

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MILWAUKEE COUNTY PROFESSIONAL FIRE FIGHTERS' ASSOCIATION,
LOCAL 1072, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO**

and

MILWAUKEE COUNTY

Case 794
No. 71746
MA-15201

(Paoletti/Wojczulis Grievance)

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Case 795
No. 71747
MA-15202

(Doyne Grievance)

...

Case 796
No. 71748
MA-15203

(Wendt Grievance)

Appearances:

Mr. Patrick Kilbane, Field Service Representative, International Association of Fire Fighters, 6847 East County Road N, Milton, Wisconsin 53563, on behalf of the Union.

Attorney Molly J. Zillig, Assistant County Corporation Counsel, Milwaukee County Courthouse, 901 North 9th Street, Room 303, Milwaukee, Wisconsin 53233, on behalf of the County.

ARBITRATION AWARD

At all times pertinent hereto, Milwaukee Professional Fire Fighters' Association, Local 1072, IAFF (herein the Union) and Milwaukee County (herein the County) were parties to a collective bargaining agreement dated March 14, 2012 and covering the period from January 1, 2009 through December 31, 2011. On September 7, 2012, the Union filed requests with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the grievances files by Fire Fighters Jayson Paoletti and Robert Wojczulis (MA-15201), Kevin Doyne (MA-15202) and Henry Wendt (MA-15203). The Paoletti/Wojczulis grievance and Wendt grievance related to the County's implementation of an interest arbitration award issued by Arbitrator Thomas Yeager on January 18, 2012, resulting in the current collective bargaining agreement. The Doyne grievance related to the County's refusal to pay out paid time off the Grievant was allegedly unable to use during the year in which it accrued due to temporary job assignments and minimum staffing issues. The undersigned was appointed to arbitrate the dispute. The grievances were consolidated for hearing and a hearing was conducted on November 28, 2012. The proceedings were not transcribed. The parties submitted principal briefs on January 28, 2013, and the Union submitted reply briefs on February 14, 2013, whereupon the record was closed.

ISSUES

The parties stipulated to the following statement of the issues:

MA-15201: Did the County violate the labor agreement when it reduced the placement of Jayson Paoletti and Robert Wojczulis on the new wage step scale following the arbitration award for the 2009-2011 labor agreement?

If so, what is the appropriate remedy?

MA-15203 Did the County violate the labor agreement between the parties when it failed to compensate Henry Wendt with the back pay from the 2009-2011 contract between the parties?

If so, what is the appropriate remedy?

As to MA-15202, the parties proposed the following statements of the issues:

Union: Did the County violate the labor agreement between the parties when it failed to compensate Kevin Doyne per Airport Fire Department Policy for the time off benefits (vacation and Paid Off Days) he was denied use of during 2011?

If so, what is the appropriate remedy?

County: Did the County violate the labor agreement between the parties when it failed to compensate Kevin Doyne for the time off benefits (vacation and Paid Off Days) he was denied use of during 2011?

If so, what is the appropriate remedy?

The Arbitrator adopts the issues proposed by the County.

PERTINENT CONTRACT LANGUAGE

1.02 EMPLOYEE DEFINED

Wherever the term “employee” is used in this Agreement, it shall mean and include only those employees of Milwaukee County within the certified bargaining unit represented by the Association.

1.03 DURATION OF AGREEMENT

- (1) The provisions of this Agreement shall become effective on January 1, 2009, unless herein provided. Unless otherwise modified or extended by mutual agreement of the parties, the agreement shall expire on December 31, 2011.

1.04 MANAGEMENT RIGHTS

The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, resolutions, and executive orders. Included in this responsibility, but not limited thereto, is the right to determine the number, structure and location of departments and divisions; the kinds and number of services to be performed; the right to determine the number of positions and the classifications thereof to perform such service; the right to direct the work force; the right to establish qualifications for hire, to test and to hire, promote and retain employees; the right to transfer and assign employees, subject to existing practices and the terms of this Agreement; the right, subject to civil service procedures and the terms of this Agreement related thereto, to suspend, discharge, demote, or take other disciplinary action and the right to release employees from duties because of lack of work or lack of funds; the right to maintain efficiency of operations

by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policies, procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement.

