STATE OF WISCONSIN

Before the Interest Arbitrator

In the Matter of the Petition	
of	**Case 130**
AFSCME Local 546B	**No. 66383 INT/ARB-10807** **Decision No. 32092-A**
For Final and Binding Arbitration Involving Non-professional Courthouse Personnel in the Employ of Clark County	

APPEARANCES

For the Union:

Houston Parrish, Staff Representative Council 40

For the Village

Stephen Weld, Attorney

PROCEEDINGS

On June 19, 2007 the undersigned was appointed Arbitrator by the Wisconsin Employment Relations Commission pursuant to Section 111.70 (4)(cm) 6. & 7. of the

Municipal Employment Relations Act, to resolve an impasse existing between AFSCME Local 546B of Wisconsin, hereinafter referred to as the Union, and Clark County, hereinafter referred to as the Employer.

The hearing was held on August 10, 2007 in Neilsville, Wisconsin. The Parties did not request mediation services. At this hearing the Parties were afforded an opportunity to present oral and written evidence, to examine and cross-examine witnesses and to make such arguments as were deemed pertinent. The Parties stipulated that all provisions of the applicable statutes had been complied with and that the matter was properly before the Arbitrator. Briefs were filed in this case and the record was closed on October 7, 2007 subsequent to receiving the final reply briefs. WERC ruling regarding the authority of the Arbitrators in this and other matters dated December 19, 2007 is attached.

FINAL OFFERS

Employer	Union
The Employer has a proposed drug and alcohol policy.	Status quo

STATUTORY CRITERIA

7. "Factor given greatest weight." In making any decision under the arbitration

procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give the greatest weight to any state law or directive lawfully issued by a state legislative or administrative officer, body or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer. The arbitrator or arbitration panel shall give an accounting of the consideration of this factor in the arbitrator's or panel's decision.

7g. "Factor given greater weight." In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give greater weight to economic conditions in the jurisdiction of the municipal employer than to any of the factors specified in subd. 7r.

7r. "Other factors considered." In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall also give weight to the following factors:

a. The lawful authority of the municipal employer.

b. Stipulations of the parties.

c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.

d. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of

employment of other employees performing similar services.

e. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees generally in public employment in the same community and in comparable communities.

f. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees in private employment in the same community and in comparable communities.

g. The average consumer prices for goods and services, commonly known as the cost of living.

h. The overall compensation presently received by the municipal employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

I. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

j. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

EMPLOYER POSITION

The following represents the arguments and contentions made on behalf of the Employer:

The Parties are in agreement on all except one issue. The County has proposed an implementation of a drug and alcohol testing policy. This does not change the existing contract language. It simply seeks to implement this policy that would be separate and apart from the Collective Bargaining Agreement.

The County has the right to establish and enforce reasonable rules and regulations and the right to make reasonable changes to such rules and regulations and to enforce such changes. The need for a drug and alcohol policy was raised during negotiations. When the Union refused to agree to any policy, it became clear to the County that, if it subsequently implemented the policy unilaterally, the policy would be challenged. So it elected to adopt this policy through the interest arbitration process. The Union has not challenged the appropriateness of this approach. The policy addresses a reasonable need and is consistent with policies already in place among the comparables. It places no undue hardship upon the members of the bargaining unit. Therefore, the County's final offer should be selected by the Arbitrator.

With respect to the comparables the Union has proposed to add two comparables to the

eight counties which have historically been accepted as comparables for Clark County. Those are Eau Claire and Marathon. Marathon has never been a comparable used in interest arbitration for Clark County. Eau Claire was included by Arbitrator Krinski based on the mistaken assumption that two prior arbitrators had accepted Marathon County as comparable. The Employer provided a history of the various interest arbitrations involving Clark County which shows that the only two decisions to reference Eau Claire and Marathon Counties appear to have done so erroneously. Therefore, the eight comparable counties that have been historically used should continue.

The identical policy proposed here was agreed to by the county with the Teamster represented health care center employees. Also, the WPPA Law Enforcement Group has agreed to a policy. In addition a third unit, the highway department, has had a policy in place for several years. It is only the AFSCME that has not settled this issue.

Even if the Employer accepts the County's final offer, those employees in the non-professional courthouse unit would receive the protections afforded by the Collective Bargaining Agreement. The County is fostering a healthy, safe and productive work environment which all employees have a right to expect.

These policies are not the anomaly that the Union suggests. The Union shows uniform but erroneous entries of no drug policy for each of the Union's proposed external County comparables in each of the school districts located in Clark County. It is true that the

comparables have no contract language concerning drug and alcohol testing. In fact, however, all of the comparable counties do have drug and alcohol policies. Here Clark County proposed no contract language but policies similar to all of the comparables. All of the County's proposed comparables have drug and alcohol policies and six of the eight have policies that include testing.

Arbitrators have found that policies such as these address the issue of the interest of the public. Arbitrator Michelstetter stated in a 1994 decision that "The public has an unquestionable interest in insuring that its employees are not involved in drug activity." Thus, even where the proposal was to add a policy to the contract language, it has been upheld in arbitration. Under the proposed policy the current employees would only be subject to testing for post work related injuries, for reasonable suspicions or post rehabilitation, not for random testing. The goal is to have a drug and alcohol free work place and ton insure that any testing that occurs would be done in a carefully prescribed manner.

In fact three of the County's bargaining units already have similar, if not more restrictive, drug and alcohol testing policies in place. All three agreed to external policies not contract language. It should be noted that the highway policy includes random testing which the County is not proposing for this unit. Also, the law enforcement unit will also include a provision for random testing. Therefore, what the County is proposing here is less restrictive.

Does the adoption of this policy require a quid pro quo? The County argued that it

does not, however, the County's offer which is consistent internally for those units that have adopted drug and alcohol testing policies should be considered a quid pro quo.

Clark County is an agrarian low income county whose constituents earn significantly lower wages and benefits than the majority of employees in the bargaining unit. The Arbitrator is ordered by the comparables to give the greatest weight to state laws and administrative directives which limit employer expenditures and/or revenues and greater weight to local economic conditions. Also included in this would be the lawful authority of the municipal employer, the interest and welfare of the public, and such other factors which are normally taken into consideration in arbitration cases. The facts are that Clark County has very little industry and few high paying jobs. Clark County itself is the county's largest employer. The county's farmland valuation is twice that of any other comparable. Clark County's income levels are at rock bottom with a high unemployment rate and low median home values. Overall, given the circumstances of the County, the total offer for this unit is more than generous and exceeds the increase in the cost of living.

The County also had the opportunity to respond to the Union's initial brief, i.e. as follows:

Contrary to the Union's assertion that the Employer has attempted to force the drug policy on all Union members, both the health care center and law enforcement units voluntarily agreed to implement the policy. While it is true that management and unrepresented employees currently are not subject to a drug policy, the County has the

authority to unilaterally implement a policy for those employees and as represented is in fact preparing to do so. In addition the policy does not cover employees when they are not working. There is no reference to control of employee behavior during non-work hours.

Despite the Union's claim that this policy is geared toward equipment operators and drivers, it is just as important for courthouse employees to be substance free as it is for drivers and equipment operators. The Union also attempted to discredit various aspects of the County's proposed policy. The County would note that the Union had ample opportunity in the course of face to face bargaining and mediation to identify specific concerns regarding the policy. The Union chose not to do so. In addition the comparables, many of whom have language mirroring the County's proposed policy, have reached agreement with their represented employees. The Union has identified specific areas of the policy with which it is unhappy which have been addressed by the Employer.

The County has demonstrated a need. The proposal reasonably addresses the need. There is sufficient support among the comparables. There is a quid pro quo incorporated. Thus, the County's proposal meets the four elements of the status quo test.

The Union attempted to draw distinctions between the County's highway policy and this proposal; yet the Union never once raised such concerns during face to face bargaining. The County had no idea as to what the objections were because the Union not only refused to identify its objections, it refused to participate in any discussion at all. Likewise, the Union's

allegations that the company policy forces employees to waive future bargaining rights is contrary to the specific provision in the management rights clause. The Union will not lose any of its existing bargaining rights under the County's offer. The County may make unilateral changes in any of its policies. The Union retains the right to challenge the reasonableness of any such changes via the just cause and grievance procedures.

The Union claimed erroneously that this proposal would insert the drug and alcohol policy as a contractual provision. The County is not proposing a contractual drug and alcohol provision but merely a policy.

The Union argued that, if the County were to unilaterally implement a drug and alcohol policy, any issues surrounding the specifics of the policy could be addressed if and when they arise. This is true under the County's proposal. The County could have unilaterally imposed this policy but it wanted to negotiate the impact and reasonableness rather than argue about its contents after implementation. The Union refused to discuss this matter at all. The Union noted that other internal settlements demand equal and, if not, controlling weight absent extraordinary circumstances. In this matter two bargaining units had agreed to and ratified the agreement to implement the drug and alcohol policy in exchange for increases in pay. The County offered the Union the opportunity to bargain. The Union refused. The County's final offer is reasonable, consistent with the policies already in place among comparables both internal and external, and poses no undue hardship on the members of the bargaining unit. Therefore, it is the Employer's proposal that should be selected.

UNION POSITION

The following represents the arguments and contentions made on behalf of the Union:

Clark County has the burden to show that the Arbitrator is required to change the status quo. One of the requirements is to establish that a legitimate problem exists. The Union provided citations in support of this position. The County has failed to even attempt to show that there is a problem and it has not shown why employees at the courthouse unit perform such dangerous tasks as to merit a drug policy. The drug policy proposed contemplates its implementation for employees operating machinery or equipment. Currently employees who do operate vehicles or require a commercial drivers license are subject to a much more detailed and thorough drug and alcohol policy implemented for such employees. Therefore, the County has failed to prove that the current contract or circumstances require a drug policy. It fails to show how the proposed policy would remedy any problem and it fails to show that the policy does not unreasonably burden employees. It also fails to show how any quid pro quo was offered to the employees for the burden of the proposed policy.

The County cannot force employees to waive future bargaining rights. The proposed policy contains a waiver highlighted in capital letters effectively constituting a blank check. Again, citations were provided.

The County offers no quid pro quo for the significant burden of the drug policy. Even

if the policy was necessary, a quid pro quo would be required. The County has failed to show how public safety would be substantially promoted by burdening clerical employees with such a policy. Even if the policy was reasonable and reasonably tailored to remedy a real problem, a quid pro quo would be required. This would be true even if the policy did not have an absurd waiver provision.

The comparables do not support the County's position. The Employer's own exhibit shows drug policies have not been bargained into collective bargaining agreements and that those that have policies generally cover CDL holders and law enforcement units. CDL and police units are relevant. The Employer failed to show how courthouse workers are remotely analogous to law enforcement employees.

The facts are that Clark County agreed to the same economic proposal with respect to other employees.

The Union also had the opportunity to reply to the Employer's initial brief:

A party has no duty to fix the other party's unreasonable offer. The Union did not submit an offer that included a drug testing policy because it is unnecessary. The County declined to revise its own proposed drug policy to make it reasonable.

The Arbitrator is not vested with the authority to order what County policies will be

mandatory for the Union unless such policy is part of the binding Collective Bargaining Agreement. The County lobbies for the Arbitrator to exceed his statutory authority and implement a policy that is not contractually binding. The County cites no precedent for such an award. Before the arbitration the County did not even remotely suggest that its proposed policy was anything but contractual. The Union has always read the County's fourth final offer as addressing only contractual changes.

The Parties are prohibited from making changes to final offers during arbitration. At first it attempts to convince the Arbitrator that the drug policy is not really contractual. It claims that the Union can grieve changes to the drug policy. Both the Employer's right to make reasonable policies and the Union's right to grieve to the grievance procedure are general contract provisions. The waiver provision for the drug policy is very specific to that policy alone. In short the County attempted to substantially revise its fourth final offer. It is well established that such modifications are impermissible. Again, numerous citations were provided.

The County speculated that the Union would grieve a reasonable drug policy. Certainly the Union made no such threats and it was never discussed. Therefore, this is pure speculation.

The County admitted that it has an obligation to bargain the policy. It is inconsistent for the County then to demand a waiver. The County improperly relied on non-contractual

drug policies particularly in Jackson and Polk Counties. The Employer should not be encouraged to discriminate against employees simply because they are part of a bargaining unit. While the County claimed it wants uniformity, it ignored the fact that its proposal excludes the very people proposing this policy. Comparing equality among Union members is desirable. Just don't make them equal to non-Union employees. The highway unit and sheriff's department have different drug and alcohol policies. The County has no policy at all for non-Union employees.

While the County highway unit has had a drug policy for years, there is no showing that any improvement has been made because of its implementation. There was no showing that the CDL policy had any similar effects. Likewise, there was no showing that there were any workers compensation improvements. The Union's own Exhibit 14 includes scientific proof of flaws in drug testing.

The Union is surprised that the County is utilizing its two/one split wage increase as a quid pro quo since this was never mentioned in bargaining. It is unquestioned that the wage increase is in line or slightly below raises in established comparables. In addition the quid pro quo based on the fact that no changes in the health insurance are proposed is equally specious. Clark County employees already pay 15% premium share for their insurance which is well above comparables. The County cannot claim it is doing employees a favor by not once again raising their health insurance costs.

The County does not cite a single case where an arbitrator has forced a courthouse union to accept a drug testing policy. The Union has not agreed to any part of the drug policy because it is arbitrary and overly broad, discriminatory and contains waiver language. The Union provided numerous examples of problems within the proposed policy.

The County's position that it must bargain the drug policy is inconsistent with its position that it can unilaterally implement the policy. The Union provided a number of citations to that effect.

Based on the above the status quo is clearly the best choice. If no drug policy is implemented, then the County is no worse off. The County failed to even attempt to show that there is a problem of drug and alcohol use, yet it has been marching along for decades without such a policy in place. Therefore, the Union submitted that its final offer is the more reasonable.

DISCUSSION AND OPINION

COMPARABLES

With respect to the comparables, any proposed change in the eight comparables would be a deviation from the status quo, such deviation is not taken lightly. The purpose for this is to provide some consistency and continuity in the Collective Bargaining process. Despite two awards the status quo does not include Eau Claire or Marathon Counties. There is nothing contained in the record of this case that would allow this Arbitrator to approve a deviation from the status quo as the proponent of any change must fully justify its position providing strong reasons and a proven need. That showing has not been made and, therefore, the comparables remain as previously determined.

MERITS

The role of an Arbitrator in interest arbitration is substantially different from that in a grievance arbitration. Interest arbitration is a substitute for a test of economic power between the Parties. The Wisconsin legislature determined that it would be in the best interest of the citizens of the State of Wisconsin to substitute interest arbitration for a potential strike involving public employees. In an interest arbitration, the Arbitrator must determine not what the Parties would have agreed to, but what they should have agreed to, and, therefore, it falls to the Arbitrator to determine what is fair and equitable in this circumstance. The statute provides that the Arbitrator must choose the last best offer of one side over the other. The Arbitrator must find for each final offer which side has the most equitable position. We use

the term "most equitable" because in some, if not all, of last best offer interest arbitrations, equity does not lie exclusively with one side or the other. The Arbitrator is precluded from fashioning a remedy of his choosing. He must by statute choose that which he finds most equitable under all of the circumstances of the case. The Arbitrator must base his decision on the combination of 11 factors contained within the Wisconsin revised statute (and reproduced above). It is these factors that will drive the Arbitrator's decision in this matter.

Prior to analyzing the open issue, the Arbitrator would like to briefly mention the concept of status quo in interest arbitration. When one side or another wishes to deviate from the status quo of the collective bargaining agreement, the proponent of that change must fully justify its position, provide strong reasons, and a proven need. It is an extra burden of proof placed on those who wish to significantly change the collective bargaining relationship. In the absence of such showing, the party desiring the change must show that there is a quid pro quo or that other groups comparable to the group in question were able to achieve this provision without the quid pro quo. In addition to the above, the Party requesting change must prove that there is a need for the change and that the proposed language meets the identified need without posing an undue hardship on the other Party or has provided a quid pro quo, as noted above. In addition to the statutory criteria, it is this concept of status quo that will also guide this Arbitrator when analyzing the respective positions. Based on this award the Arbitrator has meet the standards required for a change in status quo, particularly based on the fact that this is not part of the CBA but a policy.

Finally, before the analysis the Arbitrator would like to discuss the cost of living criterion. This is difficult to apply in this Collective Bargaining context. The weight placed on cost of living varies with the state of the economy and the rate of inflation. Generally, in times of high inflation public sector employees lag the private sector in their economic achievement. Likewise, in periods of time such as we are currently experiencing public sector employees generally do somewhat better not only with respect to the cost of living rate, but also vis-a-vis the private sector. In addition, the movement in the consumer price index is generally not a true measure of an individual family's cost of living due to the rather rigid nature of the market basket upon which cost of living changes are measured. Therefore, this Arbitrator has joined other arbitrators in finding that cost of living considerations are best measured by the external comparables and wage increases and wage rates among those external comparables. In any event, both sides have agreed that the wage increases for this bargaining unit would exceed the cost of living percentage increases no matter what source.

The WERC mandated that this Arbitrator and other arbitrators involved in other interest arbitrations between the Parties rule on the drug and alcohol policy. This Arbitrator finds this ruling to be unusual. Normally, policies are implemented as follows:

Typically the Employer may propose a policy. The Parties would then discuss the matter and hopefully agree on the appropriate wording of the proposed policy. If the Parties were unable to agree, the Employer would have the right to implement that policy. This does not, however, mean that the Union could not object to the policy. All policies and particularly

those that could result in employee discipline or discharge must meet the tests required for just cause, i.e. these policies must be properly promulgated and both reasonable and necessary. In addition all management unilateral decisions must show that they are not arbitrary, capricious, discriminatory or unreasonable. This means that the entire policy including the waiver section must meet all tests. This would apply to any future changes in the policy also. Any objections to the initial policy or change policy can be resolved by discussions between the Parties or in a grievance arbitration. The Union has the right to save its objections until that time.

As noted above, it is unusual that this would be an issue in interest arbitration because interest arbitration is driven by the criteria contained within the statute. Whether or not the policy is put in place by an interest arbitrator or it is unilaterally implemented by the Employer in this matter is really immaterial since the interest arbitrator is not driven by those standards noted above under grievance arbitration.

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. In addition the external and internal comparables do favor the Employer, particularly if the Employer lives up to its representation that it will be including non-represented employees in the policy. 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 based on the standards

noted above. Based on the above a quid pro quo is not required.

In addition to the above, drug and alcohol policies are common among both private and public employees. Just because Clark County is a rural county does not mean that drug and alcohol issues do not exist within the county. With respect to courthouse employees, while public safety may not be the biggest concern, certainly productivity and public confidence issues could be negatively affected. How can the County know if it has a problem without a reasonable policy in place. Studies have shown that the mere presence of a policy can have a positive effect. Therefore, the County has met the tests for a change in status quo.

AWARD

On the basis of the foregoing and the record as a whole, and after full consideration of each of the statutory criteria, the undersigned has concluded that the final offer of the Employer is the more reasonable proposal before the Arbitrator and directs that it, along with the stipulations reached in bargaining, constitute the 2007-2008 agreement between the Parties.

Signed at Oconomowoc, Wisconsin this 7th day of January, 2008.

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Raymond E. McAlpin, Arbitrator