BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**JACKSON COUNTY PROFESSIONAL POLICE ASSOCIATION**

and

**JACKSON COUNTY**

Case 124
No. 57163
MA-10536

*(Mach Squad Car Grievance)*

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Appearances:

**Mr. Richard Thal**, General Counsel, Wisconsin Professional Police Association/LEER Division, 340 Coyier Lane, Madison, Wisconsin 53713, appearing on behalf of the Association.

**Mr. Alan Moeller**, Corporation Counsel/Personnel Director, Jackson County, 307 Main Street Black River Falls, Wisconsin 54615, appearing on behalf of the County.

## ARBITRATION AWARD

Jackson County Professional Police Association and Jackson County are parties to a collective bargaining agreement that provides for final and binding arbitration of disputes arising thereunder. The Association made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance involving the interpretation and application of the terms of the agreement relating to the use of squad cars. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Black River Falls, Wisconsin on March 25, 1999; it was not transcribed. The Association filed written arguments on June 7 and August 13; the County filed written argument on July 20, all 1999.

## ISSUE

The Association states the issue as follows:

"Did the County violate the parties' collective bargaining agreement when it unilaterally discontinued the practice of allowing the grievant to drive a squad car to and from work? If so, what is the appropriate remedy?"

The County states the issue as follows:

"Is the employer's provision of a squad car a bargain benefit or within the management rights of the County and if so, is the County required to provide a squad car to deputies if the employe is performing light duty, reasonable accommodation, temporary, transitional duty?"

I frame the issue as follows:

"Did the County violate the parties' collective bargaining agreement when it denied the grievant use of a squad car for commuting purposes during the period he was on light duty? If so, what is the appropriate remedy?"

## RELEVANT CONTRACTUAL PROVISIONS

### AGREEMENT

This Agreement is made and entered into by and between Jackson County, Wisconsin, a Municipal Corporation, hereinafter called the "Employer," and the Law Enforcement Employee Relations Division of the Wisconsin Professional Police Association, for and on behalf of the Jackson County Professional Police Association, hereinafter called the "Association."

### ARTICLE I – RECOGNITION

Section 1: The Employer hereby recognizes the Association as the exclusive bargaining agent for the purpose of conferring and negotiating on questions of wages, hours, conditions of employment and the adjustment of employee complaints and employee grievances for all regular law enforcement employees employed in the Sheriff s and Traffic Departments of Jackson County, excluding the Sheriff, the Undersheriff, supervisory employees above the rank of sergeant, clerical employees, temporary and all other employees.

## ARTICLE II - MANAGEMENT RIGHTS

Section 1: Except to the extent expressly abridged by a specific provision of this Agreement, the County reserves and retains, solely and exclusively, all of its Common Law, Statutory, and inherent rights to manage its own affairs. Such rights include, but are not limited to the following:

A. To direct all operations of the County;
B. To establish work rules and schedules of work;
C. To hire, promote, transfer, schedule and assign employees in positions within the County;
D. To suspend, demote, discharge and take other disciplinary action against employees;
E. To relieve employees from their duties;
F. To maintain efficiency of County operations;
G. To take whatever action is necessary to comply with State or Federal law;
H. To introduce new or improved methods or facilities;
I. To change existing methods or facilities;
J. To determine the kinds and amounts of services to be performed as pertains to operations; and the number of positions and kind of classifications to perform such service;
K. To contract out for goods or services;
L. To determine the methods, means and personnel by which County operations are to be conducted;
M. To take whatever action is necessary to carry out the functions of the County in situations of emergency.

Nothing herein contained shall divest the Association from any of its rights under Wisconsin Statutes, Section 1 1 1.70 as amended.

## ARTICLE III - GRIEVANCE PROCEDURE

Section 1: A grievance is defined as any difference or dispute regarding the interpretation, application or enforcement of the terms of this Agreement. The grievance procedure shall not be used to change existing wage schedules, hours of work, conditions and fringe benefits.

