BEFORE THE ARBITRATOR

In the Matter of the Petition of

CLARK COUNTY EMPLOYEES, LOCAL 546-A,
(SOCIAL SERVICES PARAPRPOFESSIONALS)
AFSCME, AFL-CIO

To Initiate Arbitration Between Said Petitioner and

CLARK COUNTY

Case 129
No. 66382
INT/ARB-10806
Decision No. 32091-A

Appearances:
Mr. Houston Parrish, AFSCME Council 40 Staff Representative, on behalf of the Union.
Weld, Riley, Prenn & Ricci, S.C., by Mr. Stephen L. Weld, on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "County," selected the undersigned to issue a final and binding award pursuant to Section 111.70(4)(cm)6 of the Municipal Employment Relations Act, herein "MERA." A hearing was held in Neillsville, Wisconsin, on August 17, 2007. The hearing was not transcribed and the parties subsequently filed briefs and reply briefs which were received by February 26, 2008.

Based upon the entire record and the arguments of the parties, I issue the following Award.

BACKGROUND

The Union represents for collective bargaining purposes a bargaining unit composed of paraprofessionals employed by the County's Department of Social Services.

The parties engaged in negotiations for a successor collective bargaining agreement, herein "agreement," to the prior agreement which expired on December 31, 2006, and the Union

filed an interest arbitration petition on October 19, 2006, with the Wisconsin Employment Relations Commission, herein "WERC." The WERC appointed Steve Morrison to serve as an investigator and to conduct an investigation pursuant to Section 111.70(4)(cm)6 of MERA, and the investigation was closed on May 8, 2007. The WERC on June 19, 2007, issued an Order appointing me as the Arbitrator.

The County throughout this time engaged in collective bargaining negotiations with several other unions who represent other County employees.

Arbitrator Howard S. Bellman was chosen as the interest arbitrator for the professional Social Workers unit and he by letter dated October 10, 2007, asked the WERC to determine whether he had authority under Section 111.70(4)(cm)6, Stats., to select the County's Final Offer which centered on the same drug and alcohol policy the County proposes here, herein "Policy," and which, like here, would not be contained in the body of the collective bargaining agreement. [1]

The WERC on December 19, 2007, ruled that Arbitrator Bellman had the authority to select the County's Final Offer. [2]

Arbitrator Bellman on December 28, 2007, ruled that the County's Policy should not be adopted and he selected the Union's Final Offer. [3]

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[1] Because of Arbitrator Bellman's request, this and other pending proceedings were held in abeyance pending the WERC's ruling.

[2] Clark County Employees Local 546-D (2) (Social Services Social Workers), AFSCME, AFL-CIO, and Clark County, Decision No. 32094-B (2007).

[3] Clark County and Clark County Employees Local 546-D(2) (Social Services Social Workers), Decision No. 32094-A (2007), herein "Bellman Award."

Arbitrator Raymond E. McAlpin in an interest arbitration proceeding involving the non-professional Courthouse employees ruled on January 7, 2008, that the County's Policy should be adopted and he selected the County's Final Offer. [4]

FINAL OFFERS

The parties' Final Offers as amended at the August 17, 2007, hearing are as follows:

1. The Union's Final Offer:

. . .

5. Article VI: Reclassification Language – Clarify language of Article VI by including the definition of a reclassification, consistent with the definition outlined in § 3.13 of the Clark County Personnel Policy, as "A change in position due to the addition or deletion of significant duties, skill requirements, and responsibilities and/or education or experience requirements." Add this definition as the second sentence of § 6.4 of the Collective Bargaining Agreement.

6. Increase the base rate for the lead Economic Support Specialist prior to the general wage increase by 10 cents per hour January 1, 2007 and an additional 20 cents January 1, 2008.

. . .

2. The County's Final Offer:

1. Appendix A – Salary Schedule – For employees hired after January 1, 2007, delete 6-month Step.

. . .

[4] AFSCME Local 546-B and Clark County, Decision No. 32092-A (2008), herein McAlpin Award."

3. Implement attached drug and alcohol testing policy. [5]

. . .

POSITIONS OF THE PARTIES

The Union asserts that the County has not offered a quid pro quo and has failed to meet its burden of proving that the status quo must be changed to include a drug testing policy; that the County's failure to apply its Policy to unrepresented employees is "inequitable"; that the County "cannot force employees to waive future bargaining rights" under its waiver provision; and that the comparables, which include Eau Claire and Marathon counties, "do not support the County's position." The Union also contends that I should follow Arbitrator Bellman's lead and reject the County's Policy; that the County is now asking me to "exceed the scope of § 111.70" by asking me to adopt a Policy which is not included within the agreement; that the County improperly has changed its Final Offer; that there is no legal support for the County's position; and that the County did not bargain the Policy in good faith.

It adds that the Company has failed "to show a compelling reason" to delete the six-month wage step for new employees; that the Union's proposal to define a reclassification in the contract provides "clarity"; that its requested wage increase for the lead Economic Support Specialist position is needed because it is "substantially behind the comparables"; and that the County can afford to grant that increase.

