BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between

MARATHON COUNTY PROFESSIONAL EMPLOYES COURTHOUSE AND AFFILIATED DEPARTMENTS AFSCME, LOCAL 2492-D

and

MARATHON COUNTY

Case 258
No. 56926
MA-10462

(Shelter Home Meals Grievance)

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin, for the Union.

Atty. Richard J. Weber, Kelly, Weber, Pietze & Slater, S.C., 530 Jackson Street, Wausau, Wisconsin, for the County.

ARBITRATION AWARD

The Marathon County Professional Employees, Local 2492-D, AFSCME, AFL-CIO ("the Union,") and the County of Marathon ("the County,") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. On October 26, 1998, the Union made a request, in which the County concurred, that the Wisconsin Employment Relations Commission appoint a member of its staff to hear and decide a grievance concerning the interpretation and application of the terms of the collective bargaining agreement relating to meals. Hearing in the matter was held in Wausau, Wisconsin, on February 23, 1999; it was not transcribed. The Union submitted written arguments on March 17,1999; the County submitted a brief on April 8, 1999; the Union

submitted a response on May 14, 1999. The Union extended to the County the opportunity for an additional reply brief, an offer to which the County did not respond. The record in this matter closed on June 1, 1999.

ISSUE

The parties stipulated to the following issue:

Did the employer violate the collective bargaining agreement, Article 5/A/4, when it changed the meal provision for Shelter Home employes on January 1, 1998? If so, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE

Article 2 – Management Rights

The County possesses the sole right to operate the departments of the County and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract. These rights include but are not limited to the following:

A. To direct all operations of the respective departments;

**

F. To maintain efficiency of department operations entrusted to it;

**

H. To introduce new or improved methods or facilities;

**

I. To change existing methods or facilities.

The rights of management set forth above are not all inclusive, but indicate the type of matters or rights which belong to and are inherent to management. Any of the rights, powers and authority the County had prior to entering into this collective bargaining agreement are unqualified, shall remain exclusively in this County, except as expressly and specifically abridged, delegated, granted or modified by this Agreement.

Article 5/A/4 – Hours of Work and Overtime

Breaks: All employees except Shelter Home Youth Workers shall receive a one(1) hour lunch period without pay and two (2) fifteen minute rest breaks with pay in each complete working day. The County shall provide Shelter Home Youth Workers with meals according to current practice.

BACKGROUND

Effective with the 1982 collective bargaining agreement between the parties, the County has had the obligation to provide Shelter Home Youth Workers "with meals according to current practice." This grievance concerns changes in the meal system which the County implemented on January 1, 1998.

For several years prior to 1998, the Home was operated as part of the Children's Court Services Department. During a time when the Home was located in immediate proximity to the Marathon Health Care Center, the employes took their meals by access to the Center's cafeteria line, along with the Center residents. Subsequently the Home relocated, and the Center delivered meals to the employes, who had the option of taking a tray (with one of two or three pre-selected entres) or ordering soup and sandwich *a la carte*. Meals provided under this arrangement were valued at about $4.60.

Effective January 1, 1998, reflecting changed philosophies and procedures in the field of juvenile justice, the County transferred operation of the Home to the Sheriff's Department. In order to reduce costs, the Sheriff sought a unified contract for all Jail/Shelter Home/Juvenile Detention Facility meals, and bid the package pursuant to county procurement policy. The multi-county North Central Health Care Facilities (NCHCF), was the sole bidder, and the Center and the Sheriff agreed on a contract under which the meals would be provided by the Marathon Health Care Center, an element of the NCHCF.

Under the contract, all Home employes and residents of the Jail, Home and Detention Facility are offered the same single tray option. Employes are presented with weekly menus, based on at least a four-week cycle, and decide daily whether or not to order the meal. The menu is as recommended by the Health Care Center nutritionist, and conforms to dietary requirements which the Wisconsin Department of Corrections has established for jail residents. In addition to the elimination of choice for the Home employes, the new system provides for a lower quality of food, reflected by the discontinuance of items such as baked potatoes and the prevalence of processed meats. There has been a significant reduction in the number of meals

eaten by Home employes. 1/ While the meals at the three facilities are identical, they are valued differently based on monthly average meal count, and budgeted at $2.04 for the Jail,

---

1/ Union witnesses testified at hearing that they had frequently eaten the meal under the former arrangement, and rarely ate under the new provisions. County witnesses did not dispute this anecdotal evidence, and testified that they did not maintain records of employe usage of this benefit other than the gross numbers on the monthly billing statements.

---

and between $2.75 and $3.41 at the Home/Juvenile Detention Facility, depending on the number of meals ordered.

On February 2, 1998, Shelter Home Youth Worker Ralph Chavez filed the following grievance:

> Management is operating against current practice and is in direct violation of employee contract.
>
> Since 1-1-98 all youth workers must eat trays prepared for the jail (worth $1.90) or not eat at all (unless the employee brings in their own pre-cooked etc, food). Prior to this, youth workers had their choice of the general tray (worth $4.25) or food from the "soup and sandwich" menu (up to $4.25).
>
> This meal choice was agreed upon by management and the employees to replace the youth workers rest breaks and the workers inability to take a lunch period.
>
> The choice the choice the employees had of a meal has been in effect for at least 5 years and is considered to be a current (and past) practice. Presently the labor agreement is being violated by not following current practice of breaks/meals.
>
> Youth workers need to be returned to "current practice", i.e. their choice of the general tray, not the jail tray, or their choice of food from the soup and sandwich menu.
>
> Another option youth workers may accept would be compensation (monetary) equal to the price of the general tray.

> At this time, the youth workers are requesting management to make the employees whole and return them to the benefit which they are entitled to per contract (Article 5A#4).

On July 6, 1998, the Food Services Director at North Central Health Care Facilities provided Jail Administrator Capt. John Reed with the following memorandum:

> North Central Health Care Food Service developed a menu and price per meal based on a single menu for the Marathon County Jail, Shelter Home and Detention Center. The feasibility of increasing the trayline by 30% with the increases from these 3 facilities is based on the single menu and efficient organization of production and tray preparation.
>
> At this time we are not interested in offering an al a cart (sic) menu to Marathon County facilities as an alternate to the current single menu system.

In early August 1998, Marathon County Sheriff Gary Marten and Tim Steller, the chief executive officer of the provider, NCHCF, executed the following Contract Amendment:

> When average meal count is forty-five (45) or more for the Shelter Home/Detention Center for any month, the price per meal shall be two and 75/100 dollars ($2.75); when average meal count is less than forty-five (45) for the Shelter Home/Detention Center for any month, the price per meal shall be three and 41/100 ($3.41).

POSITIONS OF THE PARTIES

In support of its position that the employer violated the collective bargaining agreement, the Union asserts and avers as follows:

> There can be no reasonable doubt that the County has violated the contract. The Union finds it difficult to understand how the County can believe that their action is even remotely consistent with the provisions of the collective bargaining agreement requiring it to provide meals according to the current practice. The undisputed circumstances are in direct and flagrant conflict with the spirit, intent and unambiguous meaning of terms of the contract.

Case law holding that language that is clear must be given its full effect is longstanding and voluminous. Here, the circumstances are undisputed and the contract language exceedingly clear. The meal change at the Shelter Home constituted a flagrant contract violation.

A proper remedy is less clear. The standard "make whole" remedy is unworkable because there is no way employees can now be granted past meals. In fashioning an appropriate remedy, the arbitrator should be mindful of the following:

* Cost-free meals were provided in return for the facts that employes did not enjoy two fifteen minute breaks per work shift. Unrebutted testimony showed that employes were advised that the free meals were being provided in exchange for the fact that the employes could not take breaks.

* The vast majority of Shelter Home employes did no even order the meals after the changed practice was implemented. The County thus realized an additional, possibly unintended, bonus for its contract breach – first it saved on the reduced cost of the meal, then it saved because employes were ordering far fewer meals than before.

* While it is clear the revised meal plan saved the County money, the specific facts of the cost picture are somewhat clouded.

* It might not be possible for the employer to revert back to the previous practice. While a letter from the Health Care Center said is was "not interested" in offering the old a la carte menu, no witness testified as to whether or not such an offering would be possible, or whether a private caterer could assume the responsibilities.

Accordingly, the Union believes that all Shelter Home employes should receive one-half hour of pay (plus retirement contribution) for each full shift they worked since implementation of the program. The County should be ordered to cease and desist from this action, and revert to the former meal arrangement. If that is not possible, the County should continue to provide Shelter Home employes with one-half hour pay (with retirement) in lieu of the meals.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

> The selection of a menu and the delivery of meals to county employes is a function of county government which by necessity must be characterized as a management function. The logical extension of the Union's argument is to return to the same menu and manner of serving the meals in place on January 1, 1982. It is clear from the contract that the phrase 'current practice' by necessity refers to whatever practice the County might have with respect to meals from time to time. There is nothing in the contract which gives the employes the right to tell the County what the menu ought to be from day to day; rather, those rights have been reserved to the County under the management rights provision of the collective bargaining agreement.
>
> The Union's argument that the meals were provided in return for the fact that these employes did not enjoy the fifteen-minute breaks completely ignores the fact that while other employes received an unpaid lunch hour, the Shelter Home Youth Workers were being paid during their lunch hour which more than made up for the two 15-minute rest breaks with pay that the other employes received.
>
> The growth of the County and the consolidation of services required because of that growth make it imperative that the County operate its departments so as to maintain efficiency; the collective bargaining agreement specifically reserves that prerogative to the County under the management rights clause, which includes reserving unto the County the sole prerogative to introduce new or improved methods of facilities or to change existing methods or facilities. Although the practices of the County have changed since January 1, 1982, due to changing circumstances, the County has complied in every respect with the contractual provision regarding meals for these employes.
>
> The remedy which the Union suggests is inappropriate, and would result in the equivalent of the arbitrator rewriting the labor agreement – in violation of the specific commentary which the Union cites in its brief. There is no justification for the Union's proposal that the County hire a private caterer to provide meals, or that the employes receive one-half hour pay plus retirement contribution for each shift they worked.
>
> Because the labor agreement gives the County the sole right to operate its respective departments, and because there is nothing in the agreement which allows the Shelter Home Youth Workers to select meals from a menu or to in any way dictate to the County what its current practice ought to be in that

regard, the grievance should be denied. Further, to award the remedies proposed by the Union would amount to an impermissive rewriting of the labor agreement by the arbitrator.

In its reply, the Union responds as follows:

The County makes a significant factual error by claiming in its brief that Shelter Home employes receive pay while on lunch break. In fact, these employes work a continuous eight-hour shift and do not receive pay while on their lunch break.

The County also errs in not understanding that the language it cites from the preamble to the Management Rights clause in the collective bargaining agreement is subordinate to the specific provisions of the language of Article 5 now under review.

While the County is correct that the way meals are provided changed with the opening of the new health care center, the fact is that this modification was a distinction without an appreciable difference. The employes still had the ability to select, the quality of the food did not change significantly, and the food was still prepared by the health care center. These changes are vastly different from what happened in January 1998 when, as the County acknowledges, "the current practice was modified."

The County's assertion that the Union's argument would compel a return to the menus of 1982 is incorrect and ignores the fact that this collective bargaining agreement has been negotiated many times since. The Union is not asserting that a 1982 practice be followed, but that the spirit and intent of the 1997 practice be honored in a good faith manner.

The County's line of thinking that all that is required is a nutritious, well-balanced meal, prepared at the kitchens of the Health Care Center, and that it has the management right to introduce new methods could result in the County providing freeze dried or powdered food (or even dog food), provided it was prepared in the health care center and was equally as nutritious. This is certainly not what Article 5 intends.

When the County transferred the operations of the Shelter Home, the new supervisors took action to modify the meal provisions purely to reduce costs.

While the Union has no specific objections to cutting costs, it respectfully disagrees when doing so violates the collective bargaining agreement terms on wages, hours and conditions of employment.

Since the County has acknowledged that the cost-free meals were provided in lieu of two fifteen minute breaks enjoyed by all other County employes, it is the belief of the Union that a remedy which recognized this undisputed fact would appropriately and equitably restore justice to those harmed by this violation, namely pay for lost breaks in lieu of meals.

DISCUSSION

Prior to January 1998, the County provided to its Shelter Home employes the same meals as it provided to the residents of its nursing home; since then, it has offered the same meals as it provides to residents of its jail and juvenile detention facility. The Union contends the attendant diminution of quality and elimination of choice violates the provision of the collective bargaining agreement ensuring that these employes receive meals "according to the current practice." The County disagrees, contending that "the current practice" is, by definition, that practice which is currently in force, and that it has the managerial right to determine how to provide the meal. The County also objects to the Union's proposed remedies.

The County repeatedly cites the provision in the collective bargaining agreement regarding management rights as its source of authority for its actions. To the extent that the County contends that Management Rights clauses of Article 2 take priority or have precedence over the meal provisions of Article 5, it is in error; the collective bargaining agreement provides that the managerial grants in Article 2 "must be exercised consistently with the other provisions of this contract." The express and specific provisions of Article 5 supersede the general provisions of Article 2.

County witnesses readily acknowledged they were aware of the provision in the collective bargaining agreement regarding meals, that the County unilaterally changed the way meals were provided, and that the change was expressly undertaken in order to reduce costs. The County also acknowledge at hearing that it saves money -- $3.41 -- on each meal that an employe does not order.

The heart of the County's case is that the way it has provided meals to these employes has already changed over time, as necessitated by operational changes; this, it contends, establishes that "the current practice" is indeed whatever practice the County decides to make current at any particular time, and not any one practice that is fixed in time.

The County also contends that the basic parameters of the meals program remain substantially similar to the outlines of earlier system. Indeed, in their broadest terms, certain elements of the program remain unchanged. Prior to January 1, 1998, the County delivered to its Shelter Home youth workers meals prepared by the Marathon Health Care Center which were nutritionally balanced. After that, it still provided to its Shelter Home youth workers meals prepared by the Marathon Health Care Center which were nutritionally balanced.

