BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MARINETTE COUNTY PROFESSIONAL EMPLOYEES UNION, LOCAL 1752-A, AFSCME, AFL-CIO

and

MARINETTE COUNTY

Case 205
No. 71280
MA-15116

(Contract Renewal Grievance)

Appearances:

Mr. John Spiegelhoff, Staff Representative, 1105 East Ninth Street, Merrill, Wisconsin, appearing on behalf of Marinette County Professional Employees Union, Local 1752-A, AFSCME, AFL-CIO.

Ms. Gale Mattison, Corporation Counsel, Marinette County, 1926 Hall Avenue, Marinette, Wisconsin, appearing on behalf of Marinette County.

ARBITRATION AWARD

Marinette County Professional Employees Union, Local 1752-A, AFSCME, AFL-CIO, hereinafter "Union" and Marinette County, hereinafter "County," requested that the Wisconsin Employment Relations Commission provide a panel of arbitrators from which they would select a sole arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot of the Commission's staff was selected. The hearing was held before the undersigned on March 28, 2012, in Marinette, Wisconsin. The hearing was not transcribed. The parties submitted briefs and reply briefs, the last of which was received by May 14, 2012, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute, but were unable to agree as to the substantive issues.

The Union frames the substantive issues as:

> Did the County violate the Collective Bargaining Agreement when it refused to recognize that the 2009-2011 contract continued in full force and effect for calendar year 2012 due to the failure of the parties giving written notice requesting changes prior to June 1, 2011? If so, what is the appropriate remedy?

The County frames the substantive issues as:

> Under Article 31.01, does the January 1, 2009 through December 31, 2011 Collective Bargaining Agreement continue for another year in full force and effect past December 31, 2011? If so, what is the appropriate remedy?

Having considered the evidence and arguments of the parties, I frame the substantive issues as:

> Was the 2009-2011 Collective Bargaining Agreement between the County and the Union automatically renewed for calendar year 2012 pursuant to Article 31.01?

RELEVANT CONTRACT LANGUAGE

. . .

ARTICLE 24 – GRIEVANCE PROCEDURE

24.04 Arbitration Procedure

A. If the grievance is not satisfactorily settled by the above steps, it may be taken to arbitration utilizing the Wisconsin Employment Relations Commission (WERC). The Union and county shall first attempt to voluntarily agree upon an Arbitrator. In the event they are unable to agree, the Arbitrator shall be selected as follows: The parties shall select three (3) names from a panel of staff arbitrators from the WERC, and one (1) name shall be arbitrarily withdrawn leaving a panel of five (5) names. The parties shall flip a coin to determine who goes first and alternately strike names until one (1) is left. The WERC staff arbitrator whose name remains shall be the arbitrator who settles the dispute. The party losing the coin flip shall notify the WERC in writing of the staff Arbitrator selected by the parties.

B. After the Arbitrator has been selected, he/she shall hear the evidence of both parties and render a decision which shall be final and binding upon

both parties. The Arbitrator shall have no authority to add to or subtract from or to modify this Agreement in any way. All fees of the Arbitrator and Arbitration Reporter shall be divided equally between the parties. Each party shall bear the cost of preparing and presenting its own case. If a Court Reporter is requested, the party making the request shall bear the cost. In cases where the Arbitrator requests that a Court Reporter be present or when both parties requests (sic) a copy of the transcript, the parties shall equally share the costs.

C. If only one party requests a court reporter and transcript and as a result the Arbitrator requests a copy of the transcript, the other party shall not bear any cost for the Arbitrator's copy.

. . .

ARTICLE 31 – DURATION

31.01 This agreement shall be effective January 1, 2009 through December 31, 2011 shall continue in full force and effect from year to year unless either party gives written notice to the other requesting changes prior to June 1, 2011.

BACKGROUND AND FACTS

The grievance is filed on behalf of the entire bargaining unit. At all times relevant herein, the Union President was Michelle Brownson, the AFSCME Staff Representative was Randall Etten and the County Human Resources Director was Jennifer Holtger.

On February 11, 2011, the Wisconsin Governor introduced a budget repair bill that included among other provisions, one which would eliminate nearly all collective bargaining rights for most public sector employees. Throughout March, April and May, there were protests, litigation and turmoil leaving both management and labor uncertain as to how to proceed. Ultimately, Act 10 was published and became law on June 29, 2011 thereby extinguishing collective bargaining rights for non-protective public employees "on the day the agreement expires or is terminated, extended, modified, or renewed, whichever occurs first."

