BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 569-A, AFSCME, AFL-CIO	Case 22 No. 46905 MA-7099
and	
CITY OF MAUSTON	

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Jon E. Anderson, Godfrey & Kahn, S.C., Attorneys at Law, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned to resolve a grievance concerning ambulance call. Hearings were held in Mauston, Wisconsin, on June 16, July 23, and October 28, 1992, at which time the parties were given full opportunity to present their evidence and arguments. The parties completed filing briefs by April 7, 1994.

ISSUE:

The issue to be decided is this:

> Did the City violate the collective bargaining agreement by promulgating a rule which prohibited employees from responding to fire and ambulance calls during their regular working hours, and when it applied this rule to Grievant Susan Bosgraaf before the rule took effect for other employees? Is so, what is the appropriate remedy?

BACKGROUND:

The Grievant, Susan Bosgraaf, has worked for the City as a utility clerk for 14 years. She has served as a volunteer for the ambulance service since 1982, when Mayor Larry Taylor thought it would be a good idea for City employees to volunteer their services. The City is required to provide ambulance services.

The Grievant's standard work hours at the City are between 8:00 a.m. and 5:00 p.m., five days a week. She serves as a volunteer on call for ambulance calls between 8:00 a.m. and 5:00 or 6:00 p.m. two or three times a week. She lives too far out of town to serve as a volunteer for ambulance calls when at home and does not respond to calls at night unless she has plans to be in town for a certain length of time at night.

The Grievant estimates that the calls required her to miss about one hour per week on the average. Ambulance report records show that estimate of time to be fair, given the fact that some calls occurred on the Grievant's break or lunch time, some occurred after working hours, etc. In some cases, the ambulance would need gas, and the Grievant would be dropped off in front of City Hall before the EMT's took the ambulance for gas. The ambulance is located at the City Hall where the Grievant works, and is only a few feet away

from her office.

On January 22, 1991, 1/ the Common Council adopted a Fire and Ambulance Policy which prohibited City employees from participating in such volunteer services while working for the City. The policy was to become effective July 23rd. The delay in implementing the policy was to give the Ambulance Commission time to recruit and train emergency personnel.

Before the Council met on January 22nd, the Grievant met with Kenneth Tulley, the Director of Public Works and her immediate supervisor. Tulley told her that the City was passing a policy to eliminate all full-time employees from taking ambulance calls, and that it would take effect February 1st. The Grievant asked Tulley whether a part-time secretary in City Hall -- Patty Wilke -- would be included in that policy, and Tulley told her that Wilke could not take such calls either. Union President Charles Torkelson was also present, and he asked if City employees would be disciplined if someone stopped to administer CPR on the street. Tulley told him that it would be a judgment call. In addition to the Grievant and Wilke, another City employee affected by the policy is John Nicksic, who is in the volunteer fire department.

On January 31st, the Grievant asked Tulley if this was her last day on ambulance call, and Tulley told her she would be on it until July 23rd. The Grievant stopped taking ambulance calls on April 23rd in accordance with directions from the City Administrator, W. Bruce Bierma, who followed up on those verbal directions with the following written note:

> This is a followup note on May 13, 1991 to my statement of April 23, 1991. I no longer wanted Sue Bosgraaf to take ambulance calls during working hours until the utility bills would be able to be run on the Unisys System.

After April 23rd, Wilke and Nicksic continued to take calls for their respective volunteer work, but the Grievant could not.

When taking such calls, employees are not paid by the City but are reimbursed based on their response to calls by the ambulance service. The Grievant testified that no one from the City told her that her ambulance work interfered with her work for the City. When the Grievant missed time with the City, she usually made up the time by cutting her lunch and break periods short. If the Grievant stayed at work after 5:00 p.m., when her regular day ended, she did not consider such work to be on overtime when making up time missed for ambulance duty except when she stayed past 5:00 p.m. to serve customers.

When the Grievant first started ambulance calls in 1982, there were more employees in the front office than there were in 1991. In 1982, the front office included HUD secretary Sandy Wilke, Deputy Clerk Tom Tryber, Clerk Russ Bergh, Building Inspector Ray Voigt and the DPW Director Adrian Madsen. In 1991, the front office included the Grievant, Eileen Powers, a full-time employee, Patty Wilke, a part-time employee, and Bierma who was also in the front office at that time. About three to five employees are on duty currently in the front office.

Virgil Gulley, who was an alderman and chairman of the personnel committee during the time the Council enacted the policy and the grievance was filed, testified that the City had tried a couple of times to negotiate with

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1/ All dates refer to the year 1991 unless otherwise stated.

the Ambulance Commission to eliminate the burden of having City employees serving during their working hours due to the stress on the front office employees when someone was gone. The Ambulance Commission was not happy with the City's position, and the policy was delayed to allow time to recruit and train extra EMT's. Gulley understood that Bierma's direction to the Grievant on May 13th was because of the Grievant's inability to do the work needed on the Unisys computer system. When the Grievant received Bierma's memo, she called Gulley at home, and he explained to her that the City needed to have the Unisys system up and running.

The new Unisys computer system was purchased in late 1989. The Grievant was assigned to put the water and sewer bills on it. Council Member David Pelton testified that it was very important to the City to get the new system running, because the old system could not take the new rate increase and put it into the system retroactively. The City was losing money in both cash flow and interest on that cash flow to the amount of about $40,000 a month. At one point, the City did not get bills out for three months and did not know who was overdue with their bills. The delinquency rose to $179,000 at one point, and is now down to around $20,000.

Tulley wanted the Unisys system up and running by March 22nd, and Bierma extended that to April 21st, but it was still not fully operational at that date. The first sewer and water bills were sent out on the system in late May. On February 20th, the Grievant sent Tulley a memo asking him for work priorities:

> I have spent Monday and Tuesday this week answering questions and complaints regarding the water and sewer bills which were mailed out last week. Also preparing payments to be entered on the IBM along with changes, finals and adjustments.
>
> What are your priorities for me to do? Do you want me to work on the IBM to keep current on all day to day changes, finals, adjustments and payments, or do you want me to work on the Unisys entering the accounts and name and addresses and meter information?
>
> Your immediate written response is needed to comply with your instructions to be on the Unisys by March 22. Until I receive your response I will continue on the Unisys as previously instructed.

The Grievant testified that Tulley did not respond to the above memo. A handwritten notation on the bottom of the Grievant's memo written by Tulley states:

> Discussed w./Sue the need to continue on both subjects. Getting on Unisys is still #1 however other utility work must also be completed. If she has a problem or complaint she cannot handle she will tell us. Also explained that not every direction or assignment will be put in writing.

Tulley's recollection is that he spoke with the Grievant on February 22 about her memo in accordance with his calendar entry about it. He gave the Grievant's memo to Bierma with his handwritten response, but cannot recall whether he gave the same handwritten response to the Grievant. The Grievant had no recollection of a discussion with Tulley and had not seen the handwritten portion on her memo until the arbitration hearing.

The parties' bargaining agreement for 1991 and 1992 was tentatively

settled on October 15, 1991, with full ratification taking place later that month. The issue of employees taking ambulance calls during working hours was not discussed during bargaining.

THE PARTIES' POSITIONS:

The Union:

The Union seeks a finding that the City violated the past practice and/or the collective bargaining agreement when it promulgated the rule prohibiting the Grievant from responding to ambulance calls during working hours, and seeks rescission of the rule to allow the Grievant and other employees to respond to such calls during working hours.

The Union asserts that there is a binding past practice which permits City employees to respond to ambulance calls during working hours. The question is not whether a practice existed, which it clearly did, but whether that practice rose to the level of one that is binding upon the parties. The well-known standards are that the practice must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

The Grievant testified that City employees had participated in the ambulance program for years, and the City's Mayor, Larry Taylor, stated that everyone should be permitted to participate in the ambulance service during working hours. There was no example where a City employee was denied the opportunity to respond to ambulance calls during their regular working hours. The Union argues that since a binding practice existed, the City is obligated to maintain this practice until it is properly and successfully repudiated by the City.

In order to establish that a valid repudiation of the practice took place, the Union claims that there must be some showing that the City formally conveyed its desire to repudiate the practice to the Union's bargaining team or to its
principal representative. The mere passage of a City Council resolution or policy does not suffice any more than a vote taken at a Union membership meeting. When the Council passed the resolution regarding ambulance calls on January 22, 1991, it did not convey any notice to the Union.

Furthermore, the Union notes that when Bierma talked with the Grievant on April 23, 1991, he stated his desire that he no longer wanted the Grievant to take ambulance calls during working hours until the utility bills were running on the Unisys system. This does not show a desire to repudiate the practice in general, but rather an intent to subordinate the practice temporarily to a particular work-place need at that time.

In sum, the Union states that there can be no serious question that a binding practice existed whereby employees responded to ambulance calls during their regular working hours. The practice was of long duration, endorsed by the Mayor, it was unequivocal, clearly enunciated and acted upon, and readily ascertainable over a long period of time as a fixed and established practice. The practice was therefore binding on the parties until it is timely and successfully repudiated. There is no evidence that the City has repudiated this practice.

The City:

Management has the right to implement reasonable work rules, and the right to direct the work force is a basic management prerogative. The City

asserts that if this grievance were sustained, it would interfere with the City's operations by allowing employees to leave work on short notice or no notice for indefinite periods of time, disregarding the City's needs.

The City's instruction to the Grievant was related to its efficient operation. The new billing system was months behind schedule and adversely affecting the City's revenue. The Grievant had been given clear instructions as to when the Unisys billing system was to be completed, but she was unable to meet the deadlines. Yet she continued to leave the office to respond to ambulance calls, until the March and April deadlines were missed and the City told her not to take ambulance calls while at work. The Grievant's inefficiency is reason alone to support the City's decision to prohibit her from taking ambulance calls during work.

While the Grievant believes that she should be able to set her own hours and take ambulance calls whenever she chooses, that activity interfered with getting the job done. The Grievant claimed that the calls she responded to averaged one hour a week, but the records show that she spent 87 hours on such calls in 1990, as well as 15 hours one month and five hours during one day. From January to April 23, 1991, the Grievant lost almost 20 hours of work, which is valuable time when one is under a deadline for completing a project.

The City submits that the Grievant's participation in ambulance calls is similar to "moonlighting" in that she was paid for her service on ambulance calls. Management has the right to prohibit an employee from leaving the office

during regular work hours for outside employment. When an employee's activities adversely impact work performance, it is reasonable for the employer to direct the employee to stop those activities and demand a full day's work for a full day's pay.

The City also was concerned about staffing the front office, and the Grievant's ambulance calls created problems with a small staff. The City's decision to implement a new policy was a matter of efficiency and business necessity. Thus, the City's instruction to the Grievant not to take ambulance calls during work hours until the Unisys system was operating was reasonably related to a legitimate business concern -- the Grievant's absences hindered the completion of the computer billing system and the staffing of the front office. Further, her failure to complete her work in a timely manner resulted in lost revenue for the City. The City's action is consistent with the management rights provision in the contract.

DISCUSSION:

The practice of allowing employees to respond to fire and ambulance calls during working hours meets the tests of being adequately established as unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. However, there is still a question of whether the practice should be given binding practice status as an implied term of a collective bargaining agreement or part of the parties' whole agreement. There are practices which meet the test of longevity, etc., but which should not necessarily be imposed on one party or the other as a part of their contract.

There is no bright line that determines which practices become implied terms of agreement and which do not. However, the practice must be at least related to conditions of employment or working conditions or of some benefit.

There is no evidence on the record that taking fire and ambulance calls is a benefit to employees, and it may even be a detriment to them. While one Grievant apparently sees it as a desirable practice -- at least, by her attempt to maintain the practice -- it is not obvious or within common knowledge of why taking ambulance calls is a personal benefit to an employee. One may derive some personal sense of satisfaction in performing a public service or doing a civic duty, but there needs to be a more objective standard than one's own view of a benefit.

The people who respond to fire and ambulance calls are paid for such services, but the record does not indicate how much they are paid, and it is unlikely that there is any significant monetary advantage in performing this service. The fact that time spent on such calls must often be made up at the forbearance of lunch hours or break time does not indicate that it is much of a benefit to employees. The Grievant did not claim that it was a benefit to her, and the Union cites no reason to consider the practice a benefit. Even if one were to view the practice as a benefit peculiar to a few employees, it is not a benefit to the general union membership, as only three employees took part in responding to fire and ambulance calls.

Nor can the practice be considered to be reasonably related to working conditions or conditions of employment. The practice apparently arose when the Mayor thought that it would be a good idea for City employees to participate in taking ambulance and fire calls. These services are of great benefit to a small community, and it may have been commendable for the City to set an example by allowing its own employees to take ambulance and fire calls while on duty, thereby encouraging other employers to follow its lead. However, this

laudable effort does not rise to the level of a binding past practice. Few of the City's employees took part in the program, and it cannot be said from the level of participation that it was a condition of employment for the general working force. It is also outside of the regular working conditions of the Grievant, a matter that does not impact on her working conditions except at her own discretion to take part in the program. The practice is not a working condition where it is not associated with work -- except for the fact that it disrupts work. Therefore, it cannot attain some binding status as a major condition of employment.

Since the practice of responding to fire and ambulance calls during working hours does not rise to the level of a binding past practice, it was unnecessary for the City to repudiate it during bargaining. However, the question remains whether the City promulgated a reasonable rule and applied it in an equitable manner where the rule went into effect for the Grievant well in advance of other employees.

Article II, Section 1 of the labor contract gives the City the right to direct the work force, as well as the right to promulgate reasonable work rules. Article VII provides an eight hour day and a 40 hour work week, with the Grievant's hours listed as 8:00 a.m. to 5:00 p.m. with a one hour unpaid lunch between 12:00 and 1:00 p.m.

It is reasonable for the City to demand that employees be at work during their scheduled hours. While it may also have been reasonable for the City to allow for some variance to accommodate the fire and ambulance response time, the City does not have to make the most reasonable rule to be upheld, but the rule must be grounded in a valid basis or concern. The City had a concern about employees leaving the premises and whether other employees would be able to staff the City offices. This is a valid basis for the City's rule. Although it does not appear that the City was harmed as much as it claimed by the Grievant's occasional absences (one hour a week is not that significant, especially where some of the time was made up), the City has the right to expect employees to maintain their regular hours except for approved absences, such as vacations and leaves.

The question of whether the rule was equitably applied to the Grievant is answered by another case involving these parties and this Arbitrator (see Case 21, award issued August 5, 1993). The Grievant was running behind time deadlines on an important assignment for which she alone was responsible, and her inability to get the utility billing on the new computer system was causing problems for the City. On April 23, 1991, when Bierma told her to not respond to ambulance calls, she had already missed the first two deadlines -- March 22

and April 22, 1991 -- for getting the utility billing up and running on the Unisys system. Therefore, the City had a valid reason to apply the rule to the Grievant before it became effective for all employees in July. All employees had adequate notice of the change months in advance.

For the reasons noted above and based on the record as a whole, I find that the City did not violate the collective bargaining agreement.

AWARD

The grievance is denied.

Dated this 15th day of April, 1994, at Elkhorn, Wisconsin.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator