

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**WISCONSIN PROFESSIONAL POLICE ASSOCIATION/
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION**
and
CHIPPEWA COUNTY

Case 248
No. 68429
MA-14240

Appearances:

Attorney Roger W. Palek, Staff Attorney, Wisconsin Professional Police Association, 660 John Nolen Drive, Suite 300, Madison, Wisconsin 53713, on behalf of the Union.

Mr. Todd A. Pauls, Assistant County Corporation Counsel, 711 North Bridge Street, Room 113, Chippewa Falls, Wisconsin 54729, on behalf of the County.

ARBITRATION AWARD

The Wisconsin Professional Police Association/Law Enforcement Employee Relations Division (herein the Union) and Chippewa County (herein the County) have been parties to a collective bargaining relationship for many years. At the of the events pertinent hereto the parties' were operating under a collective bargaining agreement covering the period January 1, 2007 through December 31, 2009 which provided for binding arbitration of certain disputes between the parties. On November 25, 2008, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the County's alleged miscalculation and misappropriation of health insurance premiums paid by bargaining unit members. The undersigned was jointly requested by the parties to arbitrate the matter. A hearing was conducted on March 17, 2009. The proceedings were transcribed and the transcript was filed on May 4, 2009. The parties submitted briefs on July 24, 2009, and replies on August 28, 2009, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issues.

The Union did not submit a proposed framing of the issues. The County would frame the issues as follows:

Did the County violate the Contract when it established a risk corridor funding mechanism for its health insurance program that mandated a maximum health insurance fund balance cap representing 25% of the annual expenditures of the fund to cover claims pursuant to County Board Resolution only after transparently providing information and reasonable notice to the Union, and the Union acquiesced for years and made no demand for bargaining?

The Arbitrator frames the issues as follows:

Did the County violate the collective bargaining agreement when, without full disclosure, it inflated the health insurance premiums of bargaining unit members in order to fund the risk corridor in its self-insured plan?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 2 – MANAGEMENT RIGHTS

The County possesses the sole right to operate the County government and all management rights related to the same, subject only to the provisions of this Agreement, past practices, and applicable law. Except as specifically modified by other provisions of the contract, the County possesses the sole right the County and all management rights repose in it. These rights include, but are not limited to, the following:

A. To direct all operations of the County;

...

D. To maintain the efficiency of County operations;

...

ARTICLE 20 – INSURANCE

Section 1 – Health Insurance: For all employees, health insurance premiums will be prorated on a per-hour basis. No payment of health insurance premiums shall be earned for time off without pay, unless otherwise specified in this agreement. Upon termination of employment with Chippewa County, however, coverage will continue until the end of the month at no additional premium cost to the employee.

The employee shall have the option of selecting one of four (4) plans (A, B, C, or D) under the County's health insurance self-funded preferred provider plan during the annual open enrollment period.

a. Plan A – Choice Care or Preferred One PPO.

The County shall pay set [sic] percentage of the single and family premiums for the County's self-funded Preferred Provider health insurance plan. Each employee shall two networks to choose from, Choice Care and Preferred One. Employees shall be charged a monthly access fee for utilizing the Preferred One network. Premium contributions are distributed as follows:

	2007	2008	2009
Employee Contribution	6.00%	7.00%	8.00%
Employer Contribution	94.00%	93.00%	92.00%

b. Plan B – Core 5. Premium contributions are distributed as follows:

	Family Plan	Single Plan
	\$25.00	\$10.00

c. Plan C – Core 16. The County shall pay 100 percent of the premium for all full-time employees.

d. Plan D – Core 65. The County shall pay 100 percent of the premium for all full-time employees.

All plan premiums will be pro-rated accordingly for part-time (1/2 time and 3/4 time employees)

There shall be a standing Union-Management Insurance Committee, with representative from each bargaining unit, Management and Department heads, Personnel, Insurance, and the County Board of Supervisors. Each bargaining unit shall appoint its representative. The committee shall meet as needed, but at least annually, to study insurance problems and options, and to make recommendations for uniform future negotiations. Changes in coverage/benefits shall first be discussed with this committee for its recommendation.

