BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PIERCE COUNTY (HEALTH DEPARTMENT)

and

PIERCE COUNTY – COMMUNITY HEALTH ASSOCIATION, affiliated with the LABOR ASSOCIATION OF WISCONSIN, INC.

Case 117
No. 56273
MA-10224

Appearances:

Mr. Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., 206 South Arlington Street, Appleton, Wisconsin 54915, on behalf of the Union.

Mr. Stephen L. Weld, Weld, Riley, Prenn and Ricci, S.C., Attorneys at Law, 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, on behalf of the County.

ARBITRATION AWARD

According to the terms of the 1996-1998 collective bargaining agreement, the parties jointly requested Sharon A. Gallagher, a member of the Wisconsin Employment Relations Commission's staff, to hear and resolve a dispute between them regarding whether the County should be required to continue paying for certain mileage and travel time costs claimed by Home Health Care employes working in the Public Health Department of the County. A stenographic transcript of the proceeding was taken and received by the Arbitrator on August 3, 1998. The parties agreed to submit their post-hearing briefs postmarked September 15, 1998 and the parties waived the right to file reply briefs. The record in this case was closed on September 21, 1998.

ISSUES

The parties stipulated that the following issues should be determined in this case:

Did the Employer violate Articles II, VI, XXI or XXXIV of the collective bargaining agreement when the Employer implemented a policy on reimbursement for mileage and travel time? If so, what is the appropriate remedy?

The parties also stipulated that should the Arbitrator rule in favor of the Union in this case, she should retain jurisdiction regarding the scope of the remedy.

RELEVANT CONTRACT PROVISIONS

ARTICLE II – SCOPE OF AGREEMENT

Section 2.01. The execution of this Agreement on the part of the Employer shall cover all operations of the Employer which are covered by this Agreement and shall have no application to the work performed set forth in this Agreement.

Section 2.02. The Employer agrees not to enter into any agreement or contract with the employees in the unit, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement. Any such agreement shall be null and void.

Section 2.03. This Agreement, reached as a result of collective bargaining, represents the full and complete agreement between the parties and supersedes all previous agreements between the parties. Any supplemental amendments to this Agreement or past practices shall not be binding upon either party unless executed in writing by the parties hereto. Waiver of any breach of this Agreement by either party shall not constitute a waiver of any future breach of this Agreement.

. . .

ARTICLE VI – MANAGEMENT RIGHTS

Section 6.01. The County Board possesses the sole right to operate the County and all management rights repose in it. These rights include, but are not limited to, the following:

A. To direct all operations of the Department;

B. To hire, promote, transfer, schedule and assign employees in positions within the Department;

C. To suspend, demote, discharge and take other disciplinary action against employees for just cause;

D. To relieve employees from their duties for lack of work, lack of funds or other legitimate reasons;

E. To maintain efficiency of County operations;

F. To take whatever action is necessary to comply with state or federal law;

G. To introduce new or improved methods or facilities;

H. To change existing methods or facilities;

I. To determine the methods, means and personnel by which County operations are to be conducted; and

J. To take whatever action is necessary to carry out the functions of the County in situations of emergency.

. . .

ARTICLE XXI – WORK RELATED ACTIVITIES

Section 21.01. Nurses and Home Health Aides who, with prior approval of the supervisor, attend department meetings, staff development or inservice, shall be paid at the Nurse's or Home Health Aide's regular rate of pay for all hours so spent. The Nurse or Home Health Aide will be reimbursed for travel time and mileage for work related activities outside the office.

. . .

ARTICLE XXXIV – ENTIRE MEMORANDUM OF AGREEMENT

This Agreement has been reached as a result of collective bargaining, represents the full and complete agreement between the parties and supersedes all previous agreements between the parties. Any supplemental amendments to this Agreement or past practices shall not be binding upon either party unless executed in writing by the parties hereto. Waiver of any breach of this

Agreement by either party shall not constitute a waiver of any future breach of this Agreement. [Employees with benefit packages inconsistent with the contract would continue to receive their current benefits.]

. . .

CHANGED COLLECTIVE BARGAINING PROVISIONS

The 1991-1993 collective bargaining agreement between the parties contained the following Article:

ARTICLE XXVIII – REIMBURSEMENT

Existing departmental policies relative to reimbursement of employees for mileage expense, out of pocket expense and meal allowances shall be continued in effect during the term of this Agreement. Mileage shall be reimbursed at the rate of twenty-one and one-half cents (21-1/2) per mile, or state reimbursement on the date miles were driven, whichever is greater, for the first six-hundred (600) miles driven. If an employee drives over six-hundred (600) miles in one month, the reimbursement shall be at the rate of twenty-one and one-half cents (21-1/2 cents per mile plus twenty-five dollars ($25.00) per month car allowance.

