

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CLARK COUNTY

and

**CLARK COUNTY COURTHOUSE EMPLOYEES,
LOCAL NO. 546B, AFSCME, AFL-CIO**

Case 138
No. 69019
MA-14443

In the Matter of the Arbitration of a Dispute Between

CLARK COUNTY

and

**CLARK COUNTY PARAPROFESSIONAL EMPLOYEES,
LOCAL NO. 546A, AFSCME, AFL-CIO**

Case 139
No. 69020
MA-14444

Appearances:

Houston Parrish, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1457 Somerset Drive, Stevens Point, Wisconsin, appeared on behalf of the Union.

Weld, Riley, Prenz & Ricci, S.C., Attorneys at Law, by **Mindy K. Dale**, 3624 Oakwood Hills Parkway, Eau Claire, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

Clark County Paraprofessional Employees, Local 546A, AFL-CIO, and Clark County Courthouse Employees, Local 546B, AFL-CIO, herein collectively referred to as the "Union," and Clark County, herein referred to as the "County" or "Employer," are parties to a

collective bargaining agreement that provides for final and binding arbitration of grievances. The Union and the Employer jointly selected the undersigned from a panel of arbitrators of the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The parties agreed to consolidate these cases for the purposes of hearing and decision. An arbitration hearing was on September 23, 2009 in Neillsville, Wisconsin. The record closed on November 24, 2009, following receipt of the parties' post-hearing written argument.

ISSUES

The parties have stipulated to the following statement of the issues:

Did the County violate the collective bargaining agreement including wage schedules by unilaterally switching from a one-week pay delay to a two-week pay delay?

If so, what is the remedy?

The parties further stipulated that the grievances are properly before the arbitrator.

PERTINENT PROVISIONS OF THE 2007-2008-2009 CONTRACTS

LOCAL 546A

ARTICLE II- MANAGEMENT PREROGATIVES

- 2.1 Except as otherwise specifically provided in this Agreement, the County retains all the rights and functions of management that it has by law.
- 2.2 Without limiting the generality of the foregoing, this includes:
 - A. The determination of services to be rendered, and the right to plan, direct and control operations.
 - B. The location of the work, including the establishment of new offices, departments and the relocation or closing of offices or departments.
 - C. The determination of the equipment to be used and the providing of services; the methods and means of providing services as well as the right to introduce new methods, jobs or classifications, or

change, delete, or combine existing methods, jobs, or classifications.

- D. The determination of the size of the work force; the assignment of work or workers; the determination of policies affecting the selection and training of employees, and the right to hire, recall, transfer, promote, lay off, suspend or dismiss employees for just cause.
- E. The establishment of reasonable quality and workmanship standards except as provided herein.
- F. The maintenance and disciplinary control in use of County property.
- G. The scheduling of operations and starting time of shifts; the right to cease operations for any reason not in violation of this Agreement; the transfer of employee or employees from one job to another or from one department to another; and the assignment of overtime as necessary, except as provided herein.
- H. The determination and enforcement of reasonable rules and regulations and the right to make reasonable changes to such rules and regulations and to enforce such changes, except as provided herein.
- I. To maintain efficiency of government operations entrusted to it.
- J. To take necessary action to carry out the functions of the County in situations of emergency.
- K. To take necessary action to comply with state or federal law.
- L. The determination as to whether, and to what extent, any work shall be performed by employees; however, the Union does not waive any rights to bargain that it has by law. Provided, however, the Union does not waive the right to bargain the impact or the exercise of these management rights on wages, hours, and conditions of employment.

2.3 The County agrees that none of these rights shall be used for the purpose of discriminating against any employee because of membership or

nonmembership in the Union, or against any member of the Union because of proper Union activities.

...

ARTICLE XIX - ENTIRE AGREEMENT CLAUSE

- 19.1 This Agreement shall constitute the entire Agreement between the parties that no oral statements or County Board resolutions shall supersede. Any amendment shall not be binding on any of the parties unless executed in writing and signed by both parties. Waiver of any breach of this Agreement by the parties in writing shall not constitute a waiver of any future breach of this Agreement.
- 19.2 In the event any clause or portion of the Agreement is in conflict with the statutes of the State of Wisconsin governing municipalities or other statutes, such clause or portion of the Agreement shall be declared invalid and negotiations shall be instituted to adjust the invalidated clause or portion thereof.

...

LOCAL 546B

...

ARTICLE II- MANAGEMENT RIGHTS

- 2.1 Except as otherwise specifically provided in this Agreement, the County retains all the rights and functions of management that it has by law.
- 2.2 Without limiting the generality of the foregoing, this includes:
- A. The determination of services to be rendered, and the right to plan, direct and control operations.
 - B. The location of the work, including the establishment of new offices, departments and the relocation or closing of offices or departments.
 - C. The determination of the equipment to be used and the providing of services; the methods and means of providing services, as well as the right to introduce new methods, jobs or classifications, or

change, delete, or combine existing methods, jobs, or classifications.