However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purposes of discriminating against any employee or for the purpose of discrediting or weakening the Association.

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2.01 SALARY

- (1) Effective pay period 8 of 2009 (March 22, 2009), the wages of bargaining unit members shall be increased by two percent (2.00%).
- (2) Effective pay period 21 of 2009 (September 20, 2009), the wages of bargaining unit members shall be increased by two percent (2.00%).
- (3) Effective pay period 8 of 2010 (March 21, 2010), the wages of bargaining unit members shall be increased by two percent (2.00%).
- (4) Effective pay period 21 of 2010 (September 19, 2010), the wages of bargaining unit members shall be increased by two percent (2.00%).
- (5) Effective pay period 8 of 2011 (March 20, 2011), the wages of bargaining unit members shall be increased by two percent (2.00%).

- (6) Effective pay period 21 of 2011 (September 18, 2009), the wages of bargaining unit members shall be increased by two percent (2.00%).
- (7) Effective January 18, 2012, the number of steps in Pay Range 17B and Pay Range 18B shall be reduced from ten to eight. The Step 4 and Step 9 rates for Pay Ranges 17B and 18B shall be deleted. In both Pay Range 17B and 18B, Step 5 shall become Step 4, Step 6 shall become Step 5, Step 7 shall become Step 6, Step 8 shall become Step 7 and Step 10 shall become Step 8.

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2.07 OFF DAYS

- (1) Effective December 23, 2001, employees shall be granted 12 paid off days per year in lieu of holidays and personal days. Such days shall be selected by the employees on the basis of departmental seniority.

2.08 VACATION

- (1) Effective January 1, 2002, employees shall receive annual leave with pay to serve as vacation in accordance with the following schedule based upon years of continuous service, as defined in S.17.17,C.G.O.:

After 1 year	5 days
After 5 years	7 days
After 10 years	10 days
After 15 years	12 days
After 20 years	15 days

For purposes of this section, a vacation day shall mean one 24-hour shift.

2.14 TEMPORARY ASSIGNMENT

When assigned to perform duties of a higher classification, employees will be paid for all hours as though promoted to such classification, except Fire Fighter and Equipment Operator, when assigned as Fire Captain, shall be compensated at the top step of Pay Range 18B.

BACKGROUND AND FACTS

These three grievances arise out of separate fact situations, but were filed together and consolidated into one arbitration for purposes of hearing. There is no dispute in any of the cases that the matters are properly before the arbitrator. For ease of explication and understanding, the arbitrator will address each case individually one its distinct facts.

The Paoletti/Wojczulis grievance

Local 1072 and the County have been parties to a collective bargaining relationship for many years. Local 1072 represents a bargaining unit of fire fighters who provide fire suppression and emergency services at Mitchell International Airport in Milwaukee. Prior to the adoption of the 2009-2011 contract, the parties' agreement contained a ten step wage scale. New hires in the bargaining unit were placed on Step 1 of the wage scale and moved to each successive step annually on their anniversary dates until they reached Step 10. In negotiations for the 2009-2011 contract, the Union proposed language compressing the wage scale from ten steps to eight and eliminating Steps 4 and 9. Negotiations were unsuccessful and the parties went to interest arbitration. The final offer of the Union, which contained the proposed reduction of the wage scale, was awarded by Arbitrator Thomas Yeager on January 18, 2012 and was made retroactive to January 1, 2009.

Jayson Paoletti and Robert Wojczulis are members of the bargaining unit represented by Local 1072. At the time of Arbitrator Yeager's award, Paoletti was at Step 7 of Pay Range 17B and Wojczulis was at Step 8 of Pay Range 17B. In implementing the award, the County interpreted the language of Section 2.01, referenced above, to mean that employees moving through the pay grid would be reduced to a lower step on the grid, corresponding to where their former position was located on the new grid. Accordingly, Paoletti, who was at Step 7 on the ten step grid, was reduced to Step 6 on the new grid and Wojczulis, who was at Step 8 on the ten step grid, was reduced to Step 7 on the new grid. It is conceded that the new step placements of the Grievants corresponded to the rates of pay they were earning under the previous contract. The grievances contend that the Grievants should have remained at Steps 7 and 8 on the new grid, respectively, and should have received the corresponding increases in pay.

The Doyne grievance

Kevin Doyne is member of the bargaining unit represented by Local 1072. At all relevant times, Doyne was classified as a Fire Fighter/Heavy Equipment Operator. From August 2010 onward, Doyne was assigned for extended periods to the duties of Assistant Fire Chief. While working as a fire fighter, Doyne was paid at a rate of \$18.88 per hour. While assigned as Assistant Fire Chief, Doyne was paid at a rate of \$28.64 per hour. Due to staffing requirements and a desire to avoid overtime, Doyne was frequently denied the ability to take

off for requested vacation time and holidays during 2011. In years past, the Airport Director had authorized a year end payout of unused vacation and holidays to fire fighters with a year end balance to avoid rollover of paid time off into the new year and thereby avoid increased overtime costs. Doyne received a payout of unused paid leave from 2010 in January 2011, and was also permitted to carry over two weeks of unused vacation, pursuant to County policy. At the end of 2011, due largely to his denied requests, as well as his two weeks of carried over vacation, Doyne had a balance of 80.36 unused hours of vacation and 189.30 hours of Paid Off Days, for a total of 269.66 hours.

On January 10, 2012, Airport Director C. Barry Bateman made a request to the County Human Resources Department to pay out Doyne's accrued vacation and paid time off. In his request, Bateman cited the number of occasions when Doyne was not permitted to use his vacation and paid off days in 2011 due to his temporary assignment and other staffing needs and stated that the payout was needed to avoid carryover of the unused hours, which would be detrimental to airport operations. This was in keeping with Bateman's practice in previous years, when he had made similar requests on behalf of Doyne and others, which had been honored by the County. In this case, the request was denied, resulting in the instant grievance.

The Wendt grievance

Henry Wendt was employed by the County, and was a member of the bargaining unit represented by Local 1072 from June 29, 2009 until September 30, 2011. At the time of the arbitration hearing, he had left his employment with the County and was employed by the Wauwatosa Fire Department.

On January 18, 2012, as noted above, Arbitrator Thomas Yeager issued an interest arbitration award which formed the basis of the parties' 2009-2011 contract. Part of the award ordered back pay for bargaining unit members from the effective date of the agreement. Subsequent to the issuance of the award, the County calculated and paid the requisite back pay to the bargaining unit members and issued back pay checks to them, but made no payment to Wendt. When approached by the Union about the matter, the County stated that no payment was made because Wendt was not employed by the County as of the date of the award and, pursuant to a long-standing County policy, he was, therefore ineligible for back pay. The matter was grieved and proceeded to arbitration.

POSITIONS OF THE PARTIES

The Union

The Paoletti/Wojczulis grievance

The Union asserts that prior to the current contract there was a ten step wage grid for

bargaining unit members in the parties' contract. Newly hired employees were placed on the first step of the grid and moved to each successive step annually on their anniversary dates, thus reaching the top step at the beginning of their tenth year of employment. When the parties negotiated over the 2009-2011 contract, the Union proposed eliminating Steps 4 and 9 from the wage grid, reducing it from ten steps to eight. The express intent of the proposal was to bring the bargaining unit more into line with other comparable fire fighter units, which had fewer steps, and to reduce the number of years it would take bargaining unit members to reach the top step on the grid. This proposal was contained in the Union's final offer in interest arbitration, which was adopted by Arbitrator Yeager in his award on January 18, 2012. Because the change would not occur until after the issuance of the award, there would be no financial impact to the County during the term of the contract. There was no anticipation that the change would result in any member being reduced to a lower step on the grid.