It was during this time of confusion that the Union and County began exchanging communication regarding what, if anything would follow the expiration of the 2009-2011 agreement. The Union set off the dialogue when Etten telephoned Holtger on March 11, 2011 leaving a voice mail message. Etten inquired as to whether the County was interested in sitting down to "meet and confer" about "sending the labor agreement out a couple years." Etten represented that a "wage freeze" and "WRS concessions" would be possible. Holtger responded to Etten's voice mail with an email on March 14, 2012, stating that, "Marinette County is not in a position to discuss collective bargaining at this time. Thank you."

Shortly thereafter, the Union leadership met and concluded it would be beneficial to meet with the County. Brownson first telephoned Holtger and asked to meet. Holtger responded, explaining that the County was not interested. Brownson then telephoned the County Personnel and Veterans Services Chair and asked to be placed on the agenda. Brownson's request was untimely and the issue was scheduled to be placed on the April agenda. In advance of the April meeting, Brownson informed Holtger that the Union had developed a new strategy and no longer wanted to be placed on the agenda. Holtger confirmed the content of her conversation with Brownson in an email dated April 13:

> Per our discussion today, based on new advice from your Business Rep, the Profession (sic) Union no longer wished to be placed on the Personnel agenda. Please contact me with any changes. Thanks.

The next communication relevant to this issue between the parties occurred on July 18, 2011 when Etten informed Holtger that the Union believed the labor agreement had automatically renewed itself. Etten's letter read as follows:

> Dear Ms. Holtger:
>
> I am writing on behalf of Local 1752-A and an issue relating to the Collective Bargaining Agreement (CBA) between Marinette County and this local. I have had the opportunity to review the CBA specifically relating to Article 31 – Duration and Execution.
>
> Article 31 calls for an automatic renew of the CBA for an additional one year period unless either party notifies the other party in writing that they desire to alter or amend the Agreement by June 1st in the last year of the existing Agreement. It is my understanding that neither party requested to reopen the Agreement dated January 1, 2009-December 31, 2011 prior to June 1st, 2011, and as such, according to contractual language contained in Article 31, the Agreement is extended under the same terms and conditions through December 31, 2012.
>
> Local 1752-A is ready to sign a new CBA with Marinette County for the period January 1, 2012 to December 31, 2012 once the County has drafted such a document.
>
> Sincerely,
>
> /s/
> Randall W. Etten
> Staff Representative
> AFSCME Wisconsin Council 40

The County disagreed with Etten's conclusion and on August 23, 2011 sent Etten an email stating "please be advised the County declines your invitation to extend the agreements." The Union filed a grievance on September 5, 2011, asserting a violation of Article 31. The grievance contended that:

> Article 31 of the the (sic) Collective Bargaining Agreement (CBA) calls for an automatic renewal of the CBA if neither party notifies the other party in writing that they desire to alter or amend the CBA by June 1st in the last year of the agreement. Neither party requested to reopen the contract prior to June 1st, therefore the CBA is mutually extended for an additional year.

The remedy the Union sought was a one year extension of the labor agreement. The County denied the grievance and the matter proceeded to arbitration.

ARGUMENTS OF THE PARTIES

Union

The Union's framing of the issue defines the substantive question before the Arbitrator. Since neither party gave written notice to the other requesting changes prior to June 1, 2011 the labor agreement renewed itself, and therefore the grievance should be sustained.

The language of Article 31 is clear, unambiguous, and must be enforced. It is elementary in contract interpretation that clear and unambiguous contractual language must be enforced since it reflects the parties' true intent:

> There is no more fundamental principle in arbitration than that which requires the plain meaning of clear and unambiguous contract language to be enforced and upheld. Sealy Mattress Co., 99 LA 1020, 1024 (Heakin, 1994). An Arbitrator cannot ignore clear-cut contractual language, and may not legislate new language, since to do so would usurp the role of the labor organization and employer. Elkouri & Elkouri, *How Arbitration Works*, (BNA, 5th Ed. 1997) p. 482 (citing Arbitrator Whitney in Clean Converall Supply Co., 47 LA 272, 277 (1996).

