BEFORE THE ARBITRATOR

In the Matter of the Arbitration between

CLARK COUNTY EMPLOYEES, LOCAL 546D1 (PROFESSIONAL COURTHOUSE EMPLOYEES), AFSCME, AFL-CIO,

and

CLARK COUNTY

Case 131
No. 66384
INT/ARB-10808

Decision No. 32093-A

Arbitrator: James W. Engmann

Appearances:

Mr. Houston Parrish, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1457 Somerset Drive, Stevens Point, Wisconsin 54481, appearing on behalf of Local 546D1 Professional Courthouse Employees.

Mr. Stephen L. Weld, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, WI 54702-1030, appearing on behalf of Clark County.

ARBITRATION AWARD

Clark County (County or Employer) is a municipal employer which maintains its offices at 517 Court St., Neillsville, WI 54456. Clark County Employees, Local 546D1 (Professional Courthouse Employees), AFSCME, AFL-CIO (Union), is a labor organization which maintains it offices at 1457 Somerset Drive, Stevens Point, Wisconsin 54481, and which, at all times material herein, has been the exclusive collective bargaining representative for all regular full-time and regular part-time professional employees of Clark County, excluding sworn law enforcement, blue collar highway, social service, health care center, managerial, confidential and supervisory employees and elected officials.

The County and the Union have been parties to a series of collective bargaining agreements, the last of which expired on December 31, 2006. The parties exchanged their initial proposals and bargained on matters to be included in the successor agreement. On October 19, 2006, the Union filed a petition with the Wisconsin Employment Relations Commission (Commission) requesting the Commission to initiate arbitration pursuant to Sec. 111.70(4)(cm)6 of the Municipal Employment Relations Act (MERA). An investigation was conducted by a member of the Commission staff on December 13, 2006, which reflected that the parties were deadlocked in their negotiations. On or before April 4, 2007, the parties submitted their final offers and stipulation on matters agreed upon, after which

the Investigator notified the parties that the investigation was closed. The Investigator also advised the Commission that the parties remained at impasse. On May 8, 2007, the Commission certified that the conditions precedent to the initiation of arbitration as required by statute had been met and ordered the parties to select an arbitrator from a panel of arbitrators submitted by the Commission.

The parties selected the undersigned to serve as the impartial arbitrator in this matter and advised the Commission of its selection. On June 19, 2007, the Commission appointed the undersigned as arbitrator to issue a final and binding award, pursuant to sec. 111.70(4)(cm)6. and 7. of MERA, to resolve said impasse by selecting either the total final offer of the City or the total final offer of the Union. Hearing was held on October 2, 2007, in Neillsville, WI, at which time the parties were afforded the opportunity to present evidence and make arguments as they wished.

In addition to this dispute, the County and three of its other AFSCME bargaining units were also in interest arbitration over successor agreements. The County's final offer in each case is as follows:

> 1. Implement attached drug and alcohol testing policy. (Underlining in original).

Arbitrator Bellman, selected by the parties to decide the dispute between the County and Local 546D2 (Social Services Social Workers), wrote to the Commission on October 11, 2007, in part as follows:

> As I understand the final offer of the County, it includes a drug and alcohol policy that would be "separate and apart," from the collective bargaining agreement. . .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.[1]

The Commission placed all four disputes in abeyance while it determined its response to the question raised by Arbitrator Bellman. In its decision reached December 19, 2007, the Commission wrote in part as follows:

> In our view, the content and context of the proposal should govern the

[1] Clark County Employees Local 546-D(2) (Social Services Social Workers), AFSCME, AFL-CIO, and Clark County, Decision No. 32094-B (12/19/07), at 4, hereinafter "Commission Decision," quoting the letter Arbitrator Bellman sent to the Commission.

> 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 accepted. 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 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 accepted) contains some language incorporating by reference the specific proposed policy or rule.[2]

The Commission concluded that Arbitrator Bellman had the statutory authority to select the County's final offer and thus incorporate into the agreement the drug and alcohol policy proposed by the County, even if the specific policy will exist outside the physical confines of the collective bargaining agreement, if that should be his finding under the criteria in Sec. 111.70(4)(cm)7, 7g and 7r, Stats.

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[2] Commission Decision at 5.

After the Commission's decision, the parties in this matter filed briefs and reply briefs, the last of which was received April 2, 2008. The record had remained open so as to include the other arbitration decisions regarding this issue. Arbitrator Bellman issued his decision on December 28, 2007, and selected the Union's offer.[3] Arbitrator McAlpin issued his decision involving Local 546B (Non-Professional Courthouse Personnel) on January 7, 2008, and selected the County's offer.[4] Arbitrator Greco issued his decision involving Local 546-A (Social Services Para-professionals) on April 1, 2008, and selected the County's offer.[5]

Full consideration has been given to all of the testimony, exhibits and arguments of the parties in issuing this Award.

