BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration of a Dispute Between | |
| LINCOLN COUNTY HIGHWAY EMPLOYEES LOCAL 332, AFSCME, AFL-CIO, and LINCOLN COUNTY COURTHOUSE EMPLOYEES LOCAL 332-A, AFSCME, AFL-CIO | Case 96 No. 42702 MA-5783 |
| and | |
| LINCOLN COUNTY | |

Appearances:
Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, and Courthouse Employees Local 332-A, AFSCME, AFL-CIO, collectively referred to below as the Union.
Mr. Charles A. Rude, Personnel Coordinator, Lincoln County, Lincoln County Courthouse, 1110 East Main Street, Merrill, Wisconsin 54452, appearing on behalf of Lincoln County, hereinafter referred to as the County.

## ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union and the County jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in two grievances filed on behalf of the Highway Department and Courthouse bargaining units. The Commission appointed Richard B. McLaughlin, a member of its staff, to serve as the Arbitrator. Hearing on the matter was conducted in Merrill, Wisconsin, on October 10, 1989. The hearing was not transcribed. The parties submitted briefs by November 8, 1989.

## ISSUES

The parties stipulated the following issues:

> Did the County violate either collective bargaining agreement by discontinuing personal deductions for certain employes?
>
> If so, what shall be the remedy?

## RELEVANT CONTRACT PROVISIONS

### The 1988-89 Agreement Between The County And Local 332

#### ARTICLE III
#### MANAGEMENT RIGHTS

> The Union recognizes that the management of the Highway Department and the direction of its working forces is vested exclusively in the County subject to the terms of this Agreement. These rights include:
>
> . . .
>
> H. To determine what constitutes good and efficient County service.
>
> It is understood that management rights are not limited to those specifically mentioned above. It is also understood that the Employer's management prerogatives shall not be used for purposes of discrimination against employees. Any unreasonable exercise or application of the Management Rights by the County as set out in this Article shall be appealable by the Union or any employee through the grievance procedure.
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> . . .

#### ARTICLE IX
#### GRIEVANCE PROCEDURE

> A. Definition of a Grievance: A grievance shall mean a dispute between the County and the Union or the County and an employee(s) concerning the interpretation or application of this contract and shall be handled as

follows:

. . .

ARTICLE X
ARTICLE PROCEDURE

. . .

B. Arbitration Board:

. . .

The parties hereto may, if they desire, submit the grievance to a sole arbitrator, who shall be appointed by the Wisconsin Employment Relations Commission from a member of its staff.

. . .

D. Decision of the Arbitration Board: The Board, by majority vote, shall render a decision as soon as possible, which shall be final and binding on the parties hereto. The arbitration board shall only have the power to interpret the express terms of the contract as they may apply to the particular grievance. The Board shall not have the power to amend, add to, revise, modify or delete any language expressed in said terms.

. . .

The 1988-89 Agreement Between The County And Local 332-A

ARTICLE 2 - MANAGEMENT RIGHTS

2.01 The County possesses the sole right to operate County Government and all management rights repose in it, subject only to the provisions of this Agreement and applicable law. These rights include, but are not limited to the following:

. . .

F.To maintain efficiency of department operations entrusted to it;

. . .

Any unreasonable exercise or application of the above mentioned management rights, which are mandatorily bargainable shall be appealable through the grievance and arbitration procedure; however, the pendency of any grievance or arbitration shall not restrict the right of the County to continue to exercise these management rights until the issue is resolved.

. . .

ARTICLE 5 - GRIEVANCE PROCEDURE

5.01 Definition: A grievance is a dispute between the Employer and the Union, an employee or a group of employees concerning the interpretation or application of this contract.

. . .

5.03 Arbitration:

. . .

5. Decision of the Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to the interpretation of the contract in the area where the alleged breach occurred. The arbitrator shall not modify, add to, or delete from the terms of the Agreement.

. . .