The parties have a long history of bargaining successor agreements and both parties knew the importance of the reopener date. The parties negotiated and modified Article 31 during the last round of bargaining. Previously, written notice to bargain was due by August 1. That date was moved up to June 1. Had the County wanted verbal notice to satisfy the reopener deadline date, they could have proposed that, but they did not. It is undisputed that neither party forwarded written notification of their intent to bargain a successor agreement to the 2009-2011 contract by June 1, 2011. Given this, the existing contract should continue in full force and effect for an additional year.

It is true that the parties have mutually waived the written notification requirement and verbally agreed to a different date to commence bargaining. Any mutual waiver of the written notification requirement contained in Article 31 is not transferrable and does not prohibit a party from enforcing the language of the contract.

The WERC and National Labor Relations Board have consistently ruled that automatic extension of a collective bargaining agreement is appropriate when parties fail to meet negotiating timelines. Se-Ma-No Electric Cooperative, 284 NLRB No. 109 (1987); Anchorage Laundry and Drycleaning Association, 216 NLRB No. 22 (1975); Chetek School District, Dec. No. 22872-B (Honeyman, 1/86), aff'd Dec. No. 22872-C (WERC, 3/86).

The Union intentionally did not act in a manner that would fulfill the reopener requirement of Article 31. Etten was careful to never ask the County to "reopen" the labor agreement and instead used terms such as "meet and confer." At no time did Etten agree to waive the clear written notice requirement. Additionally, he did not send any written documentation to the County which would satisfy the reopener requirements of Article 31. Similarly, Brownson did not send any written documentation to the County and ultimately declined to meet with the County Personnel Committee. Etten explained to Brownson and the entire membership that the labor agreement would roll over if the County did not reopen the contract by June 1. Moreover, as Arbitrator Matthew Greer concluded in Price County Professionals, MA-15085 (Greer, 12/30/11), oral communications between the parties do not satisfy reopener provisions:

> The County conveyed its position during the meeting on March 31, 2011 and April 27, 2011 that it viewed all County collective bargaining agreements, except 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 the purpose 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.

County

The collective bargaining agreement between the Union and the County expired on December 31, 2011. State statute prohibits its continuation and the grievance should be denied.

The parties have a binding past practice of not strictly adhering to the formalities set forth in the labor agreement. Not only have they verbally communicated their intent to enter into negotiations and extend labor agreements, but they have also bargained over the successor agreement in the absence of any written or verbal notification. In 2005, then Staff Representative Dennis O'Brien sent the County a letter five days later than the labor agreement required and proposed a joint session for an "...initial exchange..." and even though O'Brien's

notice was late, the parties still bargained the 2006-2008 agreement. Similarly, there is no record of any written correspondence from either side opening bargaining for the 2009-2011 labor agreement, but a successor labor agreement exists.

County Human Resources Director Jennifer Holtger testified that she and O'Brien frequently waived time lines and addressed issues informally. Holtger stated that she believes the parties have a history of bargaining in good faith and she would never consider holding the Union to terms and conditions of an expired labor agreement due to lack of written notice.

Aside from the parties' past practice, the Union asked to re-open the labor agreement before December 31, 2011. On March 11, 2011, Staff Representative Randy Etten telephoned and left a message for Holtger asking that they negotiate an agreement for a period of one or two years beyond December 31, 2011. Etten offered a wage freeze and concessions in WRS and health insurance contributions. Etten clearly requested to change the terms of the labor agreement and did so consistent with past practice.

The Union made a second request to open negotiations for the successor agreement. The Union asked to be placed on the Personnel and Veterans Services Agenda to bargain an extension. The County was unable to add it to the April agenda, but agreed to add the item to the May agenda. Thereafter, the Union strategically withdrew its request to speak to the County believing that by not meeting or putting something in writing; it was preserving the continuation of the labor agreement. Holtger confirmed in writing the Union's desire to negotiate changes.

Article 31 states that the labor agreement will "…continue in full force…" The agreement does not describe this as either renewal or extension. Wisconsin Act 10 eliminated collective bargaining rights for everything except wages on the day the agreement expires or is terminated, extended, modified or renewed. Since the agreement "continued" and did so effective January 1, 2012 then, Act 10 prohibits its recognition.