. . .

Section 4 – Steps in the Procedure:

. . .

STEP 3: Any grievance which cannot be settled through the above procedure may be submitted to final and binding arbitration as follows:

The parties shall first attempt to mutually agree on the selection of a Wisconsin Employment Relations Commission (WERC) staff member to serve as arbitrator. If the parties are unable to agree, the WERC shall appoint a member of its staff to serve as arbitrator. The decision of the arbitrator shall be limited to the subject matter of the grievance. The award of the arbitrator shall not add to nor delete from the express terms of the contract. Both parties shall share equally the costs and expenses of the arbitration proceedings, if any, including transcript fees and fees of the arbitrator.

. . .

ARTICLE XX - DURATION AND EXECUTION

Section I - This Agreement shall be binding and in full force and effect from January 1, 1997 through December 31, 1998.

Section 2 In the event the parties to this Agreement have not agreed to a subsequent Labor Agreement by the expiration date defined above, this Agreement shall continue in full force and effect until a new Agreement is reached. Conferences and negotiations shall be carried on between the County and the Association as follows:

Step I - On or before July 15th of the expiration year of this Agreement, the Association shall notify the County of an intent to open the Agreement for negotiations on a Successor Agreement.

Step 2 - The parties shall commence bargaining at a mutually agreeable date and time. Written proposals shall be exchanged at the first bargaining session.

Step 3 - The parties shall attempt to begin bargaining no later than September 15th of the expiration year of the Agreement.

This timetable is subject to adjustment by mutual written agreement of the parties consistent with the progress of negotiations.

. . .

ARTICLE XXII - ENTIRE MEMORANDUM OF AGREEMENT

This Agreement supersedes the previous Agreement between the County and the Association, and constitutes the entire Agreement between the parties. Any amendment or Agreement supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto.

The parties further acknowledge that during the negotiations which resulted in this Agreement, they each had the unlimited right and opportunity to make demands and proposals with respect to any subject and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the County and the Association for the life of this Agreement, each voluntarily and unqualifiably waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered by this Agreement unless otherwise mutually agreed by the parties.

If a law is changed that makes a change in this Agreement necessary, the parties may negotiate with respect to such changes.

ARTICLE XXIII - UNILATERAL RIGHI.S

Rights claimed in this Agreement shall be consistent with those rights and responsibilities conferred upon the Employer and the Association by applicable State and Federal Statutes.

Nothing contained in this Agreement shall be interpreted as granting to either party hereto authority to unilaterally establish any matter which is subject to collective bargaining pursuant to Wisconsin Statutes.

## BACKGROUND

Christian J. Mach, the grievant, has been a Jackson County Sheriff's Department Patrol Officer since June 1985. This grievance concerns the aftermath of a work-related injury (a torn anterior cruciate ligament behind his right knee) he suffered while chasing a suspect through a wooded area on March 30, 1998.

Following the injury Mach was placed on light duty for approximately ten weeks (until June 22), during which time he continued to drive his assigned squad car to and from work while performing the light duty assignments. Mach underwent surgery for the torn ACL ligament on June 23, and was thereafter provided with worker's compensation in the form of temporary total disability benefits.

Mach returned to work on October 6, 1998, performing clerical work in the computer area in the Jackson County courthouse adjacent to the Sheriff's Department. He worked his full shift in this way (other than when he was at physical therapy once a week), and continued to wear his uniform and weapon.

At some point during the fall of 1998, Sheriff Richard Galster read a magazine article on officer safety and employer liability which lead him to question the policy of allowing deputies on light duty to continue to drive their squad cars. Accordingly, he determined on his own authority to establish a new policy under which deputies would not have use of a squad car unless they were on full duty without restrictions.

Upon his return to work on October 6, 1998, Mach was informed that he would no longer be allowed to use his squad car to commute to and from work. Mach and the Association grieved the matter, alleging that "this type of practice has been allowed for 15 plus years – it is taking benefits from a patrol deputy's wages."

