

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WALWORTH COUNTY COURTHOUSE EMPLOYEES, LOCAL 1925B,
WISCONSIN COUNCIL OF MUNICIPAL EMPLOYEES,
AFSCME, AFL-CIO**

and

COUNTY OF WALWORTH, WISCONSIN

Case 174
No. 67560
MA-13939

Appearances:

Nicholas Kasmer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8450 82nd Street, No. 308, Pleasant Prairie, Wisconsin 53158, for Walworth County Courthouse Employees, Local 1925B, Wisconsin Council of Municipal Employees, AFSCME, AFL-CIO, which is referred to below as the Union.

Oyvind Wistrom, Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 1800, Milwaukee, Wisconsin 53202, for County of Walworth, Wisconsin, which is referred to below as the Employer or as the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement, which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin to resolve a grievance filed on behalf of Michelle Brower, who is referred to below as the Grievant. After extensive efforts to informally resolve the grievance, the parties requested that the matter be set for hearing. Hearing was set for March 13, 2008, in Elkhorn, Wisconsin. In an e-mail dated March 10, the parties noted they had agreed to submit the grievance “on stipulated facts and briefs in lieu of conducting a live hearing on March 13th.” The parties filed “Joint Stipulated Facts” with the Commission on October 28, and filed briefs and a waiver of any reply by December 11.

In an e-mail to the parties dated February 3, 2009, I noted a concern regarding one of the exhibits submitted into evidence and a concern regarding a potential conflict regarding Sections 8.06, 9.02A and 9.03. I offered the parties the opportunity to address those concerns prior to my issuance of a decision. After an e-mail exchange between February 3 and

February 16, the parties agreed to address my concerns during a teleconference held on February 19. At that teleconference, the parties noted agreement that Exhibit 6 should be read to establish that two employees have served a Section 8.06 promotional probationary period during their Section 7.03A new hire probationary period. Beyond that, the parties noted their agreement that the Brower grievance poses a narrow compensation issue which should be addressed as narrowly as possible. Each party supplemented their arguments regarding the potential conflict between Sections 8.06, 9.02A and 9.03, agreeing that whatever the outcome, the implications of the wage schedule placement would have no bearing on any substantive difference(s) between a probationary period under Section 8.06 and a probationary period under Section 7.03A.

ISSUES

The parties did not stipulate the issues for decision. The Union states the issues thus:

1) Were the wages recouped by the County from the Grievant properly paid under the terms of the Collective Bargaining Agreement between the parties?

If so, what is the appropriate remedy?

2) Did the County violate the Collective Bargaining Agreement between the parties when it recouped the wages paid to the Grievant?

If so, what is the appropriate remedy?

The Employer states the issues thus:

In accordance with the Agreement, after an employee is permanently assigned (promoted) to another position with a higher pay range, when is the employee entitled to a step increase?

With respect to this grievance, was the Grievant erroneously issued a step increase on November 12, 2005, only two months after her promotion to the Clerk IV position?

In my opinion, resolution of the grievance demands that each of the issues raised by the parties be addressed.

RELEVANT CONTRACT PROVISIONS

ARTICLE II

2.01 In General. The management of Walworth County and the direction of the employees in the bargaining unit, including, but not limited to the right to hire, the right to assign employees to jobs and equipment in

accordance with the provisions of this Agreement, the right to assign overtime work, the right to schedule work, the right to relieve employees from duty because of lack of work or for other legitimate reasons, except as otherwise provided in this Agreement, shall be vested exclusively in the County. . . .

ARTICLE VII – SENIORITY

7.01 Full-time Employees. A regular full-time employee is defined as an employee hired to fill a regular full-time position in the Job Classification and Rate Schedule attached to this Agreement and made a part hereof, marked Exhibit “A” through “C”. . . .

7.03 Probationary Employee. . . .

A. Probationary Period. New employees shall be on a probationary status for a period of six months, however, such period shall be extended by mutual agreement only, for an additional thirty calendar days for individual employees as the need arises. If still employed after such date, their seniority shall date from the first day of hiring and eligible employees shall receive sick leave and vacation benefits from their first day of hire.

B. Termination. Probationary employees (new employees) may be terminated at any time at the discretion of the County. Discharges during the probationary period shall not be subject to the grievance procedure. . . .

ARTICLE VIII – JOB POSTING

. . .

8.06 Promotions – Probationary Period. Employees filling promotional vacancies shall be on a probationary period for sixty (60) days for purposes of training and to become adjusted. Retention in the position after the 60 days shall indicate satisfactory performance. Upon completion of the probationary period the employee shall receive a scheduled increase.

This period may be extended for an additional 60 days upon mutual agreement of the employee and the new department head, upon notification to the Union president and the former department head.

8.07 Return to Previous Position. . . .

ARTICLE IX – WAGES

- 9.01 Pay Rate Schedule. All employees . . . shall be paid in accordance with the “Job Classification and Rate Schedule”(s) attached to this Agreement as Exhibits “A” through “C” and made a part hereof. . . .
- 9.02 New Employees.
- A. Hired at start rate. New employees hired at the start rate shall receive a step increase upon completion of the probationary period. They shall advance through the rate range according to the schedule set forth in Exhibits “A” through “C”. . . .
- 9.03 Promotion. An employee permanently assigned to a position assigned to a higher pay range shall advance to the next pay step in the higher pay range providing the minimum increase in pay rate. Advancement to any additional steps shall be in accordance with the schedules set forth in Exhibits “A” through “C”.

BACKGROUND

The “Stipulated Facts”, which are referred to below as the Stipulation, read thus:

1. Ms. Michelle Brower (“Ms. Brower”) was hired on May 2, 2005 as a Clerk II.
2. Under the pay provisions of the collective bargaining agreement, Ms. Brower was making \$11.23 per hour as a Clerk II. *See* Ex. 1, Wage Exhibit A, 2005-2007 Collective Bargaining Agreement (“Agreement”).
3. The pay steps are set forth in the Agreement, which is attached hereto as Exhibit 1, and includes the following pay rates, “Start Rate”, “6 Month Probation Rate”, “1 Year Rate”, “2 Year Rate”, “3 Year Rate”, and “4 Year Rate”. *See* Ex. 1, Wage Exhibits, Agreement.
4. Ms. Brower received a pay increase to \$11.37 per hour on July 1, 2005 as part of a general schedule change.
5. Ms. Brower posted for and was promoted to a Clerk IV position on September 12, 2005.
6. Ms. Brower received a pay increase to \$12.52 per hour effective September 12, 2005 based on her promotion to a Clerk IV position. *See* Ex. 1, Wage Exhibit A, Agreement.

7. Ms. Brower received an increase to \$13.13 per hour on November 12, 2005. *See Ex. 1, Wage Exhibit B, Agreement.*
8. Ms. Brower received a pay increase to \$13.50 per hour on January 1, 2006 as part of a general schedule change. *See Ex. 1, Wage Exhibit B, Agreement.*
9. Ms. Brower received an increase to \$14.16 per hour on May 12, 2006. *See Ex. 1, Wage Exhibit B, Agreement.*
10. On Friday, May 4, 2007, Andrea Lazzeroni, a Human Resources Manager, met with Ms. Brower and explained that the increase to \$13.13 that she received on November 12, 2005, had been erroneously issued four months too early. *See Ex. 2, 5/7/07 Letter from Lazzeroni to Brower.*
11. Ms. Brower agreed to a repayment plan in which \$778.48 would be recovered at the rate of \$14.97 per pay period for fifty-two pay periods.
12. AFSMCE Local 1925B ("Union") was not invited nor informed of the meeting that occurred on May 4, 2007.
13. Ms. Brower contacted the Union after the May 4th meeting and after conferring with Union representatives decided against the repayment plan.
14. Ms. Brower communicated her opposition to the repayment plan on May 11, 2007 to Ms. Lazzeroni. *See Ex. 3, 5/11/07 e-mail from Brower to Lazzeroni.*
15. The County collected the \$778.48 over the next twenty-six pay periods. *See Ex. 4, 5/11/07 Letter from Lazzeroni to Brower.*
16. The \$778.48 has now been fully repaid by Ms. Brower.
17. A grievance was filed by the Union and Ms. Brower protesting the County's action in recovering the \$778.48. *See Ex. 5, Grievance dated May 14, 2007.*
18. The County has always interpreted wage exhibits of the contract to require that the Start Rate to 6 Month Probation Rate and 6 Month Probation Rate to 1 Year Rate increases occur at six month intervals, while all other rate increases occur at twelve month intervals thereafter, until the maximum pay step is achieved.