In the 1994-1995 contract, the parties agreed to change the above-quoted language to read as follows:

ARTICLE XXVIII – REIMBURSEMENT

Section 28.01. The then-existing County policies relative to reimbursement of employees for out-of-pocket expenses and lodging will be utilized. Mileage shall be reimbursed for an entire calendar year at the state reimbursement rate in effect the prior July 1. Employees hired on or before July 1, 1994, shall continue to receive a $25.00 per month mileage stipend should they drive more than 600 miles in that month.

This language, as amended, appears in the effective labor agreement.

BACKGROUND

The County's Home Health Care Agency is part of the Public Health Department in the County. The Department of Public Health in the County runs a number of programs including Home Health Care. The other programs are Public Health Nursing, WIC Program, Maternal Child Health, Reproductive Health, Teaching Homemaker Program, Dietary Services and Birth to Three-Years Program. The Labor Association of Wisconsin, Inc., (Union), represents Public Health Department employes, including HHC employes.

The facts of this case clearly demonstrate that for many years, Home Health Care (hereinafter HHC) employes have been paid both for their travel time at their regular hourly rate as well as for mileage from their home to their first patient and from their last patient either to the office or to their home at the end of the day. It is also clear, however, on this record, that other employes of the Public Health Department of the County have been paid in an inconsistent fashion, without regard to any past practice regarding their mileage and travel time. The County never memorialized in writing its policy regarding travel time and mileage as it was applicable to HHC or any other employes.

HHC Supervisor Caralynn Hodgson stated that when she was hired by the County in December, 1993, Raymond Cink had been the Director of Public Health there for at least eight years and that she had a conversation with him regarding what she believed was the very unusual travel time and mileage policies applicable to HHC employes. Hodgson stated that Cink told her that this policy was a long-standing one in the County and that he was not willing to change it. Hodgson also stated that the travel time and mileage policy applicable to HHC employes, in effect prior to January 12, 1998, had probably been in place for at least 20 years in the County. 1/

1/ It should be noted that Raymond Cink left County employment on January 12, 1996; that Jane Dietzman then took over as Director of Public Health and worked for the County for approximately one year and two months prior to the July, 1997 hire of current Director Jane Brueggeman.

As a general matter, Home Health Care employes (HHC) of the County's Department of Public Health visit patients who are eligible for home care and provide them with skilled nursing, coordinate services between the patients' doctors, the Department of Human Services and other nursing services; they arrange transportation, write physician's orders, and complete documentation necessary to process the patients' home health care. HHC employes do not work an eight-hour day and are not required to work regularly at the County's offices.

Rather, HHC employes are only assigned to work when there are patients who need home health care in the HHC employes' geographic area (near their residences). The County employs six RN's, two LPN's and five Nurses Aides in the Home Health Care program.

Since July, 1997, Jane Brueggeman has been the Director of the Public Health Department for the County. Prior to Brueggeman, the Public Health Department was headed by Jane Dietzman. Prior to Dietzman, Raymond Cink and, before Cink, Jerri Wagner were Directors of the Department.

FACTS

In April, 1996, the independent auditor for the County went to a Board of Health meeting with a summary of cost findings regarding the County's travel time and mileage costs for the HHC employes. This summary showed that two other agencies (similar to HHC) in contiguous counties had travel time and mileage costs approximately two to three times less than that of Pierce County. At this meeting, the County Auditor recommended that the County cut HHC travel time and mileage costs in order to avoid running a higher deficit than it had previously. 2/

2/ From 1993 through 1996, the County Auditor found that the Public Health Department had run its operations at a deficit (between $57,000 to $64,000) each year.

In May, 1996, the Director of the Public Health Department conducted a staff meeting for nurses in which the Director produced documents indicating that the travel time and mileage costs for the County were $7.26 per visit and for other agencies of a similar type, these costs were much less. At this May, 1996 meeting, then-Director Dietzman indicated that the County would be developing a new travel policy shortly and that employes should make suggestions regarding how to change the travel time and mileage policy of the County in order to bring about cost containment. In response to Dietzman's comments, at least two HHC nurses indicated that the question of travel time and mileage was one which affected wages and that this type of issue should be negotiated with the Union. Dietzman made no comment in response to the nurses' assertions. It is undisputed that the County never sought to negotiate with the Union regarding travel time and mileage for HHC employes.