On October 16, 1998, Chief Deputy Dennis Blanchard replied to Mach's as follows:

> The bargaining agreement does not provide, nor does it address, use of patrol vehicle while traveling to and from work. The vehicle is assigned to employees performing patrol duties, investigations and to some supervisors. Department policy does not provide for use of department vehicles to travel to and from work unless the employee is so assigned. Other department employees, not assigned to patrol duty, are not provided with a vehicle to travel to and from work.
>
> You are on medically restricted work assignment and cannot perform the duties outlined in the deputie's (sic) job description. Your travel, in uniform, in a marked patrol vehicle, places you in the position of having to involve yourself in a situation contrary to that restriction. This places you in jeopardy of further injury, and probable inability to serve the public, which would expect you to respond to that situation. That places the public at further risk as well.

> We have a responsibility for your safety, especially under your current medical restriction, to not place you at risk for further injury. We have an expectation by the public to respond to a situation that obviously requires law enforcement action, not driving past without a response.
>
> Conclusion: Use of department vehicle to travel to and from work will not be permitted until you have been medically cleared to return to unrestricted duty status.

On October 30, Mach responded to Blanchard, in part, as follows:

> ….During the time I was on light duty I was allowed use of my squad car to travel to and from work as has been past practice of the Department as long as I remember. Other deputies who were on light or restricted duty and still allowed to use their squad car to travel to and from work have been Deputy Bue, Deputy Haldeman, Deputy Christman, Deputy Holman, Deputy Berry and I learned others has as well prior to my employment in 1985.

Prior to Galster's reading the magazine article and ordaining the new policy, deputies were routinely allowed to use their assigned squad cars for commuting purposes during periods when they were on restricted light duty. From December 22, 1997 to January 8, 1998, Deputy Melvin Bue used his assigned squad car on 15 occasions to commute to duty as a dispatcher while recovering from knee surgery. From June 5 to June 28, 1997, Deputy Charle Berry used his assigned squad car to commute to his light duty assignment following an leg injury. Mach himself had previously driven his assigned squad car to commute to light duty assignments following injuries in 1990 and 1993. He was also allowed to keep his squad car at his residence for several months in 1992-93 while on extended sick leave/worker's compensation.

On January 28, 1999, Mach was performing his light duty assignment, in full uniform, at the department when he was directed by a supervisor to drive the supervisor's marked squad car to and from an auto body shop in Black River Falls for a headlight alignment.

## POSITIONS OF THE PARTIES

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

> The County violated the parties' collective bargaining agreement when it discontinued the established practice of allowing deputies working a light duty assignment to drive a squad car to and from work.

Because the use of a take-home vehicle is part of a compensation package, it is a benefit that falls within the scope of wages and benefits and is therefore a mandatory subject of bargaining. As such, the county may not unilaterally discontinue its provisions. Even in the absence of contractual language providing officers with take-home vehicles, and established practice of providing this benefit becomes a condition of employment which is binding on the parties. The arbitrator should reject the employer's claim that it had the management right to unilaterally terminate the practice.

It is also significant that courts and commissions have found this to be a mandatory subject of bargaining. In Wisconsin, it is well settled that a benefit which is a part of a compensation package is a mandatory subject of bargaining. Consequently, the employer did not have the management right to unilaterally discontinue the provision of this benefit. The evidence shows that a binding practice of allowing deputies on light duty to use take-home squad cars existed, making the employer's refusal to allow the grievant to use his squad car to drive to and from work a violation of the collective bargaining agreement.

The hearing testimony established that the Sheriff discontinued the practice after reading a magazine article about the potential liability concerns for the department. Whether or not the County's stated concerns were legitimate and genuine (points on which the record does not support the County's position) is irrelevant; the County simply cannot unilaterally discontinue the practice because if fears there may be injury or lawsuits.

