BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

OCONTO COUNTY (HUMAN SERVICES)

and

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

Case 128
No. 52529
MA-9014

Appearances:

Mr. David Campshure, Staff Representative, Wisconsin Council 40, 1566 Lynwood Drive, Green Bay, Wisconsin 54311, on behalf of the Union.

Godfrey & Kahn, by Mr. Dennis W. Rader, Esq., Suite 600, 333 Main Street, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, on behalf of the County.

ARBITRATION AWARD

According to the terms of the 1993-1994 collective bargaining agreement between Oconto County (hereafter County) and Oconto County Professionals, Local 778-D, AFSCME, AFL-CIO (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as impartial arbitrator of a dispute between them regarding whether the County was privileged to videotape evaluations of four bargaining unit employes as a training tool for the evaluating supervisor. The Commission designated Sharon A. Gallagher arbitrator. A hearing was held at Oconto, Wisconsin on July 24, 1995. A transcript of the proceedings was made and received by the undersigned on August 7, 1995. The parties agreed to submit their initial briefs to the undersigned postmarked September 20, 1995. Those briefs were thereafter exchanged by the undersigned. The parties reserved the right to file reply briefs.

Issues:

The parties were unable to stipulate to the issues to be determined in this case. The parties stipulated that the undersigned could frame the issues based upon the relevant evidence and argument in the case. The Union suggested the following issues:

> Did the County violate the collective bargaining agreement when it videotaped the performance evaluations of clinical team employes without their consent? If so, what is the appropriate remedy?

The County suggested the following issues for determination:

Did the County violate the contract when it videotaped bargaining unit members as a part of its staff development plan? If so, what is the appropriate remedy?

Based upon the relevant evidence and argument in this case the undersigned concludes that the following issues shall be determined herein:

Did the County violate the collective bargaining agreement when it videotaped bargaining unit members' interaction with a County Supervisor for the purpose of training and evaluating the Supervisor?

If so, what is the appropriate remedy?

Relevant Contract Provisions:

ARTICLE I - MANAGEMENT RIGHTS RESERVED

The management and the direction of the work force is vested exclusively in the Employer; to be exercised through the Department Heads, including, but not limited to, the right . . . to determine any type, kind and quality of service to be rendered to patients and citizenry; to determine the location, operation and type of physical structures, facilities or equipment of the departments; to plan and schedule service and work; to plan and schedule any training programs; to create, promulgate and enforce reasonable work rules; to determine what constitutes good and efficient County service and all other functions of management and direction not expressly limited by the terms of this Agreement. The Union expressly recognizes the prerogative of the Employer to operate and manage its affairs in all respects.

Relevant Personnel Policy:

The Human Services Board of Directors approved a Personnel Policy for the Human Services Department effective August 11, 1993 which reads in relevant part as follows:

. . .

13. PERFORMANCE EVALUATION

Written performance evaluations may be completed for all probationary and permanent employees of the Oconto County Human Services Department.

A. Evaluation of employees during the training period shall be completed at the end of three months and at the end of the fifth month training period by the Immediate Manager.

B. Evaluations of permanent employees may be completed annually, or as needed, by the Immediate Manager.

. . .

D. The employee and the Immediate Manager shall sign the written evaluation. If the employee refuses to sign, or his/her signature cannot be obtained, reasons shall be recorded on the face of the evaluation. Any employee who refuses to sign based on serious disagreement with content, or if the employee indicated he/she was evaluated unfairly, the grievance procedures set forth in these policies and procedures may be utilized.

E. A copy of the written evaluation shall be made a party (sic) of the employee's personnel record.

14. STAFF DEVELOPMENT/TRAINING

A. The Oconto County Human Services Department views training and education as necessary to maintain, improve, or impart new skills in order to perform more effectively and efficiently.

B. The Oconto County Human Services Department may provide its employees with an opportunity for career enhancement through training, education and promotion.

. . .

