STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME, LOCAL 60, AFL-CIO, Complainant, vs. CITY OF MADISON, Respondent.	Case 120 No. 35573 MP-1757 Decision No. 23967-A

Appearances:

Lawton & Cates, S.C., Attorneys at Law, by Mr. Richard V. Graylow, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of the Complainant.

Mr. Timothy C. Jeffrey, Director of Labor Relations, Room 401, City-County Building, 210 Martin Luther King, Jr. Blvd., Madison, Wisconsin 53710, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

AFSCME, Local 60, AFL-CIO, having, on August 30, 1985, filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Madison had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 4 and 5 of the Municipal Employment Relations Act, herein MERA; and the Commission having, on September 25, 1986, appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats.; and hearing in the matter having been held in abeyance pending settlement discussions between the parties, which ultimately were unsuccessful; and hearing on the complaint having been held in Madison, Wisconsin on September 15, 1987; and the parties having filed briefs and reply briefs, the last of which were exchanged on November 13, 1987; and the Examiner having considered the evidence and arguments of counsel, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That AFSCME, Local 60, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats. and is the exclusive bargaining representative for all nonsupervisory, nonprofessional employes of the City of Madison excluding managerial and confidential employes; and that its offices are located at 5 Odana Court, Madison, Wisconsin 53719.

2. That the City of Madison, hereinafter referred to as the City, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats. and its offices are located at City-County Building, 210 Martin Luther King Jr. Blvd., Madison, Wisconsin 53710.

3. That at all times material hereto, the Union and the City have been parties to a series of collective bargaining agreements, including an agreement effective January 1, 1981 through December 31, 1981; that said agreement provided for the final and binding arbitration of grievances; and that said agreement contained the following pertinent provisions:

MANAGEMENT RIGHTS

ARTICLE V

5.01 MANAGEMENT RIGHTS:

> The Union recognizes the prerogative of the City to operate and manage its affairs in all respects in accordance with its responsibility and the powers or

authority which the City has not officially abridged, delegated, or modified by this Agreement and such powers or authority are retained by the City.

These Management Rights include, but are not limited to, the following:

A. To utilize personnel, methods, and means in the most appropriate and efficient manner possible; to manage and direct the employees of the City; to hire, schedule, promote, transfer, assign, train, or retain employees in positions within the City; to suspend, demote, discharge, or take other appropriate action against the employees for just cause.

B. To determine the size and composition of the work force, to eliminate or discontinue any job or classification and to lay off employees.

C. To determine the mission of the City and the methods and means necessary to efficiently fulfill that mission including: the transfer, alteration, curtailment, or discontinuance of any goods or services; the establishment of acceptable standards of job performance; the purchase and utilization of equipment for the production of goods or the performance of services; the utilization of students, and/or temporary, provisional, or military leave replacement employees.

D. The City has the right to schedule overtime as required in the manner most advantageous to the City and consistent with the requirements of municipal employment in public interest.

. . .

PAY POLICY

ARTICLE XII

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12.05 HOLIDAY WORK:

Employees performing authorized work on a contract-designated holiday shall be compensated at the rate of double (2) times the employee's regular rate of pay for hours worked in addition to the holiday pay or compensatory time off.

. . .

HOURS OF WORK

ARTICLE XIII

13.01 There shall be established for all permanent full-time employees, except certain Park Division employees, general work schedules. A through F below shall each be considered a general work schedule. Employees shall not be shifted from one general work schedule to another except by mutual consent of the parties. Such work schedules shall be:

. . .

D. A schedule shall provide for an eight (8) hour day and an average of forty (40) hours per week.

. . .

13.03

The City agrees that an employee's assigned hours, days of the week, days off, shift rotation within each general work schedule as set out in 13.01, shall not be changed without providing five (5) work days' notice. Such notice shall be posted on the appropriate bulletin boards or sent directly to the employee(s) affected. . . .

. . .

AUTHORIZED LEAVE

ARTICLE XIV

. . .

14.03 HOLIDAYS

The following days are established as paid holidays for permanent full-time employees: New Year's Day, Memorial Day (The last Monday in May), Independence Day, Labor Day, Thanksgiving Day, December 25th, Two Floating Days . . . .

. . .

B. Employees required to perform work on the designated holidays shall be compensaed as per Article XII, 12.05.

. . .

MISCELLANEOUS

ARTICLE XVI

. . .

16.03 EXISTING BENEFITS:

The Employer intends to continue other authorized existing employee benefits not specifically referred to or modified in this Agreement. It is ageed by the Union that bad or unreasonable habits that may develop among employees do not constitute "past practice" rights or employee benefits. The existing employee benefits referred to in this section shall be related to wages, hours and other conditions of employment.

4. That on December 25, 1980 and January 1, 1981, an Animal Control Officer was ordered not to report to duty although those days were his normally scheduled duty days; that two Police Dispatchers were ordered not to report to duty on January 1, 1981, although that day was a normally scheduled duty day for both individuals; that a grievance was filed on these actions; that two Animal Control officers were directed not to work on May 25, 1981, Memorial Day, and they filed a grievance contending it was a City past practfice to fully staff the Animal Control Division on holidays; that these two grievances were submitted to final and binding arbitration pursuant to the parties' collective bargaining agreement; that Arbitrator Sharon K. Imes issued an award under the date of September 15, 1981, wherein she stated, in part, as follows:

> The City argues that Section 13.03 of the collective bargaining agreement, by allowing it to change the work schedule through the alteration of employee assigned hours, days of the week, days off and rotation with an appropriate five day advance notice, also gives it the right to allow the

employee the holiday off, even though it has been normally scheduled, provided it gave the appropriate notice and paid straight time pay for the day, since this still meets the contractual obligation of an approximate 40 hour work week. There is no question that the language within the contract is clear and unambiguous, but in conflict with this language is a long standing practice of the City. The undersigned is aware that arbitrators generally tend to rule that when the contract language is clear and unambiguous, the effect of past practice holds very little weight in deciding disputes involving the language. However, the undersigned finds in this instance that the language has existed within the contract for a number of years and the practice of the employer has been to allow the employees to request the day off rather than to order the employee to take the day off during this time. . . Additionally, the City did not submit evidence that it has attempted to change either the contractual language or to bargain a change in its practice. Thus, the undersigned finds that if the practice is well-established, which it is in this instance, and if no effort has been made to discontinue the practice through bargaining, which no evidence was submitted to support, the Union has a right to believe the practice is part of the agreement covering holidays.

. . .

Thus, having concluded the custom and practice of the City is to allow employees to work on normally scheduled holidays, if they so elect to work; that it is a well-established practice; that the Union has the right to believe the practice is part of the agreement covering holidays by custom and usage, and that managment has made no effort in negotiations to discontinue the custom and practice, and based on the record in its entirety, the argument of counsel and the discussion set forth above, the arbitrator makes the following:

AWARD

The City has violated the conditions of the collective bargaining agreement for 1981 with regard to allowing employees to work their normally scheduled holiday and is hereby ordered to compensate the grievants for the holidays they were ordered to not report for duty according to Section 12.05 of the collective bargaining agreement.

Dated this 15th day of September, 1981, at LaCrosse, Wisconsin.

5. That the City petitioned to vacate this award under Secs. 788.10 and 788.11, Stats.; that the Court of Appeals, District No. 4 ordered enforement of the award in City of Madison v. AFSCME, AFL-CIO, Local 60, 124 Wis. 2d 298 (1985); that the parties stipulated that the City implemented Arbitrator Imes' decision for the calendar year 1981; and that the City has not implemented the decision for the 1982 and subsequent calendar years.

