

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PRICE COUNTY

and

**PRICE COUNTY, WISCONSIN, EMPLOYEES LOCAL 2656A,
AFSCME, AFL-CIO (PROFESSIONALS UNION)**

Case 106
No. 70913
MA-15085

Appearances:

Mindy K. Dale, Attorney at Law, Weld, Riley, Prenz, & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Price County.

John Spiegelhoff, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1105 East Ninth Street, Merrill, Wisconsin 54452, appearing on behalf of Price County, Wisconsin, Employees Local 2656A, AFSCME, AFL-CIO (Professionals Union).

EXPEDITED ARBITRATION AWARD

Price County (County) and Price County, Wisconsin, Employees Local 2656A, AFSCME, AFL-CIO (Professionals Union) (Union) are parties to a collective bargaining agreement covering contract years 2010-2011. (Contract). The Contract provides for final and binding arbitration of grievances arising under the Contract. On September 9, 2011, the Union filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission (Commission) and requesting a panel of five Commission staff members and commissioners from which the Parties could select an arbitrator. The undersigned was selected. Hearing was held on the grievance on November 2, 2011 in Phillips, Wisconsin. An audio recording of the hearing was created and the Parties agreed that the recording together with admitted exhibits constitute the official record of this matter. The Parties submitted post-hearing written arguments in support of their positions, the last of which was received on December 12, 2011, closing the record in the matter. The Parties requested that the undersigned issue an expedited award by the end of calendar year 2011.

Now, having considered the record as a whole, I make and issue the following award.

ISSUES

At the hearing, the Parties stipulated that I should frame the issues in the award. The County proposed the issues as:

- 1) Is the Grievance procedurally arbitrable under the terms of the Collective Bargaining Agreement?
- 2) If the Grievance is found to be procedurally arbitrable, did the county violate Article 28 of the Collective Bargaining Agreement when it refused to renew the Agreement through December 31, 2012?
- 3) If the County is found to have violated the language of the collective bargaining agreement, is the County prohibited from renewing the Agreement after 2011 Wisconsin Act 10 became effective? What is the remedy?

The Union proposed the issue as:

[W]hether the current collective bargaining agreement is extended through 2012 as a result of the parties' decision not to reopen the contract by the deadline of March 1st.

I frame the issues as follows:

Is the grievance procedurally arbitrable?

If so, does the County violate the Contract by refusing to recognize a renewed contract for 2012?

If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 11 – GRIEVANCE PROCEDURE

- A. Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of this contract or any question regarding wages, hours and conditions of employment.
- B. Subject Matter: Only one (1) incident shall be covered in any one (1) grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, the relief sought, the date the incident or violation took place, and the specific section of the Agreement alleged to have been violated.

C. Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual agreement. Any reference to working days in this article shall mean Monday through Friday excluding Saturdays, Sundays and holidays listed in Article 21.

D. Steps in Procedure:

Step 1. The employee with his steward, shall submit his grievance in writing to his supervisor no later than ten (10) working days after he knew or should have known of the cause of such grievance. In the event of a grievance, the employee and his steward shall perform their assigned work task and grieve the complaint later. Grievance conferences shall be held during nonworking hours whenever possible. The grievance conference will be scheduled within five (5) working days. A decision on the grievance is to be provided within ten (10) working days of the grievance conference.

Step 2. If the grievance is not settled in Step 1, the Union may appeal the grievance in writing to the Personnel Committee within ten (10) working days after receipt of the written decision of the supervisor. Within thirty (30) working days of the appeal, the parties shall meet and discuss the grievance. The Union Grievance Committee and Representative shall represent the aggrieved person(s). Said conference shall be held during nonworking hours. The Committee shall respond in writing within ten (10) working days of said conference.

E. Arbitration:

1. Time Limit: If a satisfactory settlement is not reached in Step 2, the Union must notify the Personnel Committee in writing within ten (10) working days that they intend to process the grievance to arbitration.

...

