IN RE ARBITRATION BETWEEN:

TEAMSTERS LOCAL #320

and

WASECA COUNTY

DECISION AND AWARD OF ARBITRATOR

BMS 13-PA-0405 & 13-PA-0406

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ARBITRATOR

April 5, 2013

IN RE ARBITRATION BETWEEN:

Teamsters Local #320,

and

Waseca County.

DECISION AND AWARD OF ARBITRATOR
BMS Case # 13-PA-0405 and 13-PA-0406
Pay grievances

APPEARANCES:

FOR THE UNION:

Paula Johnston, Attorney for the union
Dan Mocol, Jailer Dispatch union Steward
Tim Collins, Deputy Sheriff union Steward
Jeremy Conrath, grievant
Vance Rolfzen, union Business Agent

FOR THE COUNTY:

Frank Madden, Attorney for the City
Laura Elvebak, County Administrator
Dan Kuhns, County Commissioner
Richard Androli, County Commissioner

PRELIMINARY STATEMENT

The hearing in the above matter was held on February 6, 2013 at the Waseca County Courthouse East Annex in Waseca, MN. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted Briefs dated March 13, 2013.

ISSUES PRESENTED

Is the grievance procedurally arbitrable as untimely?

The union stated the issue on the merits as follows: Did the employer violate Article XXIV, Section 12 and Section 14 of the 2010-2011 Collective Bargaining Agreement, hereinafter CBA, when it did not permanently roll a $.32 per hour increase onto the grievants' base pay? If so, what should the remedy be?

The County stated the issue on the merits as follows:

Whether the County violated Article XXIV, Section 13 of the collective bargaining agreement in the manner in which it calculated 2011 wage step increases for grievants Jeremy Conrath and Patrick Anderson? If so, what should the remedy be?

The issue on the merits as determined by the arbitrary after a full review of the evidence in the matter is as follows:

Did the County violate Article XXIV of the CBA in the manner in which it calculated the 2011 wage step increase for the grievants herein? If so what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2010 through December 31, 2011. Article XVIII provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE XXIV- SALARIES AND COMPENSATION

Section 1

Salaries paid to the employees covered by this Contract shall be based on the following compensation plan:

DISPATCHER/JAILER

Step	Years of Service	1/1/10
		0.0%
A.	0-1	2,687
B.	1-2	2,824
C.	2-3	2,976
D.	3-4	3,168
E.	4+	3,366
F.	Head Disp/Jailer	3,543

Section 10

Effective for calendar year 2010, eligible employees will continue to receive wage step increases in accordance with the terms and wage structure of the 2009 collective bargaining agreement.

Section 11

Effective on or about November 1, 2010 employees whose current wage rates are below the minimum of the revised Springsted salary range will be increased to the revised Springsted range minimum.

Section 12

Effective on or about November 1, 2010, current full-time employees who have worked a minimum of one year for the County shall be eligible to receive a non-base lump sum payment in the amount of $667.37 which will be subsequently rolled onto their current salary in 2011 as a $.32 per hour adjustment as noted in Section 14 below. Full-time employees at or above the maximum of the revised Springsted salary range will be eligible to receive the $667.37 lump sum.

Section 14

Effective the first day of the first pay period following January I, 2011, full-time and regularly scheduled part-time employees who were employed in 2009 and received a lump sum payment shall be eligible for the lump sum to be rolled onto the base salary in the form of a $.32 per hour increase (the 2010 lump sum converted to cents per hour) provided that no such increase shall result in a salary above the revised Springsted salary maximum for the employee's applicable pay grade. Employees who are at or above the Springsted revised salary maximum for their applicable grade, shall receive the $.32 per hour increase in the form of a non-base lump sum payment.

Section 15

Effective for calendar year 2011, eligible employees will continue to receive wage step increases in accordance with the terms and wage structure of the 2009 collective bargaining agreement. Effective the first day of the first pay period following July 1, 2011, full-time and regularly scheduled part-time employees shall receive a 2.0% wage increase provided that the increase does not result in a salary above the revised Springsted salary maximum for the applicable grade. Employees who are at or above the Springsted revised salary maximum for their applicable grade, shall receive the 2.0% salary increase in the form of a non-base lump sum payment. Employees eligible to receive a wage step increase in 2011 will not be eligible for both the wage step increase and 2.0% wage increase, but rather the higher percentage of the two. The resulting increase will not go above Springsted salary maximum for their applicable grade.

UNION'S POSITION

The union's position was first that the matter is procedurally arbitrable and was timely since the issue here is in the nature of a continuing violation of the CBA. On the merits the union contended that the County violated Article XXIV when it did not permanent roll a $.32 per hour wage increase onto the two grievants' base wages pay. In support of this position the union made the following contentions:

1. TIMELINESS/ARBITRABILITY - The union asserted that the matter is timely both because of a continuing grievance theory. The union asserted that this case is an almost classic case of a continuing grievance since each pay period the County failed to correctly calculate the correct base pay gives rise to a new grievance.

2. The union cited Elkouri and Elkouri, *How Arbitration Works*, for the proposition that a failure to correctly calculate wages fits the continuing violation theory. The union also cited several arbitration cases holding that such a failure is arbitrable. See, *Copolymer Rubber & Chemical Corp. and Machinists*, 40 LA 923, 926, (Oppenheim 1963), *U.S. Steel Corp. and Steelworkers*, 48 LA 34, (McDermott, 1996); *Tendercare, Inc. and Service Employees International union, Local 79*, 111 LA 1192, 1196 (Borland, 1998).

3. Further, the union pointed out that one of the grievants could not grieve this immediately since the CBA was not settled as of his anniversary date. The other grievant was not able to file a grievance immediately either since his anniversary date is July 29th and the calculations did not occur until August of 2011. The union pointed out that the grievances on behalf of these grievants involved in this case were filed in August of 2012, immediately after it was discovered that the County did not intend to honor the commitment it made during the settlement of the Appel grievance, discussed more below.

4. Finally, on the question of timeliness, the union pointed out that when these grievances were first filed the County did not claim they were untimely. Rather they simply requested that the matter be appealed to the next step in the grievance procedure. This action led the union to believe in good faith that the County regarded the grievances as timely and proper but had issues with the merits only. The union asserted that given these unique facts coupled with the continuing grievance theory, which is followed by virtually all arbitrators, the grievance must be considered timely and procedurally proper.

5. MERITS – The essence of the union's argument is that the language cited above calls for the $0.32 per hour pay raise to be "rolled onto" the affected employee's base rate of pay and that this is just what it says, i.e. a permanent increase in wages.

6. The union asserted that these two grievants were treated differently because of their placement on the wage schedule and that when each grievant received his step increase in 2011, he should have been paid at the rate of $17.93. Instead, the grievants were paid $17.60, which leaves them short. (Due to mathematical rounding some of the disputed wages rates are different by $0.33 rather than $0.32.)

7. The union noted that each grievant received the $0.32 per hour increase on January 1, 2011 along with the 2.5% hazardous duty pay set forth above. Both grievants moved from Step B to Step C on the wage schedule on their respective anniversary dates; here May 14 and July 29. The union converted the base wage rates to hourly rates and asserted that what should have happened on the anniversary dates was for these two grievants to have been paid $17.93 per hour as opposed to the $17.60 the County paid them at that point.

8. The union refuted the County's claim that the two were only eligible to receive the $0.32 increase until they got to Step C on the wage schedule by arguing that the clear language of the CBA says that the $0.32 increase is "rolled onto the base salary." Thus, the argument goes, the County improperly calculated the wage increase by failing to include the $0.32 when it moved the two grievants to Step C.

9. The union further asserted that this is not a "double recovery" as alleged by the County and that the understanding was that the increase would be permanent. The net effect of the County's action is to ignore the $0.32 increase and calculate the 2.0% increase when moving to the next step on the base wage rate without the increase.

10. The union also countered the claim that the language of Section 15 prevents the addition of the additional wages here. The union asserted that the term "rolled onto" the base pay means just what it says, despite anything to the contrary and that since the County drafted this language any latent ambiguity must be construed against it.

11. Moreover, the use of the term "non-base" in Sections 12, 14 and 15 of the language cited above clearly means that the parties understood what that meant – that the lump sum payment was a one-time event. However when they used a different term for the rollover to the base rate, they understood something very different, i.e. that the rollover to the base rate would be permanent and would be used to calculate future wage increases.

12. The union also asserted that a basic tenet of contract interpretation is to apply the same meanings to similar words used in other parts of the contract. The provisions dealing with hazard pay contained similar base pay language and have always been considered and applied to mean that they are a permanent increase in base salary that is used as the basis for wage increases.

13. The union further noted that while the $0.32 per hour wage increase does not itself appear on the wage schedule set forth in Section 1 of the CBA, one can infer that it is permanent by looking at the wage scales for those at the top of the pay scale. They were paid the 2.5% hazard pay and those at the top never "lost" their $0.32 increase in the same way as did these employees. The union maintained that it would never have agreed to what it termed "wildly disparate increases for the members at the top of the wage scale [versus] members in the middle of it."

14. The union cited other CBA's within the County and noted that those contracts have identical clauses in them with regard to the lump sum and the rollover of the wage increases. The union noted that these provisions have been interpreted consistent with the union's position here and that consistency mandates that it be so interpreted for these grievants.

15. The other main prong of the union's argument is based on a specific settlement of the Appel matter by the County Board. Ms. Appel's grievance was factually and contractually identical – she is in the same unit and similarly situated to these two grievants. Her matter was heard before the Board in July 2012 and the Board voted unanimously to grant her grievance. Moreover, the claim now that the agreements reached at that meeting were "just all a big mistake" are incorrect and even disingenuous.

16. The union noted that the board voted unanimously to approve her grievance, which was over this identical issue. Despite that two board members testified that they misunderstood the nature of her grievance. First, the union asserted, a majority of the Board did not testify at the hearing of this matter. The fact that two of them did not understand it still does not constitute a majority of the Board. Second, it was absolutely clear what the Appel grievance was about. The union business agent explained it, the grievance clearly set forth what was at stake and, more importantly, the County Administrator also presented the County's case at the Board meeting. The union asserted most strenuously that the Board knew exactly what it was doing when it granted the Appel grievance. Further, that the Board committed to "make things right" or words to that effect to the business agent at that meeting. The union understood that this resolution would apply to the two grievants involved in this matter. It was only after the union realized that the County had reneged on its commitment to honor the resolution of the Appel matter to these grievants that the grievance on their behalf was filed.

The union seeks an award as follows:

The only appropriate remedy in this case is to make the grievants completely whole. Each grievant should receive the difference between the correct wage at step 3 ($17.93 and the incorrect wage ($17.60) he was given at his anniversary date in 2011 through July 1, 2012, when the new twenty step wage scale was retroactively put into effect. Beginning July 1, 2012, each grievant should receive the difference between step 4 ($17.65), on which they were improperly placed, and step 6 ($18.21), the correct step. The grievants should receive back pay for all hours worked, including, but not limited to, overtime, holiday, and any other paid leave time.

COUNTY'S POSITION:

The County's position was that the matter is procedurally non-arbitrable as untimely. On the merits, the County' position is that there was no violation of the labor agreement herein. In support of this position the County made the following contentions:

1. TIMELINESS – The County first took the position that this matter is time barred and should be dismissed without ever reaching the merits of the case. The County noted that the grievance filed by Ms. Appel in 2011 was not a "class" grievance but rather was filed on her behalf. The union clearly knew of the issue and yet did not include the two grievants involved in that matter on that grievance.

2. The grievance filed on behalf of Mr. Conrath and Mr. Anderson here was filed a year later, in August 2012, well after the time limits set forth in the grievance procedure had expired. Article XVIII, Section 2 of the collective bargaining agreement requires a grievance to be filed within fifteen (15) working days of its occurrence or knowledge of it. Joint Exhibit 1.

3. The County noted that the first "occurrence" of the grievance that triggered the 15-working day period under Article XVIII was more than a year before the union filed the grievance the first of these two grievances on August 16, 2012. The County further asserted that even if the arbitrator allows this to go forward after the first potential occurrence, the second "occurrence" was the Board decision rendered July 3, 2012. The grievances were filed well over a month after the Board made its decision on the Appel grievance on July 3, 2012.

4. Further, the union knew of the County's position on these two grievances well before they were filed and well outside of the 15-day limitation set forth in the grievance procedure. The business agent acknowledged that he was aware of the Conrath and Anderson situations and that he was aware they were factually identical to the Appel grievance at the time her grievance was filed. He admitted this is at the hearing and in conversations with the County after the Appel grievance.

5. The County cited both the terms of the grievance procedure as well as arbitral precedent for the proposition that a grievance that is filed outside of the prescribed time limits must be denied without ever reaching the merits.

6. The County also countered the claim that this is a continuing grievance as asserted by the union. The County noted that this was in fact a separate and distinct decision made by the County when the wage increase was calculated and that the attempt to bootstrap this into a violation for every subsequent paycheck is an absurd result.

7. The County also asserted that the union failed to even follow the prescribed grievance steps in processing the grievance – adding the Anderson grievance along the way and failing to follow the steps by filing at step 4 rather than proceeding to step 2. The County made the union aware of these procedural deficiencies and further denied the grievance on this basis as well as the merits in its subsequent responses to the grievances.

8. The County also cited the equitable doctrine of laches, or unreasonable delay in asserting that these grievances should be denied. The union knew that the Appel grievance was identical on its face yet waited well over a year after filing that grievance to assert these grievances. At the very least the union "sat on its hands here" and waited an unduly long period before filing these grievances. The County asserted that allowing this grievance to go forward will encourage the filing of stale and old grievances and would undercut the clear time limits set forth in the parties' grievance procedure.

9. MERITS – The County asserted most strenuously that the language of the CBA is clear and unambiguous and required only that the $0.32 per hour be paid once – not twice as the union suggests. The County pointed to Article XXIV, Sections 14-15, and noted that employees in the Jailer/Dispatcher bargaining unit received a $0.32 per hour increase on January 1, 2011 and in July of 2011, employees received either a step increase in accordance with the 2009 wage structure or a 2.0% increase, whichever was greater. They were not however entitled to both another $0.32 per hour increase plus a 2.0% increase as the union suggests.

10. The County noted that the union is in effect asking for a double recovery of the $0.32 per hour and for something the CBA does not say. The County maintained that for the union to prevail the CBA would have to read as follows: The union wants Article XXIV, Section 15 to state, "effective for calendar year 2011, eligible employees will continue to receive wage step increases in accordance with the terms and wage structure of the 2009 collective bargaining agreement with *$.32 per hour added to the wage structure for 2011*. The CBA does not say that however and the County asserted that there is no contractual basis to add the $0.32 to the 2011 wage rates.

11. The County further maintained that even the union's witnesses acknowledged that the County's interpretation was what was discussed and agreed to at the bargaining table when these wage rates were negotiated.

12. The County also pointed to the language of Section 15 which provides that the employees eligible for a wage increase in 2011 were to receive the $0.32 plus a step increase or a 2.0% wage increase whichever is greater. They are not entitled to both. The 2009 wage schedule, which is the basis of the wage increases does not provide for an additional $0.32 increase over and above what the employees were to receive in 2011. All the union witnesses admitted that the affected employees in fact got the $0.32 increase in 2011; thus showing that there was no contractual violation here at all.

13. The County pointed to the bargaining history as well and noted that all parties present, on both sides, knew and acknowledged that the affected employees were to get a $0.32 per hour increase on January 1, 2011 and then to receive either a 2.0% increase or a step increase based on the 2009 wage scale. Since the 2009 and 2010 wage scales are the same this clear language and understanding can only mean that they were to get the greater of these two increases. The County maintained most vehemently that there was never an agreement that the $0.32 was to be added to the 2011 wage scale.

14. The County countered the claim by the union that the Board's decision determines this result and asserted that there was simply a mistake made by the Board members based on a number of other sorts of errors made by payroll when implementing the new wage schedules. They misunderstood what the Appel grievance was about and believed that she had never been granted the $.32 per hour in 2011 when in fact she had. The County argued that a mistake cannot change clear contract language and cited cases that held that a clerical error or a mistaken settlement cannot bind a future grievance, even over the same language.

15. Moreover, neither of these two grievants claims were involved in the Appel grievance. Thus, the County argued, the mistaken resolution of the Appel grievance should not be extended to the instant case under any circumstances. The County countered the claim that there was any agreement or statement to the effect that the Appel grievance would be extended to any other employees. The County asserted that the Board made a mistake, pure and simple, and that such an error cannot trump clear negotiated CBA language.

The County seeks an award of the arbitrator denying the grievance in its entirety.

DISCUSSION

FACTUAL BACKGROUND

The grievants are members of the unit of jailer/dispatchers for the County and members of Local 320. Sometime prior to 2010 the County undertook a wage study with the Springsted Group. The terms of the 2009 CBA remained in effect and the affected employees received their step increases in accordance with that CBA.

The evidence showed that these grievants received the non-base lump sum of $667.37 on or about November 1, 2010 just as the CBA provided at Section 12 and 13. The evidence also showed that they received $0.32 per hour increase as of January 1, 2011. The contract was not executed until July 7, 2011 however, see Employer exhibit 2, so there were retroactivity payments made. There were apparently a number of errors by payroll during this time.

Effective July 1, 2011, the employees received a 2.0% wage increase provided the increase did not result in a salary above the revised Springsted salary maximum.[1] Employees who were eligible to receive a step increase in 2011 were not eligible for both the step increase and the 2.0% wage increase, but rather the higher percentage of the two. Employees who were at or above the Springsted revised salary maximum received the 2.0% wage increase in the form of a non-base lump sum payment. Joint Exhibit 1, Article XXIV, Section 15.

There was no dispute that as of December 31, 2010 both of the grievants in this matter were paid $16.70 per hour. Further, there was no dispute that both were paid $17.03 (reflecting rounding) as of January 1, 2011. Grievant Conrath's anniversary date is May 14th and he as eligible for a Step increase as of May 14, 2011. Grievant Anderson's anniversary date is July 29th and he was eligible for a Step increase as of July 29, 2011.

On August 22, 2011 Ms. Sheila Appel filed a grievance claiming that she had not been paid the correct amount. The evidence showed that her grievance was in effect identical to the grievances filed by both Conrath and Anderson in terms of the provisions allegedly violated and the relief sought. See union Exhibit N. This was initially denied by the County and was eventually appealed to the County Board for resolution.

The County argued that the Board mistakenly granted this grievance by unanimous vote because it did not fully understand the nature of the grievance and because they thought that her claim was that she had never been paid the $0.32 per hour on January 1, 2011 as the CBA provides.

[1] There was no evidence that these grievants' salary was above that level and the question of how their salaries compared to the Springsted salary maximum. On this record the issue was decided based on the contract language and the actions of the County Board as discussed below.

On this record that argument rang hollow. First, even a cursory review of the grievance filed by the union on Ms. Appel's behalf shows exactly what she was looking for. See union exhibit J. The documents contained in that exhibit shows that her grievance was not at all about not getting the $0.32 per hour as of January 1st but rather was about not getting that increase permanently rolled onto her base pay rate.

Second, the evidence clearly showed that the Board was apprised of the facts and circumstances of this grievance and understood exactly what they were doing when they granted it. There was no evidence whatsoever that the Board was misled or misinformed in any way. In fact the County Administrator was present at the Board meeting and could have been asked any questions by the Board if they had any misunderstanding of the grievance. The minutes reflect only that there was a unanimous vote to grant her grievance retroactively to September 10, 2011 and there was no transcript introduced at this hearing.

There was no evidence that the County's labor counsel was at the July 3, 2012 Board meeting and it was clear that counsel did not agree with the resolution of that grievance. It will never be known if the result might have been different had he appeared but the fact remains that the Board had the information available to it and that the claims made in the Appel grievance were quite clear. It is perhaps to the state the obvious but the final legal authority in the County is not the labor counsel but rather the County Board and when the Board made this decision it was a binding action on the County. The mistake if any was unilateral by the Board, although the evidence tended to show that the claim that this was a mistake was made only well after the grievances on behalf of Conrath and Anderson were filed. Thus the assertion that this was a mistake was unpersuasive on this record.

Further there was evidence to suggest that the Board committed to the union that it would honor the same resolution for other similarly situated employees in discussions with the union business agent. See employer exhibit 6, in which it was clear that the Board knew about the other grievances but only dealt with the Appel grievance in July of 2012. That document clarified that "the Board did know about [the other two grievants] but did not take action regarding the other two."

These grievances were filed on August 16, 2012 on behalf of Mr. Conrath and on or about August 27, 2011 on behalf of Mr. Anderson. The initial response by the County denied these but did not raise the assertion of untimeliness, See Joint exhibit 5, August 29, 2012 letter to Mr. Rolfzen. That letter also directed the union to file the grievance at the "next appropriate step" and did not raise any procedural assertion that the matter had been filed or processed at the incorrect step of the grievance procedure.

It is thus against that factual and procedural backdrop that the case proceeds. The first question is thus whether the matter is arbitrable or must be dismissed as untimely.

PROCEDURAL ARBITRABILITY

The County asserted that the matter should be dismissed since these two grievances were filed in August 2012 even though the union knew about the issue when it filed the Appel grievance well before that. The County further asserted that under the clear terms of the CBA grievance procedure such matters must be filed within 15 days of its occurrence or within 5 days of knowledge. The first "occurrence" was over a year before the grievance was filed. Moreover even if the arbitrator were to use the July 3, 2012 Board meeting as the occurrence, even that occurred well over 5 days prior to the filing of these grievances.

The union on the other hand relied upon the so-called "continuing grievance" theory and asserted that the matter falls squarely within that concept and should thus be heard and decided on the merits. The union further noted that these grievants would not have been able to grieve the incorrect rate of pay because they were not aware of it until well after their anniversary dates.

It has long been held that grievances which occur repeatedly over a long period can be considered continuing for purposes of procedural arbitrability. Elkouri notes as follows: "Many arbitrators have held that 'continuing' violations of the agreement (as opposed to a single isolated and completed transaction) give rise to 'continuing' grievances in the sense that the act complained of may be said to be repeated from day to day, with each day treated as a new 'occurrence." These arbitrators permit the filing of such grievances at any time, although any back pay would ordinarily accrue only from the date of filing. For example, where the agreement provided for filing 'within ten working days of the occurrence." It held that where employees were erroneously denied work, each day lost was to be considered an occurrence and that a grievance presented within 10 working days of any such day lost would be timely." Elkouri and Elkouri, *How Arbitration Works*, 6th Ed at page 218-219.

The evidence showed that this case is entirely based on the incorrect calculation of a wage increase and that each pay period gives rise to a new occurrence under the terms of the CBA. Further, there is no language in the grievance procedure limiting the grievance to the "first" occurrence or other language that might prevent the filing of a continuing type grievance.

Thus, the evidence and record here supported the union's claim that this is indeed a continuing type grievance, procedurally arbitrable under the terms of this grievance procedure.[2]

Having said that however, the back pay remedy if any here, should the matter be sustained on the merits, is limited to the filing date of these grievances.

[2] The County's claim that this matter is barred by the doctrine of laches was unpersuasive. The case that this argument was based on seems to be an outlier at best and finds little support in the vast majority of arbitral precedent. Further laches is an equitable doctrine used in the common law and may well have its applications in the Courts. It has little place in labor relations where the terms of the parties' relationship are governed by the CBA. See Elkouri and Elkouri, 6th Ed at page 564, citing Black's Law Dictionary 7th Ed at 879 that defines laches as "an equitable doctrine by which Court denies relief to a claimant who has unreasonably delayed or been negligent in asserting the claim, when that delay or negligence has prejudiced the party against whom relief is sought." Here there was no showing of prejudice against the County whatsoever nor was the deal unreasonable in light of the fact that there was, as noted herein, statements by the Board at the July 3, 2012 meeting that led the union to believe that the other similarly situated grievants' cases would be handled similarly to the Appel matter.

MERITS

The question on the merits is whether the County violated Article XXIV of the CBA in the manner in which it calculated the 2011 wage step increase for these grievants. The starting point for any such discussion is the contract language itself.

Both parties made excellent arguments here but there was indeed some latent ambiguity in the language. The union pointed to the language that provided that the $0.32 increase would be "rolled onto the base salary in the form of a $.32 per hour increase." There was merit to the union's assertion that this was intended and understood to be a permanent increase and not one that would only last until the affected employee reached his or her next anniversary date. The term "rolled onto the base salary" has traditionally been interpreted to mean a permanent wage increase and that any subsequent steps or wage increases called for, absent clear contact language to the contrary, uses the base rate, including the amount "rolled" onto it.

The evidence here showed that this indeed happened – the grievants were granted that $0.32 increase as of January 1, 2011.[3] The question is thus whether it was or should have been included in the wage step increase each received on their respective anniversary dates. The union asserted that they did not "receive" it since it was not used to calculate the step increase when each reached their anniversary dates in 2011.

Also, Section 15 provides that employees eligible to receive a wage step increase in 2011 will not be eligible for both the wage step increase and 2.0% wage increase, but rather the higher percentage of the two. This language uses the term "wage step increase," which pertains to the wage structure set forth in Section 1. It also uses the term "2.0% increase, which clearly pertains to the increase set forth earlier in that Section which is to be payable effective on or about July 1, 2011. Significantly, nowhere does it refer to the $0.32 per hour. There was thus some merit too to the union's claim that the language of Section 15 does not apply to the $.32 per hour increase at all

The union further argued that the CBA uses the specific terminology "rolled onto the base pay" in Section 14 and asserted that the clear implication of this language is that the $0.32 per hour increase would be permanently rolled onto the base pay and was not intended to be a temporary payment until the affected employee reached their anniversary date. The union's argument in this regard was persuasive. The union argued in its Brief as follows:

> Further evidence that the increase was intended to be permanently rolled onto every member's base rate, and not just those at the top of scale, can be found when one examines how it was determined that the hourly increase would be $.32 and not some other amount. In Section 14, the parties agreed that those employees who received the lump sum of $667.37 under Section 12 (i.e., everyone in the bargaining unit) would be "eligible for the lump sum to be rolled onto the base salary in the form of a $.32 per hour increase (the 2010 lump sum converted to cents per hour)". Union Ex. I, at p. 16. In other words, the lump sum of $667.37 was divided by 2,080 hours to arrive at a sum of $.32 per hour to be rolled onto the base pay. Grievants Conrath and Anderson did not have the full lump sum amount rolled onto their base pay. Conrath earned only about $270 of the $667.37 lump sum by his anniversary date of May 14, just over one-third of the intended amount. Anderson earned about $560 of the amount.
>
> Furthermore, the County's argument that the $.32 per hour increase was intended to be applied only until a member reached the next step on their anniversary date produces an absurd result. According to Laura Elvebak, if a member had an anniversary date of January 2nd, which was the date that the $.32 increase was given, he or she would not have received the increase at all. Elvebak testified that in that case, she would have ignored Section 14 and given the employee either a 2% increase or a step, whichever was higher, in accordance with Section 15, but not the $.32. This would have clearly violated the contract.

There was some merit to this argument as well.

On the other hand the County argued that the clear understanding by the parties at the negotiation table was that the $.32 increase would be paid effectively once, not twice, and that the employees have not "lost" anything. They received it and the clear language of Section 15 demonstrates a clear contractual intent that the employees were to receive the greater of the 2.0% increase or the wage step increase but not both.

[3] That increase was paid retroactively since the CBA was not executed until mid-August 2011. See Joint exhibit 1, at p. 19.

The County further asserted that the union is in effect asking for an additional increase. The County asserted that the union cannot gain something in arbitration it was not able to get, or even ask for, in negotiations. The union is thus asking for additional language in the CBA that the $0.32 increase be added to the wage structure in 2011.

As noted herein, the union's argument regarding the "rolled" onto language had some merit and appears to result in exactly what the County says the union is seeking. At the end of the day, both these arguments had some cogency and gave the arbitrator considerable pause here as to the ultimate determination. In a vacuum, the decision would have been most difficult but for the action of the County Board on July 3, 2012.

As noted here in, the claim that this was all a big mistake was not supported by a preponderance of the evidence. Also, while the County's argument that a mistake may not trump clear and unambiguous contractual language, this language was not as clear as the County would like it. Indeed, the language contains a latent ambiguity as set forth above. The operative factor that swung this case in the union's direction was that decision reached by the Board.

THE IMPACT OF THE JULY 3, 2012 ACTION BY THE COUNTY BOARD.

Clearly, the final authority in Waseca County is the Board, not the labor consultant. It was clear as discussed above that when Ms. Appel's grievance was heard the Board had all of the relevant information both available and apparently presented to it to know that her grievance was in fact not about failing to receive the $.32 in January 2011 but was rather on all fours with these two grievances.

Also, there was no evidence that Ms. Elvebak was confused by the Appel grievance. Further there was evidence to suggest that she articulated the County's position at that meeting. These two pieces of evidence again undercut the claim that the County Board was under some sort of mistaken impression about the nature of the Appel grievance.

The County cited Elkouri for the proposition that such a grievance settlement may not trump clear contract language as follows:

> Of course, arbitrators who strictly follow the "plain meaning" doctrine may disregard a past settlement that is inconsistent with the "clear language" of the agreement in subsequent cases involving that language on the theory that, while prior settlements may aid an arbitrator in interpreting ambiguous contractual language, such settlements cannot alter the meaning of negotiated provisions. Elkouri and Elkouri, *How Arbitration Works,* BNA, 7th Ed., 9-31 (2012).

Several issues arise with this assertion on this record. First, the contract language in this matter is ambiguous enough that such a settlement was quite instructive on how the parties viewed it and was thus a very significant factor in this determination. Elkouri's quotation might well be entirely applicable where there was both evidence of a clear mistaken belief or where the evidence showed that some crucial piece of evidence was withheld or not presented to the governing body in order to guide their determination. No such evidence was present here. Further, the proposition cited above applies to those situations of unambiguous language. Here the language was not completely so.[4]

Second, the *remainder* of the quotation from Elkouri was as follows:

> "Unless expressly disclaimed in a settlement document, grievance resolution may have precedential value and can be used as evidence of a "past practice" in subsequent arbitration of factually similar disputes on the same issues. In the arbitral forum, unqualified and unconditional grievance settlements are very persuasive and carry considerable probative value. (Citing Los Angeles MTA and ATU, 120 LA 869 (Gentile 2004))." Elkouri and Elkouri, *How Arbitration Works*, BNA 7th Ed at 9-31 (2012).

The County cited other cases where arbitrators have rejected claims made by a union that a mistake should bind the employer. Upon review those were distinguishable. In *Dakota County and IBT #320* 1995 (Flagler) Arbitrator Jack Flagler was confronted with a case where the County erroneously set the wages of two newly hired Nutrition Assistants at $.75 more per hour than the contractual entry-level rate and paid them more than three other more senior Nutrition Assistants.

[4] Elkouri also cites in that same section the notion that a grievance over "benefits," as the authors put it, may not bind the employer forever. Elkouri goes on however to state that where the employer has adhered to the terms of the settlement but changed circumstances have given rise to the need to eliminate a benefit, the decision to do so has been upheld. That appears to apply to those situations where there was adherence to the settlement for a period of time, whereas here there never was, at least not with respect to these grievants. It also applies to those cases where there was a significant change of circumstances; again not present on this record. Elkouri 7th Ed at 9-31.

The union argued that the clerical error bound the County to the higher wage rates for the affected employees. The arbitrator correctly rejected that claim noting that it was indeed a mistake and did not rise to the level of a past practice (as it did in *Ramsey County v AFSCME*, 309 N.W.2d 785 (Minn. 1981)). Under such circumstances a cogent argument can be made that there was no mutuality.

The County also relied on other cases where arbitrators rejected arguments of past practice based on mistakes. The union is not making a past practice argument here but is rather basing its case on the contractual language *as interpreted by the County Board*. See, *Ralph's Grocery Store*, 94 LA 880, 884 (Kaufinan, 1990), *(Michigan Department of Social Services*, 87 LA 398, 402-403 (Frost, 1986),(*Globe Ticket and Label Co.*, 105 LA 62, 66 (McCurdy, 1995), *Local 415 Wausau Firefighters Association and City of Wausau*, WERC Case 70 No. 47913-MA-7432 (Yaeger, 1993). These cases all proceed on the theory that a mistake without some sort of mutual consent cannot form the basis of a past practice. The basis of the rationale used by these arbitrators is essentially that a one-time occurrence or clerical misstep lacks mutuality and/or acceptability, necessary elements of past practice, and thus do not bind the employer in the future.

However, this case did not involve a mere clerical error or a mistaken payment to one employee without the full knowledge of the governing body or managerial personnel. The settlement here was made by unanimous vote of the full County Board after being fully apprised of the nature of the grievance, the contractual language involved and of the positions of both union and management. To say that this was not mutual ignores the clear facts here. Both County Board members testified that they misunderstood the nature of the Appel grievance and thought she had been somehow missed in the January 1, 2011 wage increase. As discussed above, it was not clear how all of them could have thought that given the clear documentation presented by the Appel grievance,

Finally, there was no evidence that anything was withheld or misrepresented by the union in order to mislead or dupe the Board. The mistake if any was that perhaps they did not consult their labor relations counsel in a timely fashion but that does not alter the determination they made or the implications such a determination had on the union and its members.

On balance, the comments by Elkouri the authors cited in that work support the union's claims here. Accordingly, the grievance is sustained in part and denied in part. Each grievant is to receive the increase requested by the union but only from the date of their respective grievances due to the date of filing of those grievances as set forth above

AWARD

The grievance is SUSTAINED as set forth above.

Dated: April 5, 2013

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Jeffrey W. Jacobs, arbitrator

IBT 320 and Waseca County - Award.doc