Background:

The Oconto County Human Services Department (hereafter Department) employs four Clinical Services Division employes. Two of these employes, Becky Hobbs and Julie Whitworth (formerly Julie Guelzow), have been employed in the Clinical Services Division for eleven years

and four and one-half years respectively. 1/

In offering its clinical services to clients, the County issues each client a "Client Bill of Rights" which assures each client, among other things, that they will have the "right to confidentiality of conversations and medical records . . . the right to refuse to be filmed or taped . . . the right to file a grievance which can be made in writing to the Clinical Director. . . ." Each client must sign and date the "Client Bill of Rights" and their signature must be witnessed and dated.

The County has required videotaping of clients and clinical staff as a part of their family-based training for an unknown number of years. Before a client may be taped, the clinical employe must obtain a signed document entitled "Permission to Tape" from the client or clients that will be taped being interviewed by the clinical employe. This written permission reads in relevant part as follows:

> We, the undersigned, give the Oconto County Department of Human Services permission to audiotape, videotape, or view our treatment sessions.
>
> This taping or viewing will be used for supervision and training purposes, as well as to assist us in our treatment. No one outside the Oconto County Department of Human Services will be allowed access to the sessions or tapes without our written permission. . . .

In addition, anyone participating in or having access to the session tapes must be listed on the "Permission to Tape" form. The County does not require clients to give their permission, so that if a client refuses to be taped, no taping will be done.

Facts:

In mid-February, 1995, Therapeutic and Quality of Care Manager, Bruce Retzlaff evaluated four Clinical Services Division employes, including Becky Hobbs and Julie Whitworth. Retzlaff scheduled evaluation interviews with all four Clinical Service Division employes in or around the week of February 20, 1995. Apparently, employe Gary Anderson was given his oral evaluation early on. Anderson then spoke to Chemical Dependency Counselor Becky Hobbs and indicated that he had been videotaped during his evaluation. Hobbs' evaluation was scheduled for February 21, 1995.

1/ Julie Whitworth, at the time of the filing of the instant grievance, was employed as a Clinical Social Worker for the County and was a Union Steward. Becky Hobbs was then employed as a Chemical Dependency Counselor for the Clinical Services Division.

Hobbs went to Retzlaff's office before her scheduled interview evaluation to discuss her concerns about possibly being videotaped during her evaluation. Also present at this meeting were Union President Joanne Bronk and Union Steward Julie Whitworth. Hobbs asked Retzlaff if the videotaping would be mandatory; she expressed her concerns, and that she would be uncomfortable in such a situation. Hobbs asked the purpose for the taping. Retzlaff then asked why Hobbs was anxious about being taped. Union President Bronk said that the Union felt it was not appropriate to tape employe evaluations without permission of the employe involved and that employes should have the same rights as clients to refuse to be videotaped. Bronk then asked Retzlaff why the County was insisting upon videotaping employe evaluations. Retzlaff stated that the taping was for his training so that his supervisor, Craig Johnson, could view his interaction with employes in the evaluation setting. Bronk then asked whether Johnson could simply sit in on the evaluations and avoid videotaping the employes. Retzlaff did not respond. Bronk then stated that Union employes would not be insubordinate; if the videotaping was mandatory, the employes would proceed with the videotaping of their evaluations but they would grieve it thereafter. Bronk asked if the videotaping was mandatory. Retzlaff stated that it was. Hobbs responded that she would proceed with the videotaping of her evaluation but that she would grieve it. 2/

