BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between		
ELM GROVE PROFESSIONAL POLICE ASSOCIATION, LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION, WISCONSIN PROFESSIONAL POLICE ASSOCIATION	Case 10	No. 44294 MA-6243
and		
VILLAGE OF ELM GROVE		

Appearances:
Mr. Richard T. Little, Bargaining Consultant, and Mr. Robert Pechanach, Business Agen
Mr. Edmund M. Henschel, Village Manager, and Mr. Jeffery W. Haig, Chief of Police, Vi

ARBITRATION AWARD

Law Enforcement Employee Relations Division of the Wisconsin Professional Police Association (hereinafter Association) and the Village of Elm Grove (hereinafter Village) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances involving a dispute concerning wages, hour and conditions of employment by an arbitrator from the staff of the Wisconsin Employment Relations Commission (hereinafter Commission). On July 13, 1990, the Association requested the Commission to assign a member of the Commission's staff to arbitrate this grievance. On July 23, 1990, the Village concurred with said request. On July 24, 1990, the Commission appointed James W. Engmann, a member of its staff, as the impartial arbitrator in this matter. A hearing was held on October 25, 1990, in Elm Grove, 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. Both parties submitted briefs, the last of which was received on January 11, 1991. Reply briefs were due January 25, 1991, but neither party filed a reply brief. Full consideration has been given to the evidence and arguments of the Association and the Village in reaching this decision.

STATEMENT OF FACTS

The Association and the Village were parties to a collective bargaining agreement for the years 1978-79. Said agreement included the following article:

> Article XVI - Mileage Pay
>
> Employees shall receive compensation of fifteen cents. . . per mile for use of personal automobiles for Department business authorized by the Chief and for travel to and from the employee's residence to training schools, municipal or county court.

In the 1980-81 agreement, the language in Article XVI remained unchanged except that the rate of compensation was changed to 17 cents per mile. In the agreement for 1982-83, Article XVI was changed to Article XVIII as follows:

> ARTICLE XVIII - MILEAGE PAY
>
> When authorized by the Police Chief, or his designee, employees shall receive compensation of seventeen (cents) per mile for use of personal vehicles. Employees shall be covered by the Village's comprehensive and liability insurance while using personal vehicles while acting with in the scope of employment for Village business.

Other than the rate of compensation, the language stated above has continued into the current contract.

From 1982 until on or about April 2, 1990, the various Police Chiefs have consistently authorized payment for travel to and from the employe's residence to the Village Hall for municipal court, training schools and call-ins.

On or about April 2, 1990, the Association filed grievance 90-14. The facts as alleged in Grievance 90-14 were as follows:

> On 4/02/90, Officer Fuchs requested, and was denied mileage pay for using his personal vehicle to appear in court. Officer Fuchs was told by the Chief of Police that this practice was to be discontinued for all officers.

As a remedy the Association sought that officers would be reimbursed for

mileage when using their personal vehicles for department functions. In a letter from Edmund M. Henschel, Village Manager, to Robert Pechanach, WPPA/LEER Business Agent, dated May 11, 1990, the Village Manager stated in relevant part as follows:

> . . .it's doubtful that the union should prevail on this issue. However, an important consideration to the Village has always been to maintain good employer-employee relations. To that end, we will grant the unions (sic) request for mileage for travel from the employees (sic) residence to municipal court and training schools held at the Village Hall for the duration of the 1990-91 union contract. At the expiration of the said contract, the mileage payments for travel from the employees residence to municipal court and training schools held at the Village Hall shall cease unless such a benefit is specifically negotiated as a benefit of the successor contract.

The Association took no further action on Grievance 90-14.

On or about June 6, 1990, the Association filed Grievance 90-27, the grievance in dispute herein. Grievance 90-27 states in relevant part as follows:

> REMEDY FOR COMPLAINT(:) Continue to reimburse all officers covered under the current contract for mileage when using their personal vehicles for department functions other than reporting to duty for their normal work shift.
>
> ISSUE: Did the Chief of Police violate the current collective bargaining agreement by discontinuing a long established past practice of paying officers mileage pay for using their personal vehicles for department functions?
>
> FACTS: On 6-4-90, Chief Haig stated that he would not pay officers mileage pay for using their personal vehicles for all department functions other than reporting to duty for their normal work shift.
>
> ARGUMENT: It is the position of the Association that because of the long established past practice of reimbursing officers for mileage when using their personal vehicles for department functions other than reporting to duty for their normal work shifts, that the Chief of Police is violating the contract by discontinuing said payments.