The County made an unfounded assumption that the new grid would go into effect in 2011 when it did its costing. Even based upon that assumption, however, the County's costing is inaccurate as to the effect of the change. Further, it wrongly assumed that the Union intended that members would remain at the same wage rate as previously, meaning the Grievants would need to be placed at a lower step. This was never contemplated by the Union and the County made its assumption without consulting the Union about its intent.

The only reasonable application of the new wage grid is to place employees on the step that corresponds to their actual years of service, which would reflect the Union's intent. Thus, Paoletti should have been placed on Step 7, not reduced to Step 6, and Wojczulis should have been placed on Step 8, not reduced to Step 7.

The Doyne grievance

Kevin Doyne qualified as an "employee" under Sec. 1.02 of the 2009-2011 contract and was entitled to all its benefits. The County's action had the effect of denying Doyne full benefit of his off days and vacation days in 2011. Further, the County's reduction of the value of his off days based on pay he received while temporarily assigned to the position of Assistant Chief violated the clear language of Sec. 2.14. The County's reliance on management rights in making its decision ignores the language in the management rights clause that specifically makes it subject to other provisions in the contract.

The contract specifies the number of off days and vacation days a bargaining unit member is entitled to. Due to medical leave and staffing needs Doyne was unable to use all of his paid leave in 2011. To avoid the overtime problem created by allowing employees to carryover their unused leave, the Fire Chief instituted a policy of paying out unused leave at the end of the year, which worked successfully for years. The County accepted this policy for years, but in the past few years the County policy regarding unused leave changed several times with the changes in County administration. Under current policy, Fire Fighters are

entitled to carryover 40 hours of unused leave, even though they work 56 hour weeks, although the County's disposition of the grievance states that employees are entitled to carryover one half of their leave.

The only policy that makes sense is the Fire Chief's policy requiring all unused leave to be paid out at the end of the year. Instead, the County changed the rules without notice to the Union, thus frustrating the intent of the contract. The County's action has the further effect of weakening and discrediting the Union, because the unit members will lose faith in the Union if the County can abrogate the contract at will.

The Wendt grievance

There is no dispute that Henry Wendt was employed by the County during the term of the 2009-2011 contract and was a member of the bargaining unit, that the contract covered the entire period Wendt was employed, or that the Union's final offer, which awarded wage lifts for unit members in each year of the contract, was accepted by Arbitrator Yeager. The Union asserts, therefore, that there is no basis for denying back pay to Wendt.

The County based its decision on a claim of past practice. County Exhibit #1 outlines the claimed practice:

- (a) Retroactive wage adjustments shall apply to the following:
 - (i) employees on the payroll as of the date of implementation of the 2009-2011 contract (January 18, 2012).
 - (ii) former employees who have retired on or after January 1, 2009 and prior to the date of implementation of the 2009-2011 contract.
 - (iii) employees who are laid-off on or after January 1, 2009 and prior to the date of implementation of the 2009-2011 contract.
 - (iv) to the estates of those employees who have died while in the service of Milwaukee County on or after January 1, 2009 and prior to the date of implementation of the 2009-2011 contract.

The County's argument is flawed because it did not produce evidence supporting the existence of this practice. To be binding, a past practice must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. The evidence shows these elements do not exist.

Wendt testified that he was unaware of any practice, policy, or contract provision that would deny him back pay. Union President Dan Hareng testified to the same and only learned of the County's position after the fact from Director of Labor Relations Fred Bau. Hareng was unaware of any past instance when this policy was applied. County Comptroller Scott Manske testified that he had no knowledge of the Union being informed beforehand of the County's position and stated that County Exhibit #1 reflected notes of a meeting of which the Union was not informed to which it was not invited.

It is clear the Union was unaware of the claimed practice. Wendt was an employee during the term of the contract and a member of the bargaining unit. There is no contract provision excluding him from the wage increases in the contract. The management rights clause gives the County authority to make reasonable rules and regulations relating to personnel policies, procedures and practices, but only subject to other provisions of the contract. Further, it has a duty to meet with the Union and discuss any proposed rules prior to implementation. This did not occur. The County's claimed practice violates the terms of the contract by unilaterally excluding certain employees from the wage increases. All the groups of employees listed in the policy, like Wendt, were employees during the term of the contract. Like them, Wendt should be entitled to the retroactive wage increases awarded in the arbitration.

The County

The Paoletti/Wojczulis grievance

The County asserts that at the time of the interest arbitration award in January 2012, Wojczulis was at Step 8 and Paoletti was at Step 7. After the increases awarded in the arbitration, the wage grid was collapsed and two steps were eliminated. In that process, Step 8 became Step 7 and Step 7 became Step 6. Wojczulis and Paoletti, accordingly were likewise reduced to Steps 7 and 6, respectively, which corresponded to their wage rates prior to the award. On their anniversary dates they were properly advanced to Steps 8 and 7. No violation of the contract occurred.

The Doyne grievance

According to Comptroller Scott Manske, at the end of 2011, Doyne had 197.5 unused personal hours, which were lapsed and not paid out. This reduction was made according to the higher rate of pay Doyne received as Acting Assistant Chief. Although Doyne was paid for 224 unused hours after 2010, the payments were not approved by the Administration and the Airport had no authority to make them. Manske claimed that it had always been County policy that unused hours are lost at the end of the year.

For 2011, Doyne had a bank of 288 personal hours, based on his fire fighter pay rate of \$18.88/hour. While at the higher rate, Doyne earned \$28.64/hour, during which time he also used 146.5 hours of personal time and was paid at that rate. Based on his fire fighter rate, this equals 221.1 of his 288 hours, leaving 65.9 unused hours, which were lost. Likewise, Doyne had 80.6 hours of unused vacation in 2011. 40 hours were allowed to be carried over, per County policy, and the remaining 40.6 hours were reduced based on Doyne's higher temporary rate of pay and lapsed.

The Wendt grievance

Henry Wendt was employed by the County until his resignation on September 29, 2011. County Exhibit #1 is clear that back pay was only available to employees who were active employees after January 1, 2009 and who (1) were on the payroll on the date of the arbitration award; (2) retired prior to the date of the award; (3) were laid off prior to the award; or (4) who died prior to the award, in which case the payment was made to their estate. Due to his resignation, Wendt was not in any of the listed categories and was ineligible for back pay.

DISCUSSION

The Paoletti/Wojczulis grievance

The dispute between the parties in this grievance centers on the implementation of language in the interest arbitration award of January 18, 2012, which was based on the Union's Final Offer, and which formed the basis for the parties' 2009-2011 contract. Specifically, the Union proposed a compression of the wage grid for bargaining unit members from ten steps to eight, effective on the date of the award. At the time of the award, Jason Paoletti, whose date of hire was November 7, 2005, was at Step 7 and Robert Wojczulis, whose date of hire was May 14, 2004, was at Step 8. ¹ Because the award eliminated Steps 4 and 9, the County took the position that Fire Fighters moving through the grid would be reduced to lower steps corresponding to their pay rates prior to the award, resulting in Paoletti and Wojczulis being reduced to Steps 6 and 7, respectively. They were the only bargaining unit members to whom this reduction applied. The Union argues that its proposal was not intended to result in anyone receiving a Step reduction and that the award does not specify such. The Union further notes that this action violates the longstanding understanding of the parties that step movement occurs annually on an employee's anniversary date, as well as the intent of the Final Offer, which was to move bargaining unit members through the grid more quickly.

The County implemented the award by first applying the wage lifts for 2009-2011 to

¹ Robert Wojczulis died on May 13, 2012, subsequent to the interest arbitration award and filing of the grievance, but prior to the grievance arbitration hearing.

the ten steps existing in the previous contract for back pay and wage rate purposes, and then collapsing the grid and repositioning the members. Part of the County's rationale was based on a costing analysis it developed based on an assumption that the change would occur in July 2011, i.e., during the life of the 2009-2011 contract. Because the award was issued after the contract expired, however, this costing analysis was inaccurate and is not deemed relevant to the outcome of this grievance.

The question before me, then, is what is the proper way to view the application of the wage grid to the Grievants in the wake of the 2012 award? One way of looking at the equities is that the Grievants should have been left at the steps corresponding to their years of service, despite the removal of intermediate steps. This would have reflected step placement based on their actual years of service, but would have resulted in them receiving a jump in step for pay purposes in 2012, because the pay rates for the steps changed with the compression. Another approach, favored by the County, would have been to place them at the step corresponding to their pay rates under the previous contract, which would require them to work an additional year to get to the top of the grid.

The bottom line for me is that the scheme employed by the County treated Paoletti and Wojczulis differently than all other employees in the bargaining unit. There is no evidence in the record as to where the other employees in the unit were placed on the grid, but it is clear that the Grievants were the only two moved backward as a result of the change. The fact is that as of January 18, 2012, Paoletti was at Step 7 and Wojczulis was at Step 8 because of their years of service. There is no evidence that the parties intended to calculate step placement in any other way, so, despite the fact that it results in a jump in pay rate, the appropriate result was for the Grievants to have kept their step placement after the award and to have continued to advance annually, in keeping with the longstanding practice of equating step movement with years of service.

It is also significant that the Union's intent in seeking to reduce the number of steps in the wage scale was to shorten the time necessary for employees to reach the top step, which argument was apparently persuasive with Arbitrator Yeager. To move Paoletti and Wojczulis back on the wage grid, therefore, would increase the time necessary for them to reach the top step and would be contrary to the intent and effect of the interest arbitration award.

The Doyne grievance

Kevin Doyne was refused payment for his accrued personal days and vacation at the end of 2011. The County argues that the reason for this was twofold. First, the County asserts that per County policy unused paid off days are lapsed at the end of the year and employees may only carry over 40 hour of unused vacation. It also asserts that because Doyne took personal time and vacation while working at a higher rate while temporarily assigned as Assistant Chief, his personal days were reduced at an accelerated rate using his lower Fire

Fighter rate as the basis for the reduction, so that actually only 65.9 hours were lapsed, not the 269.66 hours claimed by the Union.

I note at the outset that the contract makes no provision for how unused vacation and paid off days are to be dealt with at the end of the contract year. Both parties seem to be in accord, however, that 40 hours has been the County wide standard carry over for unused vacation, although the Union argues that this is because 40 hours is the standard workweek for other County employees. Because Fire Fighters work a 56 hour average week, the Union argues that the standard should be 56 hours for this unit.

The evidence reveals a discrepancy regarding the practice for unused hours greater than 40. The County asserts that the policy has always been that unused hours are lapsed, but the record is clear that this has not been universally the case. In 2010, Doyne's unused hours which weren't carried over were paid out at the specific request of the Airport Administrator. The record also reveals that in 2010, Captain Victor Salbashian was paid out 192 hours of unused vacation and paid off days that were not used in 2009. In both cases, the Airport Director made requests to the County Human Resources Department to pay out these hours and the requests were granted. In both cases, as in the present instance, the Director's rationale was that paying out the unused time to avoid carry over would save the County costs in the future by reducing the need for overtime.

The foregoing instances rebut the County's argument that there is a standard policy of lapsing unused hours over 40. Further, while the County's solution would also have the effect of reducing overtime and thereby controlling costs, it would do so at the expense of the employee, who would lose his contractual leave benefit, largely due to circumstances beyond his control, inasmuch as his leave requests were frequently denied due to staffing requirements. In my view this is inequitable. Vacation and paid off days are bargained benefits and the contract does not stipulate that they must be used in the year earned or lost. Further, the fact that they have been paid out in the past refutes the contention that there was a lapsation policy of which the Union or employees should have been aware.