Retzlaff then met with both Hobbs and Whitworth separately to discuss their evaluations. Retzlaff had both meetings videotaped. Retzlaff went over a form entitled "Staff Development Plan" with each employe, discussed how each employe saw themselves in each of the possible categories after having given each of them a blank form so they could follow along. Retzlaff indicated his views regarding each category in which the employe worked, and although Retzlaff skipped around, he covered the entire Staff Development Plan form for each employe and also covered all areas concerning his comments regarding their performance both as employes and in terms of their interaction with other workers and with clients. Both Hobbs and Whitworth stated that while they were being taped in their evaluations they felt intimidated and they stated that they would have behaved differently had they not been taped. Both Hobbs and Whitworth stated that they would have been more comfortable if Deputy Director Craig Johnson had attended the evaluation interviews rather than their being videotaped. The interviews took approximately one hour or one hour and fifteen minutes each. Both Hobbs and Whitworth received very good evaluations; no objections or complaints were filed regarding the content of these evaluations. Also, neither Hobbs nor Whitworth was disciplined as a result of the videotaping of their evaluations. In fact, neither of them had been disciplined in any way regarding a taping situation.

Both Hobbs and Whitworth stated that whenever their clients had been asked for permission to tape sessions with them for training purposes, they (Hobbs and Whitworth) had never been asked to sign a permission slip for videotaping of their performance during their client

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2/ The County never informed Clinical Service Division employes in advance that their evaluations with Retzlaff would be videotaped.

interviews. Hobbs and Whitworth both stated that they did not ask not to be taped with clients and that neither of them filed grievances regarding being taped with clients in interview situations. In addition, neither Whitworth nor Hobbs was receiving services from the Human Services Department when they were videotaped in an evaluation setting with Retzlaff. Both Whitworth and Hobbs stated that they were sure that no clients or members of the public had seen the videotapes of their evaluation interviews. Both Whitworth and Hobbs stated that the tapes that the County had made of them with their clients had been used only as training material for others in their bargaining unit and that this was of a positive value to employes. Whitworth stated that she was unaware that the evaluation videotape had ever been shared with any other employes, clients or the general public. It is undisputed that Deputy Director Craig Johnson has never sat in on evaluations given by Retzlaff before this point.

Johnson stated that he is responsible to assess County Human Services Managers' abilities. Johnson stated that videotaping of employe evaluations between Retzlaff and his employes was a good tool for evaluating Retzlaff as it did not affect Johnson's schedule and the tape could be reviewed and rewound and discussed between himself and Retzlaff and the context of the statements could not be disputed. Johnson stated that he reviewed the tapes of the four Clinical Service Division employes' evaluations with Retzlaff; that he (Johnson) never evaluated the employes' responses given on the tapes; that he (Johnson) only discussed the contents of the tapes with his supervisor (Director Dennis Tomchek) and with Retzlaff. Johnson also stated that he has never videotaped managers assessing the skills of other employes in an evaluation setting prior to this instance. Johnson stated that Retzlaff is the only supervisor whose evaluations he has required to be videotaped. Johnson supervises six line managers.

Bruce Retzlaff stated that he prepared the Staff Development Plans in advance for each employe of the Clinical Services Division prior to their evaluation meetings; and that he was not taped during the time he prepared those forms. Retzlaff stated that the videotaping of Clinical Service Division employes was not shared with other Human Services Department employes except for his supervisor Craig Johnson, as far as he knew. And that he did not discuss with any employes of the County the results of the videotapes except with his supervisor Johnson. Retzlaff stated that one videotape had already been destroyed and that he had retained the other three videotapes in his locked desk drawer. Retzlaff stated that there was no plan to share the three remaining videotapes with any other employes of the County or anyone else.

Briefs:

Union:

The Union stated that by filing the instant grievance, it only intended to question the County's unilateral decision to videotape employe evaluation sessions without their consent. Thus, the taping of employe/client interviews is not at issue here.

The Union argued that the Management Rights clause of the effective labor agreement does not give the County the right to "make unilateral changes regarding issues not covered by the Agreement, if those issues relate to the wages, hours, or working conditions of the employes." The Union urged that the WERC has held that the receipt and review of evaluations and conferences regarding these are mandatory subjects of bargaining. Therefore, the videotaping of employe evaluations without their consent must infringe upon the employes' "opportunity to fairly respond to the evaluation ratings they have been given." The fact that the County failed to give the Grievants copies of the videotapes containing their evaluations, in the Union's view, constituted a separate violation of the labor agreement at Appendix A, Section 3.

In addition, the Union asserted that bargaining unit employes are entitled to the same individual personal privacy rights that clients have to refuse to be videotaped when their participation in the videotaping is not the focus of the videotaping. In this regard, the Union noted that the avowed object or focus of the disputed videotaping was to evaluate Supervisor Retzlaff. If evaluation of Retzlaff were the true reason for the videotaping, the Union asserted, then the "incidental actors" in the videotapes (unit employes) should be able to veto the videotaping if they are, as they asserted, intimidated and/or uncomfortable. The Union found it odd that the County only videotaped some of Retzlaff's employe evaluation sessions and it implied that Retzlaff, a supervisory employe for the County for the past fifteen years, should not need to have his interactions with employes evaluated.

The Union further contended that the County's videotaping employes interacting with Retzlaff, violated the employes' rights to personal privacy. On this point, the Union implied that the County's reason for videotaping the disputed sessions was insufficient to justify the invasion of the employes' privacy rights. The Union claimed that in this context, the County recorded "private employe evaluations and private statements and actions of employes" (emphasis in original). The Union urged that evaluations of employes are confidential, that conferences regarding employe evaluations are also confidential, and that these matters are mandatory subjects of bargaining. "Absent negotiated language regarding the use of videotaped evaluations, the taping of such evaluations constitutes an invasion of privacy." 3/

3/ The Union cited Wis. Stats. 895.50(2)(a) and (c), defining "invasion of privacy", as follows:

> (a) Intrusion upon the privacy of another of a nature highly offensive of a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass. . . .
>
> (c) Publicity given to a matter concerning the private life of another, of a kind, highly offensive to a reasonable person, if the defendant has acted either

The Union therefore sought that the grievance be sustained, that the undersigned issue an Order that the videotapes of the Grievants be destroyed and an Order that the Employer cease and desist from videotaping employe evaluations in the future without the employes' consent.

County:

The County argued that despite the Union's assertions, no violation of the Grievants' statutory right to privacy under State law occurred as a result of the County's videotaping Supervisor Retzlaff's evaluations of the Grievants. The County urged that the purpose of the videotaping was to assess Retzlaff's management skills; that the tapes were used exclusively for this purpose; that the County destroyed one tape, and at the instant hearing, it offered to destroy the other tapes; and that the tapes were not used to discipline, adversely affect or damage the unit employes taped.

The County further contended that the Grievants' taped actions and statements were not unqualifiedly private, as they were made within the employment relationship and that the County never intended to make them public or to profit from their publication. In this regard, the County asserted that the Employer was conditionally privileged to videotape interactions between its employes, so long as a legitimate common interest existed for such taping. The County asserted that it had the legitimate purpose of training supervisor Retzlaff and that this was its only purpose in videotaping the interviews. As the County had not abused its "conditional privilege" to videotape employes at work by showing those tapes to clients, the public, or to other employes not involved in the evaluation of Supervisor Retzlaff, the County did not violate the taped employes' right to privacy, in the County's opinion.

The County observed that the Grievants admitted to being videotaped with clients in the past, as a part of the County's family-based training program; that none of the unit employes taped in these circumstances were asked their permission or consent to be videotaped; and none of the employes taped in these circumstance objected or filed grievances regarding any contract violations or violations of their rights to privacy. The County also pointed out that at the time the instant grievance was filed, the Grievants and Union President Bronk were aware that the County's reason for videotaping these unit employes' interactions with Supervisor Retzlaff was in order to assess the management skills of Supervisor Retzlaff (a non-unit employe).

> unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed. It is not an invasion of privacy to communicate any information available to the public as a matter of public record.

