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 169
No. 55895
MA-10119

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Local 332, AFSCME, AFL-CIO.

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

ARBITRATION AWARD

Lincoln County Highway Employees, Local 332, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Lincoln County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on February 18, 1998, in Merrill, Wisconsin. There was no stenographic transcript made of the hearing and the parties' post-hearing briefing schedule was completed by April 12, 1998. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties stipulated that there was no procedural issue and to the following statement of the substantive issue:

Did the Employer violate the collective bargaining agreement and/or a binding past practice by changing its policy with regard to withdrawing discipline from an employe's personnel file? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The parties' Agreement contains the following provision, in relevant part:

ARTICLE III
MANAGEMENT RIGHTS

The Union recognizes that the management of the Highway Department and the direction of its working forces is vested exclusively in the County subject to the terms of this Agreement. These rights include:

A. The right to hire, suspend, demote, discipline or discharge for just cause;

. . .

F. To determine the methods, procedures and means of providing such services;

G. To establish work rules;

H. To determine what constitutes good and efficient County service.

It is understood that management rights are not limited to those specifically mentioned above. It is also understood that the Employer's management prerogatives shall not be used for purposes of discrimination against employees. Any unreasonable exercise or application of the Management Right's by the County as set out in this Article shall be appealable by the Union or any employee through the grievance procedure.

. . .

ARTICLE IX
GRIEVANCE PROCEDURE

. . .

B. Arbitration:

. . .

6. 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 the interpretation of the contract in the area where the alleged breach occurred. The arbitrator shall not modify, add to, or delete from the express terms of the Agreement.

. . .

BACKGROUND

As part of its governmental responsibilities, the County maintains and operates the Lincoln County Highway Department. Since 1992, Peter Kaphel has been the Highway Commissioner. The Union is the recognized exclusive bargaining representative for all employes of the Highway Department excluding the confidential, clerical, and supervisory personnel.

For over 30 years, the County has had work rules regarding the imposition of discipline. The rules were rewritten in 1992, and at least since then the relevant rule stated:

DISCIPLINARY ACTIONS

SECTION 1 – TYPES OF DISCIPLINARY ACTIONS

. . .

B. Written Reprimand:

. . .

2. A copy of each written reprimand given shall be placed in the employee's personnel file for 1 year. Removal upon request by employee after 1 year, only with Commissioner's approval.

. . .

Union witnesses testified that for as long as they have been employed in the Department, when an employe went to the Highway Commissioner after one year and requested that the reprimand be removed from their personnel file, that request has been granted. The Highway Commissioner testified that he has not reviewed the personnel files after one year and removed reprimands on his own, but has removed reprimands at the request of an employe approximately six times. He testified that, in his view, he was exercising his management discretion in deciding whether or not to grant the employe's request on each occasion.

In 1997, the County's Personnel Committee revised the work rules to provide that a copy of all discipline, including reprimands, given an employe shall be permanently placed in the employe's personnel file. The Union subsequently grieved that change in the work rules.

The parties attempted to resolve their dispute through the grievance procedure, but were unable to do so, and proceeded to arbitration of the grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union first notes as background facts that the contract has long permitted the County to make work rules, but that under the Agreement, the Union had the right to grieve "unreasonable" exercises of that authority, and that management was also prohibited from using its "prerogatives. . . for the purposes of discrimination against employes." The Union asserts that the evidence shows that for the past 37 years, written disciplinary reprimands were removed from an employe's personnel file after one year, the only requirement being that the employe had to request that the Highway Commissioner remove it. Since 1992, the written work rules have confirmed that practice and provided only that there be no reoccurrence of the misconduct during that year, and that it was subject to the "approval" of the Highway Commissioner. While this seems to make removal discretionary on the part of the Commissioner, the actual practice has been that reprimands have always been removed upon the employe's request after one year had passed. The practice then has been that removal is automatic upon request, and not subject to the discretion of the Commissioner. The Union takes the position that the new work rule that provides that future reprimands will permanently remain in an employe's personnel file is both contrary to past practice and patently unreasonable.

The Agreement permits the Union to challenge unreasonable work rules through the grievance procedure. The Union notes that *Robert's Dictionary of Industrial Relations*, (3rd Edition, 1986, BNA Books), does not contain a definition of the term "reasonable", and assserts that arbitrators have concluded that the term is a relative one.

There can be little question then that the term "unreasonable" is ambiguous. The tool often used by arbitrators to define ambiguities in a labor agreement is the parties' past practice. This is because the parties' themselves have frequently shared a mutually-acceptable definition of these ambiguities in the workplace. This is true in the instant case. Union officers testified without challenge that for many years, disciplinary warnings have been routinely and automatically removed from employes' personnel files upon request and that the Commissioner's approval was understood to be no more than a formality, i.e., his actions were custodial rather than discretionary in nature. Longtime employe and local union representative, Oscar Wangen, testified that during his 37 years in the Department, a period covering five different Highway Commissioners, he personally knew of at least 40 to 50 instances where the practice occurred. He also testified that he had no personal knowledge of any individual employe who had his request that discipline be removed after one year refused. This was confirmed by similar testimony of Gross and Janssen, both of whom testified that they did not know of a single instance where an employe's request to have discipline removed from their personnel file after a year had been denied.

Past practice aside, it can also be argued that permanently maintaining references to minor discipline in an employe's work record would strike a "reasonable person" as unjust. Under the new work rules, by implication, past minor infractions could be indefinitely brought up and used in progressive discipline scenarios which ultimately could result in an employe's discharge, e.g. an employe might be tardy four or five times in a 10-year period, but under the newly-enacted policy, this could result in the County ultimately using this to justify termination. This would be an absurd result, and one inconsistent with any notion of the contractual requirement of "reasonableness". It is a well-recognized arbitral principle that interpretations of ambiguous language should not result in overly harsh or absurd results. The Union cites a number of arbitration awards for the principle that where one interpretation of ambiguous language would lead to a harsh or absurd result, while another interpretation, equally consistent, would lead to a just and reasonable result, the latter interpretation shall be used.

For all of these reasons, the Union contends there can be little question that the institution of a new work rule violates the Agreement, and that the grievance should be sustained.

County

With regard to the argument that there is a binding practice that disciplinary items are removed from an employe's personnel file after one year, the County asserts that contention ignores the fact that the work rule specifically stated that removal is at the request of the employe and the discretion of the Highway Commissioner. The Highway Commissioner

testified that the County has had a very specific work rule stating that "a copy of each written reprimand given shall be placed in the employe's personnel file for one year. Removal upon request by employe after one year, only with Commissioner's approval." The Commissioner testified that rule had been in effect at least since 1992 and that the Department had operated under it ever since. While the Commissioner has removed items from employes' personnel files in the past, it was done at the Commissioner's discretion. The use of discretion in a certain way should not be elevated to a binding practice.

The County cites Elkouri and Elkouri, *How Arbitration Works* (Fifth Edition) in its discussion of Arbitrator Shulman's reasoning that a practice does not become binding if it is the result of a discretionary exercise of management rights:

> 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 the convenient methods at that time. In such cases there is no thought of obligation or commitment to 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. (5th Edition p. 636, internal citations omitted.)

Arbitrators frequently recognize wide authority in management to control methods of operation and direct the work force, including the right to make changes if these do not violate some right of the employes under the written contract.

The County asserts that if the Union were to prevail in this case, then the remedy must be that the County would have to return to the old policy, meaning that the Commissioner would have discretion to remove the items. There is no evidence suggesting that the removal of the reprimands was automatic, or that the County waived its right to exercise such discretion. To interpret the issue as broadly as the Union, would change the practice of the Commissioner's discretion to a policy of automatically removing items after one year, and would modify the Agreement in a manner that is contrary to the limitation on the Arbitrator's authority. As to the Union exhibit regarding a settlement of a grievance in 1990, the exhibit should be given no weight, as such a settlement is a compromise where neither party is agreeing that it will be raised to the status of contract language which would be binding in the future.