6. Limitation: The Arbitration Board shall not modify, add to or delete from the express terms of the Agreement.

ARTICLE 28 – DURATION AND BARGAINING PROCEDURES

A. Duration: This Agreement shall become effective January 1, 2010, and shall remain in full force and effect through December 31, 2011, and shall renew itself for additional one-year periods thereafter, unless either party pursuant to

this article has notified the other party in writing that it desires to alter or amend this Agreement at the end of the contract period. This Agreement shall remain in full force and effect until the expiration date set forth in the termination clause, and shall be binding on the present Employer.

- B. Bargaining Procedures: Either party wishing to reopen the contract shall in the last year of the Agreement on or about March 1, notify the other party of its intent to reopen negotiations. Thereafter the parties shall establish a mutually agreeable date to exchange proposals and commence bargaining.

BACKGROUND

In March 2011 and going forward, public sector labor law in Wisconsin was in a state of unprecedented upheaval. The Governor had introduced what is now known as 2011 Wisconsin Act 10 (Act 10), a law that eliminates nearly all non-protective service public sector collective bargaining rights. The law provides that those rights are extinguished “on the day the agreement expires or is terminated, extended, modified, or renewed, whichever occurs first” following June 29, 2011, the effective date of Act 10. Act 10 does not affect rights in contracts in place prior to June 29, 2011.

The County and Union have been parties to a series of collective bargaining agreements, including the current version in effect from January 1, 2010 through December 31, 2011. Before 1999, the Article 28 reopener date was September 1. Since January 1, 1999 and through the current Contract, the Contract has contained a March 1 reopener date in Article 28.

On March 11, 2011, the County’s Human Resources Coordinator (HR Coordinator) received a request from another of its unions to extend that union’s contract. The HR Coordinator then consulted legal counsel to obtain advice on whether the County could, legally, extend contracts for another year, and was informed that it could do so before Act 10 became effective. With that advice in hand, the HR Coordinator met with the County Board Chairperson and Personnel Committee Chairperson on March 14, 2011 to discuss contract extensions. While that meeting occurred, the Union’s representative left a voicemail requesting an extension of the Contract. On March 15, 2011, the County’s Human Resources Coordinator sent an e-mail to the Union informing that the County had considered the requests to extend contracts and had:

...decided that there would not be the needed level of support from County Board and that it was not in the best interests of the County to offer contract extensions at this time.

Therefore, the County declines your request to enter into negotiations for an extension of your respective contracts.

On March 31, 2011, the HR Coordinator met with union leaders representing County employees, including the president of the Union, regarding the effect of Act 10. During the meeting, she stated that the County's position was that existing contracts would be in effect through December 31, 2011, but that "on January 1, 2012 everything between the recognition clause and wage page becomes void (except for Deputies)." On April 27, 2011, the HR Coordinator made a presentation at a staff meeting for the Health and Human Services department where she made the same comment as at the March 31, 2011 meeting. The Union president and approximately 11 other Union members were in attendance at the staff meeting.

On June 15, 2011, the County again considered and denied the Union's renewed request to extend the Contract. The Union's renewed request and the County's denial were communicated orally.

On July 7, 2011, the Union's representative sent a letter to the HR Coordinator explaining the Union's view that the Contract had renewed for 2012. In pertinent part, the letter states:

Article 28 calls for an automatic renew of the collective bargaining agreement for additional one-year periods unless either party notifies the other party in writing that they desire to alter or amend the Agreement by March 1st in the last year of the Agreement. It is my understanding that neither party reopened the Agreement and as such, according to the contractual language contained in Article 28, the Agreement is extended under the same terms and conditions through December 31, 2012.

In a letter dated July 18, 2011, the HR Coordinator responded by explaining that the County did not share the Union's view that a Contract was in place for 2012:

Your assertion is incorrect. The current collective bargaining agreement expires on December 31, 2011. There has been and will be no extension of the current agreement. To prepare and execute a contract for January 1, 2012, through December 31, 2012, incorporating the terms of the current agreement would violate Acts 10 and 32.