FINAL OFFERS

County

A: Implement attached drug and alcohol testing policy.

Union

APPENDIX A – SALARY SCHEDULE - Prior to the general wage increase, increase the rate of Registered Nurse by 10 cents January 1, 2008.

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[3] Clark County and Clark County Employees Local 546-D2 (Social Services Social Workers, Decision No. 32094-A (12/19/07), hereinafter "Bellman Award."

[4] AFSCME Local 546-B and Clark County, Decision No. 32092-A (01-07-08), hereinafter "McAlpin Award."

[5] Clark County Employees, Local 546-A, (Social Services Paraprofessionals) AFSCME, AFL-CIO and Clark County, Decision No. 32091-A (04-01-08), hereinafter "Greco Award."

ARBITRAL CRITERIA

Section 111.70(4)(cm) MERA states in part:

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.

POSITIONS OF THE PARTIES

County on Brief

The County argues that the impact of a drug and alcohol testing policy on wages, hours and conditions of employment is a mandatory subject of bargaining; that the County's proposed drug and alcohol policy addresses a reasonable need, is consistent with the policies already in place among the comparables (both internal and external), and poses no undue hardship upon the members of the bargaining unit; that the County could have unilaterally imposed its drug policy; that, instead, the County offered the Union the opportunity to bargain over the policy; that the Union refused; that the Union cannot now lambast the County for failing to address the Union's purported concerns when it refused to identify those concerns during face-to-face bargaining and mediation; that the County's proposed drug and alcohol language is narrowly-tailored and designed to constructively address employee drug and alcohol use in a consistent manner across all of the County's bargaining units; that in five of those units, identical or more restrictive drug and alcohol testing policies have been, or shortly will be, implemented in exchange for the same wage increases that the County proposes to this (and all other) units; that the proposed policy is external to the contract; that as a result, the County has clearly met its burden of proof to change the status quo; that the County has established a need and its proposal reasonably addresses that need, while at the same time finding support among both the internal and external comparables; that, in addition, the County's offer incorporates

a quid pro quo, even though one is not needed; that there is no justification for awarding the Union's demand for an extra wage boost for the registered nurse position; that the County's wage rates have always been low; that there is no evidence that the registered nurse wage rate requires arbitral correction at this time; that the County is an agrarian, low-income county whose taxpayers earn far lower wages and benefits than the vast majority of employees in the bargaining unit; that the County's offer exceeds the increase in the cost of living; and that, for the aforementioned reasons, the County requests that its final offer be selected by the arbitrator.

Union on Brief

The Union argues that the County has the burden to show that the arbitrator is required to change the status quo and include a drug testing policy in the contract; that the County failed to prove that the current contract requires a drug policy; that the County failed to show how the proposed drug policy would remedy any problem; that the County failed to show how the policy does not unreasonably burden the employees; that the disparate treatment between unrepresented and represented employees is inequitable; that the County cannot force employees to waive future bargaining rights; that the comparables do not support the County's position; that the County is unable to show "strong evidence" that its drug policy for professional employees must be placed in the collective bargaining agreement; that the County agreed to the same or better economic proposal with other employees; that the registered nurse position is substantially behind the comparables; that the Commission has already determined that the drug testing policy must be included as part of the collective bargaining agreement if the county's final offer is selected; that not only does the policy give the County carte branch to change the policy, it gives the County authority to discipline employees for using many types of lawful, helpful medications that would improve, not harm, work performance; that the County lobbies the arbitrator to exceed his statutory authority and implement a policy that is not contractually binding; that at no time before arbitration did the County remotely suggest that its proposed policy was anything but contractual; that parties are prohibited from making changes to final offers during arbitration; that the County attempts two substantive changes to its final offer; that, first, the County attempts to convince the arbitrator that the drug policy is not really contractual; that, second, the County claims the Union can grieve changes to the drug policy; that the County's final offer states neither of those positions; that the County's final offer must be read according to its plain meaning, not how the County has attempted to modify it; that the County has offered no compelling reason for even a reasonable policy's adaption as part of the contract, much less the one proposed; and that, for the foregoing reasons, the Union submits that its offer is the more reasonable.

County on Reply Brief

The County argues that it has the contractual right to unilaterally adopt reasonable work rules, including a drug policy, for this bargaining unit; that the County will attach the drug policy to the contract but maintain it as an external work rule, just like the other five bargaining units that have, or will have, the same or similar drug policy; that despite the Union's contention that the County has "changed" its final offer during the arbitration process, the County, from the beginning, has

maintained that its final offer proposes a drug policy that is external to the contract; that the Commission confirmed that, even though the County is not proposing a contractual drug provision, the Arbitrator had jurisdiction; that the Commission's decision should lay to rest any remaining Union arguments that the County's proposed drug and alcohol policy is or must be a contractual provision; that the Union will not lose any of its existing bargaining rights under the County's offer; that, moreover, employees will retain the right to challenge the reasonableness of the drug policy (or any future changes to the policy) through the contractual grievance procedure; that the County has demonstrated a need; that the County's proposal reasonably addresses that need; that the County's proposal finds support among the external comparables; that the County's proposal incorporates a quid pro quo; that the County's final offer is reasonable, consistent with the policies already in place among the comparables (both internal and external), and poses no undue hardship upon the members of the bargaining unit; that the County's offer will not change one iota of contract language since the proposed policy is external to the contract; that, as a result, the County has clearly met its burden of proof to change the status quo; and that, for all of the foregoing reasons, as well as the arguments set forth in the County's initial brief, the County respectfully requests that its offer be selected by the Arbitrator.

Union on Reply Brief

The Union argues that a letter filed by the Employer post hearing is not evidence and is submitted after the record was closed; that the Union objects to its admission; that the Union is not aware that the County has implemented a drug policy; that the County's alleged unilateral implementation of the drug policy establishes the fact that the County's concern about grievances from unilateral implementation of a policy was groundless; that the reason the Union did not challenge the appropriateness of the County's inclusion of the drug policy prior to certification is that the County only changed its position regarding the contractual nature of the drug policy after offers were certified; that only then did it decide to claim that the policy would not be part of the collective bargaining agreement; that the County's unilateral implementation of an identical drug policy as a non-contractual policy does not support placing that drug policy in the collective bargaining agreement; that the policy is still patently unreasonable; that the County has not established a need for the policy; that the County has not offered a quid pro quo; that the County misrepresents the Commission's ruling; that the County improperly relies on non-contractual drug policies; that the County's claims it has an obligation to bargain the policy is inconsistent with the County's waiver demand; that the County's position that it must bargain the drug policy is inconsistent with its position that it can unilaterally implement the policy; and that, therefore, the Union submits that its offer is the more reasonable.

DISCUSSION

Introduction

This is a case of first impression for this arbitrator. Never before have I faced the question of

ordering the inclusion of a work rule or policy into a collective bargaining agreement via interest arbitration that the employer could unilaterally implement under it powers reserved under its Management Rights clause.[6] This case has been well argued by the parties who submitted long and detailed briefs and reply briefs, such that an easy answer was not to be. Fortunately, the very issue in dispute in this matter has already be litigated and decided for three other units of this Employer and Union. Better yet, the arbitrators in all three cases are nationally well respected arbitrators with a wealth of experience and a wide range of expertise. This should make a decision easy. But there is a glitch: the arbitrators disagree 2-1. Nothing ever comes easy, does it?

Each party has an issue on the table. The County's proposal is to "Implement attached drug and alcohol testing policy."[7] There is no cost to this proposal. The Union's proposal is "Prior to the general wage increase, increase the rate of the unit's one registered nurse by 10 cents January 1, 2008." The cost of this proposal is a little over $200 which amounts to less than one percent of the

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[6] No one in this case, including the Union, disputes the right of the County to implement work rules or policies and specifically the Drug Policy at issue here under its Management Rights reserved in the parties' agreement.

[7] While this has no impact on my decision in this matter, as a certified alcohol and other drug counselor, I cringe a bit when the word "other" is not included with the terms "alcohol" and "drug", as if alcohol itself is not a drug. Normally I would refer to this as the County's Alcohol and Other Drug Policy. For simplicity sake, I will refer to this proposal as the County's Drug Policy.

registered nurse's salary, an amount so small that it could probably be covered by the County's petty cash fund, wherever that may be kept, an amount so small that it would have almost no impact on the County's budget, an amount so small it will have no impact on the Arbitrator's decision in this matter.

Statutory Criteria

The amount of money involved in this dispute is so small as to not even kick-in the factor given greatest weight and the factor given greater weight. The parties agreed at hearing that not only do the final offers not favor either party in terms of these factors but they do not even apply in this case. In terms of other factors considered: the lawful authority of the municipal employer, the stipulations of the parties, the financial ability of the County to meet the costs of any proposed settlement, and the overall compensation presently received by these employees, none of these were argued by the parties and, therefore, are an issue here.

The County argues that the cost of living factor favors its proposal because its agreed-upon financial package is above the CPI index, while the Union argues that the cost of living factor favors its proposal as the agreed-upon monetary settlement is less than comparable settlements, a bench mark many arbitrators use to determine the true and/or local cost of living. Both parties are correct so this criterium favors neither one.

The County argues that the criterium of the interests and welfare of the public strongly favors its proposal in that the public wants a government work place free of drugs and government employees drug free on the job, as well. While I believe it is true that the public wants drug-free work places in County government, as a drug policy can be implemented outside the agreement quickly and easily, there is no public interest in having it contained in the agreement.[8] The Union could well argue that the interest and welfare of the public is best served by having a qualified registered nurse who is compensated appropriately. Therefore, I find that this issue slightly favors the Union's Final Offer.

In terms of the comparison of wages, hours and conditions of employment of this units employees with a variety of other types of employees, the Union has shown that the position of Register Nurse is, indeed, significantly behind the comparables. In this day and age of nursing shortage, keeping this wage rate competitive supports the Union's offer. How these criteria impact the County's drug policy will be discussed below.

In terms of the criterium of changes in any of the foregoing circumstances during the pendency of the arbitration proceedings, the three interest arbitration awards issued previously issued between

[8] There is a huge question of whether this Drug Policy is, indeed, contained in the agreement but, for purposes of deciding the issue of the interests and welfare of the public, I will act as if there is no dispute about that.

these parties certainly is covered by this, but only as to the Employers' Drug Policy.[9] These will be discussed below. And in terms of the criterium of other factors which are normally or traditionally taken into consideration in arbitration proceedings, this has a major impact on this case, as discussed below.

To summarize up to this point, I have good news and bad news for the Union. The good news is that it has shown the need for the increase and has dealt with that need in a most conservative way, seeking only a 10 cent increase, and thus, is favored on this issue. If that was all there was to this dispute, the Union would win. But, compared to the County's Drug Policy, this wage issue is so small that it will have no impact on the outcome of this arbitration. Whichever party is favored on the County's Drug Policy was have its final offer accepted. Obviously, for the Union, the fact that its issue will not impact the final decision in this matter is the bad news, though not unexpected. Of course, the good news-bad news analysis would be flipped for the Employer.

County's Drug Policy

[9] The issue of the wage adjustment for the registered nurse is unique to this bargaining unit.

In its brief, the County poses the question: "What precipitated the County's proposed drug and alcohol policy?"[10] This is a good question, for which the County offers the following answer:

> The County's main goal was the ability to conduct post-accident and reasonable suspicion testing. The County has a direct interest in (and liability for) ensuring that its employees remain drug-free. Post-accident and reasonable suspicion testing are two avenues for accomplishing that objective while at the same time limiting the County's testing authority to only these instances in which employees have exhibited specific behaviors that are common indicators of drug or alcohol impairment.[11]

While that is all well and good, as far as it goes, what I really want to know is: What precipitated the County's placing of its Drug Policy in its Final Offer? The County does ask the other side of that question: "The Arbitrator may ask why the County did not simply implement its proposed policy unilaterally."[12] I do ask: Why did the County not simply implement its proposed policy unilaterally? The County replies:

> The County's answer is twofold. First, the County wanted to give the Union the opportunity to have input and, therefore, "buy in" to the policy up front. Instead, the Union flat-out refused to discuss the policy at all. Second, based on AFSCME's refusal to discuss/negotiate implementation of any drug and alcohol testing policy, the County had good reason to believe it would find itself in litigation if it imposed any policy unilaterally.[13]

Here is where I begin to have problems with the County's position and its rational. In terms of the first answer, nothing would stop the County from including the Union in discussions of a proposed policy before the County unilaterally implements it under its Management Rights clause. The Union can "buy in," as the County says, without the policy being incorporated into the Agreement. So, from my point of view, the first answer stated above does not answer the question of why the County

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[10] County Brief at 6.

[11] Id. at 6-7.

[12] Id. at 7.

[13] Ibid.

did not simply implement its proposed policy unilaterally.

The second answer befuddles me even more. As noted above, the County said it "had good reason to believe it would find itself in litigation if it imposed any policy unilaterally." So even though the County said it hoped to produce "a mutually agreed-to policy that would preclude future grievances regarding the reasonableness of the policy,"[14] when it did not accomplish such an agreed-to policy, it included the policy as a proposal in four final offers which it knew would not be accepted by the Unions but would be litigated "regarding the reasonableness of the policy." And for those arbitrations it would lose, if any, the County knew it would implement the policy unilaterally anyway and, therefore, call forth the very grievance arbitration litigation it said it was trying to avoid, compounded by the additional litigation caused by the interest arbitrations. There is something about the "litigation to avoid litigation" argument that comes up short.

So how does the County benefit if, instead of abiding by a long tradition of employers making and implementing work rules and policies and unions having the right to challenge them via the grievance procedure, it includes the implementation of the policy via interest arbitration? In other words, from the County's point of view, what reason exists that makes litigation before an interest arbitrator preferable to litigation before a grievance arbitrator? I do not know the answer to that question from the County's case. So the second answer to the question, like the first, does not answer the question of why the County did not simply implement the drug policy unilaterally.

