BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
PIERCE COUNTY HIGHWAY EMPLOYEES LOCAL 556, WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES AFSCME, AFL-CIO	Case: 81 No: 44176 MA-6196
and	
PIERCE COUNTY	

Appearances:

Ms. Margaret M. McCloskey, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1203 Knollwood Court, Altoona, Wisconsin 54720, appearing on behalf of Local 556.

Mr. Joel L. Aberg, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 715 South Barstow, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Pierce County.

ARBITRATION AWARD

Pierce County Highway Employees Local 556, Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO (hereinafter Union) and Pierce County (hereinafter County) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances by an arbitrator appointed by the Wisconsin Employment Relations Commission from its staff. On June 20, 1990, the Union filed a request to initiate grievance arbitration with the Commission. On July 23, 1990, the Employer concurred with said request. On July 30, 1990, the Commission appointed James W. Engmann, a member of its staff, as the impartial arbitrator in this matter. A hearing was scheduled for October 3, 1990, but said hearing was postponed. A hearing was held on December 6, 1990, in Ellsworth, 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. The parties submitted briefs and waived the submission of reply briefs on March 22, 1991, at which time the record in this matter was closed. Full consideration has been given to the evidence and the arguments of the parties in reaching this decision.

STATEMENT OF FACTS

From 1969 or 1970 to 1975, Ed Colburn was a paver operator who, with the approval of Assistant Highway Commissioner Bob Anderson (hereinafter Assistant Commissioner), used a County pickup truck to commute to and from work. From 1975 to the fall of 1978, Leon Stockwell was the paver operator. He was not assigned a pickup truck to commute to work.

On September 1, 1978, the County posted a job opening for asphalt paver operator. The wage rate for said job was listed as "$6.11 per hour (Class IV)". The qualification for said job were listed as follows:

Must have mechanical ability.
Required to service & maintain paver.
Be willing to work overtime.
Must have valid Wisconsin driver's license.

On or before September 11, 1978, John Lindstrom, Jr., posted for the position. On September 22, 1978, he was awarded the paver operator job. Since Colburn had been assigned a County pickup truck and Stockwell had not, Lindstrom went to the Assistant Commissioner to request assignment of a County pickup truck to commute to and from work. The Assistant Commissioner approved said assignment.

In 1984, a controversy arose over use of use of pickup trucks by employes who had not been assigned trucks. The Union met with the Assistant Commissioner who stated that other employes would not be assigned pickup trucks but that the paver operator would be because of the cleanup necessary for the paver. The Assistant Commissioner's decision was not placed in writing.

In a resolution dated February 25, 1986, the County passed a ordinance which, in relevant part, states as follows:

RESOLUTION NO. 85-61
A RESOLUTION REGARDING PERSONAL USE OF VEHICLES

> The County Board of Supervisors of the County of Pierce does hereby ordain as follows:

> Section 1: Purpose. The purpose of this Ordinance is to prohibit county employees from making any personal use of county vehicles. . . .
>
> Section 2. Personal Use Prohibited. No county employee may, except as provided, make any personal use of any county-owned or county-operated vehicle.
>
> (a) This section shall not apply to the use of a county vehicle for commuting to and from the employee's jobsite when, in the judgement of the employee's supervisor, the interests of the county require the employee to take such county vehicle home and commute to and from work with such county vehicle.
>
> (b) This section shall not forbid employees from making minimal personal use of county vehicles with the permission of their immediate supervisor.
>
> . . .
>
> Section 7. List of Employee Positions Whose Occupants Currently Commute By Driving County-Owned Vehicles. The following is a list of employee positions whose occupants currently commute to and from work by driving county-owned vehicles:

Assistant Highway Commissioner--Highway Department
Construction Foreman--Highway Department
Sign Engineer--Highway Department
Hot Mix Foreman--Highway Department
Bridge Foreman--Highway Department
Crusher Foreman--Highway Department
Black Top Foreman--Highway Department
Paver Operator--Highway Department

Lindstrom used a County pickup truck to commute to and from work until he vacated the job in the fall of 1987. On September 25, 1987, the County posted the paver operator job, listing the wage rate as "Class IV ($10.02 per hr)". The qualifications for said job were listed as follows:

Valid Wisconsin Driver's license required.
Must have mechanical ability(.)
Required to service and maintain machine.
Employer must be furnished a complete written explanation of each accident & breakdown of this vehicle.
Be willing to work overtime.