The Union president filed a grievance on July 26, 2011 alleging that the County violated Article 28 of the Contract by not executing a renewed Contract for 2012. The County denied the grievance on its merits and as untimely. The instant arbitration proceeding was then conducted.

DISCUSSION

I conclude that the grievance is procedurally arbitrable. I further conclude that, by the Article 28 automatic renewal mechanism, the Contract renewed itself for 2012.

Procedural Arbitrability

The County argues that the grievance should be dismissed because it was not timely filed at step 1 of the grievance procedure. In its view, the grievance should have been filed within 10 working days of the HR Coordinator's March 15, 2011 letter informing the Union that it did not intend to extend the contract. The County denied the grievance, in part, based on timeliness as described in its August 11, 2011 letter. The Union in turn argues that the grievance is timely because the contract violation will not occur until January 1, 2012, when the existing Contract expires and the renewed 2012 contract should, in the Union's view, become effective.

Given the facts of this case, I conclude that the County's July 18, 2011 letter was the first unequivocal statement by the County that it would not recognize a renewed Contract for 2012. The grievance was filed within 10 days of the July 18, 2011 letter. Therefore, I conclude that the grievance is timely.

Merits

This case turns on the interplay between two provisions of Article 28. Paragraph A provides that the Contract will "renew itself" for a one-year period beginning at the end of the current Contract term, "unless either party pursuant to this article has notified the other party in writing that it desires to alter or amend this Agreement at the end of the contract period." Paragraph B in turn provides that "[e]ither party wishing to reopen the contract shall in the last year of the Agreement on or about March 1, notify the other party of its intent to reopen negotiations." It is clear to me that the "on or about March 1" language in Paragraph B is the timeframe for which the notification made "pursuant to this article" referred to in Paragraph A must occur. Paragraph A and Paragraph B constitute the entirety of Article 28 and a reference to "this Article" in either paragraph necessarily incorporates the provisions of the other paragraph. I also conclude that the "alter and amend" language in Paragraph A is equivalent to the "reopen negotiations" language in Paragraph B.

Article 28's provisions provide for a renewed Contract in the face of inaction by the Parties. There must be an action by one of the Parties that would prevent the automatic operation of Article 28's renewal provisions creating a Contract for 2012. Specifically, to avoid an automatic renewal for one year, the Contract requires written notification of intent to reopen, for the purpose of altering or amending the Contract, on or about March 1 in the last year of the Contract.

I disagree with the Union's contention that March 1 is the deadline by which action must be taken to avoid renewal. The qualifying language "on or about" compels the conclusion that March 1 is not itself the deadline. Rather, "on or about March 1" is the reopener notification timeframe. The use of that phrase, without further evidence of what the parties' meant by that language, does not permit me to find a "deadline" of March 1. The Union's reading would require a change of the "on or about" language to mean "on or before," or to simply eliminate the "on or about" language altogether to create a March 1 deadline. If the Parties intended such a deadline with such a significant consequence, they would not have used the ambiguous "on or about" language. Thus, the fact that no action was taken by March 1, 2011 does not trigger the renewal.

Nevertheless, I do not agree with the County's position that past practice strips Article 28 of its requirement that the notification be timely and written. The record shows that the Parties have a mixed history of complying with the Article 28 reopener notification provision. The Union representative testified that he always stopped by the HR Coordinator's office on or about March 1 to orally request the reopener of the Contract and obtain agreement to waive the written notification requirement. The HR Coordinator testified that it was more common for the Union to orally request to reopen the Contract in the summer of the last year of the Contract, consistent with the reopener dates for the other County units. Documents in the record establish that 1) on February 21, 2001¹ the Union provided a written reopener notice in preparation to bargain the 2002-2004 Contract, 2) on February 18, 2004,² the Union provided a written reopener in preparation to bargain the 2005-2007 Contract, 3) no Party provided any written reopener notification in preparation to bargain the 2008-2009 Contract, and 4) on May 4, 2009 the County provided a written reopener in preparation for bargaining the current 2010-2011 Contract. The Union provided timely written reopener notifications on two out of four occasions and, by their conduct in bargaining successor Contracts, waived the requirement on the two other occasions. This is the first occasion where one Party has sought to enforce the renewal provision. Given this background, absent waiver by the Parties, Article 28 requires written reopener notification "on or about March 1."