BACKGROUND

The Wisconsin Professional Police Association represents the members of the Chippewa County Deputy Sheriffs' Association, which includes all regular full-time law enforcement employees of Chippewa County, including jailers, dispatchers, patrol officers, sergeants, investigators and process servers. Chippewa County provides health insurance benefits for its bargaining unit employees according to the terms of their various collective bargaining agreements. The health insurance benefits provided to the members of the Deputy Sheriffs' bargaining unit are described in Article 20 of the parties' collective bargaining agreement, set forth above.

On August 9, 1983, the County Board passed resolution 51-83 wherein it decided to self-fund the health insurance plan for its employees. In 1998, at the suggestion of its auditor, the County Board passed resolution 83-98 to address cash flow problems with the self-funded plan, which had required the County to advance \$100,000 from the general fund in 1994 and another \$200,000 in 1998. The resolution provided for the creation and maintenance of an end of the year \$300,000 fund balance, which represented approximately 25% of annual expenditures, to address cash flow concerns. The previously advanced sums were considered permanent contributions to the fund. The resolution also provided that any year-end excess or deficit in the fund would be appropriated to or from the County's general fund. The creation of this risk corridor was revealed to the Union in a letter from the County's attorney to Union bargaining representative Gary Gravesen on November 10, 2000. In 2002, the County Board passed resolution 11-02 to modify the self-insurance formula. Under this resolution, the County modified the language regarding the fund balance to cover the risk corridor, which was the difference between 100% of total expected claims, as estimated by the actuary, and 125% of expected claims, at which point the County's aggregate insurance coverage kicked in to cover claims over 125%. The County remained liable for claims falling within the risk corridor. The County created a similar reserve for incurred but not reported claims (IBNR). To fund the risk corridor and IBNR reserve, County Risk Manager Connie Goss began inflating the suggested premium figures provided by the actuaries by amounts as high as 12%. Prior to 2004, the County paid the full cost of the health plan up to 125% of expected claims based upon claims estimates provided by its actuaries. In 1998, the County and the Unions representing all its bargaining units had created a joint union-management insurance committee. The mandate of this committee was to meet at least annually "...to study insurance problems and options, and to make recommendations for uniform future negotiations." The County and the Unions regarded this committee as advisory.

In the parties' 2004-06 collective bargaining agreement, the Union agreed for the first time that bargaining unit members would contribute to health insurance premiums in return for guaranteed cost. Premium data was provided by the County, but the Union was not told that the premiums were being inflated in order to fund the risk corridor or the IBNR fund. On July 12, 2006, while negotiating the 2007-2009 contract, Union Bargaining Representative Joe Durkin wrote to County Human Resources Director Shirley Ring to request information regarding how insurance premiums were determined and how the funds are accounted for. At Ring's request, Goss responded on July 14, 2006, in pertinent part, as follows:

“Premiums are determined by the actuaries, from both Humana and verified by our broker, Associated Financial Group. I have attached a copy of the 2005/2006 renewal for your review. This shows how the premiums are calculated.

The funds for the health plan are in a dedicated non-lapsing fund. When setting premiums, the goal is to get as close to actual as possible. We do not want a short fall, where we would have to go back to the tax payer, as has happened in the past, nor do we want a profit, which means we are over funding/taxing. The program has three parts; claims, administration and reinsurance...There is a risk corridor (\$1,045, 181.00 for the current plan year) that the program is liable for. I have attached the resolutions approved by the County Board establishing the maximum fund balance to the risk corridor. At this time we are not fully funded for the risk corridor. The 2005 fund balance was \$831, 109.51. We have an aggressive wellness/loss control program, and we have been able to slowly build this fund through good claims experience. But it is not fully funded. Any loss or gain remains within this fund.”

Goss’ letter did not inform Durkin that she had added a percentage to the premium figures supplied by the actuary for the funding of the IBNR and risk corridor funds. Further, the 2005/2006 renewal she supplied to Durkin did not contain the suggested premiums supplied by the actuaries, but rather reflected the suggested premiums with an additional 12% added in for funding the risk corridor and the IBNR funds. The parties settled the 2007-09 contract, including provisions increasing Union members’ contributions to their health insurance premiums for the ChoiceCare or Preferred One PPO to 6% in 2007, 7% in 2008 and 8% in 2009. In 2007, there was a surplus in the risk corridor fund from the 2006 policy year, allowing the County to transfer \$367,696.00 to the general fund. In 2008, there was another surplus, which resulted in the County transferring another \$1,126, 849.00 to the general fund.