Sometime on or before October 2, 1987, Donald Hines signed the posting. On October 8, 1987, the Highway and Union Committees agreed to award the job to Hines. One week after getting the job, Hines was bumped from the job by Jim Snow. He was assigned a County pickup truck to commute to and from work until he left the job in 1990.

On or about January 30, 1990, Patrol Superintendent Ronald O. Anderson (hereinafter Superintendent) met with three other people to draft a posting for the paver operator position. The Superintendent did not talk to Union President Kim Greske (hereinafter Union President) about attending the meeting as the Union President was not available. Instead, the Superintendent invited Willard Langer to attend. Langer is both the Union Vice President and a shop foreman who, in the past, has represented the Union at some meetings and the County at others, depending on the type of meeting it is. During the meeting, the four, including Langer, agreed to include language in the job posting excluding a county pickup truck from the position.

On January 31, 1990. the County posted an opening for a paver operator at a wage rate of Class IV. The qualifications for said job were listed as follows:

> Valid Wisconsin Driver's license required, also chauffeur's license required. Must have mechanical ability. Required to service and maintain machines. Must be willing to accept training that is required for the machines listed above. Be willing to work overtime. Be able to know and understand all controls on the machines listed above. Must be willing to cooperate in achieving a quality end product. Does not include a county pickup to take home. Perform any tasks that become necessary due to weather conditions, machinery failure, finances, or any unforseen circumstances.

On or before February 7, 1990, Howard D. Anderson (hereinafter Grievant) posted for said job. He was aware that the posting did not include a County pickup truck. On February 8, 1990, the Highway and Union Committees agreed to give the job to the Grievant.

On or about February 20, 1990, the Grievant filed a grievance, alleging that the County had violated past practice in that an agreement was made with the last three operators over a 12 year period that the pickup truck would be used for transportation during the paving season. The Grievant requested that the pickup truck be kept with the position of paver operator and that it be added to the job posting. In a letter dated February 26, 1990, to the Union President, the Superintendent denied the grievance.

Other facts, as necessary, will be included in the Discussion section.

ISSUE

The Union frames the issue as follows:

> Did the County violate the collective bargaining agreement by refusing to furnish a County pickup truck to the employee filling the Paver Operator position?
>
> If so, what is the appropriate remedy?

The County frames the issue as follows:

> Whether the Union's position supports a claim of past practice?
>
> If so, whether any action taken by Pierce County was violative of that past practice.

The Arbitrator frames the issue as follows:

> Did the County violate the collective bargaining agreement as modified by past practice when it terminated the assignment of a County pickup truck to the paver operator to commute to and from work?
>
> If so, what is the appropriate remedy?

POSITION OF THE PARTIES

A. Union

The Union argues that the County has a long-standing, consistent past practice of providing a County pickup truck to the employe who holds the position of paver operator; that this practice has been in effect for a long period of time; that this practice reflects an oral commitment made to the Union by the County; that the practice is not spelled out in the collective bargaining agreement; that it reflects a "perc" attached to the paver operator position consistently over the years; and that unit members considered the vehicle to be a basic condition of attaining the position.

The Union also argues that the vehicle was originally provided to the employe in the position for various work-related reasons; that, first, the position involves some additional responsibilities; and that, second, the position involves spraying the paver at the end of operations with diesel fuel which could transfer to the employe's private vehicle.

In addition, the Union argues that the County posted the paver operator position in January 1990; that the posting stated that the practice of providing a County pickup truck to the employe holding the position would not be continued; that the County has not notified the Union of its intention to discontinue the practice; that the County has not attempted to negotiate a discontinuation with the Union; that the employe eventually awarded the position and the Union grieved the County's action in discontinuing its practice; that the Union considers the practice to be a condition of work in the paver operator position; and that employes view the practice as part of the overall benefits inherent in holding the position.

The Union asks that, first, the County's action in discontinuing its past practice of assigning a County pickup truck be found a violation of the collective bargaining agreement; that, second, a vehicle be assigned to the position's incumbent; that, third, the Grievant be made whole for any losses suffered as a result of the County's action; and, fourth, any other remedies the arbitrator deems appropriate.