Union in Reply

Neither of the parties provided written notification to modify the existing collective bargaining agreement by June 1 and therefore, the contact continues in full force for an additional year. While it is true Etten and Brownson communicated with the County regarding extending the 2008-2010 labor agreement, at no time did they do so in writing. The contract language mandates two things that must occur in order for the contract to not continue in full force for another year; 1) written notice by one party requesting changes; and 2) this written request must be made by June 1st. Lacking this, it is as if the parties put pen to paper and signed a continuation of the existing contract for another year.

The County's email stating that "Marinette County is not in a position to discuss collective bargaining at this time" does not satisfy the Article 31 requirement and cannot be viewed to have triggered opening the contract. This email is better characterized as the

opposite of a reopener since it communicated that the County did not want to talk to the Union about the contract.

The Union did not waive any rights or the contractual language of Article 31 when it verbally communicated with the County in March 2012. Waiver is the voluntary intentional relinquishment of a known right. In 2002, O'Brien timely notified Holtger in writing of the Union's intent to bargain a successor agreement. In 2005, O'Brien sent Holtger written notice four days late and the County waived its right to continue the agreement in full force. In bargaining the 2009-2011 agreement, although neither party sent written notification, a successor agreement was signed evidencing mutual intent to waive Article 31. While one or both of the parties has elected to waive the written date specific notification, those actions do not relinquish or abandon the requirements of Article 31.

Act 10 did not take effect until June 29th. Prior to that date, public sector unions maintained the capacity and right to enter into binding agreements with their employers. When neither the County nor Union gave the other party notice by June 1 to reopen the contract, their inaction evinced mutual agreement to 2012. This agreement occurred one full month before Act 10, specifically as of June 2, 2012, and therefore it is legally binding and enforceable.

Given the record evidence, the Arbitrator must find that the parties have a legally binding contract for 2012.

<u>County in Reply</u>

The County responds to two arguments presented by the Union.

The Union and County have a practice of addressing Union issues, including agreements, absent timely written notice. From 2002 through the present, in only one instance was the term "reopen" used and that was in 2002. Since then, neither side offered timely written notice to the other side therefore the parties have a history and practice of waiving time lines and addressing bargaining issues verbally.

The Union misstates the language of the labor agreement. Nowhere in Section 31.01 does the word "reopen" appear. The Union attempts to contrast the word "reopen" with the word "extend," yet the common meaning of extension is "...an increase in length of time; specifically: an increase in time allowed under agreement or concession." The Union's voice mail of March 11 and the County's response on March 14 satisfy the notice provision of the Agreement.

The cases cited by the Union all address the issue of timely notice which is not at issue in this case. It is also interesting that the Union does not view Etten's request to "extend" the labor agreement was not a request to reopen, renew or continue the agreement even though the cited cases support the "automatic extension..."

The County and Union have a practice of verbal notification, waiver and negotiation. The Union noticed the County well before June 1 that it wished to change the terms and conditions of the existing agreement. Based on the uncertainty of the law, the County declined to engage in bargaining an extension, renewal or new agreement.

For the reasons cited in the County's brief and the evidence presented at hearing, the County respectfully requests that the Arbitrator dismiss the grievance.

DISCUSSION

The issue in this case is whether the contract automatically renewed itself.

I start with the contract clause. Section 31.01 provides for the automatic renewal of the labor agreement if certain conditions are met. Those conditions include: 1) written notice to the other side; 2) that the notice must be offered before June 1, 2011; and 3) that the notice must request changes to the labor agreement. This language is clear and unambiguous and, on its face, negates any need to rely on extrinsic evidence to ascertain its meaning.

It is undisputed that neither the County nor the Union gave the other party written notice either before or after June 1, 2011 that either wanted to begin bargaining or change the terms of the labor agreement. Lacking this notice, the Union's position that the contract automatically renewed itself and therefore, is in full force and effect, is persuasive.

The County argues that that the parties' communications exchanged before June 1, albeit not written, satisfies the notice requirements of Article 31.01 and as such, effectively negate the automatic renewal of the agreement. Moreover, the County maintains that the parties have a practice of not complying with the formalities of the collective bargaining agreement, including the written notification, and therefore it was not required in this instance.

There is no question that the Union on multiple occasions prior to June 1 communicated to the County that it desired to prolong its contractual relationship beyond the term of the 2009-2011 labor agreement. Etten asked to "send out" [into future years] the contract with possible modifications in the areas of retirement and a wage freeze. Brownson's verbal exchanges with Holtger and the Personnel Committee Chair similarly informed the County of the Union's desire to discuss a successor to the 2009-2011 contract. These communications occurred prior to June 1 and conveyed the Union's willingness to modify the terms of the labor agreement in exchange for adding time to the current labor agreement, but they were not in writing. The question therefore is, whether the parties have amended the terms of the labor agreement by their conduct.

The majority rule is that when custom and practice conflicts with the clear language of the collective bargaining agreement, the language of the agreement governs since it is the best evidence of the parties' intent. Bornstein, Gosline, & Greenbaum, *Labor and Employment Arbitration,* 2nd (2002) p.10-24. To ignore clear contract language requires convincing proof

that the parties mutually agreed to amend the contract. As Arbitrator Platt stated in Gibson Refrigerator Co. 17 LA 313, 318 (Platt, 9/14/1951),

> While, to be sure, parties to a contract may modify it by a later agreement, the existence of which is to be deduced from their course of conduct, the conduct relied upon to show such modification must be unequivocal and the terms of the modification must be definite, certain, and intentional.

The County maintains the existence of a binding past practice of not following the terms of section 31.01 of the labor agreement. The parties' actions in preparation for bargaining their last three labor agreements ignored, waived, and complied with the language of 31.01. Up until the 2005-2008 labor agreement, Section 31.01 required written notice before August 1 in order to make changes to the agreement. In preparation for the 2002-2005 agreement, the evidence establishes that the Union fulfilled the written terms of 31.01 when it sent a letter to the County on July 21, 2002 indicating a desire to "reopen the Agreement." [1]

For the 2005-2008 agreement, the Union gave written notice to the County, but the letter was dated four days after the August 1 due date and received by the County even later. The County did not object or take the position that the labor agreement automatically renewed and the parties negotiated and reached agreement on new terms and conditions including changing the date from August 1 to June 1 in Section 31.01. Neither the Union nor the County provided written notice to the other party prior to June 1 in preparation for the 2009-2011 agreement. Thus, for the 2002-2005 agreement there was compliance with 31.01; for the 2005-2008 agreement the parties waived 31.01; and 31.01 was ignored for the 2009-2011 agreement. The parties' course of conduct varied and does not amount to a binding past practice. Lacking consistency and mutuality, there is insufficient proof to conclude that the labor agreement was modified.

Bearing on this conclusion is the parties' bargaining history. During negotiations for the 2005-2008 labor agreement, the parties discussed and modified the language of Section 31.01. Holtger testified that the date was changed so the parties could "jump start" the negotiations. The record is silent as to whether the written notice condition was discussed, but had the parties wanted to allow oral communications to satisfy the notice requirement contained in 31.01, it is reasonable to presume that they would have made such change when they changed the due date from August 1 to June 1.

Finally, the County points out that Act 10 eliminates collective bargaining rights for everything except wages on the day that the collective bargaining agreement is terminated, extended, modified, or renewed. During the period of time when the law was in flux, municipal employers and unions weighed the risks as to whether the law would ultimately be implemented with some reaching voluntary agreements and others taking a "wait and see"

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[1] It is clear from this record that the County and Union have had a good working relationship premised on regular communication and good will.

approach. The current state of the law recognizes both approaches as lawful. See Richland Center (Utilities), Dec. No. 33281-B (WERC, 6/12). These parties negotiated a date specific – June 1 – whereby if neither side submitted, in writing, proposed changes to the labor agreement, then the current would continue for an additional year. The parties failure to act by the June 1 date extended the labor agreement and since this occurred in advance of the Act 10 effective date, I conclude that the 2009-2011 collective bargaining agreement was automatically extended through December 31, 2012.[2]

AWARD

1. Yes, the 2009-2011 Collective Bargaining Agreement between the County and the Union automatically renewed for calendar year 2012 pursuant to Article 31.01.

2. The grievance is sustained.

Dated at Rhinelander, Wisconsin, this 10th day of August, 2012.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

[2] Neither of the parties found there to be any ambiguity in the portion of Section 31.01 which reads, "from year to year unless either party gives written notice to the other requesting changes prior to June 1, 2011." In that the remedy sought by the Union was a one year extension and not an attempt to define "year to year," I decline to address that portion of Section 31.01.

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