The grievance should be sustained and the County ordered to pay the grievant $456.75, representing 75 days of light duty, a 21-mile commute and a reimbursement rate of twenty-nine cents per mile.

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

A deputy's use of a squad car to commute is not a benefit enforceable under the collective bargaining agreement, as it is precluded by the agreement's "zipper clause" that nullifies any and all alleged past practices.

If a deputy's use of County owned squad cars to commute to work is not precluded under the "zipper clause," the usage still does not give rise to an established "past practice." The parties never mutually agreed to and accepted

the practice of County owned squad vehicles being provided to patrol deputies in order for them to travel to and from their place of residence but rather the provision was unilaterally and voluntarily implemented by the County and therefore a binding past practice does not exist.

The Union seeks to have the alleged "practice" supplement the collective bargaining agreement so as to be binding on the parties and become an enforceable condition of employment. Where a party wished to clothe a course of conduct with contractual status, that practice must reflect as many elements of a contract as possible; the practice must be the understood and accepted way of doing things over an extended period of time, and the parties must understand their obligation to continue doing things this way in the future. A "practice" known to just one side and not the other will not normally be considered as the type of mutually agreeable item that is entitled to arbitral enforcement. It is clear the County did not believe and does not believe the alleged past practice has created an obligation to provide squad cars to all deputies to allow them to commute to work, so this is not a mutually agreeable item subject to arbitral enforcement.

The record does not support the Union's contention that the alleged past practice allowed for squad car usage irrespective of how long the light duty was to last, the nature of the restriction, or the light duties assigned to the deputies. The practice, if at all, shows a willingness of the County to grant light duty to employes who require it and to allow for squad car usage for short term recovery from illness or injury. This is the first instance of an employe who required light clerical duty for any extended period of time, so that the practice of the parties in this situation cannot be readily ascertained over a reasonable period of time.

Even if the matter is not precluded by the zipper clause, and is found to be a past practice, it is a past practice subject to unilateral revision by the employer under its management rights clause.

In its reply brief, the Association argues further as follows:

The County errs in asserting that the "zipper clause" automatically nullifies the established past practice of allowing deputies working a light duty assignment to drive a squad car to and from work. The effect of a zipper clause must be evaluated on a case-by-case basis, including an analysis of all relevant language and an analysis of the background of the dispute. The County improperly ignores the duty of an employer to bargain over changes in wages, hours and

conditions of employment. Even a zipper clause stronger than the one found here has been held to not nullify the established practice of providing take-home squad cars.

The ability of the County to rely on the zipper clause in this collective bargaining agreement to nullify the established past practice is explicitly restricted by another provision which prohibits either party from making unilateral changes affecting mandatory subjects of bargaining. As the use of take-home squad cars is a form of compensation and thus a mandatory subject of bargaining, the County cannot rely on the zipper clause as it has proposed.

The County also errs in arguing that the existing practice is not binding because it was voluntarily implemented and because the County maintained the management right to eliminate the practice. When an employer provides a form of compensation (such as the take-home squad cars) over a number of years, that practice is readily ascertainable and becomes an implied contract term which cannot be nullified by a general management rights clause. Thus, the County does not have the management right to unilaterally end its practice of giving take-home squad cars to deputies on light duty.

Accordingly, the arbitrator should sustain the grievance and direct the County to pay the grievant $456.75, representing 75 days of light duty, 21 miles per day round-trip, and a reimbursement rate of twenty-nine cents per mile.

## DISCUSSION

The Association presented testimony and evidence of several deputies on medically necessary restricted duty who, over several years, used their assigned squad cars to commute during their periods of light duty. These instances were open, continuing, and with the employer's full knowledge and acceptance. The record thus establishes that there was a past practice under which deputies on restricted duty used their assigned squad cars to commute. The county argues that Mach's request for use of his squad car is materially different from the other examples in the record, which were of shorter and more definite length. This after-the-fact rationale is not a distinction that is significant enough to distinguish the past practice.

