BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LINCOLN COUNTY	
and	Case 97 No. 42703 MA-5784
THE LABOR ASSOCIATION OF WISCONSIN, INC.	

Appearances:
Mr. C. A. Rude, Personnel Coordinator, on behalf of the County.
Mr. Thomas A. Bauer and Mr. Dennis A. Pedersen, Labor Consultants, on behalf of the Association.

ARBITRATION AWARD

The above-captioned parties, hereinafter the County and the Association respectively, are signatory to various collective bargaining agreements covering certain of the County's employes in the Sheriff's Department, Department of Social Services, and Pine Crest Nursing Home which provide for final and binding arbitration. Pursuant to said agreements, the parties requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear the instant dispute. The undersigned was appointed by the Commission. The parties waived hearing with respect to the instant dispute and submitted a Stipulation of Facts on October 27, 1989. They concluded their briefing schedule on December 5, 1989. Based upon the record herein and the agreements of the parties, the undersigned issues the following Award.

ISSUE:

The parties stipulated to the framing of the issue as follows:

> Did the County violate the express or implied terms of the 1989 collective bargaining agreement when it unilaterally eliminated certain payroll deduction options heretofore available to the bargaining unit employes of Lincoln County?

RELEVANT CONTRACTUAL PROVISIONS:

The parties agreed to utilize the Sheriff's Department collective bargaining agreement as the sole and exclusive document for purposes of the instant arbitration.

The relevant provisions of the collective bargaining agreement which are necessary to the resolution of this instant dispute, are the following:

ARTICLE 1 - MANAGEMENT RIGHTS

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

A. To direct all operations of the County;

B. To establish reasonable work rules and schedules of work;

C. To hire, promote, transfer, schedule, and assign employees to positions within the County;

D. To suspend, demote, discharge and take other disciplinary action, for just cause, against employees;

E. To relieve employees from their duties because of lack of work or any other legitimate reason;

F. To maintain efficiency of County government operations;

G. To take whatever action is necessary to comply with State or Federal law;

H. To introduce new or improved methods or facilities;

I. To change existing methods or facilities;

J. To determine the kinds and amounts of services to be performed as pertains to County government

operation; and the number and kinds of classifications to perform such services;

K. to contract out for goods and services;

L. To determine the methods, means and personnel by which County operations are to be conducted;

M. To take whatever action is necessary to carry out the functions of the County in situations of emergency.

Any unreasonable exercise or application of the above mentioned management rights which are mandatorily bargainable, shall be appealable through the Grievance and Arbitration process, 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 issues is resolved.

ARTICLE 8 - GRIEVANCE PROCEDURE

Section C - Arbitration

(Specifically paragraph 5, page 11):

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 interpretation of the contract in the area where the alleged breach occurred. The arbitra-tor shall not modify, add to, or delete from the express terms of the Agreement. (Emphasis added)

ARTICLE 26 - ENTIRE MEMORANDUM OF AGREEMENT

A - Amendments: This Agreement constitutes the entire Agreement between the parties and no verbal statements shall supercede any of its provisions. Any amendment or agreement supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto.

B - Waiver: The parties further acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the areas of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and the opportunities are as set forth in this Agreement. Therefore, the County and the Association for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter specifically referred to in this Agreement.

C - Ordinances and Resolutions: All existing ordinances and resolutions of the County Board affecting wages, hours and conditions of employment not inconsistent with this Agreement are incorporated herein by reference as though fully set forth. To the extent that the provisions of this Agreement are in conflict with the existing ordinances, resolutions or rules, such ordinances, resolutions or rules shall be modified to reflect the agreements herein contained.

FACTUAL STIPULATIONS OF THE PARTIES:

The County and the Association have agreed to the following facts relevant to this instant case:

1) That the payroll deduction policy, at issue in this instant arbitration, had been in effect for at least eight (8) years prior to the County changing said policy on February 1, 1989.

2) That the payroll deduction policy, which existed prior to February 1, 1989, permitted an employee to designate payroll deductions from his/her paycheck to be remitted to specifically designated payees authorized by the employee.

3) That, effective February 1, 1989, the County unilaterally eliminated the payroll deduction policy option available to all employees, and implemented a new policy which maintained only the option of the employee depositing his/her entire paycheck into a designated account.

4) That the County did not eliminate the past practice via the collective bargaining process.

5) That the County had never raised the issue of eliminating, or modifying, the past practice regarding payroll deductions during collective bargaining between the parties for 1988/1989.

POSITION OF THE PARTIES:

Association:

In essence, the Association makes five arguments in support of its position: (1) The payroll deduction policy, as it existed prior to February 1, 1989, had been the recognized practice for at least eight (8) consecutive years and that it should be continued as the unequivocal procedure for payroll deductions authorized by an employe. (2) The payroll deduction policy had existed as a long-standing past practice over the years and successive collective bargaining agreements and had become a well established "implied mutual agreement" between the parties. (3) The County cannot change the benefits provided by the payroll deduction policy without the specific consent of all parties and without negotiating said change at the bargaining table. (4) The County is prohibited from making any unilateral changes to any benefit of the contract under Article 26, Section C of the agreement. (5) Moreover, if the County desires to amend the payroll deduction policy, as it existed prior to February 1, 1989, such modifications or amendments must be made at the bargaining table.

The Association requests the undersigned to prohibit the County from denying its contractual obligation in this respect, to reinstate the policy and to make grievants whole for the benefits denied by the County.

County:

The County contends that, other than with respect to the provisions relating to union dues and fair share payroll deductions, the agreement does not contain any other deduction provision. The County further asserts that there is no reference in the contract to past practices being incorporated into the contract either by reference or agreement.

While admitting that the County is obligated to bargain with the Association over wages, hours, and conditions of employment, the County maintains that the subject of the instant grievance is not related to wages, hours, nor conditions of employment but is rather a matter of personal convenience for certain employes.

Conceding that the County's practice of permitting the personal deductions seems to go back in time for some years, nevertheless, the County claims these deductions have never been the subject of bargaining nor have they been universally requested by employes.

In sum, the County believes that its action in discontinuing the payroll deductions does not violate the contract and is within its management rights as a municipal employer. It requests that the grievance be denied.

DISCUSSION:

The initial issue for determination is whether or not the County's payroll deduction policy constitutes a binding "past practice" which is impliedly or expressly included in the parties' collective bargaining agreement.

Generally speaking, "past practice" to be binding on both parties must be "(1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties." 1/

In light of the underlying factual stipulation of the parties, it is evident that the County's payroll deduction practice fulfills all of the above criteria. For at least the past eight years the County honored the employes' individual payroll deduction requests and remitted portions of the employe's

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1/ Celanese Corp. of America, 24 LA 168, 172 (1954), How Arbitration Works, Elkouri and Elkouri, 4th Edition, p. 439.

paycheck to the employe's designated financial institutions or business enterprises. Thus the practice was clear, established, and readily ascertainable existing over a long period of time.

Contrary to the assertions of the County, the practice is related to wages and conditions of employment 2/ and not strictly a matter of personal convenience. Having concluded that a past practice exists relating to wages and conditions of employment, the question of whether or not the practice is impliedly or expressly included within the parties' agreement or whether the agreement permits the practice to rise to the level of a binding past practice remains to be addressed.

The County strenuously avers that the agreement does not permit the practice to have a binding effect. It claims that the contract contains no specific authorization for payroll deductions but rather restricts deductions to those for union dues and fair-share purposes. It also points to Article 26, the Entire Memorandum of Agreement clause, to support its claim that the past practice is not binding in nature. Both of these arguments to some extent do support the County's primary contention that the contract does not recognize the binding nature of a past practice in the absence of express contractual language.

The instant practice, however, does not stand bereft of any supporting contractual language. Article 1, the Management Rights Clause, grants to the County the right to make changes of a managerial nature. However, said rights are qualified by the final paragraph of Article 1 which states:

> Any unreasonable exercise or application of the above mentioned management rights, which are mandatorily bargainable shall be appealable through the Grievance and Arbitration process; 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. (Emphasis added).

Therefore, if the County's decision to eliminate the past practice is a mandatory subject of bargaining, and is found to be unreasonable, this paragraph has been violated.

In the Menominee Indian School District case, supra, at least the allocation of costs of voluntary payroll deductions was found to be mandatorily bargainable. The undersigned finds the voluntary payroll deductions themselves to be mandatory subjects of bargaining as a significant employe benefit. The County's decision to eliminate this benefit, and thus the cost of the benefit, standing alone, however, cannot be characterized as unreasonable. The County's action cannot be viewed as having been made in a void. The stipulated facts make it clear that the County determined to and did implement the change in the payroll authorization policy without bargaining over it with the Union and without serving notice to the Union that it wished to terminate the practice at the expiration of the previous agreement. This action, in light of the length and established nature of the past practice, was unreasonable. 3/ It follows then that the County's unilateral termination of the practice violated the agreement.

Remedy

Inasmuch as the contract has now expired, the issue of appropriate remedy is not a simple one. The Union, in its brief, has requested the arbitrator to preclude the County from denying its contractual obligations, to interpret the contract according to its clear and unambiguous terms, and to make the grievants whole for the benefits denied by the County.

A make-whole remedy is appropriate for any monetary losses which may have been incurred by the grievants during the term of this agreement as a result of the County's discontinuance of the payroll deduction policy.

The parties' at the expiration of this agreement are not left with an irrevocably binding past practice but rather with a past practice which can be changed by the County by serving appropriate notice as to its wishes to terminate said practice. The parties can then bargain from this point should they so desire.

Therefore, based upon the above, it is my decision and

2/ Menominee Indian School District, Dec. No. 23849-A (Buffett, 8/87), aff'd by operation of law, Dec. No. 23849-C (WERC, 9/87).

3/ Although it is not dispositive in this case, it is noted that this result is consistent with that reached by Arbitrator Richard B. McLaughlin in Lincoln County issued on December 22, 1989.

AWARD

1. That the County violated Article 1 of the 1988-89 agreement by discontinuing the past practice of making personal payroll deductions for certain bargaining unit employes.

2. The County is ordered to make whole any employes for losses incurred as a result of the above action during the term of the agreement.

3. The County is further ordered to serve appropriate notice to the Union of its intent to eliminate the past practice of payroll deduction if that is its intent so that the parties can act accordingly in upcoming negotiations.

Dated at Madison, Wisconsin this 12th day of January, 1990.

By _____
Mary Jo Schiavoni, Arbitrator