B. County

The County argues that the elements which make up a binding past practice are not present in this case; that unit members testified that use of a County pickup was not continuous, that there had been no negotiation for use of a pickup truck, and that permission from supervisors was required before utilizing the County pickup truck to commute from home to job site; that the County's authority to exercise discretion in this regard is confirmed by Resolution No. 85-61; that said resolution created a County ordinance prohibiting the use of County vehicles by its employes except under certain circumstances; that rather than codifying by ordinance when a vehicle would be utilized by a county employe, the ordinance established, if not confirmed, the County's authority to exercise its discretion in determining when and which County employes would have the use of a County vehicle for commuting purposes; that in this case the County's exercise of that discretion is found in the language of the posting; that the County decided it would not, at this time, offer the use of a County vehicle to the paver operator position; that the record in this case is devoid of any objective and corroborative evidence showing the necessary mutuality required of the employer and the employe to create a binding past practice; and that, therefore, the grievance should be dismissed.

The County also argues that nothing has been done by the County which takes away any interest held by the Grievant; that the Grievant posted for the position with the knowledge that the position did not include a County vehicle; that the Union tried to show, in essence, that use of a County vehicle by the paver operator is one of the perquisites of that position because the machine cleaning activities that are a part of that job can result in soiling the employe's own vehicle at the end of the day; that the County does not accept this rational now nor has it in the past for the creation of a benefit to which employes believe they are entitled; that the County's position is bolstered by the fact that no paver operator since the passage of the County's ordinance has declared this benefit for income tax purposes; that any use that was granted by the County in the past was solely at its discretion and for its convenience; that any use was received and treated as a mere gratuity by the employes as well as the Union, not as compensation; and that acceptance of the County's discretionary authority by the rank and file is confirmed by its lack of objection to Resolution 85-61 in 1986 and its failure to grieve the language of the posting in this case.

Finally, the county argues that the Union has failed to meet its burden in this case by not establishing any binding past practice which would limit the discretionary managerial authority of the County; that, further, the Union has not demonstrated that any right of the Grievant has been denied by any action of the County; and that, accordingly, the County respectfully requests that the grievance be dismissed in its entirety.

DISCUSSION

Past practice, as such, is insufficient to imply terms and condition upon an express contract, such as the collective bargaining agreement between these parties, but under certain condition a past practice can be binding on the parties. The County, quoting Elkouri and Elkouri, How Arbitration Works, (4th Ed. 1985), states a standard definition of binding past practice as follows:

> 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.

The County argues that these elements are not present in this case and that, therefore, the Union has not proven the existence of a binding past practice.

First, the County argues that the use of the County pickup truck by the paver operator was not continuous. While the use of the truck has not been continuous from 1970 as one operator did not use the truck from 1975 to 1978, the use of the truck by the paver operator has been continuous since 1978, until the County stopped the practice in 1990. Twelve years qualifies as continuous, at least in this case.

Second, the County argues that there has been no negotiation for the use of the County pickup truck by the paver operator. This is true of most past practices, for they are ways of doing things not discussed at the bargaining table but developed on the job. Negotiation is not required to have a binding past practice.

Third, the County argues that permission from supervisors was required before utilizing the County pickup truck to commute. While the record is clear that Lindstrom asked permission from the Assistant Commissioner, it was because the paver operator before him was not assigned the truck. This asking for permission appeared to have been a one-time request, not a daily asking. In any case, it is at this time that the past practice begins. Since that time the record does not show that the paver operators had to ask permission to use the truck.

Tied in to this argument, the County asserts that Resolution 85-61 confirms the County's authority to exercise discretion in regard to letting the paver operator commute in the County pickup truck. Specifically, the County points to Section 2(a), which states as follows:

> This section (prohibiting employes from using County vehicles for personal use) shall not apply to the use of a county vehicle for commuting to and from the employee's jobsite when, <u>in the judgment of the employee's supervisor</u>, the interests of the county requires the employee to take such county vehicle home and commute to and from work with such county vehicle.

(Emphasis added in County's brief). This did not establish or confirm the County's authority to exercise discretion regarding the vehicle, as argued by the County, for by this time the past practice was already in place, and had been for eight years. In fact, said practice was acknowledged in the same ordinance, specifically Section 7, which states, in relevant part, as follows:

> The following is a list of employee positions whose occupants currently commute to and from work by driving county-owned vehicles:
>
> Assistant Highway Commissioner--Highway Department
>
> . . .
>
> <u>Paver Operator--Highway Department</u>

(Emphasis added).

Fourth, the County argues that the necessary mutuality required of the employer and the employee to create a binding past practice is not present. Yet the testimony was clear and consistent that the employes believed that the County pickup truck went with the job of paver operator. The testimony by various Union members showed that the County through the Assistant Commissioner concurred that the truck would be part of the paver operator's position. This testimony was not refuted in any way.

Fifth, the County argues that it did not take anything away any interest held by the Grievant since he knew from the posting that the position did not include a County vehicle. This argument assumes that the Grievant has no interest in the continuation of the past practice, a truth if the past practice is not binding. But if the past practice is binding, the unilateral change by the employer certainly takes something away from the Grievant--an obligation binding upon the employer. It is a change in his wages, hours and conditions of employment, the primary interest of the collective bargaining process.

Finally, the County argues that the County's position is bolstered because no paver operator since the passage of the ordinance has declared this benefit for income tax purposes, thus showing that the employes treated the use of the vehicle as a mere gratuity, not as compensation. However, the burden for collecting taxes on this benefit appears to lie with the County since Section 3 of Resolution No. 85-61 clearly allows the County to include $1.50 per commuting trip as gross income for employe's use of a County vehicle to commute to and from work. In any case, the record is not clear if the County

is even aware if employes declare the vehicle for tax purposes.

The record is clear that the parties do not have a written agreement regarding the assignment of a County pickup truck to the paver operator. Yet the practice of assigning a truck to the paver operator has been unequivocal since 1978. The practice has been clearly enunciated by the parties, on the County's behalf by the Assistant Commission and Resolution No. 85-61, and it has been acted upon over a period of 12 years. Thus, the record is clear that the practice of assigning a County pickup truck to the paver operator is one that is readily ascertainable over 12 years as a continuous and ongoing practice, one that is fixed and established and one that is accepted by the parties.

A binding past practice is not subject to unilateral termination during the term of the collective bargaining agreement between the parties. Thus, the passage of Resolution No. 85-61 does not terminate the binding past practice as it occurred during the term of the agreement. Nor did the meeting in January 1990 to draft the posting notice modify the past practice. Again, it occurred during the term of the agreement. The fact that the Union Vice President participated in said meeting does not alter this conclusion. The record does not show that he had any authority to act for the Union in the matter of modifying or eliminating the past practice regarding assignment of the pickup to the paver operator.

This does not mean that the County is forever locked into this past practice. As with all past practices, the County can terminate said practice at the end of the term of the collective bargaining agreement between the parties by giving due notice to the Union of its intent to terminate the practice. The burden will then be on the Union to negotiate said practice into the agreement. The parties are, of course, free to negotiate a change to said practice during the term of the agreement if both parties so agree.

But until such time as the past practice is properly terminated by the County, it is binding on the parties. At hearing, the Union's request for a remedy included assignment of the vehicle to the paver operator and ordering the County to negotiate any changes to said practice. The Award requires the County to assign the County pickup truck to the paver operator consistent with the past practice. The Award does not order the County to negotiate any changes to said practice as it is required to do so under the terms of the collective bargaining agreement and arbitrable holdings regarding binding past practice. On brief, the Union also requests that the Grievant be made whole for any losses he suffered as a result of the County's actions. Although the record does not specify any such loss, the Award includes a make-whole remedy, a common remedy in contract violation cases. Finally, the grievance itself requests that the County pickup truck be added to the job posting. As the truck has not been included in the job postings in the past, the Award does not require the County to include the truck in the job posting.

For the reasons stated above, I issue the following

AWARD

1. That the County violated the collective bargaining agreement as modified by a binding past practice when it terminated the assignment of a County pickup truck to the paver operator to commute to and from work.

2. That the County assign a County pickup truck to the paver operator to commute to and from work, consistent with the binding past practice.

3. That the County make the Grievant whole for any losses he suffered as a result of the County's violation of the collective bargaining agreement as modified by a binding past practice.

Dated at Madison, Wisconsin, this 21st day of June, 1991.

By _____
James W. Engmann, Arbitrator