19. For more than ten years, the County has consistently moved employees from one step to another as described in paragraph seventeen (sic) *See* Ex. 6, Employee History Reports.
20. The issue was last formally dealt with between the County and the Union in early 2004. The grievance in that case was settled (“Settlement”) on a non-precedential basis with the parties executing Exhibit 7. *See* Ex. 7, 2/2/04 Second Step Grievance Answer.
21. There have been three situations since 2007 in which employees were given a step increase either too soon or not soon enough. In each of those three situations, the County either recovered the overpayment or paid the employee the underpayment. The Union was not informed or involved in any of these situations.
22. The parties failed to address the issue in negotiations for the 2005-2007 Agreement. *See* Ex. 7, 2/2/04 Second Step Grievance Answer. The County did propose including the step increase language contained in the Settlement in its initial coordinated proposal for the upcoming collective bargaining agreement between the parties. *See* Ex. 8 County's Coordinated Bargaining Proposals to AFSCME, 9/6/07, Section B, 4. The County dropped said proposal as part of its final proposal for the purposes of interest arbitration. *See* Ex. 9 County's Final Proposal to AFSCME, 9/22/08.

The parties filed a series of exhibits with the Stipulation.

Exhibit 1 is the labor agreement, and Exhibit “A” of the labor agreement states the following wage progression for the position of Clerk II, with an “Effective Date” of “1-1-05”:

	6-month				
Start	Probation	1 Year	2 Year	3 Year	4 Year
\$11.23	\$11.75	\$12.37	\$12.97	\$13.62	\$14.27

The Exhibit “A” rates, for Clerk II, with an “Effective Date of “7-1-05” read thus:

	6-month				
Start	Probation	1 Year	2 Year	3 Year	4 Year
\$11.37	\$11.90	\$12.52	\$13.13	\$13.79	\$14.45

The Exhibit “A” rates, for Clerk IV, with an “Effective Date of “7-1-05” read thus:

	6-month				
Start	Probation	1 Year	2 Year	3 Year	4 Year
\$12.52	\$13.13	\$13.79	\$14.45	\$15.16	\$15.91

The Exhibit "B" rates, for Clerk IV, with an "Effective Date of "1-1-06" read thus:

	6-month				
Start	Probation	1 Year	2 Year	3 Year	4 Year
\$12.88	\$13.50	\$14.16	\$14.83	\$15.55	\$16.31

Exhibit 2 of the Stipulation is Lazzeroni's letter to the Grievant dated May 7, 2007. The letter reads thus:

As you are aware from our meeting on Friday, there has been an error in the payroll system regarding your rate of pay. Your Step Increases have been issued to you approximately four months early since November 12, 2005. This has resulted in an overpayment of wages to you in the amount of \$778.48. . . .

In a non-precedent setting agreement, you have agreed that the monies will be paid back . . .

Your next step increase will be issued on September 12, 2007. . . .

The grievance lists the following sources for the alleged violation of the agreement: Section 7.01; 7.03A; 7.04; 8.06; 9.01; 9.02; and 9.03. Exhibit 7 of the Stipulation is the February 2, 2004 grievance settlement, which includes the following:

1. The employee will make repayment in the amount of \$16.00 per check for an additional 22 payroll checks.
2. Settlement of this grievance shall be without precedent.
3. The county and union agree to redraft contract provisions regarding the time periods between steps in relation to the classification and rate schedule so that the language is easily understood by employees. The revised wording shall not have an impact on the past or future administration of the labor contract, except as the parties may otherwise agree to modify the agreement in future contract negotiations.

The agreement included the following language under the heading, "9.01 Pay Rate Schedule":

Advancement through the rate range shall be as follows: 6 months from step A to B, or B to C; and 12 months from step C to C, D to E, or E to F. Time is measured from the date the employee last received a step.

Further references to facts set forth in the Stipulation or the attached exhibits will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Union's Brief

After a review of the evidence, the Union contends that the County violated the labor agreement "when it required (the Grievant) to repay wages against her will" either because it properly paid her the wages or because any impropriety "was the fault of the County."

More specifically, the Union contends that reading the agreement as a whole, as relevant arbitral precedent requires, establishes that the Grievant was properly paid. Section 8.06 governs job postings and specifically provides for a wage increase after "completion of the probationary period." Section 9.02A governs step increases upon "completion of the probationary period." Section 9.03 governs employee wages "following a promotion" and incorporates Section 9.01 and the governing wage schedules. Of these sections, 8.06 and 9.02, are the keys. Section 8.06 mandates a scheduled wage increase after a promotional probationary period, and Section 9.02 mandates a step increase after the new hire probationary period. Reading all of these provisions "together in unison" establishes that the Grievant was properly paid. Section 9.03 demanded she receive an increase as a function of the promotion, and Sections 8.06 and 9.02 demanded an increase after the completion of her promotional and new hire probationary period.

The County's reading of these provisions unpersuasively "adds further limiting language to the Agreement." To limit the increases as it urges "is clearly contradicted by the explicit and unambiguous language of Sections 9.02 and 8.06." The wage exhibits underscore this by specifying a wage step for "6-Month Probation Rate." The County's reading of the agreement unpersuasively reads "Probation" out of existence. The County's proposal to amend Section 9.01 "for 2008 and forward" underscores this. Its proposal eliminates the reference to "Probation" and measures step movement "from the date the employee last received a step." Its failure to secure agreement to this proposal establishes that the Union's reading of the agreement is correct and that the County's is attempting to secure in arbitration what it failed to secure in negotiation.

Anticipating County arguments, the Union adds that it "did not acquiesce or waive its rights to file a grievance." After a review of arbitral precedent, the Union contends that only two examples exist regarding employee movement on the wage scale. Those two examples are relevant because they involve promotions occurring within an initial probationary period. The examples, if relevant, are not binding here because the Union was unaware of the County's actions in either case. There can be no acquiescence in the absence of knowledge. Nor can prior County recovery of wages regarding three other employees bear on this grievance, since they "are insufficient to demonstrate a practice or pattern" under relevant arbitral precedent.

Nor can the Settlement Agreement be considered helpful in addressing the grievance. By its terms, it was non-precedential. To find precedent in its terms violates those terms and would chill future efforts to resolve grievances. Even though the Settlement Agreement contains language later proposed by the County to clarify the agreement, it affords no reliable basis to resolve this grievance. Rather, it underscores that the County has yet to secure this language in the negotiation process.

Even if the County could demonstrate that the Grievant should not have advanced as she did on the salary schedule, it does not follow that it had any right to recoup her wages. Citing *PEABODY GALION CORP.*, 63 LA 144 (Stephens, 1974), the Union notes that the “County was the party that mistakenly moved (the Grievant) along the pay scale”; notes that “the County has made the exact same mistake before”; and concludes “the party which committed the mistake should bear the consequences of the mistake.” That judicial precedent exists that allows “an employer (to) recover an overpayment of wages to an employee” cannot obscure that the grievance involves “a collective bargaining relationship between a union and an employer.” The Agreement governs the grievance and the Agreement provides no basis for the County to recoup wages.

Viewing the record as a whole, the Union concludes that the Grievant “should be made whole and the County should be ordered to cease and desist from like conduct in the future.” Under Section 4.03, an appropriate back pay order is necessary to make the Grievant whole for the County’s violation of the Agreement.

The County’s Brief

After a review of the record, the County urges that “the step increase issued to the Grievant on November 12, 2005 . . . was issued four months too early.” It follows that the County was “within its rights to recoup the amounts erroneously overpaid to the Grievant and the grievance should be denied.”

Considerable arbitral precedent establishes that arbitrators apply the “plain meaning rule” which “provides that when bargaining agreement language is clear and unambiguous” the arbitrator will “not look outside the four corners of the agreement to determine the meaning of the language.” This demands reading the agreement as a whole, but precludes recourse to “relevant extrinsic evidence, including bargaining history.”

Section 9.02 starts employees on an established wage schedule which entitles the new employee to “a step increase after completion of the six month probationary period and then another step increase after the completion of one full year of service and every year thereafter.” The promotion of the Grievant to a Clerk IV position entitled her to “the standard starting pay for a Clerk IV in effect as of July 1, 2005.” Her next step increase was due “after completing six months in that position.” The one year step increase would follow and “should not have occurred until September 12, 2006 rather than May 12, 2006.” Her receipt of a step increase on November 12, 2005 “was an administrative mistake.”

When advised of the overpayment, the Grievant agreed to a repayment plan, then changed her mind after consulting her Union representative. Neither she nor the Union ever indicated what prompted the change of mind, or gave any indication that she had not been overpaid “the sum of \$778.48.” The payment she actually received flies in the face of “the standard practice in the County for over ten years.” There have been no deviations from this practice. Union recourse to the Settlement Agreement affords no guidance to resolution of the grievance. It is, by its terms, non-precedential. Viewed on its terms or in light of arbitral precedent, the Settlement Agreement affords no guidance here. If it does, “it should be noted

that the Union did agree to a repayment plan.” The parties’ agreement to “redraft the pertinent contract language” to make it more easily understood affords no guidance. County attempts to do so were rebuffed, and its strategic reasons to withdraw the proposed clarification “cannot be relied upon to create an adverse inference” under relevant arbitral precedent.

Arbitral precedent, such as *BEVERLY ENTERPRISES*, 109 LA 7 (Bard, 1997) and well as legal precedent such as *BATTERIES PLUS, LLC v. MOHR*, 244 Wis. 2d 559 (2001), establish that a debtor is legally required to repay money received in error. The labor agreement “does not restrict the County’s right to recover overpayments via withholding.” There can be no contract breach because the agreement specifies the appropriate wage levels and payment above them obligates the County “to recover such amounts.” A significant body of arbitral precedent “supports the repayment of overpayments that are the result of an administrative oversight by a municipal employer.” This body of precedent underscores the significance of the fact that “repayment of amounts overpaid to employees has also been the accepted past practice in Walworth County.” In every case of overpayment or underpayment, “the County has corrected the mistake.” It would work an injustice to “allow the Grievant to keep any portion of the public monies paid to her erroneously” and would compound the injustice “if the County were directed to repay to the Grievant the monies already withheld from her paycheck.”

Viewing the record as a whole, the County “requests that the Grievance be denied.”

DISCUSSION

The parties stipulated the record but not the issues for decision. The interpretive dispute focuses on Sections 8.06, 9.02A, and 9.03. In my view, resolution of this interpretive issue demands consideration of each of the issues the parties pose for decision.

As preface to this point it is appropriate to set the factual background to which the contract must be applied. The County hired the Grievant on May 2, 2005 as a Clerk II, paid at the “Start” rate of, adjusted for a contractual wage increase, \$11.37. Had the Grievant remained in that position, she would have received, upon the completion of her Section 7.03A probationary period on or about November 2, 2005, an increase under Section 9.02A to \$11.90, the “6-month Probation” step for the Clerk II classification. However, the County promoted the Grievant to Clerk IV on September 12, 2005, paying her at \$12.52, the “Start” step for the Clerk IV classification. On November 12, 2005, the County increased her wage rate to \$13.13, the “6-month Probation” step for the Clerk IV classification. The Grievant received an increase to \$14.16 on May 12, 2006, the “1 Year” step for the Clerk IV classification. The County alerted the Grievant to what it viewed as an error regarding her movement through the steps in May of 2007.

The County’s statement of the issues sets the contractual background and will be addressed first. The County’s first issue points to the operation of Sections 8.06 and 9.03. Section 8.06 establishes a sixty day “probationary period” for “Employees filling promotional vacancies” and required the Grievant to perform satisfactorily in the Clerk IV position through November 12, 2005. Standing alone, Section 8.06 mandates, “Upon completion of the probationary period the employee shall receive a scheduled increase.” This could be read to

demand the increase to \$13.13 awarded the Grievant by the County on that date. Section 8.06 does not, however, stand alone and must be read with Section 9.03, which places an “employee permanently assigned to a higher pay range” at “the next pay step in the higher pay range providing the minimum increase in pay rate.” The County made this placement at the start of the Grievant’s Section 8.06 promotional probationary period on September 12, 2005. Exhibit 6 establishes that this has been the County’s consistent practice. There is no dispute regarding the Grievant’s receipt of the Section 9.03 increase on September 12, 2005. Beyond this, there is no dispute that an employee completing a Section 8.06 probationary period is not entitled to further “scheduled increases” under Section 8.06 until the passage of the intervals between the salary steps of Exhibit “A” of the labor agreement. Regarding an employee not serving a Section 7.03A Probationary Period, there is no dispute that: there must be six months of work in the higher classification prior to movement from the first step (“Start”) to the second step (“6-month Probation”); six more months of work in the classification prior to movement from the second step to the third step (1 year); or one more year of work in the classification prior to movement from the third step to the fourth, fifth or sixth step of the salary schedule. The fact that the Grievant was serving a Section 7.03A probationary period as a Clerk II at the time she was promoted to a Clerk IV position poses the interpretive difficulty. More specifically, Section 9.02A mandates “a step increase upon completion of the probationary period” for “New Employees” who are “Hired at start rate.” The County’s first issue highlights the interpretive problem, which is to reconcile the various mandates.

The County’s statement of the first issue is unit-wide in scope. The record establishes that the parties do not dispute how “an employee” moves through the wage schedule, but for the case where “an employee” is serving a Section 7.03A probationary period during the time the employee also serves a Section 8.06 probationary period. Regarding the County’s first issue, I do not view the record to pose any question that there must be six months between step placement under Section 9.03 and the next scheduled wage increase. The first paragraph of the Award notes this, and the disputed portion of the interpretive issue remaining is best addressed under the County’s second and the Union’s first issue.

Those issues bring the interpretation of Section 9.02A into play. The County’s statement of the issue poses the issue whether the Grievant’s payment was “erroneous.” The record establishes that to the extent error can be found, it does not reflect mutual mistake. Items 10 and 12 of the Stipulation establish that Lazzeroni brought up the error to the Grievant alone. The Union was not involved until after the Grievant and Lazzeroni had agreed to a repayment plan. The Union’s first involvement was the grievance’s filing and the Stipulation affords no basis to conclude the Union agreed with the repayment plan. Nor will the Stipulation support a view that the Union agreed that the County’s consistent practice regarding step movement was anything but unilateral. Items 12 and 21 of the Stipulation establish that the Union was not involved in or aware of the development of the administrative practice regarding step movement through the salary schedule. Since contract interpretation is founded on giving the parties the benefit of their agreement, and since there is no evidence of mutuality regarding the administrative practice, the “error” established in the record affords no binding means to reconcile the various mandates noted above. The second paragraph of the Award highlights that the “error” involved was rooted in the County’s unilateral view of step movement and that the interpretive issue demands further analysis.

The interpretive issue regarding those sections is better caught by the Union's first issue, which questions the contractual propriety of the County's payment of the wages ultimately recouped under the repayment plan. Analysis of this issue starts with the Grievant's placement on the "6-month Probation" step effective November 12, 2005. The strength of the Union's position rests on the clarity of Section 9.02A, which mandates that "New employees hired at the start rate shall receive a step increase upon completion of the probationary period." Items 1 and 2 of the Stipulation establish that the County hired the Grievant at the start rate. The wage exhibit puts the next wage step as the "6-month Probation" step. As the Union notes, the wage exhibit labels the step a "6-month Probation" step, not a "6-month" step. The contractual force of the Union's position must be acknowledged.

Adoption of the Union's contractual position, however, turns on reading the above-noted provisions standing alone and is difficult to reconcile to the facts. As noted above Sections 8.06 and 9.03 also employ the mandatory "shall", and if each use of "shall" is read standing alone, the provisions conflict. The goal of contract interpretation is to give meaning to each section, which makes finding conflict between the sections unpersuasive. Beyond this, the parallel use of terms in the final sentence of the quoted portions of Section 9.02A and Section 9.03 as set forth above makes it unpersuasive to conclude the parties failed to consider the relationship of the sections governing the step sequence demanded by Article IX. Viewed more factually, it is difficult to understand why the parties would agree to a system that economically favors an employee who is promoted prior to completing a Section 7.03A probation period over one who is promoted just after doing so. This is the logical consequence of the Union's position.

Adoption of the Union's view creates further factual issues. The Union agrees that the County's application of Section 9.03 to the Grievant was correct, raising her to a promoted rate effective September 12, 2005. This complicates reading the raise she received on November 12, 2005 as payment of a "6-Month Probation" step. But for the promotion, the Grievant's Section 7.03A probation period would have ended on November 5, not November 12. The Union asserts this extension reflects that her Section 8.06 probationary period extended past her Section 7.03A probationary period. This accounts for the time lag, but lacks any evident contractual basis, and would appear to fly in the face of the "mutual agreement" requirement stated in Sections 7.03A and Section 8.06 regarding the extension of a probationary period. The Stipulation is silent regarding any such agreement. In any event, the two probationary periods are contractually distinct, as the parties confirmed in the teleconference call. Slurring the two undercuts the assertion that the "6-month Probation" step of the wage exhibits must be read literally. This is further complicated by the Grievant's receipt of a raise on May 12, 2006, which, under the Union's view, presumably corresponds to the "1 Year" step. However, May 12 does not correspond to the annual anniversary date of either her hire or her promotion. This undercuts the persuasive force of the Union's contractual position, which requires reading the terms of the wage exhibits literally.

On balance, the language of the disputed sections favors the County's view. Section 9.03, on its face, demands that the steps of the wage schedule not be applied literally to a promoted employee. The reference to step placement under Section 9.03 is to a wage rate, not to a period of time from hire. Thus, the Union's literal reading of the wage exhibits poses

an unnecessary conflict with County application of Section 9.03, which the Union does not challenge. Viewed more factually, whatever is said of Exhibit 6, the promotion of a probationary employee is the exception and not the rule regarding promotions. Even if the Union never agreed to, or participated in, the administrative practice uniformly followed by the County, the County's view does not economically favor an employee promoted during their Section 7.03A probation period over one who is promoted after doing so. It is more probable that the drafters of the disputed sections considered the issue of promotion standing alone, without regard to the presence of a Section 7.03A probation period. Reading the provisions of Section 9.02A standing alone elevates the anomaly of a promotion during a probation period into an interpretive guide.

In sum, the County's reading of the disputed sections reconciles them more persuasively than the Union's. Thus, the County's interpretation that the Grievant was improperly paid under Articles VIII and IX is persuasive. The third paragraph of the Award confirms that the County's view of salary schedule movement is persuasive.

This poses the Union's final issue, which is whether the payment plan agreed to by Lazzeroni and the Grievant, prior to Union involvement, violates the labor agreement. In my opinion, it does. This conclusion does not reach whether the County can, under appropriate circumstances, recoup wages. Rather, it reflects the circumstances posed here. As preface, a certain asymmetry to the County's position must be noted. That the relevant events took place within the current labor agreement cannot obscure the roughly one and one-half year lag between the improper step payment and County action to recoup the resulting overpayment. It is at least ironic that a Union attempt to challenge an improperly low step placement would face at least an arguable claim that a one and one-half year delay in its assertion rendered it untimely. Even if the Union could raise a timely challenge through an "ongoing violation" theory, it would face at least a remedial issue regarding how far back the claim could reach. Irony is not a ground for contract interpretation. It does highlight, however, the interpretive dilemma, which is that when the County took action, the action rested on its unilateral view of the agreement.

Each of the contract provisions cited by the parties recognizes that the Union functions as the exclusive collective bargaining representative of a bargaining unit of which the Grievant is an individual member. Section 2.01 expressly acknowledges the point, as well as the County's duty to exercise its authority "in accordance with the provisions of this Agreement". The issue raised by the grievance poses a web of agreement provisions, the relationship of which cannot be considered clear or unambiguous. The conclusion that the Grievant's receipt of the November 12, 2005 step increase was not contractually valid cannot obscure that there was a genuine interpretive issue in play at all times from the Grievant's promotion.

As Item 12 establishes, Lazzeroni and the Grievant agreed to a repayment plan without Union involvement. The Union was not brought into the matter until the Grievant advised it of the repayment plan after it had become accomplished fact. That the Union responded by grieving the matter is not surprising against this background. It had no other evident means to address the enforceability of the repayment plan under the labor agreement, and the Union is the collective bargaining representative who negotiates and enforces the agreement. Had the

County contacted the Union before the development of the plan to address the interpretive issue involved, the “error” could have been clarified as a mutual mistake. As it developed, however, the “error” and its correction stand as unilateral action less akin to addressing contract ambiguity than to individual bargaining. In my view, the Union’s statement of the second issue puts the matter squarely, and I do not believe the repayment plan can be enforced consistent with the Union’s duty to act as the unit’s exclusive bargaining agent. As a result, the Award entered below sets that payment plan aside and orders the County to repay the disputed amount to the Grievant.

No further remedial action is appropriate on this record. The cease and desist order requested by the Union stretches the evidence unduly. To the extent precedent for the future can be placed in issue on this record, it is best addressed by a statement of what the contract demands. Here, as the Award notes, the County’s reading of the contract regarding the Grievant’s movement through the wage steps is preferable to the Union’s.

Before closing, it is appropriate to tie this conclusion more closely to the parties’ arguments. Each party discusses MOHR. That matter involved the court’s analysis of the employment at will doctrine, which is inapplicable to the interpretation of an employment contract or collective bargaining agreement, cf. 244 Wis. 2D at 566. Analytically, the case has some bearing on this matter in a procedural sense. The MOHR court questioned action by MOHR against his employer which left “the employer . . . no option except to sue the employee for what the employer believes is an overpayment of expenses”. *Ibid.*, at 577. In my view, this is analogous to Lazzeroni’s reaching a repayment plan with an individual unit member without any Union involvement. The interpretive issue underlying the “error” demanded more, and the Union’s sole effective recourse was the grievance procedure.

The Union cites PEABODY GALION, in which the arbitrator concluded, “Where the mistake was an unilateral one on the company’s part and the employee could reasonably believe that he was being properly paid, the company should be the one to suffer for its mistake and not the employee” 63 LA AT 147. The mistake involved here was unilateral and the Grievant’s receipt of a step payment corresponding closely to her simultaneous completion of a Section 8.06 and a Section 7.03A probationary period lent itself to a reasonable perception of proper payment. I do not, however, want to stretch the point too far. I am not convinced the employer “should be made to suffer for its mistake.” I see the payment noted in the Award not as a punitive matter, but as the necessary make whole to the absence of Union involvement in the application of the contract it negotiated and is responsible to enforce. The issue here would have been different had the Union been involved in any meaningful sense in the repayment plan, if only to alert the County to the existence of an interpretive dispute. Thus, this decision does not reach whether the County can, under appropriate circumstances, recover wages improperly paid under the labor agreement. Rather, it reflects my conclusion based on the all-or-nothing posture of the parties’ positions regarding the repayment plan. That the County’s reading of the labor agreement is preferable to the Union’s does not also establish that its means of securing enforcement of its view of the labor agreement was appropriate.

Individual bargaining has statutory ramifications, but nothing beyond the contract is posed here. The evidence affords no reason to believe Lazzeroni acted to do anything other

than correct a mistake. Her view of the labor agreement cannot, however, obscure that it was not the sole reasonable reading of the relevant provisions. It is not necessary to conclude she individually bargained with the Grievant to note the contractual infirmity of the procedure. My after-the-fact conclusion that the unilateral action reflects a persuasive reading of the contract does not warrant condoning the unilateral action. The Grievant was in no position to respond meaningfully to the County's assertion of "error" and her being placed in that position cannot persuasively be subsidized under the labor agreement without undercutting the Union's role as the contractual bargaining representative for unit members.

The settlement agreement reached by the parties in February of 2004 states that it "shall be without precedent." Thus, it plays no role in the conclusions stated above. The County's failed attempt in the negotiations for a 2005-07 labor agreement to secure clarification of the contract regarding step movement underscores that the interpretive dispute has a long enough history to pose a genuine issue of contract interpretation. This underscores the contractual weakness of securing the County's interpretation through a repayment plan reached with an individual employee. The strength of this point should not, however, be overstated. The relationship of the disputed provisions of the labor agreement is not clear and unambiguous, and the County's failed attempt does not establish the persuasiveness of the Union's view. Rather, it underscores the ambiguity of the governing language and that the County attempted to clarify it. This cannot be held against the County without sending a chilling message to either party regarding the attempt to clarify contract ambiguity through the bargaining process. Recourse to past practice to clarify the underlying ambiguity would have been desirable, but the essence of the binding force of past practice is the agreement manifested by the bargaining parties' conduct over time, see generally, "Past Practice And The Administration Of Collective Bargaining Agreements", by Richard Mittenhal in *Arbitration and Public Policy, Proceedings of the Fourteenth Annual Meeting National Academy of Arbitrators*, (BNA, 1961). Here, the evidence establishes no such agreement and the consistency of the practice reflects nothing beyond the consistency of the County's unilateral, administrative actions.

AWARD

In accordance with Section 9.03 of the Agreement, after an employee is permanently assigned (promoted) to another position with a higher pay range, the employee is entitled to a step increase only "in accordance with the schedules set forth in Exhibits "A" through "C".

With respect to this grievance, the Grievant was not erroneously issued a step increase on November 12, 2005, only two months after her promotion to the Clerk IV position, in the sense that the error was rooted in the County's unilateral action, leaving the Grievant's entitlement to a step increase on November 12, 2005, as a genuine issue of contract interpretation concerning the application of Sections 8.06, 9.02A and 9.03.

The wages recouped by the County from the Grievant were not properly paid under the terms of the Collective Bargaining Agreement between the parties.

The County did violate the Collective Bargaining Agreement between the parties when it recouped the wages paid to the Grievant because the repayment plan reached between

Lazzeroni and the Grievant addressed a genuine issue of contract interpretation through an agreement between the County and the Grievant without any involvement of the Union as the exclusive bargaining representative of the bargaining unit of which the Grievant is an individual member.

As the remedy appropriate to the procedural violation noted in the paragraph above, the County shall repay to the Grievant the amount of wages (\$778.48) recouped by the County through the repayment plan noted in Item 11 of the Stipulation.

Dated at Madison, Wisconsin, this 4th day of March, 2009.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
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