6. That in negotiations for a successor to the 1981 agreement, the City submitted proposed changes in a document dated October 15, 1981; that item 18 of said proposals was as follows:

> 18. The Employer hereby serves notice of its intent to reduce staffing levels on certain holidays for Civilian Dispatchers and Animal Control Officers.;

that the City informed the Union that the past practice of allowing employes to work on holidays that were normally scheduled duty days would cease at the expiration of the 1981 contract unless the Union secured language in the agreement continuing it; that neither the City nor the Union agreed to any language change in the 1982 agreement with respect to the practice of having employes continue to

work on holidays; that the City ordered certain employes not to work holidays in 1982; and that grievances were filed and denied by the City.

7. That in negotiations for a successor to the 1982 agreement, the City contended that Sec. 16.03 of the parties' agreement was a permissive subject of bargaining; and that the parties amended Sec. 16.03 of their 1983 agreement to read as follows:

> 16.03 EXISTING BENEFITS:
>
> The Employer intends to continue other authorized existing employee benefits not specifically referred to or modified in this Agreement. It is agreed by the Union that bad or unreasonable habits that may develop among employees do not constitute "past practice" rights or employee benefits. The existing employee benefits referred to in this section are those that are mandatory subjects of bargaining primarily related to wages, hours and other conditions of employment.

8. That the City timely repudiated the past practice of allowing employes to choose to work holidays which were part of their normally scheduled work days after the expiration of the 1981 collective bargaining agreement; and that the Union has not established by a clear and satisfactory preponderance of the evidence that the City's directing employes not to work on a holiday that is a normally scheduled work day is inconsistent with the terms of the parties' agreement.

9. That the Union did not introduce any evidence in support of its allegations that the City violated Secs. 111.70(3)(a)4 and derivatively (3)(a)1 by a refusal to bargain with the Union.

Based on the above and foregoing Findings of fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. That the City has complied with the September 15, 1981 Arbitration Award of Sharon K. Imes for the term of the 1981 agreement and the City has timely repudiated its past practice related to scheduling on holidays in negotiations for the 1982 and subsequent agreements, and thus has not committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

2. That the City of Madison did not commit any prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

IT IS ORDERED that the complaint filed herein be, and the same hereby is dismissed.

Dated at Madison, Wisconsin this 10th day of December, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(Footnote 1 Continued on Page 6)

(Footnote 1 Continued)

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In its complaint initiating these proceedings, the Union alleged that the City committed prohibited practices in violation of Secs. 111.70(3)(a)1, 4 and 5, Stats. by the City's refusal to implement the September 15, 1981 Arbitration Award by Sharon K. Imes. The City denied that it had refused to implement said Award and alleged that the Award was limited to the term of the 1981 agreement by virtue of the negotiations for successor agreements and the City had fully implemented the Award for the term of the 1981 agreement.

UNION'S POSITION:

The Union contends that, subsequent to 1981, the City has sought language that would permit the discontinuation of the scheduling benefit but has never been successful in obtaining contractual language revoking or discontinuing this benefit. It argues that the unilateral discontinuation of the benefit over the Union's objection is the antithesis of good faith bargaining. It submits that the City's position was repudiated in arbitration and language was interpreted to have a certain meaning, thus the agreement must continue to have such meaning until the language is changed. It claims that the City's refusal to consent to be bound by a prior interpretation does not imply that it is not bound by that interpretation as the arbitration was final and binding. It submits that dismissal of the complaint will encourage sharp practices by employers to escape a past practice by fiat or proclamation. The Union requests appropriate remedial orders be issued.

CITY'S POSITION:

The City contends that the Arbitration Award by Arbitrator Imes is limited to the term of the 1981 agreement. It argues that her decision was based on a past practice which the City had not tried to change in negotiations. It submits that after the decision, the City in negotiations repudiated the past practice and it was incumbent on the Union to secure contractual language to preserve the practice. It maintains that the City did not have to secure language as the present language of the agreement already allowed it to schedule employes off on holidays. It notes that Arbitrator Imes found the City had clear and unambiguous authority to schedule employes off but its existing past practice, without any effort to change same in negotiations, required it be continued. The City submits that all it had to do was repudiate the past practice and the language prevailed. The City futher contends that the 1982 and subsequent agreements are distinguishable from the 1981 agreement and should be interpreted in an arbitral forum and not in this proceeding.

The City points out that Sec. 16.03 of the agreement was amended in the 1983 contract so that Arbitrator Imes' decision cannot apply to the new language as that is distinguishable from the provision she considered. It insists that the only proper forum for interpreting the new language is grievance arbitration. The City asserts that the Imes' Award is limited to the 1981 contract and the complaint should be dismissed.

DISCUSSION:

The parties stipulated that the City complied with Arbitator Imes' Award for the term of the 1981 agreement. 2/ The sole issue here is whether her award should be implemented for the 1982 and subsequent contracts. The City insists that it repudiated the past practice and the Union takes the position that the City could only repudiate the past practice by securing language in the agreement to that effect. The proper repudiation of past practices has been described by Arbitrator Richard Mittenthal as follows:

2/ Tr. - 6.

"Once the parties become bound by a practice they may wonder how long it will be binding and how it can be terminated.

Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For, as I explained earlier in this paper, if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.

The inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding.

Consider next a well-established practice which serves to clarify some ambiguity in the agreement. Because the practice is essential to an understanding of the ambiguous provision, it becomes in effect a part of that provision. As such, it will be binding for the life of the agreement. And the mere repudiation of the practice by one side during the negotiation of a new agreement, unless accompanied by a revision of the ambiguous language, would not be significant. For the repudiation alone would not change the meaning of the ambiguous provision and hence would not detract from the effectiveness of the practice.

It is a well-settled principle that where past practice has established a meaning for language that is subsequently used in an agreement, the language will be presumed to have the meaning given it by practice. Thus, this kind of practice can only be terminated by mutual agreement, that is, by the parties rewriting the ambiguous provision to supercede the practice, by eliminating the provision entirely, etc." 3/

Applying these principles to the instant case, the past practice did not serve to clarify any ambiguity in the agreeement. Arbitrator Imes stated in her award:

There is no question that the language within the contract is clear and unambiguous, but in conflict with this language is a longstanding practice of the City. The undersigned is aware that arbitrators generally tend to rule that when the contract language is clear and unambiguous, the effect of past practice holds very little weight in deciding disputes involving the language.

Arbitrator Imes went on to state:

Thus, the undersigned finds that if the practice is well-established, which it is in this instance, and if no effort has been made to discontinue the practice through bargaining,

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3/ Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements", Proceedings of the 14th Annual Meeting of NAA 30, 56 (BNA Books, 1961).

which no evidence was submitted to support, the Union has a right to believe the practice is part of the agreement covering holidays.

Clearly, this past practice falls within the first type of past practice discussed by Arbitrator Mittenthal which practice cannot be changed unilaterally during the term of the agreement but can be repudiated during the negotiations for the next agreement because the inference is no longer based on acquiescence of the parties.

In this case, the City repudiated the practice in the negotiations for the 1982 agreement. The City in Item 18 of its proposals put the Union on notice that it was repudiating the past practice and the Union had no further right to believe the practice would continue in the face of the clear and unambiguous language of the agreement. Thus, the Union was obliged to secure language continuing the practice or it would no longer be binding on the City. There was no change in language, so the City properly and effectively repudiated the past practice and the Imes' decision did not apply beyond the 1981 agreement.

Although the Union has not expressly argued that Sec. 16.03 of the agreement applies to the past practice on holidays, this argument would also be rejected because it preserves rights not specifically referred to or modified in the agreement because of the clear and unambiguous language of Sec. 13.03 of the Agreement. 4/

Thus, having concluded that the City properly repudiated the past practice, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 10th day of December, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

4/ City of Stevens Point, Dec. No. 21646-B (WERC, 8/85).