BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CITY EMPLOYEES LOCAL 67, AFSCME,
AFL-CIO

and

THE CITY OF RACINE

Case 482
No. 53677
MA-9423

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 624, Racine, Wisconsin 53401-0624, appeared on behalf of the Union.

Mr. Guadalupe G. Villarreal, Attorney at Law, City Attorney, City of Racine, City Hall, 730 Washington Avenue, Racine, Wisconsin 53403, appeared on behalf of the City.

ARBITRATION AWARD

On December 20, 1995, Local 67, of the American Federation of State, County and Municipal Employes filed a request with the Wisconsin Employment Relations Commission to have the Commission appoint a member of its staff to hear and decide a grievance pending between the Union and the City of Racine. Following an unsuccessful attempt to mediate the underlying dispute, the Union and the City requested that the Commission appoint William C. Houlihan, a member of its staff, to hear and decide the matter. A hearing was conducted on May 16, 1996, in Racine, Wisconsin. At the conclusion of the evidentiary hearing, the parties made oral arguments and requested a bench decision. What follows is the written confirmation of the bench decision issued on May 16, 1996.

BACKGROUND AND FACTS

Local 67 of AFSCME is the exclusive collective bargaining representative of certain employes of the City of Racine, namely those employed in the City's Public Works, Streets, Solid Waste, Bridges and Buildings, Parks and Recreation Departments. The Employer and Union have a long-standing relationship and have been signatories to a series of collective bargaining agreements going back many years. One of the provisions of the parties' labor agreement provides for a coffee break. Historically, bargaining unit employes enjoyed the flexibility to take breaks on or off-site. The 1990-91 collective bargaining agreement, Article XIII, "Miscellaneous Provisions", paragraph "A", provided the following:

> A. Coffee Break: A coffee break of fifteen (15) minutes will be

> allowed per day during a period following in the first four (4) hours of an employe's working shift. The coffee break shall be computed from the time of cessation of work to the resumption of work. Police Department employes shall not leave the Safety Building for this break, except for the Animal Control Officer when he is on the road for animal calls.

This language was historically interpreted to permit off-site coffee breaks for all but the narrowly excepted Police Department and animal control officer bargaining unit members.

During the negotiations leading to the 1992-1994 collective bargaining agreement, the Employer bargaining team, headed by Personnel Director James Kozina, was under direction to change certain aspects of the morning coffee break. Specifically, the management team was directed to eliminate what was perceived to be coffee break abuses. According to Kozina, those concerns were directed at coffee breaks exceeding the 15-minute allocation, and the congregation of workers at restaurants and/or convenience stores. To that end, the Employer proposed to replace the last sentence in paragraph "A" with the following:

> Police Department employes shall not leave the Safety Building for this break, and all other employes shall take any coffee breaks at the job site.

The proposal, in that form, was unacceptable to the Union. The parties' negotiations led to compromise language, which is set forth below.

On April 6, 1992, the following interpretive memorandum was issued by the Department of Public Works:

CITY OF RACINE

DEPARTMENT OF PUBLIC WORKS

MEMORANDUM

TO: ALL STREET MAINTENANCE - SOLID WASTE AND BRIDGE PERSONNEL **FROM:** JOE GOLDEN **DATE:** APRIL 6, 1992

STARTING ON APRIL 6, 1992, NEW CONTRACT LANGUAGE ADDRESSING THE COFFEE BREAK BECOMES EFFECTIVE. THE NEW AGREEMENT BETWEEN THE CITY OF RACINE AND LOCAL 67 READS AS FOLLOWS:

COFFEE BREAK: "COFFEE BREAKS SHALL BE TAKEN ON THE JOB SITE BY ALL BARGAINING UNIT MEMBERS FROM THE FIRST FULL WEEK OF APRIL THROUGH THE LAST FULL WEEK OF OCTOBER, UNLESS THE EMPLOYEE IS WORKING EMERGENCY OVERTIME AND/OR HOURS OUTSIDE OF HIS/HER REGULAR WORK SCHEDULE. EMPLOYEE'S PERMANENTLY ASSIGNED TO CITY FACILITIES SHALL TAKE THEIR COFFEE BREAK ON THE JOB SITE YEAR ROUND.

THIS AGREEMENT MEANS YOU **MUST** TAKE YOUR COFFEE BREAKS ON THE JOB SITE THROUGH OCTOBER 30, 1992. MANAGEMENT RECOGNIZES THE NEED TO USE BATHROOM FACILITIES DURING THE COURSE OF THE DAY. WE EXPECT OUR EMPLOYEE'S TO USE THE **CLOSEST BATHROOM FACILITY AVAILABLE** TO THE JOB SITE. IF THIS HAPPENS TO BE A CONVENIENT (sic) STORE OR GAS STATION THAT SELLS FOOD, YOU MAY USE THE **BATHROOM FACILITIES ONLY! NO FOOD OR BEVERAGES CAN BE PURCHASED WHILE USING AN ESTABLISHMENT FOR A BATHROOM BREAK.** YOUR COOPERATION IN THIS MATTER IS APPRECIATED.

The parties had a dispute over the meaning of this clause and submitted that dispute to this arbitrator. On February 2, 1993, I issued an Award sustaining the right of the City to prohibit an employe from leaving the work site during the morning coffee break to make purchases, even if items purchased are consumed back on the work site during the contractually- provided break.

This Award reflects a second dispute relative to the coffee break provision.

ISSUE

The parties stipulated the following issue:

Does the City have the right, pursuant to Article XIII, Section "A" to prohibit employes temporarily assigned, pursuant to Article V, Section 1, to City facilities from taking their coffee breaks away from their work site outside of the time frame of the first full week of April through the last full week of October? If not, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE III

Grievance Procedure

. . .