The County counters that its Final Offer should be selected because the Union's inclusion of Eau Claire and Marathon counties as proposed comparables is not appropriate; because the impact of drug and alcohol testing is a mandatory subject of bargaining; because its Policy is

[5] The County's Policy is attached to this Award as Appendix A.

"narrowly tailored" and is needed to address employee drug and alcohol use; and because it has offered an appropriate quid pro quo in exchange for its Policy even though one is not needed. The County adds that it is in the process of implementing a drug and alcohol policy for its non-represented employees; that the Union erroneously claims its proposed policy is to be a contractual provision when it is not; that the Union has refused to bargain and that I should follow Arbitrator McAlpin's lead and adopt the Policy.

It also argues that the Union has not offered a quid pro quo for its reclassification proposal which does not, in fact, represent the status quo; that the Union's request for a wage boost for the lead Economic Support Specialist is not justified "at this time" because County residents earn significantly less than many bargaining unit employees; that the County's offer already exceeds the cost of living; and that its proposal to abolish the six-month wage step for new hires should be adopted.

DISCUSSION

There are four issues in dispute: (1), the County's proposed Policy; (2), the County's proposal to delete the six-month wage step for new hires; (3), the Union's request to increase the lead Economic Support Specialist's wages by 10 cents on January 1, 2007, and an additional 20 cents on January 1, 2008; and (4), the Union's reclassification language. The County's Policy is the most significant issue.

Since the monetary issues involve very little cost, and since the County at the hearing agreed that they are inapplicable, the statutory criteria set forth in Section 111.70(4)(cm)7 relating to "Factor given greatest weight" and "Factor given greater weight" do not favor either party.

As for the "Other factors" to be considered under subdivision 7r, there is no dispute over the "lawful authority of the municipal employer"; or the "Stipulations of the parties"; or over the applicability of private sector wages, hours and conditions of employment to this dispute.

The CPI favors the County because both parties' Final Offers exceed the CPI, with the County's total package costing 4.35 percent and 4.42 percent over two years, and with the Union's total package costing 4.40 percent and 4.51 percent (County Exhibits 5-6). The financial ability of the County to meet the costs of any settlement has little weight because of the small monetary difference in the Final Offers, and overall compensation is not a factor.

As for external comparables, the parties have agreed to the following counties: Chippewa, Jackson, Lincoln, Monroe, Pierce, Polk, Taylor and Wood.

The parties disagree over Eau Claire and Marathon counties, with the Union proposing, and the County opposing, their inclusion.

The Union argues that Marathon and Eau Claire counties should be included because they have been included in two prior interest arbitration cases involving the County.[6] The County contends that the historical comparables have excluded those two counties and that arbitrators in the two cases relied upon by the Union erred when they stated that other arbitrators had previously included them.

The County is correct. Those arbitrators erred when they mistakenly stated that Marathon and Eau Claire counties had been previously included as external comparables when,

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[6] Clark County (Courthouse Non-Professionals), Decision No. 22200-A (Krinsky, 1985); Clark County and Clark County Social Services Employees Local 546-A, AFSCME, AFL-CIO, Decision No. 22202-A (Fogelberg, 1985).

in fact, they had not been. Accordingly, I find that Marathon and Eau Claire counties should not be included among the agreed-upon external comparables.

None of the external comparables have alcohol and drug policies within the four corners of their collective bargaining agreements (Union Exhibit 6), as all of them have unilaterally adopted substance abuse policies which exist outside of their collective bargaining agreements (County Exhibits 45-54).

The internal comparables consist of Local 546-D (2), the AFSCME Social Services Social Workers' professional unit which was the subject of the Bellman Award; Local 546-B, the AFSCME non-professional Courthouse unit which was the subject of the McAlpin Award; Local 546-D (1), the professional Courthouse unit which is slated for interest arbitration; Local 546, the AFSCME Highway Department unit; Local 662, the Teamsters' Health Care Center unit; and the WPPA Sheriff's Department unit.

Four of these internal comparables – i.e. Local 546-B, Local 546, Local 662 and the WPPA unit – are covered by the Policy or some variation of it.

Unfortunately, there is a gap in this record which goes to a central issue in dispute: Can an employer in an interest arbitration proceeding under Section 111.70(4)(cm)6, Stats., propose a drug and alcohol policy which is not referenced within a collective bargaining agreement and which may exist entirely outside the four corners of a collective bargaining agreement?

That was the question Arbitrator Bellman posed to the WERC in his October 10, 2007, letter which stated:

. . .

> My concern is that the Municipal Employment Relations Act at Section 111.70(4)(cm)6 provides interest arbitration for "any (deadlocked) dispute . . . over wages, hours and conditions of employment to be included in a new collective bargaining agreement;" and that the final offer selected by an arbitrator,

"shall be included into a written collective bargaining agreement." Thus, my question is whether my authority allows me to address a proposal for terms that are not to be so included. [7]

. . .

The WERC ruled he had the statutory authority to select the County's final offer by stating:

. . .