Then Sheriff Galster read a magazine article that gave him concerns over the County's liability, employe safety and public understanding if the practice continued. The Sheriff's concerns are appropriate, and I find no fault in his motivation. He then unilaterally abrogated the past practice authorizing the use that Mach sought. The Sheriff essentially acknowledged that the practice had existed, testifying at hearing that "the biggest difference" between operations before Mach's incident and afterwards was "changing the way we do business."

The county, while still maintaining that no practice had been established, asserts that, even if one did arise, other provisions in the collective bargaining agreement nullified it. At Article 22, the collective bargaining agreement provides that only written amendments can supersede the entire agreement then ascribed to. This, the county claims, successfully abrogates any past practice, such that it is null and void. If the Association claim rests fully and solely on past practice, and the county's zipper argument is valid, the grievance would fail.

Certainly, the Association's claim does rest fully and solely on past practice; there clearly is nothing in the text of the collective bargaining agreement to establish the benefit they seek. The question then becomes the validity of the county's zipper argument.

As it is an integral aspect of the collective bargaining agreement, the zipper clause must be understood as a full and legitimate term in the relationship between the parties. However, its mere presence in the agreement does not automatically resolve the legal question and authorize unilateral employer action. "Rather, a complex and meticulous set of standards has evolved to evaluate the relationship of the waiver language" to the duty to bargain. CITY OF KANSAS CITY, KAN., 94 LA 191, 195 (Berger, 1989). As set by courts and administrative agencies, public policy does "not assume a waiver by a union of its statutory right to bargain over changes in terms and conditions of employment." SUFFOLK CHILD DEVELOPMENT CENTER, 277 NLRB No. 158, at 1349 (1985).

That statutory right to bargain is further enhanced in the instant analysis by Article XXIII of the collective bargaining agreement, which provides as follows:

> Nothing contained in this Agreement shall be interpreted as granting to either party hereto authority to unilaterally establish any matter which is subject to collective bargaining pursuant to Wisconsin Statutes.

The Association contends that the provision of the assigned squad car for commuting purposes during periods of restricted light duty is a mandatory subject of bargaining, in that it relates to wages, hours and conditions of employment.

It is useful to set forth the general legal framework within which the issues herein must be resolved. In BELOIT EDUCATION ASSOCIATION V. WERC, 73 Wis. 2D 43 (1976), UNITED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 Wis. 2D 89 (1977), and CITY OF BROOKFIELD V. WERC, 87 Wis. 2D 819 (1979), the Court set forth the definition of mandatory and permissive subjects of bargaining under Sec. 111.70(1)(a), Stats., as matters which primarily relate to "wages, hours, and conditions of employment" or to the "formulation or management of public policy," respectively.

As the Court noted in WEST BEND EDUCATION ASSOCIATION v. WERC, 121 Wis.2d 1, 9, (1984):

> As applied on a case-by-case basis, this primarily related standard is a balancing test which recognizes that the municipal employer, the employees, and the public have significant interests at stake and that their competing interests should be weighted to determine whether a proposed subject for bargaining should be characterized as mandatory. If the employees' legitimate interest in wages, hours, and conditions of employment outweighs the employer's concerns about the restriction on managerial prerogatives or public policy, the proposal is a mandatory subject of bargaining.

In contrast, where the management and direction of the public service or the formulation of public policy predominates, the matter is not a mandatory subject of bargaining.

As noted above, there certainly are some public policy issues implicated in whether deputies use their assigned squad cars while performing restricted light duty -- financial (mileage reimbursements), operational (availability of cars for deputies on full road duty), even public safety (whether the public or even the officer might be at risk if the officer was pressed into duty that s/he was physically unfit for). The county substantially weakened its public safety argument, however, when a supervisor directed Mach to drive a marked squad for auto maintenance purposes, contrary to its stated desire to not have a physically infirm uniformed deputy in a squad car. Moreover, there are clearly elements of this issue that relate squarely, even more directly, to wages and conditions of employment.