J. Decision of the Arbitrator: The decision of the Arbitrator shall be limited to the subject matter of the grievance, and shall be restricted solely to interpretation of the contract area where the alleged breach occurred. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement. . .

ARTICLE V

Seniority

. . .

I. Temporary Assignment: An Administrative Manager or his designee through the rank of Assistant Division Head shall have the right to make temporary changes on a day-to-day basis in the assignment of personnel within his division. Employes notified prior to the close of their work shift shall immediately report to the reassigned temporary position and thereafter perform the work shift of that division for the duration of the reassignment. If a temporary assignment will last more than twenty-five (25) work days, the assignment will be based on seniority, subject to ability to perform the assigned task.

. . .

ARTICLE XIII

Miscellaneous Provisions

A. Coffee Break A coffee break of fifteen (15) minutes will be allowed per day during a period following in the first four (4) hours of an employe's working shift. The coffee break

shall be computed from the time of cessation of work to the resumption of work. Police Department employes shall not leave the Safety Building for this break, except for the Animal Control Officer when he is on the road for animal calls.

Coffee breaks shall be taken on the job site by all bargaining unit members from the first full week of April through the last full week of October, unless the employe is working emergency overtime and/or hours outside of his regular work schedule. Employes permanently assigned to City facilities shall take their coffee break on the job site year-around.

DISCUSSION

In the negotiations leading to the creation of this clause, the Employer sought a blanket rule requiring on-site coffee breaks. The City settled for less than that. Specifically, there is a seasonal exception. Also, the proposed "all other employes" was modified to "employes permanently assigned to City facilities". The use of the term "permanently" implies a category of employes temporarily or not permanently so assigned. The City acknowledges the existence of these temporary assignments, but contends that the temporary assignment language (Article V, Section I) controls their working conditions. I disagree, and find nothing specifically within Article V, Section I that is applicable. The only language arguably applicable requires employes to "thereafter perform the work shift of that division for the duration of the reassignment". I regard this language as too remote and general to control the appropriate site for a coffee break, especially in light of the very specific coffee break language contained within the contract.

The parties used the words "permanently assigned to City facilities" in reference to certain employes. The term "permanent" must be regarded as having some meaning. The historical context in which it is used is that all employes once enjoyed a right to take their break off-site, and that right was narrowed and/or eliminated for some. Additionally, the Employer proposed the elimination of the right to take off-site breaks for all employes. That privilege was eliminated for employes permanently assigned to City facilities. The effect of the City's construction of this Article is to remove the term "permanent" from the contract. Article III, Section "J" forbids this. The bargaining history and background suggests that this was not a thoughtless or casually-used term.

Doug Dresen, union president, gave uncontradicted testimony relative to the practice of the parties in interpreting this language. The historic practice of generally allowing employes to take off-site breaks was intentionally modified by the parties 1992 negotiated agreement. However, according to Dresen's testimony, it appears that from January of 1992 through November of 1995,

employes temporarily assigned to a facility did take their breaks off-site during "cold weather". That practice was halted by an oral directive in approximately November of 1995. The cessation of that practice lead to the grievance that is the subject of this arbitration. Prior to the time that directive was given, a number of employes, over a period of years, took their breaks off-site in the presence of their supervisors. This practice took place immediately upon the implementation of the revised language, and I believe it supports the Union's interpretation of the words.

I do not believe that Golden's implementing memo of April 6, 1992, is relevant. That memo requires all breaks on-site from April through October, 1992. The memo, on its face, addresses the warm weather months, not the cold weather months, which are the subject of this grievance.

The City argues that there is no practical reason to carve out the exception claimed. The purpose of off-site breaks was to allow employes to escape from the elements, or to provide relief from plowing or the ability to get food and/or coffee when an employe was called in to work with little or no notice. None of those factors are present here. The Employer also notes that temporarily-assigned workers work immediately next to permanently-assigned workers and that the Union's construction of the language allows for one employe to leave the site for a break while his co-worker is forced to remain. The Employer also contends that off-site coffee breaks can lead to the problems which led to the original proposals, i.e., employes congregating and stretching their coffee breaks. All of these contentions go to the wisdom or merits of the City's rule. They form a sort of reverse parallel of the kinds of arguments advanced in the prior coffee break arbitration.

The question put forward in the first arbitration over the coffee break was, "May a worker leave his work site during the warm weather to make a convenience store purchase, return to the work site, and consume his purchase?" In that dispute, the Employer insisted upon a literal reading of the contract, got such a reading, and prevailed. I concluded that an employe who leaves an outdoor work site, and makes a purchase in a convenience store, takes a part of his break off-site. The contract requires the break to be taken on-site. There, the Employer argued that if employes were allowed to make convenience store purchases incidental to restroom breaks, the exception would soon swallow the rule. There, the employer was allowed to enforce this language to preclude an employe who needed to use the restroom from making even an incidental purchase. This literal, and somewhat severe result, was intended to preserve to the Employer the benefit of his bargain.

In summary, I think the language, read literally, does not restrict temporarily-assigned employes from taking coffee breaks away from the work site between approximately late October through approximately early April. This is particularly so in light of the history of breaks and the bargaining history of this language. The practice immediately after the negotiation of the new language supports the Union's interpretation. In light of the prior coffee break award with its very literal construction, an equally literal construction of this clause seems particularly appropriate.

AWARD

The grievance is sustained.

REMEDY

The City is hereby directed to cease and desist from prohibiting employes temporarily assigned pursuant to Article V, Section I to City facilities from taking their coffee breaks away from their work site outside of the time frame of the first full week of April through the last full week of October.

Dated at Madison, Wisconsin this 29th day of May, 1996.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator