BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LINCOLN COUNTY HIGHWAY EMPLOYEES
LOCAL 332, AFSCME, AFL-CIO

and

LINCOLN COUNTY

Case 162
No. 55353
MA-9992

Appearances:

Mr. Philip Salamone, Staff Representative, on behalf of the Union.

Mr. John Mulder, Administrative Coordinator, on behalf of the County.

ARBITRATION AWARD

The-above captioned parties, herein "Union" and "County", are parties to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Merrill, Wisconsin, on September 29, 1997. The hearing was not transcribed and the parties thereafter filed briefs which were received by November 11, 1997.

Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUES

1. Is the grievance arbitrable?

2. If so, whether the County violated the contract when it failed to place grievant George Janssen on light-duty status and, if so, what is the appropriate remedy?

BACKGROUND

Grievant Janssen, an Operator 3, suffered an off-the-job injury (arthritis), which caused him to have surgery on his left shoulder on December 12, 1996. Janssen used 9.5 days of sick

leave for his absence before returning to work on January 6, 1997. 1/ Janssen at that time had a sick leave bank of about 500 hours.

Janssen asked Highway Commissioner Peter A. Kachel whether the County had a light duty policy. Kachel replied that the County did not. Janssen then never asked Kachel whether he could be assigned to light duty after his surgery and Kachel never volunteered that, in accordance with what he has done in the past, he would have assigned Janssen to sharpen stakes after his surgery if Janssen had expressly asked for that assignment.

Janssen in March, 1997, submitted a doctor's note dated March 6 to the County which stated that he could have been placed on light duty right after his December, 1996, surgery. That marked the first time that Janssen had ever provided medical documentation to that effect.

The County has a formal light duty policy for those employes who are hurt on the job and who receive workers' compensation. The County in late September, 1997, thus informed its employes in a memorandum entitled "Policy For Modified Or Transitional Work - Lincoln County Highway Department" that said policy provided, inter alia:

. . .

> NON-WORK RELATED:
>
> If an employee is injured or has become ill unrelated to work, the County has no obligation under the Worker's Compensation law to return the employee to work on a modified basis. The employee will be required to use qualified leave until a physician's statement indicates he/she is able to resume regular duties. Under certain circumstances, however, state of federal law requires employers to make reasonable accommodations which would enable a qualified individual with a disability to return to work.

. . .

In this connection, the County maintains that it has been told by its insurance carrier that it should not place employes on light duty status if they have an off-the-job injury because such employes may reinjure themselves on the job, thereby exposing the County to liability for such injuries.

The County in the past assigned light duty to highway employes Gerald Schmidt and John Slewetski on an informal basis. Superintendent Kachel said at the hearing that even though the County does not have a formal light duty policy for employes who suffer off-the-job injuries, he will go on considering on an individual basis whether a given employe should be assigned light tasks until he/she is fully recovered from an off-duty injury.

Throughout this time, there were ongoing discussions between the Union and the County over Janssen's situation. A grievance was filed on his behalf on April 4, which the County subsequently denied in part on the ground that it had been untimely filed.

POSITIONS OF THE PARTIES

The Union asserts that its April 4 grievance is timely because grievant Janssen "engaged management in repeated attempts to settle the matter informally in a mutually satisfactory way" and because he filed his grievance only "after an exhaustive investigation, and a series of seemingly endless settlement discussions proved fruitless." The Union argues that the County has discriminated against Janssen in violation of Article III of the contract because: "It is unfair and unequal to apply a light duty policy which allows certain employes [who are injured on the job] this right, while denying it to others" [who are injured off the job]. It further argues that "the County is discriminating against disabled employes by not temporarily accommodating their special needs" and that, furthermore, a past practice supports its position here. As a remedy, the Union asks that Janssen be made whole for all lost wages and benefits.

The County, in turn, contends that the grievance is untimely because it was not filed until three full months after Janssen returned to work on January 6; that it is not obligated under the contract to provide light duty for non-job related injuries; and that sick leave is provided for this purpose because it in effect serves as a "short term income continuation plan."

DISCUSSION

Turning first to the timeliness issue, I find that the grievance was timely filed under Article IX of the contract, entitled "Grievance Procedure", because Janssen met with County representatives and informally tried to resolve this issue before he filed his written grievance. He therefore acted in good faith throughout this matter and his grievance certainly did not cause any surprise to County officials.

As for the merits of the grievance, the County correctly points out that there is no contractual language requiring it to provide light duty to employes who suffer off-the-job injuries. Indeed, there is no contractual language which mandates light duty for employes who hurt themselves on the job.

The Union therefore argues that there is a binding past practice which required the County to place Janssen on light duty when he returned to work on January 6. As to that, the record clearly shows - as correctly argued by the Union - that the County in the past assigned light duty to employes Schmidt and Slewetski when they suffered their off-the-job injuries.

The fact that the County did so on those occasions, however, does not automatically mean that there is a binding past practice to that effect. For, as stated by arbitrator Harry Shulman in FORD MOTOR CO. V. UNITED AUTOMOBILE WORKERS, 19 LA 237, (1952):

> A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice but rather to the agreement in which it is based.
>
> But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to convenient methods at the time. In such cases, there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion, such practices are, in the absence of contractual provisions to the contrary, subject to change in the same discretion. . . But there is no requirement of mutual agreement as a condition precedent to a change of a practice of this character. A contrary holding would place past practice on a par with written agreement and create the anomaly that, while the parties expend great energy and time in negotiating the details of the Agreement, they unknowingly and unintentionally commit themselves to unstated and perhaps more important matters which in the future may be found to have been past practice.

Here, the County over the years informally assigned light duty to employes who were injured off the job not through "mutual agreement", as is required under a valid past practice, but rather, through "mere happenstance" and without "design or deliberation" because it was "convenient" to do so at the time. Hence, said isolated assignments did not constitute a past practice, which is why the County here was not required to assign Janssen to light duty. 2/

The Union also argues that the County discriminated against Janssen in violation of Article III of the contract which states: "the Employer's management prerogatives shall not be used for purposes of discrimination against employes." In order to find discrimination, however, employes must be similarly situated and/or belong to the same class or group of employes. Employes who are injured <u>off</u> the job, though, are situated differently from employes who are injured <u>on</u> the job.

That is why, for instance, the former group of employes is entitled to worker's compensation while the latter group is not. Indeed, Article XIV, Section F, of the contract provides for this very subject by stating:

> "Worker's Compensation: The County shall not pay for sick leave for on-the-job activities covered under Worker's Compensation. However, if an employe suffers an on-the-job injury and is not eligible for Worker's Compensation, reimbursement on any work day, the employe shall be allowed to use accumulated sick leave in lieu of receiving no payment of wages for such work day."

That is also why Article XIV, Section B, entitled "Eligibility", provides:

> "Each employee, to be eligible to receive sick leave pay, must be off work due to sickness or off the job injury. Sick leave may be used in one-half day increments."

By specifying that sick leave must be used for "off the job injury", the parties thereby agreed that this was the only benefit to which employes like Janssen were entitled.

To be sure, there is no evidence in this record that the parties in past contract negotiations ever expressly discussed whether employes who suffer off-the-job injuries are entitled to be placed on light duty status. That, though, only means that the County has never agreed to grant the benefit sought here. Absent any such commitment on its part and any contractual language requiring it to do so, I therefore find that the County is not required under the contract to offer light duty to employes who are injured off the job.

In light of the above, it is my

AWARD

1. That the grievance is arbitrable;

2. That the County did not violate the contract when it failed to place grievant George Janssen on light duty status; the grievance is therefore denied.

Dated at Madison, Wisconsin, this 1st day of December, 1997.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

FOOTNOTES

1/ Unless otherwise stated, all dates hereinafter refer to 1997.

2/ The Union's reliance on LINCOLN COUNTY, Dec. No. 42702 (1989), is misplaced because that case centered on a well-established policy of honoring payroll deductions, a practice which arbitrator Richard B. McLaughlin found ran from "at least 1972 until February 1, 1989. . ." and that the County's administration "did not refuse any employe request for a payroll deduction during. . ." that time period. Here, by contrast, there is no such 17-year practice.

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