The County further contended that it has the Management Right to determine the proper procedures for training its supervisors and to control its operations and its supervisory personnel without interference from the Union. The County urged that the benefit of videotaping the County's supervisors while interviewing unit employes outweighs the unit employes' avowed feelings of intimidation at having these sessions videotaped. As the County used the tapes for the legitimate purpose of training Supervisor Retzlaff and because Retzlaff actually evaluated the unit employes in the privacy of his office before the videotaping occurred, the County asserted, the tapes were never actually used for purposes of evaluating unit employes.

The County argued that absent any restriction on videotaping in the County's personnel policies and the collective bargaining agreement, the County should be free to videotape for training purposes. In addition, the fact that the County has not previously videotaped employe evaluation reviews, does not mean that the parties mutually agreed never to videotape such sessions for the reason the County videotaped the Grievants. Rather, the County asserted, in

the silence of the labor agreement and County policy regarding videotaping, the County should be privileged, in its discretion as detailed in the Management Rights clause of the labor agreement, to include videotaping as a part of its methods, procedures and operations to meet the mission of the Human Services Agency.

Reply Briefs:

Union:

The Union took issue with the County's justification that by its videotaping employe evaluation meetings, the County had not violated the privacy rights of employes because such videotaping was privileged. The Union asserted that, per Section 895.50(2)(a), Wis. Stats., the videotaping herein was not only offensive to the employes but also done without any assurances of privacy or confidentiality. In these circumstances, the Union asserted, the employes taped could reasonably conclude that the tapes might be used against them in the future.

In addition, the Union urged that the videotape arguments made by the County in its initial brief based on case law, were not applicable to the instant case because the County had no legitimate business reason to videotape employes, in the Union's view. The Union stated that it has never alleged a violation of State or Federal privacy laws by its grievance, but it nonetheless asserted that it offered sufficient proof herein to meet State and Federal legal standards.

The Union contended that the videotaping of employes during client sessions is distinct and different from videotaping employes during a supervisory meeting. That is, in this case the employes had no right to decline to be taped with their supervisor, but clients have an absolute right to refuse to be taped in client interviews. The Union asserted that the fact that Hobbs and Whitworth were aware of the reason (given by Retzlaff) for the disputed taping is neither relevant

nor does this fact make the taping appropriate. The Union argued that the County's "conditional privilege" argument does not apply in this case, as the County failed to prove that employes and the County have a common interest in having these sessions taped.

Finally, the Union urged that the Management Rights clause of the contract is restricted by the County's statutory obligation to bargain in good faith regarding mandatory subjects of bargaining and to eschew making unilateral changes therein. Whether the disputed videotaped meetings were to review employe performance evaluations, or themselves constituted performance evaluations, the Union contended this distinction is meaningless because such sessions, no matter how they are described, are mandatory subjects of bargaining. The Union renewed its request for the remedy it sought in its initial brief.

County:

The County took exception to the Union's characterization of the videotaping as a mandatory subject of bargaining. In this regard, the County noted that the videotapes did not constitute evaluations of the unit employes involved and they therefore did not affect the unit employes' job security. Rather, the taping was solely for the purpose of evaluating the

supervisor in his interaction with employes. In addition, the County urged that the videotaping involved was not done for the purpose of monitoring unit employes. Furthermore, the County observed, the fact that the unit employes feared reprisals from their being videotaped while their supervisor was being trained/evaluated, not only was irrelevant to this case but those fears were unsubstantiated, based on the facts of this case. Nor did the failure of the County to give the Grievants copies of the videotapes violate the labor agreement in the County's view, because these tapes did not constitute evaluations of the Grievants.

The County further contended that unit employes do not have the same rights as the clients/members of the public they serve. Rather, the County noted, employe rights are generally prescribed by the collective bargaining agreement. In addition, the County disputed the value of the Union's "incidental actors" argument. Furthermore, the County contended that it has the management right under the contract to plan, schedule and change its training procedures at any time, especially in light of the fact that the contract lacks a Maintenance of Standards clause.