- D. The determination of the size of the work force; the assignment of work or workers; the determination of policies affecting the selection and training of employees, and the right to hire, recall, transfer, promote, lay off, suspend or dismiss employees for just cause.
- E. The establishment of reasonable quality and workmanship standards except as provided herein.
- F. The maintenance and disciplinary control in use of County property.
- G. The scheduling of operations and starting time of shifts; the right to cease operations for any reason not in violation of this Agreement; the transfer of employee or employees from one job to another or from one department to another; and the assignment of overtime as necessary, except as provided herein.
- H. The determination and enforcement of reasonable rules and regulations and the right to make reasonable changes to such rules and regulations and to enforce such changes, except as provided herein.
- I. To maintain efficiency of government operations entrusted to it.
- J. To take necessary action to carry out the functions of the County in situations of emergency.
- K. To take necessary action to comply with the State or Federal laws.
- L. The determination as to whether, and to what extent, any work shall be performed by employees; however, the Union does not waive any rights to bargain that it has by law.

Provided, however, the Union does not waive the right to bargain the impact or the exercise of these management rights on wages, hours, and conditions of employment.

- 2.3 The County agrees that none of these rights shall be used for the purpose of discriminating against any employee because of membership or nonmembership in the Union, or against any member of the Union because of proper Union activities.

...

ARTICLE XVII - ENTIRE AGREEMENT

- 17.1 This Agreement shall constitute the entire Agreement between the parties that no oral statements or County Board resolutions shall supersede. Any amendment shall not be binding on any of the parties unless executed in writing and signed by both parties. Waiver of any breach of this Agreement by the parties in writing shall not constitute a waiver of any future breach of this Agreement.

...

FACTS

On or about June 25, 2008, the parties entered into the 2007-2008 collective bargaining agreement for Local 546-B. The parties also entered into a 2007-2008 collective bargaining agreement for Local 546-A.

By September 8, 2008, the Union had ratified a 2009 extension to the Local 546-A and 546-B agreements. The County ratified this extension on or about October 2, 2008.

On November 25, 2008, the County Personnel Manager sent Union Representative Houston Parrish an e-mail with the "Subject" of "Pay dates" that includes the following:

...

As you may have heard Clark County is moving to a timekeeping system in an effort to streamline the payroll process. In addition, we are looking at the way we process payroll and when. Currently, the Payroll and Benefits Coordinator does payroll every week. We would like to shift some dates in order that payroll processing be done on a bi-weekly basis for all employees. This of course would affect the union staff as well, Attached is a chart showing what the pay periods would be if we left the system as is and what would change if we modified a few pay dates. We would like to give employees notice of this change ASAP and the Personnel Committee will be meeting on 12/1/08 to review the attached as well. Would it be possible for you to review and let me know if you think there will be significant issues? Or if there is a way I could

explain it better so that the membership would understand they are continuing to be paid the same amount for 2009, it will just have different pay dates? I'd appreciate any assistance you could offer. Thanks.

...

The County Personnel Manager attached payroll schedule charts to explain the discussed modifications.

Union Representative Parrish responded to the County Personnel Manager in an e-mail dated November 25, 2008 that includes the following:

...

It looks like all employees will get 1 week's pay on 5/29/09 where they now would get a 2 week paycheck. Many employees don't have that kind of cushion to play with so I would, at the outset, guess that such a plan will cause an uproar.

I think you'd have a heck of a lot better luck paying employees 1 week early (e.g. ½ way through the normal pay cycle for 1 week's pay) than the other way around.

Is the proposed payday of 6/6/09 for 1 week's pay or 2?

Thanks.

...

The County Personnel Manager's responsive e-mail, dated November 25, 2008, includes the following:

...

I guess I should have clarified. Currently we have three different payroll schedules: the Health Care Center, Highway and the Courthouse. None of these have the same pay period start/end dates or pay dates, What we are trying to do is make them all the same. I left you a message, but thought I should add more in this e-mail as well.

Highway would receive a 1-week check on 5/29/09 (their regular pay date), a week later, they would receive a two week check on (6/5/08). The Courthouse employees currently receive their pay check one week after submitting their

timesheet. With this change, they would then be the same as others and receive their check two weeks after the last day of the pay period (they would continue to receive checks on a bi-weekly basis).

We are planning these changes further out so that people may plan for them (hopefully). We didn't want to do this at the beginning of the year as that is usually a financially difficult time following the holidays. Bill Shockley stopped by and gave some good suggestions on how to demonstrate the changes — I will work on those and forward them to you. Thanks.

...

The County's Personnel Manager sent an e-mail dated November 26, 2008 to Union Representative Houston as well as to Local Union representatives that includes the following:

...

I have completed a calendar to demonstrate what the current pay periods are for 2009 and what we are proposing to occur in the end of May beginning of June. When the changes take place the dates that are ~~struck through~~ are the pay dates we would have had should no changes take place. The regular type is what we are hoping to accomplish. I know that this may be a big change for some, but we are hoping that with the advance knowledge, they will be able to prepare for the shift.

Please let me know if this better explains what we hope to transpire and how it may affect the employees of Clark County or if additional information is necessary. Thanks.

...

Union Representative Parrish sent an e-mail dated December 2, 2008 to the County's Personnel Manager that includes the following:

...

So which bargaining units, like 546B (courthouse) are going to have a permanent one week "delay" under this proposal? 546B, 546A, 546D1 and 546D2?

I understand the county's intent and desire, but I don't see how we can agree to this and the county certainly appreciates how this is going to harm its employees.

I don't know if something can be worked out or not, but this is clearly a bargaining issue and the county does not have the right to unilaterally implement this change.

I look forward to hearing from you.

...

The County Personnel Manager's e-mail response of December 2, 2008 includes the following:

...

We can sit down and do "mid-term" bargaining on this issue if you would like. We were thinking we could do something like this...

5/29/09— pay 1/2 of employee's average net check
6/5/09 pay actual hours worked minus amount paid 5/29/09
6/19/09 — resume regular two week pay period checks

Check dated 5/29/09 would be an actual check through the finance/voucher system
Pay on 6/5/09 would be direct deposit through payroll system.

Please let us know what you think. Thanks.

...

Union Representative Parrish sent an e-mail dated December 2, 2008 to the County's Personnel Manager that includes the following:

...

Can you more fully explain what you are proposing here? i.e., for the dates you list below, for what days will the employees be being paid? And for which bargaining units?

Thanks.

...

The County's Finance Manager sent a letter dated January 28, 2009 to "All Courthouse Payroll Employees" that states:

. . .

To All Courthouse Payroll Employees

As some of you may be aware, with the onset of 2009, the Office of Finance was required to reduce our staff by one. Specifically, the part-time limited position was eliminated. With the loss of this position and an ever-tightening budget, we have been re-evaluating processes and efficiencies while working to streamline operations and provide the same or better services. To this end, we have requested and received permission to modify some current payroll procedures.

Currently we process payroll in each and every week of the year. Both the Health Care Center and the Highway are on a two week delay from the end of a pay period to receiving their paychecks. In our continued effort to streamline operations, we have received approval to modify the courthouse payroll to be on the same two week delay. This will allow for the major payrolls to be processed and paid every other week.

To accomplish this task, with the best interests of the employees in mind, we have chosen to begin this process at the end of May 2009. Normally, May 29th would be a third payroll and thus appeared the most beneficial time in which to implement this modification.

Therefore, on May 29, 2009, you will receive approximately half of your net payroll check as a "payroll advance." This will be done through the voucher system and will be an actual physical check. On June 5th this "advance" will be deducted from your regular payroll check. For example, an employee normally receives \$800.00 bi-weekly. With this modification, the employee would receive \$400 on 5/29 and any adjustments (overtime, etc) on 6/5/09. Following the June 5th payroll deposit, pay checks will continue on a bi-weekly basis.

Attached is a 2009 calendar indicating the modification of the pay dates for the year. May 29th is shaded in order to indicate where the adjustments to the pay procedure will begin.

To further assist in the financial process, we would request that those responsible for vouchers submit the majority of vouchers for payment on the week opposite of payday.

We hope that with this advance notice, employees will be able to plan for this transition. Your cooperation is truly appreciated. Thank you.

...

Union Representative Parrish responded to the letter of January 20, 2009 with an e-mail dated January 29, 2009 and addressed to the County Personnel Manager. This letter contained a series of questions. These questions and the County Personnel Manager's response thereto (in italics) are as follows:

...

I note the 1/28/09 letter to Courthouse employees states that the payroll change from a one-week to a two-week delay means that "major" payrolls will now be every other week. Thus it appears some payrolls will still be operating on the other weeks. Which ones are those?

When we say "major payrolls" this refers to Highway, Health Care Center, ADS —Client Employees and Courthouse. The other payrolls (not major) are monthly payrolls for County Board and Health Care Center—Patient Employees.

And, what delay are all of the nonreps on? i.e., a) management and b) unrepresented management? Will all employees be on a two week delay if this goes through?

Currently, non reps are on a one week delay, the same as 546B, 546D-1 & 2 and 546A. Highway is currently on a two-week delay but the dates covered are different from the others. If/when this change takes place non-represented staff will be impacted the same as the unions indicated above.

Also, do I correctly understand that the courthouse units {546A, 546B, 546D1 and 546D2) are the only ones affected? Highway will be entirely unaffected?

No, we did separate memos for Courthouse and Highway employees as the groups will be impacted differently because of the current differences in their payrolls. I have attached a copy of both memos for you to look at.

If so, then the calendar you e-mailed me some time ago seems inaccurate, as the 5/29 payday for highway indicates pay for only one week on that date. Can you explain that?

Please see my answer above.

Regardless, while I understand why the county wants to do this, the county could also just put all employees on the one week delay if it wanted to process all payroll checks at the same time.

While I think that would be great, it isn't realistic with the quantity of staff involved. With our current staffing and systems, it would not be possible to process over 600 timecards and paychecks in 6 days (less than that on weeks with holidays).

As I understand it, the county proposes holding one week of the courthouse employees checks until that employee retires. That effectively is what switching from a one week to a two week delay means. I.e., that employee will never recapture that money until he/she leaves employment. That is an enormous issue.

Maybe I am not understanding this... we are not keeping any money from employees indefinitely.

Frankly, I cannot imagine why the employees would ever agree to this. I agree (as you've alluded to) that the matter must absolutely be bargained and if the county does this unilaterally the unions will be forced to file numerous prohibited practice charges against the county. There may also be other legal ramifications in that the county is admittedly keeping employees' money for a week on an indefinite basis.

I was under the impression that the county was going to try to figure out a way around this but I was apparently mistaken.

No, you were not mistaken we have tried to come up with alternatives to ease employees through this process. The only other option that we see would be to gradually change the date of the pay check 1 day at a time and I think that would be more confusing and frustrating to the employees involved.

You have previously mentioned wanting to bargain early this term. I am agreeable to that idea, I believe we need to address this issue before it reaches a crisis level. I will speak to my members about this in the near future, but it is incumbent upon the county to propose a solution to this issue in the event the unions do not (i.e., the party wanting to change the contract bears the burden to justify the change and offer a fair quid pro quo).

We are open to discussion. Please let me know when you would be available to sit down and discuss this issue.

I hope you know that I always encourage my members to cooperate with the county whenever possible. I do not see the employer-employee/union relationship as an adversarial one. However, this is a significant violation of employees rights that cannot simply be agreed upon without being bargained.

I look forward to hearing from you.

Thank you,

...

In an e-mail dated February 4, 2009, Union Representative Parrish advised the County Personnel Manager of the following:

I think we should hold off on a meeting so let's not meet this Friday. I don't want to do anything premature.

Preliminary research shows that Waupaca, Wood, Chippewa, Jackson, and Taylor are all on a one week delay. Only Eau Claire County is on a two week delay to my knowledge, though I still have some information requests pending.

Since the majority of Clark County is already paid on a one week delay and the vast majority of comparables are as well I have a hard time advising my members to take a two week delay, If you have additional information, however, I would be pleased to review it.

Thanks,

...

The County Personnel responded in an e-mail dated February 4, 2009 as follows:

...

I currently do not have that information for external comparables, however if you look at the internal comparables, they would include employees in the AFSCME Union (546) as well as the Teamsters Union at the health care center. I can look into the others...

...

In an e-mail to the County Personnel Manager dated April 3, 2009, Union Representative Parrish states:

...

Do you want to meet at 9 am this Thursday for the payroll negotiation? While I understand WPPA accepted this change for no compensation I do not anticipate AFSCME doing that. In fact, I am sure the change will not be affected without substantial compromise and a tender of the savings created from withholding our members pay, so if that renders the need to meet moot please advise.

Thank you,

...

The County Personnel Manager responded in an e-mail dated April 6, 2009 as follows:

...

I am not sure if you have heard or not, but the account in which payroll monies are kept is required to be a 0% interest account. There are NO cash savings involved in this change. We are still willing to meet to discuss the issue.

I would also be happy to attend one of your union meetings to explain this to anyone who is interested. If you would like a copy of the policy regarding the 0% interest, I am more than happy to forward it to you as well.

...

Union Representative Parrish responded in an e-mail dated April 6, 2009 as follows:

...

Thank you, but that does not change the fact that the county is still saving money in the current budget by withholding employees' paychecks.

And even if no money is saved at all, it does not resolve the issue that these funds are being withheld from their rightful owners.

I understand from your e-mail, and our numerous prior discussions, that the county is unwilling to compensate the employees for substantial change.

I will proceed accordingly and have little choice but to ask the WERC to intervene in the near future.

I will proceed with that course of action unless and until I hear from the County that it has reconsidered its position.

Thank you,

...

The parties met on April 9, 2009. In a letter dated April 22, 2009, the County Personnel Manager advised Union Representative Parrish as follows:

...