In 1996, the County did nothing in regard to changing its travel time and mileage policies and these policies remained the same as they had been for at least the past 20 years: employes of the Home Health Care program were paid both travel time and mileage from their

home to their first patient as well as from their last patient either to their home or to the office. In April, 1997, the County Auditor again compared Pierce County's travel time and mileage costs with those of two contiguous counties and found that these two other rural counties had travel time and mileage costs for Home Health Care approximately three times less than those in Pierce County.

In September, 1997, Director of Public Health, Jane Brueggeman, had a meeting for all County Public Health staff. One of the items discussed at this meeting was the County's need to change the travel time and mileage policy. (Prior to this meeting, Brueggeman and Supervisor Hodgson had put together a new travel time/mileage policy which had been approved by the Board of Health.) Brueggeman placed a copy of this new travel policy in each employe's mailbox prior to the September, 1997 staff meeting. At that meeting, Brueggeman went through the policy in detail with employes. Brueggeman told employes that the new travel policy would be more restrictive than the prior policy in order to cut high travel costs in the County. At this meeting, Supervisor Hodgson also told employes that she did not know if the new travel time/mileage policy would be a Department-only policy or a County-wide policy; that she was aware that there had been discussions about the policy in the past and that the County was concerned that the travel budget was too expensive for 1997. Again, the County did nothing to change the old policy for several months and the County did not approach the Union to negotiate regarding the travel time and mileage for HHC employes.

The County implemented the new travel time and mileage policy on January 12, 1998. The 1996-98 collective bargaining agreement was in full force and effect on January 12, 1998. On February 17, 1998, the Union wrote a letter to the County offering to open contract negotiations in order to talk about the newly-instituted County travel time and mileage policy. The County never responded to this letter and the Association filed the instant grievance thereafter.

POSITIONS OF THE PARTIES

Union

The Union argued that prior to January, 1998, there existed a clear past practice whereby the County paid HHC employes their hourly rate of pay plus mileage from each employe's residence to their first patient, as well as from their last patient or the office back to their residence. The Union pointed out that long-term employes stated that this was the past practice for approximately the last 20 years. The Union noted that employe Stapleton testified that when she was hired in 1983, she was told by the Director of the Department she would be paid according to the above-stated practice. The Union noted that the Employer's witnesses also confirmed the past practice and that the practice had been consistently applied to HHC

employes for at least a 20-year period. In these circumstances, the Union contended that the mileage and travel time past practice of the County was clear, unequivocal, mutually accepted and acted upon by the parties for 20 years and as such, it should be given full effect by the Arbitrator.

The Union urged that the past practice regarding travel time and mileage for HHC employes should be binding on the County. Even if certain language in the collective bargaining agreement (Article XXVIII) had been changed in the 1990's. In the Union's view, these changes did not affect the past practice and, in any event, the practice continued to be fully used by the parties. Furthermore, the Union asserted that because the travel time and mileage past practice alluded to in Article XXI is a term which has been written down between the parties, it should be protected by Article II, Section 2.03 of the Agreement which specifically states that past practices, in order to be effective, must be written between the parties.

In addition, the Union noted that the Employer never proposed to change the past practice during the recent contract negotiations for the effective labor agreement. Rather, the Employer negotiated the 1996-98 collective bargaining agreement and after the contract had been entered into, unilaterally changed the travel time and mileage practice without affording the Union any opportunity to bargain regarding this change. As the travel time and mileage practice directly affects wages of HHC employes, the Union urged that the Arbitrator should not allow the Employer to unilaterally change a past practice and that the Arbitrator should order the County to bargain with the Union regarding any changes it wishes to make in such past practices. The Union noted that it had requested such bargaining, and that the County failed and refused to do so after it had made the unilateral change in the practice.

Therefore, the Union urged that the grievance should be upheld, that the Arbitrator find that the past practice (as stated by the Union) existed prior to January, 1998; that the Arbitrator order the County to reinstate the past practice and to make employes whole for any losses they suffered due to the County's unilateral change of the practice; that the Arbitrator order the County to cease and desist from violating the contract and that she issue as part of her Award, a statement that the County has a duty to bargain regarding any future change in the travel time and mileage practice. The Union noted that approximately $8,973.69 has been lost by unit members due to the County's change in the disputed past practice in this case.

County

The County argued that because there is no language in the contract, no written policy, and no written sidebar agreement regarding travel time and mileage for HHC employes, the County is not required to pay HHC employes for travel time and mileage to their first patient

and then home from their last patient or from the office. The County noted that all other employes of the Public Health Agency as well as other County employes and private and public sector employes in the County pay for their own mileage to and from work and that they are not paid for their travel time to and from work. In addition, the County contended that the fact that the contract contains strong "zipper clause" language would preclude any practice from becoming binding unless that practice is put into writing.

In the County's view, both Article VI, Management Rights, and Article XXVIII, Reimbursement, allow the County to alter its reimbursement policies to make such policies consistent across the board for all Public Health Agency employes. The County also argued that it had not violated Article XXI, as that clause speaks of travel time and mileage for "work related activities outside the office" to be reimbursed to HHC employes. Also, in the County's view, Article XXI does not require a conclusion that travel time and mileage must be paid to and from HHC employes' homes. In this regard, the County noted that all Public Health Agency employes drive to and from work and that this should not be considered "work related" as these employes are not performing any job duties by such travel. The County also pointed out that as a general matter under FLSA, it is not a part of an employe's workday to travel to and from his/her workplace. Therefore, in the County's view, the Union's reliance on Article XXI is misplaced.

The County urged that there is no language in Article VI, Management Rights, which requires the County to bargain regarding a change in its reimbursement policy. In this regard, the County asserted that Article VI actually gives the County the right to change its policies in order to maintain efficiency or to determine the methods and means of operation.

The County argued that the change in the language of Article XXVIII regarding reimbursement supports the County's position in this case. In this regard, the County noted the use of the term "then-existing" referring to County policies shows that whenever the County decides to change a policy, that the new policy will be utilized without concern for any change in the policy. Therefore, any policy that is in effect when reimbursement is requested will be used under this language. The County further pointed out that the language quoted above in Article XXVIII replaced old language which included the phrase, "existing departmental policies" in the contract prior to the 1994-95 Agreement. Thus, in the County's view, the January 12, 1998 policy change in travel time and mileage for HHC employes was necessary in order to create a uniform and efficient method of reimbursement for all Public Health Agency employes and this change in policy did not violate the collective bargaining agreement. Therefore, the County urged that the grievance be denied and dismissed in its entirety.

DISCUSSION

It is axiomatic in labor relations that a past practice, to be binding, must be clearly enunciated and acted upon, unequivocal and readily ascertainable as a fixed, well-established practice which has been accepted by both parties. Thus, past practice has come into play in cases where contract language is ambiguous – that is, subject to more than one reasonable interpretation. However, evidence of past practice is also relevant and admissible in cases where the contract language, although it generally covers a particular subject, fails to cover all aspects of that subject, so that past practice is necessary to fill in the gaps in the labor agreement. In contrast, custom and practice cannot be used to amend or vary clear and unambiguous contract language. Furthermore, arbitrators generally hold that where a practice has continued intact and unabated across several contract terms, despite changes in the contract language over the years, general "zipper" clause language cannot eradicate such a practice.

The record in this case clearly demonstrates that a past practice has existed regarding travel time and mileage payments for HHC employes which has been consistently maintained and acted upon by the parties over the past 20 years, despite agreed-upon changes, from time to time, in the language of Article XXVIII, Reimbursement. In addition, it is significant that the Employer never proposed to delete or change the language of either Article XXI, Work Related Activities, or Article XXVIII, in negotiations for the effective labor agreement.

Therefore, the initial question in this case is whether the provisions of Article II, Section 2.03 and Article XXXIV, which essentially constitute identical "zipper" clauses, require a conclusion that the past practice regarding travel time and mileage payments for HHC employes is not binding on the parties. In this regard, I note that Section 2.03 states that "any past practices cannot be binding upon either party unless executed in writing by the parties hereto." In my view, the contents of Article XXI make clear that the parties have a general written agreement regarding the payment of travel time and mileage to HHC employes. Therefore, Article II and the essentially identical Article XXXIV are not applicable to this case.

In analyzing Article XXI, I note that that provision clearly requires the County to pay Home Health aides and nurses "for travel time and mileage for work related activities out of the office." This language is extremely broad and contains no express limitation on the term "work related activities". Traveling between patient homes could clearly be considered work-related out-of-office activities, as these are activities necessary for the performance of HHC duties.

The question then arises whether travel time and mileage from the employes' residence to their first patient and at the end of the day from their last patient to the office or their homes can be considered "work related activities out of the office" in the context of this case. In this

regard, it is significant that HHC employes work out of their homes (as they are normally assigned to patients nearest their residences) and visit patients' homes to perform the great majority of their HHC duties. HHC employes are only paid by the County to visit and work with patients in the patients' homes. Thus, HHC employes are not like other County employes who are regularly paid by the County and who must report to a County office to perform their work. These factual distinctions between HHC employes and other County workers make all the difference in this case. In my opinion, HHC employes' travel time and mileage are work-related out-of-office activities. Therefore, the broadness of the language of Article XXI and the manner in which HHC employes work, require a conclusion that the parties essentially intended to read the terms of Article XXI in conjunction with the past practice under which they had hired and employed HHC employes for many years.

The Employer has argued that Article VI and Article XXVIII allow it to essentially change its policies regarding travel time and mileage without notice or the opportunity to bargain being granted to the Union. The Employer has also urged that after such a change in policy, it can then apply the new policy to all employes with impunity. I disagree. Article VI lists management rights reserved to the County as a general matter. Specifically, the County has reserved the right

> ". . .to direct all operations of the Department; . . .to maintain the efficiency of County operations; . . .to introduce new or improved methods or facilities; to change existing methods or facilities; to determine the methods, means and personnel by which County operations are to be conducted."

In my view, none of these provisions is specific enough to supersede the specific language of Article XXI. Indeed, I note that Article VI does not contain any language providing that the County may change work rules or policies as it sees fit. Thus, the relatively general language of Article VI is insufficient to provide the County with authority to change the more specific language of Article XXI.

In regard to Article XXVIII, the County has argued that the use of the term "then-existing County policies" in this Article, allows it to essentially change the HHC travel time and mileage policy and to then apply the new policy to HHC employes under the rubric of reimbursement of employes for "out-of-pocket expenses and lodging". In my view, the term "then-existing County policies" refers specifically to the reimbursement of out-of-pocket expenses and lodging, not to travel time and mileage, as the latter are not included in the first sentence of Section 28.01.

In addition, the County's arguments in this area are not supported by the bargaining history evidence it proffered. If we look at the language of Article XXVIII in the 1991-93 Agreement as compared to the language which appears in the 1994-95 Agreement (and the effective contract), it appears clear that the parties decided to remove references in the first sentence of this Article in the 1991-93 Agreement to mileage expense and meal allowances. The parties, however, left intact the reference to out-of-pocket expense, but then added the reference to lodging which clearly indicates that the County wished to tie these two terms together. This would lead to a reasonable conclusion that Article XXVIII was intended to address expenses incurred when County employes were overnight on County business and away from home. The fact that the parties removed the reference in the first sentence to mileage expense is therefore quite significant.

I also note that the second sentence of the paragraph addresses the rate of payment for miles driven, not when mileage may become payable. In my view, the parties' agreement to remove a reference to "departmental policies" from Article XXVIII in the 1994-95 contract and replace it with a reference to County policy relates only to the reimbursable items specifically referred to in Article XXVIII. Finally, we know from this record that the travel time and mileage practice applicable to HHC employes continued in full force and effect after the execution of the 1994-1995 contract. In these circumstances, I believe that Article XXVIII is not applicable to this case, as it refers specifically to out-of-pocket expenses and lodging and only generally to the mileage rate applicable in the County. 3/ Rather, it is Article XXI which is effective herein.

3/ The final sentence of Article XXVIII was changed in 1994 so that only employes hired on or before July 1, 1994 would receive a $25.00 per month mileage stipend if they drive more than 600 miles in a month. This change speaks for itself and it does not assist us in determining this dispute.

Under the above analysis of the collective bargaining agreement, it is clear that the contract addresses the dispute between the parties in this case; and that a clear past practice exists which fleshes out the language of Article XXI regarding travel time and mileage to be paid to HHC employes. In addition, no section of the collective bargaining agreement effectively supersedes the language of Article XXI as it is fleshed out by the past practice. Finally, despite some changes in the labor agreement over the years, the HHC travel time and mileage practice found herein has remained in full force and effect and employes were hired and employed under its terms until the County changed the practice by its Januay 12, 1998 implementation (mid-term of the 1996-98 contract) of a new reimbursement policy applicable to HHC employes.

Based upon the evidence and the arguments in this case, the Arbitrator issues the following

AWARD 4/

4/ The Union has requested that the undersigned order the County to make employes whole and to reinstate the past practice regarding travel time and mileage for HHC employes. This shall be ordered in this case. However, the Union has also requested that the Arbitrator issue a statement that the County has a duty to bargain any change in the travel time and mileage policy for HHC employes. This is beyond the jurisdiction of the Arbitrator in this case, and it shall not be ordered.

The Employer violated Article XXI of the collective bargaining agreement when it implemented a policy on reimbursement for mileage and travel time for HHC employes. The Employer shall immediately reinstate the travel time and mileage practice which was in place prior to January 12, 1998, and it shall make all affected employes whole. 5/

5/ The Arbitrator shall retain jurisdiction in this case only regarding the remedy for a period of ninety (90) days after issuance of this Award should the parties have difficulty in determining the appropriate amount due to affected employes.

Dated at Oshkosh, Wisconsin this 13th day of October, 1998.

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

SAG/gjc
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