BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between DODGE COUNTY PROFESSIONAL EMPLOYEES UNION, LOCAL 1323-A, AFSCME, AFL-CIO and DODGE COUNTY	Case 193 No. 52138 MA-8853

Appearances:

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

Mr. Roger Walsh, Attorney at Law, appearing on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the County or Employer, respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on June 8, 1995, in Juneau, Wisconsin. The hearing was transcribed. Afterwards the parties filed briefs whereupon the record was closed on August 31, 1995. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the statement of the issue. The Union proposed the following issue:

> Did the County violate the labor agreement and Section 6.3 when it refused to allow the grievant to work through his lunch period, and if so, what should the remedy be?

The County proposed the following issue:

> Did the County violate the collective bargaining agreement by temporarily denying, on December 15, 1994, the grievant's request to work without an unpaid lunch period on a regular basis? If so, what is the appropriate remedy under the agreement?

Since the parties were unable to agree on the wording of the issue, the undersigned has framed it. From a review of the record and the briefs, the undersigned has framed the issue as follows:

> Did the County violate the collective bargaining agreement when it denied the grievant's request to work through his lunch period on a regular basis? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1994-96 collective bargaining agreement contains the following pertinent provisions:

ARTICLE III - MANAGEMENT RIGHTS

> Except as hereinafter provided, the Employer shall have the sole and exclusive right to determine the number of Employees to be employed, the duties of each of these Employees, the nature and place of their work and all other matters pertaining to the management and operation of the County, including the hiring, promoting, transferring, demoting, suspending or discharging for cause of any Employee. This shall include the right to assign and direct Employees, to schedule work and to pass upon the efficiency and capabilities of the Employees and the Employer may establish and enforce reasonable work rules and regulations. Further, to the extent that rights and prerogatives of the Employer are not explicitly granted to the Union or Employees, such rights are retained by the Employer. However, the provisions of this Section shall not be used for the purpose of undermining the Union or discriminating against any of its members.

. . .

ARTICLE VI - HOURS OF WORK AND OVERTIME

6.1. The normal regular workweek for all regular full time Employees shall be Monday through Friday.

6.2. The hours of work for Professional Employees shall be one of the following:

6.21 Monday through Friday between 8:00 a.m. and 4:30 p.m. (overtime paid after eight (8) hours per day).

6.22 Monday through Thursday between 7:00 a.m. and 9:00 p.m. and Friday between 7:00 a.m. and 4:30 p.m. (overtime paid after forty [40] hours per week).

6.23 Employees may schedule their hours of work with the approval of their supervisor or department head provided that the respective County department units shall have staff coverage five (5) days per week from 8:00 a.m. to 4:30 p.m. The department head shall have final approval of all Employees' hours of work.

6.3. Employees shall be entitled to a fifteen (15) minute break in the morning and afternoon and a thirty (30) minute lunch period per day. The thirty (30) minute lunch period shall be without pay.

6.4. Flex-time. When pre-arranged appointments would require time outside of the normal work day, the Employee shall, with the approval of their supervisor, adjust his/her work schedule.

6.5. Overtime shall be compensated at the rate of time and one-half (1-1/2) the Employee's normal rate of pay for all hours worked in excess of their approved work scheduled as stated in 6.21 and 6.22 above and for all work performed on Saturdays, Sundays and holidays. Compensatory time will be computed the same as for overtime.

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FACTS

Psychiatric Therapist II Jack Ingersoll has worked a flexible schedule since he was hired by the County in 1988. He normally works from 8:30 a.m. to 9:30 p.m. on Monday and Wednesday, and from 8:30 a.m. to 4:00 p.m. on Tuesday and Thursday. This flexible schedule allows him to see clients outside traditional working hours, namely after 5:00 p.m. When circumstances dictate, he adjusts the starting and ending times in order to meet his own or clients' needs. He does not need supervisory approval to make adjustments to his starting or ending times.

From 1988 to late 1993, Ingersoll regularly worked through lunch and did not take his half hour lunch break. When he did so, he came into work a half hour later than normal or left work a half hour earlier than normal. In November of 1993, a departmental memo was issued which informed employes that henceforth they were to take their half hour lunch break and not work through lunch. After this memo was issued, Ingersoll reduced the number of times that he worked through his half hour lunch break, although he still did so on occasion.