The County contested the Union's argument that because the County has not previously taped supervisory interactions with employes, this constitutes a mutually agreeable, binding past practice. The County urged that no evidence of mutuality was proffered by the Union in this case. The County also noted that no violation of employes' rights to privacy could occur given the County's qualified privilege to videotape employes at the work place. Here, the tapes were made for legitimate business reasons and no public access was granted to any performance evaluations so that the right to privacy, in the County's view, is a non-issue in this case.

Discussion:

Initially I note that the effective labor agreement makes no mention of videotaping employes. In addition, Article I - Management Rights specifically grants the County the right, inter alia ". . . to plan and schedule any training programs . . . and all other functions of management and direction not expressly limited by the terms of this agreement." Furthermore, Article I states that "(t)he Union expressly recognizes the prerogative of the Employer to operate and manage its affairs in all respects." The County's personnel policy, approved in August, 1993, also fails to address the subject of videotaping of employes. However, the policy sets out a detailed employe evaluation procedure and assures that each evaluation will be made a part of the employe's personnel record. The policy also states generally, that the County ". . . views training and education as necessary to maintain, improve, or impart new skills in order to perform more effectively and efficiently." Finally, I note that in Appendix A at Section 3 of the labor agreement, the parties agreed as follows:

> Employees shall be given a copy of all their evaluations taken by the Employer.

It is in the above-described context that the specific facts of this case must be judged. Based upon the record evidence herein and the language of the contract, I can find no violation of the contract (or of County policy) in this case.

The Union in this case has argued that the Employer has violated employes' privacy rights. In these situations, arbitrators have attempted to balance the personal rights of the employes with the rights of the employers to conduct the company's business. In striking this balance, arbitrators have generally inquired into the following issues: whether the employer has a legitimate business need for its actions or rules; whether there are reasonable safeguards for employe rights; whether the employer's actions resulted in a substantial change in employe working conditions due to observation/surveillance; and whether there was public disclosure of any private actions or facts by the employer.

It is significant that in mid-February, 1995, when Grievants Hobbs and Whitworth discovered that they would be videotaped in their meetings with Supervisor Retzlaff regarding their evaluations, they asked Retzlaff the purpose of the taping and he stated that the taping was necessary for his own training and that his own supervisor, Craig Johnson, wished to view his interactions with employes in the evaluation setting and evaluate Retzlaff's performance. Whether or not the Union or the undersigned believes such taping would be an effective tool in training and evaluating Retzlaff, the County's stated reason for the taping appears to be legitimate, reasonable and within the common interest of the County and its employes: to have properly trained supervisors capable of managing unit employes 4/

That Hobbs and Whitworth felt intimidated and uncomfortable during the videotaping and stated that they would have behaved differently had they not been taped, was based on their own fears, which proved to be unjustified by the facts and circumstances of the taping. In this regard, it is significant that neither Hobbs nor Whitworth was disciplined as a result of the videotaping of their interactions with Supervisor Retzlaff, that both Hobbs and Whitworth received very good evaluations of their performance, and no objections were filed thereon. Thus, on this record, the disputed taping had no affect on employe working conditions.

In addition, I note that the only people who viewed the videotapes were Retzlaff, Johnson and Johnson's immediate supervisor, the Director of Human Services Tomchek; that as of the date of this hearing, the County had voluntarily destroyed one of the videotapes and had retained the other three videotapes in Retzlaff's locked desk drawer; and that no evidence was offered

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4/ Clearly, the testimony of Hobbs and Whitworth that they were both uncomfortable and intimidated by the videotaping of their interactions with Retzlaff, might tend to decrease the value of the videotapes for the reason given here. However, absent contractual limitations to the contrary, it is for the County to judge whether the videotaping of its supervisors interacting with its employes in an evaluation setting is valuable, overall, in judging the performance of its supervisors. In addition, in my view, it is just as likely that some employes would feel more nervous and intimidated by the physical presence of the Deputy Director than by the presence of a video camera.

by the Union to show that the County had allowed members of the public, clients, or other employes to view the videotapes of Clinical Service Division employes with Mr. Retzlaff. Finally, the evidence in this case failed to show that Clinical Services Division employes were subjected to unwarranted invasions of their privacy during the videotaped sessions in dispute here. Thus, the evidence herein showed that the videotapes have been safeguarded against release or circulation except for the specific reason the County originally videotaped the sessions.

The Union argued that by videotaping employes, the County made a unilateral change regarding an issue not covered by the labor agreement relating to the wages, hours or working conditions of employes. However, the Union failed to prove that an actual unilateral change had been made by the County in this case. In this regard, I note that the evidence showed that the County had simply never videotaped employes in a similar situation before it videotaped Retzlaff and these Clinical Services Division employes. Also, it is clear based upon this record, that the parties never discussed the videotaping of employes for the reasons given here. Thus, no evidence of a mutually agreeable past practice or any bargaining history in support thereof was revealed to bolster the Union's contention that a unilateral change in videotaping practices had been made by the Employer. 5/

The Union also asserted in this case that bargaining unit employes should be entitled to the same individual personal privacy rights that Human Services clients have, to refuse to be videotaped. The videotaping of employes in an employment setting is quite different from the videotaping of members of the public who have agreed to receive the services of a County Human Services Department. In this regard, I note that a client who agrees to be videotaped during a session with a Human Services Department employe essentially waives his/her right to the privacy and confidentiality that are normally inherent in an interaction between a client and his/her therapist or counselor who is, in this case, a Human Services Department employe.

The Union also argued that the County's failure to give Hobbs and Whitworth copies of the videotapes containing their evaluations constituted a separate violation of the labor agreement at Appendix A, Section 3. This contention is simply not supported by the facts of this case. In

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5/ Thus, it is clear that the County's actions represented merely a change in their present way of functioning rather than a mutually agreed upon and understood past practice that employes in an evaluation setting should not be videotaped for the purpose of evaluating their supervisor. Furthermore, the videotaping of employes in the specific circumstances of this case does not appear to constitute a mandatory subject of bargaining.

this regard, I note that the videotapes themselves did not constitute unit employe evaluations. As such, the County's failure to put copies of the videotapes in the employes' personnel records or to give the Grievants copies of the videotapes did not constitute either a violation of the labor agreement or of the County's policy.

Based upon the specific facts of this case and noting particularly the silence of both the labor agreement and County policy regarding videotaping in these particular circumstances, 6/ I issue the following

AWARD

The County did not violate the collective bargaining agreement when it videotaped bargaining unit members' interaction with a County supervisor for the purpose of training and evaluating the Supervisor. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 22nd day of December, 1995.

6/ The arbitral case law indicates that in past cases where arbitrators have granted employers the greatest latitude, employers have been allowed to engage in the following types of activities with impunity:

1) intensive supervisory observation of employes despite the fact that employes reported feeling annoyed, fearful, alarmed and apprehensive, Picker X-Ray Corp., 39 LA 1245 (Kates, 1962);

2) monitoring employes by using closed circuit TV cameras to check on whether employes were stealing materials or equipment, FMC Corp., 46 LA 335 (Delaney, 1966), (cited with approval in Cooper Carton Corp., 61 LA 697 (Kelliher, 1973) and Colonial Baking Co., 62 LA 586 (Elson, 1974);

3) secretly listening in on employes' telephone performance with customers for evaluation purposes, Michigan Bell Tel. Co., 45 LA 689 (R.A. Smith, 1965);

4) secretly employing private "checkers" to follow and check the work performance of Company drivers, Kroger Co., 40 LA 316 (Reid, 1963).

The facts of this case fail to prove that such intense observation and/or secret surveillance of employes occurred. Also, the above cases, unlike the instant case, involved observation and surveillance of unit employes for the purpose of evaluating unit employe conduct and/or performance. Yet, in the cited cases the arbitrators found that the employers' actions did not violate employes' privacy rights.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator