BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MARATHON COUNTY EMPLOYEES UNION LOCAL 2492-E, AFSCME, AFL-CIO	Case 153 No. 42394 MA-5675
and	
MARATHON COUNTY	

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, 5 Odana Court, Madison, Wisconsin, appearing on behalf of Marathon County Employees Union Local 2492-E, AFSCME, AFL-CIO.

Mulcahy and Wherry, S.C., Attorneys at Law, 401 Fifth Street, P.O. Box 1004, Wausau, Wisconsin, by Mr. Dean R. Dietrich at hearing and on brief and Mr. Jeffrey T. Jones on brief, appearing on behalf of Marathon County.

ARBITRATION AWARD

Marathon County Employees Union Local 2492-E, AFSCME, AFL-CIO (hereinafter Union), and Marathon County (hereinafter County or Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved disputes over the interpretation or application of the provisions of said agreement by an arbitrator appointed by the Wisconsin Employment Relations Commission (hereinafter Commission). On June 20, 1989, the Union filed with the Commission a request to initiate grievance arbitration. Said request was concurred in by the County. On August 22, 1989, the Commission designated James W. Engmann, a member of its staff, as impartial arbitrator in this matter. Hearing was scheduled for October 9, 1989, at which time the Union and the County entered into mediation to resolve said dispute. Said mediation effort was not successful. A hearing was held on December 19, 1989, in Wausau, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. No transcript was made of the hearing. Briefs were exchanged on March 1, 1990. In a letter dated March 5, 1990, the County questioned and objected to documents attached to the Union's brief. In a letter dated March 14, 1990, the undersigned received the documents and scheduled argument as to the admission of said documents. Reply briefs in the case in chief, including the County's argument as to the documents attached to the Union's brief in chief, were exchanged on March 21, 1990. The Union waived the filing of a brief on the issue of the admission of the documents attached to its brief on April 3, 1990, at which time the record in this matter was closed. Full consideration has been given to the evidence and arguments of the parties in reaching this decision.

STATEMENT OF FACTS

The basic facts in this case are not in dispute. Dan Jezeski (hereinafter Grievant) has been employed as a Correctional Officer in the Marathon County Sheriff's Department since April 1988. Correctional Officers work in four different positions: Rover, Booking, Central Control and Housing Control. The positions of Rover and Booking require direct contact with inmates while the positions of Central Control and Housing Control have little or no direct contact with inmates.

By medical slip dated February 19, 1989, 1/ the Grievant's physician excused the Grievant from work through February 22. The physician also recommended that, upon the Grievant's return to work, he be assigned to light duty for two weeks. The Grievant was on sick leave from February 19 through February 22, after which he was assigned to the positions of Central Control and Housing Control. Since these two positions require little or no direct contact

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1/ All dates are for 1989 unless specified differently.

with inmates, the parties agree that these positions constitute light duty. The Grievant was on light duty for the remainder of February.

The Grievant did not work on March 1 and 2. On March 3 the Grievant submitted another medical slip from his physician, recommending that the Grievant be assigned light duty for an additional two-week period. From March 3 to March 18, the Employer assigned the Grievant to the light duty positions of Central Control and Housing Control. The Grievant did not work on March 19 and 20. On March 21, the Grievant submitted another medical slip from his physician, recommending that the Grievant be assigned light duty for an additional two-week period. From March 21 through April 5, the Employer assigned the Grievant to the light duty positions of Central Control and Housing Control.

The Grievant did not work on April 6 and 7. On April 7, the Corrections Supervisor, the Jail Administrator and the Chief Deputy met to discuss continuation of the Grievant on light duty status. As a result of that meeting a decision was made that the Grievant would not be assigned further light duty and that he would be so informed upon his return to work on April 8.

The Grievant returned to work on April 8, at which time he submitted another medical slip from his physician recommending that the Grievant be assigned light duty until May 1. The Corrections Supervisor advised the Grievant that he would no longer be assigned light duty and that he had the option of using sick leave or accepting full duty assignment. The Grievant was on sick leave, vacation or compensatory leave from April 14 through July. The Grievant remained off work until on or about December 10, at which time the Grievant's physician stated that the Grievant was able to return to full duty.