As to the appropriate balance, Section 2.14 of the contract provides that employees working temporarily in a higher classification shall be compensated accordingly. Thus, while working as Assistant Chief, Doyne was paid for time off at that rate. There is no language providing that the hours used are then to be reduced at the lower Fire Fighter rate. Further, there is no apparent history of this formula ever having been applied in the past. Doyne had a reasonable expectation, therefore, that his total leave would be reduced hour for hour regardless of the rate applying at any given time. I find, therefore, that the County's formula of reducing all of his vacation time and paid off days, including those used while working at a higher classification, by the lower rate is unreasonable, and that he is entitled to be paid out all of his unused leave for 2011, less a carry over of 40 hours, at the Fire Fighter rate.

The Wendt grievance

Henry Wendt worked as a Fire Fighter for the County between June 29, 2009 and September 30, 2011. During this time he was a member of the bargaining unit. By the time the January 18, 2012 award was issued, he had left his employment with the County and, on this basis, the County denied him back pay for the period he worked despite the fact that it occurred during the period covered by the 2009-2011 contract.

The County offered an exhibit and supporting testimony as to a practice to determine which employees were entitled to back pay upon settlement of a contract. A number of employee groups were provided for, including some who were not employed at the time of the award or settlement, such as those who died, were laid off, or who retired. Employees who resigned, however, were excluded.

The problem with the County's claimed practice is that there is no evidence that the Union either knew of it or accepted it. The scheme was apparently discussed at a meeting of County management officials to which the Union was not invited and of which it was unaware. The County Comptroller offered no evidence that the Union was made aware of the substance of the discussion, or that it knew of the plan until after the back pay was paid out and Wendt's exclusion was discovered. The County also offered no rational basis for excluding Wendt, although one supposes that it elected to treat him differently because a voluntary separation is qualitatively different than an involuntary one. I note, however, that a voluntary retirement is more like a voluntary quit than a layoff or death.

In my view, Wendt was working for the County during the period covered by the 2009-2011 contract. Had the contract been settled while he was still employed, he would have been entitled to back pay for the period that he worked. That the contract did not settle was not a matter within his control. The purpose of back pay is to put the employee in the same position he or she would have been had the contract settled earlier and reflects the actual wage the parties agreed, or arbitrator decided, was appropriate for the contract term. Since, but for the delay, Doyne would have received the higher rate while working for the County, I find no basis for denying him the benefit of that increase after the fact merely because he was no longer employed when the award was issued. This is especially so since it appears that this was a unilateral determination of the County, with no apparent supporting rationale, that was made without Union knowledge or support and is not part and parcel of the contract. I find, therefore, that Wendt is entitled to back pay at the appropriate rate for the entire period he was employed by the County.

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

AWARD

The County violated the labor agreement when it reduced the placement of Jayson Paoletti and Robert Wojczulis on the new wage step scale following the arbitration award for the 2009-2011 labor agreement. They are, therefore, to be deemed to have remained at their same level of Step 7 and Step 8 after January 18, 2012. Paoletti and the estate of Wojczulis are to be paid the back pay due them to make them whole.

The County violated the labor agreement between the parties when it failed to compensate Kevin Doyne for the time off benefits (vacation and Paid Off Days) he was denied use of during 2011. He is to be paid out for 229.66 hours of unused vacation and Paid Off Days for 2011 at his Fire Fighter rate, representing his outstanding balance less 40 hours of carried over leave.

The County violated the labor agreement between the parties when it failed to compensate Henry Wendt with the back pay from the 2009-2011 contract between the parties. He shall be paid back pay at the appropriate rate for all hours he worked during the term of the 2009-2011 contract.

Dated at Fond du Lac, Wisconsin, this 11th day of July, 2013.

John R. Emery /s/

John R. Emery, Arbitrator