The only written communication that could arguably serve as timely notice of intent to reopen the Contract is the March 15, 2011 e-mail sent by the County informing the Union that it would not agree to enter negotiations to extend the Contract. However, the e-mail only refers to the County's refusal to enter negotiations to extend the Contract. Extending the Contract involves not altering or amending the terms of the Contract for an additional period of time. Therefore, I do not find that the March 15, 2011 e-mail served as a notice under Article 28 to reopen the Contract sufficient to stave off a one year renewal. The next written communications did not occur until July 2011. No reasonable interpretation of "on or about March 1" would encompass communications sent in July. Therefore, I conclude that neither Party notified the other in writing of its intent to reopen the Contract to "alter or amend" the Contract at the end of its current term "on or about March 1" of 2011, the last year of the Contract and that the Parties did not waive the notification requirement.

The County conveyed its position during the meetings on March 31, 2011 and April 27, 2011 that it viewed all County collective bargaining agreements, except that for the sheriff's deputies, as expiring at the end of 2011. The content of those communications could be interpreted as a notice of intent to reopen the Contract for purposes of altering or amending the Contract to remove all provisions that are inconsistent with Act 10. However, those communications were oral and there was no corresponding conduct by the Union that would indicate agreement to waive the written notification requirement.

¹ The identities of the Union, the Union representative, and the HR Coordinator were different than in the instant dispute. However, the relevant Article 28 language with the March 1 reopener was the same.

² The identities of the Union, Union representative, and the HR Coordinator at this time and going are the same as in the relevant timeframe for this matter.

The Article 28 renewal mechanism is automatically activated on or about March 1 of the last year of the Contract and continues towards the consequence of an automatic one year renewal. Because I find that neither Party took action to stop the renewal mechanism on or about March 1, 2011, by operation of Article 28, the Contract renewed itself for 2012.

Under normal circumstances, the analysis would end here with the issuance of an award requiring the Parties to renew the Contract through 2012 with the exact terms of the existing Contract. However, given the external legal factors related to public sector collective bargaining in Wisconsin, the County has asked me to decide whether the County would violate Act 10 by honoring the renewed Contract for 2012. The County argues that the relevant date for purposes of applying Act 10 to the Contract is January 1, 2012, when the renewed Contract takes effect and that Act 10 prohibits the Parties from renewing the Contract after June 29, 2011, the effective date of Act 10, and that the Arbitrator likewise lacks authority to issue an award requiring renewal after that date. The Union in turns argues that the effect of Act 10 is irrelevant because the Contract renewed itself in March 2011, prior to the implementation of Act 10.

As arbitrator, my role is to interpret the Contract. Doing so leads me to the result that the Contract automatically renewed itself for 2012. To deviate from this conclusion by applying external law potentially would require me to violate Article 11's admonition not to "modify, add to or delete from the express terms" of the Contract. The Parties cite no provision of the Contract that would authorize me to apply external law, including Act 10, and the Parties did not clearly stipulate that I should apply external law in this award. Even had they done so, the arguments submitted on those legal issues are insufficient for me to draw legal conclusions and I decline to do so on the existing record, including deciding what effect, if any, Act 10 has on this award. However, the Parties stipulated that I should retain jurisdiction over the award for 60 days. The award may be supplemented by applying external law if the Parties so stipulate and supplement their arguments on those issues.

CONCLUSION

For the foregoing reasons, Article 28 of the Contract provides that the Contract renewed itself through December 31, 2012. I will retain jurisdiction over this award for 60 days pursuant to the Parties' stipulation.

Dated at Madison, Wisconsin, this 30th day of December, 2011.

Matthew Greer /s/

Matthew Greer, Arbitrator

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