The past practice involved the use of county squad cars; the remedy sought involves a direct cash reimbursement. While the subject of the provision of a squad car for commuting purposes could implicate enough public policy issues to be held under certain circumstances to be a permissive subject of bargaining, the matter of the cash reimbursement could not be anything other than a mandatory subject of bargaining.

At least one nationally respected arbitrator has even stronger views that vehicles for law enforcement officials is a mandatory subject of bargaining, and sustained a grievance even in the fact of an extremely strong zipper clause. In CITY OF KANSAS CITY, KANSAS, 104, LA 711 (Bailey, 1995) the grievance was very much on point, concerning the police department's unilateral termination of take-home vehicle assignments. The collective bargaining agreement at issue provided as follows:

> This Memorandum of Understanding supersedes and cancels all previous agreements, *oral or written, and all existing unwritten practices* between the City and members of the Lodge and constitutes the entire Memorandum between the parties.... (emphasis added).

By its explicit reference to the cancellation of "all existing unwritten practices," and its lack of language akin to that in Article XXIII of the instant agreement, the Kansas City collective bargaining agreement seemingly gave the employer a very strong case. The arbitrator, however, found that while the department's reduction in the take-home vehicles "may well have been a legitimate business decision...it did not eradicate the department's obligation to negotiate with the Union over the binding past practice concerning take-home vehicle assignments." Id., at p. 718.

The county cites four instances in which WERC arbitrators have relied on zipper clauses to deny grievances based on past practices. A close review of those cases show important distinctions between the precedent the county claims and the instant grievance.

In WAUNAKEE SCHOOL DISTRICT (Houlihan, 1992, No. 46802), the collective bargaining agreement included the following language:

> This Agreement supersedes and cancels all previous agreements *verbal or written or based on past practice*, between the School District and the Association and constitutes the entire agreement between the parties. (emphasis added).

By its explicit reference to, and rejection of, past practice, this language is significantly stronger than is the zipper clause in the instant agreement.

In MARATHON COUNTY (COURTHOUSE), Case 146, No. 41722, MA-5445 (Schiavoni 1989), and FOREST COUNTY (SHERIFF'S DEPARTMENT), Case 61, No. 47776, MA-7379 (Burns 1993), the collective bargaining agreement included the following language:

> This Agreement constitutes the entire Agreement between the parties and no verbal statement shall supersede any of its provisions. Any amendments supplemental thereto shall not be binding upon either party unless executed in writing by the parties hereto.

In WISCONSIN RAPIDS (FIREFIGHTERS), Case 106, No. 47179, MA-7192 (McGilligan, 1992), the collective bargaining agreement included the following language:

> This Agreement is subject to amendment, alteration or addition only by subsequent written agreement between, and executed by, the City and the Union where mutually agreeable. The waiver of any breach, term, or condition of this Agreement by either party shall not constitute a precedent in the future enforcement of all its terms and conditions.

Further, it appears that none of the agreements in the cases which the county cites included language of the nature found in Article XXIII of the agreement under review. Again, the absence of similar or comparable language in the cases which the County has herein cited is a significant diminution of the force of its legal argument.

Over time, a practice arose under which deputies on restricted light duty continued to use their assigned squad cars for commuting purposes. Sheriff Galster then unilaterally abrogated this practice, thus requiring Deputy Mach to use his personal car, driving 21 miles per day for 75 days of light duty, without providing mileage reimbursement. In so doing, the Sheriff sought to unilaterally establish a matter subject to collective bargaining in Wisconsin.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

## AWARD

1. That the grievance is sustained, in that the employer has violated Article XXIII by unilaterally establishing a matter subject to collective bargaining in Wisconsin.

2. The employer shall provide mileage reimbursement to the grievant in the amount of $456.75.

Dated at Madison, Wisconsin this 10th day of November, 1999.

Stuart Levitan /s/
Stuart Levitan, Arbitrator

SDL/gjc
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