With regard to the new rule, the County asserts that it has the express right under Article III, Section G, of the Agreement, to create work rules. Further, it is well-established that management has the fundamental right to unilaterally establish reasonable plant rules, not inconsistent with law or the labor agreement. The County asserts that the new rule is reasonable for the following reasons. First, while the Union expresses concern about the possible favoritism on the part of the Commissioner, the new method of retaining disciplinary actions actually provides greater consistency and eliminates possible favoritism. The Commissioner would not be allowed to favor certain employes, since all disciplinary items would remain in the personnel file. Second, it is reasonable to keep an accurate record of an employe's work history. Under the Union's view, there would be no record of prior discipline. Under the new rule, a good employe could point to the rule and say he has never been disciplined, while under the old rule, an employe could only say that he has not been disciplined in the last year, even if he had a spotless record for 30 years. Third, progressive discipline and just cause requires that the employer review the entire record of the employe, and not just limit it to the most recent year. It would be unfair to impose the same level of discipline on an employe who had never been warned about performance problems, as that imposed upon an employe who had been warned three times over three years. Under the Union's view, the County would have to treat them the same. Fourth, while the Union claims it is losing something if such items are retained permanently in a personnel file, employes are still protected by the just cause standard which takes into consideration prior incidents. Arbitrators also have the opportunity to measure the relevance of past disciplinary actions. Finally, while the Union suggests it will be forced to grieve every disciplinary action because it will not have some kind of assurance that it will be removed in a year, employes already have the right to grieve disciplinary actions and could implement that strategy now. The County posits that by keeping disciplinary items permanently in the file, perhaps the employe will be more concerned about the possible consequences of inappropriate behavior, and management will be more conscientious about providing discipline which will stand the test of a grievance. The County requests that the grievance be denied.

DISCUSSION

It is first noted that under Article III, G, of the Agreement, the County has expressly reserved the right "to establish work rules." Article III also provides that the Union or any employe has the right to appeal the unreasonable exercise or application of the management rights set forth in that Article through the grievance procedure. The question then, is whether the new work rule requiring that all discipline is to permanently remain in an employe's personnel file is an unreasonable exercise of the County's right to establish work rules.

The Union asserts that the term "reasonable" is ambiguous and that the parties' long-standing practice must be considered in defining the parties' intent. The Union is correct insofar as past practice is generally utilized, where one exists, to establish the parties' intent where the contract language is ambiguous. However, that rule of contract interpretation has no application in this case. While such terms as "reasonable" and "unreasonable" can be ambiguous, the term, as used by the parties, applies to the exercise of the right to establish work rules. In that regard, the term sets a standard, i.e., whether a work rule so established is unreasonable. While a practice may aid in interpreting an ambiguous contract term, it does not aid in applying the standard of reasonableness to the exercise of management discretion. As the County asserts, where the Agreement reserves such discretion to management, the manner in which it chooses to exercise that discretion does not establish a binding practice, and the fact that it has exercised its discretion in the same fashion over a lengthy period of time does not bind it to continue to do so in the same fashion. Again, the question is only whether the new work rule is unreasonable, not whether it is consistent with the prior rule or favors employes more or less than its predecessor.

As to the reasonableness of the new rule, both parties offer examples of possible outrageous results under the other's position. Both examples ignore the contractually required application of the just cause standard under Article III, A, of the parties' Agreement, and the role an employe's work record necessarily plays in applying that standard. While the new rule is not as favorable to employes, it is not necessarily unreasonable to have an employe's personnel file contain his/her entire disciplinary record. An employe has the right to challenge any discipline imposed through the grievance procedure, including to arbitration. Such a work rule does not preclude an arbitrator from finding past discipline to be stale or otherwise lacking in relevance in considering the appropriateness of the discipline under challenge. Such a work rule also would not preclude an arbitrator from ordering the removal of discipline from an employe's personnel file where the arbitrator has found it was not for just cause.

For these reasons, it is concluded that the new work rule is not unreasonable. Therefore, the County did not violate the parties' Agreement or a binding past practice by changing its work rule with regard to removing discipline from an employe's personnel file.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 21st day of August, 1998.

David E. Shaw /s/

David E. Shaw, Arbitrator

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