In a letter from the Business Agent to the Village Manager dated June 21, 1990, the Business Agent wrote in relevant part as follows:

> Enclosed is a copy of Grievance 90-27 regarding payment of mileage for police officers using their personal vehicles.
>
> Please be advised that nowhere in our discussions, my notes, or in our understanding of the settlement agreement for Grievance 90-14, did the word "compromise" appear. The Association stands by its position that officers receive mileage pay for using their personal vehicles for all duties except reporting to work for their normal work shift.
>
> . . . .
>
> Therefore, this grievance is being submitted to you under Step 3 of the grievance procedure.

In a letter from the Village Manager to the Business Agent dated June 25, 1990, the Village Manager wrote as follows:

> I am in receipt of the above referenced grievance regarding reimbursement for mileage for use of personal vehicles.
>
> I had understood that this matter was resolved by your acceptance of my resolution of grievance No. 90-14 as outlined in my letter of May 11, 1990. That resolution was not intended to be a "compromise", nor does the word "compromise" appear in my response. This was a management interpretation of Article XVIII.
>
> The resolution of grievance No 90-14 was that the Village

> would pay for mileage to officers traveling from their home to Village Hall for municipal court and training schools for the duration of the current contract. All other mileage requires authorization by the police chief. My understanding is that the mileage payments being grieved were not authorized by the police chief and, therefore, the grievance is denied.

On July 13, 1991, the Association requested the Commission to assign a member of its staff to arbitrate this grievance.

PERTINENT CONTRACT LANGUAGE

ARTICLE VII - GRIEVANCE PROCEDURE

D. Settlement of Grievances:

> Any grievance shall be considered settled at the completion of any step in the grievance procedure. If the party concerned fails to appeal to the next step in a timely fashion, the grievance will be deemed resolved. Dissatisfaction is implied in recourse from one step to the next.

. . .

ARTICLE XVIII - MILEAGE PAY

> When authorized by the Police Chief, or his designee, employees shall received compensation of twenty-four. . .cents per mile for use of personal vehicles. Employees shall be covered by the Village's comprehensive and liability insurance while using personal vehicles while acting within the scope of employment for village business.

STATEMENT OF THE ISSUES

The parties stipulated to framing the issues as follows:

Is the grievance properly before the Arbitrator?

If so, did the Village violate the labor agreement in full force and effect when it failed to pay mileage to return to the municipal building for work assignments other than municipal court and training schools?

If so, what is the appropriate remedy?

POSITIONS OF THE PARTIES

A. Association

In regard to the issue of timeliness, the Association argues that the grievance is timely and, therefore, properly before the Arbitrator; that a timeliness argument based only upon the similarity of a past grievance can not be viewed as a factor for consideration; that while there can be no question that a central issue of both grievances is mileage pay, the factual background that formed the basis of the earlier grievance can be clearly distinguished from the instant grievance; that the issued in the earlier grievance involved mileage compensation for attending court; that it was not until the Village denied mileage compensation for officers being called-in outside of the regular duty shift that the Association was made aware that there was an unresolved problem; that the conditions prevalent to the instant matter were not present when the earlier grievance was settled; and that the Association requests that the Arbitrator find that this grievance was filed in a timely manner and proceed to determine the merits.

In regard to the merits, the Association argues that the past practice of the Village provided mileage compensation to officers required to report for duty outside of the officer's scheduled hours of work; that the fact that mileage pay has never in recallable history been an issue of dispute between the parties clearly indicates a mutual understanding of the intent of Article XVIII - Mileage Pay; that unrefuted testimony showed a clear and unequivocal practice has existed for at least 18 years which provides compensation for mileage when called-in to duty during off duty time; that the only reason that an officer was not paid for mileage under present circumstances would be that the officer did not file the required request; that such a past practice accurately reflects the understanding of the parties as to the proper interpretation of Article XVIII; that the language contained in Article XVIII was never designed, nor utilized, to grant or deny mileage compensation; that the term "authorized" applies only to the requirement placed upon an employe to accrue mileage for employment purposes; that, simply stated, when an officer is required to report to duty outside of the regular shift, the

officer will then be compensated for incurring mileage; that the monetary compensation for the mileage only becomes applicable after the use of the personal vehicle has been authorized by the Village; that this interpretation conforms with the past practice which is as much a part of the Agreement as the actual wording of the contract; that this past practice has served to express, by consistent example, the parties' understandings as to the intended interpretation for more than eighteen years; that clearly, in this case, the long-standing, clear and unequivocal past practice is binding on the parties unless such practice is changed through the collective bargaining process; that no such change has occurred; that the Village seeks to obtain through grievance arbitration a change in a condition of employment without bargaining the impact of the change; that to permit such efforts to succeed would be absolutely unconscionable; and that the Association requests the Arbitrator to find that the Village violated the spirit and intent of Article XVIII - Mileage Pay by failing to pay officers the appropriate compensation for use of the officers' personal vehicles and grant the appropriate relief to the affected officers.

B. Village

As to the timeliness issue, the Village argues that this grievance lacks standing before the Arbitrator due to its untimeliness; that in a previous grievance (No. 90-14) the Association alleged that the Village discontinued a past practice of reimbursing officers for use of personal vehicles in certain circumstances; that at the third step meeting, the Association stated that the issue was reimbursement for mileage for use of personal vehicles to drive to the municipal building to attend municipal court, departmental meetings, training and overtime assignments; that the Village responded in writing, granting the Association's request for the use of personal vehicles for driving from the officer's residence to the Village Hall for purposes of attending municipal court and training; that said reply did not include departmental meetings and overtime assignments; that per Article VII (D) - Settlement of Grievances, if a party fails to appeal to the next step of the grievance procedure, the grievance is deemed resolved; that the Association did not appeal the decision in Grievance No. 90-14; that the language of the Agreement is clear as to the resolution of grievances; that said language is designed to prohibit resolved issues from reappearing before management again; that, therefore, this issue should not now be before the Arbitrator since the issue was resolved in its entirety and has no standing before the Arbitrator; and that the Village requests the Arbitrator to find that the instant grievance has no standing in that Grievance 90-14 resolved the issue and was not appealed by the Association and, therefore, this grievance in not timely.

In regard to the merits, the Village argues that the relief requested by the Association should be denied; that during the period 1978-81, the Agreement provided for mileage reimbursements specifically for travel from an employe's residence to training schools, municipal and county court; that in 1982, these specific provisions were deleted from the Agreement; that a provision was added to provide employes with comprehensive and liability insurance while suing person vehicles while acting within the scope of their employment; that in 1982 language was added that the use of personal vehicles while on Village business clearly required the authorization of the Police Chief of designee; that the language accepted by the Association clearly requires action on the part of the Police Department's management; that management must authorize the use of a personal vehicle for department business; that this grants discretion on the part of and a decision by police management; that the Association is attempting to take away this management discretion and authority through the grievance procedure and without bargaining for it; that the Village offered to bargain this issue with the Association when negotiations began on a successor agreement; that past practice is not to be used to define a benefit or condition of employment when the contract language is clear; that the contract language herein is both clear and intentional by the parties when they negotiated the agreement; that mileage payments made in the past did not create a past practice but said payments were made at the discretion of the Police Chief; and that the Village requests the Arbitrator to find that there is no past practice and that the contract language grants broad discretion to the Chief of Police and, therefore, find for the Village.

DISCUSSION

A. Timeliness Issue

In Grievance 90-14, the Chief of Police denied a request to pay mileage to an officer for using his personal vehicle to appear in municipal court. The Association grieved said denial. At Step 3 of the grievance procedure, the Association met with the Village Manager regarding said grievance. Pursuant to Step 3, the Village Manager responded to the grievance in writing, stating that the Village would grant mileage for travel to municipal court and training schools for the duration of the 1990-91 agreement, after which that practice would cease. The Association did not appeal the grievance to the Public Safety Committee under Step 4.

The Village's timeliness argument in the grievance before this Arbitrator, Grievance 90-27, is based on the resolution of Grievance 90-14 by the Village Manager at Step 3 of the grievance procedure. Basically, the

argument of the Village is that the issue of mileage pay for various types of travel was dealt with in the Grievance 90-14. That grievance was resolved by the Village Manager agreeing to pay mileage for municipal court and training schools through the end of the current agreement. Since the Association did not appeal that determination, which did not include mileage payment for any other type of travel, the Village argues that it is now untimely to do so, citing Article VII (D) - Settlement of Grievances.

The facts in Grievance 90-14 are specific to payment of mileage to appear in municipal court. The remedy sought by the Association is general: to continue to reimburse officers for mileage when using personal vehicles for department functions. The relief granted by the Village, mileage payments for travel to municipal court and training schools, is specific, although it includes more that the factual circumstance present in Grievance 90-14 but less than the remedy sought by the Association. Herein may lie part of the confusion and misunderstanding.

The specific issue before the Village Manager in Grievance 90-14 was payment of mileage for travel to municipal court. The discussion between the parties at Step 3 was not limited to the factual situation present in the grievance but included the broader issue sought in the Association's remedy of payment of mileage for department functions. If in Step 3 the Village had conditioned its granting of mileage for municipal court and training schools on the Association's waiving of mileage for other department functions, the Association would have been free to appeal said conditions to Step 4 of the grievance procedure. If, in such a case, the Association had not appealed to Step 4, the Village would be correct that Article VII (D) - Settlement of Grievances would pertain in this case. It would not be because the grievance was untimely; instead, it would be because, by not appealing said conditional resolution to Step 4, the Association would have acquiesced to said resolution, which would have the full force and effect of the collective bargaining agreement.

However, in its Step 3 answer, the Village granted mileage payments for travel to municipal court and training school unconditionally, without any mention of mileage payment for other types of travel. Once the Village granted the relief that made the officer in the grievance whole, once it remedied the factual situation underlying the grievance, the Association had no grounds to seek further relief. As the Village did not formally advice the Association in its Step 3 answer that it would no longer grant mileage payments for other types of travel, the Association had no reason to seek further relief. Therefore, based upon the Village's Step 3 answer, the Association had nothing to appeal to Step 4.

The issue in Grievance 90-27 involves payment of mileage for travel for department functions other than municipal court and training schools. As that issue was not part of the factual situation grieved in Grievance 90-14 and as the resolution of that grievance did not formally deal with mileage payments other than those involving travel to municipal court and training schools, this Arbitrator determines that Grievance 90-27 is not barred by the resolution of Grievance 90-14 and, therefore, is properly before this Arbitrator.

B. Mileage Payment Issue

The Association argues that the past practice of the Village requires the Village to pay mileage to officers who are required to report for duty outside of regularly scheduled hours of work. Before this arbitrator can determine whether such a past practice exists and, if so, whether said past practice makes such a requirement upon the Village, a threshold issue must be answered: Is the contract language ambiguous?

While past practice is used very frequently to establish the intent of contract provisions which are so ambiguous or so general as to be capable of different interpretations, it ordinarily will not be used to give meaning to a provision which is clear and unambiguous. 1/ For if the contract language is plain and clear, if the words in the agreement convey a distinct idea, no need exists to look to such extrinsic tools as past practice to determine the meaning of the language in dispute. 2/

The reason for this was stated clearly by Arbitrator Justin in Phelps Dodge Copper Prods. Corp.:

> Plain and unambiguous words are undisputed facts. The conduct of parties may be used to fix a meaning to words and phrases of uncertain meaning. Prior acts cannot be used to change the explicit terms of a contact. An arbitrator's function is not to rewrite the parties' contract. His function is limited to

1/ Elkouri and Elkouri, How Arbitration Works, Fourth Edition (BNA, 1985).

2/ Ibid at 342.

> finding out what the parties intended under a particular clause. The intent of the parties is to be found in the words which they, themselves, employed to express their intent. When the language used is clear and explicit, the arbitrator is constrained to give effect to the thought expressed by the words used. 3/

In Super Valu Stores, Arbitrator Goldman stated that the test of ambiguity is whether the "contractual language is subject to more than one single, reasonable, apparent understanding." 4/

The language in dispute in this case is as follows: "When authorized by the Police Chief, or his designee, employees shall receive compensation of twenty-four. . .cents per mile for use of personal vehicles." This language is clear on its face. Who receives compensation? Officers do. How much compensation do they receive? Twenty-four cents per mile. Why do they receive compensation? For use of personal vehicles. When do they receive compensation? When authorized by the Police Chief or designee. The language is clear on its face.

The Association argues that this language was never designed or utilized to grant or deny pay as indicated by the Chief, that the term "authorized" applies only to the requirement placed upon an employe to accrue mileage for employment purposes, that when an employe is required to report to duty outside of his regular shift, the employe will be compensated for incurred mileage, and that the monetary compensation for the mileage only becomes applicable after the use of the personal vehicle has been authorized by the department for call-in. In essence, the Association argues that by calling an employe in to work, the Police Chief has authorized the officer's use of a personal vehicle. Such a reading of the language is not apparent on its face nor is it a reasonable reading of the plain and simple words of the contract.

Parties to an arbitration are bound by unambiguous language despite a contrary past practice, even where the practice may have been followed for many years. Thus, this Arbitrator is required to follow the clear and unambiguous language of the contract, even if the Association was successful in showing that a past practice existed and had been followed for many years. Where a conflict exists between contract language and a past practice, even a long-standing past practice, the Arbitrator is required to overturn the past practice in favor of
the clear and unambiguous contract language. 5/

Even if the language at issue here is susceptible to more than one single, reasonable, apparent understanding; that is, even if Article XVIII is ambiguous, two issues must be answered: Is a past practice present? If so, is said past practice binding on the parties?

A difference exists between a past practice between the parties and a past practice binding on the parties, as Arbitrator Goodman stated in Safeway Stores, Inc.:

> Not all practices, even those which have been around for 25 years, are ipso facto binding upon management. Past practices are not etched in stone, incapable of change or modification without agreement from the employee's bargaining representative. Although a course of conduct may exist and be resorted to on a daily basis, it would be incorrect to conclude that each and every one of these "practices" has attained the dignity of an implied term of the agreement or a binding condition of employment, thereby precluding unilateral change or modification by management. Simply, some of these practices may be binding and some may not. 6/

To determine whether a practice is binding, a large number of arbitrators accept the standards for determining binding past practice enunciated by Arbitrator Justin in Celanese Corporation of America:

> 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

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3/ 16 LA 229, 233 (1951).

4/ 87 LA 453, 456 (1986).

5/ E.g., BASF Wyandotte Corp., 84 LA 1055 (Caraway, 1985).

6/ 73 LA 207, 212 (1979).

parties. 7/

In this case the Association has shown that over the years the various Police Chiefs have authorized officers to use personal vehicles for department functions other than court and training, and that said officers have received the mileage rate if they applied for compensation. In fact, this past practice has been unequivocal, acted upon and readily ascertainable over a reasonable period of time. But that is not enough to make it binding on the Village.

In this case, the past practice is neither clearly enunciated nor is it accepted by the Village. In fact, the language at issue here specifically reserves the Village's right to determine when officers shall be authorized to use of personal vehicles and to receive compensation for said use; said determination occurs through the authorization of the Police Chief. The fact that the Police Chief has authorized use of personal vehicles and compensation for said use in the past does not control the authority of the Village to make that determination today or in the future because the language specifically reserves that right for the Village. As Umpire Shulman stated in Ford Motor Co.:

> A practice, whether or not fully stated in writing, may be the result of an agreement or mutual understanding. . . .A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice but rather to the agreement in which it is based.
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> But there are other practices which are not the result of joint determination at all. They may be. . .choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. . . .Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion. 8/

Officers have used personal vehicles for department functions other than court and training in the past and the Village has paid mileage compensation for said use, but this was done through the discretion permitted and clearly enunciated by the language in Article XVIII, language which states, "When authorized by the Police Chief. . .", language agreed to by the parties. As the language grants the Police Chief discretion to authorize employes to use personal vehicles, for which use employes are compensated at 24 cents per mile, so it grants the Police Chief discretion to deny said authorization. This is not a case where the management right to control is general, found lurking in the Management Rights clause. In this case, the language specifically reserving management's right of discretion, the right to authorize, immediately proceeds the language regarding compensation. Arbitrators are hesitant to permit unwritten past practice or methods of doing things to restrict the exercise of legitimate and retained functions of management. 9/ So it is in this case.

Arbitrators are also reluctant to find that a management right is extinguished by lack of its exercise. The fact that the Village has not used its discretion to deny use of personal vehicles does not mean it has lost its discretion to authorize use of personal vehicles, as Arbitrator McCoy stated in Esso Standard Oil:

7/ 24 LA 168, 172 (1954).

8/ 19 LA 237, 241 (1952).

9/ How Arbitration Works, supra., at 440.

> But caution must be exercised in reading into contracts implied terms, lest arbitrators start re-making the contracts which the parties themselves made. The mere failure of the Company, over a long period of time, to exercise a legitimate function of management, is not a surrender of the right to start exercising such right. If a Company had never, in 15 years and under 15 contracts, disciplined an employee for tardiness, could it thereby be contended that the Company could not decide to institute a reasonable system of penalties for tardiness? Mere non-use of a right does not entail a loss of it. 10/

So it is in this case.

For these reasons, based upon the foregoing facts and discussion, the Arbitrator issues the following

AWARD

1. That the grievance is properly before the Arbitrator.

2. That the Village did not violate the labor agreement in full force and effect when it failed to pay mileage to return to the municipal building for work assignments other than municipal court and training schools.

3. That the grievance is dismissed in its entirety.

Dated at Madison, Wisconsin, this 9th day of April, 1991.

By James W. Engmann /s/
James W. Engmann, Arbitrator

10/ 16 LA 73, 74 (1951).