BACKGROUND

From at least 1972 until February 1, 1989, the County honored employe requests to have amounts deducted from their paychecks and forwarded to a financial institution of the employe's choice. Elizabeth Henry, who serves as the County Clerk, testified that the County started making payroll deductions for members of the Highway bargaining unit, and did so only for the Park City Credit Union. As time went on, more employes requested the payroll deductions and the practice spread to the Courthouse bargaining unit. As the number of employe requests grew, other financial institutions in Merrill requested that the County honor the requests of institutions other than Park City Credit Union. The County ultimately acceded to that request. Henry testified that County administration never liked the practice, but did not refuse any employe request for a payroll deduction during the period of time noted above.

The County issued the following notice to employes in the Highway and Courthouse bargaining units on December 30, 1988:

> To: All Lincoln County Employees
>
> For some time, the County has made payroll deductions, as requested by some employees and as a convenience to them, then forwarded these deductions in separate checks to financial institutions on behalf of the employee. This has become a very time consuming burden on the Payroll Department, results in substantial extra expense, including postage, and substantially reduces the efficiency of the computer payroll system.
> As a result, the Legislative and Personnel Committee has directed that, effective February 1, 1989, deductions from paychecks are to be only those which are 1) legally required (federal and state income taxes, Social Security, garnishments, wage assignments or other court ordered payments); 2) deductions which may be required by union contracts (union dues, fairshare), or 3) County Board approved deductions (Deferred Compensation, life insurance, health insurance for part time employees, United Way, etc.)
> All other deductions are to be discontinued.
> Employees who are affected by this change should make their own arrangements for payments/deposits to their financial institution on or before February 1, 1989.

On February 1, 1989, the County ceased making payroll deductions other than those listed in the December 30, 1988, notice. The County did, however, honor employe requests to have their paycheck directly deposited with local financial institutions.

On January 6, 1989, Christine Thomaschefsky filed a grievance on behalf of employes in the Courthouse bargaining unit. The body of that grievance reads as follows:

> Statement of Grievance:
>
> (Circumstances of Facts): (Briefly, what happened) On 12/30/88 county employees received written notice that effective 2/1/89 all payment/deposit deductions previously taken care of by Lincoln County on behalf of county employees would be discontinued.
>
> (The contention--what did management do wrong?) (Article or Section of contract which was violated if any)
> Lincoln County has unilaterally cut a long standing past practice benefit to county employees (i.e. payment/deposit payroll deductions from employee paychecks for deposit at banks, savings & loans, etc.).
>
> The Request for Settlement or corrective action desired): Lincoln County continue i

On January 9, 1989, a grievance was filed on behalf of employes in the Highway bargaining unit. The body of that grievance reads as follows:

> Statement of Grievance:
>
> (Circumstances of Facts): (Briefly, what happened) On December 30, 1988 the Highway Dept. employees were informed that the County would no longer make automatic deposits to employees personal savings accounts, from their paychecks.
>
> (The contention--what did management do wrong?) (Article or Section of contract which was violated if any) This

is a violation of our past practice rule.

(The Request for Settlement or corrective action desired): Continue to make payroll

. . .

It is undisputed that the parties have never addressed the payroll deductions at issue here during collective bargaining. The Union has not requested that the County bargain the point.

At the October 10, 1989, hearing the parties agreed to the following stipulation:

> The present matter involves two grievances, one filed on behalf of the Highway Department bargaining unit and one filed on behalf of the Courthouse bargaining unit. The parties agree that the Arbitrator's decision will govern both grievances.

Further facts will be set forth in the Discussion section below.

## THE UNION'S POSITION

The Union argues initially that "(n)o contract, regardless of how complete or extensive, can address all assumed benefits and the variety of circumstances which invariably arise throughout its duration." It follows, according to the Union, that bargaining parties "customarily respect certain conditions of employment, while not expressly set forth in labor agreements", and that "arbitrators recognize this fact and have ruled accordingly." The Union asserts that a past practice can be the source of a benefit if it is "long-standing, consistent, and mutually accepted by the parties." The present record demonstrates, the Union contends, that the County made payroll deductions for seventeen years prior to February, 1989, and did so without denying any employe request for a deduction. Beyond this, the Union argues that the practice could not have been anything other than mutually accepted, given the nature of payroll deductions. Asserting that the loss of the deduction could "reach into hundreds of dollars" for each employe denied the deduction, the Union concludes the practice constitutes a "major" benefit. The Union concludes by requesting that "the arbitrator . . . rule that the County violated the labor agreement and direct the County to make all affected employes whole for all losses incurred by this violation."

## THE COUNTY'S POSITION

After a review of the background to this matter, the County states three issues posed by the grievances. The County states the third issue thus: "Is the grievance arbitrable?" The County notes that the payroll deductions have been permitted by the County "as a matter of convenience", and that "the Agreement (does not) contain any references to past practices being incorporated by reference or agreement into the contract." Acknowledging that the County does make deductions for Union dues and fair share payments, the County argues that no other deductions have ever been a subject of collective bargaining between the County and the Union. Although the practice "seems to go back in time for some years", the County argues that the practice was never the subject of bargaining, affects only a small portion of the two bargaining units, and can be handled by the employe's chosen financial institution since the County will forward employe checks for direct deposit. The County concludes that "the grievances, if arbitrable, neither violate the Agreement with Local 332, AFSCME, nor Local 332-A, AFSCME, and that the County's discontinuing personal deductions for some employees . . . is within its management rights as an employer."

## DISCUSSION

The parties stipulated to the two issues noted above, but the Employer's brief states a third issue. That issue does not, however, state an issue separable from the two stipulated issues. Put another way, resolution of the stipulated issues fully addresses the third issue. Due to the convoluted processing of this matter, some discussion of this point is necessary prior to addressing the stipulated issues.

The Employer originally refused to concur in the Union's request for arbitration of the two grievances posed here. Ultimately, the Union filed a complaint of prohibited practice, which was resolved, in the Employer's words, when "the parties agreed to submit the grievances to arbitration, with the question of arbitrability to be decided by the arbitrator." The determination required of a court or of an examiner in a prohibited practice questioning the arbitrability of a grievance has been stated by the Wisconsin Supreme Court thus:

> The court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face, and whether any other provision of the contract specifically excludes it. 1/

The parties' arguments on the stipulated issue fully pose these issues as well as the ultimate issue of a possible contract violation. The Union's past practice arguments, as countered by the Employer, question whether any provision of the contract covers the asserted practice. Accepting the Employer's arguments requires denying the grievance because the contract does not recognize the efficacy of the asserted practice. Rejecting the Employer's arguments requires isolating a contract provision covering the practice, and determining that the Employer's actions violated that provision. Thus, resolving the stipulated issues fully addresses the Employer's concerns regarding the arbitrability of the grievances. This conclusion also accounts for the fact that the Employer did not separately state the issue of arbitrability during the October 10, 1989, hearing.

The source of the parties' dispute is the County's abrogation of a long-standing practice of honoring employe requests for payroll deductions. The parties do not dispute that this practice would constitute a binding practice if the contract covered the issue. One of the most widely cited standards for determining the binding nature of a past practice is that stated by Arbitrator Jules J. Justin, who stated that:

> In the absence of a written agreement, 'past practice,' to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties. 2/

There is no dispute here that the practice meets each of those criteria. For at least seventeen years, individual employe requests for payroll deductions were honored by the County. For each deduction, the employe or the employe's financial institution would expressly request the deduction and the County uniformly would grant the request. Thus, the practice must be considered to meet the cited standards.

This only prefaces the parties' dispute, however. The County does not deny the existence of the practice. Rather, the County contends the contract does not permit the practice to have binding effect.

The County forcefully counters the Union's assertion that the practice, standing alone, must be considered to create a binding condition of employment. The County notes that the contract contains no specific authorization for payroll deductions of the type at issue here. The County's assertion is lent considerable force by the language of Article 5 of the Local 332-A agreement and of Articles IX and X of the Local 332 agreement. Section 5.01 of the Local 332-A agreement defines a grievance as "a dispute between the Employer and the Union . . . concerning the interpretation or application of this contract." Section 5.03 of that agreement restricts "(t)he decision of the arbitrator . . . to the subject matter of the grievance and . . . to the interpretation of the contract in the area where the alleged breach occurred." The Local 332 agreement contains stronger limiting language. Section A of Article IX contains a definition of a grievance similar to that of Section 5.01 of the Local 332-A agreement. However, Section D of Article X of the Local 332 agreement provides that the arbitrator "shall only have the power to interpret the express terms

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1/ Joint School District No. 10 v. Jefferson Education Association, 78 Wis2d. 94, 111 (1977). For a more detailed discussion of the law on this point, see Milwaukee Board of School Directors, Dec. No. 23592-A (McLaughlin, 5/88), aff'd Dec. No. 23592-B (WERC, 12/88).

2/ Celanese Corp. of America, 24 LA 168, 172 (1954). For a general discussion of this point, see How Arbitration Works, Elkouri & Elkouri, (BNA, 1985) at Chapter 12.

of the contract as they may apply to the particular grievance." The language of each agreement lends forceful support to the County's assertion that the contracts do not recognize the force of a past practice in the absence of express contractual language.

The practice asserted by the Union does not, however, stand alone, and each agreement does contain language which renders the practice meaningful. The County has requested a ruling that its unilateral action is within its management rights. Those rights are specified in Article 2 of the Local 332-A agreement and in Article III of the Local 332 agreement. The notice by which the County abrogated the practice stated that the practice was to be discontinued for efficiency reasons. The County's right to make such changes is governed by Section 2.01 F of the Local 332-A agreement and by Article III, Section H, of the Local 332 agreement. Each agreement qualifies that right. The final paragraph of Section 2.01 provides that:

> Any unreasonable exercise or application of the above mentioned management rights, which are mandatorily bargainable shall be appealable through the grievance and arbitration procedure; however, the pendency of any grievance or arbitration shall not restrict the right of the County to continue to exercise these management rights until the issue is resolved.

The final sentence of Article III of the Local 332 agreement provides that:

> Any unreasonable exercise or application of the Management Rights by the County as set out in this Article shall be appealable by the Union or any employee through the grievance procedure.

Each agreement, then, expressly requires that the County's exercise of its management rights be reasonable. The issue posed under each agreement, then, is whether the County's unilateral abrogation of the practice on February 1, 1989, can be considered reasonable. Because the language of each agreement is distinct, each agreement will be discussed separately.

The Local 332-A Agreement

The County's exercise of its management rights is "appealable" through the grievance procedure under the terms of Section 2.01 if the County's action is "unreasonable" and if the action concerns a "mandatorily bargainable" subject. Section 2.01 F is broad enough to permit the County either to make or to refuse to make payroll deductions. Thus, the County's refusal to make the deductions can not be characterized as unreasonable standing alone. The issue is whether the unilateral cessation of the practice is unreasonable. The facts at issue here establish that the unilateral abrogation of the practice was unreasonable. The County accurately notes that the parties have not addressed the point in bargaining, but this fact highlights how established the practice had become. There was no reason for the parties to address the practice in bargaining, because the practice survived the renegotiation of a series of collective bargaining agreements from the 1970's through the 1988-89 agreement. The parties had, then, come to rely on the continuing existence of the practice. That the practice was mutually understood and of such extensive duration establishes that the reliance of the employes' on the practice was reasonable. Against this background, the County's unilateral discontinuance of the practice must be characterized as unreasonable.

In Menominee Indian School District, the allocation of the costs of voluntary payroll deductions was held to be a mandatory subject of bargaining. 3/ The County's December 30, 1988, notice of the cessation of the

3/ Dec. No. 23849-A (Buffett, 8/87), aff'd by operation of law, Dec. No. 23849-C (WERC, 9/87).

practice, as well as the County's response to the grievance, cites economic considerations as the basis for the County's acts. Unlike the situation in Menominee Indian School District, the Employer has not shifted the cost of the deductions to the employes, but has eliminated the cost by stopping the deductions. This is not a significant enough difference to warrant characterizing the dispute here as anything but a dispute on the allocation of the cost of voluntary payroll deductions. Thus, the County's acts affected a mandatory subject of bargaining.

It follows that both elements to the operation of the final paragraph of Section 2.01 have been met. The County's unilateral discontinuation of the practice was an unreasonable means to terminate the practice, and the allocation of the costs of the deductions is a mandatory subject of bargaining. It follows that the County's unilateral termination of the practice violates that paragraph.

The Local 332 Agreement

The County's exercise of its management rights is "appealable" through the grievance procedure under the terms of the final sentence of Article III if the County's action is "unreasonable". Article III, Section H, is broad enough to permit the County either to make or to refuse to make payroll deductions. Thus, here as with the Local 332-A agreement, the County's refusal to make the deductions can not be characterized as unreasonable standing alone. Here, as with the Local 332-A agreement, the issue is whether the County's unilateral cessation of the practice is unreasonable. Because the same considerations apply here as with the Local 332-A agreement, the record warrants characterizing the County's unilateral acts as unreasonable. Unlike the Local 332-A agreement, a finding of unreasonableness is the sole element to the operation of the limiting language. It follows that the County's unilateral cessation of the deductions violates the final sentence of Article III.

The Issue of Remedy

Determination of the remedy appropriate to this case poses a troublesome point. The award entered below notes the nature of the Employer's violation and directs the County to cease and desist from refusing to honor employe requests for payroll deductions. Given the limited amount of time remaining in the agreements at issue here, the efficacy of this remedy is questionable. The nature of the County's violation, viewed in light of the facts posed here, does not, however, warrant further remedial measures.

The source of the County's violation is the unilateral nature of its termination of the practice. As noted above, the practice was sufficiently well established that the Union reasonably relied on its continuation through the negotiations preceding the 1988-89 agreements. Those agreements were simply the most recent negotiations through which the practice continued. That the County unilaterally terminated the mutually accepted practice during the term of those agreements was unreasonable.

It does not follow from this, however, that the County is permanently bound to the practice. Each of the management rights clauses at issue state the County's authority to oversee the efficiency of its operations broadly enough to permit the County to either make the payroll deductions or to refuse to make the deductions. Beyond this, the Union has not attempted to bind the County to the practice by specifically addressing the issue of payroll deductions in the Local 332 or Local 332-A contracts. In addition, the circumstances underlying the practice may have changed. The frequency and the type of deductions requested may have posed the County a far different circumstance than that it faced at the inception of the practice. Thus, the nature of the County's violation warrants the continuation of the practice through the term of the current agreements. This assures the practice will be continued until the time the matter can be addressed in collective bargaining. 4/ The County's December 30, 1988, notice serves, then, only to notify the Union that the County wishes to terminate the practice at the expiration of the current agreements.

This poses the point that little is left of the nominal term of the current agreements. This point must be acknowledged, but does not afford a persuasive basis for any remedy beyond that entered below. There is no persuasive evidence that the County has acted in bad faith in this matter. The

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4/ For a general discussion on the duration and termination of a past practice, see "Past Practice And The Administration Of Collective Bargaining Agreements", by Richard Mittenthal in Arbitration and Public Policy, Proceedings of the Fourteenth Annual Meeting National Academy of Arbitrators, (BNA, 1961).

force of its arguments has already been noted. More significantly, the nature of the County's violation focuses on its attempt to terminate the practice during the effective term of the Local 332 and Local 332-A agreements. This precluded addressing the matter during collective bargaining. The Union never requested that the County bargain the matter, but chose to litigate the matter to establish the deduction as an established benefit. The benefit cannot be established on the present record without affording the Union through arbitration a fixed benefit it never specifically negotiated. Beyond this, the Union has not proven the employes have suffered damages which warrant make-whole relief. The County did agree to deposit employe checks directly with the employe's chosen financial institution so that further deductions could be made by that institution. Thus, make-whole relief on the present record would be based on speculation.

## AWARD

The County violated Article III of the 1988-89 Local 332 agreement, and Section 2.01 of the 1988-89 Local 332-A agreement by discontinuing personal deductions for certain employes.

To remedy its violation of Article III of the 1988-89 Local 332 agreement, and Section 2.01 of the 1988-89 Local 332-A agreement, the County shall cease and desist from refusing to make the payroll deductions terminated by the County on February 1, 1989.

Dated at Madison, Wisconsin, this 22nd day of December, 1989.

By _____
Richard B. McLaughlin, Arbitrator