As the Arbitrator's inquiry notes, Sec. 111.70 (4)(cm) 6, Stats. Speaks in terms of interest arbitration over "wages, hours and conditions of employment to be included in a new collective bargaining agreement" and provides that the arbitrator's decision "shall be incorporated into a written collective bargaining agreement." The question before us is whether this statutory language is broad enough to encompass the content of work rules or policies which a party specifically references as part of its final offer but the text of which rule or policy will not be physically included in the bargaining agreement if the parties' final offer is selected.

A literal interpretation of the above-quoted statutory language could answer this question in the negative, such that the content of final offers would be restricted to proposals that in all respects would be physically included within the four corners of the contract. Under that interpretation, the proposed location of some portion of the proposal would govern over the content and context. Such an interpretation would be easy to enforce and comply with: in this instance, the County would either propose that the text of the specific drug and alcohol policy be included (sic) the contract or drop the proposal and adopt the policy as a work rule. However, we conclude that a result is not consistent with the dispute resolution policy that underlies Sec. 111.70 (4)(cm) interest arbitration or with the above-quoted statutory language. In our view, the content and context of the proposal should govern the question of access to interest arbitration, so long as some portion of the final offer will be "included" or "incorporated" into the new bargaining agreement if that final offer is selected. Where, as here, the parties are bargaining a new collective bargaining agreement and, as a part of that bargaining process, have unsuccessfully engaged in an effort to reach agreement on a policy or work rule the text of which will exist outside the physical confines of the collective bargaining agreement, an impasse/deadlock over such a policy or work

[7] Decision No. 32094-B, supra, at 4.

> rule can proceed to be resolved through the statutory interest arbitration, provided that the final offer (and thus the contract, if that final offer is selected) contains some language incorporating by reference the specific proposed policy or rule.
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> Here, the content of the proposal regards employee wages, hours and conditions of employment, the context is the bargaining of a new collective bargaining agreement, and the final offer itself contains at least some language that would be "incorporated" into the contract (the contract would "include" the language "Implement attached drug and alcohol testing policy"). (Emphasis added). Therefore, we conclude that the intent behind the statutory phrases "wages, hours and conditions of employment to be included in a new collective bargaining agreement" and "shall be incorporated into a written collective bargaining agreement" is honored and met.
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> Given all of the foregoing, we conclude that Arbitrator Bellman has the statutory authority to select the County's final offer and thus incorporate into the agreement the drug and alcohol policy referenced therein, even if the specific policy will exist outside the physical confines of the collective bargaining agreement, if Arbitrator Bellman concludes such is otherwise appropriate under the criteria in Sec. 111.70(4)(cm) 7, 7g and 7r. Stats. (Footnote citations omitted) [8]
>
> . . .

The WERC thus found that "the final offer itself contains at least some language that would be 'incorporated' into the contract (the contract would 'include' the language "Implement attached drug and alcohol testing policy"). (Emphasis in original). The WERC therefore apparently assumed that this latter language was to be contained in the parties' 2007-2008 agreement.

In fact, the County's Final Offer there, like its Final Offer here, does not state that it is to be "incorporated" or "included" within the four corners of the collective bargaining agreement.

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[8] Id. at 4-6.

It, instead, simply states what it does without referring to whether the disputed language "Implement attached drug and alcohol testing policy" is, or is not, to be included within the agreement.

Whether it is included or excluded is critical because the WERC ruled that Section 111.70(4)(cm) is satisfied "so long as some portion of the final offer will be 'included' or 'incorporated' into the new bargaining agreement if that final offer is selected," and provided that "the final offer (and thus the contract if that final offer is selected) contains some language incorporating by reference the specific proposed policy or rule." Id. at 3.

Hence, under its analysis, a proposal cannot be selected if it is not incorporated by reference in the agreement or unless it is "included" or "incorporated" in an agreement.

Arbitrator McAlpin apparently concluded that the County's policy will not be referenced, incorporated or included in the parties' contract because he ruled: "There is no reason not to include the policy which is clearly not to be considered part of the Collective Bargaining Agreement since the Employer could simply implement that policy unilaterally." [9] (Emphasis added). He also ruled that the County had met the standards required for a change in the status quo "particularly based on the fact that this is not part of the CBA but a policy. [10] (Emphasis added).

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[9] McAlpin Award, at 21.

[10] Id. at 19.

Here, the Union argues that there is no merit to the County's claim that its proposed policy is "extraneous" to the agreement since the County's Final Offer "expressly makes implementation of the drug policy part of the contract . . ." [11]

The County, in turn, asserts the following:

1. "From the beginning, the County has maintained that its final offer proposes a drug and alcohol policy that is external to the contract." [12]

2. "In its December 19, 2007 decision, the Wisconsin Employment Relations Commission confirmed that, even though the County is not proposing a contractual drug and alcohol provision, the interest arbitrator has jurisdiction." (Emphasis in original). [13]

3. "Thus, the WERC has concluded that an interest arbitrator does have jurisdiction over a drug and alcohol policy that is not part of a Collective Bargaining Agreement." [14]

4. "However, under the County's final offer, not one iota of contract language will change, "and that its offer" does not add the policy to the agreement as a contractual provision." [15]

The parties thus have diametrically opposing views over whether this part of the County's Final Offer is, or is not to be, part of the agreement.

The County points out that Arbitrator Jay Grenig in Vernon County (Courthouse & Human Services), Decision No. 31299-A (2006) found that the employer's proposal to set up a

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[11] Union Reply, at 10.

[12] County Reply at 1.

[13] Id. at 2.

[14] Ibid.

[15] County Main Brief, at 17-18.

committee to study health insurance options was reasonable even though that provision was external to the contract; that Arbitrator Stanley H. Michelstetter in Unified Board of Grant and Iowa Counties, Decision No. 27960-A (1994) adopted a management rights clause giving the employer the right to require drug tests; and that Arbitrator Frank Zeidler in Village of Plover (Police), Decision No. 27471-A (1993) adopted the employer's proposed drug policy.

In Vernon County, Arbitrator Jay Grenig ruled in favor of the employer's proposal to establish a health insurance committee and stated that it was "not outcome determinative." Decision No. 31299-A, at 16.

Here, the Policy is "outcome determinative." The parties in Vernon County also did not litigate whether a proposal which may be outside the contract could be adopted by an interest arbitrator, which is why Arbitrator Grenig never addressed that issue. His decision therefore does not shed much light on what should be done when this issue is raised.

In Unified Board, the employer proposed a work rule which prohibited employees from working under the influence of alcohol "or unprescribed narcotics or drugs or using or possessing unprescribed drugs or alcohol on Employer property after warning."

The ban on "unprescribed" drugs thus did not cover legally prescribed or over-the-counter medications which did not adversely affect an employee's workplace performance, and it also did not contain any pre-fixed disciplinary penalty of up to six weeks. In addition, the employer's work rule was aimed at only drug abuse since Arbitrator Michelstetter stated that "The public has an unquestionable interest in insuring that its employees are not involved in drug activity"; that "unit employees have a high responsibility in curbing drug abuse"; and that "unit employees possess the expertise to negotiate a satisfactory policy." Decision No. 27960-A, at

15-16. (Emphasis added). Here by contrast, the Policy is aimed at much more than drug abuse and employees for all practical purposes will not be able to change the Policy once it is adopted unless they proceed to interest arbitration.

In Plover, the parties agreed upon a drug policy, but disagreed over testing. Arbitrator Zeidler selected the employer's testing proposal because the union's proposal did not provide for "incident testing" and because the employer's additional proposal for random testing was reasonable, Decision No. 27471-A, at 13-25. Unlike here, there thus was no dispute over the reasonableness of the employer's policy which covered "controlled substances" and prescription medicines affecting an employee's work performance. Id. at 23.

None of these cited cases therefore raised the precise issues found here.

For here, the County has proposed something novel: It wants an interest arbitrator to rule on the reasonableness of its Policy and find that that Policy should be adopted as a separate , stand-alone work rule which does not reside within the four corners of the parties' agreement and which contains the following language:

. . .

> **THIS POLICY IS SUBJECT TO CHANGE BY COUNTY ACTION WITH OR WITHOUT PRIOR NOTICE TO EMPLOYEES. MODIFICATIONS, ADDITIONS, CORRECTIONS OR OTHER POLICY CHANGES WILL BE COMMUNICATED BEFORE ENFORCEMENT BY THE COUNTY. IN ADDITION, COUNTY POLICY IS SUBJECT TO APPLICABLE STATE OR FEDERAL LAWS WHICH MAY GOVERN COUNTY ACTION. THE PROVISIONS OF THIS POLICY ARE IN ADDITION TO ESTABLISHED COUNTY PERSONNEL POLICIES.** (Boldface in original).

. . .

The Union contends that this language is "a blank check" for the County because "employees have no way of even guessing what their rights will be . . . down the road," and that it represents "a direct attempt to restrain the future bargaining rights of . . ." bargaining unit members. [16]

The County argues that employees will retain "the specific contractual right to bargain the impact or the exercise of the County's implementation of the drug and alcohol policy" because Article II, Section 2.2, the contractual management rights clause, states: "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." [17]

Arbitrator Bellman rejected the County's Policy in part on the ground that it "would have the status of agreed upon terms" whereas "the conventional and time-honored process for resolving such contentions about the reasonableness of a work rule, which remains available under this Award, is to be preferred." [18]

Arbitrator McAlpin reached the opposite conclusion by stating: "Whether implemented by an interest arbitrator or by the Employer unilaterally does not change the Union's right to grieve the policy itself and/or any implementation of this policy that would affect one of its members . . ." [19]

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16 Union Main Brief, at 10-11.

17 County Reply, at 5.

18 Bellman Award, at 3.

19 McAlpin Award, at 21-22.

I do not agree with Arbitrator McAlpin's view that adoption of the Policy will not change "the Union's right to grieve the policy itself . . ." Adopting the Policy would, in fact, represent the "status of agreed upon terms" just as Arbitrator Bellman ruled, thereby preventing the Union from ever challenging the reasonableness of the Policy through the grievance procedure (as opposed to its application to a given situation).