In December, 1994, Ingersoll learned that two bargaining unit employes were working through their lunch period on a regular basis. The two employes, Terri Wilkens and Diane Persick, had been given permission by Department Director David Titus to regularly work their work day without taking a half hour lunch break. Thus, they were allowed to regularly work through lunch. Around December 15, 1994, Ingersoll went to his supervisor, Edward Ormont, and asked if he could work without taking his lunch break like Wilkens and Persick were doing. Ormont denied Ingersoll's request. Specifically, Ormont told Ingersoll that he could not work through his lunch period on a regular basis. The record does not indicate why Ingersoll's request to work through his lunch period was denied.

Ingersoll grieved the denial of his request to work through his lunch period. When the grievance was being processed, management representatives indicated that the Department was engaging in a trial program with Wilkens and Persick and that the decision to deny Ingersoll's request was a temporary one.

POSITIONS OF THE PARTIES

The Union's position is that the County violated the contract when it refused to allow Ingersoll to work through his lunch period. For background purposes, the Union initially notes that since Ingersoll was hired, he has worked through his lunch period on occasion. Next, it notes that while employes were advised via a memo in 1993 that they were to take their lunch breaks and not work through lunch, Ingersoll learned in December, 1994, that two bargaining unit

employes were being allowed to do just that (i.e. work through lunch). Finally, it notes that Ingersoll sought the same treatment as them but was not afforded same. The Union first argues

that this action (i.e. the County's refusal to let Ingersoll work through lunch) violates Section 6.03 of the contract. In the Union's view, Section 6.03 gives employes the right to work with or without a lunch period. In addition to its reliance on that section, the Union also asserts that requiring Ingersoll to take a lunch period is contrary to "accepted notions of custom and past practice." Next, the Union notes that Article III (the Management Rights clause) gives it the right to grieve unreasonable application of work rules. The Union argues that in this instance, the County has unreasonably exercised its management right by not allowing Ingersoll to work through lunch. The Union initially notes in this regard that the County has not identified any managerial inefficiencies which would occur if Ingersoll worked through lunch. Next, it notes that no claim has been made by the County or evidence shown that allowing Ingersoll to work through lunch would create staffing problems. Finally, it notes that there is no monetary implication to Ingersoll's desire to work through his lunch period as the time is unpaid and creates no overtime considerations. Given the foregoing, the Union contends that the County has offered no rationale, other than its apparent whim, for not allowing Ingersoll to work through his lunch period. In order to remedy this contractual breach, the Union asks that the County be ordered to cease and desist from applying its policy of requiring employes to take their unpaid lunch period.

The County's position is that it did not violate the collective bargaining agreement by denying Ingersoll's request that he work without an unpaid lunch period on a regular basis. According to the Employer, various provisions in the collective bargaining agreement do not support the Union's contention that employes can determine on their own whether or not to take lunch breaks on any work day. First, it cites the Management Rights clause (Article III). The Employer reads that clause, specifically the phrase "including the . . . right . . . to schedule work . . .," as giving it the right to determine the employe's work schedule. The Employer asserts this right to approve work schedules is exclusive because there is no explicit restriction on that right. Second, the County cites those portions of Sections 6.23, 6.4 and 6.5 which provide that the department head/supervisor approves daily work hours. It notes that there is no restriction in any of these sections on the department head's approval. In the County's view, these provisions establish that there is no contractual basis for the Union's contention that it is the employe, and not the Employer, who makes the determination whether an employe can work without taking a lunch break. The County asserts that the reference to "reasonable" in the Management Rights clause applies to establishing and enforcing work rules and regulations, and does not apply to the provisions found in Article VI. The County also argues that the Union misunderstands Section 6.3. According to the County that clause prevents it from forcing an employe to work his or her full work day without being given a lunch break. The Employer therefore submits this clause simply guarantees employes a lunch break. The Employer argues that while an employe can request that he or she be allowed to work his or her work day without taking a lunch break, it is still the Employer's prerogative to determine whether or not to grant the employe's request (to not take a lunch break). In addition to the contractual argument just noted, the Employer also contends there is no factual basis for the grievance either. To support this premise, it notes that Ingersoll has been aware since he was hired that he had to get his

supervisor's approval before he was able to work a daily work schedule in which he did not take a lunch break. According to the County this establishes that if there was a past practice regarding not taking lunch breaks, it was that employes would do so only after requesting and getting their department head's approval. Finally, with regard to the two bargaining unit employes who are being allowed to work without taking a lunch break, the County submits that they are doing so on a trial basis. The County avers that if the experiment proves satisfactory, it may allow Ingersoll to have his work day not include a lunch break. The Employer therefore requests that the grievance be denied.

DISCUSSION

The factual context for this matter is as follows. The grievant does not want to take his half hour lunch break. Instead, he wants to work through his lunch break when his work load permits so that he can come into work a half hour later than normal or leave work a half hour earlier. The County has refused to let him do so. It wants him to continue to take a lunch break. Given the foregoing, the question is whether the County's refusal to let the grievant work through his lunch break violates the labor agreement. The Union contends that it does while the County disputes this assertion.

My analysis begins with a review of the contract language covering lunch breaks. The only provision in the contract which explicitly addresses lunch breaks is Section 6.3. It provides that "Employees shall be entitled to a . . . thirty (30) minute lunch period per day. The thirty (30) minute lunch period shall be without pay." The plain meaning of this provision is that employes are entitled to a half hour lunch period. Thus, employes are contractually guaranteed a lunch break. The Union contends this contractual right to a lunch break can also be read conversely so that employes also have the contractual right to work without a lunch period if they so desire (i.e. to work through lunch). I disagree. The problem with this contention is that the language does not say anything about employes not taking their lunch break. As previously noted, all it says is that employes get a lunch break. It does not say whether employes who want to work through lunch and not take a lunch break can do so. That being so, it follows that Section 6.3 is silent on whether employes can work through their lunch break if they want. The other contractual provisions cited by the Employer, namely Sections 6.23, 6.4 and 6.5, like Section 6.3, are also silent on the topic of whether employes can work through lunch.

It is an accepted arbitral principle that when a contract is silent on a particular topic, management has the right to formulate and enforce rules and procedures which are not inconsistent with the labor agreement. 1/ This principle has been incorporated into the parties' agreement through the Management Rights clause (Article III) wherein it provides that the Employer has the right to "establish and enforce reasonable work rules and regulations."

1/ Elkouri and Elkouri, How Arbitration Works, 3rd Edition, page 517.

Application of this principle here means that the Employer can establish rules and/or policies concerning working through lunch since that topic is not addressed in the parties' labor agreement.

The record indicates that the Employer adopted and implemented such a policy in November, 1993. That was its contractual right. At that time employes were informed that henceforth they were to take their lunch break and not work through lunch. Prior to the issuance of this new policy some employes had been doing just the opposite, namely working through lunch and not taking a lunch break.

This new policy was apparently applied uniformly to all bargaining unit employes until late 1994. At that point two bargaining unit employes were exempted from its application and allowed to work through lunch and not take a lunch break. The grievant sought similar treatment but was denied same. Thus, the current situation is that two bargaining unit employes are being allowed to work through lunch, but the grievant is not being permitted to do so.

If the County wants to make exceptions to their own lunch policy, that is its call to make. Thus, exceptions to a policy do not make it per se unreasonable. That said, once an employer opens the door, so to speak, and allows exceptions to its own policy, it has to objectively justify same if an employe seeks an exception and is not granted one. Here, though, there is absolutely nothing in the record either explaining or objectively justifying why the grievant was not exempted from the Employer's lunch policy like the other two bargaining unit employes. If the County had a business reason for not allowing the grievant to work through lunch, that reason was never identified. Additionally, the County has not identified any inefficiencies, staffing problems or operational needs which would occur if the grievant worked through his lunch period. Finally, there is nothing in the record which shows that the two bargaining unit employes who are being allowed to work through lunch have job responsibilities or working conditions that are different from the grievant. In the absence of such evidence, the assumption drawn by the undersigned is that the grievant is similarly situated to the two bargaining unit employes who are being allowed to work through lunch. Given the foregoing, it is held that no justification exists in the record for treating the grievant differently from the two bargaining unit employes who are being allowed to work through lunch. That being so, the grievant is being treated in a discriminatory fashion. This inequitable treatment of the grievant violates the portion of the Management Rights clause which specifies that "work rules and regulations" will be enforced reasonably. I therefore find that in this specific instance the Employer has not reasonably applied the granting of exceptions to its existing lunch policy. Consequently, the Employer violated the labor agreement when it denied the grievant's request to work through his lunch period on a regular basis.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the County violated the collective bargaining agreement when it denied the grievant's request to work through his lunch period on a regular basis. In order to remedy this contractual breach, the County is directed to allow the grievant to work through his lunch period.

Dated at Madison, Wisconsin, this 27th day of October, 1995.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator

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