is seeking to achieve through arbitration what it was not able to negotiate. It disputes that assertion, and avers that bargaining proposal should not be dispositive to the Agreement's interpretation. To support that premise, it relies on Kathy Lee's testimony that the District's bargaining proposal was merely "a housekeeping matter" which reflected the District's existing "practice of mandatory direct deposit for new employees." According to the Employer, after the Union would not agree to the proposal, it withdrew the proposal "without prejudicing its practice of mandating that new employees be paid by direct deposit."

The District therefore asks that the grievance be denied.

DISCUSSION

At issue here is whether the District violated the collective bargaining agreement when it eliminated the option of paying employees by paper paychecks, and mandated instead that employees be paid by either direct deposit or with pay cards. Based on the rationale which follows, I answer that question in the affirmative.

My discussion is structured as follows. First, I will address the contract language cited by the parties. They relied on two contract provisions: the Management Rights clause (Article II, Section 3) and the Payroll Deduction provision (Article XIX, Section 9). These provisions will be addressed in the order just listed. After that, I will address whether a past practice is applicable here. Finally, I will address the parties' bargaining history.

Since this is a contract interpretation case, I've decided to begin with the following introductory comments about how I go about interpreting contract language. In a contract interpretation case, my interpretive task is to determine if the meaning of the contract language is clear and unambiguous, or whether it is ambiguous. Language is considered clear and unambiguous when it is susceptible to but one plausible interpretation/meaning. Conversely, language is considered ambiguous when it is capable of being understood in two or more different senses, or where plausible arguments can be made for competing interpretations. If the language is found to be clear and unambiguous, my job is to apply its plain meaning to the facts. If the language is found to be ambiguous though, my job is to then interpret it to discern what the parties intended it to mean, and then apply that meaning to the facts. Attention is now turned to making that call.

I'll first focus on the Management Rights clause which is found in Article II, Section 3. That clause gives the District numerous management rights. Some of the rights specified therein are the right to ". . .utilize. . .methods and means in the most appropriate and efficient manner possible. . ." and "the right to determine the services" of the school system including the right to transfer, alter, curtail or discontinue any of these services. Having just noted those general principles, it's my view that those general principles do not apply in this case. Here's why. As previously noted, what's at issue here is whether the District could unilaterally

eliminate the option of paying employees by paper paycheck. Since that is the issue, it would certainly be noteworthy if that topic was referenced in the Management Rights clause. It is not. There is nothing therein that specifically deals with the topic of how employees are paid. While the Employer asks me to infer that the Management Rights clause gives it the ability to unilaterally change the “method and means” by which it pays employees (i.e. to change how it pays employees), I decline to make such an inference in this case. It would be one thing if this collective bargaining agreement was silent on the matter of how employees are paid. That’s not the situation though. I’m referring, of course, to the language contained in Article XIX, Section 9. While that language will be addressed next, it suffices to say here that that language does deal with the topic of how employees are paid. Since this case involves the topic of how employees are paid, it logically follows that the contract language most applicable to such a case would be found in Article XIX, Section 9 and not in the Management Rights clause. Consequently, this decision will not be based on the Management Rights clause.

The focus now turns to an examination of the language contained in Article XIX, Section 9. The sentence in that section which is applicable to this case is the second sentence. It provides thus:

The Board also agrees to make direct deposit of the entire paycheck to the financial institution of the employee’s choice available.

I begin my analysis of this language by noting what it does not address. It does not address **when** employees are paid. Instead, this sentence deals with **how** employees are paid, and specifically **the method of payment**. That’s important because, as previously noted, that’s exactly what’s involved here. This sentence authorizes the District to directly deposit an employee’s pay into the employee’s financial institution. Said another way, it makes direct deposit an authorized way for the District to pay employees. However, while direct deposit is one way an employee can be paid, there are other ways as well. The record herein establishes that there’s also cash, paper paychecks, and plastic pay cards. Given the existence of those other pay options, the question is whether they are available to employees in addition to direct deposit. On its face, the second sentence does not say anything about those other pay options, nor are those pay options referenced elsewhere in the rest of the section. Since the language does not say whether those other pay options are also available to the employees, I find that the contract language is ambiguous on that point. The reason it is ambiguous is because Article XIX, Section 9 is susceptible to more than one plausible interpretation/meaning concerning whether pay options other than direct deposit are available to employees.

Having just found that Article XIX, Section 9 is ambiguous, my interpretive task is now to ascertain whether those other pay options – particularly paper paychecks – are available to the employees.

In litigating their case, the Union relied on past practice and bargaining history to buttress their position that employees have the option of receiving paper paychecks if that is their choice. Past practice and bargaining history are forms of evidence which are commonly

used to help interpret ambiguous contract language. The rationale underlying their use is that they can yield reliable evidence of what ambiguous contract language means. Thus, the manner in which the parties have carried out the terms of their agreement in the past provides reliable evidence of its meaning.

I will first address whether a past practice is applicable here. It is generally accepted by arbitrators that for a practice to be considered indicative of the parties mutual intent and be binding, the conduct must be clear and consistent, of long duration and accepted by both sides. The Union asserts that the record evidence meets all of these criteria and, thus, is entitled to be given effect herein.

In this case, there is no dispute about what happened previously. For at least the last twenty years, employees have had the option of receiving a paper paycheck or having their pay directly deposited. It was their choice. The foregoing qualifies as a practice. That practice establishes how the Agreement has historically been interpreted by the parties themselves. It shows that until the Employer eliminated the paper paycheck option, the parties had mutually interpreted Article XIX, Section 9 to mean that while direct deposit was one option for receiving pay, another option was a paper paycheck. This practice clarified that the parties intended their Agreement to mean that direct deposit is not the only way that employees can receive their pay – another option is with a paper paycheck. It would be one thing if this practice conflicted with the contract language. However, it does not. Thus, this is not a situation where the practice was inconsistent with the contract language.

This interpretation of Article XIX, Section 9 (i.e. that direct deposit is not the only way employees can receive their pay – another option is with a paper paycheck) is also supported by the parties' bargaining history. Here's why. In the last round of bargaining, the District made a bargaining proposal to modify Article XIX, Section 9. The first sentence in that proposal (i.e. "direct deposit is used for payment of wages and salaries") made it clear that direct deposit would be used for payment of wages (i.e. that direct deposit would be mandatory). By making direct deposit mandatory, the Union understood that the Employer was proposing to eliminate the existing option of employees receiving a paper paycheck. The Union rejected this bargaining proposal and it was not incorporated into the parties' collective bargaining agreement. While it's the District's view that it is not trying to get the same outcome through arbitration that it could not get through negotiations, that's certainly how it looks to me.

The District essentially asks me to overlook the past practice and bargaining history just referenced. I could do that if the contract language was clear and unambiguous. However, it is not. The parties' past practice and their bargaining history helps to establish that the parties intended Article XIX, Section 9 to mean that direct deposit is not the only way employees can receive their pay – another option is with a paper paycheck. The District violated that provision when it unilaterally eliminated that option (i.e. the option of a paper paycheck). It lacked a sound contractual basis for doing so.

In order to remedy this contractual violation, the District shall offer employees the option of receiving their wages by paper paycheck.

In light of the above, it is my

AWARD

That the District violated Article XIX, Section 9 when it eliminated the option of paying employees by paper paychecks, and mandated instead that employees be paid by either direct deposit or with pay cards. In order to remedy this contractual violation, the District shall offer employees the option of receiving their wages by paper paycheck.

Dated at Madison, Wisconsin, this 18th day of December, 2008.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