On April 23, 2008, the Union filed a grievance with the Sheriff, alleging that the County had violated the labor contract by improperly calculating insurance premium rates and taking funds paid by bargaining unit members for health insurance premiums and applying them to other purposes. As a remedy, the Union sought return of all monies improperly taken from the members. The grievance was denied and the matter was advanced to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that the County violated the contract by inflating the insurance premiums beyond the levels recommended by the County’s actuaries and insurance consultant. Article 20 provides that the County shall pay a set percentage of the single and family health insurance premiums. Implicit in the use of the term “premium” is the notion that it is an

estimation of the amounts necessary to pay claims, provide reinsurance and cover administrative expenses. This is supported by the notes of Goss' comments to the Administrative Committee in August 2006, her July 14, 2006 letter to Durkin and the County's publication, "A Consumer's Guide to Chippewa County's Health Insurance Program." None of these give any indication that premiums are inflated. This case is similar to the facts in FOREST COUNTY (SHERIFF'S DEPARTMENT), WERC CASE 82, NO. 59476, MA-11311 (Nielsen, 7/20/01), wherein the County artificially inflated premiums in the hope of receiving a rebate from the insurance company at the end of the year. Here, however, the County inflated the premiums and then took the surplus generated by the excessive premiums and diverted them to the general fund.

The County is also estopped under principles of promissory and equitable estoppel and detrimental reliance from reaping a financial windfall from its conduct where the Union reasonably relied on its representations in entering the contract. These are equitable principles, similar in nature, Estoppel applies where one party induces another, through promises or actions, to reasonably rely on them and act in response to their detriment. MUZAK LLC DALLAS, 116 LA 945 (Neas 11/30/01); TOWN OF MINOCQUA, WERC CASE 3, NO. 57049, MA-10496 (Hempe, 6/11/99); CALUMET COUNTY, WERC CASE 120, NO. 62015, MA-12126 (McGilligan, 8/7/03). Here, the Union asked for health insurance information in preparation for contract negotiations. Goss sent Durkin a letter in reply in which she represented that the risk corridor was being funded by savings generated by an aggressive wellness/loss control program and good claims experience and, further, that any losses or gains remain within the fund. This was the basis for the Union's understanding and tracked with information that claims had, in fact, been decreasing, therefore, the Union's reliance on this information was reasonable. Further, the letter included an attachment entitled "Chippewa County Renewal Exhibit" which appears to have been created by the County's actuaries, but which in fact had been altered by Goss to reflect her inflated premium numbers. Premium inflation in the manner done by Goss is out of the norm for self-funded insurance plans and there is no way the Union can have been expected to have known or figured out that the County had done so. The County should not be permitted to profit from this wrongdoing by retaining the premium contributions it wrongfully collected.

Allowing the County to retain its windfall would also violate the covenant of good faith and fair dealing inherent in every contract. By withholding pertinent information from the Union, the County violated the covenant of good faith and fair dealing. Goss was the only person who had information about the premium inflation process. The Union did not even have information sufficient to know to ask the correct questions to find out about the premium inflation. The doctored premium information was supplied in documents that suggested they had been prepared by the actuaries and Goss not only avoided mentioning premium inflation, but suggested that the risk corridor was being funded by good claims experience, instead. The covenant of good faith and fair dealing required the County to disclose any premium inflation beyond the amounts recommended by the actuaries. Withholding this information denied the Union the benefit of the bargain and violated the contract.

This is also not a case of mutual mistake. The County clearly anticipated health insurance premium increases in each year of the contract, because of Goss' inflation scheme. This allowed the County to negotiate cost shifting back on the employees by getting the Union to agree to a larger share of premium contributions. Had Goss not inflated the premiums, the increased contributions would not have been necessary. The Union was entitled to rely on the information it was given and was not party to a mistake. Goss was not involved in contract negotiations, so the County either deliberately withheld the information about premium inflation or it mistakenly gave the Union the wrong information. If a mistake, it was a unilateral mistake by the County.

At the hearing, the County relied heavily on the existence of the labor-management insurance committee to support its position. There was no evidence that the committee ever acted outside its contractual role, however, which was merely to review and discuss coverage and benefit issues. There is no evidence that the committee ever looked into how premium levels were established, or had any means of questioning how Goss obtained her figures.

As and for a remedy, the Union seeks to have the individual bargaining unit members made whole by repaying them the premium contributions that they paid in reliance on the inflated figures provided by the County. The Union also seeks recompense for the money remaining in the risk corridor, as well as the money that was transferred into the general fund, arguing that these monies represent lost opportunity for bargaining unit members in wages and benefits. The County must either disgorge the balance of the risk corridor monies attributable to the bargaining unit, or must enter into negotiations as part of an interim award in order to resolve the dispute. In light of the fact that the County has had the use of money belonging to bargaining unit members, the arbitrator should also award interest.

The County

The County asserts that the grievance should be denied because the contract places no limitation on the County's authority to set the health insurance budget or determine premiums. The Union failed to introduce any evidence of any contractual limitation on the County's ability to establish a risk corridor or any requirement that the County bargain with the Union over the subject. All the contract provides is that the Union bargained for a fixed percentage contribution to the health insurance premiums established by the County. The Union was put on notice as early as 2000 that the County was going to establish a risk corridor over a period of five years, but never raised any concerns or bargained for any language limiting the County's ability to manage the health insurance program. Under the existing language the arbitrator cannot find that the County exceeded its authority in creating the risk corridor. Further, the management rights clause makes it clear that the County retains the sole right to manage the county unless specifically restricted by the contract.

The Union has also waived any right it had to seek to bargain over the County's actions when it failed to raise the issue in a timely fashion after having been given reasonable notice and information. The record is clear that the County has been transparent in handling the risk

corridor and has provided the Union with ample information about its activities. The Union did not act on the information, however, and thus waived any argument for a duty to bargain that it may have had. This is analogous to CLINTONVILLE SCHOOL DISTRICT, WERC CASE 42, NO. 60743, MA-11708 (Emery, 2003), wherein this arbitrator upheld the District's action in unilaterally activating a contingency agreement in its insurance program because the Union failed to object to the action after having been put on notice. Here, Union witnesses admitted knowing about the risk corridor and its inclusion in the health insurance budget and premium calculations as early as 2000, but did not follow up investigation on the information they received. In 2006, Union Representative Joe Durkin requested information about the health insurance plan from the County, which was provided. Despite the fact that he had all the information necessary to make informed decisions, Durkin admitted that he did not read all the information, and , had he done so, he would have known that surplus monies were to be transferred out of the fund and into the County's general fund. It should further be noted that since 1994 there has been a joint Union-Management Committee, including representatives from all the County bargaining units, the purpose of which is to discuss health insurance issues and make recommendations. Since 2001, Goss has carefully explained the health insurance renewals to the Committee, whose members are to report back to their bargaining units.

There is also no merit to the Union's contention that the County artificially inflated premiums in order to mislead the Union and profit from the health insurance program. The Union claims the County, with its actuaries and administrator, hatched a nefarious scheme to enrich the County at the expense of Union health plan participants. In fact, the County has worked diligently to provide high quality, low cost benefits. The Union appears to expect that the County can somehow match expected claims with actual claims, but the record reveals that this is not the case. The risk corridor is necessary to cover the possibility that actual claims will exceed expected claims. The Union has not offered evidence that the risk corridor achieved full funding as a result of premium inflation. In fact, for many years the County covered all the costs of coverage and the program ran at a deficit, requiring regular infusions of taxpayer money. The establishment of the risk corridor has resulted in the program running at a slight deficit over the past ten years. It is inaccurate, therefore, to only look at the years when there was an excess in the fund and not look at the years when there was a deficit.

Union Reply

The Union raises objections to a number of the factual representations in the County's brief and asserts that it had no actual or constructive knowledge of the County's premium inflation practice. The County frequently asserts that the Union was aware of the existence and extent of the risk corridor, but that is not the same as knowledge as to how the corridor was being funded. The Union concedes that it was long been aware of the existence of the risk corridor, but that is irrelevant. The only thing that is relevant is how the corridor was funded and that is something of which the Union had no knowledge. The Union was told that the corridor was funded by an aggressive wellness campaign and that all deposits remained in the fund. Only just before the arbitration did the Union learn the truth when the County delivered documents that had been requested for the hearing. This was the first opportunity the Union had to discover the County's financial windfall.

The County also improperly relies on the CLINTONVILLE SCHOOL DISTRICT case. The facts of that case are inapposite to this one. In one sense, however, CLINTONVILLE supports the Union, because in that case the money generated was returned to the employees in the form of higher wages. Here, all the money was retained by the County, so whereas the Clintonville School District did not profit, the County here unquestionably did.

The County also places great reliance on the joint insurance committee and what it supposedly knew, but in fact the committee had no power and had no knowledge of the premium inflation. The information supplied to the committee by the County was the same as that shared with Durkin, revealing what the premium rates were, but not the fact that the rates were artificially inflated to fund the risk corridor. Finally, it is immaterial whether the County inflated the premiums to deliberately defraud the Union because the result was the same. What is known is that Goss did not tell the Union she was funding the risk corridor through premium inflation and she actively took steps to hide the fact by changing the exhibits supplied by the auditors before sharing them with the Union. Thus, the Union experienced loss due to Goss' misrepresentations regardless of whether that was her intent.

County Reply

The County contends that it has always bargained in good faith, as reflected in its transparent efforts to inform the Union regarding the risk corridor and the Union's past acknowledgement that the risk corridor was a legitimate claims expense. The Union has no evidence of a contract violation, but rather makes an equitable claim based on unsubstantiated claims that the county engaged in a nefarious scheme to defraud the members by inflating premiums. Contrary to the Union's assertions, the County made every effort to keep it informed about the risk corridor, as evidenced by the letter from the County's counsel to the Union on November 10, 2000, explaining that premium increases were based on the establishment of, and need to fund, the risk corridor. Further, the brochure "Consumer's Guide to Chippewa County's Health Insurance Program" clearly indicates the County's future intent to fund the corridor through premium contributions.

It should be noted that, contrary to the Union's assertions, according to the Commissioner of Insurance the risk charge is a legitimate claims charge. It was a prudent decision based on a need to cover potential claims, as well as projected claims. It was also a decision that fell within the County's unrestricted management rights. Also, the Union's reliance on FOREST COUNTY is misplaced. In that case, the arbitrator found that the County had withheld premium information from the Union, whereas here the County made every effort to provide the Union with all necessary information.

There is also no basis in the record for any claim based on promissory or equitable estoppel or detrimental reliance. Promissory estoppel does not apply because no promises were made. Equitable estoppel also does not apply because it is an affirmative defense, which is not appropriate in this case. Should the arbitrator find that equitable estoppel applies, however, the Union has still failed to prove the elements of the claim. There is absolutely no evidence that

the County or its employees have engaged in any fraud or misrepresentation. This is especially true since the former Union representative, Gary Gravesen, testified that he knew and understood about how the risk corridor worked. Now the Union claims it did not understand the information it was given, but it is not the County's job to make sure the Union understands, only that it receives the proper information.

The Union's argument that there was a unilateral mistake is also misplaced. There is no evidence of mistake on the County's part. If anything, the claim of mistake may be made against the Union for its lackadaisical handling of the information provided to it. In any event, even if the arbitrator finds liability against the County, a monetary award would be inappropriate. The County has put a significant amount of money into the risk corridor, so the money it has taken out has only allowed it to nearly break even, not to mention the interest the County has foregone due to the money it has funneled into the plan. The moneys flowing into the fund go not only to the risk corridor, but also the IBNR account and the employees' HRA accounts. On the other hand, the Union uses distorted figures to justify its claim for reimbursement. Further, the risk corridor has had the effect of stabilizing insurance premium rates, which has benefited the employees by reducing costs. Finally, the evidence shows that, in fact, the risk corridor grew as a result of good claims experience. There is no evidence, only speculation, showing that the growth occurred due to inflated premium rates.

DISCUSSION

The Merits

In this case, the Union has alleged that the County violated Article 20 of the collective bargaining agreement when, without notice, it artificially inflated the health insurance premium rates for bargaining unit members in order to fund the "risk corridor" between 100% of expected claims in a given plan year, as determined by actuaries retained by the County, and 125% of expected claims, which is the threshold for coverage from the County's reinsurance policy. The Union alleges a further violation occurred after the risk corridor was fully funded, when the County diverted surplus monies from the account, some of which represented premium payments from bargaining unit members, into the County's general fund. The Union further asserts that the County's conduct violates the principles of good faith and fair dealing that are inherent in all contracts.

The fact that the risk corridor was funded from inflated premiums is not in serious dispute. Connie Goss, the County's Risk Manager, is in charge of overseeing the County's insurance programs, including the employees' health plan, which the County self-insures. She testified that the County established the risk corridor through a series of County Board resolutions, beginning in 1998, to deal with the problem of shortfalls arising in the insurance budget due to higher than expected claims, which then would require infusions of cash from the County's general fund. At that time the County made all contributions to the insurance plan, so the funding of the risk corridor basically only involved moving money between various County accounts. The 1998 resolution also provided that any excess or deficit in the

self-insurance account at the end of the year, which at that time was considered fully funded at \$300,000.00, would be paid into or out of the County's general fund. In 2002, when the County was still totally funding the health insurance plan, the Board passed resolution 11-02, which adjusted the ceiling for the risk corridor to 125% of anticipated claims and provided that the corridor would be funded "...by annual gains in the Non-Lapsing Self Funding Health Insurance Account." The resolution did not say how those anticipated gains were to be achieved. On November 10, 2000, the County's attorney sent a letter to the then Union representative in which he indicated that the County would be establishing a reserve within the insurance fund, but again declined to indicate how the reserve would be funded. What the County was doing, however, was building an additional percentage into the monthly insurance premiums it was paying into the self funding account, over and above the premiums recommended by its actuary, in order to build up the risk corridor reserve.

After the bargaining unit members began contributing to the health insurance premiums in the 2004-06 contract, there is no indication that the County directly told the Union about how the risk corridor was being funded, or that part of the members' premiums were being allocated to this purpose. Connie Goss testified that information about premiums was shared with the joint insurance committee, but the details of what was conveyed are not clear. Carole Lendle, a member of the committee from another bargaining unit, testified that there were presentations and discussions about premiums, but her understanding of the funding for the risk corridor was that it was funded with money left over in the self-insurance account at the end of the year due to good claims experience. Lendle did not have an understanding that premiums were increased beyond the recommendations of the actuaries in order to fund the reserve. What is more, when responding to Union representative Durkin's inquiry on July 14, 2006, Goss informed him that the costs of the health insurance resulted from claims, administration and reinsurance. She said nothing about an additional charge to fund the risk corridor. Further, she attached a copy of the Chippewa County Renewal Exhibit, which appears to have been prepared by the County's actuarial firm, Jabas, Inc., and which contained the cost breakdown for the 2005-06 plan year. What she did not say was that the actual premium levels recommended by Jabas were lower and that she added an additional 12% to fund the reserve. To all appearances, the premium levels in the renewal exhibit were set by Jabas, not Goss. She also told Durkin that the risk corridor was being funded by good claims experience and that any loss or gain remained within the fund.

It is clear that Goss' letter to Durkin contains numerous misrepresentations of fact. The premiums in the renewal provided to Durkin were higher than those recommended by Jabas, but the document was altered to make it look as if the numbers therein were those recommended by Jabas and Durkin was not informed otherwise. Durkin was led to believe that the risk corridor was funded through the savings generated by good claims experience, rather than through inflated premiums. He was also told that all gains remained in the fund, when in reality the County was transferring any surpluses into its general fund. The effect of these misstatements was that the Union was deprived of key information regarding the cost of the health insurance plan which may well have impacted the outcome of the bargain. The County may argue that it had no affirmative duty to disclose how it arrived at its premium levels, but

the fact is that in this bargain the County convinced the Union to increase its premium contribution and part of its rationale was the increased cost of the insurance plan. What is more, it intentionally inflated the premiums for the purpose of funding the risk corridor, in part using contributions from the employees. This, to my mind, imposes a duty on the County to be totally forthcoming with the data underlying its position. What is more, the County did not just withhold pertinent information, through Goss it made positive representations about the insurance program that were not true.

The County points out that Goss provided Durkin with copies of the resolutions establishing the risk corridor and that had Durkin read them he would have known that surpluses in the reserve were being transferred into the general fund. That may be true, but Durkin cannot be faulted for taking Goss' representations at face value. It is no defense to say that if the injured party had been more diligent he would have discovered the wrongdoing, so therefore the misrepresentations should be excused. The County also argues that the Union should have inferred the premium inflation from Attorney Ricci's November 10, 2000 letter, but that letter, while referring to the risk corridor, does not state how it is to be funded. Telling the Union that the County is planning to build a risk corridor reserve is not the same as telling it where the money is expected to come from. It is also noteworthy that the County provides all its employees with a document called "A Consumer's Guide to Chippewa County's Health Insurance Program." This document states that the components of the health insurance premiums are claims, administration and reinsurance. It further contains the following statement: "*NOTE* At this time the County's premium rates are not calculated to build up a reserve fund or cover the difference between 100% of the claims and the aggregate stop loss of 125% of expected claims." The County argues that the document had not been updated, but, notwithstanding, the Union members should have understood that there was an intent to fund the reserve with premium contributions in the future. Be that as it may, the fact that the language remained in the document would have given an employee the clear impression that, whatever the future may hold, the reserve was not being funded by premiums at present. Further, Goss' letter to Durkin clearly suggests that the risk corridor was being funded by savings from good claims experience and an aggressive loss control/wellness system and does not mention higher premiums as a component of the funding mechanism.

In my view, the foregoing misrepresentations by the County constitute a violation of the contract. I note the County's argument that it is within the County's management rights to set premium rates because that power is nowhere restricted in the contract, and I do not dispute the point. Nevertheless, that authority does not excuse the County from the duty to disclose how those premium rates are derived and what they are applied to. What is more, once the County represented that it based the premium rates on claims, administration and reinsurance costs, it essentially defined the premium, and thereby established what the employees' percentage contribution would theoretically be based upon. The Union and its members had the right to expect that their premium rates were based upon the items listed in Goss' letter to Durkin and that their premium contributions went to fund those things.

When the County decided to self-fund its health insurance and further decided to obtain reinsurance coverage that kicked in at 125% of anticipated claims it understood that there was a 25% gap. Initially, it chose to fund the self-insurance account at 100% of anticipated claims and, if claims exceeded expectations, to make contributions from the general fund to cover the gap. Sometimes this worked well and other times not. Occasionally the County had to make significant contributions to cover excess claims. Eventually, the County determined that it made more sense to build up a balance in the risk corridor in order to avoid the necessity of having to move money out of the general fund when claims exceeded expectations. Hence, in 1998, the County began paying a greater amount into the insurance fund than recommended by the actuary in order to build up the fund balance over time. In hindsight, this is apparently what Attorney Ricci was talking about in his November 10, 2000 letter to Union representative Gravesen when he mentioned an anticipated 25 percent premium increase. This appears to have been an appropriate and prudent business decision by the County, which at the time was funding the entirety of the insurance plan. This changed in 2004 when the bargaining unit members began contributing to the premiums. If the County expected the employees to contribute to the funding of the risk corridor it should have bargained the matter with the Union. When the County unilaterally, and without notice, added the additional cost of funding the risk corridor to the employees' premiums, and later when it took the surpluses from the risk corridor account and added them to the County's general fund, it violated the contract.

Remedy

The Union maintains that the appropriate remedy contains two components. First, the Union asserts that the bargaining unit members must be made whole for the excess premiums they paid. I agree. The evidence indicates that in 2005-06 the County inflated the premiums by 12% in order to fund the risk corridor. Thus, each employee making premium contributions in 2005-06 paid 12% more than they should have. This money must be repaid to the individual employees. For 2006-07, there is no direct evidence as to how much, the premiums were inflated. What is known, however, is that the premiums were increased by 9% and that at the end of 2006 the County transferred \$367,696.00 to its general fund. Likewise, an additional \$1,126,848.75 was transferred at the end of 2007. I am persuaded, therefore, that premium inflation continued in 2006-07 and that the County benefited inappropriately from the excess contributions of the Union members. This money, too, must be repaid. Thus, based on the risk manager's records, the County must calculate how much the premiums were inflated in 2006-07 and reimburse that amount to the employees who paid premiums, as well. Furthermore, inasmuch as the inflated premium rates were carried forward from year to year, the employees continue to be negatively impacted from the inflation. Thus, in addition to the reimbursement, the County must rollback the insurance rates to what they would have been without the inflation. Contrary to the Union's assertion, however, I find that an award of interest on the money is not warranted. The Union cites FOREST COUNTY (SHERIFF'S DEPARTMENT) WERC CASE 82, NO. 59476, MA-11311 (Nielsen, 7/20/01) in support of its position, but that case is not on point. There, Arbitrator Nielsen awarded interest in a case where the County underpaid its own contribution to the insurance plan, while charging the Union members the actual rate. As a result, the Union paid a greater proportion of the

premiums for the majority of the plan year than it was contractually required to do, although the rates were correct. The arbitrator found that the employees were not entitled to a refund of their premiums, but that they were entitled to interest for the period of time the County had the use of their money. The arbitrator also noted that interest on monetary awards is not typically awarded by arbitrators as a matter of custom, but made an exception because interest was the award. Here, where there is a monetary award available, I find that interest is not appropriate.

The other component of the Union's proposed remedy involves what could properly be characterized as lost opportunity damages. In essence, the Union asserts that, by inflating premiums, the County made the cost of insurance appear to be higher than it actually was and was thereby able to induce the Union to agree to contribute a higher share of the premium. The Union further asserts that the money the County paid into the risk corridor fund, and subsequently returned to the general fund, were monies that would otherwise have been available for wages and benefits and that by concealing what it was doing the County deprived the Union the opportunity to bargain for higher wages and benefits. It seeks, therefore, to have the arbitrator require the County to disgorge the funds in the risk corridor fund attributable to this bargaining unit, as well as those returned to the general fund and pay them over to the Union. Failing that, it seeks to have the arbitrator order the parties into negotiations to arrive at a mutually agreeable resolution. In my view, the Union has not proven its case with respect to this remedy. Other than what the Union members paid in inflated premiums, the money in the risk corridor fund was either contributed by the County or was derived from savings generated by the plan. As I have previously noted, other than the use of inflated employees' premiums there was nothing inherently wrong with the County funding the risk corridor by using general revenues, which it then transferred back when the corridor was completely funded. Having ordered the return of the monies paid by the employees, the remainder is the County's to use as it sees fit. Furthermore, there is no evidence that the County used the higher insurance rates to induce the Union to contribute a greater premium share, or that the Union, in fact, agreed to pay more than it otherwise would have. Nor is there any evidence that, had the Union known that the County was funding the risk corridor from its general fund it would have changed its bargaining posture. In my view, therefore, any argument that disclosure of the County's use of general revenue to fund the risk corridor would have resulted in higher wages or better benefits for the employees is speculative. That being the case, I am not including any such lost opportunity damages in my award.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby enter the following

AWARD

The County violated the collective bargaining agreement when, without full disclosure, it inflated the health insurance premiums of bargaining unit members in order to fund the risk corridor in its self-insured plan. As and for a remedy, the County will calculate and pay to each participating bargaining unit member an amount equivalent to the increase of the employee's share of the health insurance premiums in 2005-06 and 2006-07 attributable to the

County's inflation of premiums. The County will also supply the Union with documentation verifying the amount of the premium inflation in 2006-07 and explaining its calculation of the amounts owed.

The Arbitrator will retain jurisdiction for a period of sixty days in order to resolve any issues arising in the implementation of the award.

Dated at Fond du Lac, Wisconsin, this 11th day of December, 2009.

John R. Emery /s/

John R. Emery, Arbitrator