Furthermore, even if the Policy is adopted, the County's waiver language enables it to unilaterally change the Policy the day after this Award issues, subject only to the Union's right to bargain over the effects of those changes and the Union's later right to seek removal of the language in another interest arbitration proceeding. That, in turn, will prolong disputes over the Policy, thereby depriving this process of the finality and predictability that should come about as a result of an interest arbitration proceeding.

As for the contents of the Policy, the County asserts that "There is no reference to the control of employee behavior during non-working hours" and that "Wisconsin law prohibits employer discrimination based on the use or nonuse of lawful products off the employer's premises during nonworking hours (see Section 111.321, Wis. Stat.)." [20] It also states that its proposal is similar to the drug and alcohol policies established by Chippewa and Lincoln counties (County Exhibits 45, 48).

The Chippewa County policy is not contained in a collective bargaining agreement and hence was never negotiated with the employees' bargaining representative. In addition, it only

[20] County Reply, at 2.

covers employees with commercial drivers licenses ("CDL's") who hold "safety sensitive positions," as opposed to here where the Policy covers all bargaining unit members even if they do not have CDL's.

Furthermore, the Chippewa County policy defines which substances are prohibited by stating:

. . .

C. PROHIBITED SUBSTANCES

> Prohibited drugs are any illegal controlled substance including, but no limited to, marijuana, amphetamines, opiates, phencyclidine (PCP), and cocaine, as well as any drug not approved for medical use by the USDA or the USFDA. Illegal use includes use of or impairment by any illegal drug, misuse of legally prescribed or over the counter drugs, or illegally obtained prescription drugs.
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> The use of any alcoholic beverage or mixture containing alcohol, including any medication, during or prior to performing job functions is also prohibited.
>
> The appropriate use of legally prescribed drugs and non-prescription medication is not prohibited. However, the use of any substance which carries a warning label indicating that mental functioning, motor skills, or judgment will be adversely affected MUST be reported to supervisory personnel prior to performing duties. **It is the responsibility of employees to remove themselves from service if they are experiencing any adverse effects from medication.** Notification of the use of legally prescribed drugs must include documentation of the patient's name, the substance name, the quantity to be taken and the period of authorization. A physician's written statement shall suffice as documentation. (Boldface in original).

. . .

Here, by contrast, the Policy bans the use of certain legally prescribed drugs and non-prescription medication even if they do <u>not</u> have a warning label.

As for Lincoln County's policy, it also was unilaterally established by the employer and thus does not reside in a collective bargaining agreement, and it is limited to "all vehicle operators," as opposed to other employees who do not operate vehicles, and it is limited to "controlled substances" and alcohol. It also narrowly defines which drugs are prohibited by stating:

. . .

> B. The term "illicit drugs" is meant to include any and all illegal drugs, including so-called look-alike and designer drugs; legally obtained drugs which are used in a manner other than that prescribed by a physician, and any substance which can affect a person's perceptions or motor functions.
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> The persons affected by this policy will be tested for at least the following substances: Amphetamines, Cannabinoids, Cocaine, Opiates, Phencyclidine (PCP), and Alcohol.

The Chippewa County and Lincoln County policies also differ from the County's proposal on another important issue: discipline.

The Chippewa County policy states violations can lead to discipline which "shall be consistent with County rules, regulations and policies and may include measures up to and including discharge." The Lincoln County policy provides for discipline "up to and including termination." Hence, employees charged with violating those two policies can claim that their discipline does not meet the contractual just cause standard.

Here, on the other hand, the County's proposal provides for "up to" a six-week suspension without pay if an employee fails a "confirmatory retest," along with discharge for repeated positive drug or alcohol tests. Employees thus may not be able to claim that just cause requires lesser discipline when the Policy itself provides otherwise.

Of the remaining six external comparables, two do not provide for any kind of testing (Pierce and Taylor counties); two have policies which only cover employees who need CDL's or law enforcement employees (Monroe and Wood counties); and two provide for testing and have policies which cover all employees (Jackson and Polk counties) (County Exhibit 44).

Thus, only two out of the eight external comparables have policies which cover all employees and which provide for testing.

The Policy differs from the Jackson County policy which covers alcohol and illegal "controlled substances" which are identified (County Exhibit 46-47); the Monroe County policy which covers "Drugs of Abuse" which are identified and referenced in Section 161.01(4), Wis. Stats., (County Exhibit 49); and the Pierce County policy which only covers "a controlled substance" and which are referenced in federal and state statutes (County Exhibit 50).

The Policy also differs from the County's Highway Department policy which prohibits alcohol and defines "Prohibited Substances" as "any illegal controlled substance including, but not limited to, marijuana, amphetamines, opiates, phencyclidine (PCP), and cocaine, as well as any drug not approved for medical use by the USDA or the USFDA," and any misuse of legally prescribed over-the-counter drugs or any illegally obtained prescription drugs (Union Exhibit 9). Legally prescribed drugs also are prohibited if their warning labels warn of serious side affects.

The Policy here makes no attempt to define which illegal drugs are prohibited since it states in pertinent part:

. . .

> The County further requests that employees report to work free of illegal drugs, alcohol and other drugs that are capable of altering an employee's mood, perception, pain level, or judgment and/or affecting an employee's ability to perform his or her job. (Emphasis added).

. . .

The parties disagree over whether this language enables the County to discipline employees if their legal medication does not adversely affect their work performance with the Union claiming, and the County denying, that it does. The County thus argues that its language "specifically limits the policy's applicability to only those substances "affecting an employee's ability to perform his or her job." [21]

That would be true if the word "and" in the above language were used alone as opposed to being used with the disjunctive word "or" which means: "expressing a choice between two mutually exclusive possibilities." See The New Oxford American Dictionary, Second Edition (Oxford University Press, 2005), at 486.

Hence, this language contains "two mutually exclusive possibilities": (1), one which relates to drugs which "are capable of altering an employee's mood, perception, pain level, or judgment"; and (2), another which relates to "affecting an employee's ability to perform his or her job." Employees thus can be disciplined for violating either of these "mutually exclusive possibilities," which means they can be disciplined for violating the former even if they do not violate the latter.

The Policy is thus unreasonable because it provides for up to a six-week suspension for employees who fail a confirmatory drug test for a legal drug like a pain killer even if they do not show any impairment on the job. The Policy also is unreasonable because it does not specifically address which substances are banned, thereby failing to provide the notice requirement of the just cause standard and because it also is too broadly worded.

[21] County Reply, at 4.

The County argues that its proposal is supported by Factor 7.r.c. which refers to the "interests and welfare of the public."

It certainly is true that the "interests and welfare of the public" are served by having workplaces which are free of illegal drugs and/or medications which adversely affect an employee's ability to properly perform his or her duty. The Policy here, however, casts a far broader net than is necessary, thereby needlessly exposing employees to possible discipline for simply having legal medications which do not adversely affect their work performance.

In addition, Factor 7.r.j. weighs against adopting the Policy because, as Arbitrator Bellman pointed out, the County's proposal to place it outside the agreement does not follow the normal or traditional course followed in collective bargaining.

The County also states that its goal here is to have "a framework (policy) established in order to promote a drug and alcohol free workplace and to make sure that any testing that occurs is done in a carefully prescribed manner." [22]

That is a laudable goal because all workplaces should be drug and alcohol free and nothing herein is meant to abridge the County's right to achieve that goal. The only thing being decided here is that the Policy, as currently worded, is too flawed to be adopted. The County therefore retains its right to unilaterally adopt a more reasonable work rule which the Union can then grieve. That is the course suggested by Arbitrator Bellman who pointed out that it would be much more in line with traditional concepts of collective bargaining which enable employers to adopt work rules which then can be grieved.

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[22] County Brief, at 20.

The County points out that it has negotiated "significant modifications to the health care center's policy," (which is identical to the Policy here) and it faults the Union for never stating in negotiations that the Highway Department's policy is preferable to the one proposed here. The County thus asks: "Why, then, did the Union never once, during face-to-face bargaining or mediation, suggest that the highway policy (for CDL employees) be the starting point for negotiations on the policy." [23] (Emphasis in original).

I agree that that may have made this entire process more productive. But it is not an arbitrator's function to try to ascertain why parties have adopted their bargaining strategies, just as it is not an arbitrator's function to let those strategies (whatever they may be) affect which final offers should be selected. The statutory criteria in Section 111.70(4)(cm)7 expressly lists what factors must be considered and a party's bargaining strategy is not one of them.

I therefore find that the Policy should not be in the parties' agreement because none of the external comparables, which outweigh the internal comparables, have such a policy in their collective bargaining agreement; because the Policy does not define which substances are prohibited; because the Policy subjects employees to discipline for taking drugs which alter their "mood, perception, pain level, or judgment" regardless of whether such medication affects their work performance; because the Policy calls for disciplining employees up to six weeks regardless of the circumstances and regardless of whether such a disciplinary penalty otherwise

[23] County Reply, at 3-4.

meets the contractual just cause standard; and because the attempt to have the Policy outside the four corners of the agreement is not in accord with traditional collective bargaining concepts. [24]

Turning now to the remaining issues in dispute, the Union requests that the lead Economic Support Specialist, who is the lead worker for six employees, be awarded a 10 cent wage increase effective January 1, 2007, and a 20 cent wage increase effective January 1, 2008, because that person is earning about $1.70 below the external comparables (Union Exhibit 16).

The County does not dispute that the wages for the lead Economic Support Specialist rank at the bottom of the external comparables, but it argues that the low ranking "is not a new phenomenon" and that "where taxpayer income ranks 63rd out of 72 counties in the State, there is no justification for singling out one employee for an extra wage boost at this time."

But there also is no justification for singling out an employee for an extra low wage, particularly since that position has been underpaid for about the last 15 years. Given the small amount of money involved, I find that the County can afford to pay a slightly higher wage which still would leave that position dead last among the comparables, as the County in recent negotiations with its law enforcement unit found enough money to give an additional $2.00 an hour raise to its Investigators so they could catch up with Sergeants and Detectives.

The County proposes to delete the six-month wage step for new hires on the ground that its difficult economic condition makes it necessary to take this step. The Union counters that the County can afford to retain the six-month wage step and that the County has not offered sufficient justification to abolish it.

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[24] It therefore is unnecessary to address the many other issues raised herein, including whether a quid pro quo must be offered in exchange for the County's proposal; whether the County has met its burden of changing the status quo; whether the parties have bargained in good faith; etc.

The Union's point is well taken since the County has not met its burden of proving that the status quo on this issue should be changed.

Lastly, the Union has proposed contract language which it maintains simply "adds clarity to the agreement" by defining the term "reclassification" in the agreement so it reads:

> A change in position due to the addition or deletion of significant duties, skill requirements, and responsibilities and/or education or experience requirements."

The Union asserts that this language is identical "to the language found in § 3.13 of the Clark County Personnel Policy" (Union Exhibit 19).

But this claim is only partly accurate because, as the County correctly points out, the County's Personnel Policy also contains the following next sentence which is not in the Union's proposal: "An increase in the volume of previously established duties does not constitute cause for reclassification."

While the Union's proposal is otherwise reasonable, its failure to include the second sentence of the County's Personnel Policy may create an issue over whether additional duties can serve as a basis for a reclassification. I therefore find that it should not be adopted even though the Union represents that it should be construed in accordance with the County's Personnel Policy.

I therefore conclude that the County's proposed Policy should not be adopted; that the County's proposal to delete the six-month wage step should not be adopted; that the Union's proposal to increase the wage level of the lead Economic Support Specialist should be adopted; and that the Union's reclassification language should not be adopted.

Since the Policy is far more important than the other issues and thus outweighs all other considerations, I select the Union's Final Offer which is to be included in the parties' 2007-2008 agreement, along with all other tentative agreements agreed to by the parties.

Based upon the above, I therefore issue the following

AWARD

The parties' 2007-2008 successor agreement shall contain all of the terms of the Union's Final Offer, along with all of the tentative agreements agreed to by the parties.

Dated at Madison, Wisconsin, this 1st day of April, 2008.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

DRUG AND ALCOHOL TESTING POLICY

I. STATEMENT OF POLICY

It is the policy of Clark County (the "County") to create a drug free workplace. The use of controlled substances or alcohol or the misuse of other drugs is inconsistent with the behavior expected of employees, subjects all employees and visitors to our facility to unacceptable safety risks, and undermines the County's ability to operate effectively and efficiently.

The unlawful manufacture, distribution, dispensation, possession, sale, or use of a controlled substance or alcohol while operating County machinery, equipment or vehicles, or while engaged in County business off premises are strictly prohibited. The County further requests that employees report to work free of illegal drugs, alcohol and other drugs that are capable of altering an employee's mood, perception, pain level, or judgment and/or affecting an employee's ability to perform his or her job.

Failure to comply with any part of this Policy may result in a withdrawal of any conditional job offer for job applicants, and in discipline up to and including termination for employees.

To effectuate this Policy, the County will test applicants and employees for drugs and/or alcohol under the circumstances outlined below.

II. TESTS REQUIRED

A. Pre-employment testing. Any person applying for a position with the County, who is conditionally offered employment, will be required to undergo a test for the use of alcohol and controlled substances. Any applicant [or employee] who refuses to undergo a test will be disqualified from further consideration for employment.

B. Post work-related injury testing. The County, at its discretion, may require that any employee involved in a work-related accident submit to an alcohol and/or drug test as soon as possible after the accident, but no later than eight (8) hours for alcohol or thirty-two (32) hours for drug testing. Any employee involved in a reportable accident shall notify the County at the first available opportunity after the accident, at which time the employee will be advised to report to an appropriate collection site for testing.

In the event an employee is seriously injured and unable to report to the collection site, the employee shall authorize the health care provider to release to the County any information necessary to indicate the presence of alcohol or any controlled substance in the employee's system.

APPENDIX A

C. Reasonable suspicion testing. The County will require that an employee be tested, upon reasonable cause, for the use of controlled substances or alcohol. An employee shall submit to testing when requested to do so by the County. The County will presume a positive test result if an employee refuses to be tested upon reasonable cause.

The reasonable cause circumstances should be witnessed by two (2) employees, one of whom is a supervisor who has received training in the detection of probable drug or alcohol use through observations. The reasonable suspicion determination shall be documented on a form entitled "Supervisor's Report of Reasonable Cause" (Appendix A) and should be completed at the time of the observations but in no case later than twenty-four (24) hours after the initial reasonable cause observation.

Reasonable cause means a belief drawn from facts or circumstances and inferences from those facts or circumstances sufficient to lead a reasonable person to suspect that the employee is using a controlled substance or alcohol. Examples of reasonable cause include but are not limited to:

1. Direct observation of physical symptoms;
2. Pattern of abnormal conduct or erratic behavior;
3. Arrest or conviction for drug or alcohol related offenses;
4. Information from credible and reliable sources; and
5. Evidence of employee tampering with drug or alcohol tests.

D. Post-rehabilitation drug and alcohol testing. Any employee who undergoes rehabilitation or who enrolls in a program because of a positive drug or alcohol test result shall be required to undergo an additional drug and/or alcohol test before returning to work. If the test results are negative, the employee will be returned to work, if work is available. If the test results are positive, the employee will be disqualified from employment and, in reasonable cause circumstances, any previous discharge or other discipline will be reinstated.

III. CONSEQUENCES FOR POSITIVE TEST RESULTS

A. If the result of any drug or alcohol test conducted in accordance with this policy is confirmed positive for the presence of drugs or alcohol, the employee will be contacted and advised that they have seventy-two (72) hours to request a confirmatory retest, at the employee's expense.

B. If the confirmatory retest is also positive, the County reserves the right to temporarily suspend the tested employee for a period of up to six weeks without pay. No benefits will accrue to the tested employee during the period of unpaid suspension.

C. An employee who tests positive for drug and/or alcohol use may seek assistance and rehabilitation through any available means, at the employee's sole expense. Any County-provided insurance or benefits, including earned or accrued time off, if applicable, may be utilized by the employee.

D. Repeated positive drug or alcohol test results for any reason may lead to discharge from employment.

IV. CONFIDENTIALITY

The County respects the confidentiality and privacy rights of all of its employees. Accordingly, the results of any test administered under this policy and/or the identities of any employees participating in a rehabilitation program will not be revealed by the County to anyone without the express written consent of the employee. In addition, the County's contract with the testing laboratory requires it to maintain all employee test records in confidence. However, the laboratory will disclose information related to a positive drug or alcohol test of an individual to the individual, the employer, or the decision-maker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual and arising from a certified positive drug or alcohol test.

The testing laboratory will not reveal individual test results to anyone unless he/she has been presented with written authorization from the tested employee. The testing laboratory may, however, reveal to the County, without an authorization, relevant employee qualification information which indicates whether the employee has tested positive for a controlled substance. The County will not release the employee qualification information without first obtaining the tested employee's written authorization and consent.

THIS POLICY IS SUBJECT TO CHANGE BY COUNTY ACTION WITH OR WITHOUT PRIOR NOTICE TO EMPLOYEES. MODIFICATIONS, ADDITIONS, CORRECTIONS OR OTHER POLICY CHANGES WILL BE COMMUNICATED BEFORE ENFORCEMENT BY THE COUNTY. IN ADDITION, COUNTY POLICY IS SUBJECT TO APPLICABLE STATE OR FEDERAL LAWS WHICH MAY GOVERN COUNTY ACTION. THE PROVISIONS OF THIS POLICY ARE IN ADDITION TO ESTABLISHED COUNTY PERSONNEL POLICIES.

SUPERVISOR'S REPORT OF REASONABLE CAUSE

Employee Information

Employee:_____ Date:_____

Location:_____ Time:_____ a.m./p.m.

Observations

Breath: (odor of alcoholic beverage)

Eyes:	( ) Bloodshot	( ) Glassy	( ) Normal	( ) Watery	( ) Clear
	( ) Heavy Eyelids	( ) Fixed Pupils	( ) Dilated Pupils	( ) Normal	
Speech:	( ) Confused	( ) Stuttered	( ) Thick-Tongued	( ) Accent	( ) Mumbled
	( ) Fair	( ) Slurred	( ) Good	( ) Mush-Mouthed	( ) Not under-
	( ) Cotton Mouthed	( ) Other_____			standable
Attitude:	( ) Excited	( ) Combative	( ) Hilarious	( ) Indifferent	( ) Talkative
	( ) Insulting	( ) Carefree	( ) Cocky	( ) Sleepy	( ) Cooperative
	( ) Profane	( ) Polite	( ) Other_____		
Unusual	( ) Hiccoughing	( ) Belching	( ) Vomiting	( ) Fighting	( ) Crying
Action:	( ) Laughing	( ) Other_____			
Balance:	( ) Falling	( ) Needs Support	( ) Wobbling	( ) Swaying	( ) Other_____
Walking:	( ) Falling	( ) Staggering	( ) Stumbling	( ) Swaying	( ) Other_____
Turning:	( ) Falling	( ) Staggering	( ) Stumbling	( ) Swaying	( ) Hesitant
	( ) Other_____				

Indicate any other unusual actions or statements:_____

_____

_____

Signs or complaints of illness or injury:_____

_____

_____

Supervisor's Opinion

Effects of alcohol/drug intoxication: ( ) None ( ) Slight ( ) Obvious ( ) Extreme

Operation of equipment: ( ) Yes ( ) No

Additional comments:_____

_____

_____

Supervisor:_____

Signature:_____

_____

Time: _____

Witnesses:_____

_____

_____

_____

APPENDIX