The County argues long and hard that, if its final offer is accepted and the drug policy implemented, nothing changes, in essence, for the unit members.

> But they also will continue to be governed by, and receive the protections afforded by, the collective bargaining agreement (including) the Union's right to challenge the reasonableness of a policy and to bargain the impact. . .In addition, the collective bargaining agreement provides employees with the traditional safeguards of a just cause standard. . .and a grievance procedure . . .should an employee be disciplined for violating the drug and alcohol testing policy. . .(U)nder the County's proposal employees will retain the specific contractual right to challenge the reasonableness of the policy and to bargain the impact or the exercise of the County's implementation of the drug and alcohol policy . . .Moreover, employees will retain the right to challenge the reasonableness of the drug policy (or any future changes to the policy) through the contractual grievance procedure. . .which will afford them an established procedure to address the essential reasonableness of the policy and/or any future revisions to the policy. . .Thus, it is clear that the grievance procedure allows employees a forum to address the essential reasonableness of any revisions to this policy/work rule. The County's proposal does not require the Union to "waive" any

[14] Id. at 8.

of its existing bargaining rights.[15]

Assuming the correctness of this assertion that things will not change for the Union and the unit members if the County's Final Offer is accepted and the County's Drug Policy is implemented via the Arbitration Award, as opposed to the County unilaterally implementing the Drug Policy, something must be different for the County for it to go through all this litigation to attempt to secure its policy via interest arbitration when it could have secured it just like that by unilaterally implementing it.

The County asserts many good policy reasons why it should have a drug policy:

[15] Id. at 8-9.

> The U.S. Department of Health and Human Services states that substance abuse lowers workplace productivity, causes accidents and injuries, increases absenteeism and turnover and increases an employer's medical costs. A publication of the Occupational Safety & Health Administration (OSHA) indicates that "OSHA recognizes that impairment by drug or alcohol use can constitute an avoidable workplace hazard and that drug-free workplace programs can help improve worker safety and health and add value to American businesses." Employer recognition of the impact of substance abuse on the workplace appears to be growing. A survey conducted by the American Management Association states that more than 81% of businesses surveyed were conducting some form of applicant or employee drug testing. . .The U.S. Department of Health & Human Services reports a finding that illicit drug users said they would be less likely to work for employers who conducted random drug testing. (Citations omitted)[16]

There is support specific to the County in terms of implementing a drug policy.

> The implementation of drug and alcohol testing policies is endorsed by Clark County's worker's compensation insurance provider, which noted the connection between drug/alcohol use and workplace injuries and which advised that at least one Wisconsin worker's compensation insurance carrier will only provide insurance for organizations and employers that have a documented alcohol and drug abuse policy. There is also evidence that drug and alcohol testing policies may limit the County's liability exposure since drug testing policies can serve as a deterrent to job applicants who are using drugs. (Citations omitted).[17]

So there is much to confirm the County's argument for a drug policy. BUT the County never offers a concrete reason why such a policy should be included in the Agreement via interest arbitration, as opposed to a policy implemented via its powers to formulate work rules and policies under the Management Rights Clause.

But the crux of the County's argument and, ultimately, one major basis for this arbitrator's decision, is as follows:

> The Union may argue that the County's proposed policy is contractual. However, the County's offer does not call for the creation of a new contract provision nor does it add language to an existing contract provision. Rather, it

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[16] Id at 10-11

[17] Id. at 11.

> calls for the parties to implement the "attached drug and alcohol testing policy" as a policy external to the collective bargaining agreement.
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> The distinction is important. While it is true that the employees will be subject to the policy (just as they are currently subject to other personnel policies), the County's offer does not add the policy to the agreement as a contractual provision. Indeed, such a proposal would find absolutely no comparable support since none of the comparable counties include drug and alcohol language in their collective bargaining agreements. But the comparable counties all do have drug and alcohol policies that are external to the contract. And regardless of whether those policies came into existence via bargaining or unilateral implementation, the impact is the same: the policies are binding upon the employees of the comparable counties (just as the County's proposed policy would be binding on employees in this unit) but the employees retain the right to challenge the reasonableness of the policy. (Emphasis in original, citation omitted).[18]

The County understates the importance of this distinction for I believe it is critical to and determinative of the decision in this case. The County says, in essence, that if the arbitrator decides for the County, if he finds the County's final offer to be the more reasonable of the two offers, his decision will not impact the collective bargaining agreement in any way, shape or form. If appears obvious, then, that a typical interest arbitration award, such as "Based upon the foregoing, the Employer's final offer is to be incorporated into the successor collective bargaining agreement" is not appropriate here because the County's final offer has nothing to incorporate into the successor agreement.

This brings me to the question Arbitrator Bellman posed to the Commission:

> 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.[19]

The County believes that, based upon the Commission's Decision, the arbitrator has authority to address a proposal for terms that are not to be included in the successor agreement:

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[18] Id. at 12-13.

[19] Commission Decision at 4 quoting Arbitrator Bellman's letter.

> If the Union continues to argue that the County's final offer makes the proposed drug and alcohol policy a contractual provision, the WERC's recent decision should lay any such contention to rest. In its December 19, 2007 opinion, the WERC confirmed that even though the County is not proposing a contractual drug and alcohol provision, the interest arbitrator has jurisdiction. The Commission stated:
>
> > Arbitrator Bellman asks if he has statutory jurisdiction to select a final offer that includes a drug and alcohol policy that will not be physically included in the 2007-08 contract. We conclude that he does. . .
> >
> > * * *
> >
> > Where, as here, the parties are bargaining a new collective bargaining agreement and, as 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 rule can proceed to be resolved through . . . statutory interest arbitration. . .(Clark County, Dec. No. 32094-B [12/19/07]). (Emphasis added by County)
>
> Thus, the WERC has concluded that an interest arbitrator does have jurisdiction over a drug and alcohol policy that is not included in a collective bargaining agreement. Any Union arguments that the County's proposed drug and alcohol policy is or must be a contractual provision should, therefore, be rejected.[20]

But wait a minute! Hold on here! Let's look at the line following the underlining above which reads as follows: "...an impasse/deadlock over such a policy or work rule can proceed to be resolved through (the) statutory interest arbitration. . .". What are those three dots replacing? What is the rest of the story? I will tell you. The Commission decided as follows:

> Where, as here, the parties are bargaining a new collective bargaining agreement and, as 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 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

[20] County Brief at 13-14, quoting Commission Decision at 4-5.

> language incorporating by reference the specific proposed policy or rule. (Emphasis added).[21]

The Commission's ruling is absolutely clear that the proposed policy or rule must be must be contained in or incorporated by reference in the collective bargaining agreement. But the County has stated emphatically, "However, the County's offer does not call for the creation of a new contract provision nor does it add language to an existing contract provision." (Emphasis added).[22]

In case I had any misgivings that I had misread the County's position on whether selecting its final offer would change the collective bargaining agreement in any way, the County restates it, saying that a Union exhibit, to be accurate:

> should more clearly identify the fact that the comparables have *no contract language* concerning drug and alcohol testing. However, all of the comparable counties do have drug and alcohol *policies* that are external to the collective bargaining agreements. Here, Clark County proposes *no contract language* concerning drug and alcohol testing, just as the comparable counties have *no contract language* concerning drug and alcohol testing. Similar to all of the comparable counties, Clark County is proposing

[21] Commission Decision at 5.

[22] County Brief at 12. At one point, the County states the policy would be attached in the back of the contact but no where does the County state that the policy is part of the contract.

> implementation of a *policy/work rule* that is external to the contract. (Emphasis in original).[23]

And just in case I missed that point, the County restates it in its Reply Brief: "The County's offer will not change one iota of contract language since the proposed policy is external to the contract."[24]

In essence, the County is asking the interest arbitrator to put his imprimatur on a work rule totally separate and distinct from the collective bargaining agreement. I do not believe that to be the role of the interest arbitrator. I do not believe that this is the factual situation that the Commission was presented nor the factual situation it envisioned when it issued its decision.

There are times when a contractual provision is incorporated by reference or anchored in the contract but the actual language does not appear there. For example, a municipal employer and a labor organization agree to specify in the agreement that the insurance plan is ABC Health Package 123. In this case, the title of the agreed-upon package is be included in the agreement, but the verbiage of the provisions of that insurance package, which may cover reams of pages, is not contained in the contract, but is included by reference. The same could be true of the seniority list or a "grand-fathered" list or numerous other examples. I would think this is analogous to what the Commission thought was the fact situation in this case.

In fact, I am sure of that. In its decision, the Commission also said:

> Here, the content of the proposal regards employee wages, hours and condition 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"). (Footnote omitted, emphasis in original).[25]

But, as noted above, the County has stated emphatically, "However, the County's offer does not call for the creation of a new contract provision nor does it add language to an existing contract provision (emphasis added)."[26] Thus, I would question, just as Arbitrator

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[23] Ibid.

[24] County Reply at 10.

[25] Commission Decision at 5-6.

[26] County Brief at 12.

Bellman questions in his request to the Commission, "whether my authority allows me to address a proposal for terms that are not to be so included"[27] but I would add, "in any way, shape, or form." My sense is that if the Commission looked at this matter again, realizing that no language would be included in the agreement under the County's final offer, the Commission would have come to a different result. But the Commission has decided and I will work with the Commission's decision as is.

The Companion Awards

Arbitrator Bellman's decision was short and to the point:

> In the judgment of the Arbitrator, the Union's proposal should be selected because the County's strategy is to avoid both subjecting the policy to examination that might occur if the policy were subject to a grievance challenging its reasonableness, and negotiating out of an apparent impasse.
>
> . . .
>
> ...(I)f the policy were adopted as proposed by the County, the reasonableness of the work rule in its present form, unchanged, would have the status of agreed upon terms. In other words, the only forum for contentions regarding the proposed rules seems to be the instant final-offer, all-disputed-items interest arbitration.

[27] Commission Decision at 4.

> The Arbitrator is convinced that 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. The County maintains the right under the collective bargaining agreement to enact the policy as a work rule, and the Union may challenge it in the grievance procedure, in whole or in part, upon enactment or upon its application. That process focuses on the rule and allows for remedies beyond the parties' proposals. (Emphasis in original).[28]

I agree with Arbitrator Bellman that the County is attempting to bypass the traditional and longstanding process of how work rules and policies have been implemented by employers and challenged by unions. Such fundamental changes to this long-held process should be made only after due deliberation and only if such changes add to the goal of labor peace. I do not find that situation here. I also agree with Arbitrator Bellman regarding the status of this policy in that, once ordered into the contract via interest arbitration, only thorough interest arbitrator could it be challenged as unreasonable, not a very efficient or effective way for a union to do so.

In terms of the factors which are normally or traditionally taken into consideration in arbitrations, Arbitrator Bellman said, "There is every reason to believe that in the development of 'extra-contractual' work rules the prevalent strategy of employers and union in the public and private sectors has been unilateral adoption as a management prerogative to be challenged by the union through a grievance procedure."[29] Again, I agree.

Arbitrator Bellman ruled for the Union.

Arbitrator McAlpin approached this case from a different point of view:

> (I)t is unusual that this (Drug Policy) 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 the interest arbitrator or it

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[28] Bellman Award at 3.

[29] Ibid.

> 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.

With all due respect, I disagree that the method of placing the work rule or policy in the agreement is immaterial in that there must be a difference between having a work rule or policy put in place by the interest arbitrator and one unilaterally implemented by the Employer, or why would the Employer attempt to do so? While the County has not offered a concrete and plausible reason as to why it chose to attempt to implement this policy via interest arbitrator, still there must be some difference when one or the other process is used to implement a work rule or policy for it to take on all this interest arbitration litigation.

Indeed, Arbitrator McAlpin notes such a difference: "the interest arbitrator is not driven by those standards noted above under grievance arbitration." Exactly. The standards to be applied by the interest arbitrator are specified in a state statute which is not true of grievance arbitration which receives its authority from the contract itself. My sense is that this is at least one reason driving the County's proposal. And I believe this to be consistent with Arbitrator Bellman's judgment that "the County's strategy is to avoid both subjecting the policy to examination that might occur if the policy wee subject to a grievance challenging its reasonableness."[30]

Arbitrator McAlpin continued, "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."[31] I respectfully disagree once again. The idea that there is no reason not to include the policy because it is not to be considered part of the agreement is a Catch-22 to me: Since the policy is not included in the Agreement, we can include it. The fact that the policy is not going to be considered part of the agreement is a major factor for me in deciding this matter.

Finally, Arbitrator McAlpin wrote, "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." Once again, I respectfully disagree in that I believe the method of implementation may very well have an impact on the Union's ability "to grieve the policy itself and/or any implementation."

Arbitrator McAlpin ruled for the County.

Arbitrator Greco applied the Commission's criteria to the case before him.

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[30] Bellman Award at 2.

[31] McAlpin Award at 21.

> 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. 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."
>
> 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. (citations omitted).[32]

But then, as in the present case, the County gets very specific, leaving no room for interpretation: "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."[33] I thought that Arbitrator Greco might stop the analysis there because the County had stated that no contract language would be included and that, therefore, it could not be selected under the criteria set forth in the Commission's decision.

But, as in the case before me, the County cites authority in support of its position. I will not repeat the cogent analysis that Arbitrator Greco applied but as I found that it was consistent with but better written than mine and that he came to the same conclusion I did, let me take the shortcut of citing his finding: "None of these cited cases therefore raised the precise issues found here."[34]

Focusing on the waiver language[35] included in the policy, Arbitrator Greco came to the

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[32] Greco Award at 10.

[33] County's Brief at 17-18, quoted in Greco Award at 11.

[34] Greco Award at 13. For Arbitrator Greco's analysis, see Greco Award at 11-13.

[35] THIS POLICY IS SUBJECT TO CHANGE BY COUNTY ACTION WITH OR WITHOUT PRIOR NOTICE TO EMPLOYEES. MODIFICATIONS, ADDITIONS,

conclusion similar to Arbitrator Bellman's as follows:

> 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.[36]

I believe that the County would have a good argument that any disputes over this language would have to be heard in an interest arbitration, not by a grievance arbitrator as the County has asserted and to which Arbitrator McAlpin has apparently agreed.

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. (Emphasis in original).

[36] Greco Award at 15

The County argues long and hard in this case that its proposal is a narrowly-tailored drug testing policy with the goal of constructively and consistently addressing employee drug use, as it argued in Arbitrator Greco's case. Again, Arbitrator Greco analyzed the policy in great detail[37] and found, instead, that the policy was unreasonable because it does not define which substances are prohibited, because it subjects employees to discipline for taking drugs which alter their "mood, perception, pain level, or judgment" regardless of whether such medication affects work performance, and because it calls for disciplining employees up to six week regardless of the circumstances and regardless of whether such a disciplinary penalty otherwise meets the contractual just cause standard.[38] I agree.

Arbitrator Greco ruled for the Union.

Final Considerations

In terms of the comparables, the County asserts that all of the external comparables have drug policies but they are outside of the contract; therefore, the County argues, the external comparables support its case in that the Drug Policy it wishes to implement will be external to the contract. In essence, the County is saying to the arbitrator that since the drug policy will be external to the contract, just as in all of the external comparables, you can choose our final offer which implements the Drug Policy but does not include it in the contract or incorporate it by reference. This argument is most unique, such that I can find no instance where it had been used before, much less a situation where such an argument prevailed.

If the County wanted to place the drug policy into the contract, the County asserts that "such a proposal would find no comparable support since none of the comparable counties include drug and alcohol language in their collective bargaining agreements."[39] The funny thing is that I believe the Commission assumed the County wanted to put at least a reference to the drug policy into the contract. That is the purpose for final offer binding arbitration: to determine the content of an agreement and not to decide issues not to be included in the agreement. Since the Commission determined that some part of the Final Offer must be anchored in the contract and since the County admits that not one external comparable has a contractual drug policy, I find that the County has no external comparable support.

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[37] See Greco Award at 15-19.

[38] Id. at 19, 21.

[39] County Brief at 13.

The County argues it has strong internal comparable support. The Health Care Center unit represented by the Teamsters has accepted the drug policy at issue here and is therefore an internal comparable supportive of the County's position. The AFSCME Courthouse Non-Professional unit has the drug policy at issue here via the McAlpin Award and is, therefore, supportive of the County's position. But the Law Enforcement unit, represented by the Wisconsin Professional Police Association, is differently situated. Members of this unit enforce drug laws and if there is any one group of employees that the public want drug free, it would be this unit. The Highway unit represented by AFSCME is also differently situated in that those employees who require a commercial drivers license to do their job are mandated by federal law to follow a drug policy. In addition, both the Law Enforcement and Highway unit's drug policies are different from the one at issue here. The fact that the County has unilaterally implemented the drug policy for the AFSCME Social Worker unit, in response to the Bellman Award, and, if the County is consistent, which I believe it will be in this case, the AFSCME Social Services Paraprofessionals unit, in response to the Greco Award, do not add credible internal comparables. While the County has some support among the internal settlements, I do not find a sufficient number of internal settlements involving the Drug Policy at issue here to find a pattern binding in this matter.

In sum, I find that most of the statutory criteria either do not apply in this case or do not favor neither party; that the criterium of the interest and welfare of the public slightly favors the Union Final Offer but does not support the County's Final Offer in that the interest and welfare of the public can be attained via unilateral implementation, thus negating the need for it to be included in the Final Offer; that the external comparables strongly favor the Union in regard to the wage adjustment it is seeking for the registered nurse; that, by the County's own admission, the external comparables do not support the creation of their drug policy via the collective bargaining agreement; that while the County has some internal comparable support, it is not enough to show a binding pattern; that the criterium of other factors normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment strongly favors the Union Final Offer on status quo in terms of the County's proposed Drug Policy; that the County's proposal abrogates the traditional method of implementing and challenging work rules; that the County's proposal opens up the possibility of future litigation to determine the effect of implementing the County's Final Offer, thus, detracting from the goal of clarity and certainty in bargaining and labor peace; and that the County's stated position that nothing from its Final Offer is to be incorporated into the Agreement does not meet the standard established by the Commission.

Both the County and the Union made other arguments which have been reviewed and all of which are trumped by the County's proposed abrogation of the traditional method of implementing and challenging work rules and its assertion that its Final Offer does not include any language to be included in the parties Agreement; therefore, having reviewed all of the testimony and evidence in this case, for the reasons stated above, the Arbitrator issues the following

AWARD

That the Final Offer of the Union, together with any tentative agreements between the parties, shall be incorporated into the parties 2007-2008 collective bargaining agreement.

Dated at Madison, Wisconsin, this 30th day May, 2008.

By _____
James W. Engmann, Arbitrator