On April 9, 2009, we met to negotiate the possible implementation of a change in the pay dates beginning in May of 2009. During this discussion, the Union proposed the following:

546 - Hwy Unit: Employees receive the day after Thanksgiving off with pay for 2009 in exchange for moving the pay date and adding in an extra 1/2 check for the year.

546A, 546B, 5460-1 &2: Employees receive 2 1/2 days of pay in exchange for moving the pay date one week.

The County has considered your offer and have determined that we are unable to accept the terms you propose. We continue to offer the following:

- Employees in the 546A, 546B, 546D-1 &2 Units will receive a voucher check on 5/29/09 for half their average net pay. On 6/5/09, payroll will be processed as usual with the subtraction of the pay advance provided on 5/29/09. Payroll will continue on a bi-weekly basis from 6/5/09 forward.
- Employees in the 546 Unit will receive a one-week check on 5/29/09 and a regular two-week check on 6/5/09 in order to alter the start and end dates of their pay periods to be consistent within the County.
- The County is also willing to provide documentation of this change for any employee who may require it for pre-established auto payments from their bank accounts.

We would like to continue with this process and ask that if you have any other offer which we may consider in negotiating this change that you notify us on or before April 30, 2009. Thank you.

...

In an e-mail dated April 22, 2009, Union Representative Parrish responded as follows:

...

Despite it being the County's burden to offer the quid pro quo in this matter the unions took the initiative and did that for the county. A simple "No, try again" is not a sufficient response by the County. The locals decline to bargain against themselves in this matter and will proceed accordingly.

...

In a letter dated April 23, 2009, the County Personnel Manager advised Union Representative Parrish as follows:

...

Your e-mail of April 22, 2009, stated:

Despite it being the County's burden to offer the quid pro quo in this matter the unions took the initiative and did that for the county. A simple "No, try again" is not a sufficient response by the County. The locals decline to bargain against themselves in this matter and will proceed accordingly.

The County did provide a quid pro quo in that we offered to structure the implementation of this change in phases to minimize the impact rather than just implementing it in one step. In addition, we considered:

- The timing of the change so that it did not fall close to the end of the year and the holiday season; at the beginning of the year, so not as to come on the heels of the holiday season; and after most staff would have filed and dealt with taxes and possibly received returns; and
- In considering the timeline, we also provided significant notice of our desire for the change.

In continuing our bargaining on this issue, Clark County requests that the union provide a dollar itemization of the cost of the County's proposal on your unit members to justify your economic proposal.

...

In an e-mail dated April 27, 2009, Union Representative Parrish advised the County Personnel Manager that the unions will grieve the proposed payroll changes and suggested that the parties bypass initial steps of the grievance process. The County Personnel Manager's responsive e-mail of the same date contains the following:

...

As we have not yet implemented any changes, I believe discussing the grievance process would be premature. Does your position on taking this to a grievance mean you no longer want to negotiate?

...

Union Representative Parrish responded with the following e-mail dated April 27, 2009:

...

Clearly the parties are at impasse so yes we are done negotiating. As the county has not backed off on its implementation date we can but are not obligated to wait to grieve the matter. I would appreciate a reply on my earlier e-mail. Thank you. Houston.

...

In an e-mail dated April 29, 2009 and addressed to the County Personnel Manager, Union Representative Parrish states:

...

I should clarify that even if the county wishes to make a counter offer to attempt to revive the negotiation, the locals will proceed with the grievances, so your response is still needed. We can always drop the grievances later if they become moot.

...

In a letter dated May 7, 2009, the County's Personnel Manager advised Union Representative Parrish of the following:

...

Your e-mail of April 27, 2009, stated:

“Clearly the parties are at an impasse so yes we are done negotiating. As the County has not backed off on its implementation date we can but are not obligated to wait to grieve the matter. I would appreciate a reply on my earlier e-mail. Thank you. Houston”

You have also not responded to my request of April 23, 2009 requesting a dollar itemization of the cost of the County’s proposal on your unit members to justify your economic proposal. We remain willing to negotiate with you to discuss your assessment of the costs to your unit members. However, given your refusal to further discuss this matter with us and your belief that impasse has occurred, which we do not dispute given your stance, the County will proceed with implementation of our offer.

This offer, as indicated previously, includes:

- Employees in the 546A, 54GB, 546D- 1&2 Units will receive a voucher check on 5/29/09 for half their average net pay. On 6/5/09, payroll will be processed as usual with the subtraction of the pay advance provided on 5/29/09. Payroll will continue on a bi-weekly basis from 6/5/09 forward.
- Employees in the 546 Unit will receive a one-week check on 5/29/09 and a regular two- week check on 6/5/09 in order to alter the start and end dates of their pay periods to be consistent with the majority of staff within the County.
- The County is also willing to provide documentation of this change for any employee who may require it for pre-established auto payments from their bank accounts. Employees who require this letter should contact me directly.

As I indicated to you via e-mail on 5/1/09, the County will agree to bypass steps 1 & 2 of the grievance procedure and allow filing of the grievance with the Personnel Committee at step 3. Given our planned implementation date, we do not object to your filing of a grievance prior to implementation of our plan.

...

On or about May 18, 2009, Local 546A and 546B each filed a grievance. The grievance of Local 546A states: “Employer has declared it will unilaterally hold employees’ pay for two weeks instead of the one week delay that has been the practice for many years” and contends that management has violated “Wage table and past practice recognizing employees are to be paid on a one-week delay. And Article 1.1 failure to bargain to agreement

on changes in wages and conditions. Any other applicable provision.” The grievance of Local 546B states: “County will unilaterally hold employees’ pay for 2 weeks instead of the 1 week delay that has been the practice for many years” and contends that management has violated “-Wage table and past practice recognizing that employees are to be paid on a one-week delay. -Article 1.1 – failure of County to successfully bargain a desired change in contract regarding wages/conditions. – Any other applicable provision.”

The County denied the grievances. Following this denial, the parties submitted the grievances to arbitration.

POSITIONS OF THE PARTIES

Union

It is undisputed that for decades the County has paid members of the Local 546A and 546B bargaining units on a one-week pay delay; with the effect that employees would be paid Friday January 8 for the pay period that ended January 1. In May 2009, the County unilaterally switched to a two-week delay; with the effect that employees would be paid Friday January 15 for the pay period that ended January 1.

At the time of the switch, the parties had agreed on the terms of their 2009 collective bargaining agreements. The County had never proposed changing the payroll delay during the bargaining process, including the negotiations that lead to the 2009 agreements.

The Union’s representative repeatedly informed the County that such a switch would violate the Union’s contracts and the parties’ past practice and that it was up to the County to offer some type of quid pro quo in order to obtain the bargaining units’ agreement to switch. The Union’s representative also informed the County that the vast majority of surrounding counties are on a one-week payroll delay.

The parties did not reopen contracts on this issue. In April of 2009, the parties met to attempt to negotiate a resolution to forestall a grievance. This negotiation failed because the County refused to offer any form of quid pro quo for the change. The County’s proposal to “bargain” the impact of the change was for the Union to accept the County’s plan prior to implementation. The County’s proposal is not bargaining.

In the exercise of its lawful discretion, the Union opted to file grievances over prohibited practices charges. The County’s mid-term bargaining defense is only relevant if the Unions had filed prohibited practice claims.

The Union has consistently made clear to the County that the County was under an obligation to continue paying employees on a one-week delay unless the parties reached an agreement to the contrary. Contrary to the argument of the County, the Union has not waived

any right to argue unilateral change in the grievance process or enforce its contractual rights in the grievance process.

The Union's contracts have tables establishing wages. The decades-old practice is interpretive of the contracts; including when wages are to be paid. As Local 546B President Smagacz and Local 546A President McDonell testified, they were informed of this one-week delay when they were hired. Assuming *arguendo*, that Article 17.1 was a zipper clause, it would have no bearing on this type of past practice.

As President Smagacz further testified, the two-week pay period referenced in Article VIII of the 546B contract did codify a two-week pay period. It was his understanding, however, that this change codified current practice that included the one-week pay delay.

If, as the County claims, it wished to have a more efficient payroll operation, then the County could have switched all of its employees to a one-week delay. Such a switch would not have harmed any employee by withholding employee pay for an additional week.

The parties' payroll practice was consistent, mutual and long-standing. The County's unilateral change in this practice has harmed members of the Union's collective bargaining units.

The Union requests that the arbitrator sustain the grievances. Additionally, the Union requests that the arbitrator order the County to revert to a one-week pay delay for these bargaining units.

Employer

Under WERC case law, a change in the schedule of payroll periods is a mandatory subject of bargaining. A municipal employer has a duty to bargain during the term of a contract with respect to all mandatory subjects not dealt with in the contract unless the union has waived its right to bargain over those subjects. If such mid-term bargaining results in impasse, then an employer may make unilateral contract changes that are consistent with its last offer.

The 2009 agreements were settled by the time that the County Board decided to reduce staffing in the Finance Department; which was the original catalyst for streamlining payroll processes. There was no reason to raise the issue during the May 13, 2009 negotiation session for the 2010 successor agreements because the parties had already agreed that they were at impasse.

When the County notified the Union of its proposed payroll changes, it recognized it had a duty to bargain the issue. The County offered to enter into "mid-term" bargaining and

the Union responded in a manner that indicates that the parties engaged in “mid-term” bargaining, rather than “negotiations to avoid a grievance.”

Mid-term bargaining does not require the parties to re-open the entire contract. Nor does it require the parties to reach an agreement.

The parties’ contracts direct the parties to negotiate over the impact or exercise of the County’s management rights on wages, hours and conditions of employment. The parties bargained in good faith to impasse and, thereafter, the County acted lawfully when it implemented changes consistent with its last offer of April 9, 2009.

The County had good reasons for its payroll change. The County took steps to minimize the impact of the change upon its employees. All employees received their contractual wage rate and the County did not make a profit on any payroll monies. Converting all County employees to a one-week delay was not workable because it would have provided the Finance Department with only six days to process over 600 paychecks.

The parties agree that the contracts of Locals 546A and 546B do not contain contractual language addressing how employees will be paid. Thus, this is not a case in which past practice interprets contract language. The determination of whether to pay employees on a one-week or two-week delay is a right reserved to management under the management rights clauses.

There is no evidence that a one-week pay delay was agreed upon by the parties. The binding past practice claimed by the Union lacks the essential element of mutuality. Additionally, each contract contains a “zipper clause;” which would preclude enforcement of extra-contractual items.

The County’s implementation of the revised bi-weekly payroll schedule did not violate the contract. The grievance should be denied.

DISCUSSION

It is undisputed that, for more than twenty-five years, employees in the bargaining units represented by Locals 546A and B have been paid based on a one-week pay delay. Under the one-week pay delay, if the pay period ended on Friday, then the employee would receive the pay for that pay period the following Friday.

In May of 2009, the County changed its payroll procedures with the effect that employees in the bargaining units represented by Locals 546A and B now are paid based on a two-week pay delay. Under the two-week pay delay, if the pay period ended on Friday, then the employee would receive the pay for that period pay on the second Friday thereafter.

The Union, contrary to the County, argues that there is past practice evidence that is “interpretive” of contract rights. Evidence of past practice may be relevant for one of three purposes. These purposes are to (1) provide the basis of rules governing matters not included in the written contract, (2) indicate the proper interpretation of ambiguous contract language, or (3) support allegations that the clear contract language of the written contract has been amended by mutual action or agreement of the parties. Elkouri & Elkouri, How Arbitration Works 630 (5th ed. 1997)

In May of 2009, Local 546A and Local 546B bargaining unit employees were subject to collective bargaining agreements that, by their terms, expired on December 31, 2009. The parties agree that these agreements do not contain any provision that expressly addresses the length of delay between the end of a pay period and the employee’s receipt of pay for that period. Thus, this is not a case in which evidence of past practice is offered to amend clear contract language.

As the County argues, Article XIX of the Local 546A agreement and Article XVII of the Local 546B agreement each state that “Any amendment shall not be binding on any of the parties unless executed in writing and signed by both parties.” Accordingly, this contract does not permit the use of past practice evidence to amend the contract by imposing a term of contract that is external to the parties’ signed, written agreements.

In this case, the only “interpretive” use of past practice evidence is to indicate the proper interpretation of ambiguous contract language. As the Union argues, such use does not conflict with the Article XIX and Article XVII restrictions because the effect of such use would be not to amend the contract, but rather, to give effect to the contract language agreed upon by the parties.

As the Union argues, the Local 546A and 546B agreements each contain a wage schedule. These wage schedules identify a Job Title and/or Grade, wage steps and wages. These wage schedules are devoid of any language that addresses payroll processes, in general, or pay delay specifically.

The wage schedules in the contracts of Local 546A and 546B do not contain any ambiguous contract language for which the past practice relied upon by the Union would indicate a proper interpretation. Nor has the Union identified any other “ambiguous” contract language for which the past practice relied upon by the Union would indicate a proper interpretation.

Additionally, to be useful as an interpretive tool, past practice evidence must establish that the asserted practice results from an agreement between the parties. At hearing, the President of Local 546B, Jim Smagacz, recalled that, from the time that he became a County employee in 1981 until the change that is the subject of this proceeding, the County paid his bargaining unit employees based on a one-week pay delay. President of Local 546A, Jackie

McDonnell, recalled that, at the time she was hired (approximately ten years ago), the person in payroll told her that she would turn in her payroll and be paid the next week and that, until the change that is the subject of this proceeding, she had always been paid on a one-week pay delay. President McDonnell did not identify this payroll person or her position in the County's table of organization. Union Representative Parrish states that, in his review of Union records of the past 25 years, he did not discover any bargaining proposal on the topic of pay delay.

Neither the Union Presidents, nor any other witness, recalled discussions between the County and representatives of either Local 546A or 546B regarding a one-week pay delay, or any other pay delay, prior to the time that the County raised this issue in November of 2008. As the County argues, the evidence of "past practice" establishes that the procedure of paying on a one-week pay delay has existed for many years, but fails to establish that this procedure was a product of a mutual agreement between the parties.

As the County further argues, each of the contracts contains a management rights clause. Each management rights clause states "Except as otherwise specifically provided in this Agreement, the County retains all the rights and functions of management that it has by law." Among the management rights specified by the parties are the right to "plan, direct and control operations" and the right to "introduce new methods . . . or change, delete, or combine existing methods" As discussed above, the parties' contracts do not "otherwise specifically provide" a one-week pay delay, or any other type of pay delay. The facts of this case warrant the conclusion that the determination of the length of the pay delay is reserved to the County as a contractual management right.

The management rights clauses in the Local 546A and Local 546B agreements contain the following restriction on the County's exercise of its management rights:

- 2.3 The County agrees that none of these rights shall be used for the purpose of discriminating against any employee because of membership or nonmembership in the Union, or against any member of the Union because of proper Union activities.

The Union does not argue and the record does not establish that the County has exercised its management rights in a manner that discriminates against employees based upon Union membership or proper Union activity.

The written statements of County managers, as well as the testimony of the County Personnel Manager, indicate that the change to a two-week pay delay was due to a County Board decision to reduce the Office of Finance staff by one and a County desire to streamline operations by having major payrolls processed and paid every other week. The County has offered legitimate business reasons for its decision to change from a one-week to a two-week pay delay. The Union has not argued and the record does not establish that the County's

decision to change to a two-week pay delay was motivated by other than its stated business reasons.

As the Union argues, the County first raised the issue of a two-week pay delay after the parties had agreed to their 2009 contract. It is not evident, however, that the County was contemplating any change to the one-week pay delay prior to the time that the parties agreed upon their 2009 contract. The timing of the County's proposal to implement a two-week pay delay does not warrant the conclusion that the County has acted in bad faith.

As the County argues, the change from a one-week pay delay to a two-week pay delay does not deny any employee his/her contractual wages. As the Union argues, the change from a one-week pay delay to a two-week pay delay has the permanent effect of lengthening the period between paychecks; with the effect that employees have to wait longer to receive their pay. Financially strapped bargaining unit members may have difficulty in obtaining creditor's agreement to change payment due dates; which may subject them to the exorbitant charges for late/under payments on debt that are commonly imposed by lending institutions. The testimony of Union President McDonell establishes that, in fact, this change has caused financial problems for at least one employee.

The Union argues that the "norm" in comparable counties is a one-week pay delay. According to the County's Personnel Manager, the County has approximately 600 employees; the Health Care and Highway employees comprise more than one-half of the workforce; and the Health Care and Highway employees were on a two-week pay delay at the time that Local 546A and Local 546B employees were changed to a two-week pay delay. The record does not establish otherwise.

In summary, in changing from a one-week to a two-week pay delay, the County has deprived the Union's bargaining unit employees of a valuable benefit. However, given the internal comparability evidence, the record does not warrant the conclusion that a two-week pay delay is unreasonable, *per se*.

Statutory Duty to Bargain

The management rights clauses in the Local 546A and Local 546B agreements contain language that states "Provided, however, the Union does not waive the right to bargain the impact or the exercise of these management rights on wages, hours, and conditions of employment." Relying on this language, the County argues that the parties' management rights clauses direct the parties to negotiate over the impact or exercise of the County's management rights on wages, hours and conditions of employment.

The provision relied upon by the County is not clear and unambiguous. However, the plain language of the provision does not direct the County to bargain with the Union. Nor does it impose a contractual duty upon the County to comply with its statutory duty bargain.

Rather, the most reasonable construction of this plain language is that it recognizes that the Union has not waived its statutory bargaining rights. The parties have not offered any evidence, such as bargaining history or past practice, to establish that the parties intended any other interpretation of this provision.

As reflected in the stipulated issue, the Arbitrator's jurisdiction is limited to a determination of a contract violation. The County's arguments that it was required to engage in mid-term bargaining over the County's pay delay proposal; that the parties bargained to impasse over this pay delay proposal; and that, therefore, the County has the statutory right to unilaterally implement its last offer have not been addressed by the Arbitrator. As the Union argues, the appropriate forum to determine violations of, or compliance with, the statutory duty to bargain is a prohibited practice proceeding before the WERC.

Conclusion

Under the facts of this case, the determination of the length of the pay delay involves the exercise of discretion reserved to the County under its contractual management rights clause. The record fails to establish that, in changing the length of the pay delay from one-week to two-weeks, the County has exercised its contractual management rights in an arbitrary, capricious or bad faith manner.

As the Union argues, this record does not establish that the Union has waived any right to argue unilateral change in the grievance process or to use the grievance process to enforce its contractual rights. Contrary to the argument of the Union, however, this record does not establish that the County violated the collective bargaining agreement when it implemented a two-week pay delay in May 2009.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following:

AWARD

1. The County did not violate the collective bargaining agreement including wage schedules by unilaterally switching from a one-week pay delay to a two-week pay delay.
2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 21st day of December, 2009.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

CAB/gjc

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