The Union posits a question – would the County use this line of reasoning to justify meals of freeze-dried or powdered food, or even dog food, provided it was equally as nutritious and prepared by the Health Care Center? That question, while rhetorical, does highlight the difficulties in the County's position. If "current practice" is a entirely flexible standard that is only measured by time, what is its real meaning?

The legal analysis turns on this question: does the phrase "according to current practice" mean the practice that was **current at the time** the language was agreed to, or the practice that management subsequently **made** current?

In evaluating what this provision means, it is useful to consider its purpose and impact, and to note how the Shelter Home youth workers are accorded different treatment from other county employes.

As noted above, all other unit employes receive two paid rest breaks of fifteen minutes each in addition to their unpaid lunch hour; the Shelter Home youth workers do not receive the paid rest breaks. Testimony from both Union and County witnesses established explicitly that the youth workers received the meals in lieu of getting the paid rest breaks.

For operational reasons, the parties determined that it was necessary to deny the youth workers at the Shelter Home the same rest breaks all other unit employes received under the collective bargaining agreement; to offset the loss of that benefit (a duty-free half-hour with full pay), the parties further agreed on a unique benefit, available only to these employes, namely the employer-provided meal. Indeed, at one point there was a rough economic equivalency between the value of the $4.60 meal and thirty minutes of youth worker pay. Today, the $4.60 meal would provide somewhat less economic value to a youth worker than would two 15-minute paid breaks. 2/ A meal valued at $2.04 provides even less value, or about one-third of what thirty minutes of pay would bring.

2/ The collective bargaining agreement in evidence states the annualized pay up through December 31, 1997. The Shelter Home Youth Workers (pay range: $22,443 to $26,403) were at the bottom of the pay classification, which ranged from assistant

corporation counsel (top pay: $47,916) to the second-lowest position, assistant dispositional intake worker (top pay: $28,583)That is, the assistant corporation counsel's two 15-minute breaks were worth about $12 a day, and the intake worker's were worth about seven dollars.

The current practice at the time the parties adopted this language was for the employes to have a number of options for their meals, meals that were valued at about $4.60. The practice which the employer later implemented involved the lack of choice, and a basic value of as low as $2.04. This new arrangement was contrary to the county's contractual obligation to provide "meals according to current practice."

I find that the language must mean the practice that was current at the time the parties agreed to the language. For it to mean otherwise – that the current practice is the practice that is current – would be a meaningless tautology.

The grievance is well-founded, and must be sustained.

I turn now to the issue of remedy. The Union has proposed several elements – that I grant to all affected employes one-half hour of pay (plus retirement contribution), and order the County to revert to the former meal arrangement. If reversion to the former meal arrangement is not possible, the Union asks for one-half hour of pay (with retirement) in lieu of meals.

The County correctly notes the extraordinary nature of these remedies. My arbitral authority is broad; however, I do not think it broad enough to authorize me to amend the salary schedule – and provide for a retirement contribution -- in the manner the Union has proposed. Further, the signatory to the contract as provider of the meals is the chief executive officer of the multi-county North Central Health Care Facilities; the record is not sufficiently clear on the organizational and jurisdictional arrangements of the Facilities for me to determine whether the County could implement an award directing it to restore the former meal arrangement precisely as prior to January 1, 1998.

However, I do have sufficient authority to provide some degree of redress. The meals that the employes formerly received were valued at $4.60; the current meals are valued at between $2.04 and $3.41, depending on location and volume. That is, the Sheriff and the Health Care Center have, since January 1, 1998 provided a meal which they have determined has a basic value of $2.54 less than the value of the meal previously offered to the youth workers. A reasonable remedy would be to make the employes whole for this past loss of economic value occasioned by the county's violation, and to provide for alternative remedies for any continuing violation.

Accordingly, it is my

AWARD

1. That the grievance is sustained;

2. That the County shall pay to all Shelter Home Youth Workers $2.54 for each shift they have worked since January 1, 1998;

3. That the parties shall meet and confer about prospective remedies, including but not limited to compensation, the restoration of a meal arrangement substantially equivalent to that in effect prior to January 1, 1998, or such other remedies as the parties may mutually agree to;

4. That I shall retain jurisdiction in the event the parties are unable to agree on a prospective remedy, such jurisdiction to lapse on September 1, 1999 unless prior to that time either party requests my further participation in a supplemental proceeding.

Dated at Madison, Wisconsin this 22nd day of June, 1999.

Stuart Levitan /s/

Stuart Levitan, Arbitrator

SDL/gjc
5885