On April 12, 1989, the Grievant filed the grievance in this matter. Said grievance was timely processed through the grievance procedure and is properly before this arbitrator.

PERTINENT CONTRACT LANGUAGE

ARTICLE 2 - MANAGEMENT RIGHTS

> The County possesses the sole right to operate the departments of the county and all management rights repose in it, but such rights must be exercised consistently with the other provisions of the contract. These rights include, but are not limited to, the following:
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> A. To direct all operation of the respective departments;
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> . . .
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> C. To hire, promote, transfer, assign and retain employees;
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> D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;
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> E. To relieve employees from their job duties because of lack of work or for legitimate reasons;
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> F. To maintain efficiency of department operations entrusted to it;
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> G. To take whatever action is necessary to comply with State and Federal laws;
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> . . .
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> I. To manage and direct the working force, to make assignments of jobs, to determine the size and composition of the work force, to determine the work to be performed by employees, and to determine the competence and qualifications of employees;
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> J. To change existing methods or facilities;
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> K. To determine the methods, means and personnel by which operations are to be conducted;
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> . . .

ARTICLE 6 - SENIORITY

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B. Layoff: In the event it becomes necessary to reduce the number of employees in a department, temporary and seasonal employees in that department shall be the first to be laid off before the employee in the classification in the department whose position is being eliminated. The employee whose position is being eliminated shall, if necessary, be allowed to replace an employee with less seniority in the same or a lower pay range provided the employee (whose position is eliminated) is qualified to perform the work of the position selected. The employee replaced under this provision shall be allowed to exercise similar rights under this provision. Employees laid off in a reduction in force shall have their seniority status continued for a period equal to their seniority at the time of layoff, but in no case shall this period be more than two (2) years. When vacancies occur in any department while any employees hold layoff seniority status, these employees shall be given the first opportunity to be recalled and placed in those jobs, provided they are qualified to perform the available work.

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ARTICLE 13 - SICK LEAVE

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B. Advance Notice and Use: In the event that an employee is aware in advance that he/she will be hospitalized or that sick leave benefits will be needed for an extended period of time, it shall be the duty of the employee to notify the department head as far in advance as possible in writing of the anticipated time and duration of such sick leave, the reason for requesting such sick leave and medical certification that the employee will be unable to perform his/her normal work functions. Employees will be required to begin using sick leave on the date which their doctor certifies that they are medically unable to perform their normal duties. An employee on sick leave for an extended period of time is required to notify the department head at the earliest possible time of the anticipated date on which the employee will be able to resume normal duties.

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ARTICLE 17 - OTHER LEAVES

A. Personal Leave: Applications for leave of absence without pay for personal reasons shall be made in writing on forms provided by the County to the department head. A leave of absence may not be granted for the purpose of taking other employment; however, the term "other employment" shall not include union duties. Union duties do not include the taking of a full-time position with the Union as a representative.

The granting of such leave and the length of time for such leave shall be contingent upon the reasons for the request. The department head may grant leaves of absence without pay for thirty (30) calendar days or less without further authority of the Personnel Committee. Leave of absence for more than thirty (30) calendar days shall be referred to the Personnel Committee by the department head with a recommendation, and all such leaves, if granted, shall be for a specified period of time.

. . .

F. Medical Leave: In the event of an extended absence due to sickness or temporary disability stemming from such causes as heart attack, stroke, cancer, pregnancy, etc., the employee may take an unpaid medical leave of absence up to one (1) year so as to retain a sick leave balance for use after return to work. Such medical leave of absence may be requested as specified above.

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ARTICLE 29 - ENTIRE MEMORANDUM OF AGREEMENT

This Agreement constitutes the Agreement between the parties and no verbal statement shall supersede any of its

provisions. Any amendments supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto. The parties further acknowledge that, during negotiations which resulted in the Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any items covered by the terms of this Agreement and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity is set forth in this Agreement. Waiver of any breach of this Agreement by either party shall not constitute a waiver of any future breach of this Agreement.

ISSUE

The parties were unable to stipulate to formulation of the issue. The parties did stipulate that the Arbitrator had authority to frame the issue in his Award.

The Union would frame the issue as follows:

Whether the County violated either past practice or the collective bargaining agreement in its denial of employment, direction to utilize sick leave and subsequent continual denial of employment rights to Grievant Dan Jezeski effective April 8, 1989, through December 9, 1989, and if so what is the appropriate remedy?

The County would frame the issue as follows:

Whether the County violated the provisions of the Management Rights clause, Article 2, of the labor agreement when it discontinued the assignment of specific duties to the Grievant and required the Grievant to perform all duties of the Corrections Officer position? If so what is the appropriate remedy?

The Arbitrator frames the issue as follows:

Did the County violate the collective bargaining agreement or binding past practice when it discontinued assignment of the Grievant to light duty? If so, what is the remedy?

POSITION OF THE PARTIES

Union

On brief the Union argues that there is no basis in the contract or past practice for the Employer's denial of employment to the Grievant; that both the agreement as a whole as well as certain specific provisions of the agreement, supported by past practice, were violated by the Employer's actions; and that if there is no basis for a finding of a violation of the written contract, there is a pattern of past practice which, standing alone, could support a decision favoring the Union. The Union also argues that clear and unambiguous contract language expressly provides both specific and general employment rights to employes; that said rights include but are not necessarily limited to provisions concerning layoff, sick leave, other leaves, management rights, seniority and just cause; and that in addition there is no right granted to the Employer, either expressed or inferred, to deny employment under circumstances such as those involved in the instant case.

Specifically, the Union argues that nothing contained in the Management Rights clause can be interpreted to support any Employer right to deny employment to any individual employe who has an injury which prevents the employe from performing each and every duty in every job description; that, indeed, the Management Rights clause requires the Employer to obey all state and federal laws, including laws which prevent employers from discriminating against handicapped employes, which includes the Grievant; that the Management Rights clause allows the Employer to relieve employes of their job duties for legitimate reasons; and that if an employe can perform certain jobs and a physician certifies that the employe should not perform others, it is clear that no legitimate contractual reason exists to deny employment.

In addition, the Union argues that nowhere in the sick leave provision is authority granted to the Employer to legitimately direct an employe to utilize this benefit; that the intent of the medical leave provision is that such leave is voluntary and that no expressed or inferred authority is granted to the Employer to direct or require an employe to utilize this benefit; that no evidence is in the record indicating that this was a layoff; and that a reasonable interpretation of the agreement as a whole requires that a decision to take time off from the job due to illness or injury should be at the discretion of the employe and attending physician.

Finally, the Union argues that if it is determined that the contract is silent respecting the Grievant's assertions, the circumstances conform to the standard of a past practice which sustains the Union's position; that in this case the past practice was unequivocal in that there is no evidence that any employe has ever been denied the right to light duty; that the practice is clearly enunciated and acted upon in that the Employer provided this benefit to the Grievant for five weeks and for others before; and that the past practice is readily ascertainable over a reasonable period of time in that this standard has been ascertained wherever the circumstances arose which required it.

On reply brief the Union argues that it could be argued that this is not a light duty assignment case in the sense that the Grievant could perform all of the duties of two of the four positions; that, in fact, the Grievant did perform all of the duties of Central Control and Housing Control adequately for five weeks; that while the County argues that it only permitted light duty for other employes for limited periods of time, the evidence can also be read that light duty was provided whenever needed by employes; that there is no evidence in the record of an involuntary leave ever being forced upon an employe; that this grievance is based on the employment guarantees provided in the agreement; that those guarantees were onerously ignored for this employe; and that the Grievant should be made whole.

County

On brief the County argues that the Union's contention that the County has violated the provisions of the labor agreement and past practice by refusing to maintain and continue the Grievant on light duty is totally without merit; that pursuant to the agreement's Management Rights clause, the County has retained the exclusive right and is vested with the sole discretion to determine whether an employe will or will not be assigned light duty and, at a minimum, the length of such duty; and that no provision of the agreement grants an employe a contractual right to light duty or, once assigned to light duty, the right to continue on light duty.

The County also argues that the evidence unequivocally establishes that the County's decision to refuse to continue the Grievant on light duty and its refusal to permit the Grievant to do so was reasonable and in accord with the provisions of the Management Rights clause; and that said decision was necessary to maintain departmental efficiency and employe morale.

In addition, the County argues that the evidence in this dispute clearly demonstrates that no binding past practice exists which required the County to maintain the Grievant on light duty indefinitely; that the Union's contention

that a binding past practice exists which required the County to continue the Grievant on light duty, regardless of the length of that duty, is unsupported by the record; that the evidence establishes that the past practice as alleged by the Union does not exist; and that this alleged past practice does not extend to a requirement that, regardless of the time period involved, the County must maintain an employe on light duty until the employe is fully capable of performing his job duties.

Finally, the County argues that the alleged past practice must be deemed nullified by existing contract language; that arbitral law mandates that "zipper clauses" such as Article 29 be enforced; and that, therefore, the agreement's "zipper clause" has nullified any such past practice. For the foregoing reasons, the County requests that the grievance be dismissed in its entirety.

On reply brief, the County argues that the Union's arguments are without any basis in the agreement or the evidence in the record; that the agreement does not include a contract provision which expressly, or even impliedly, refers to and incorporates legal standards pertaining to the "reasonable accommodation" of handicaps; that, to the contrary, the agreement is devoid of any nondiscrimination contract provision; that in light of this fact, acceptance of the Union's "discrimination" and "reasonable accommodation" argument would be clearly inappropriate; that this dispute is not a discrimination case and the issue is not whether under state or federal laws, the County failed to "reasonably accommodate" the Grievant's alleged handicap; and that, rather, the issue is whether the County's refusal to continue the Grievant on light duty constituted a violation of a provision of the agreement.

The County also argues that the Union's additional evidence should be given no consideration by the Arbitrator in resolving this dispute; that the Union's additional evidence leaves many questions unanswered and addresses a time period irrelevant to this dispute; and that the Union's evidence demonstrates that the Grievant was assigned to light duty positions far more often than other Officers and that these assignments disrupted the normal rotational system used to maintain the Officer's proficiency in performing the duties of all the positions.

DISCUSSION

The Union argument is in two parts. First, the Union argues a violation of the collective bargaining agreement proper. Initially, the Union asserts that there is no basis in the contract for the Employer's denial of light duty for the Grievant. Next, the Union asserts violations of specific contractual violations as well as violation of the agreement as a whole. Second, the Union argues a violation of a binding past practice. Prior to deciding the merits, however, the question of admission of certain documents must be resolved.

1. Admission of Documents

The County argues that the documents submitted by the Union should be given little, if any, consideration in resolving this dispute. Specifically, the County argues that the County was deprived of an adequate opportunity to address the credibility and weight the documents should be accorded, and that the County was precluded from presenting testimony which would explain its proper interpretation.

Two documents were presented by the Union. The first consisted of 18 pages of work schedules. The 18 pages of this document were prepared by the County in its normal course of business. On its face, this document is credible and relevant. As to its proper interpretation, both parties were free to argue that in their briefs. Therefore, I admit this document into evidence.

The second document is one page, entitled "Weekly Schedule Summary". This document was prepared by the Union. The County was precluded from examining the person who prepared it. For this reason, I do not admit this document into evidence. However, as it is an interpretation of the evidence, I will receive it as part of the Union's written argument. The County had the opportunity to and did offer its own interpretation of the work schedule admitted above, including the creation of two charts, and I therefore find no prejudice on the County in viewing the "Weekly Schedule Summary" prepared by the Union as part of the Union's written argument.

2. Violation of the Agreement

Initially, the Union asserts that there is no basis in the contract for the Employer's denial of light duty to the Grievant. This line of argument turns the question before this arbitrator around. The question faced in this case is not whether there is specific contract language that permits the Employer to take the action that it did, but whether contract language exists which prohibits the Employer from doing what it did. The Union's argument goes, in essence, to the burden of proof. Under the Union's analysis, the burden appears to be on the Employer to prove that it is permitted to take the action it did; however, the burden in this case is for the Union to prove that the Employer is not allowed under this agreement to do what it did.

Next, the Union asserts violations of specific contract language. First, the Union argues that Article 2--Management Rights requires the Employer in Section G to take "whatever action is necessary to comply with State and Federal laws." However, as pointed out by the County, Article 2, Section G is a statement of a right retained by the County, not a requirement imposed upon it. Even if by some reading of this language state and federal laws regarding handicap discrimination were incorporated into this contract, the Union did not show that the Grievant was handicapped within the meaning of any such laws nor that the Employer's action did not meet the standards required by such laws.

Second, the Union argues that the Employer violated Article 2, Section E which states that the Employer retains the right "to relieve employes from their job duties because of lack of work or for legitimate reasons." Specifically, the Union argues that no legitimate contractual reason exists to deny light duty to the Grievant when it is undisputable that the Grievant could perform certain jobs and his physician certified he should not perform others. Contrary to the Union, the fact that the Grievant could not perform half of the positions for which he was hired is indeed a legitimate reason for an employer to relieve an employe of his job duties. This language provides no support for the Union's assertion that the Employer was under a contractual obligation to continue to provide light duty for the Grievant. Again, the Union attempts to shift the burden of proof, arguing that the County needs a contractual basis to deny the light duty; however, what the Union needs to show is that there is a contractual requirement for the Employer to provide light duty.

Third, the Union argues a violation of Article 13--Sick Leave in that no where in this article is there authority for the Employer to direct an employe to utilize this benefit. Yet, in Article 13, Section B, the agreement states as follows: "Employees will be required to begin using such leave on the date which their doctor certifies that they are medically unable to perform their normal duties." The record is clear that the Grievant was unable to perform the duties of Rover and Booking. The record is also clear that these are part of the Grievant's normal duties. As the Grievant could not perform all of his normal duties, this language does not support the Union's assertion of contract violation but, instead, verifies the appropriateness of the County's action.

The other contract articles cited by the Union attempt to show that the County did not have specific contractual authority to limit the Grievant's light duty assignment. As stated above, this reverses the burden of proof in this

case. Since none of the other contractual articles cited by the Union limits the County's right to limit the Grievant's light duty assignment, these arguments must fail.

3. Violation of Past Practice

The Union correctly states that in the absence of a written provision or agreement, 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 the parties.

In terms of the alleged past practice being unequivocal, the Union argues that there is no evidence that the Employer ever denied the right to light duty. That is true, not only for other employes but for the Grievant as well. The Employer has consistently allowed employes to go on light duty. But the alleged past practice is not unequivocal in regard to time. All previous employes on light duty were assigned such duty for a brief period of time. In terms of the practice clearly enunciated and acted upon, the Union argues that the Employer provided light duty to the Grievant and others before him. Again, the record does not support a contention that the alleged past practice allowed for light duty until the employe was healed, irrespective of how long it took. The practice, if present at all, shows a willingness of the employer to grant light duty to employes who require it for short term recovery from illness or injury. As to the practice being readily ascertainable over a reasonable period of time, this is the first instance of an employe who required light duty for any extended period of time and, therefore, the practice of the parties in this situation is not readily ascertainable over a reasonable period of time.

4. Conclusion

Because the Union did not show that the Employer violated the collective bargaining agreement or a binding past practice, the Arbitrator issues the following

AWARD

1. That the County did not violate the collective bargaining agreement or binding past practice when it discontinued assignment of the Grievant to light duty.

2. That the grievance is dismissed in its entirety.

Dated at Madison, Wisconsin this 29th day of June, 1990.

By _____
James W. Engmann, Arbitrator