

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 VERNON COUNTY HIGHWAY EMPLOYEES :
 LOCAL 1527, AFSCME, AFL-CIO : Case 79
 : No. 42777
 and : MA-5802
 :
 VERNON COUNTY (HIGHWAY DEPARTMENT) :
 :

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, Route 1, Sparta, Wisconsin, on behalf of the Union.
 Klos, Flynn & Papenfuss, by Mr. Jerome Klos, Attorney at Law, 318 Main Street, La Crosse, Wisconsin, on behalf of the County.

ARBITRATION AWARD

Vernon County Highway Employees Local 1527, AFSCME, AFL-CIO, hereafter the Union, and Vernon County (Highway Department), hereafter the County, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the meaning and application of the terms of the agreement relating to job assignment. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing was held in Viroqua, Wisconsin, on November 2, 1989; it was not stenographically transcribed. The County and Union submitted written arguments on November 30, 1989 and February 6, 1990 respectively. The record was closed on February 19, 1990, after both parties waived their right to file a reply brief.

ISSUE

The parties stipulated to the following issue:

"Did any County past practice exist with regard to assignment by seniority within job classifications? If so, did the County violate past practice by passing over the Grievant in the assignment of blade grader work on June 27, 1989? If so, what is the appropriate remedy?"

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE I
 Recognition

. . .

1.03 Subject to the provision of this contract and applicable law, the County possesses the right to operate County government and all management rights repose in it. These rights include, but are not necessarily limited to the following:

- A. To direct all operations of the County;
- B. To establish reasonable work rules and schedule work;
- C. To hire, promote, transfer, schedule and assign employees to positions within the County Highway Department;
- D. To suspend, demote, discharge and take other disciplinary action against employees, for just cause;
- E. To relieve employees from their duties because of lack of work or other justifiable economic reasons;

F. To maintain efficiency of County government operations;

G. To take reasonable action necessary to carry out the functions of the County in situations of emergency;

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

I. To introduce methods or facilities which are new or exist elsewhere;

J. To change existing methods or facilities;

K. To determine the kinds and amounts of services to be performed as pertains to County government operations; and the number and kinds of classifications to perform such services;

L. To contract out for goods or services;

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

N. Provided, with regard to Paragraphs H through M above, the County will comply with its duty to bargain on such matters to the extent required by law.

. . . .

ARTICLE X

Seniority, Probation, Layoff, Rehire and Job Posting

. . . .

10.03 Employees who have completed the probation period satisfactorily and are continued thereafter, shall have a permanent status and shall be entitled to all rights, protection, and benefits provided by this agreement retroactive to the original date of hire.

. . . .

BACKGROUND

Kay Lewison, the Grievant, is a Grader Operator with the Vernon County Highway Department, ranking third in seniority out of four employees in her classification. On June 27, 1989, she was assigned truck driving duties, while the less senior operator was assigned grader blade duties. Lewison grieved, contending that such assignment violated past practice to make assignments based on seniority within classification.

On July 7, 1989, Highway Commissioner William R. Stahl wrote to Union President Orlan Kirking as follows:

SUBJECT: Grievance - Kay Lewison

I find noting in Section 10.03 or any where else in the contract that dictates seniority rights as a criteria in the selection of an employee within his classification; however, I know that management has extended this courtesy in the past.

In this particular case six days seniority is not significant, especially when the employee chosen for the work is a superior operator and can produce a better job at less cost to the County.

I am responsible to obtain maximum efficiency from the personnel and equipment at my disposal and the above decision reflects this.

I find no grounds for grievance.

William R. Stahl /s/

WILLIAM R. STAHL, P. E.

Vernon County Highway Commissioner

On August 3, 1989, County Personnel Committee Chairperson Jon Parkyn issued the following communique':

VERNON COUNTY PERSONNEL COMMITTEE RESPONSE TO
JUNE 29, 1989 GRIEVANCE OF KAY LEWISON

FACT: Kay Lewison on June 29, 1989 filed a grievance that on June 27, 1989, a highway employee was assigned work on a grader blade when she had more seniority in violation of 10.03. In fact, someone with six days less seniority was so assigned. Lewison was assigned truck driving duty that day for which she received the same rate of pay and number of hours as the above noted grader operator.

Highway Commissioner Stahl denied the grievance by letter of July 7, 1989, on the ground the labor contract (10.03 or elsewhere) made no provision requiring assignment by seniority within the classification. Further, he indicated the assignment was predicated on superior work product and efficiency. At the Personnel Committee hearing on August 2, 1989, the Union admits the lack of contract language, but claims prior practice of seniority assignment which is denied by the County.

DECISION: The Personnel Committee by unanimous 5 - 0 vote denied the grievance on the following basis.

1. The labor contract does not require such assignment by seniority.

2. While assignment at times is made on seniority especially with regard to truck drivers, such procedure never has been used so extensively to have become a past practice.

3. It is management's right to assign for reasons of skill, productivity, efficiency and availability, and the committee concludes it was on that basis that the assignment was made.

Dated August 3, 1989.

Jon D. Parkyn /s/
Jon Parkyn, Personnel
Committee Chairman

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union avers and asserts as follows:

Arbitral authority holds that past practice is binding when it is unequivocal, clearly enunciated, readily ascertainable and established. The facts herein meet that standard, as applies to assignment by seniority for the positions of truck driver, blade work and mechanic/shop work.

Testimony establishing assignment by seniority was given by a shop employe with 21 years service; a former blade operator and foreman; and a truck driver.

In contrast to the Union evidence establishing assignment by seniority, none of the County witnesses could testify as to any time that a relevant work assignment was given to a less senior employe when a more senior employe was available. The only exception was an isolated occurrence, when the most senior blade operator was assigned as standby for snow plowing but retained his regular assignment.

Further, gender discrimination may have been a factor, in that the grievant is the only female non-clerical employe in the fifty-employe Highway Department work force. County claims about ensuring operational efficiency notwithstanding, the grievant was in close proximity to where the duties were to be performed, while the less senior employe who was assigned such duties had to be called in from a distant location. It is also noteworthy that, while the grievant operated heavy equipment while

serving in the United States Air Force, the Highway Commissioner responded to a complaint she raised in 1987 about the brakes on a grader by writing, "I believe this complaint is unwarranted and suggest it may take a person of larger stature to operate a grader of this type."

Because the Union has met its burden of proving that all assignments in the areas of truck driver, shop employes and blade operators have been made by seniority within job classification, the grievance should be sustained and the County ordered to make all such future assignments on the basis of seniority within classification.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

The Union concedes that there is no contractual provision to support its grievance. The facts demonstrate that there is no past practice either.

While some skilled or unskilled assignments may have generally been by seniority, such assignments were never of sufficient uniformity to establish a clear and convincing past practice. Instead, testimony established that the Highway Commissioner made grader assignments on the basis of skill, which may have frequently corresponded to seniority, and patrolmen assignments on the basis of locale. While foremen may have made truck driver assignments on the basis of seniority, such action did not relate to assignment of skilled duties, and, as it was taken by union members, should not be assumed to be departmental policy overriding the employer's clear contractual powers.

Through collective bargaining, the County has attained provisions granting it administrative powers to operate the Highway Department in an economic and efficient manner. A purported past practice which would supersede this contractual right, and restrict the way in which the County makes work assignments, would have to be established by clear and convincing evidence. No such evidence is here present. There was no past practice modifying the labor agreement, and this grievance should be dismissed.

Both parties waived their right to file a reply brief.

DISCUSSION

The Union is correct in its statement of the standard necessary for establishing a past practice. The Union errs, however, in asserting that it has met such standard in this case.

Arbitral authority is indeed well-settled -- a finding that a past practice exists requires evidence that such purported practice is unequivocal, clearly enunciated and readily ascertainable. See, Celanese Corporation of America, 24 LA 168, 172 (Justin, 1954); Montgomery Ward & Co., 85 LA 913, 915 (Caraway, 1985).

Further, recourse to such external evidence is generally disfavored where the language of the collective bargaining agreement is itself clear and unambiguous. The contract here under review contains a broad management rights clause, empowering the County to "direct all" of its operations, "schedule work", "schedule and assign employees. . .", "maintain efficiency" of its operations, and "to determine the methods, means and personnel" by which its operations are to be conducted.

The Union has conceded that there is no specific contractual provision relating to work assignment by seniority within job classification. Rather, it has contended that a past practice has arisen, which it asserts the County is now compelled to continue.

Accepting, for the sake of argument, that the management rights clause could be overcome by evidence sufficient to establish a past practice, I find that the Union has failed to meet its burden of producing such evidence as relates to the skilled classifications.

The best that can be said about the Union's case is that specific assignments for certain skilled positions were generally made in a manner that did not violate existing seniority, and that assignments for non-skilled positions may have been in accord with seniority. However, the testimony revealed a direct correlation between seniority and skill level, thus making the operative factor less than clear and unambiguous. That is, an assignment which the Union chose to portray as reflecting seniority was, from the Commissioner's perspective, really based on the skill of the affected incumbents. Skill may indeed be an outgrowth of seniority, but the two concepts are undeniably distinct. Had the record clearly established a pattern of assignments of workers with less skill but greater seniority, the Union's argument may have prevailed. However, that is not what the record establishes,

as relates to the skilled classifications. The record does establish -- both through direct testimony and the Highway Commissioner's written acknowledgement in his July 7 response -- that truck driving assignments were made on the basis of seniority. However, given the differences between skilled and other classifications and the fact that such assignments were made by Union foremen with management's acquiescence, I conclude that the truck driver precedent does not carry over into the skilled positions. 1/

Finally, the Union also raises the specter of gender discrimination, suggesting that the Grievant's status as the Department's only non-clerical female employe helps account for the Department's decision to forsake seniority in the work assignments on June 27, 1989. Such allegations are serious, and deserve serious consideration. However, this is not the preferred forum to litigate this claim; its consideration must come somewhere else than in this grievance arbitration hearing.

Accordingly, on the basis of the collective bargaining agreement, record evidence and the arguments of the parties, it is my

AWARD

That this grievance is denied.

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

By _____
Stuart Levitan, Arbitrator

1/ The parties should note that nothing in this award questions the continuation of the practice regarding the assignment of truck drivers by seniority.